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TABLE OF CONTENTS

From the Editor-in-Chief 5

Constitutional Law

Constitutional Interpretation of Protection of Rights and Legitimate Interests of an Economically Weaker Party in their Relations with Commercial Banks
Sergei N. Shishkin 6

Abolition of a Constitutional Statute by the Constitutional Court of the Czech Republic
Zdeněk Koudelka 15

Tax Law

On the Recognition of the Object of Taxation of VAT Operations to Perform Work and Provide Services in the Event of Bankruptcy of the Taxpayer
Stanislav S. Izvekov 43

State Tax Policy in Oil Industry as a Factor Ensuring Financial Security of the Russian Federation
Elena N. Gorbunova 54

Economy and Law

The Principle of Limited Liability of Legal Entities and its Overruling in Russian Law
Irina S. Shitkina 59

Legal Regulation of Outward Investments: Chinese Experience
Vladimir S. Belykh, Aleksandr P. Alekseenko 72

Comparative Law

Concept of Avoidance of the Law (Fraus Legis) through Roman and German Law History
Marko Ravljen 78

The Legislative Powers of the Head of State in New EU Democracies
Tadej Dubrovnik, Aleš Kobal 89

Outer Space Law
Ian Mathers 100

Energy Consumption as the Object of Energy Relations
Aleksandr M. Shafir 116

History

Soviet Medieval Justice
Aleksandr Ya.Kodintsev, Denis N. Shkarevsky 127

La Rosa De Foc – Barcelona 1937-2017. Lessons of Separatism
Sergei V. Ratz 137

DEAR READERS!

The year of 2018 is the year of the Yellow Dog according to the Oriental Calendar. This year promises to be more successful and memorable. In the Oriental Calendar, the Yellow Dog is a wise and balanced person that will keep under control all that will happen this year. A dog is selfless and generous; it does not tend to fame and comfort. So, strong determination, persistence and stability are becoming a priority now.

However, 2018 will be difficult for many countries in the world including Russia. What is Russia facing in 2018? There are various forecasts which are rather contradictory. Even venerable fortune tellers differ in their opinions and evaluations.

Russian presidential elections were held on 18 March 2018. I agree with the thesis that a strong state needs a strong president. However, it needs not only strength but fairness in the adopted decisions and their implementation.

Russia needs a modern concept of socially-oriented state management of society, state, and economy. "The merit" of Putin and his team is that they could build and effectively use the so-called "managed democracy", where actual participation of the civil society in the state management and the influence of society over the state power (feedback) is little or reduced to minimum.

The primary example for Russia is the People's Republic of China which launched the policy of reform and opening up in 1978. Over almost 40 years of its development, China has made a huge leap toward modernization of the economy and society, transition from the administrative-planned economy to the market one and toward building "the society of average wealth" by 2020.

In the night from 16 to 17 July 1918 in Yekaterinburg, former Russian Emperor Nikolai II and his family were shot down. So, this year is 100 years since the execution of the last Emperor and his family.

Some historians put forward the hypothesis that the Emperor's family was not shot. The reasons vary including the version of imperial savings. There is a perception that the truth about the shooting will be made public on the eve of centenary. Each version has the right to exist. Time will show!

In September 2018, the Ural State Law University will mark the 100th anniversary of its foundation. This is the landmark date in the life of Alma Mater!

On 13-14 September 2018, Yekaterinburg will host the XII session of the Euro-Asian Law Congress "Law and Justice: Global Challenges". Its work will be organized in the form of a plenary session, panel discussions and round tables.

Dear readers! Take care of yourselves and your relatives. Love your neighbors as yourselves. It is very important not to lose yourself in this raging world.

Editor-in-Chief V.S. Belykh

CONSTITUTIONAL INTERPRETATION OF PROTECTION OF RIGHTS AND LEGITIMATE INTERESTS OF AN ECONOMICALLY WEAKER PARTY IN THEIR RELATIONS WITH COMMERCIAL BANKS

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Abstract
The article focuses on constitutional interpretation of protection of rights and legitimate interests of citizens as an economically weaker party to a bank deposit agreement and a credit/loan agreement. The author substantiates the necessity to identify the protection of rights and legitimate interests of an economically weaker party as a guarantee; in his view, the decisions of the RF Constitutional Court entail such protection not as a principle but as a guarantee. The author offers constitutional interpretation of rights and legitimate interests of an economically weaker party to a credit/loan agreement.

Keywords: constitutional interpretation; protection of rights and legitimate interests of citizens; an economically weaker party; the legal position of the RF Constitutional Court; a contract of adhesion; a bank deposit agreement; a credit/loan agreement.

The contract of adhesion is a legal construction which legally limits the fundamental principles of freedom of contract and equality of participants in civil-law relations. This feature inevitably predetermines financial and moral problems for consumers in their relations with subjects of entrepreneurial activity. It primarily concerns the banking sphere affecting interests of millions of citizens. In this connection, utmost importance is given to the interpretation of protection of rights and legitimate interests of an economically weaker party provided by the RF Constitutional Court.

Thus, returning to the issue of protection of an economically weaker party in their relations with subjects of entrepreneurial activity, in its decision No.28-P of

27 October 2015 "On the Case Concerning the Review of Constitutionality of Article 836(1) of the RF Civil Code in Connection with Complaints from I.S. Biller, P.A. Gurjyanov, N.A. Gurjyanova, S.I. Kamiskaya, A.M. Savenkov, L.I. Savenkova and I.P. Stepanyugina"[1] the Constitutional Court of the Russian Federation found that Article 836(1) of the RF Civil Code does not contradict the RF Constitution[2]. At the same time, the RF Constitutional Court has interpreted the said rule in the part which enables to confirm the written form of the agreement by any other document issued by a bank to the deposit holder and which fully complies with the requirements established by law as well as corresponding banking rules and applied business practices. Article 836(1) of the RF Civil Code reads that the written form of the bank deposit agreement is considered valid if the placement of the deposit is certified by the bank savings book, the savings or deposit certificate or any other document issued by a bank to the deposit holder and which fully complies with the requirements established by law as well as corresponding banking rules and applied business practices. Article 836(2) of the RF Civil Code says that non-compliance with the written form of the bank deposit agreement makes such an agreement invalid. Such an agreement is void.

The RF Constitutional Court has established that provisions of Article 836(1) of the RF Civil Code which contain requirements to the form of a bank deposit agreement in their constitutional meaning in the system of current legal regulation do not prevent the court from recognizing the requirements to the form of a bank deposit agreement met and the agreement concluded based on the analysis of factual circumstances of a case. Meanwhile it should be determined that the receipt of money from a citizen for deposit shall be confirmed by documents issued by a bank or an official who, based on the circumstances of concluding an agreement, is perceived by a citizen as a person acting on behalf of a bank and the text of the agreement proves the fact of depositing the relevant sum of money.

The claimants in the above said case entered into bank deposit agreements but faced two different situations with the same result of law application[3].

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[1] The RF Collection of Legislation, 2015. No.45, Art.6311.

[2] The original text of the document is published in the RF Collection of Legislation. 1996. No.5. Art.410.

[3] See: S.N. Shishkin, O 'belykh i pushistykh' bankakh i ikh 'serykh' klientakh: po sledam Postanovleniya Konstitutsionnogo Suda RF ot 27 oktyabrya 2015g. No.28-P i nekotorykh publikatsij [On 'Warm and Fuzzy' Banks and Their 'Illegal' Clients: Following Ruling No.28-P

In one case, bank deposit agreements were concluded at an additional office of one of the banks; moreover, all the agreements were concluded in the premises of a bank and in the presence of bank workers serving the bank's clients. Later, the claimants asked the bank to return their money before the scheduled date. The bank refused to return the money because there were no agreements concluded between them and the bank and because the person who signed them (the director of an additional office) had no powers to enter into such transactions on behalf of the bank, and the bank did not receive money from these citizens. Courts of general jurisdiction sustained the position of the bank. In their decisions it was stated that the agreements submitted by the claimants did not comply with the standard form of the agreement established by the bank and that they were signed by a non-authorized person. The bank deposit agreement itself cannot confirm the fact of depositing money if there are no documents to prove the opening of an account by a bank deposit holder and to duly confirm the receipt of money on the account.

In the other case, the Bank of Russia by its decision revoked the license of a commercial bank to render banking services, and the commercial court found the bank bankrupt; as a result, bankruptcy proceedings were initiated against it. In this connection, the claimants asked the bankruptcy manager to include their money claims (the sum of deposits with interest accrued) in the first line of claims of the bank's creditors, but they were refused. The court decisions stated that when concluding agreements, the parties did not comply with the requirements to their form. Lack of information concerning the opening of a bank deposit account and accrued interest demonstrates non-compliance with the written form of a bank deposit agreement.

Needless to say that the above said rules of the RF Civil Code did not give any grounds to courts in both cases to refuse to protect the rights of the claimants. Based on the statement of reasons in Ruling No.28-P of 27 October 2015, the RF Constitutional Court established that considering the case and based on Article 836(2) of the RF Civil Code in its connection with Article 166 of the RF Civil Code, the court cannot find a bank deposit agreement with a citizen valid or non-concluded only on the ground that it is concluded by a non-authorized person and the bank has no information on the deposit (on the opening of a bank account for placing a deposit and accruing interest as well as on the receipt of money on the account). It concerns

of the RF Constitutional Court of 27 October 2015 and some other publications// Business, Management and Law. 2016. No.1–2, pp.41–42.

those cases when reasonableness and good faith in the deposit holder's actions, including when estimating the conditions of a bank deposit, concluding an agreement and giving money to a non-authorized bank representative, are not refuted. In such a situation, the burden of negative consequences is to be borne by a bank which has created conditions for illegitimate conduct of its representative or provided access of a non-authorized person to the bank staff premises (despite strict requirements to economic safety in the banking sphere), and also which has failed to properly control the actions of its representatives or authorized a person who takes advantage of the bank official's status to reach his/her own aims without proper control.

Besides, the RF Constitutional Court has stated that bank deposit agreements belong to agreements of adhesion; and the conditions of such an agreement are determined by one party (a bank) in standard forms, and which is recognized as a public agreement if the other party (the bank deposit holder) is a citizen.

In accordance with the legal position of the RF Constitutional Court stated in Ruling No.4-P of 23 February 1999 "On the Case Concerning the Review of Constitutionality of the Second Part of Article 29 of the Federal Law of 3 February 1996 "On Banks and Banking Activity" in Connection with Complaints from O.Yu. Veselyashkina, A.Yu. Veselyashkin, and N.P. Lazarenko"[4], citizens - deposit holders as a party to the bank deposit agreement – are deprived of a possibility to change the content of an agreement that is the limitation of freedom of contract for them and, therefore, it is necessary **to comply with the principle of proportionality** (*given in bold by the author*). By virtue of the principle of proportionality citizens as an economically weaker party in these relations need special protection of their rights. This, in its turn, makes it necessary to legally restrict freedom of contract for the other side, i.e. banks, with the purpose to really **guarantee the compliance with the constitutional principle of equality** (*given in bold by the author*) when conducting entrepreneurial or any other economic activity not prohibited by law.

Banks are engaged in professional entrepreneurial activity, with risk being an integral part of it. Therefore, the RF Constitutional Court in its Ruling No.28-P of 27 October 2015 justly stated that negative consequences of non-compliance with the requirements to the form of the bank deposit agreement and the procedure of its conclusion are to be borne by the bank. This peculiarity is determined by the fact that both the drafting of an agreement and receipt of money from a citizen on the

[4] RF Collection of Legislation. 1999. No.10, Art.1254.

bank deposit account is conducted by the bank which, being a commercial organization, bears all the risks connected with its entrepreneurial activity aimed at regular profit making and is endowed with special legal capacity. Unlike a citizen who makes the deposit being unaware of banking rules and business practices, the bank in this situation is a professional with special knowledge in the banking sphere.

There is no legal definition of 'an economically weaker party', but there are worthy attempts to elaborate a doctrinal approach to this notion. For example, Professor A.Ya.Ryzhenkov distinguishes the following features of an economically weaker party: property status (possessing significantly fewer resources and status possibilities in respect to the counterparty), subordination (with the other party having a possibility to impose its own conditions on the weaker party), interest in concluding an agreement, the volume of rights and obligations under the agreement.

Interest in concluding an agreement is connected with subordination, since interest of one party in concluding an agreement enables the other party to impose its conditions of obligation[5].

However, it seems doubtful to identify the protection of rights and legitimate interests of an economically weaker party as the principle of law, which has not been reflected in legislation yet and still unknown to the Russian civil doctrine as well as to constitutional law and entrepreneurial law[6].

There are numerous approaches to the legislative recognition of principles of law. For example, A.L. Zakharov says that principles of law can be recognized as specific rules as well as derive from a set of rules[7]. However, the position of Professor G.A. Gadzhiev seems more preferable: principles of law may be or may not be reflected in the texts of laws but they must be applied in the judicial practice[8].

There is a question whether the protection of rights and legitimate interests of an economically weaker party can be considered principles of law created during

[5] *See*: A.Ya. Ryzhenkov, Printsip zashchity ekonomicheski slaboj storony v predprinimatel'skikh pravootnosheniyakh// Grazhdanskoe pravo [The Principle of Protection of an Economically Weaker Party in Entrepreneurial Relations // Civil Law]. 2016. No.2. SPS 'Konsul'tantPlus' [Legal Reference System *ConsultantPlus*].

[6] *See*: A.Ya. Ryzhenkov, Ibid.

[7] *See*: A.L. Zakharov, Mezhotraslevye printsipy prava [Inter-branch Principles of Law. – Samara: Samar.Otd-nie Litfonda]. – Samara: Samara Branch of Lit.fund, 2004. 238 p. - P.38.

[8] *See*: G.A. Gadzhiev, Konstitutsionnye printsipy rynochnoj ekonomiki (razvitie osnov grazhdanskogo prava v resheniyakh Konstitutsionnogo Suda Rossijskoj Federatsii). [Constitutional Principles of the Market Economy (Development of Civil Law Basics in the Decisions of the Constitutional Court of the Russian Federation)] – Yurist', 2002. 286 p. - P.55.

constitutional proceedings, or whether in the RF Constitutional Court decisions it is recognized in another form, and namely, as one of the guarantees of rights and freedoms of a person and a citizen.

Though constitutional principles and guarantees can be said to be conditionally differentiated, the constitutional doctrine contains rather strict definitions of guarantees of rights and freedoms of a person and a citizen, as material, organizational, spiritual and legal conditions and prerequisites which enable to really guarantee fundamental rights and freedoms, fulfill obligations of a person and a citizen, and secure their protection from illegal limitations and abuse[9].

In its Ruling No.6-P of 21 April 2003 "On the Case Concerning the Review of Constitutionality of Article 167(1-2) of the RF Civil Code in Connection with Complaints from O.M. Marinicheva, A.V. Nemirovskaya, Z.A. Sklyanova, R.M. Sklyanova, and V.M. Shiryaeva"[10], the RF Constitutional Court formulated the protection of rights and legitimate interests of a *bona fide* purchaser as a guarantee.

The meaning of the above said position of the RF Constitutional Court stated in its Ruling No.4-P of 23 February 1999 leads to the conclusion that the protection of rights and legitimate interests of an economically weaker party is rather strictly defined as a guarantee of the implementation of proportionality and constitutional equality principles.

On the whole, it can be stated that the RF Constitutional Court interprets the protection of rights and legitimate interests of an economically weaker party to the bank deposit agreement objectively, reasonably and adequately to the content of relevant relations. This constitutional interpretation is duly followed by the RF Supreme Court and lower courts in their practice.

We can see a different situation in respect of the interpretation of protection of rights and legitimate interests of an economically weaker party to a credit/ loan agreement; when concluding it, a citizen strives to solve certain financial, housing or other matters and problems; however, being an economically weaker party, a citizen is significantly limited in choosing terms and conditions of such an agreement. In particular, it concerns mortgage loan agreements where some legal problems still remain unsolved, such as problems connected with the categorical imposition of insurance services.

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[9] *See*: S.A. Avak'yan, Konstitutsionnyj leksikon: Gosudarstvenno-pravovoj terminologicheskij slovar' [Constitutional Lexicon: State Law Terminology Dictionary]. – M.: Yustitsinform, 2015, 640 p. - P. 178.

[10] RF Collection of Legislation. 2003. No.17, Art.1657.

In this respect there are some legislative problems. Thus, legislation on mortgage loans in fact does not take into account the rule prescribed by Article 16(2) of the RF Law No.2300-1 (rev. on 1 May 2017) of 7 February 1992 "On Protection of Consumers' Rights"[11], under which it is prohibited to make consumers buy one goods (works, services) together with other goods (works, services).

At the same time, part 10 of Article 7 of Federal Law No.353-FZ of 21 December 2013 (rev. on 3 July 2016) "On Consumer Credits (Loans)"[12] states that when concluding a consumer credit (loan) agreement, to guarantee the fulfillment of obligations under the agreement the creditor is entitled to require the borrower to indemnify the pledged property against the loss or damage at their own expense in the amount not exceeding the secured claim and also to indemnify any other insurable interest of the borrower.

There was a period of time when different mass media welcomed the adoption of Ruling No.3854-U of 20 November 2015 by the Central Bank of Russia "On Minimal (Standard) Requirements to the Conditions and Procedure of Conducting Separate Types of Voluntary Insurance" (further – Ruling) which nowadays is effective in its revised form of 21 August 2017[13]. It was stated that since 1 June 2016 the Russians were given an opportunity to turn down the imposed insurance.

From the content of the Ruling, it can be seen that it has a rather narrow scope of application. Under p.1 of the Ruling, the insurer should stipulate a provision concerning the return of the paid insurance premium to the insured in the procedure established in the Ruling in case the insurer refuses from the voluntary insurance agreement within 14 (fourteen) calendar days since the moment of its conclusion with the absence of some events during this period which can be classified as insured events. The Ruling does not cover those hundreds of thousands of 'enslaved' borrowers (more than fourteen calendar days). Potential borrowers will still have to enter into insurance agreements because there is no universal and unconditional prohibition to do that[14].

[11] The original text of the document is published in the RF Collection of Legislation. 1996. No.3, Art.140.

[12] The original text is published in the RF Collection of Legislation. 2013. No.51, Art.6673.

[13] The original text is published in 'Vestnik Banka Rossii' [Bulletin of the Bank of Russia]. 2016. No.16.

[14] *See*: S.N. Shishkin, O neobkhodimosti dal'nejshego navedeniia poriadka v bankovskoj sfere// Tamozhennye chteniia – 2016. Mirovye integratsionnye protsessy v sovremennoj nauke: Sbornik materialov Mezhdunarodnoj nauchno-prakticheskoj konferetsii [On the Necessity of Further Improvement in the Banking Sphere// Customs Readings - 2016. World Integration Processes in the Contemporary Science: Collection of Materials of the International Scientific

The RF Constitutional Court refrains from interpreting Article 16(2) of the Law on Protection of Consumers' Rights so far. For example, courts of general jurisdiction refused to satisfy claims of S.I. Filina, including her claim to return the insurance premium for joining the program of collective voluntary insurance of life and health which she paid when entering into the credit/loan agreement. Courts underlined that when entering into the credit/loan agreement S.I. Filina signed an application for insurance which read that she had been informed of the voluntary nature of insurance and that such an application did not affect the decision of the respondent to give a credit/ loan and the claimant was free in her choice of an insurance company. In her statement to the RF Constitutional Court, S.I. Filina challenged Article 16(2) of the Law on Protection of Consumers' Rights.

In its Decision No.159-O[15] of 28 January 2016, the RF Constitutional Court established that Article 16(2) of the Law on Protection of Consumers' Rights protects the rights of citizens as an economically weaker and more dependent party in civil relations with organizations and sole traders and also provides customers an opportunity to freely choose goods (works, services) and cannot be viewed as violating some constitutional rights and freedoms of the claimant.

Making some conclusions, we should underline the necessity to reach an optimal balance of interests of parties in the credit/loan agreement with the participation of citizens. Now it is time to constitutionally evaluate the situation and find a possible solution because the voluntary nature of insurance and the freedom of choice of an insurance company, and freedom of contract on the whole becomes an imperative for an economically weaker party and, consequently, becomes a fiction.

Thus, we should elaborate such an imperative legislative decision so that any documents from a bank, including a typical agreement, would not contain any provisions on insurance, except for a case of pledged property. But even in the latter situation, why not put the burden of insurance and any other relevant financial burdens on the economically stronger party to the credit/ loan agreement, if not to refer to the so-called developed legal system?

Such an approach is rather consistent with the principle of a social state which is obliged to create conditions for a decent life and free development of a person. The

and Practical Conference] In 2 volumes. Vol.II. / under gen.edit. of Professor S.N. Gamidullaev, St.-P.: V.B. Bobkov, Saint-Petersburg Branch of the Russian Customs Academy, 2016. 356 p. - P.250.

[15] SPS 'Konsul'tantPlus' [Legal Reference System *ConsultantPlus*].

state support of the family presupposes, *inter alia,* accessibility of credit/loan sources to solve financial and housing issues and problems of the family and, as a result, to solve demographic problems of Russia.

The conclusion of an agreement with insurance organizations and, consequently, payment of all insurance premiums actually under the pressure of a commercial bank as an economically stronger party in credit/loan relations is an additional property burden which limits social and economic rights of citizens as an economically weaker party in such relations requiring special protection of their rights. The protection of rights and legitimate interests of an economically weaker party in credit/loan relations is a constitutional guarantee of implementing principles of proportionality and constitutional equality. The federal legislator should work out a proper legal mechanism which will enable to implement the said guarantee. But the federal legislator should take into account the fact that the risky character of the banking activity as a type of entrepreneurial activity predetermines the right of a bank to voluntarily insure its own property from defaulting borrowers and predetermines the unconditional and strict prohibition to require that from citizens.

This might be an approximate constitutional interpretation (and, consequently, the position of the RF Constitutional Court) of protection of rights and legitimate interests of an economically weaker party to the credit/loan agreement.

ABOLITION OF A CONSTITUTIONAL STATUTE BY THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

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Abstract
The article focuses on the judgment of the Constitutional Court in Brno which adopted the competence to abolish constitutional acts. The Constitutional Court abolished the constitutional act on shortening the electoral term of the Chamber of Deputies due to the alleged conflict to Constitutional Statute No.1/1993 Coll., Constitution of the Czech Republic. The Constitutional Court did so without being expressly entitled to it by the Constitution. Extraordinary elections took place on the basis of a special constitutional act; this practice was applied repeatedly within the effective legal order in the Czech Republic and it became a constitutional convention. Abolition of a constitutional act which was enacted by the qualified majority within the right procedure is in conflict to the constitutional command which states that the Constitutional Court is bound by the constitutional acts. If the Constitutional Court designates the constitutional act as something that is not a constitutional act, then the others can designate the judgment of the Constitutional Court as something that is not a judgment and can refuse to respect it. Such a consequence of the conduct of the Constitutional Court is a serious violation of the principle of legal certainty.

Keywords: a constitutional statute, the Constitutional Court of the Czech Republic, abolition of a constitutional act, violation of the principle of legal certainty, suspension of enforcement, premature elections, retroactivity.

The Czech Constitutional Court abolished a constitutional statute by its Judgment which was adjudicated on the basis of a constitutional complaint of the member of the Czech Parliament Miloš Melčák[1]. This Judgment has changed the traditionally understood role of the Constitutional Court which should serve as a protector of constitutionality towards the laws with lower legal force. Nevertheless, the recent practice of the Constitutional Court has been against cancellation of the constitutional

[1] Judgment No.318/2009 Sb. (Pl.ÚS 27/09) which cancelled Constitutional Statute No.195/2009 Coll. on shortening the fifth electoral term of the Chamber of Deputies. Hereinafter, Judgment.

statutes[2]. The Constitutional Court has decided to guard constitutionality – the constitutional order against itself. The mentioned Judgment confirmed the tendency of the Constitutional Court to strengthen its power. However, this is a natural feature of each power body. The Constitutional Court uses the current situation because the Czech Constitution does not deal with a review of unconstitutional decisions of the Constitutional Court. A limited control over violating the law by the Constitutional Court is exercised by the European Court of Human Rights in Strasbourg in the field of fundamental rights and freedoms. The European Court of Human Rights provides protection in the cases where the national protection in front of the Czech Constitutional Court has not been found. In other cases, the Constitutional Court uses its status of the uncontrollable incumbent. The Constitutional Court is always able to find some arguments for its power competences when it wants to answer some questions of law.

1. Suspension of enforcement

The Constitutional Court issued a Resolution[3] on 1 September 2009 before issuing the Judgment on merits. On the basis of this Resolution the enforcement of the decision of the President of the Republic on declaring the elections to the Chamber of Deputies on 9–10 October 2009 was suspended. In addition, the complainant did not demand the suspension of enforcement of the decision of the President. The demand is the legal condition for the suspension of enforcement which is regulated in the Law on the Constitutional Court[4] – this Law is binding for the Constitutional Court[5].

The Constitutional Court has made a big activist move. The Constitutional Court acted not only *ultra petitum* and that is why contrary to law[6] but also contrary to the sense of mandatory representation of the complainants by the advocate in front of the Constitutional Court. The qualified petitions which should entirely defend the

[2] The Constitutional Court is not entitled to review (or even abolish) the provisions contained in Constitutional statutes. The aim of the Constitutional Court is to interpret them. Point 6.2 of Judgment No.14/2002 of the Collection of Judgments and Resolutions of the Constitutional Court vol.25 (95/2002 Sb., Pl.ÚS 21/01).

[3] Resolution of the Constitutional Court No.312/2009 Coll. (Pl.ÚS 24/09-16). Hereinafter, only Resolution.

[4] § 79 Art.2 of Statute No.182/1993 Coll., on the Constitutional Court.

[5] Art.88 of the Constitution No.1/1993 Sb. Hereinafter only Constitution.

[6] Point 1 of the dissenting opinion of constitutional judge Jan Musil to the Resolution.

legal interests of the complainant are the main aim of the institution of mandatory representation. What the interest of the complainant is, the complainant himself/herself knows best. The Constitutional Court is not a guardian of the complainant. The Constitutional Court denied the legal capacity of the complainant Miloš Melčák and the legal qualification of advocate Jan Kalvoda who did not request the suspension of enforcement of the decision of the President of the Republic. A big part of the constitutional judges wanted to use the opportunity and abolish the constitutional statute; and that is the reason for the imposition of the enforcement to the constitutional complaint of deputy Melčák. At the end, the suspension of enforcement had no meaning because the constitutional judges were pushed to make a quick decision because of the pressure from the public[7].

Another condition for the suspension of enforcement is the presumption that the suspension of enforcement cannot cause more severe harm to other persons than to the complainant himself/herself by not suspending the enforcement[8]. The harm was created by the 8 month-salaries of deputy Melčák. On the other hand, private and public expenses were in play. The Constitutional Court stated there were no harms regarding the public funds in the reasoning of the Resolution. It was a completely false statement; this fact was proved by the information of the Minister of Interior who presented an amount of hundred million Czech crowns which were invested into the preparation of the elections. Subsequently, the Ministry of Finance presented an amount of 115 million Czech crowns for the unhatched elections in the National account for the year of 2009[9].

The Constitutional Court did not find any violation of the rights of third persons in the reasoning of the Resolution. Nevertheless, the Constitutional Court has violated the right of all citizens to vote because by the declaration of the elections the subjective right of all citizens to vote in October 2009 was created. The Constitutional Court has also violated the finance of the political parties which contracted obligations on the basis of the legitimate expectations of the elections in October 2009.

[7] MARIE VALÁŠKOVÁ: Volby v říjnu nebudou, říká místopředsedkyně Ústavního soudu Eliška Wagnerová, *Hospodářské noviny* 2. 9. 2009, p.3.

[8] The dissenting opinion shows that the complaint of deputy Melčák did not content any argumentation concerning the inadequacy of the harm. Point 2 of the dissenting opinion of constitutional judge Jan Musil to the Resolution.

[9] Uselessly spent money of the state was estimated in the amount of 67.2 million Czech crowns (above all, the lease of PCs to the Czech statistic office, but also some other services). *See* Zrušené volby stály 67 milionů, *Právo* 2. 12. 2009, p.3.

The Constitutional Court harmed financially weaker political subjects and violated the constitutional basis of the political system in an independent and untroubled competition of the political parties[10].

The political parties had concluded their agreements concerning their elections campaigns, and due to the suspension of enforcement nothing changed about the agreements regarding the billboards and the other elections materials. The political parties could not withdraw from the contracts without avoiding contractual sanctions. How big the extension was presents the subsequent statistics issued by the parties from the end of September and beginning of October 2009, which originally meant to be election statistics. The political parties spent their financial sources in varying degrees but the event (elections) for which the financial support was appointed did not happen. The ODS party had a credit in the amount of 150 million Czech crowns without stating the exact amount of money used for the preparation of the unhatched elections.[11] The ČSSD party estimated its costs at 130 million Czech crowns[12]. The KDU-ČSL party spent almost its whole credit in the amount of 25 million Czech crowns[13].

The fact that the Constitutional Court did not think about the suspension of enforcement proves the farawayness of the constitutional judges from the real life. However, the Constitutional Court became aware of this fact and did not repeat the idea of not affecting the rights of third persons in the final Judgment.

2. Legitimacy of the premature elections

The people are the source of power in democratic countries. Deputies are not the proprietors of power but they are administrators of the public things on the authority of the people. The administrator cannot dedicate the entrusted property to anybody; he/she has to give it back to the proprietor in case that he/she manages the administration. Deputies have the duty to enable the electors to decide about the future government if the Chamber of Deputies is not able to create government and the administration of the state is bad. It is the fault of the creators of the Constitution

[10] Art.5 of the Constitution.

[11] PETR HOLUB, KATEŘINA ELIÁŠOVÁ: ODS dluží 50 až 100 milionů, ručí vlastním sídlem, *Aktuálně.cz* 26. 11. 2009,
http://aktualne.centrum.cz/domaci/politika/clanek.phtml?id=654150

[12] SABINA SLONKOVÁ, PETR HOLUB: ČSSD ztratila na volbách 130 milionů. Srovná to stát, *Aktuálně.cz* 11. 12. 2009, http://aktualne.centrum.cz/domaci/politika/clanek.phtml?id=655448

[13] OLDŘICH DANDA: Lidovci nemají na kampaň, spasí je sbírky?, *Právo* 30. 12. 2009, p.2.

that they aggravated the procedure of breaking up the Chamber of Deputies and the solving of the governmental crises with the elections. It is possible to set it right by a special constitutional statute which should regulate the 3/5 agreement of the deputies and senators and which should regulate that the elector is the proprietor of the power and has the right to decide who will represent him/her. The premature elections are the legitimate restitution of legislative power in the parliamentary democracy.

It is possible to agree with the opinion of Pavel Rychetský which he expressed while discussing the constitutional statute draft on shortening the electoral term in 1998. Although he admitted the possibility of doubts, he stated to the draft: *"It was said here that it is a violation of the Constitution but we could hear from the submitter that the Chamber of Deputies considered both options, it means both the change of the Constitution and the option of "praeter constitutionem" which is the one-shot move beyond the Constitution. And in the light of what was expressed here as the respect to the Senate, the Chamber of Deputies decided to choose the second option – not to intervene in the Constitution. Virtually, what was enacted and submitted to us is undoubtedly an intentionally motivated deed. It is an undoubtedly purposely aimed constitutional statute ad hoc. I would like to emphasize that this is nothing pejorative. I even suppose that all the measures which are taken by the Parliament or by other constitutional bodies are purposely aimed in the sense that they follow a clearly formulated purpose.*

It was said that it is an interference into Constitution which should not be done during the crisis. The interference in the constitutional system should be made in calm periods after a long deliberation. I want to say that the statutes are to be changed and to be enacted when there is such a precedence rating to make the move that the Parliament decides to change the statute. The notion that the statutes will be changed when it is not necessary is a bad notion. But in one point I fully agree with all the things which were said here - when a statute is being enacted, it is necessary to consider all the consequences. I emphasize - the consequences.

The infringement of constitutional balance was mentioned as a possible consequence. The proposal to dismiss this constitutional statute was accompanied by words which I would like to cite exactly. It was a challenge aimed at us: "There is no authority which could change our decision". I dare to say that I deeply do not agree with the statement that we are sovereigns and we as a Parliament are the representatives of the sovereignty of this state. The sovereign is only the citizen and no one else in a

real democratic country. We are the ones who are able to express what we suppose to be the major opinion of the civil society within limited time on the authority of the people. In spite of all the reservations which we could hear here I am of the opinion that when a statute is enacted only purposely because a crisis came which is not possible to solve within a current constitutional order, then when we give the decision back to the real sovereign, to the civil society, we act democratically. The citizen is the only one who has the right to decide who will govern and enact the statutes on behalf of the citizen in this country. I consider each move with which we return the power to the citizen to be a legitimate one[14].

The way to elections is not complicated in Europe. The Queen dissolves the House of Commons at the request of the Prime Minister in the United Kingdom. In France, the President dissolves the National Assembly and consults the dissolution with the representatives of the National Assembly and the Senate whose consent is not necessary[15]. In Germany, one non-confidence vote towards the Chancellor is enough for the dissolution of the Federal Assembly by the President[16]. In Austria, the President can dissolve the National Council at any moment. The National Council can dissolve itself by a common statute; there is no need of a constitutional statute[17]. During the first Czechoslovak Republic the President could dissolve both Parliament Chambers without any condition, with the exception of the last half-year of the mandate[18]. When there is a crisis, declaration of new elections is a common procedure.

From this point of view it seems to be paradoxical when the Constitutional Court expressly invokes the creation of the legitimate Parliament to be the most important public interest[19]. Nevertheless, thanks to its Judgment the Constitutional Court

[14] Pavel Rychetský in Senate on 19 March 1998 while discussing the draft of the constitutional statute on shortening the electoral term of the Chamber of Deputies, Senate press 98021, 1st electoral term.

http://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=1&IS=2395&T=98021#st98021.

[15] Art.12 of the Constitution of the French Republic of 4 October 1958. VLADIMÍR KLOKOČKA, ELIŠKA WAGNEROVÁ: *Ústavy států Evropské unie, Díl 1*, 2. edition Praha 2004, p.115. Also hereinafter the constitutions of the states of the EU are cited from this publication.

[16] Art.68 of the Constitution of Germany of 23 May 1949, p.253.

[17] Art.29 of the Constitution of Austria of 10 November 1920, p.445.

[18] §31 of the Constitutional document which was introduced by Statute No.121/1920 Coll.

[19] Point VI/a of the reasoning (p.4634, penultimate article) of the Judgment. Here and also hereinafter, the pages are stated according to the promulgation of the Judgment in Chapter 98 of the Collection of laws of the Czech Republic.

disabled such a creation because it disabled the sovereign in the state – the people – to choose the Chamber of Deputies and to create a regular government on the basis of the elections. The criticism of the premature elections based on the enactment in the form of a special constitutional statute is not important. Unconstitutional are the unfair elections. The form how to reach the elections does not endanger the democratic character of the elections. What is not democratic on the constitutional statute and why is it better to masquerade three times not expressing the confidence to the government? Or is it better to masquerade submitting the draft of the statute in connection to the voting on the confidence of the government which is the institution helping to enact the statute at the part of the hesitating deputies who do not agree with the draft but, on the other hand, they want to express the confidence to the government? The Constitutional Court[20] recommends this way although it is simulated conduct because the aim of such a draft would not be the enactment of the draft of the statute but a covered dissolution of the Chamber of Deputies[21]. The shortening of the electoral term is from the point of view of the democratic legitimacy of other quality than the extension of the electoral term[22] because the decision is in the hands of the sovereign – the people. The Charter of Fundamental Rights and Freedoms excludes the possibility of prolongation of the electoral term[23], not the shortening, although there is a constitutional exception in extraordinary times[24].

3. Constitutional Order

The Constitution from the year of 1993 introduced the concept of the constitutional order[25] which is a different expression for constitution with the small letter ú (in Czech Constitution is translated as *ústava*). The constitutional order can be expressed as a

[20] Point VI./a of the reasoning (p.4634, penultimate article) of the Judgment.

[21] In 2005, a similar situation happened in Germany – Chancellor Gerhard Schröder asked the German Bundestag to give confidence whereas the government parties had majority in the Bundestag. However, the chancellor intended to declare premature elections. For this reason the members of government did not vote for confidence. The request for confidence was criticized as simulated with a hidden aim to dissolve the Bundestag. Nevertheless, the German President Horst Köhler considered this to be constitutional because he really dissolved the Bundestag.

[22] The judge Vladimír Kůrka points out the quality difference between the prolongation and shortening of the electoral term. Point IV. 19-20 of the different opinion of Vladimír Kůrka to the Judgment.

[23] Art.21 (2) of the Charter of Fundamental Rights and Freedoms No.2/1993 Coll.

[24] Art.10 of Constitutional Statute No.110/1998 Coll. on security of the Czech Republic.

[25] Arts.3 and 112 of the Constitution.

complex of all legal regulations with the constitutional legal force. Within this category of legal regulations with constitutional legal force, the legal rule *lex posterior derogat legi priori generali* and the rule *lex specialis derogat legi generali* were used at collision of two legal regulations. The quantity of constitutional regulations is not a static one (neither the state nor its legal regulations exist for eternity). The constitutional order is constantly being perfected by other constitutional statutes. A constitutional statute is considered as legal regulation which cannot be unconstitutional. When the constitutional statute differs from some other constitutional statute, the above mentioned rules will be applied. The only exception is the procedural unconstitutionality caused by a fault during its enactment. It is not convenient to say that the constitutional statute of one-chamber Parliament of the Czech National Council[26] takes priority over the constitutional statutes enacted by the two-chamber Parliament.

Some Constitutions exclude the constitutional change of some institutions – clause of inflexibility or eternity. However, this clause is likely to be reviewed as declaratory in the course of centuries or millenniums. The inflexibility can exist only there, where the social development stops and where the fellows want to set in their concept state for eternity, which will be considered ridiculous by the next generations. We judge others beyond their epoch and with the course of time but we miss such a course of time when we judge this epoch. In the 1st century, the most of the antic politicians considered the Roman Empire with the Roman peace to be the point of culmination in the history of mankind. However, the Christianity did not accept such a point of culmination and had a different vision of the social development. But after all we can learn from the recent historical periods. Is not the clause of inflexibility similar to the ideas of the chiliad 3rd German Empire or to the "With the Soviet Union for eternity and never otherwise"?

The idea of the end of the history was contented in the medieval chiliad visions of the end of the world or in the theory of the end of the world by the victory of communism (Marx, Engels, Lenin)[27] or by capitalism and liberal democracy

[26] The Constitution is only Constitutional Statute No.1/1993 Coll. of the Czech National Council enacted on the basis of Constitutional Statute No.143/1968 Coll. on the Czechoslovak Federation.

[27] The essence of the Marxist philosophy of history consisted of a special type of fabricating process which was based on the relation between the productive forces (productive instruments and human labor) and production relations. Their conflict was the driving engine of the history when the still developing productive forces get into conflict with the existing production relations, which causes revolution and the old production relations are replaced with the new production relations within the new ruling class over the private ownership of the productive instruments

(Fukuyama)[28]. The supporters of the victory of communism and of capitalism drew the theses of the end of the world from the philosophy of Georg Wilhelm Hegel who considered the drive for appreciation to be the mover of the history. The end of the history cannot come, if the mankind lives.

Already Hayek warned about implementing the ideological concepts to legal regulations. Hayek identified as moral states in a negative sense those states which bring the ideas of moral problems into the law and enforce such ideas to all the people (Nazism and communism). In contraposition stands the liberal state which is

(production tools and natural resources). The last revolutionary class is the proletariat which will dispose of the private ownership, the state will die and the classless society will be created in the last revolution – communism as the top of the human history. BEDŘICH ENGELS: *Původ rodiny, soukromého vlastnictví a státu*, Praha 1967, pp.110-120. VLADIMÍR ILÍČ LENIN: *Stát a revoluce*, Praha 1967, 15-19. ARNO ANZENBACHER: *Úvod do filozofie*, Praha 1990, p.67, ISBN 80-04-25414-4. Kolektiv: *Filozofický slovník*, Praha 1976, pp.522-525.

[28] Fukuyama considers together with Hegel and Alexander Kojéve (A. V. Koževnikov) the drive for recognition to be the driving motor of the history. The drive for recognition is fulfilled with the victory of liberal democracy which eliminates the difference between lords and servants. At this moment the general recognition of everyone is gained and the end of history comes. It is not the end of historical events but it shows the final and supreme social order in capitalism and liberal democracy where no essential conflicts in fulfilling the needs of recognition exist and the life is satisfying (there are no sources of deeper dissatisfaction). A **universal state** will be created which will guarantee recognition for everyone and a **homogenous state** when the classless society will be created by the disposal of the differences between lords and servants and the lord's freedom and servant's labor will be available for everyone. The liberal democracy is not the most just thinkable regime but in reality it is the most just regime. According to Fukuyama there exists only one way and one aim for the mankind on the journey on the imaginary conveyances through the history. Fukuyama relates his words with an allegation at the end: "*... we cannot be sure if the passengers do not find the new milieu unsatisfactory and do not set up on the next journey.*" (p.318).

Francis Fukuyama insists on his thesis of the top of the history in the liberal democracy and capitalism: The west has won, The Guardian 11 October 2001, http://www.guardian.co.uk/world/2001/oct/11/afghanistan.terrorism30 (the text was imprinted as an introduction to the Czech edition of the book *'The End of the History and the Last Man'*) even after the attack on the World Trade Center in New York on 11 September 2001 when he stated that the terrorist attacks are not able to create a generally accepted alternative to capitalism and liberal democracy. These Fukuyama's words are remarkable: *"... on the international stage no ideologies will compete – the majority of economic developed states will be established according to similar principles* (capitalism – note by ZK*) – but cultures*" which brings him near to the theory of the battle of civilizations by Samuel Huntington who does not agree with the end of history (p.228), Fukuyama accepts that "*... liberal democracies are not self-sufficient: the life of the society on that they are dependent have to appear from another source than from liberalism itself.*" (p.308) and that also in democracy originates: "*...dissatisfaction with the freedom and equality. For this reason those who stay discontent will always be able to start new history.*" (p.314).

FRANCIS FUKUYAMA: *Konec dějin a poslední člověk*, Praha 2002, pp.9, 11, 12, 17, 53, 61-67, 145, 150-153, 173, 178-179, 181-182, 193-195, 199, Chapter 19 Univerzální a homogenní stát, 200, 202, 204, 228, 276, 285, 286, 295, 308, 317-318, ISBN 80-86182-27-4.

not unmoral and does not enforce its ideas of moral problems to all its citizens – its law is created by the system of noted rules where the foreseeability of the consequences is the main priority for the free choice of the behavior of the people[29]. From this point of view the theory of material gist seems only to be an endeavor of the Constitutional Court (which uses this theory as a reasoning for the usurpation of power to repeal the constitutional statute) to regulate particular subjective moral opinions of law in the legal system beyond the traditional enacting mechanism by the constitutional body and by the legislative body in the continental European system. At this place it is possible to remind of Hayek's warning of the arbitrariness of the public authorities: *"Constantly the broadest powers are conferred to new authorities which, without being bound by fixed rules, have almost unlimited discretion ..."*[30].

France has a regulation which prohibits change of the republican form of state[31]. Nevertheless, France changed its form of government in the recent two and a half centuries. Since 1789, France changed repeatedly monarchy in both absolutist and constitutional form with two concurring dynasties of the Bourbons and the Orleans. France was also an empire and a republic in the form of government of the Convent, a presidential form and a parliamentary form, including the partial presidential form[32].

The constitutional body states what part of the constitutional order is. The Constitutional body is identical with the legislative body in the Czech Republic (Parliament). A bill of a constitutional statute which is marked as a bill of a constitutional statute has to be enacted by a qualified majority within a certain

[29] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, pp.80-82. Similarly points out the connection between the morality understood by the Nazis and the Nazi law VIKTOR KNAPP: *Problém nacistické právní filozofie*, Dobrá Voda 2002 – reprint from 1947, pp.69, 97-98, 114, 186, ISBN 80-86473-21-X.

[30] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p.83.

[31] Art.89 (change of the Constitution) of the French Constitution of 4 October 1958, p.136. The inflexibility of the republican form of state was enacted in 1884.

[32] Till 1789 the absolute monarchy of the Bourbons, then the constitutional monarchy till 1792. 1792-1804 had the form of the state republic (first governed by the assembly and gradually by consul as dictator). 1804-14 followed the empire with a short 100 day epilogue in the year of 1815. Since 1814 the kingdom of the Bourbons was restored in a constitutional form but there were tendencies to restore absolutism which in 1830 led to the overthrowing of the Bourbons and the Orleans got to power in the form of the Constitutional kingdom. The Constitutional kingdom was in 1848 replaced by the presidential republic which was in 1952 changed to the kingdom. Since 1870 the republic in its parliamentary form lasted till 1958 with a break when the totalitarian republic Vichy 1940-44 was created. Since 1958 the classical form of a partial presidential republic has been established by Charles de Gaulle.

procedure which is different from the procedure to enact a common statute (consent of both parliamentary chambers is needed). Since the democratic state refused to draw its power out of itself (it means out of the society), the constitutional order cannot be based on theocratic or other authority standing out of the society either. The legitimacy of the constitutional order (supremacy in the legal force) is given by the wider consent of the society which is represented in the Parliament in the system of representative democracy. This wider consent is determined by more rigorous procedural rules to enact the constitutional statutes. The rigidity of the Czech Constitution is not very big in contrast to some other constitutional systems which request, e.g. ratification plebiscite[33], consent of other state bodies[34] or choice of a special constitutional convent for the change of the Constitution[35]. Systems with flexible constitutions which can be changed by a common statute (Great Britain) have also their own legitimacy – there is no need for the Constitutional Court to act as a guardian of the constitutionality.

From this point of view it is possible to regard the inflexibility of the Constitution as a relative self-limitation of the sovereign[36] which can be withdrawn because no

[33] In Denmark, the consent of the chamber of representatives is needed which is then broken up. The newly elected chamber of representatives has to agree with the change of the Constitution in the same text, then a ratification plebiscite follows and then the king's consent is requested. § 88 of the Constitution of Denmark of 5 June 1953, p.79.

[34] In the USA, the constitutional amendments have to be first enacted by 2/3 of the Congress and then the ratification consent of 3/4 of Parliaments of the member states of the federation follows. A possible but not realized option is choosing special bodies – convents – for the state ratification as well as for the federal level. Art. V of the Constitution of the United States of 17 September 1787. JIŘÍ KROUPA: *Dokumenty ke studiu státního práva kapitalistických států*, Brno 1986, p.14. Similarly, Russia changed catch 3-8 of the Constitution by the federal constitutional statute of the Federal Assembly, which is behindhand approved by 2/3 of the citizens of the Russian Federation. Art. 136 of the Russian Constitution of 12 December 1993. ZDENĚK KOUDELKA, RENATA VLČKOVÁ: *Ústavní systém Ruska, Ústava Ruské federace*, Brno 1996, p.73, ISBN 80-210-1356-7.

[35] In Russia it is possible to change catch 1 (The essentials of the constitutional system), catch 2 (The rights and freedoms of the human and citizen) and catch 3 (Constitutional revisions) only on the grounds of 3/5 consent of both chambers of Parliament, a special constitutive assembly is established which prepares a draft bill of the new constitution which will be passed by 2/3 of all the members of the constitutive assembly or by a plebiscite. Art.135 of the RF Constitution. ZDENĚK KOUDELKA, RENATA VLČKOVÁ: *Ústavní systém Ruska, Ústava Ruské federace*, Brno 1996, pp.73-74, ISBN 80-210-1356-7.

[36] Inflexibility of constitutions is relative. "*It is not possible to presume naively that such a change is not possible in fact. It is something different: the current system has to use all the available instruments to prevent such a change.*" VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, in *Vladimír Klokočka Liber amicorum*, Praha 2009, p.223, ISBN 978-80-7201-793-5.

sovereign as a creator of the Constitution is everlasting. A sovereign in monarchy or the nation in democracy is changed by the death of the old and by the birth of the new people, including the opinions what the public good is. Formally, the sovereign is still the same (a monarch or the nation) but his substantiality is different. The clause of inflexibility can be changed[37] – can be extended, reduced and abolished.

The Constitutional Court distinguishes the material gist in the constitutional order which is the priority according to the Constitutional Court[38]. In other words, the material gist is upper-constitutional in fact. Since the real upper-constitutionality cannot be derived from the legal order itself which does not know the upper-constitutional regulations, there is a question from whom the upper-constitutionality is derived: from God or from the Constitutional Court? Virtually, it arises from the Judgment that upper-constitutional is that legal regulation which is marked in this way by the Constitutional Court. The Constitutional Court is not bound by procedural rules which would require a major consent to decide what is upper-constitutional than the majority of constitutional judges needed for the consideration when the common statute is contradictory to the constitutional order. The Constitutional Court was aware of the fact that this argumentation can be considered as antidemocratic one. The Constitutional Court operates with the fact that while abolishing some constitutional statute, the problems can be avoided by marking the regulation as not a constitutional one because according to the Constitutional Court: "Neither constitutional body must declare a legal norm as a constitutional statute if such a norm does not have character of a statute, let alone the constitutional statute"[39]. The Constitutional Court considered the given constitutional statute to be an individual legal act[40].

Virtually, the Constitutional Court does not solve the problem of its nondemocratic activities because it is always its arbitrariness which is not presumed by the Constitution. By means of arbitrariness the Constitutional Court determines which constitutional

[37] *„ ... impossible is the norm which expressly prohibits change of the legal order or of some of its part. ...If I know under which conditions such a norm was created, then I have to admit logically that under the same conditions the change or abolishing of such a norm is legally possible.*" FRANTIŠEK WEYR: *Základy filozofie právní*, Brno 1920, pp.105-106 note 18.

[38] Šimíček acknowledges and defines the priority of the material gist. He divides the constitutional order into unchangeable principles and soft constitutional law. VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, *Vladimír Klokočka Liber amicorum*, Praha 2009, pp.224-225, 227.

[39] The ultimate article of point VI/a of the reasoning (p.4635) of the Judgment.

[40] Point VI/a (Generality of the constitutional statute as an essential element of the democratic state) of the reasoning (p.4633, penultimate article) of the Judgment.

statute it agrees with and for this reason the Constitutional Court cannot cancel this constitutional statute. The Constitutional Court also determines which constitutional statute it does not like and that is why it cancels it because according to the Constitutional Court such a constitutional statute is not a constitutional one. The Constitutional Court refuses to respect the procedural rules for enacting the constitutional statute as a determining qualification what the constitutional body wants to enact as a constitutional statute – the Constitutional Court determines itself as the supreme power body of the state. But it is a double sword. If the Constitutional Court can determine a constitutional statute as something that is not a constitutional statute and at the same time the Constitutional Court does not respect such a constitutional statute, then somebody can designate a judgment of the Constitutional Court as a non-judgment and for this reason this person will not respect such a Judgment of the Constitutional Court and will act constitutionally conformal. The rules are the same for everybody or otherwise one cannot wonder if somebody breaks the rules. If the Constitutional Court does not respect the Constitution, then the Constitutional Court cannot demand it from other people.

The legal order of the Czech Republic does not distinguish between the Constitution and a constitutional statute. The Constitution itself is a constitutional statute[41]. The same was also true for the Czechoslovak Constitution[42] – it changed the constitutional statute on the Czechoslovak Federation[43]. There is no special constitutional authorization requested to enact a constitutional statute (e.g. which changes the Constitution)[44]. This is the difference from the states which consider their constitution differently from a constitutional statute but above all they enact the constitution in a more rigid procedure than the constitutional statutes, although the constitutional statutes have the same legal force. In such a case, the control of constitutionality of a constitutional statute is possible by changing the constitution either directly or indirectly – on the condition that it is not a change of the constitution which should have been enacted within a more rigorous procedure[45].

[41] Constitutional Statute of the Czech National Council No.1/1993 Coll., Constitution of the Czech Republic.

[42] Constitutional Statute No.100/1960 Coll., Constitution of the Czech and Slovak Federative Republic (originally of the Czechoslovak Socialist Republic and of the Czechoslovak Federative Republic).

[43] Constitutional Statute No.143/1968 Coll., on the Czechoslovak Federation.

[44] The problems are presented in points VI. 25-32 of the dissenting opinion of judge Jan Musil to the Judgment.

[45] In Russia, the Federal Assembly can enact constitutional statutes but the Russian Constitution can be changed only under the condition that 2/3 of the citizens of the Russian Federation agree

Similar is the case when the constitution distinguishes between several types of constitutional statutes according to the procedure of enacting – all these constitutional statutes have however the same legal force. In Austria, the qualified majority in the National Council is generally required for enacting constitutional statutes. For the constitutional statutes which restrict competences of the federal countries, the consent of the Federal Council is required. For the change of the constitution, the facultative plebiscite is needed if at least one third of the members of the National or Federal Council requests it. The plebiscite is obligatory if there is a complete change of a constitution[46]. In such cases, the control by the Constitutional Court is admissible to find out if a concrete constitutional statute, which was enacted within the simpler procedure, should not have been enacted within the qualified and more rigid procedure. This was the case when the Austrian Constitutional Court abolished a constitutional statute – the Czech Constitutional Court refers to this judgment of the Austrian Constitutional Court in its own Judgment[47]. The reason for abolishing the Judgment of the Austrian Constitutional Court was the fact that the constitutional statute was enacted as a common constitutional statute and the Constitutional Court concluded that it should have been enacted as a qualified constitutional statute within a more rigid procedure. The Czech constitutional order does not know any grades of rigidity for enacting constitutional statutes and for this reason referring to the Austrian judgment in the Czech Judgment of the Constitutional Court it is not admissible.

4. Retroactivity

The Czech Constitutional Court considers the prohibition of retroactive effects to be the essential element of the legal order. As the reason for

with it. Art.136 of the Constitution of 2 December 1993. ZDENĚK KOUDELKA, RENATA VLČKOVÁ: *Ústavní systém Ruska, Ústava Ruské federace*, Brno 1996, p.73.

[46] Art.44 of the Austrian Constitution of 10 November 1920. PAVEL KANDALEC: Materiální jádro ústavy v judikatuře rakouského Ústavního soudu, sborník *Dny práva 2009*, Právnická fakulta Masarykovy univerzity Brno, 2009,

http://www.law.muni.cz/edicni/dny_prava_2009/files/prispevky/mezin_smlouvy/Kandalec_Pavel%20__1350_.pdf

[47] The judgment of the Austrian Constitutional Court of 11 October 2001, VfGH 16.327. Part IV of the reasoning (p.4629) of the judgment where the date of the judgment (11 November 2001) is false. The Constitutional Court refers to the German literature which admits theoretically the possibility of abolishing constitutional statutes. However, this has not happened so far. Theodor Mautz, Gűnter Dűrig et alii: Grundgesetz Kommentar, Műnchen 1997, Art.79, p.14.

abolishing the constitutional statute the Constitutional Court refers to the retroactivity of this constitutional statute. The retroactivity vests in shortening of the electoral term of the Chamber of Deputies because such a shortening was not known at the moment when the elections to this Chamber of Deputies took place[48]. However, the law distinguishes various kinds of retroactivity. Retroactivity for the benefit of private persons is admissible. The persons can later obtain more rights or a better position[49]. The constitutional law even orders the retroactive effects on the condition that it is more favorable for the perpetrator[50].

Retroactivity is divided into real and non-real ones. Real retroactivity newly regulates legal relations which were established before the enactment of the new legal norm (also backward from the creation of the legal relationship). Real retroactivity with the exception of retroactivity for the benefit of private persons is considered to be inadmissible. Non-real retroactivity is considered differently: it newly regulates legal relations created before the enactment of the legal norm but it does not touch the part of the legal relations which already went on; it refers to the future existence of the legal relation.

In the given case it is not possible to newly regulate the conditions of electing the deputies and e.g. to declare some deputies as unelected on the basis of the new regulation of the right to be elected. Nevertheless, it is possible to regulate the legal relations *pro future*, including the ways of terminating the mandates of the deputies in future. This is non-real retroactivity. On the contrary, deputies cannot enact any constitutional change concerning their own position; it would mean that all the changes would concern only the future deputies. Constitutional Judge Jan Musil points out these consequences of the Judgment[51]. According to this logic of prohibiting non-real retroactivity, the Constitutional Court would have to designate as unconstitutional the proposed limitation of the legislative immunity, of the immunity of the Senators and the immunity of the constitutional judges on the condition that it would concern contemporary deputies, senators and constitutional

[48] Point VI.b of the reasoning (p.4635-4636) of the Judgment.

[49] E.g. claims on creation of the pension are assessed according to the new regulation (also while fulfilling conditions before effectiveness although it did not constitute any entitlement to pension according to the regulations effective at which time - § 69/1 of Statute No.155/1995 Coll., on pension insurance.

[50] Art.40 (6) of the Charter of Fundamental Rights and Freedoms, No.2/19993 Coll.

[51] Part VIII. (Final notes), point 40 of the dissenting opinion of Judge Jan Musil to the Judgment.

judges. Such an opinion is to refuse. It is possible to refer to the change of immunity in Slovakia which concerned the elected deputies; it means it was the effect of non-real retroactivity[52].

The absurdity of the conclusions of the Constitutional Court can be shown at the constitutional statute on the dissolution of Czechoslovakia in connection to a new Constitution because on the basis of these regulations the mandates of deputies of the Federal Assembly and of other officers dissolve[53] because together with the dissolution of the state, the public bodies of the state also dissolve. If some federal deputy or some other federal officer had brought a constitutional complaint that he/she had been elected for four years and the constitutional majority allowed him/her to stay in the office only for half a year, then he/she would have been successful according to the conclusions of the Czech Constitutional Court[54]. And what about the dissolution of district offices? Would the senior clerk of the district office be successful with his constitutional complaint concerning his demand to stay in the office till he retires because he did not know that the district offices would be abolished in the future and he suggests abolishing the district offices gradually depending on how senior clerks will retire? The common sense refuses such a constitutional complaint but the Czech Constitutional Court accepted that in the case of Melčák.

Sometimes some appeals demanding abolishing high courts arise. This would cause the dissolution of positions of the judges there – they would be assigned somewhere else, it means also without their consent. According to the logic of the Czech Constitutional Court in the case of Melčák, the Constitutional Court would

[52] Art.78(3) of the Constitution of the Slovak Republic No.460/1992 Coll., in the text of Constitutional Statute No.90/2001, Collection of Laws of the Slovak Republic.

[53] Art.3(1) of Constitutional Statute No.542/1992 Coll., on the dissolution of the Czech and Slovak Federative Republic (ČSFR). In Art.4 the deputies tried to ensure their mandate in the newly created states because they did not understand that together with the dissolution of the state their mandates also vanish. This attitude was accepted neither in the Czech Republic nor in the Slovak Republic.

[54] From the point of view of the Czech Constitutional Court either the constitutional statute itself which abolished all the federal bodies would be unconstitutional or the new Constitution which would not respect the constitutional command to involve the deputies of the Federal Assembly to the Parliaments of the Czech Republic and Slovak Republic. Similarly, no deputies of the Federal Assembly in Slovakia were involved in the legislative procedure because their mandates were finished by § 2 of Constitutional Statute of the Slovak National Council No.70/1994, Collection of Laws of the Slovak Republic, on shortening the electoral term of the Slovak National Council.

likely consider the abolishing of high courts as unconstitutional[55] because the conditions of their functions change, the judges were not aware of this fact when they entered the office. The absurdity of the logic of the Constitutional Court vests in the fact that any office could not be abolished until the officers retire.

The Constitutional Court also considers unconstitutional the shortening of the electoral term of the Chamber of Deputies in 1998[56] which was elected in 1996. On the other hand, the Constitutional Court considers constitutional the *ad hoc* shortening[57] for the elections which took place in the year of 1990 because these were enacted before the elections to the Parliaments took place[58]. The Constitutional Court suppressed that this constitutional statute could be enacted by the Czech National Council only on the basis of the constitutional authorization of the Federal Assembly[59] because the electoral term of the National Councils was contented in a Czechoslovak, not in Czech or Slovak, constitutional statute. The mentioned constitutional statute enacted by the Federal Assembly shortened the electoral term of both the Federal and the republics' Parliaments for about a year – naturally it was an *ad hoc* constitutional statute. The electoral term started as a 5-year electoral term[60]. The silence of the Constitutional Court is clear because it did not dare to declare the constitutional basis of the free elections in 1990 as unconstitutional and draw the consequences of its interpretation of law not even 20 years after the year of 1989. However, it is hypocrisy to suppress that the constitutional statute which serves as an example of constitutionality was enacted on the basis of a constitutional statute which shortened the electoral term of the contemporary Parliaments which is the fact that is considered as contradictory to the state of law.

[55] The judiciary system of courts is presented in Art.91(1) of the Constitution and any change of this system is possible only on the basis of a constitutional statute.

[56] Constitutional Statute No.69/1998 Coll., on shortening the electoral term of the Chamber of Deputies.

[57] One-shot constitutional statute is now constitutionally conformed according to the Constitutional Court. Where is the requested generality of the constitutional statute? The Constitutional Court changes its interpretation in the same judgment.

[58] The Constitutional Court mentions here Constitutional Statute No.64/1990 Coll., on the electoral term of the Czech National Council. A similar situation was in § 2/1 of Constitutional Statute No.45/1990, on shortening the electoral term of the representative assemblies.

[59] § 2/2 of Constitutional Statute No.45/1990 Coll., on shortening the electoral term of the legislative bodies.

[60] Art.30(3), Art.31(3), Art.103(2) of Constitutional Statute on the Czechoslovak Federation in the text of Constitutional Statute No.43/1971 Coll. Till the amendment in 1971 the electoral term lasted four years.

5. Essential elements of the democratic state respecting the rule of law

The Czech Constitutional Court went out of the inadmissibility of changing the essential elements of the democratic state respecting the rule of law at judging the constitutional statute on shortening the electoral term. The Constitutional Court also considers the basic principles of the election law to be one of the essential elements. Of course, a change of the election law instituting, for example, racial or religious distinction for the right to vote is inadmissible according to the Czech Constitution. The question is if the possibility of premature elections can be considered to be one of the essential elements of the democratic state.

Already in 1998, the political situation in the Czech Republic was solved by the premature elections which were declared on the basis of a special constitutional statute *ad hoc*. The same situation came in 1990 when the electoral term of the legislative bodies was shortened by a constitutional statute[61]. The shortening of the electoral term is a repeated solution[62], also after the November of 1989, which constitutes a constitutional convention. The Constitutional Court recognized the constitutional convention to be the objective source of law including the constitutional law[63]. The Constitutional Court applied a constitutional convention e.g. while deciding if the competence of the President of the Republic to appoint the governor of the Czech National Bank underlies the countersignature of the Prime Minister. The Constitutional Court applied the constitutional convention when the governors of the Czech National Bank were appointed without the countersignature and the Prime Minister did not mind. Before appointing Zdeněk Tůma to the office of the governor of the Czech National Bank in 2000, which became the object of the dispute between the Prime Minister and the President of the Republic, the governor was appointed only twice[64]

[61] §1 of Constitutional Statute No.45/1990 Coll., on shortening the electoral term of the representative assemblies.

[62] Before the November of 1989 it was §2 of Constitutional Statute No.35/1960 Coll., on change of the constitutional statute on the elections to the National Assembly and on the elections to Slovak National Council and of Constitutional Statute on the national comities, Constitutional Statute No.75/1963 Coll., on finishing the electoral term of the National Assembly, of the Slovak National Council and of the National Comities, Constitutional Statute No.112/1967 Coll., on finishing the electoral term of the National Assembly, of the Slovak National Council, of the Supreme Court, of the regional, district and military courts, Constitutional Statute No.83/1968 Coll., on finishing the electoral term of the national comities, of the National Assembly and of the Slovak National Council.

[63] Judgment No.163/1997 of the Collection of Judgments and Resolutions of the Constitutional Court, vol.9 (30/1998 Coll., Pl.US 33/97) and Judgment No.91/2001 of the Collection of Judgments and Resolutions of the Constitutional Court, vol.22 (285/2001 Coll., Pl.ÚS 14/01).

[64] Also, the vice-governors were appointed in this way.

(20 January 1993 and 22 July 1998 and only the second appointment was made by the President). In the first case the chairman of the Chamber of Deputies appointed the governor because the office of the President was not staffed[65]. The Constitutional Court speaks about a constitutional convention on the basis of one act of appointment. The Constitutional Court adjudicates in conflict with its previous practice when it does not recognize that a repeated solution became a constitutional convention.

Since the Constitutional Court refused to accept the possibility of shortening the electoral term in conflict to the constitutional convention and abolished the given constitutional statute due to unconstitutionality, it says at the same time that in 1990 and 1998 the essential elements of the democratic state were breached. If a normal person who is touched neither by the law nor by the opinions of the Constitutional Court should say how he/she imagines the breach of the essential elements of the democratic state which has to be corrected by disobedience to the will of the constitutional majority in Parliament, he/she would say that it has to be something like a severe social crisis when anarchy appears, the people are on barricades and the enemy is getting closer. If we look at the year of 1998 through the eyes of ordinary people, we can see a normal year during which the elections took place and a new government was created, but no severe social crisis can be mentioned. The year of 1998 cannot be compared with 1918, 1938, 1939, 1948, 1968 or 1989. In 1998, the government was changed but no struggle for the existence of the state or for its democratic basis existed. Based on the elections in 1998, the government of Miloš Zeman was created which as the last government finished its whole four-year constitutional mandate. In the eyes of the Constitutional Court it was a government which was created on the basis of breach of the essential elements of the Constitution. But only the Constitutional Court understands the year of 1998 in this way. The premature elections were not a breach of the democratic state but they served as confirmation of the democratic state, it means that the political crisis can be solved by the people in the elections. Pavel Rychetský was the person in the government of Miloš Zeman who directed the legislative activity.

[65] The chairman of the Chamber of Deputies appointed the first governor, Josef Tošovský, and for this reason he understood this competence as a competence which does not request the contrasignation, otherwise the competence would passage to the Prime Minister. Václav Havel took the office of the first President of the Czech Republic on 2 February 1993, and on 17 February 1993 he appointed six members of the Bank Council of the Czech National Bank including Josef Tošovský who had two special decrees – the first on the position of the governor and the second on the position of the member of the Bank Council. Article 62 letter (k) and Article 66 of the Constitution. Tošovský guvernérem ČNB, *Právo* 21 January 1993 p.3. Prezident jmenoval bankovní radu, *MF Dnes* 18 February 1993 p.2.

Nowadays Pavel Rychetský is the president of the Constitutional Court, he must do sackcloth and ashes now because he accepted the previous position on the ruins of the democratic state. Rychetský as the senator opposed the alleged unconstitutionality of the shortening of the electoral term of the Chamber of Deputies[66].

The Constitutional Court considers one-shot changes to be inadmissible. According to the Constitutional Court the statutes as well as constitutional statutes have to be general and they must not serve to solve a concrete situation[67]. One-shot changes of the Constitution are not convenient, but they are not unconstitutional. The Constitutional Court considers them to be unconstitutional. Nevertheless, one-shot changes cannot be quite eliminated out of the legal order. Constitutional Judge Vladimír Kůrka[68] mentions some examples of one-shot statutes – e.g. statutes on the state budget or the statutes on restitution[69]. Also, one-shot statutes on the merits are virtually honors awarded by the legislative power[70]. One-shot constitutional statute constituted also the *ad hoc* National Assembly[71]. The Constitutional Court says that the constitutional statute on shortening the electoral term of the Czech National

[66] The speech by Pavel Rychetský in the Senate on 19 March 1998 while discussing the draft of the statute on shortening the electoral term of the Chamber of Deputies, Senate press 98021, 1st term of office,

http://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=1&IS=2395&T=98021#st98021

Another constitutional judge Miloslav Výborný as a deputy in 1998 opposed the draft of a group of ČSSD deputies to enact a constitutional statute to shorten the electoral term of the Chamber of Deputies. However, KDU-ČSL, the party of which Výborný was a member, supported the draft. *See*: 12th vote, 21st meeting of the Chamber of Deputies on 26 February 1998 http://www.psp.cz/sqw/hlasy.sqw?G=11353.

As a rare opinion to the issue of shortening the electoral term let us mention the article by: JAN FILIP: Zkrácení volebního období, *Parlamentní zpravodaj* No.12/1997-98, pp. 132-134. PAVEL HOLLÄNDER: Materiální ohnisko ústavy a diskrece ústavodárce, Právník 4/2005, pp.313-335, ISSN 0231-6625.

[67] Point VI./a of the reasoning (p.4631-4635) of the Judgment.

[68] Point III, 11. of the dissenting opinion of Judge Vladimír Kůrka to the Judgment.

[69] Law No.298/1990 Coll., on regulating some proprietary relations of the religious orders and congregations and of the archbishopric in Olomouc.

[70] Law No.22/1930 Coll., on honors of T.G. Masaryk, Law No.232/1935 Coll., on the state honor to the first president of the Czechoslovak Republic T.G. Masaryk, Law No.35/1933 Coll., on erecting the monument to Dr. Alois Rašín and to Dr. Milán Rostislav Štefánik, Law No.117/1990 Coll., on honors of M. R. Štefánik, Law No.292/2004 Coll., on honors of Edvard Beneš. Similarly in Slovakia – Law No.402/2000 Collection of Laws of the Slovak Republic, on honors of Milan Rastislav Štefánik, Law No.531/2007 Collection of Laws of the Slovak Republic, on honors of Andrej Hlinka, Law No.432/2008 Collection of Laws of the Slovak Republic, on the honors of Alexandr Dubček.

[71] Constitutional Statute No.65/1946 Coll., on the Constitutional National Assembly was enacted without changing the regulation of the two-chamber National Assembly and it was applied in accordance with the rule *lex specialis derogat legi generali*.

Council elected in 1990[72] is a constitutionally conform solution[73]. But it was a one-shot change of the Constitution. In one case the constitutional change is unconstitutional, and in another case it is alright.

As a reason to justify abolishing constitutional statutes, the Constitutional Court mentions the prevention from misuse of power by the Parliament. The Constitutional Court points out the possible future bad intentions of the Parliament (if it is possible to shorten an electoral term, in the future it could be possible to suspend the Constitutional Court or the office of the President of the Republic)[74]. But we do not have to be afraid of bad intentions of the constitutional judges, do we? It does not mean that the contemporary Constitutional Court probably does not have bad intentions; however, it opened a way due to the abolishment of the constitutional statute. What if the Constitutional Court abolished as unconstitutional the restriction of the judicial term of the office of the constitutional judges and declared it for lifelong office? It is possible to find some arguments which suggest the judicial mandate as lifelong office and a lot of states dispose of regulation with such a mandate at the supreme or constitutional courts. Who prevents the next intention of the Constitutional Court from abolishing the Constitution when it is fully sufficient that the Constitutional Court is convinced what other state bodies should or must not do in a democratic state? It is surely possible to foresee hypothetically that the Constitutional Court can become mad in the same way as the Parliament can become and becomes a tyrant. We can presume this situation either at all the state bodies or at no bodies. It is unthinkable in a democratic state for the deputies to vote for the hereditary mandate as well as the possibility that the constitutional judges would abolish a part of a constitutional statute of the Czech National Council which restricts the length of their office and would make the office of the constitutional judges lifelong. The basis of the law creates common sense. The Constitutional Court points out to the common sense while judging the decisions of other state bodies[75]. Nevertheless, the Constitutional Court does not apply this criterion to itself.

[72] Constitutional Statute No.64/1990 Coll., on the electoral term of the Czech National Council.

[73] Point VI./b of the reasoning to the Judgment.

[74] Point VI./a of the reasoning (p.4635, 2nd article) to the Judgment.

[75] The Constitutional Court assesses if the statutes are reasonable – and it is right. The legal regulation should be reasonable. Judgment No.160/2006 of the Collection of Judgments and Regulations of the Constitutional Court, vol.42 (Pl.ÚS 57/05).

5.1. International excursus

Comparison with Slovakia is very interesting because the Czech Republic has common constitutional history with Slovakia. The electoral term of the Slovak National Council was repeatedly shortened in 1994 and 2006 by enacting two constitutional statutes *ad hoc*[76]. *This procedure was fully accepted in Slovakia, the elections were not infirmed due to the breach of the essential elements of the Constitution – neither in Slovakia nor in an international view. In 2004, trade unions even requested the plebiscite to accept premature elections to the Chamber of Deputies; however, the plebiscite was not valid due to the insufficient participation of the electors (the Constitution requests the absolute majority of electors)*[77]. *The participation in the plebiscite was 35.86%, among whom 86.73% people said yes and 11.93% said no.*

The international attitude is very important because even under a mere suspicion of a possible endangering of principles of the democratic state political sanctions can be imposed. Such sanctions were imposed against the former Austrian president Kurt Waldheim in the years of 1986-92; he was engaged in the Hitler army on the Balkan Peninsula[78]. In 2000, the Austrian coalition government of the chancellor Wolfgang Schüssel had to face the sanctions due to the participation of Jörg Haider's FPÖ in this coalition. The participation of the Slovakian political party *Směr – sociální demokracie* in the European social-democratic party was suspended during 2006-2008 due to its cooperation with the Slovakian national party. The politicians in Europe are able to criticize even a mere suspicion of breach of the democratic rules, nevertheless it never happened in connection with shortening of the electoral term of the Parliaments in Czechoslovakia in 1990, in Slovakia in 1994, 2006 and in the

[76] Constitutional statutes even stated the concrete term of elections. The following promulgation by the chairman of the National Council was only a formal act. Constitutional Statute No.70/1994 of the Collection of Laws of the Slovak Republic and Constitutional Statute No.86/2006 of the Collection of Laws of the Slovak Republic, on shortening the electoral term of the Slovak National Council. The decision of the chairman of the National Council of the Slovak Republic No.105/1994 of the Collection of Laws of the Slovak Republic and No.62/2006 of the Collection of Laws of the Slovak Republic, on declaration of the elections to the National Council.

[77] Art.98(1) of the Constitution of the Slovak Republic No.460/1992 Coll.

[78] A lot of heads of states did not want to communicate with him in spite of the fact that he acted as the Secretary General of the United Nations in 1972-81. On the initiative of the World Jewish Congress, on 27 April 1987 the American Minister of Justice Edwin Meese declared that Waldheim had been put onto the list of the undesirable people in the USA, which meant prohibition of entry for Waldheim as a private person to the USA. Also, Israel and Canada prohibited entry for Waldheim. *See* the German Wikipedia: Waldheim-Affäre http://de.wikipedia.org/wiki/Waldheim-Aff%C3%A4re

Czech Republic in 1998 and 2009. Premature elections are not connected with the breach of the democratic state in Europe.

6. Constitutional category "statute"

The Constitutional Court states a reason for acquisition of the right to abolish the constitutional statutes in part IV of its Judgment – the constitutional statute is only a statute. If the Constitution does not exclude some constitutional statutes expressly in a concrete situation[79], then the concept of statutes also includes constitutional statutes. If the Constitution enables the Constitutional Court to abolish statutes, it enables the Constitutional Court to abolish constitutional statutes as well.

Article 33 of the Constitution enables the Senate to enact the so-called statutory measures in those cases which would demand enactment of a statute[80]. At the same time it cannot happen in the issues of the Constitution, the state budget, the national account, the law on elections and international agreements in accordance with Article 10 of the Constitution. On the condition that we accept the interpretation of the Constitutional Court that the category *statute* comprises also the category of a constitutional statute, then the statutory measures of the Senate could also change constitutional statutes with the exception of the Constitution. The exception from the applicability of statutory measures of the Senate is only in the Constitution (it means in one concrete constitutional statute). However, this attitude is indefensible. The statutory measures of the Senate cannot change the constitutional statutes; they can change only the statutes because the categories of constitutional statutes and statutes are divided if there is no contrary.

It is possible to apply the procedure determined by the Constitution for statutes, e.g. at their enactment to the constitutional statutes analogically[81]. Nevertheless, a new competence cannot be determined on the basis of analogy. The competence can be given to the state body only on the basis of constitutional or statutory regulation. The Constitutional Court cannot usurp a new competence. The competence to enact a constitutional statute is given to the Parliament expressly by the Constitution[82]. Hayek already warned against the arbitrariness of the public authorities that are not

[79] Art.50 (1), Art.62 letter (h) of the Constitution.
[80] Art.33 (1) of the Constitution.
[81] Arts. 44-48, Art.62 letter (i) of the Constitution.
[82] Art.39 (4) of the Constitution.

bound by firm rules: "*Constantly broader competences which are conferred to new authorities without being bound by fixed rules, have almost unlimited discretion...*"[83].

Abolishing statutes at the day of promulgation

The Constitutional Court abolished the constitutional statute at the day of the oral promulgation of the Judgment without giving reasons why it cannot use the common abolishing at the day of publishing in the collection of laws[84]. Sudden quickness is contradictory to the proclaimed responsible long-time process of creating decisions after suspending enforcement of the decision of the President of the Republic.

Judgments of the Constitutional Court abolishing a legal regulation are published in the collection of laws of the Czech Republic. A legal regulation is abolished at the day which is determined in the Judgment (usually it is the day of publishing in the collection). The Constitutional Court can suspend the enforcement of the judgment and give some time to the legislator to regulate such a field of social relations if the immediate abolishing seems to be undesirable. The Constitutional Court cannot abolish regulations with retroactive effects, which flows from the principle of prohibition of retroactivity and from the principle of legal certainty. The regulation can be abolished from the day of promulgation. Due to the demands on publicity of law it is necessary to publish the Judgments of the Constitutional Court in the collection of laws. Nevertheless, also in this respect the Constitutional Court determined the day of the oral promulgation as the day of abolishing the constitutional statute[85]. It means breach of the old principle that the law has to be published formally including legal acts abolishing the effective regulations. The Constitutional Court tries to introduce a new practice – the state bodies should follow information on TV about the fact that some regulation has been abolished or should follow the information about such a fact on the internet pages of the Constitutional Court – but such ways of informing do not have any official publication capacity. Such a way of

[83] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p.83.

[84] Point I of the statement (p.4622) and point VI/c of the reasoning (p.4637) of the Judgment.

[85] The Constitutional Court did it in Judgment No.283/2005 Coll. (127/2005 of the Collection of Judgments and Resolutions of the Constitutional Court, Pl.ÚS 13/05) which abolished Statute No.96/2005 Coll. changing Statute No.238/1992 Coll., on conflict of interests. Judgment No.483/2006 Coll. (Pl.ÚS 51/06) which abolished part of Statute No.245/2006 Coll., on public non-profit medical institutions. A critical opinion on the steps of the Constitutional Court: JOSEF VEDRAL: K právním účinkům derogačního nálezu ÚS, *Právní zpravodaj* 8/2005, p.13.

informing is to accept in the time of war or in case of e.g. a comet falling down on the area of the Czech Republic. If the Constitutional Court had really been interested in an accelerated publication, it would have arranged a priority publication of the Judgment in the collection of laws.

Let us mention that such an important regulation for the economy of the state like law on separating the currency from the common Czechoslovakian crown in the year of 1993 was correctly published in the preferably published collection of laws within one day[86]. Also, the law on passage of the Hospital of accident in Brno (*Úrazová nemocnice v Brně*) was after its signature by the President of the Republic on 29 December 2008 signed by the Prime Minister on 30 December 2008 and published the following day on 31 December 2008[87]. This law became effective on the first day of the calendar month after the day of publication. The causation of the accelerated publication was to simplify the financial flows in the frame of the budget year. This law was enacted by the opposing deputies; it was not a governmental draft. The Senate did not discuss this draft within the 30-day time period and the President of the Republic used almost all the 15 days to decide on the signature of the law because the draft was submitted to the President on 15 December 2008. Despite this fact the publisher of the collection of laws published preferably the given chapter in the collection of laws. It would be comprehensible to bind the enforceability to the oral promulgation of the Judgment of the Constitutional Court on the condition that the publisher of the collection of laws causes any obstructions. If it is not so, the Constitutional Court breaches the generally acknowledged principles of the democratic state by not respecting the principle that the legal regulations of the state as well as their abolishing have to be formally published in official collections of laws.

7. Legitimate expectation

The Constitutional Court insists on prohibition of restricting the exercise of the right to vote[88]. This pronouncement is interesting because it is really uncommon. One of the aims of the Constitutional Court is the protection of constitutional rights. It is logical that the Constitutional Court must not limit these rights. In other

[86] Statute No.60/1993 Coll., on separating the currency. Enacted on 2 February 1993 and published in the Collection of Laws on 3 February 1993.

[87] Statute No.485/2008 Coll., on passage of the Hospital of Accidents in Brno, published in series 155 of the Collection of Laws on 31 December 2008.
http://www.psp.cz/sqw/historie.sqw?o=5&T=373

[88] Point VIII (Orbiter dictum) of the reasoning of the Judgment.

judgments of the Constitutional Court we do not find such a declaration. Why did the Constitutional Court feel the need to declare something like this? The explication is simple – the Constitutional Court was aware of the violation of the right to vote and that is the reason why the Constitutional Court declared the contrary.

The objective right to vote for the deputies in 2009 came to existence because the constitutional statute on shortening the electoral term had been enacted. By the decision of the President of the Republic this objective right to vote was transformed into a subjective right of each citizen of the Czech Republic to elect the deputies in October 2009. On the basis of the publication of the Judgment of the Constitutional Court in the collection of laws the citizens expected legitimately that they were going to elect the deputies in October 2009.

The Constitutional Court is used to protect the legitimate expectations. According to the practice of the Constitutional Court, a person must not be deprived of a once existing right by a unilateral act. The Constitutional Court abolished[89] a part of a statute[90] which cancelled a legal regulation of transformation of the right of permanent use into the right of ownership[91]. The Constitutional Court pronounced unconstitutionality of this statute which cancelled the right of the future transformation of the right of permanent use into the right of ownership in the time when the ownership did not come to existence. The Constitutional Court stated that the people expected legitimately the transformation into the right of ownership after the lapse of one year time period. Such a legitimate expectation is capable of getting some legal protection. Although it is clear that legitimate expectation in the field of the protection of the ownership cannot be applied in all the legal areas with the same effects, it is worth a deliberation[92]. However, the right to vote belongs together with the right of ownership to the same category of human rights and basic freedoms of the Charter of Fundamental Rights and Freedoms[93].

[89] Judgment No.35/2004 of the Collection of Judgments and Resolutions of the Constitutional Court, vol.32 (278/2004 Coll., Pl.ÚS 2/02).

[90] Part two (Change of the Civil Code) of Law No.229/2001 Coll.

[91] § 879c-879e of the Civil Code No.40/1964 Coll., in the text of Law No.103/2000 Coll.

[92] The Supreme Administrative Court went out of the legitimate expectation while judging the position of the trainee judge applying for the function of the judge, it means in the area of labor law. Judgments of the Supreme Administrative Court No.905/2006 of the Collection of Judgments of the Supreme Administrative Court (4Aps 3/2005) and No.1717/2008 of the Collection of Judgments of the Supreme Administrative Court (4Ans 9/2007-197).

[93] The right of ownership is in Art.11 and the right to vote is in Art.21; both articles are part of catch II – human rights and basic freedoms.

On the one hand, the existence of a statute regulating the right which comes into existence in the future is sufficient for the legitimate expectation. On the other hand, a subjective right on the basis of a constitutional statute is not enough for the Constitutional Court to protect it[94]. The Constitutional Court would not forgive such a treatment with legal institutions to some other state bodies. Towards the others the Constitutional Court insists on following the established practice of the Constitutional Court on the condition that no change is justified. Despite this fact the Constitutional Court itself changes its practice without reasoning it properly. The Constitutional Court is bound by its own judgments, it can change its own practice but it is necessary to follow a certain procedure respecting the legal certainty and foreseeability[95]. One new judgment is not able to change the present practice of the Constitutional Court, it has to be considered as a changed practice of the Constitutional Court and the Constitutional Court has to pronounce expressly why the practice should be changed[96]. The Constitutional Court is getting to a position of an unlimited ruler who creates the law but is not bound by the law.

8. Conclusion

Abolishing the constitutional statute enacted within a correct procedure is in conflict with the constitutional command referring to the duty of the Constitutional Court to be bound by the constitutional statutes. The constitutional judges tried to become immortalized. If the Constitutional Court can designate the constitutional statute as unconstitutional, then others can designate the judgment of the

[94] Constitutional Statute No.195/2009 Coll., became effective on the day of promulgation (29 June 2009). Decision of the President of the Republic No.207/2009 Coll. of 1 July 2009 was published on 9 July 2009.

[95] Hayek emphasizes the respect to the legal culture and for this reason he considers it important for the Constitutional Court to follow its previous judgments and each obvious need for changing such judgments should be made within a constitutionally regulated procedure. FRIEDRICH AUGUST von HAYEK: *Právo, zákonodárství a svoboda*, 2. edition 1994, p.365.

[96] It is not a rare situation. E.g. Judgment No.45/2007 of the Collection of Judgments and Resolutions of the Constitutional Court, vol.44 (162/2007 Coll., Pl.ÚS 42/05) changed the legal opinion on the possibility of stating general police hours for restaurants in a general binding regulation of the municipality issued to protect the public order in accordance to §10 of Statute No.128/2000 Coll., on municipalities when the Constitutional Court considers these regulations newly to be unconstitutional although it considers them to be constitutional in its earlier Judgment No.189/2001 of the Collection of Judgments and Resolutions of the Constitutional Court, vol.20 (51/2001 Coll., Pl.ÚS 4/2000). The fact is that this new practice of the Constitutional Court is not mentioned in the new judgment.

Constitutional Court as something that is no judgment and can refuse to respect it. Such a consequence is a serious breach of legal certainty.

It is admissible to abolish a constitutional statute on the condition that there appeared some procedural mistakes. The holding of premature elections[97] does not correspond to the mentioned situation if the elections fulfill the principles of equal, universal and secret franchise and the principles of free competition of political parties. The legislator should regulate the abolishment of constitutional statutes by a qualified majority of the constitutional judges.

Let us appreciate the consequence of the Judgment of the Constitutional Court which led to the permanent change of functionless part of the Constitution concerning the dissolution of the Chamber of Deputies[98]. It is the fault of the representatives of the strongest political parties that they were not able to enforce such a change earlier. However, the educational function of the Judgment of the Constitutional Court must not endanger the legal certainty and the hierarchical structure of the legal order, and it cannot lead to unconstitutional extension of competences of the Constitutional Court. The Constitutional Court cannot withdraw the existing right to vote in elections and endanger the constitutional basis of our political system by wasting the financial sources of the political parties which were spent on the election campaign[99]. The Judgment of the Constitutional Court which abolished the constitutional statute was *ultra vires*. It is a legal pseudo-act. The binding effect was conferred to this pseudo-act by the fact that other state bodies followed this Judgment and did not declare it a pseudo-act.

[97] Even the supporter of the possibility to abolish constitutional statutes by the Constitutional Court due to the conflict to the material gist of the Constitution considers abolishing of the constitutional statute on shortening the electoral term of the Chamber of Deputies to be wrong. VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, *Vladimír Klokočka Liber amicorum*, Praha 2009, p.227, 230, 234.

[98] Art.35(2) of the Constitution in the text of Constitutional Statute No.319/2009 Coll.

[99] The Constitutional Court should not enter into political disputes and teach the politicians lessons. Politics as well as economy, culture or science is quite an independent and separate area and the Constitutional Court must not be involved. Point 19, part III. Change of paradigm of the democratic state of the different opinion of Judge Jan Musil to the Resolution of the Constitutional Court of 15 September 2009, Pl.ÚS 24/09 in the case of the constitutional complaint against shortening the electoral term of the Chamber of Deputies.

ON THE RECOGNITION OF THE OBJECT OF TAXATION OF VAT OPERATIONS TO PERFORM WORK AND PROVIDE SERVICES IN THE EVENT OF BANKRUPTCY OF THE TAXPAYER

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Abstract
The subject of the selected topic is the problems arising at the junction of the legislation on taxes and fees and bankruptcy legislation. The analysis of various problems in the regulation of legal relations arising in bankruptcy cases treats separate issues sporadically, but it should be recognized that there are almost no comprehensive works devoted to the specifics of the fulfillment of the tax obligation to pay VAT in bankruptcy cases. The object of the study is public relations that arise when the organization is in bankrupt duties to pay VAT from operations related to the sale of goods, works and services. The author considers in detail such aspects of the topic as the development of a legal thought on the recognition of transactions for the sale of property and property rights of a taxpayer for the object of VAT taxation.
An attempt has been made to systematize the disparate interpretations of the norms and fill the gaps in the legal regulation with regard to the recognition by the object of VAT taxation of transactions on the sale of assets of the insolvent tax payer, both in the normal course of business of the debtor and in competitive forms, for example, tenders for the sale of the bankrupt estate.
The relevance of the study is the need to improve the provisions of the legislation on taxes and fees that do not meet the requirements of modern law enforcement practice.
The research is based on the methods of historical and comparative jurisprudence. The research has revealed contradictions in legislation and jurisprudence on the implementation of tax obligations for the payment of VAT by a taxpayer in bankruptcy procedures. The author uses the methods of legal modeling when considering tax liabilities for the payment of VAT in cases of bankruptcy in the distribution of money received from the lease of the debtor's property to pay claims of creditors whose rights are secured by the pledge of such property.
The author formulates recommendations for improving the provisions of tax legislation by expanding the positive content of transactions that are not recognized as an object of VAT taxation. Separate conclusions are made with

regard to the qualification of tax liabilities from the current activity of the debtor as an object for value-added tax in situations of unreasonably prolonged economic activity in the framework of procedures applied in accordance with bankruptcy law.

Keywords: tax object, goods, works, services, tax issues, value added tax (VAT), insolvency, bankruptcy, obligatory payment, tax agent, priority of claims.

The peculiarities of the legal regime for fulfilling the tax obligation to pay VAT from operations on the sale of goods in the case of a taxpayer's bankruptcy were the subject of a large number of studies and publications by domestic authors[1]. Initially, the interest of researchers was dictated by the changes that occurred in law enforcement practice, and in the subsequent development of tax legislation[2].

Turning to the provisions of Article 146, §2 (15) of the Tax Code of the Russian Federation[3] (hereinafter - the RF Tax Code), one can discern certain narrowness in regulating this difficult issue. Operations for the sale of property are not recognized as the object of VAT taxation; only the property rights of debtors are recognized in accordance with the legislation of the Russian Federation as bankrupt (Article 146, §2 (15) of the RF Tax Code).

The above norm regulates not only the issues of selling property (property rights) in tenders in bankruptcy proceedings, but also covers all commercial and business

[1] K.M. Alieva, Zameshchenie aktivov dolzhnika. "Podvodnye kamni" v protsedure provedeniia [Substitution of the Debtor's Assets. "Hidden Pitfalls" in the Procedure of Holding]. Arbitraznaia praktika. 2012, No.8 (Rus.); N. Berkovich, Zameshchenie aktivov dolzhnika [Substitution of the Debtor's Assets]. EZH-Yurist. 2004. No.45 (Rus); M.A. Govorukha, Reshenie organov upravleniia dolzhnika – iuridicheskogo litsa o zameshchenii ego aktivov [The Decision of the Management Bodies of the Debtor – a Legal Entity on the Substitution of its Assets]. Grazhdanskoe pravo. 2007. No.4 (Rus.); K.V. Drantsova, O nekotorykh voprosakh, voznikaiushchikh v sudebnoj praktike pri kvalifikatsii i ispolnenii trebovaniij obiazatel'nym platezham v kachestve tekushchikh v dele o bankrotstve [On Some Issues Arising in Judicial Practice in the Qualification and Fulfillment of Requirements for Mandatory Payments as Current in the Bankruptcy Case]. Arbitrazhnye spory. 2015, No.1, pp.58-84 (Rus.); A.A. Karpova, Arbitrazhnyj upravliaiushchij ne mozhet vystupat' nalogovym agentom pri realizatsii imushchestva dolzhnika [The Arbitration Manager Cannot Act as a Tax Agent in the Sale of the Debtor's Property]. Arbitrazhnaia praktika. 2011, No.12, pp.90-94 (Rus.).

[2] S.S. Izvekov, Otdel'nye voprosy pravovogo rezhima ispolneniia nalogovoj obiazannosti po uplate NDS pri bankrotstve nalogoplatel'shchika [Separate Issues of the Legal Regime for the Fulfillment of the Tax Obligation to Pay VAT in the Event of a Taxpayer's Bankruptcy]. Nalogi i nalogooblozhenie. 2016, No.5, pp.372-386. DOI: 10.7256/1812- 8688.2016.5.17958 (Rus.).

[3] The Tax Code of the Russian Federation (Part Two) of 5 August 2000 No.117-FZ. Collection of Legislation of the Russian Federation. 7 August 2000. No.32, Art.3340 (Rus.).

operations for the sale of property conducted in bankruptcy procedures in the ordinary course of business. The formal restriction on the continuation of economic activities, for example, within the procedure for bankruptcy proceedings, does not mean a complete ban on the commission of certain transactions whose purpose is to alienate goods made or purchased earlier by the debtor.

The sale of property manufactured during the current production activities of bankrupt companies is also not recognized as an object of VAT taxation, as are transactions for the sale of property from the sale (*see* Letters No.03-07-14/55736[4] from the Ministry of Finance of the Russian Federation of 30 September 2015, 05/21/2015 No.03-07-11/29287[5], as of 5 June 2015, No.03-07-11/26074[6], Federal Tax Service of the Russian Federation of 17 August 2016 No.SD-4-3/15110@[7]).

In this case, the law enforcer and the legislator follow the norm in question and do not recognize as an object of VAT all transactions for the sale of the debtor's property, both in the course of tenders for the sale of property, and in respect of operations carried out during the main economic activity of the taxpayer. Thus, the taxpayer is released even from the current mandatory VAT payments.

At the same time, as a general rule, the object of VAT taxation is not only operations for the sale of property (property rights) of the taxpayer, but also operations for the sale of work and services (Art.146, §1 (15) of the Tax Code of the Russian Federation).

Works (services) performed (rendered) by a bankrupt taxpayer are subject to VAT in accordance with the generally established procedure, as Art.146, §1 (15) of the Tax Code of the Russian Federation does not provide for their exclusion from the object of taxation (*see* Letters of the Ministry of Finance of the Russian Federation of

[4] Letter No.03-07-14/55736 of the Ministry of Finance of the Russian Federation of 30 September 2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

[5] Letter No.03-07-11/29287 of the Ministry of Finance of the Russian Federation of 21 May 2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

[6] Letter of the Ministry of Finance of the Russian Federation No.03-07-11/26074 of 6 May 2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

[7] Letter of the Federal Tax Service of Russia of 17 August 2016 No.SD-4-3/15110@. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

30 October 2015 No.03-07-14/62525[8], of 6 May 2015 No.03-07-11/26074[9], the Federal Tax Service of the Russian Federation of 17 August 2016 No.SD-4-3/15110 @).

It seems that this approach of the legislator is inconsistent and contradicts the objectives of the procedures used in the bankruptcy of the taxpayer. On the one hand, the objective of any procedure applied to an insolvent debtor is to maximally prompt and proportionate satisfaction of creditors' claims, for which the public creditor has waived his/her own fiscal interest and excluded the transactions in question from the taxable object. On the other hand, operations carried out in the situation of continuing normal business activities are not focused on achieving the objectives of bankruptcy procedures, but only indirectly contribute to them, thus their exclusion from the object of VAT taxation seems unjustified.

Actually, the position of exclusion from the object of VAT taxation from operations for the sale of property (property rights) in bankruptcy is also not always unconditional.

In some cases, the procedures provided for in the Bankruptcy Law are used in bad faith by taxpayers to optimize the fiscal burden without the purpose of settlements with creditors. The attractiveness of bankruptcy proceedings is caused by the following factors: a moratorium on the performance of obligations the term for which came, the termination of accrued penalties under contracts and penalties under the Tax Code of the Russian Federation from the moment of opening the bankruptcy procedure, the absence of a ban on the continuation of economic activity, and VAT exemption. Thus, under the patronage of a professional arbitration administrator, a formally insolvent taxpayer can continue both production and trading activities, extracting profits from this and not paying the previously charged mandatory payments.

The Supreme Court of the Russian Federation responded in several cases to the relevant actions in circumvention of tax law and pointed out the inadmissibility of applying the provisions of law to the detriment of the budget interests of the Russian Federation. It should be noted that the litigation that we have discussed was devoted to challenging the actions (inaction) of bankruptcy administrators who continued the economic activities of debtors for a long time, increased their current obligations

[8] Letter No.03-07-14/62525 of the Ministry of Finance of the Russian Federation of 30 October 2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

[9] Letter of the Ministry of Finance of the Russian Federation No.03-07-11/26074 of 6 May 2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

and failed to comply with mandatory measures provided for in the Bankruptcy Law. Meanwhile, the legal position expressed by the Supreme Court of the Russian Federation in its decisions of 30 July 2016 in case No.307-ES14-8417[10] and of 29 August 2016 in case No.306-ES16-1979[11] creates prerequisites for the formation of a law enforcement taxation approach to VAT transactions on the sale of property in the case of continuing normal business activities.

Bulletin of the Supreme Court of the Russian Federation No.3 (2016) approved by the Presidium of the Supreme Court of the Russian Federation on 19 October 2016[12], in paragraph 4 gives explanations on similar issues. As a general rule, expenses directly related to the debtor's production and economic activities are not operational payments and are included in the fourth line of current payments. Recognition as an expense for the acquisition of raw materials and their processing to expenses directly ensuring the activities of the plant with their satisfaction as part of the third line of current payments violates the rights of the tax authority as the creditor of the debtor, since the requirements for payment of mandatory payments are included in the fourth line of current requirements. As a result, this leads to a violation of the order of satisfaction of creditors' claims on current payments.

References to the provisions of Articles 20.3, 129 and 134 of the Bankruptcy Law are unacceptable in order to qualify disputed payments as maintenance costs, without which it is impossible to carry out economic activities of the taxpayer and perform the duties assigned to the bankruptcy administrator provided for in the Bankruptcy Law.

In accordance with the provisions of the Bankruptcy Law, the purpose of bankruptcy proceedings is a proportionate satisfaction of creditors' claims. As the supreme arbiter points out, acting reasonably and conscientiously in the interests of the debtor and creditors, the bankruptcy administrator, by virtue of his powers and

[10] The definition of the Supreme Court of the Russian Federation of 29 August 2016 in case No.307-ES14-8417. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

[11] The decision of the Supreme Court of the Russian Federation of 29 August 2016 in case No.306-ES16-1979. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.).

[12] Bulletin on the review of the judicial practice of the Supreme Court of the Russian Federation No.3 (2016) approved by Presidium of the Supreme Court of the Russian Federation on 19 October 2016. Bulletin of the Supreme Court of the Russian Federation No.5, May 2017 (beginning), Bulletin of the Supreme Court of the Russian Federation, No.6, June 2017 (end) (Rus.).

competences, must determine the strategy of the bankruptcy proceedings against the debtor, including the expediency of the further operation of the economic entity, in particular, taking into account unjustified idle time of property that can generate income during the implementation of activities for its assessment, preparation for the disposition, the availability of objective prerequisites for the sale of the enterprise as a single property complex or the implementation of a procedure for the replacement of assets, etc. In any case, the period during which the debtor's productive activities can be maintained must be reasonably necessary. And it also must be correlated with a period of time sufficient for the performance of all measures provided for by law aimed at alienating the objects belonging to the debtor for subsequent settlements with creditors.

In this case, the provisions of Article 129(6) of the Bankruptcy Law, according to which the meeting of creditors has the right to take a decision to terminate the economic activities of the debtor, provided that such termination does not entail man-caused and (or) environmental catastrophes, termination of operation of facilities used to provide socially significant facilities necessary for the life support of citizens, cannot be interpreted in such a way that the continuation of the activities of the legal person - the debtor in the period of bankruptcy proceedings is justified until otherwise established by the meeting of creditors.

The *aim of the above norm* is to give the meeting of creditors an opportunity to compel the arbitration manager to implement liquidation measures in a situation when he insistently increases the accounts payable by insisting on the debtor's production of goods (performance of work, provision of services), which in turn negatively affects the competitive mass.

Allocation of all expenses directly forming a chain of technological process for the production and sale of the debtor's products to operational payments and their priority over mandatory payments as well as the exclusion of transactions in current activities from the object of VAT taxation contradicts the principles of priority and proportionality of the satisfaction of creditors' claims.

It is natural to conclude that in such a situation, a scheme for evading taxes is legalized in the form of exemption from compulsory payments from operations for the sale of the debtor's property (property rights) that are carried out in the ordinary course of business.

In the considered position of the Supreme Court of the Russian Federation, the actions of the bankruptcy trustee were subject to an assessment, taking into account the decisions of the Plenum of the Supreme Commercial (Arbitration) Court of the Russian Federation of 23 July 2009 No.60 (as amended on 6 July 2014) "On Certain Issues Related to the Adoption of Federal Law of 30 December 2008 No.296-FZ "On Amendments to the Federal Law "On Insolvency (Bankruptcy)"[13] clarification, according to which the retirement of the receiver from the priority provided for in Art.134(2) of the Bankruptcy Law, can be interpreted as legal if it is necessary for the purpose of bankruptcy. At the same time, the fundamental criterion for the legality of such payments is the *bona fide* and reasonable actions of the arbitration administrator in the interests of the debtor and creditors.

However, it is not possible to speak about derogation from the order stipulated in Art.134(2) of the Bankruptcy Law, in relation to VAT from operations for the sale of the debtor's property in the ordinary course of business, since the transactions themselves are not recognized as taxable for the corresponding tax.

Thus, the Supreme Court of the Russian Federation once again has confirmed the thesis about the need to amend the provisions of subparagraph 15 of paragraph 2 of Art.146 of the Tax Code of the Russian Federation in order to clarify the limits of excluding transactions for the sale of an insolvent taxpayer's property from the VAT object - operations that are carried out in the ordinary course of business should be subject to the usual rules for VAT taxation, and property sales operations based on provisions for the sale of assets approved by creditors, or abandonment of property by creditors for themselves or as a result of the use of asset replacement may not be recognized as an object of VAT in view of the specifics and purposes of bankruptcy proceedings.

The reverse situation develops if one recognizes the validity of the complete exclusion of disputed bankrupt transactions from VAT taxation: regardless of whether the current transaction is an ordinary business activity or an operation for the sale of a bankruptcy lot carried out in the form of trades, VAT should not be paid on the sale as property (property rights), and at realization of works, rendering of services. That is, if it is expected that this or that easing of the tax burden on the

[13] Decision of the Plenum of the Supreme Commercial (Arbitration) Court of the Russian Federation of 23 July 2009, No.60 (as amended on 6 July 2014) "On Certain Issues Related to the Adoption of Federal Law No.296-FZ of 30 December 2008" On Amendments to the Federal Law "On Insolvency (Bankruptcy)". Bulletin of the Supreme Commercial Court of the Russian Federation. No.9. September, 2009 (Rus.).

taxpayer who is in insolvency will take place, then such relief should have an equal effect both on operations for the sale of property and when performing operations for the performance of work or the provision of services. Consequently, the norm fixed in Article 146 §2(15) of the RF Tax Code, which does not separate the current activity of the debtor from the sale of property, should not recognize the object of taxation and operations related to the performance of work and the provision of services.

For example, consider lease payments from granting the right to use the property that is the subject of mortgage (hypothec). The right of the bankruptcy creditor provided for in Art.334 of the Civil Code of the Russian Federation[14] (further the RF Civil Code) to receive satisfaction from the proceeds from the exploitation of the subject of pledge may be fixed in the mortgage agreement concluded between the creditor and the debtor.

Judicial and arbitration practice proceeds from the possibility of distributing rent payments in favor of the secured creditor since the moment of the opening the bankruptcy proceedings (*see* Decision of the Seventeenth Arbitration Appeal Court of 3 March 2017 in case No.A50-161/2015[15], Decision of the Arbitration Court of the Urals District of 27 January 2017 in case No.A47-3560/2015[16], Decision of the Arbitration Court of the Urals District of 4 May 2017 in case No.A60-31262/2017[17] and some others).

Thus, the money received by the debtor from the provision of property for lease shall be sent to the creditor in the manner established by Art.138 of the Bankruptcy Law in order to pay off the claims secured by the pledge of such property. Consequently, the lease in this case acts as a form of selling services in order to pay off claims of

[14] The Civil Code of the Russian Federation (Part One) of 30 November 1994 No.51-FZ (as amended on 13 July 2015). Collection of Legislation of the Russian Federation, 5 December 1994. No.32, Art.3301 (Rus.)

[15] Decision of the Seventeenth Arbitration Appeal Court of 3 March 2017 in case No.A50-161/2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.)

[16] Decision of the Arbitration Court of the Urals District of 27 January 2017 in case No.A47-3560/2015. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.)

[17] Decision of the Arbitration Court of the Urals District of 4 May 2017 in case No.A60-31262/2017. The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.)

creditors included in the register as secured by the pledge of the debtor's property, that is, it meets all the objectives of the bankruptcy procedure.

In our opinion, the situation in question does not have significant or otherwise important differences from the sale of the debtor's property in order to pay off creditors' claims. Therefore, the establishment of a different legal regime for the taxation of transactions in the provision of services in bankruptcy proceedings, in addition to that provided in Art.146 §2 (15) of the RF Tax Code for transactions on the sale the debtor's property (property rights), is an unacceptable and unjustified restriction.

The current legal regulation to some extent contradicts the basic principles of taxation in the Russian Federation (Article 3 of the RF Tax Code). In order to comply with the universality and equality of taxation, the factual ability of the taxpayer to pay taxes is taken into account.

It seems obvious that the fulfillment of the tax obligation to pay VAT for a bankrupt taxpayer is equally difficult and hinders the purposes of bankruptcy proceedings, regardless of the source and method of extracting money that replenishes the bankruptcy estate. In this connection, the arbitrary division of taxpayers according to economic activities contradicts the fundamentals of the Russian legislation on taxes and fees.

The selective approach of the legislator to the exclusion of only transactions for the sale of goods from the object of taxation for VAT does not have a sufficient economic justification. It should be recognized that the responding wording of Art.146 §2 (15) of the RF Tax Code is not supported by any justification.

The considered norm is introduced in the RF Tax Code by Federal Law No.366-FZ of 24 November 2014 "On Amendments to Part Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation"[18]. According to the passport of draft Federal Law No.605370-6[19], only the second reading of the State Duma of the Federal Assembly of the Russian Federation (Decree

[18] On Amending Part Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation: Federal Law No.366-FZ of 24 November 2014. Official Internet portal of legal information http://www.pravo.gov.ru 25 November 2014.

[19] The passport of draft Federal Law No.605370-6 "On Amending Part Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" (regarding improving tax administration)". The document was not published. SPS Konsul'tantPlus [Legal Reference System *ConsultantPlus*], 2017 (Rus.)

of the State Duma of the Russian Federation of 11 November 2014 No.5295-6GD[20]) focused on the adjustment of Art.146 of the RF Tax Code, without any prior additional explanatory notes and economic justifications. The need to change the provisions of the RF Tax Code was due to other motives.

Until 31 December 2008, claims for payment of mandatory payments that arose after the opening of bankruptcy proceedings were satisfied at the expense of property left after the satisfaction of claims of creditors included in the register (Art.142(4) of the Bankruptcy Law in the wording in force before Federal Law No.296-FZ of 30 December 2008).

Since 1 January 2009, changes have been made to Art.161(4) of the RF Tax Code, according to a new version of which the functions of tax agents for VAT are imposed on bodies, organizations or individual entrepreneurs authorized to sell property in bankruptcy cases, that is, to bankruptcy administrators.

The amendments to the Law were negatively received by the Supreme Commercial Court of the Russian Federation; Resolution of the Presidium of the Supreme Commercial Court of the Russian Federation of 21 June 2011 No.439/11[21] pointed out that when selling assets of organizations that pay VAT in bankruptcy proceedings, arbitration managers or those involved in trades, specialized organizations cannot be recognized as persons obliged to allocate from the proceeds from the sale of funds the amount of VAT and transfer it to the budget, since this performance entails preferential satisfaction of the claim on the payment of tax in violation of the order established by Art.134(2) of the Bankruptcy Law.

Later, the dispute was developed in Federal Law No.245-FZ of 19 July 2011[22], which changed Art.161 of the RF Tax Code, supplementing it with paragraph 4.1, where the tax base is determined by tax agents who purchase property as the amount of income from the sale of this property, including tax. Thus, the obligation to

[20] Resolution of the State Duma of the Federal Assembly of the Russian Federation of 11 November 2014 No.5295-6 GD "On Draft Federal Law No.605370-6 "On Amending Part Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation". Collection of Legislation of the Russian Federation. 17 November 2014. No.46. Art.6276 (Rus.)

[21] Decision of the Presidium of the Supreme Commercial Court of the Russian Federation of 21 June 2011 No.439/11. Bulletin of the Supreme Commercial Court of the Russian Federation. 2011. No.10 (Rus.)

[22] On Amending Part One and Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation on Taxes and Levies: Federal Law No.245-FZ of 19 July 2011. Collection of Legislation of the Russian Federation. 25 July 2011. No.30 (part 1). Art.4593 (Rus.)

calculate the tax, to withhold it from the paid income and pay the appropriate amount of tax to the budget was transferred to buyers (with the exception of individuals who are not VAT payers).

The preliminary result of the confrontation between the legislator and the law enforcer was Plenum Decision No.11 of 25 January 2013 "On Paying Value-Added Tax on Sale of the Debtor's Property Declared Bankrupt"[23]. It is the position of the Supreme Commercial Court of the Russian Federation based on the specific disputes discussed on the sale of the bankrupt estate (property) of the debtor that served as the basis for including new subparagraph 15 in paragraph 2 of Art.146 of the RF Tax Code. Of course, tax relations can and should be regulated only on the basis of tax law, so the fair position of the court required consolidation at the level of the federal law. However, the haste of Parliament in borrowing the idea of the supreme arbiter in a private dispute was expressed in a norm, in fact, containing a gap.

In our opinion, this explains the exclusion from the object of VAT taxation of transactions on the sale of property (property rights) of an insolvent taxpayer and a corresponding omission from the positive regulation of operations for the provision of services (performance of work) by the bankrupt organization. Returning to the example with rental payments sent in the manner established by Art.138 of the Bankruptcy Law and the repayment of claims of the creditor secured by the pledge of the leased property of the debtor, one can discern the absence of objective reasons for imposing VAT on the relevant transactions.

Nevertheless, at the moment, in accordance with the current legislation, all operations for the performance of work and the provision of services by insolvent taxpayers are recognized as the object of VAT taxation.

In order to eliminate various approaches to the qualification of transactions carried out by a taxpayer in the conditions of procedures applied in cases of bankruptcy, we believe it is necessary to amend subparagraph 15 of paragraph 2 of Art.146 of the RF Tax Code by wording it in the following way: "operations for the sale of goods, works (services), as well as property rights of debtors recognized as insolvent (bankrupt) in accordance with the legislation of the Russian Federation".

[23] Decision of the Plenum of the Supreme Commercial Court of the Russian Federation of 25 January 2013 No.11 "On the Payment of Value Added Tax for the Sale of the Debtor's Property Declared Bankrupt". Bulletin of the Supreme Commercial Court of the Russian Federation. No.3. March, 2013 (Rus.)

STATE TAX POLICY IN OIL INDUSTRY AS A FACTOR ENSURING FINANCIAL SECURITY OF THE RUSSIAN FEDERATION

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Abstract
The paper reviews pressing issues related to the corporate taxation in the oil industry amid the financial crisis, sanctions imposed against Russia, and low oil prices. Special emphasis is given to the analysis of the first results of the tax reform being implemented with regard to the introduction of a tax maneuver as one of the main mechanisms of state financial security. The subject of the study is challenging issues of the oil industry taxation, in particular, the application of the added income taxation mechanism for oil companies. The main conclusion of the research is the fact that in order to obtain beneficial results, systemic work on the oil industry tax reform is required, alongside a phased switch to the added income taxation on oil companies.

Keywords: state tax policy in oil industry, sanctions against Russia, a tax maneuver, state financial security, added income taxation.

Introduction. Over the last few years, Russia has reformed the oil sector taxation. At different times this reform was declared to have various goals; it bears many components, strategic and tactical tasks, however, its main medium-term vector is to reduce crude export duty rates, to gradually align them with export duty rates on dark and, to some extent, light oil products, as well as to raise mineral extraction tax (MET) rates. The implementation of this particular vector of the reform of the legislation adopted in 2013-2014 was named a tax maneuver.

In due time, the need for the "tax maneuver" was explained by loss minimization from oil and oil products re-export by Belarus and Kazakhstan, when export duties were much lower than Russian ones. This became a pressing issue due the Eurasian Economic Union Treaty enacted as of 1 January 2015. Also, one of the goals of this novation was to reduce the dependence of the Russian budget on export duties, the reduction of which, due to the calculation specifics, depends on oil price movements.

At high oil prices, the tax burden on operating enterprises was expected to be lower compared to the previous taxation system.

However, at the time when the "tax maneuver" was being developed, no one could have expected the steep fall in oil prices and the economic sanctions to be imposed against Russia. Originally designed to revitalize the oil and gas industry and to increase the oil refineries performance, the "tax maneuver" has brought mixed results in the present context.

Thus, the need to address the problems and develop specific theoretical bases and practical recommendations for improving principal directions of budgetary, tax, and customs and tariff state policies in the Russian oil industry has determined the choice of the topic and the relevance of this paper.

Research materials and methods. In this paper, the author examines the possibility to change the taxation system of oil production and refining, as well as of export oil products within the period following the completion of the tax maneuver in 2018. Among further reform options, it is preferable to phase out export duties on oil and oil products, with concurrent increase in MET-oil rates and excise taxation adjustment on oil products. The main objective of this maneuver is to repudiate customs duties due to their improper function to withdraw natural resource rent and to subsidize the inefficient oil refining industry.

The withdrawal of the oil rent will be carried out through the increase in MET-oil rates proportionate to the revocable customs duty. In substitution for a customs subsidy being provided to oil refining industry enterprises, it is proposed to introduce a compensation mechanism of "negative" oil excise taxes. The compensation mechanism will ensure the reliability of supply of quality commercial oil products to the domestic market and further oil refining efficiency increase.

Of note, the World Trade Organization calls Russia to totally abolish export duties on crude materials. Also, the World Bank experts claim export customs duties to have changed the prices of export sales and domestic supply. They are generally not charged in the oil and gas sector, but Russia remains to be a notable exception[1].

The increase in the MET income alongside the refusal to grant oil customs subsidies within the Eurasian Economic Union will make sources of additional income to the federal budget.

[1] S. Tordo, Fiscal Systems for Hydrocarbons: Design Issues. World Bank Working Paper. Washington, D. C.: World Bank, 2007, No.123, 73 p.

In addition, due to lower oil prices and a reduction in oil companies' investments, the increase in oil and gas costs in 2018-2019 amid the development of hard-to-recover deposits and the Arctic shelf is questioned. In order to reduce losses from the adverse consequences under current macroeconomic conditions, in 2017 a bill to impose an added extraction income tax (hereinafter - AIT) in the oil industry was introduced in the State Duma of the Russian Federation.

The new system provides for a reduction in the total amount of taxes that depend on gross indicators (MET-oil and oil customs duty) and imposing of the added extraction income taxation. As a result, higher flexibility of taxation is ensured due to the dependence of the taxes amount on the economic performance from the reserves development.

The AIT base is proposed to be defined as estimated hydrocarbon production revenues minus operational and capital oil field development costs, with the tax rate to be fixed at 50%. Herewith, for organizations adopted AIT, the current income tax calculation procedure remains effective, though with a taxable base to be cut in the amount of the AIT paid.

In order to limit incentives to overstate costs and to minimize budget shortfall in revenue, the deductible costs for mature fields are limited to 9,520 rubles per ton of produced hydrocarbon crude, adjusted for inflation. Depending on the AIT implementation results in pilot projects, a decision will be made whether to adjust and expand the application range.

An attempt to introduce a new tax is explained by the need to account oil production costs when taxing oil companies. Thus, the MET and export duty calculation depends on the oil price, while the hydrocarbon production costs are not considered. Nevertheless, the relocation of extraction fields to new territories, the complication of new development and the depletion of existing deposits lead to the need for additional privileges, as under the existing taxation system the development of reserves in such zones is considered unprofitable.

Results. In 2018-2019, under the current legislation, the federal budget revenues are expected to decrease in relation to GDP. This trend primarily due to lower oil and gas revenues to the federal budget in relation to GDP relies on **three main factors**:

Firstly, with no serious shocks in the global economy, energy prices on the world market are expected to remain close to the structurally balanced level (Urals crude at 40 USD per barrel), while the RUB-USD exchange rate will remain stable in real terms.

Secondly, during the forecast period, the share of the oil and gas sector itself within the GDP breakdown will continue to decline against the backdrop of lagging growth rates (decline in particular positions) of physical production output and export of these products.

Thirdly, as the depletion of the developed reserves increases, alongside the investments transfer to the concessional deposits, the MET exemptions and export duties will continue to grow.

However, the author thinks that the introduction of the AIT in the oil industry will result in selective introduction of a preferential taxation for randomly selected investment projects. What is more, the feature of the drafted AIT bill is that the tax parameters imply accelerated depreciation and, as a consequence, the governmental refund of oil production capital costs, however, this will negatively affect the investments efficiency.

If the MET were abolished and the AIT were introduced, the federal budget would lose stable revenues from the previous tax (MET) with a more specific tax base.

Conclusion. Due to the high competition on world hydrocarbon markets, maintaining of production and putting new oil fields into production are becoming extremely important for the Russian oil industry. The oil industry needs tax incentives to be competitive on world markets.

In conclusion, the author would like to highlight a number of **key problems** which the oil industry faces when implementing the oil production taxation legislation in Russia:

Firstly, issues when applying tax exemptions for oil production taxation. It becomes obvious that there is a need to provide MET deductions, the purpose of which will be to raise a geological exploration fund. This approach seems to be the most effective one to address the growth stimulation issue of new oil reserves, to maintain the annual hydrocarbon production volume, and, in the long run, tax revenues and other mandatory payments to budgets from additional extraction.

Secondly, tax incentives issues for geological exploration. This problem can be solved by introducing surcharge rates for corporate income tax expenses. The MET deduction in the amount of effective geological exploration expenses from the amount of the calculated MET may serve as an alternative mechanism[2].

[2] L.P. Pavlova, T.A. Bloshenko, V.V. Ponkratov, M.M. Yumaev, Teoriia i praktika formirovaniia i administrirovaniia nalogovoj bazy v otrasliakh mineral'no-syr'evogo kompleksa [Theory

Thirdly, the switch to the taxation based on financial results. This approach allows switching the tax burden for the period when the project begins to generate actual revenue.

Fourthly, the switch to the differential oil production taxation in Russia. The main problem is the taxation itself, where taxes (MET and export duty) are calculated based on the oil production volume. With this approach, the government enjoys the same amount per ton of oil, regardless of the production cost. A similar system works perfectly when the production cost of all the reserves is approximately the same. However, in Russia this cost varies considerably not only between different oil fields, but also within particular oil fields.

According to experts, the existing taxation system hampers investments in development of new deposits and does not stimulate the maintenance of the production volume in depleted areas. The system is still focused on mature deposits. In order to attract oil companies to develop new deposits, it is necessary to considerably reform the legislation[3].

and Practice of Formation and Administration of the Mineral Resources Complex Tax Base]: Monograph. Moscow: Financial University, 2014.

[3] Z.R. Gafarova, M.V. Gerasimova, I.A. Solovieva, Osobennosti nalogooblozheniia predpriiatij neftegazovogo sektora [Peculiarities of Taxation on Oil and Gas Enterprises]// Eurasian Law Journal. 2016. No.2.

THE PRINCIPLE OF LIMITED LIABILITY OF LEGAL ENTITIES AND ITS OVERRULING IN RUSSIAN LAW

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Abstract
The present article focuses on the fundamental principle of Russian law - limitation of liability of the legal entity by its property and grounds for overruling this principle which has been called "lifting the corporate veil". The author pays attention to the solidary and subsidiary liability of the parent company for the obligations of the subsidiary, the liability of controlling persons in bankruptcy and in the day-to-day activities of the entities under control. The author pays particular attention to the *de facto* control in Russian law.

Keywords: a business entity, limited liability, "lifting the corporate veil", a person with control, a person under control, solidary liability of the parent company for the obligations of the subsidiary, subsidiary liability of the parent company for the subsidiary bankruptcy, *de facto* control.

The fundamental principle of the Russian corporate law is the distinction between liability of a legal entity and liability of other entities, including its participants. Participants (shareholders) are not liable for the debts of the company, and the company is not liable for the debts of its participants (shareholders), except as otherwise provided by law.

This primary principle is expressed by the fact that in accordance with Russian law a legal person is entitled to have its own property and to be liable with such property for its obligations (Article 48(1) of the Civil Code of the Russian Federation).

Article 56(2) of the Civil Code of the Russian Federation contains a general rule on the impossibility to hold a legal entity liable for the obligations of its participants and Art.67.3(2), §1 of the Civil Code of the Russian Federation establishes and specifies the same rule for participants for the obligations of a legal entity in relation to business companies (partnerships), directly stating that the subsidiary company is not liable for the debts of the parent partnership or company[1] and determining

[1] The parent company (partnership) is a business entity which due to its controlling equity interest, an agreement or any other different way, can determine business activity of another entity considered a subsidiary.

exceptional cases when the parent company may be held liable for the obligations of the subsidiary. The principle of limited liability of the business company is also established in the Federal Law on Joint-Stock Companies (Art.3(2)) and the Federal Law on Limited Liability Companies (Art.3(2)) in accordance with which the company is not responsible for the obligations of its participants.

A legal entity acquires rights and obligations, acts in civil transactions on its own behalf and is liable for its contractual and non-contractual obligations since its registration in the Unified State Register of Information on Legal Entities (EGRUL).

Thus, in Russian corporate law the dominant approach to legal regulation of the liability of legal persons is the doctrine of an independent legal personality ("entity theory").

This approach is generally recognized in science. As I.T. Tarasov noted in the end of XIX century, "property liability limited by the share capital alone is a natural consequence of the complete separation of the company capital from the shareholders' property: this is the beginning of limited liability which is considered by almost all researchers, as well as in laws, the main characteristic of the joint-stock form of connections"[2].

Modern legal literature contains such a definition: "A legal entity is an instrument of separation (isolation) of property that is made in order to limit the risk of its loss in the course of a natural person's (founder of a legal entity) certain activity"[3].

"Lifting the corporate veil"

There is a limited number of legal exemptions established by law (but not by judicial interpretations or by-laws) from the rule established in Art.56(2) of the Civil Code of the Russian Federation that a participant is not liable for the obligations of the legal entity, and the legal entity is not liable for the obligations of its participants. In Russian law, following foreign judicial practice and doctrine, such cases of ignoring the "legal shell" of a legal entity are metaphorically named "lifting the corporate veil" or "piercing the veil".

For convenience we will omit the word 'partnership' in this article because the rules of liability of a parent company for its subsidiary are the same as the rules of liability of parent partnership for its subsidiary.

[2] I.T. Tarasov, Uchenie ob aktsionernykh kompaniiakh [Study on Joint-Stock Companies]. M., 2000, p.73.

[3] A.Yu. Tarasenko, Yuridicheskoe litso: problema proizvodnoj lichnosti // Grazhdanskoe pravo. Aktual'nye problem teorii i praktiki [Legal Entity: a Problem of the Artificial Entity // Civil Law. Topical Issues of Theory and Practice] / edited by V.A. Belov. V.1. M., 2015, p.269.

D.V. Lomakin correctly writes, "lifting of the corporate veil is not a rule, but an exception to the general principle of self-sufficiency and independence of a legal entity, including independence from its participants (shareholders). This exception can be justified in a certain number of cases when the legal structure under control is used by the person in control as a tool for fulfilling its own interests without taking into account the interests of the entity under control"[4].

Taking into account the peculiar character of the "lifting the corporate veil" mechanism in the Russian legal order, we assume that "lifting the corporate veil" cases in relation to business entities[5] can include cases of:

- liability of the parent company for transactions of the subsidiary that are made upon the instruction or with the consent of the parent company;

- liability of the parent company and other persons in control in case of bankruptcy of a legal entity under control;

- liability of persons who *de facto* determine the actions of a legal entity for damage culpably caused to it.

Solidary liability of the parent company for the obligations of the subsidiary

The parent company is solidarily liable for transactions of the subsidiary made in accordance with the instructions or with the consent of the parent company (Art.67.3(2) of the Civil Code of the Russian Federation, Art.6 of the Federal Law on Joint-Stock Companies and Art.6 of the Federal Law on Limited Liability Companies).

Meanwhile, there is no definition of "instruction" in the legislation. In the doctrine, instructions are defined as the right of the decision-making body of the parent company (director) to give orders to the decision-making body of the subsidiary company (director) to conclude an agreement on certain conditions[6].

[4] D.V. Lomakin, Kontseptsiia sniatiia korporativnogo pokrova: realizatsiia eje osnovnykh polozhenij v dejstvuiushchem zakonodatel'stve i proekte izmenenij Grazhdanskogo kodeksa RF [Theory of Lifting the Corporate Veil: its Implementation in Current Legislation and a Draft of the Civil Code of the Russian Federation] // Bulletin of the RF Supreme Arbitration Court. 2012. No.9, p.32.

[5] Business entities which can be divided in public (join stock companies which shares are traded or can be traded within an indefinite number of people) and non-public (limited liability companies and all other joint-stock companies, except for public joint-stock companies) are the most common form of legal entities in the Russian legal order. According to the data from the Unified State Register of Information on Legal Entities (EGRUL) as of January 1, 2018, 86% of all registered legal entities are commercial organizations, 96% of commercial organizations are limited liability companies; 3% - joint-stock companies; 0.4% - production cooperatives; 0.02% - partnerships; 0.5% - unitary commercial organizations; 0.4% - other commercial organizations // www.nalog.ru

[6] I.S. Shitkina, O probleme obiazatel'nykh ukazanij // Khoziajstvo i pravo [On the Issue of Mandatory Instructions // Economy and Law]. 2006, No.7.

All procedurally admissible evidence can be treated by a court as the fact of proving that instructions have been given. Usually such evidence is written evidence (letters, protocols, acts), though there are cases when courts take testimony as evidence of instructions.

The consent of the parent company is also the ground for "lifting the corporate veil". Article 67.3(2) of the Civil Code of the Russian Federation in edition of Federal Law No.210-FZ[7] of 29 June 2015 determines that voting of the parent partnership or company on the issue of approval of an agreement at the general meeting of participants of the subsidiary company as well as approval of an agreement by the decision-making body of the parent business entity, if the charter of the parent and (or) subsidiary company prescribes such approval, cannot be considered as the consent of the parent company. Thus, such a ground for holding the parent company liable for transactions of the subsidiary, as consent, is actually blocked.

It should be noted that the opposite approach can be considered as "diluting" a legal entity as a separate "personified" property, so reducing interest in doing business in the form of a business entity.

Considering the liability of the parent company in transactions of the subsidiary, a key characteristic of this type of liability should be noted: according to the law there is no need to prove culpable conduct as one of the conditions of legal liability of the parent company; in fact, it enables to consider this legal remedy as a protection and emphasizes a fine line existing between forms of liability and protection in corporate relationships. Particular features of solidary liability of the parent company for the obligations of the subsidiary – which can be imposed even without fault - allow some authors to justify the concept of the solidary liability of the parent company and the subsidiary business entity, opposing it to the existing concept of solidary liability of these companies[8].

After the reform of the Russian legislation in 2014, there was still no substantial practice of applying Art.67.3 of the Civil Code of the Russian Federation under which the parent company is liable for the obligations of the subsidiary. The analysis of applying the formerly effective Art.105 of the Civil Code of the Russian Federation

[7] Federal Law No.210-FZ of 29 June 2010 "On Amending Certain Legislative Acts of the Russian Federation and Invalidating Certain Provisions of Legislative Acts of the Russian Federation" // "Collection of Legislation of the Russian Federation", 2015, No.27, Art.4001.

[8] A.V. Gabov, Report on "Boundaries of a Legal Entity" at the round table discussion "Legal Realisation of Interests of Participants in Corporate Relations". Moscow, MSU. 15 November 2016 (the report was not published).

and relevant provisions of federal laws on business entities leads to the conclusion that Russian courts lifted the "corporate veil" and brought to account the parent company for the transactions of the subsidiary extremely rarely[9].

In the legal science there is an opinion that "lifting the corporate veil" should be limited only to cases of the winding up of a legal entity when its property is insufficient to satisfy creditors' claims. At the same time, liability should have a subsidiary nature and should be enforced only in cases when the insufficiency of property is caused by the culpable actions (inaction) of persons in control. When a legal entity acts normally, the principle states that there should not be any persons liable for the debts of a legal entity, and further development of the rule, in our view, has no perspective[10].

On the whole, not sharing such a radical opinion on the necessity to exclude liability of the parent company for transactions made by the subsidiary company in accordance with instructions from the legislation, we once again emphasize that the involvement of the parent company in solidary liability for the debts of the subsidiary in day-to-day business should be exceptional and can happen when the parent company abuses the "shell of a legal entity", specifically incorporates a subsidiary company to shift liability from itself to it.

Subsidiary liability of the parent company in case of bankruptcy of the subsidiary

Another case in Russian law for enforcement of the "lifting the corporate veil" rule under which the parent company is held *subsidiarily liable* for the obligations of the subsidiary is bankruptcy of the subsidiary. Article 67.3(2) §3 of the Civil Code of the Russian Federation establishes that *in the event of insolvency (bankruptcy) of the subsidiary company by the fault of the parent company, the latter bears subsidiary liability for the debts.*

In one of its decisions the RF Supreme Arbitration Court has established the list of circumstances in proof to bring a parent company to subsidiary liability in the

[9] On the practice of applying the provisions that were in force before September 1, 2014 on liability of the parent company in transactions of the subsidiary, *see*: I.S. Shitkina, "Sniatie korporativnoj vuali" v rossijskom prave: pravovoe regulirovanie i praktika primeneniia// Khoziajstvo i pravo ["Lifting the Corporate Veil" in Russian Law: Legal Regulation and its Application // Economy and Law]. 2013. No.2.

[10] O.V. Gutnikov, Iuridicheskaia otvetstvennost' v korporativnykh otnosheniiakh// Vestnik grazhdanskogo prava [Liability in Corporate Relations // Bulletin of Civil Law]. 2014. No.6, V.14, pp.10-11.

event of bankruptcy of its subsidiary, obliging the courts to analyze and consider the whole set of circumstances: the right of the parent company to give mandatory instructions to the subsidiary or determine actions of the subsidiary company; actions by the parent company demonstrating the use of such a right and (or) the possibility of using this right; the existence of a causal relationship between the use by the parent company of its rights and (or) the opportunities to use its right with respect to the subsidiary company and the actions of the subsidiary that led to its insolvency (bankruptcy); insufficiency of property of a subsidiary company for settlements with creditors; culpa of the parent company[11].

Courts can refuse to hold a parent company liable in absence of one of the stated above circumstances.

The provisions of corporate legislation on the liability of the parent company for the obligations of the subsidiary in day-to-day business and in case of bankruptcy of the subsidiary protect the creditors of the subsidiary company, and it is the creditors of the subsidiary company who can file claims against the parent company to hold it liable by its property.

On the concept of a controlling person

The concept of a controlling person is used in various branches of the Russian legislation: *see*, for example, Federal Law No.39-FZ of 22 April 1996 "On the Securities Market" (Art.2), Federal Law No.127-FZ of 26 October 2002 "On Insolvency (Bankruptcy)" (Art.61.10), Federal Law No.208-FZ of 26 December 1995 "On Joint-Stock Companies" (Art.81), Federal Law No.14-FZ of 8 February 1998 "On Limited Liability Companies" (Art.45). Without providing detailed description, it is worth noting that these concepts derive ***from the doctrine considering control as a prevailing influence, power to determine decisions of another person, and in certain cases based on the de facto relations.***

There is no generally accepted concept of a controlling person in Russian law. The decision whether control occurred is made taking into account specific circumstances and goals of application of specific normative acts. This is determined by the necessity to achieve different goals of legal regulation while introducing the concept of a "controlling person" into a certain normative act – both private and public goals.

[11] Decision of the RF Supreme Arbitration Court of 26 November 2010 No.VAS-15940/10 in case No.A48-400/2010 in conjunction with Decision of the Nineteenth Arbitration Appeal Court of 1 July 2010 in case No.A48-400/2010.

The legal doctrine contains the following definitions of economic control. In M. Kulagina's opinion, economic control is "not a simple influence, but main influence on the management of a company and respective decisions made by it"[12].

Economic control includes corporate control that occurs, as a general rule, by virtue of the prevailing interest of the person in the share capital of the company. E.V. Ruzakova under prevailing interest considers such an amount of interest that is the biggest share (in percent) of the share capital of a company and significantly exceeds participatory interest amount (shares) of the rest of participants (shareholders) – as a result a participant (shareholder) of a company by way of realisation of its voting right on the agenda of the general meeting of participants (shareholders) may determine such decisions which express such a participant's (shareholder's) will.[13]

In other words, corporate control is such an amount of voting rights of a person that is sufficient so that decisions of certain corporate governance bodies are taken within the charter capital structure existing in a certain corporation.

However, economic control is not limited by accumulation of shares (participatory interest) in hands of one or several shareholders or participants, i.e. it is not limited by the concept of corporate control. Economic control is a broader, more inclusive, concept than "corporate control". Control over activity of a corporation means power to determine a corporation's strategy, policy, choice of long-term goals and programs, and to have critical importance for decision-making by corporation governing bodies.

Thus, *control over a business corporation shall be considered as a power of a legal or natural person to have determining influence on making (or declining) decisions of such a business corporation, reflected in the status of subsidiarity and other forms of economic dependence.* Such forms are regulated by various branches of legislation.

With that, control is a systematic comprehensive influence of a controlling person on the whole business activity of a controlled person (not only on certain matters of governing bodies' competence of such a person). Power to determine a decision

[12] M.I. Kulagin, Gosudarstvenno-monopolisticheskij kapitalizm i iuridicheskoe litso [State-Monopoly Capitalism and a Legal Entity]. M.: Nauka, 1987, p.30.

[13] E.V. Ruzakova, Predprinimatel'skie mnogosub'ektnye obrazovaniia: pravovaia model' i dejstvitel'nost' // Pravovoe polozhenie sub'ektov predprinimatel'skoj deiatel'nosti [Business Multi-Subject Entities: Legal Model and Reality // The Legal Status of Subjects of Business Activity] Collection of Research Papers / Ural State Law Academy, Yekaterinburg, 2002, p.220.

means to have economic dominance, to replace the will of another person by your will.

Separation of a concept of a controlling person is necessary for the legislator for purposes of financial liability of persons who are "beyond the veil" [14] of a legal entity form its will, actually replacing its will by their own governing bodies' actions.

Liability of controlling persons in insolvency (bankruptcy)

Liability of controlling persons in bankruptcy is, in the first place, for protection of interests of creditors of a debtor by realising a set of legal mechanisms stipulated in Chapter III.2 of the Law on Bankruptcy "Liability of the Manager of the Debtor and Other Persons in a Bankruptcy Case"[15].

In its current edition the Law on Bankruptcy sets the following ***types of liability*** of a manager and other controlling persons in the process of insolvency (bankruptcy):

1) subsidiary liability for impossibility of full performance of claims of creditors, if full performance of claims of creditors is impossible due to action and(or) inaction of a controlling person of a debtor (Art.61.11 of the Law on Bankruptcy);

2) subsidiary liability for non-filing (late filing) of an application of a debtor to a commercial court (Art.61.12 of the Law on Bankruptcy);

3) financial liability for violating legislation on bankruptcy in the form of compensation of damages (Art.61.13 of the Law on Bankruptcy).

The purpose of the concept of a "controlling person" in bankruptcy legislation is to broaden the list of persons that may be potentially held financially liable for obligations of a debtor, since not only a parent company, but also other legal and natural persons, exercising *de facto* (non-legally based) control over a debtor may be recognised as controlling persons for these purposes.

For purposes of applying the Law on Bankruptcy, a controlling person means a person which may give obligatory instructions for a debtor or which may in any other way determine actions of a debtor, including transactions and formulating their terms and conditions.

[14] M.I. Kulagin, Selected Works on Corporate and Trade Law. State-Monopoly Capitalism and a Legal Entity. SPS 'Konsul'tantPlus' [Legal Reference System *ConsultantPlus*].

[15] The said Chapter was brought into effect by Federal Law No.127-FZ "On Insolvency (Bankruptcy)" of 26 October 2002 // Collection of Legislation of the Russian Federation, 2002, No.43, Art.4190, Federal Law No.266 "On Implementation of Amendments to Federal law "On Insolvency (Bankruptcy)" and the Code of the Russian Federation on Administrative Offences" and took effect as of 1 July 2017 // Collection of Legislation of the Russian Federation, 2002, No.31 (Part I), Art.4815.

The Law specifies circumstances resulting in a possibility to determine actions of debtors (Art.61.10(2)). A person is considered as a controlling person:

1) due to a fact of close relationship with a debtor (manager or members of governing bodies of a debtor) or an official position;

2) due to existence of powers to make transactions on behalf of a debtor based on the power of attorney, normative act or other special power;

3) due to an official position (including the position of the chief accountant, financial director or a position in other organisations that have the right to dispose of 50 percent and more of voting shares, more than half of a participatory interest in the share capital, or more than half of votes at the general meeting of participants of a legal entity or it was entitled to appoint (elect) a manager, as well as a person may hold any other position that gives power to determine actions of a debtor);

4) in any other way, including by way of forcing a manager or a member of governing bodies of a debtor or by determining influence on a manager or members of governing bodies of a debtor by other means.

Leaving the list of grounds for control open, the legislator has enhanced this approach by a provision stating that a person may be declared a controlling person by court *also on other grounds, not only on those stipulated in the Law itself* (Art.61.10(5) of the Law on Bankruptcy).

The Law contains the refutable presumption of control: by virtue of Art.61.10(4) of the Law on Bankruptcy, until contrary is proven, it is presumed that a person was a controlling person of a debtor, if this person:

1) was a manager of a debtor or managing organization of a debtor, a member of an executive body of a debtor, a receiver of a debtor, a member of a liquidation commission;

2) had the right, solely or with interested persons, dispose of 50 and more percent of voting shares of the joint-stock company or more than half of a participatory interest in the share capital of a limited liability company, or more than half of votes at the general meeting of participants of a legal entity or had the right to appoint (elect) a manager of a debtor;

3) derived benefit from unlawful or unfair acts of persons that by virtue of law, other legal acts or a constitutional document of a legal entity are empowered to act on behalf a company, including members of collective bodies of a legal entity (supervisory or other board, executive board).

***De facto* control**

Establishing the presumption of control of persons *deriving benefit from unlawful or unfair acts* of the sole executive body and members of collective governing bodies of a legal entity is a legislative innovation for Russian law.

Notwithstanding that it is legislatively novel, the possibility to hold *de facto* controlling persons financially liable has already been applied by Russian courts while applying Art.10 of the Law on Bankruptcy (before amendments of Law No.266-FZ were introduced)[16].

It is worth noting that the application of the Law on Bankruptcy regarding liability of a controlling person of a debtor is related to the introduction of the concept "***de facto control***" into the Russian court practice.

In case of *de facto* control, we speak about the so-called beneficial owners (actual receivers of profits, "ultimate owners"). Considering certain circumstances in each case, different criteria proving *de facto* control of a person may be applied. For instance, *de facto* corporate control may be exercised through a complex legal structure of ownership with indirect shareholdings, through application of schemes of crossholding of shares (participatory interest), trust schemes, schemes with application of options, etc.

It can be illustrated by the so-called "*Senatorov's case*". The court satisfied claims substantiating its decision as follows: "Through all legal entities acting in the proceedings as Respondents, Senatorov exercised beneficial ownership of assets, i.e. was the *de facto* owner of assets claimed by the Claimant"[17].

Another example of *de facto* control may also be a famous case "*Maksi-Group vs. N.V. Maksimov*".

The court stated that N.V. Maksimov exercised controlling influence through persons that are not formally affiliated persons according to the Russian legislation. The court established relations between natural and legal persons (participants of a holding controlled by N.V. Maksimov, among whom there was a former shareholder of a company, the general director, the head of the legal department, a member of the board of directors). In the course of proceedings, it was established that the general meeting of participants of "*UralSnabKomplekt*" Company (incorporated and

[16] *See*, for example, Ruling No.A22-941/2006 of the Arbitration Court of the Republic of Kalmykia of 4 August 2017 (known as the "*Brauder's case*" (HSBC Management (Guernsey) Limited in Bankruptcy of Dalnyaya Step LLC) // www.arbitr.ru

[17] Ruling of the Moscow City Court of 2 August 2012 in case No.11-16173.

controlled by the sole shareholder of the company – N.V. Maksimov) existed as a fiction, and the shareholders of this entity did not exercise their powers and rights with their own interest and by their own will.

We would like to note that as a ground for liability of *de facto* controlling persons there were not only factual circumstances of affiliation, but also that the debtor's transactions had no economic reason and were made solely in the interests of N.V. Maksimov for his financial benefit[18].

Another famous case regarding liability of a *de facto* controlling person is the so-called "*Pugachev's case*".

In this case the court noted as follows: *"Based on the structure of ownership and management of the Bank, related, firstly, to power of control by S.V. Pugachev over decisions of the Bank through the multilevel structure of ownership with offshore companies, and, secondly, with the de facto system of personal approval by S.V. Pugachev of the main decisions of the Bank's management and governing bodies, the courts came to the conclusion that S.V. Pugachev was a person controlling the Bank and he had the power to give mandatory directions to the Bank and determine actions of the Bank by other means"*[19].

Thus, when holding controlling persons liable, courts assess actual influence of such persons on determination of a debtor's will.

Such influence may be illustrated by the following examples of factual circumstances: participation of a controlling person in the transaction chain of the debtor, absence of an economic reason for the debtor's transactions, the *de facto* position of a controlling person in current activities of the debtor: management of the company reporting to such a controlling person, approval of the company's transactions, directions to legally appointed managers, control over financial operations, participation in the personnel selection and selection of counteragents of the company, negotiations on behalf of the company with counteragents, authorities, *de facto* representation of the company.

Factual control includes actual power (*de facto*, not legal) of one person over the other person, capability to replace the will of a controlled person by the will of a

[18] Resolution of the Federal Arbitration Court for the Ural Region of 12 May 2012 No.F09-727/10 in Case No.A60-1260/2009 (there was not supervision review of this case). *See*: Ruling of the Supreme Arbitration Court of 29 April 2013 No.VAS-11134/12.

[19] Resolution of the Arbitration Court for the Moscow Region of 1 October 2015 in case No.A40-119763/2010.

controlling person, and ability of a controlling person to determine decisions of a controlled person.

The Plenum of the Supreme Court of the Russian Federation in its Resolution No.53 "On Certain Matters Related to Liability of Controlling Persons of a Debtor in Bankruptcy" of 21 December 2017 noted the following: "*De facto* control over a debtor may exist regardless of legally (formally) attributed affiliation (through close relationship (filiation) with a debtor's managers, direct or indirect participation in capital or in management, etc.). A court shall establish a level of participation of a person in management of a debtor, confirming the level of significance of influence of such a person on important business decisions in a debtor's activity" (Art.3 §2 of the Resolution)[20].

Holding a person determining actions of a legal entity financially liable

It is worth noting that civil law liability for determining the will of a legal entity is possible not only in case of bankruptcy, but also in common corporate practice. Starting from 1 September 2014 (Federal Law No.99-FZ of 5 May 2014[21]), the rule stipulated by Article 53.1 of the Civil Code of the Russian Federation came into existence: a person ***with actual power*** to determine actions of a legal entity, including the power to give directions to persons acting on behalf of a legal entity, is obliged to act in the interests of a legal entity reasonably and in good faith, and may be held liable for damages caused through his fault. If damages of a legal entity are caused by joint actions of the members of governing bodies and persons who exercise *de facto* control, they are obliged to compensate damages jointly.

On that ground a business company and a shareholder (regardless of the amount of the interest in the share capital) can be claimants in the court.

In our view, the application of the considered rule is possible in case of holding a parent company and members of the board of directors of a subsidiary company, who voted according to a direction of a parent company, subsidiarily liable, if as a result of such voting a legal entity has suffered damages.

In conclusion, speaking about financial liability of persons determining the will of other persons, we would like to note that ***under the current Russian legislation there is no general regulation on legal consequences of establishing control***.

[20] "Rossijskaia Gazeta", No.297, 29 December 2017.

[21] Federal Law No.99-FZ "On Amending Chapter 4 of Part 1 of the Civil Code of the Russian Federation, and on Invalidating Some Provisions of Russian Legislative Acts" of 5 May 2014 // Collection of Legislation of the Russian Federation, 2014, No.19, Art.2304.

Under the current regulation only a parent company (partnership) may be held financially liable for debts of a controlled legal entity in connection with transactions made by the latter in pursuing the directions of a parent company or with its approval (without bankruptcy proceedings) (Art.67.3 of the Civil Code of the Russian Federation). Unitary enterprises and non-profit organizations may not be held liable for transactions of subsidiary legal entities, except for the case of culpably driving a company bankrupt according to the provisions of special legislation (Chapter III.2 of the Law on Bankruptcy).

It should be noted that p.14 of the "Roadmap" on improving corporate legislation[22] makes it necessary to introduce into the Federal Law "On Joint-Stock Companies" rules on liability of controlling persons for damages of a legal entity caused through its fault. This draft law, prepared by the initiative of the Government of the Russian Federation, recognizes a controlling person (regardless of its legal corporate form) a person solely or together with related persons, directly or indirectly controlling another person (a controlled person). Control relations are established for the purpose of compensating damages of a controlled person caused through a controlling person's fault.

We should note that an attempt of such regulation was made during the reform of civil legislation from 2012 to 2014, but it failed due to business lobby against broadening the grounds of controlling persons' liability for obligations of controlled persons.

From our point of view, the idea of determination of a controlling person, regardless of its corporate legal form, for the purpose of unification of liability of controlling persons for obligations of controlled persons is rather productive and deserves support.

[22] Approved by Decree of the Government of the Russian Federation No.1315-r of 25 June 2016 (in its edition as of 25 November 2017) "On Approval of the Plan of Measures (Roadmap) "On Improving Corporate Governance" // http://www.pravo.gov.ru, 5 July 2016.

LEGAL REGULATION OF OUTWARD INVESTMENTS: CHINESE EXPERIENCE

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Abstract
In 2014-2018, China has adopted a number of legal acts to withstand the outflow of capital in the guise of outward investments and to harmonize private interests and interests of the state in the sphere of foreign economic activity. The authors believe that Chinese experience can be useful for Russia and propose some directions for developing legislation on investments.

Keywords: modernization, China, investments, foreign economic activities, state-owned enterprises.

In 1978, the People's Republic of China launched the policy of reform and opening up. Over almost 40 years of its development, China has made a huge leap toward modernization of its economy and society, the transition from the administrative-planned economy to the market one and building "the society of average wealth" by 2020. According to the World Bank, China has become the second largest economy in the world in terms of gross domestic product[1] and is one of the largest recipients of foreign investment. Welfare and living standards of the Chinese people are also growing[2]. At the XIX CPC National Congress, Xi Jinping, President of the People's Republic of China, said:

All-round progress has been made in the development of education, with remarkable advances made in the central and western regions and in rural areas.

[1] World Development Indicators [e-resource] http://databank.worldbank.org/data/reports.aspx?source=2&series=NY.GDP.MKTP.CD&country=

[2] http://russian.cri.cn/881/2016/03/01/1s575290.htm

Employment has registered steady growth, with an average of over 13 million urban jobs created each year. Growth of urban and rural personal incomes has outpaced economic growth, and the middle-income group has been expanding. A social security system covering both urban and rural residents has taken shape; both public health and medical services have improved markedly. Solid progress has been made in building government-subsidized housing projects to ensure basic needs are met.[3]

So, China is well on its way to modernization of economy and society. The said deserves consideration. However, several experts express the view that Russia should not regard China as an example of successful modernization[4]. Such an approach is unclear as "modernization is a multidimensional phenomenon. We should welcome any positive experience in the sphere of economy modernization without labeling"[5]. Chinese experience is both necessary and possible to learn, but this should be done in such a manner that gives no way to ill-considered partial solutions. It is necessary to make complex changes that will help to solve a number of problems because "modernization is a system of measures and actions with a common objective - the improvement of state, society and economy that meets modern requirements"[6]. In the situation of unstable foreign policy, economic stagnation and growing social inequalities, there is a clear need for modernization in Russia. However, today there is no science-based concept of modernizing Russia on the whole and national economy in particular"[7].

Foreign investment is the most important incentive for the growth of the engine for the PRC economy. However, China today is also an investor. Chinese companies

[3] Xi Jinping's report at the XIX CPC National Congress [e-resource] http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf

[4] E. Yasin, Kitaj ne obrazets dlia modernizatsii Rossii! [China is not a Model for Modernization of Russia!] [e-resource] http://www.russ.ru/Mirovaya-povestka/Kitaj-ne-obrazec-dlya-modernizacii-Rossii!

[5] V.S. Belykh, Modernizatsiia Rossijskoj ekonomiki i predprinimatel'skogo zakonodatel'stva; voprosy teorii i praktiki [Modernization of the Russian Economy and Entrepreneurial Legislation: Issues of Theory and Practice]. Monograph /ed. by A.I. Tatarkin, Academician of the Russian Academy of Sciences. – Yekaterinburg: Institute of Economics, Ural Branch of Russian Academy of Sciences, 2011, 263 p.

[6] V.S. Belykh, Modernizatsiia Rossijskoj ekonomiki i problemy sovershenstvovaniia predprinimatel'skogo zakonodatel'stva // Ekonomika regiona [Modernization of the Russian Economy and Problems of Improving Entrepreneurial Legislation // Regional Economy]. No.2, 2011, p.75.

[7] V.S. Belykh, Mysli vslykh o vnutrennej ekonomicheskoj politike Rossijskogo isteblishmenta [Thoughts Aloud about Domestic Economic Policy of the Russian Establishment] //Business, Management and Law, No.2, 2016, p.33.

are intensively developing new markets and creating businesses in other countries. It is evident that capital flows out of China under the guise of investment and often returns as a foreign one. Russia faces the same problems. Russian President voiced the well-known fact – the transition of the Russian business into foreign jurisdictions and the desire to adjudicate disputes in foreign courts[8].

Though we understand that without freedom of entrepreneurial activity "it is impossible to achieve the desired results and to meet different needs of the individual and society, particularly in the economic sphere"[9], the state is nonetheless required to pursue appropriate intervention. In the context of unfavorable foreign policy environment and capital outflow, the question about the channelling of the Russian investment becomes very acute as 'free movement of the capital may undermine the state sovereignty of countries, lead to the reduction of national well-being and not meet the economic needs of citizens and society in general"[10]. So, the researchers note that "the need to form a legal algorithm for investment of the Russian Federation in a foreign economy is therefore apparent"[11]. Unfortunately, the question about investment of the Russian companies overseas is not regulated at the appropriate level. There is no special legal act of a complex character. This calls for the need to study the experience of the People's Republic of China that has such regulatory framework.

In 2014, the Chinese Ministry of Commerce adopted "Measures for Overseas Investment Management" [12] (hereafter - Measures). They are applied to business entities set up within the PRC law and investing in overseas organizations[13], thereby

[8] Presidential Address to the Federal Assembly // URL: http://www.rg.ru/2013/12/12/poslanie.html (accessed on 7 February 2014).

[9] E.P. Gubin, Pravovoe obespechenie svobody ekonomicheskoj deiatel'nosti // Predprinimatel'skoe Pravo [Legal Framework for Guaranteeing Freedom of Entrepreneurial Activity // Entrepreneurial Law], No.4, 2015, pp.3-9.

[10] V.N. Lisitsa, Pravovoe regulirovanie investitsionnykh otnoshenij: teoriia, zakonodatel'stvo i praktika primeneniia: monografiia [Legal Regulation of Investment Relations: Theory, Legislation and Practice of Application: Monograph]; Russian Academy of Sciences, Institute of Philosophy and Law, RF Ministry of Education and Science, Novosibirsk State University, Novosibirsk, 2011, p.260.

[11] I.V. Ershova, Sistema pravovogo regulirovaniia Rossijskikh investitsij za rubezhom [Legal Regulation System of Russian Investments Abroad] / Supplement to the *Entrepreneurial Law* Journal, No.4, 2012, pp.16-20.

[12] 境外投资管理办法 (Measures of the Chinese Ministry of Commerce for Overseas Investment Management of 6 September 2014).

[13] Overseas organizations are business entities including those set up under the law of special administrative regions of Hong Kong, Macao, and Taiwan Province.

regulating the investment destination. Thus, according to Article 4 of this normative legal act, Chinese enterprises are forbidden to invest overseas if it:

- harms China's national sovereignty, security and public interests or violate China laws/regulations;

- harms China-foreign relationships;

- violates international treaties or agreements that China has concluded or joined;

- leads to export of the products and technologies that China has prohibited to export.

The PRC Ministry of Commerce and its competent departments of commerce of the provinces are responsible for controlling, registering and approving overseas investment[14]. According to Articles 6 and 7 of the Measures, the approval shall be applied to the overseas investment in the countries without diplomatic relationship with the People's Republic of China and those under UN sanction and (or) in the industries sensitive for China. The list of such territories is issued as a separate document. Other investors need not go through the approval procedure, though they are subject to registration as investors. Those organizations that have passed the corresponding formalities are given "An Enterprise Overseas Investment Certificate" (企业境外投资证书) which is valid for two years. So, if a Chinese business entity wants to invest after the expiration of the certificate, it will have to pass through the procedure again.

"Measures for Overseas Investment Management" outline several requirements which must be met by investing organizations. They must, *inter alia*, comply with investment destination laws and local customs, social responsibility, environment and labor protection. Where a Chinese enterprise is not approved by the Chinese government, its external enterprises shall not be named with the word "China". Investing enterprises shall truthfully report to the embassies (consulates) or trade missions of their overseas investment practices, and statistics, etc.

This suggests that Chinese investors can act only within the framework of the Chinese economic and inter-state policy. Those who do not wish to comply with the relevant requirements are subject to legal responsibility, and their certificates can be revoked.

Apart from the normative legal act discussed above, the said relations are regulated by "Measures for the Administration of Overseas Investments by Enterprises"[15]. This

[14] Approval is exercised within the views of embassies (consulates) or trade missions.

[15] 企业境外投资管理办法 (Measures for the Administration of Overseas Investments by Enterprises of 26 December 2017).

by-law will go into effect on 1 March 2018.[16] It implies even stricter supervision over the Chinese investors. Thus, for example, they will have to coordinate their investment projects with the National Development and Reform Commission of the People's Republic of China if the investments are to be made in the states (territories) and (or) industries sensitive for China. Other projects are subject to recordation management of the above-mentioned Commission depending upon the investment volume and the enterprise's form of ownership.

Also, of interest is the norm that stipulates the state function of the PRC National Development and Reform Commission to monitor Chinese investment overseas. Starting from 1 March 2018, investors must inform the Commission about investment transactions, and if the amount of Chinese investment is more than USD 300 million, then the investor must submit the report on the investment project before its implementation. In case of non-compliance with the legal requirements, the Investment Certificate of an investor can be revoked. Noteworthy is that the revealed violations shall be reported to the PRC National Development and Reform Commission by the PRC embassies, consulates, organizations and citizens. The said cannot be commented positively as these actions may cause some distortion in the sphere of competition.

The People's Republic of China pays particular attention to the overseas investments made by state enterprises. According to Article 2 of "Measures for the Supervision and Administration of Overseas Investments by Central Enterprises"[17], "central enterprises" are the state-funded enterprises for which the State-Owned Assets Supervision and Administration Commission of the State Council performs the duties of a capital contributor on behalf of the State Council.

Articles 6 and 11-15 of the above-said normative act state that central enterprises shall make overseas investments under the following principles: compliance with the PRC legislation, compliance with the strategic plan of the PRC development, the return of the investment, interaction with embassies (consulates), etc. Articles 16-23 contain rules of control and supervision of the authorized body over overseas investment projects being implemented by central enterprises.

[16] Applicable to business entities set up in the territory of the People's Republic of China and natural persons – PRC citizens investing overseas through companies controlled by them regis-tered in special administrative regions of Hong Kong, Macao, and Taiwan Province.

[17] 中央企业境外投资监督管理办法 (Measures for the Supervision and Administration of Overseas Investments by Central Enterprises of 7 January 2017).

Thus, investment of private and state Chinese commercial organizations is thoroughly regulated by several normative legal acts that stipulate a notification system of investment and, in several cases, investment upon authorization. Obviously, this approach aims at preventing capital outflows, synchronizing the state policy with the activities of the investors, and achieving political goals.

The said experience of the People's Republic of China could potentially be used in Russia to harmonize regulation of this sphere of external economic activities. There was a long overdue need to codify the investment legislation; separate normative legal acts devoted to investment should be integrated. We think that within or out of the limits of this process the rules concerning investment overseas should be developed. These rules should address the following aspects relating to activities of Russian business entities and individuals:

– determination of the manner defining the states (regions) and spheres of economy the investment into which could be restricted (prohibited);

– determination of the minimum scale of investment whereby the investor is obliged to coordinate the transaction with the authorized body and the liability for failure to notify;

– development of regulations concerning the notification of state agencies about the investment in off-shore jurisdictions;

– provision for the mechanism in order to ensure the return of profit from investment made by organizations with a majority of state ownership.

We think that consolidation of normative regulation within the said areas will be useful in terms of harmonizing the state economic policy with private interests and curbing capital flow.

CONCEPT OF AVOIDANCE OF THE LAW (*FRAUS LEGIS*) THROUGH ROMAN AND GERMAN LAW HISTORY

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Abstract
Fraus legis is a Roman legal concept that was shaped through centuries. At the beginning, the Roman laws were exclusively interpreted literally (i.e. by the letter of the law), so that avoidance transactions achieved their peak. Only later Roman legal science changed from purely literal interpretation to the interpretation of the meaning of legal norms. Development of the concept of *fraus legis* in Central Europe actually slowed down in the Middle Ages, until its turnaround in the mid-19th century. This development was most pronounced in Germany. The concept of *Gesetzesumgehung* plays an important role in the modern German law system in combating against deliberate circumvention (avoidance) of (basically all fields of) the law.

Keywords: *fraus legis*; avoidance of the law; avoidance of the law in the Roman law; avoidance of the law of the Middle Ages; modern concept of *fraus legis* in Central Europe.

Introduction

The roots of common European understanding of avoidance of the law (abuse of the law) derive from the Roman law (*legis fraus*). In many European countries the modern doctrine of avoidance of the law (also known as abuse of rights; in German: *Gesetzesumgehung,* in French: *fraude à la loi*, also *abus de droit*; in Spanish: *abuso de derecho* or *fraude de ley*; in Italian: *negozio in frode alla legge fiscale*) has its origin in the Roman civil jurisprudence[1]. It is said that the phenomenon of avoidance of the law is as old as the law itself.[2]

[1] O. Behrends, Die Fraus legis: Zum Gegensatz von Wortlaut- und Sinngeltung in der römischen Gesetzesinterpretation. Göttingen: Otto Schwarz Verlag, 1982, p.3; A. Teichmann, Die Gesetzesumgehung. Göttingen: Verlag Otto Schwartz & Co., 1962, p.1; C. Böing, Steuerlicher Gestaltungsmissbrauch in Europa. Hamburg: Verlag dr. Kovač, 2006, p.28.

[2] In the Republican period of Roman jurisprudence (circa 510-31 BC) there was no distinction between avoidance of the law, simulation and violation of the law. This changed at the time of the classical Roman law (31 BC – 287 AD). Corpus Iuris Civilis contained in its Digest (also

Nowadays avoidance of the law is defined as behaviour that is not directed against the strict meaning of the law, but it violates the purpose and meaning of the legal norm. A transaction therefore does not violate the law by virtue of the specified literal interpretation of the statutory prohibition, but it is so constituted that achieves success, which is contrary to the purpose prohibitive norms of the law. Consequently, avoidance of the law must be strictly distinguished from violation of the law (*agere contra legem*), although both practices release the same effects. In case of avoidance of the law, there is no violation of the law in its text, but it certainly by-passes (i.e. avoids) the contents (*sententia*) and intention of the legislature (*voluntas*). And in that, avoidance of the law differentiates itself from simulation (sham), which represents violation of the law. In the case of simulation, the transaction is oriented only towards the bare legal appearance and not on actual (economic) success. In contrast to the sham transaction is *fraus legis* which is not based on "lies". *Fraus legis* embodies in reality an implemented transaction, but in a manner which is contrary to the spirit of the law.

It should be stressed that – unlike simulation – there is no general statutory provision for *fraus legis*. In practice of the German civil law, avoidance of the law is related to the provision of basic legal prohibition (§ 134 BGB) and also in many cases to the provision of legal prohibition of unmoral conduct (§ 138 BGB). Today avoidance of the law in the civil dogmatic is pushed into the background and rarely used in the Court decisions. But in contrary to that, avoidance (abuse) of the law plays an important role in other legal areas such as labour law, inheritance law, administrative law, cartel law and especially tax law.

Avoidance of the Law through History

Avoidance of the Law in the Roman Law

In the Roman legal doctrine, there was a solid legal concept of *fraus legis* created, but its exact legal significance was unclear. In that historical period it was considered that *fraus legis* indicated avoidance of the law as well as violation of the law[3].

known as Pandects) two independent definitions of avoidance of the law, and another definition is located in the later written in Codex. Böing C., Steuerlicher Gestaltungsmissbrauch in Europa, pp.29–30.

[3] M. Benecke, Gesetzesumgehung im Zivilrecht, Lehre und praktischer Fall im allgemeinen und Internationalen Privatrecht. Tübingen: Mohr Siebeck, 2004, p.11.

The history of avoidance of the law, i.e. *in fraudem legis agere* or *in fraudem legis facere*[4], *began in the Roman law relatively late. The term fraus*[5] *is otherwise one of the oldest legal words, already embodied in the Law of the Twelve Tables (Leges Duodecim Tabularum).* However, it did not mark avoidance of the law, but it was used for describing direct violation of the law. This meaning in subsequent laws also applied *sine fraude sua*: If there is a doubt whether the newer law deviates from the older law (and actually places the older one out of force), this leads to the fact that the act or omission - which is according to the new law permitted while it was under the old legislation banned - does not constitute a violation of the law (i.e. *sine fraude sua*)[6].

Fraus also occurred in conjunction with *in fraudem creditorium* and *in fraudem patroni*, meaning in connection with fraud, i.e. in relation with direct breach of the obligation[7]. Also in relation to the concept *in fraudem legis agere*, at first it marked only the conduct that directly violated the law[8], so that *agere in fraudem legis* and *agere contra legem* were identical[9]. The legal institute of avoidance of the law, which would have been conceptually separated from violation of the law and used in connection with certain specific actual situations, had not been used until the classical period of the Roman law[10].

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[4] Synonyms used for *fraus legis* are *fraus legis facta* (also *fraus legi facta*), *agere in fraudem legis* (also *in fraudem legis agere*) and *facere fraudem legis* (also *in fraudem legi(s) facere*). C. Böing, Steuerlicher Gestaltungsmissbrauch in Europa, p.30; A. Teichmann, Die Gesetzesumgehung, p.3; A. Berger, Encyclopedic Dictionary of Roman Law. Philadelphia: American Philosophical Society, 1953, p.477.

[5] *Fraus*: a detriment, disadvantage; the term means also evil intention, fraud (syn. *dolus*) and, consequently, any act or transaction accomplished with the intention to defraud another or to deprive him of a legitimate advantage. A. Berger, Encyclopedic Dictionary of Roman Law, p.477.

[6] H. Krüger, M. Kaser, Fraus, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung (SavZtschr., rom. Abt), Jahrgang 63, 1/1943, p.120; A. Teichmann, Die Gesetzesumgehung, p.3.

[7] H. Krüger, M. Kaser, Fraus, p.149; A. Teichmann, Die Gesetzesumgehung, p.3.

[8] Ulp. D. 14, 6, 7, 3 (*SC Macedonianum*).

[9] A. Teichmann, Die Gesetzesumgehung, p.3.

[10] von R. Jhering, Geist des römischen Rechts, auf den verschiedenen Stufen der Entwicklung. 4. Auslage. Leipzig: 1903, p.44; H. Lewald, Besprechung (Giovanni Rotondi, Gli atti in frode alla legge), SavZtschr., rom. Abt., Jahrgang 33, 1912, p.589; P. Partsch, Aus nachgelassenen und kleineren verstreuten Schriften. Berlin, 1931, p.126; M. Kaser, Das römische Privatrecht I. München, Berlin, 1955, p.217; H. Krüger, M. Kaser, Fraus, p.6, at 140, 148; differently P. Jörs et al., Römisches Recht (3. Auflage. Berlin, Göttingen, Heidelberg, 1949). Jörs and his co-authors argued that avoidance of the law has already been used in the classic Roman

In the Roman law, the application of the laws was followed in terms of strict formalism. The laws were exclusively interpreted literally (i.e. by the letter of the law) and any link with the spirit and purpose was excluded[11]. Avoidance transactions then achieved their peak[12]. However, already in the late republican and later imperial periods, the comprehension of the Roman legal science changed from purely literal interpretation to the interpretation of the meaning of legal norms[13]. Thus, *agere in fraudem legis* (i.e. avoidance of the law) became equal with *agere contra legem* (i.e. violation of the law) only in the classical Roman period, but not in its general meaning. The existence of avoidance of the law was recognized when the transaction did not violate the letter of the law, but the spirit of the law and (in addition to this) the avoidance itself was intended (planned). General equalization of violations of the law and avoidance of the law succeeded through the Theodosian Code (*Codex Theodosianus*) in the year of 439, which banned the implementation of all transactions that violate the legal prohibition[14].

law with intention to extend the limits of interpretation of the law. A. Teichmann, Die Gesetzesumgehung, p.4.

[11] In the classical era of Roman law, which gave priority to the form over the will of contracting parties, a formally valid transaction was valid even if it was not truly desired. H. Honsell, In fraudem legis agere. In: D. Medicus, H.H. Seiler (eds.), Festschrift für Max Kaser zum 70. Geburtstag, Verlag C.H. Beck, 1976, p.113 sqq.; K. Schurig, Die Gesetzesumgehung im Privatrecht. In: Heldrich A., Sonnenberg H.J. (eds.), Festschrift für Murad Ferid zum 80. Geburtstag am 11. April 1988. Frankfurt am Main: Verlag für Standesamtswesen, 1988, p.377 sqq.; A. Teichmann, Die Gesetzesumgehung im Spiegel der Rechtsprechung, Juristenzeitung, 58/2003, p.762. According to M. Benecke, Gesetzesumgehung im Zivilrecht, p.8; Similarly, Janez Kranjc, Rimsko pravo 206, 233 (2nd ed., Ljubljana: GV založba, 2010); M. Kaser, Das römische Privatrecht I. 2. Auflage. München: Verlag C.H. Beck, 1971, 243 sqq); G. Römer, Gesetzesumgehung im deutschen Internationalen Privatrecht. Berlin: Walter de Gruyter & Co., 1955, p.10.

[12] Roman ingenuity in avoiding strict formalist laws led to the development of some legal institution which we still know today. This is especially true for the so-called transaction of a straw man (*interposita persona*) and also for a fiduciary transaction.

[13] The reasons for this development are different. They lie in the modified understanding of laws, accompanied by a change in the spiritual and philosophical tenets. M. Benecke, Gesetzesumgehung im Zivilrecht, p.11; C. Böing, Steuerlicher Gestaltungsmissbrauch in Europa, p.30.

[14] F. Dorn, §§ 134–137 Nichtichkeit I. In: M. Schmoeckel et al. (eds.), Historisch-kritischer Kommentar zum BGB Allgemeiner Teil und §§ 1–240 675–676. Tübingen: Mohr Siebeck, 2003, pp.675–676; R. Zimmermann, The Law of Obligations, Roman Foundations of the Civilian Tradition. New York: Oxford University Press, 1996, p.702.

Thus, in the classical Roman law as *leges perfectae*[15] stands *lex non dubium* of Emperor Theodosius, which was incorporated by Justinian in his legislative *Codex*[16] *and was further generalized. In the absolute monarchy, due to the gradual rise of power of the state and, consequently, the resulting intervention in the sphere of the individuals, the number of prohibition laws greatly increased. The lex non dubium* accompanied statutory prohibitions with a nullity sanction, regardless of whether the nullity had been set in an individual law or not. All the prohibition laws thus became *leges perfectae* in its traditional sense, so that former tripartite division fell off. The absolute monarchy had established dominance of its laws over the freedom of designing legal transactions[17].

Avoidance of the Law in the Law of the Middle Ages

Medieval glossators had, in conjunction with the Roman phrase *fraus legis*, developed their own doctrine of avoidance of the law. In doing so, they defined *fraus* as selfish acts (conduct) which is not directed only against the law, but also against fiscus (emperor's treasury) or against a third party[18]. *Agere in fraudem legis* was, according to the legal tradition of glossators, given in the case of violation of *mens legis* (the spirit of the Act); this infringement was regarded as a violation of the law and could have been included together with *agere contra legem* under the term of

[15] As today, it was also considered in the classical Roman law that a violation of any legal norm does not lead to the annulment of the legal business. While in the today's law the application of a sanction depends on the purpose of the norm, however, in the classical Roman law it depended on what the law predicted in the event of infringement of the law. Thus, jurists of the classical Roman period distinguish between *leges perfectae* (which defined a transaction that violated the law as null), *leges minus quam perfectae* (which punished a transaction with a penalty, but it remained in force) and *leges imperfectae* (where neither a penalty nor a nullity of the transaction was implemented for a transaction that violated legal prohibition).

[16] C. 1, 14, 5. R. Zimmermann, The Law of Obligations, Roman Foundations of the Civilian Tradition, p.702.

[17] M. Kaser, Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht Geschäfte. Vienna: Verlag Osterreichische Akademie der Wissenschaften, 1977, p.67 sqq.; H.H. Seiler, Über Rechtsgeschäfte verbotswidrige (§ 134 BGB), Eine Bestandsaufnahme. In: P. Selmer et al. (eds.), Gedächtnisschrift für Wolfgang Martens. Berlin: Walter de Gruyter, 1987, p.719. According to F. Dorn, §§ 134–137 I. Nichtichkeit, pp. 657–658.

[18] *Fraus* was understood as a form of special *dolus*, i.e. as fraudulent, untrusted handling, aimed to achieve their own benefit. There was a distinction between three groups of fraud practices: *agere in fraudem legis*, *agere in fraudem fisci* and *agere in fraudem alterius*. *Agere in fraudem fisci* was given, for example, when a violator, shortly before being sentenced, donated his/her property (to anyone) that would otherwise belong to the state budget. M. Benecke, Gesetzesumgehung im Zivilrecht, pp.12–13; A. Teichmann, Die Gesetzesumgehung, p.5; K. Schurig, Die Gesetzesumgehung im Privatrecht, p.378.

committere in legem[19]*. Avoidance of the law therefore led – as a direct violation of the law – to the nullity of the transaction*[20]*.*

Systematic coverage of the concept of avoidance of the law in that time was not successful[21]*. In their debates, the glossators had found out that the legal concept of avoidance of a legal transaction often overlapped with simulation (a sham transaction)*[22]*. This narrow link between the teachings of an avoidance transaction and the teachings of a sham transaction (simulation) was also demonstrated in the proverb: Tot modis committitur simulatio quot modis committitur fraus* (As many methods for simulation, so many ways of fraud)[23]. Otherwise, in the German Middle Ages the term of avoidance of the law had commonly been known (and used) as shown by numerous other proverbs: *Krumme Wege beschädigen Recht* (Crooked paths harm the law); *Es ist kein Gesetz: es hat ein Loch, wer's finden kann* (It is not a law: it has a hole, whoever finds it); *Neuen Gesetzen folgt auf der Ferse neuer Betrug* (The new laws are followed close behind by a new scam); *Sobald Gesetz ersonnen, wird Betrug begonnen* (As soon as a new law is designed, fraud is begun); *Wo lex voran, da fraus Gespann* (a similar meaning as in the previous proverb)[24]. Theory of avoidance of the law had not been developed yet, but – like in the classical Roman law – they created special laws for individual events[25].

[19] I. Pfaff, Zur Lehre vom sogenannten in fraudem legis agere. Vienna: Manz´sche k. u. k. Hof-Verlags- und Universitäts- Buchhandlung, 1892, p.22; H. Coing, Simulatio und Fraus in der Lehre des Bartolus und Baldus. In: Kaser. M, Kreller H. (eds.), Festschrift für Paul Koschaker, Band III, 1939, p.410. According to A. Teichmann, Die Gesetzesumgehung, p.5; Similarly, K. Schurig, Die Gesetzesumgehung im Privatrecht, p.378.

[20] A. Teichmann, Die Gesetzesumgehung, p.5.

[21] Ibid.

[22] A. Teichmann, Die Gesetzesumgehung, p.5. While Schurig (Die Gesetzesumgehung im Privatrecht, p.378) states that the development of the doctrine of a sham transaction (simulation) took place in parallel with the development of the theory of the doctrine of an avoidance transaction. But in practice they influenced each other and both concepts were interchangeable.

[23] Especially post-glossators Bartolus and Baldus focused on the complex of issues when defining *simulatio* and *fraus*. W. Flume, Allgemeiner Teil des bürgerlichen Rechts: das Rechtsgeschäft. Band 2, 4. Auflage. Berlin/Heidelberg: Springer Verlag, 1992, p.351; G.D. Kallimopoulos, Die Simulation im bürgerlichen Recht, Eine rechtsdogmatische Untersuchung. Karlsruhe: Verlag Versicherungswirtschaft, 1966, p.81; R. Zimmermann, The Law of Obligations, Roman Foundations of the Civilian Tradition, p.648; F. Dorn, §§ 134–137 I. Nichtichkeit, pp.675-676.

[24] A. Teichmann, Die Gesetzesumgehung, p.5; I. Pfaff, Zur Lehre vom sogenannten in fraudem legis agere, p.8; M. Benecke, Gesetzesumgehung im Zivilrecht, p.13.

[25] A. Teichmann, Die Gesetzesumgehung, p.6.

The German Dogmatic Placement of Avoidance of the Law from 1840 onward

Development in the modern era has been, until the adoption of the BGB (*Bürgerliches Gesetzbuch*), marked by rapid changes and great diversity of views. The legal institute of avoidance of the law was not clearly defined, but great effort was invested in its precisizing[26]. The turnaround in the placement of avoidance of the law occurred when Savigny addressed this problem (in 1840) and when later (in 1851) this problem was also identified by Thöl[27]. Based on the findings of both studies, which are still largely the basis for discussion, many books devoted to the creation of the notion of avoidance of the law were written in the next thirty years[28]. From this time onwards, the German judicial authorities, who had previously hardly used this concept, also started to address the problem of avoidance of the law[29]. From Savigny's and Thöl's discussions and subsequent studies of other authors, we are able to distinguish between three aspects of avoidance of the law:

a) understanding avoidance of the law as a simulation.

Savigny considered the problem of *agere in fraudem legis* in conjunction with interpretation of the law. Avoidance of the law was described as a process through which the law is not violated under the letter of the law, but in its spirit (i.e. translation from D. 1, 3, 29) and demanded the use of that concept in case of breach of law as a matter of course[30]. Savigny[31] stemmed from the fact that there is no difference between simulation and avoidance of the law[32]. Thus, he synonymously used those two concepts which are today dogmatically divided.

[26] K. Schurig, Die Gesetzesumgehung im Privatrecht, p.378; A. Teichmann, Die Gesetzesumgehung im Spiegel der Rechtsprechung, p.5; M. Benecke, Gesetzesumgehung im Zivilrecht, p.12.

[27] F.C. Savigny, System des heutigen Römischen Rechts. Berlin: Veit Verlag, 1840, p.324; H. Thöl, Einleitung in das Deutsche Privatrecht. Göttingen, 1851, p.159; A. Teichmann, Die Gesetzesumgehung, p. 6; K. Schurig, Die Gesetzesumgehung im Privatrecht, p.378.

[28] J. Kohler, Studien über Mentalreservation und Simulation, JherJb, 16/1878, pp.91 sqq; F. Regelsberger, Zwei Beiträge zur Lehre von Cession, AcP 63, 1880, pp.157, 172; O. Bähr, Urteile des Reichsgerichts mit Besprechungen. München, Leipzig, 1883, p.52; A. Barthelmes, Das Handeln in fraudem legis. Göttingen (Doktorarbeit), 1889, pp.19, 31, 33; I. Pfaff, Zur Lehre vom sogenannten in fraudem legis agere; P. Neff, Beiträge zur Lehre von der fraus legi facta in den Digesten. Wien (Doktorarbeit), 1895. According to A. Teichmann, Die Gesetzesumgehung, p.6.

[29] *Reichsgericht* (RG), who represented from 1879 to 1945 the Supreme Court in criminal and civil matters, began to use the structure of the concept of *agere in fraudem legis* since 1890 onwards (RGZ 26, 180 (183)). A. Teichmann, Die Gesetzesumgehung, p.6.; Benecke (Gesetzesumgehung im Zivilrecht, pp.15–17) described in detail the creation of jurisprudence regarding *fraus legis* through the 19th century practice of RG.

[30] A. Teichmann, Die Gesetzesumgehung, pp.7–9.

[31] F.C. Savigny, System des heutigen Römischen Rechts, p.325.

[32] G.D. Kallimopoulos, Die Simulation im bürgerlichen Recht, p.96; K. Schurig, Die Gesetzesumgehung im Privatrecht, p.378.

b) avoidance of the law as a problem of interpretation of the law

Thöl rejected Savigny's position and labelled his views as too narrowly. Thöl characterized the problem of avoidance of the law as the problem of interpretation of the law. Avoidance of the law, in his views, is nothing but – perhaps harder to recognize – a violation of law, which is to be determined through the interpretation of legal norms and adequately addressed through the law[33]. Therefore Thöl's discussion from 1851[34] made it possible to distinguish between simulation and avoidance of the law, which can be achieved only through a broad interpretation of avoided law. By that, the avoidance transaction was methodically distinguished from the sham transaction[35].

c) avoidance of the law as an independent legal institution

In a short debate, Bähr also dealt with the problem of avoidance of the law[36]. After refusing Savigny's solution to treat avoidance of the law as a simulation, he suggested "some kind of expandable use of prohibition laws for such a conduct, which does not directly oppose the bans but serve their avoidance". He did not mean to address only extensive interpretation, but he advocated an independent legal institution of avoidance of the law, which should set nullity for that kind of legal transactions[37]. Slightly more detailed than by Bähr, a term of avoidance of the law was covered by Pfaff. As an element of avoidance of the law, Pfaff defined an unlawful purpose and, as its objective, the achievement of economic success, which otherwise the law tries to prevent. So, Bähr and Pfaff were of one opinion that the legal institution of *Gesetzesumgehung* is required to successfully counter avoidance transactions. They differed, however, in a way that Bähr wanted to achieve nullity of a respective legal

[33] A. Teichmann, Die Gesetzesumgehung, pp.9–11; M. Benecke, Gesetzesumgehung im Zivilrecht, p.15.

[34] H. Thöl, Einleitung in das Deutsche Privatrecht.

[35] M. Benecke, Gesetzesumgehung im Zivilrecht, p.15; K. Schurig, Die Gesetzesumgehung im Privatrecht, p.378.

[36] O. Bähr, Urteile des Reichsgerichts mit Besprechungen, p.52; O. Bähr, Besprechung des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Reich, KrVjSchr., 1888, p.321. According to A. Teichmann, Die Gesetzesumgehung, p.11; Similarely, G. Römer, Gesetzesumgehung im deutschen Internationalen Privatrecht, p.13.

[37] In the (later) formed opposite draft of the German BGB (Gegenentwurf zu dem bürgerlichen Gesetzbuches für eines Entwurfe das Deutsche Reich, Kassel 1892), Bähr gave the following definition of "the transaction to avoidance of the law" (*Geschäft zur Umgehung des Gesetzes*): "As a forbidden transaction should be equated also to such a transaction, which in some other form seeks to achieve the intended goal, to whom the law sets the ban in its original form of transaction". A. Teichmann, Die Gesetzesumgehung, pp.11–13; Similarly, A. Oguz, Probleme der Simulation in rechtshistorischer und rechtsvergleichender Sicht. München: Hohe Juristische Fakultät der Ludwig-Maximilians-Universität (Doktorarbeit), 1996, pp.85–86; M. Benecke, Gesetzesumgehung im Zivilrecht, p.15.

transaction, while Pfaff used the concept of avoidance of the law with the purpose to extend legal consequences of the Act on a (specific) avoidance transaction[38].

Bähr[39] is considered as an author of the breakthrough research in which he gave the first theoretical explanation of a boundary between avoidance and sham transactions and which is still regarded as generally correct[40]. Thus, according to Bähr[41], an avoidance transaction is in its targeted goals identical to the prohibited transaction, even though an allowed legal form was used; sanction against an avoidance transaction can be determined only by a judge, as the law itself cannot anticipate all possible forms of avoidance transactions[42]. The point of view that avoidance of the law is a problem, which has to be separated from the issue of a sham transaction, also followed the legislature of BGB and thus rejected the inclusion of a specific legal provision of avoidance of the law in § 134 BGB[43].

At the time of the formation of the BGB, the so-called second Commission retained the proposal of the legal definition, set by the so-called first Commission, without further discussion. It only changed the formulation that "the legal transaction which designing is prohibited through the law" (*ein Rechtsgeschäft, dessen Vornahme durch Gesetz verboten ist*), with the formulation of "the legal transaction which violates a statutory prohibition" (*ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt*), with the aim to make it clearer that not only execution of a transaction, that violates the ban, but also the one that has a prohibited content, can be defined as null as a void transaction[44].

The legislature of BGB followed this new legal view and gave up the inclusion of explicit legal provisions on avoidance of the law in BGB. In the process of designing BGB, Bähr prepared a proposal to include in § 105 BGB (present § 134 BGB) an additional sentence on avoidance of the law, but the Commission rejected his proposal. In its explanation, the Commission indicated that *fraus legis* is a problem of interpretation; so it should not be interfered with freedom of interpretation of the judges[45].

[38] A. Teichmann, Die Gesetzesumgehung, pp.11–13; A. Oguz, Probleme der Simulation in rechtshistorischer und rechtsvergleichender Sicht, pp.85–86; M. Benecke, Gesetzesumgehung im Zivilrecht, p.15.

[39] O. Bähr, Urteile des Reichsgerichts mit Besprechungen, p.56

[40] G.D Kallimopoulos., Die Simulation im bürgerlichen Recht, p.96.

[41] O. Bähr, Urteile des Reichsgerichts mit Besprechungen, p.59.

[42] G.D. Kallimopoulos, Die Simulation im bürgerlichen Recht, p.80.

[43] F. Dorn, §§ 134–137 Nichtichkeit I., pp.675–676.

[44] Ibid, 662.

[45] M. Benecke, Gesetzesumgehung im Zivilrecht, p.17; F. Dorn, §§ 134–137 I. Nichtichkeit, p.676; C. Armbrüster, § 134 Gesetzliches Verbot. In: F.J. Säcker (ed.), Münchener Kommentar zum

Signs of existence of the avoidance transaction under the German provision of § 134 BGB

The given autonomy (*Privatautonomie*) which in the German law system enables very extensive substantive freedom when entering into contracts has its limits when the individual transaction is made against the statutory prohibition (§ 134 BGB with title "*gesetzliches Verbot*") or morality (§ 138 BGB with title "*gute Sitten*", which is not part of the analysis of this article). The German BGB in its Article 134 states: A legal transaction which violates a statutory prohibition is null, unless something else is apparent from the law. Article 134 BGB – in spite of a given discourse in its title "statutory prohibition" – is not limited to prohibitive norms, defined in other articles of the same law, or even in other laws, but it finds through the historical development of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB) its applicability also in case of avoidance of the law (*Gesetzesumgehung*) and, therefore, also in case of the so-called avoidance transaction (*Umgehungsgeschäft*) as a "means" of avoidance of the law.

In case of the avoidance transaction the participants want to avoid (circumvent) a certain statutory or contract provision through the chosen form of the transaction[46]. In this case (i.e. avoidance of the law) a discrepancy is found between typical and actual material consequences of that particular transaction. This can be understood as follows: the legal framework allows the participants various models of conducting their activity in order to achieve their goals. But avoidance of the law is present when persons use a particular legal model in order to achieve some other purpose, as it is normal for a specific form of business[47]. In case of the avoidance transaction a person is acting between legal and illegal when he/she seeks to achieve a legal result, which realization the law (i.e. legislature) does not approve, without explicitly violating the legal prohibition.

Avoidance of the law is present only if there is a case of a misguided purpose of the legislation which happens in two cases. The first is a situation when the participants, by choosing an unconventional way of the conduct of a particular transaction, do not meet legal consequences, which should be provided by the norm if it has not been targeted by the avoidance transaction. The second situation is a case

Bürgerlichen Gesetzbuch. 5. Auflage. München: Verlag C. H. Beck, 2006, p.1572; W. Flume, Allgemeiner Teil des bürgerlichen Rechts: das Rechtsgeschäft, p.350.

[46] W. Flume, Allgemeiner Teil des bürgerlichen Rechts: das Rechtsgeschäft, p.408.

[47] G.D. Kallimopoulos, Die Simulation im bürgerlichen Recht, p.90.

when the participants achieve legal consequences which should not be achieved. In the first case the German authors use the term *Tatbestandsvermeidung* for describing a way of the avoidance conduct, while in the second case the term *Tatbestandserschleichung*[48]*. Also, the (German) literature and the Court practice occasionally differentiate between "prohibition of the intention" (Zweckverbot*), "target prohibition" (*Zielverbot*) and "prohibition of the path" (*Wegverbot*)[49].

Conclusion

Fraus legis is a Roman legal concept that was shaped through centuries. At the beginning the Roman laws were exclusively interpreted literally (i.e. by the letter of the law), so that avoidance transactions achieved their peak. Only later Roman legal science changed from purely literal interpretation to the interpretation of the meaning of legal norms. *Agere in fraudem legis* (i.e. avoidance of the law) was successfully defined in the Theodosian Code (*Codex Theodosianus* in 439) and a century later incorporated by the Byzantine Emperor Justinian in his legislative *Codex (Corpus Juris Civilis)*. In Central Europe the development of the concept of *fraus legis* actually slowed down in the Middle Ages, until its turnaround in the mid-19th century (Savigny and Thöl). Since the adoption of the BGB (1900) the concept of *Gesetzesumgehung* plays an increasingly more important role in the German law system in combating against deliberate circumvention of the law. Today the problem of the avoidance (and sham) transaction is defined not as a peripheral area of civil (and tax) law, but as its very heart, which is reflected in destroying the essence of the transaction (i.e. errors of the will) and unauthorized circumvention of the principle of the party autonomy and mandatory legal norms.

[48] E. Ratschow, Missbrauch von rechtlichen Gestaltungsmöglichkeiten, in Abgabenordnung Kommentar. In: F. Klein et al. (eds.), 10. Auflage. München: Verlag C.H. Beck, 2009, p.275; H. Weber-Grellet, Steuern im modernen Verfassungsstaat, Funktionen, Prinzipien und Strukturen des Steuerstaats und des Steuerrechts. Köln: Verlag Dr. Otto Schmidt, 2001, p.222; P. Fischer, Die Umgehung des Steuergesetzes – Zu den Bedindungen einer gewährung der Steuerrechtsordnung "aus eigener Kraft". Der Betrieb, 13/1996, p.649; G. Römer, Gesetzesumgehung im deutschen Internationalen Privatrecht, pp.33–34.

[49] M. Benecke, Gesetzesumgehung im Zivilrecht, pp.96–97; K. Schurig, Die Gesetzesumgehung im Privatrecht, p.400.

THE LEGISLATIVE POWERS OF THE HEAD OF STATE IN NEW EU DEMOCRACIES

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Abstract
This paper deals with the legislative powers of the head of state in the countries that emerged from socialist regimes, where the parliamentary system and the function of the President of the Republic as the individual head of state were introduced in the 1990s, namely in 10 (new) Member States of the European Union.

Keywords: legislative powers, head of state, EU democracies, president of the republic.

Introduction

The paper discusses the legislative powers of the head of state in the former socialist systems[1]. It presents in more detail the powers of the President in the Baltic States, Poland, the Czech Republic, Slovakia, Slovenia, Hungary, Romania, and Bulgaria. These countries are member states of the European Union, which introduced the parliamentary system in the 1990s.

The legislative powers of the President discussed are divided into those exercised by the President of the Republic before the legislative procedure starts (such as the right of legislative initiative) and those exercised after the legislative procedure (such as the right to promulgate the law or the right of legislative or constitutional veto). During the legislative procedure, which is completely under the parliament's

[1] More in T. Dubrovnik, A. Kobal: The Powers of the Head of State in the Legislative and Executive Branch in Former Socialist Systems, Lex localis, Maribor 2016; T. Dubrovnik: Predsednik republike v parlamentarnih sistemih vzhodne Evrope, in: Javna uprava, 45 (2009) 4, pp.155-179 and T. Dubrovnik: Sistem volitev in pristojnosti predsednika republike v baltiških državah in v Sloveniji, in: Revus (2010) 12, pp.165-179; and T. Dubrovnik: Položaj šefa države v izvršilni oblasti novih članic EU, in: Javna uprava, 48 (2012) 3/4, pp.141-170; and T. Dubrovnik, Tadej: Pristojnosti predsednika republike na zakonodajnem področju v bivših socialističnih ureditvah. in: Javna uprava, 50 (2014) 1/2, pp.41-70.

authority, the President of the Republic has no direct or formal influence on the content of the law in the examined systems.

In certain countries, the President holds the right of legislative initiative in the legislative procedure. In all the examined systems, the President of the Republic signs and promulgates the laws, and usually holds the right of veto, which postpones the promulgation and, consequently, the implementation of the law. In the majority of examined systems, the President of the Republic holds the right of legislative as well as constitutional veto, meaning they must decide whether to return the adopted law back to the parliament for reconsideration or send it to the Constitutional Court for a constitutional review. In systems where the President does not hold the right of constitutional veto, they have the right to request a constitutional review of the law after its promulgation and its coming into force.

Based on the analysis of the President's legislative powers in the new European Union democracies, the paper will focus on similarities between individual systems, as well as highlight their differences and specifics, and categorize individual solutions. The findings will allows us to critically assess the position of the President in the examined systems, with the emphasis on the unsuitability of the Slovenian system.

The right of legislative initiative

The right of legislative initiative gives the President of the Republic a possibility to influence the work of legislators. Generally, such formal power of the President of the Republic is characteristic of systems where the President has more power, i.e. presidential and semi-presidential systems[2]. In the majority of parliamentary systems the President of the Republic does not have the (formal) right of legislative initiative, but can however exercise their influence indirectly, for example, by expressing their opinions. Even though Poland, Hungary, Lithuania and Latvia have a developed parliamentary system, their President also holds the right of legislative initiative[3].

[2] Cf. A. Krouwel: Measuring presidentialism and parliamentarism: An Application to Central and East European Countries, in: Acta Politica, 38 (2003) 4, pp.333-364. Cf. G. Tsebelis, T. P. Rizova: Presidential Conditional Agenda Setting in the Former Communist Countries, in: Comparative Political Studies, 40 (2007) 10, pp.1155-1182.

[3] Article 118 of the Constitution of the Republic of Poland from 1997, with subsequent amendments and additions (hereinafter referred to as the Polish Constitution), Article 9 of the Fundamental Law of Hungary from 2011 (hereinafter referred to as the Hungarian Constitution), Article 68 of the Constitution of the Republic of Lithuania of 1992, with subsequent amendments and supplements (hereinafter referred to as the Lithuanian Constitution), Article 47 of the Constitution of the Republic of Latvia from 1922, with subsequent amendments and additions (hereinafter referred to as the Latvian Constitution).

The Estonian, Bulgarian and Romanian constitutions restrict this power, and only grant the President the right to submit a motion for amending the constitution[4]. The Romanian President is even further restricted, as they are bound by the government's opinion. The Polish and Hungarian Presidents hold the broadest power and hold the right of legislative initiative as well as the right to submit a proposal for amending the Constitution[5].

In these systems, the President shares the right of legislative initiative with other bodies. Laws may also be proposed by members of the parliament (and senators in Poland), the government, and (except in Hungary) by a certain number of voters[6]. The Latvian system, in which the President is the only body with the right of legislative initiative who does not have to submit a fully drawn up, legally edited draft bill, stands out. This (at least, on paper) makes it easier for the President to exercise this power.

In order to correctly define this power, we should focus on the fact that compared to other bodies with the right of legislative initiative the Presidents rarely exercise this power (the President of Latvia has, for example, only submitted one draft bill per year on average)[7]. After the new Constitution came into force in 1992 and until 2006, the President of Estonia only submitted one amendment to the Constitution in 2001, proposing that direct presidential elections be introduced and that an independent Constitutional Court be established[8]. The President of Lithuania submitted the biggest number of draft bills among those examined, although he still submitted the

[4] Article 103 of the Constitution of the Republic of Estonia from 1992, with subsequent amendments and additions (hereinafter referred to as the Estonian Constitution), Article 154 of the Constitution of the Republic of Bulgaria from 1991, with subsequent amendments and additions (hereinafter referred to as the Bulgarian Constitution), Article 150 of the Constitution of Romania from 1991, with subsequent amendments and additions (hereinafter referred to as the Romanian Constitution).

[5] Article 235 of the Polish Constitution, Article S of the Hungarian Constitution.

[6] Article 32 of the Rules of Procedure of the Polish Sejm (Monitor Polski 2009, 5, 47, with subsequent amendments and additions); Article 79 of the Rules of Procedure of the Latvian Saeima (of *2 March 2006; with subsequent amendments and additions)*; Article 68 of the Lithuanian Constitution; Article 6 of the Hungarian Constitution.

[7] Cf. W. Ismayr: Die politischen Systeme der EU-Beitrittsländer im Vergleich, in: Aus Politik und Zeitgeschichte, (2004) 5/6, p.8 and W. Ismayr: Die politischen Systeme der baltischen Staaten, in: Der Bürger im Staat: Die baltischen Staaten, 54 (2004) 2/3, p.111.

[8] Cf. K. Merusk: The Republic of Estonia, in: C. Kortmann, J. Fleuren, W. Voermans (ed.): Constitutional Law of 10 EU Member States: The 2004 Enlargement, Kluwer Law International, 2006, p. III/25.

smallest share (merely four percent) of legislative proposals compared to other bodies with the right of legislative initiative in one term[9].

The President's actual influence on the content of the law and its adoption largely depends on the political composition of the parliament, as members of the parliament at the end determine the fate of the law. The President's influence in systems with cohabitation is accordingly smaller than in systems where the President comes from the same political grouping as the majority in the parliament.

Considering that the President of the Republic often exercises restraint regarding the day-to-day politics and holds a neutral position towards the ruling coalition or opposition, the President's right of legislative initiative in a parliamentary system may also be deemed as an anachronism.

Promulgation of a law

Promulgation of a law is a traditional function of the President of a Republic. This power does not entail the President's participation in the legislative procedure in the narrowest sense, which ends with the adoption of the law, but is the final act of the legislative procedure in its broader sense, which makes the law enforceable[10].

In all the examined systems, the duty of promulgation is assigned to the President of the Republic; however, some constitutions also stipulate that the laws must be co-signed. In Slovakia and the Czech Republic, laws are, for example, co-signed by the President, the Prime Minister, and the Speaker of the parliament or Chairman of the Chamber of Deputies in case of the Czech Republic[11]. Considering the President's right and duty of promulgation, the question arises what to do when the President refuses to promulgate a law. Not many Constitutions regulate such cases explicitly. The Lithuanian Constitution contains provisions for such cases, for example[12]. If the President of Lithuania does not sign the law in the prescribed period or exercise the right of suspensive veto, the law may be signed and promulgated by the Speaker of

[9] Between 2004 and 2008, the President of Lithuania submitted 130 draft bills, while the government submitted 991 and the parliament 2171. Cf. J. Tauber: Das politische System Litauens, in: W. Ismayr (ed.): Die politischen Systeme Osteuropas, 3rd edition, Vs Verlag, Wiesbaden 2010, p.185.

[10] More on the promulgation duty of the President of the Republic I. Kaučič: Predsednik republike med ustavo in politično prakso, in: Podjetje in delo, 32 (2006) 6/7, pp.1615-1628.

[11] Article 87 of The Constitution of the Slovak Republic from 1992, with subsequent amendments and additions (hereinafter referred to as the Slovak Constitution) and Article 51 of the Constitution of the Czech Republic from 1992, with subsequent amendments and additions (hereinafter referred to as the Czech Constitution). Such a provision was already part of the former common Constitution.

[12] Cf. Article 71 of the Lithuanian Constitution.

the parliament. The Slovak Constitution only contains a provision stating that a law, which was returned to the parliament and adopted again, must be promulgated, even if the President does not sign it[13]. Promulgation of a law without the President's signature is similarly regulated in the Czech Republic, where the President does not sign a readopted law that he initially objected[14]. In other systems, the provisions on the temporary replacement of the function of President of the Republic should be applied in such cases.

The promulgation of a law is not a mere automatic action, since the President of the Republic (except in Slovenia) holds the right of suspensive veto, if they believe that there are reasons and arguments for returning the law to the parliament for reconsideration or for requesting a constitutional review. Presidents of the examined countries often exercised their right of suspensive veto in the past. The President of the Czech Republic exercised his right of suspensive veto 18 times between 1993 and 2001, and in almost one third of the cases the law was not adopted, as it did not receive the required absolute majority in the parliament[15]. The situation was similar in Estonia, where in two parliamentary terms between 1992 and 1999 the President returned 33 laws to the parliament, and requested their constitutional review in eight cases, with the Supreme Court ruling that seven laws were unconstitutional. In the following two terms between 1999 and 2007 the Estonian President refused to promulgate only 18 laws and requested a constitutional review in only four cases, with the Supreme Court declaring two laws as unconstitutional[16]. The decrease in the number of vetoed laws in the examined countries may be attributed to greater political stability in these countries in the recent past[17].

[13] Article 87 of the Slovak Constitution

[14] Cf. V. Pavlicek, M. Kindlova: The Czech Republic, in: C. Kortmann, J. Fleuren, W. Voermans (ed.): Constitutional Law of 10 EU Member States: The 2004 Enlargement, Kluwer Law International, 2006, p.II-39.

[15] More in K. Vodicka: Das politische System Tschechiens, VS Verlag, Wiesbaden 2005 and Z. Mansfeldová: Das tschechische Parlament im Zeichen allmählicher Stabilisierung, in: S. Kraatz, S. Steinsdorff (ed.): Parlamente und Systemtransformation im Postsozialistischen Europa, Leske + Budrich, Opladen 2002, pp.111-126.

[16] Cf. Office of the President of Estonia: Powers and Responsibilities: Responsibility in Regard to Legislation, available at www.president.ee/en/president/legal-authority/index.html, on 13 December 2012. Cf. T. Dubrovnik: The position, election and powers of the President of the Republic of Estonia, in: Lex localis, 7 (2009) 1, p.26.

[17] Cf. W. Ismayr: Die politischen Systeme Osteuropas im Vergleich, in: W. Ismayr (ed.): Die politischen Systeme Osteuropas, 3rd edition, Vs Verlag, Wiesbaden 2010, p.24.

Legislative Veto

If the President of the Republic disagrees with the content of a law or individual provisions, he may return the law to the parliament for reconsideration in a specified period. Such a veto postpones the promulgation of the law and consequently the date it comes into force. In all analyzed countries (except in Slovenia) the President of the Republic holds the right of legislative veto; however, in some systems the President does not have the right of veto against certain laws. The Czech Constitution explicitly states that the President does not hold the right of veto against constitutional acts and must promulgate them. In Poland, the President does not have the right of veto in the adoption of the budget, and in Latvia when the law is adopted as urgent (which is determined by a two-third majority of the parliament members)[18].

The weight of the President's veto depends on the share of votes required for the adoption of the law in the repeated vote. In the examined systems, the President's veto carries the least weight in those systems where readopting the law requires simple majority, which is the case only in Romania, Hungary, Estonia, and Latvia. A higher share of votes is required in most countries – an absolute majority in Bulgaria, Czech Republic, Slovakia, and Lithuania, while in Poland at least a three-fifth majority is required with at least one half of the members of the parliament present. In none of the systems does the President hold the right of (a second) legislative veto after a law is readopted by the parliament.

The influence that the President has on the content of a law when exercising the right of veto also depends on whether a vetoed law may be amended or not before the repeated vote. In some systems (for example, in the Czech Republic, Poland, Estonia, and Bulgaria), a law returned to parliament for reconsideration may not be changed and the parliament must either adopt it again unchanged or reject it[19]. In other countries, the law may be amended or modified in accordance with the President's comments before the repeated vote. In Hungary, the President's further

[18] Article 50 of the Czech Constitution and Article 75 of the Latvian Constitution. On legislative veto in the Polish system L. L. Garlicki: The Presidency in the New Polish Constitution, in: East European Constitutional Review, 6 (1997) 2&3, pp.81-89.

[19] Article 50 of the Czech Constitution and Article 98 of the Rules of Procedure of the Czech Chamber of Deputies (90/1995, with subsequent amendments and additions); Article 64 of the Rules of Procedure of the Polish Sejm; Article 107 of the Estonian Constitution and Article 114 of the Rules of Procedure of the Estonian parliament (RT I 2003, 24, 148, with subsequent amendment and additions); Article 101 of the Bulgarian Constitution and Article 76 of the Rules of Procedure of the National Assembly of Bulgaria (State Gazette 58/2009, with subsequent amendments and additions).

right to apply veto depends on whether the members of the parliament have considered the President's comments and modified the text of the law.

The Lithuanian system stands out, as the President of Lithuania also occasionally used a pocket veto until a Constitutional Court's ruling. It meant that the President did not sign the law within the prescribed 10-day deadline nor did they provide reasons for the rejection. Such a law could then come into force with the signature of the Speaker of the parliament[20]. The President's situation when applying a pocket veto is significantly easier than when formally exercising the right of suspensive veto, since the President does not have to refuse to sign a law nor provide comments on its content. In Lithuania, the pocket veto is practically impossible nowadays, as the Constitutional Court emphasized that the President must always provide reasons and legal arguments for refusing the promulgation. The Constitutional Court also stated that the constitutional provision giving the Speaker of the parliament the power to sign and promulgate a law if the President does not sign it (or return it to the parliament) in the prescribed period should only be applied when the President of the Republic is unavailable.[21]

The Latvian system should also be pointed out when discussing the President's powers in promulgating a law[22]. When a law is adopted, the President of the Republic may request that it should be reconsidered. If the parliament readopts the law without any changes, the President may not again return the law to the parliament for reconsideration, but they may postpone the promulgation of the law for two months. The President first exercised this right in 2007[23]. The President must postpone the promulgation of a law if so requested by one third of the members of the parliament. A referendum is held on such a suspended law if at least one tenth of all voters demand that. This may be referred to as an "absolute citizens' veto". A law is rejected in this case if the majority votes against it, under the condition that the turnout at the referendum equals at least one-half of the turnout at the latest parliamentary

[20] About the Lithuanian President's pocket veto V. A. Vaičaitis: The Republic of Lithuania, in: C. Kortmann, J. Fleuren, W. Voermans (ed.): Constitutional Law of 10 EU Member States: The 2004 Enlargement, Kluwer Law International, 2006, p.VI/26.

[21] Cf. Article 71 of the Lithuanian Constitution and the Lithuanian Constitutional Court's ruling "On the Law on State Pensions and the Law on the President of the Republic" of 19 June 2002.

[22] About the Latvian President's right of veto cf. Articles 71, 72 of the Latvian Constitution.

[23] Cf. President of Latvia: The president of Latvia Vaira Vike-Freiberga during her Presidency (1999-2007), available at www.president.lv/pk/content/?cat_id=2163&lng=en, on 13 October 2012.

election[24]. If voters do not file for a referendum within two months, the law is promulgated. A referendum is also not called if three quarters of all members of the parliament endorse it in the repeated vote. Only if the parliament determines that a law is urgent (with a two-third majority), the President of the Republic does not have the right to veto such a law, neither can a referendum be called on it; the President must promulgate such a law within three days[25].

Constitutional Veto

If the Presidents hold the right of the so-called constitutional veto, they may seek the Constitutional Court's ruling on whether a law is constitutional before promulgating it, if they believe that the law or its individual provisions are unconstitutional. Almost one half of the examined systems grant this right to the President. Presidents of Romania, Poland, Hungary, and Estonia may call on the Constitutional Court to rule on the constitutionality of a law before promulgating it[26]. In the systems where the President holds the right of legislative as well as constitutional veto, they must usually decide which veto to apply. This is the case in Romania and Poland, and partially Hungary, where only the Constitutional Court's ruling is deemed final[27]. In Estonia, the President may apply both vetoes; however, they must exercise the right of legislative veto before the right of constitutional veto.

The Polish Constitution states that the decision of the members of the parliament or the Constitutional Court's ruling is final and must be followed by the promulgation of the law. When the Constitutional Court rules that only individual provisions of a law are unconstitutional and these provisions are not an indivisible part of the entire law, the President may (after consultation with the Speaker of the Sejm) sign and promulgate the law omitting the unconstitutional provisions, or return it to the Sejm so the deputies may eliminate the unconstitutionality.

[24] Cf. D. Iljanova: The Republic of Latvia, in: C. Kortmann, J. Fleuren, W. Voermans (ed.): Constitutional Law of 10 EU Member States: The 2004 Enlargement, Kluwer Law International, 2006, p.V/28.

[25] Article 75 of the Latvian Constitution.

[26] Article 77 of the Romanian Constitution, Article 122 of the Polish Constitution, Article 6 of the Hungarian Constitution, and Article 107 of the Estonian Constitution.

[27] In practice, the Polish President rarely exercises the right of legislative veto and the constitutional review is more frequent. More in L. L. Garlicki: Das Verfassungsgericht im politischen Prozess, in: O. Luchterhandt (ed.): Neue Regierungssysteme in Osteuropa und der GUS. Probleme der Ausbildung stabiler Machtinstitutionen, Berlin Verlag Arno Spitz, Berlin 1996, pp.275-310.

The Hungarian President may exercise the right of constitutional veto if the parliament did not already call on the Constitutional Court to rule on the constitutionality of the law[28]. The ruling made by the Constitutional Court based on the President's constitutional veto is final and must be followed by the promulgation of the law. The use of constitutional veto thus excludes the option of using legislative veto. On the other hand, the use of legislative veto first does not exclude the option of using constitutional veto later. However, if the Constitutional Court rules that the law is not unconstitutional following the parliament's request for a constitutional review, the President may exercise the right of legislative veto before promulgating the law. An already vetoed law by the President may be referred to the Constitutional Court, where we should distinguish between two situations, namely whether the parliament adopted the law without any modifications or the law was modified. In the first case, the President may request that the Constitutional Court rules whether the legislators adopted the law in accordance with the prescribed procedure. In the second case, the President may request not only a constitutional review of the procedure but also of the content, in which case only the amended provisions are reviewed.

Estonia also stands out among the examined countries that grant the President the right of constitutional veto, allowing the President to exercise the right of legislative and constitutional veto for the same law, whereby he must first use legislative veto. If the parliament readopts a law without any amendments, the President of the Republic may refer the law to the Supreme Court (which also fulfils the role of the Constitutional Court) for a constitutional review. If the Supreme Court rules the law constitutional, the President of the Republic promulgates it[29].

In certain systems (such as Latvia, Bulgaria, the Czech Republic, and Slovakia), the President has the right to request a constitutional review of the law after its

[28] Between 1990 and 2010 the Hungarian President exercised the right of constitutional veto for 37 laws, returned 39 laws to the parliament for reconsideration, and submitted three draft bills to the parliament. Cf. The Hungarian National Assembly: The role of the President of the Republic in legislation 1990-2010, available at www.parlament.hu/angol/append/role_of.htm, on 17 October 2012. More on Hungarian President's constitutional veto in A. Sajo: The Republic of Hungary, in: C. Kortmann, J. Fleuren, W. Voermans (ed.): Constitutional Law of 10 EU Member States: The 2004 Enlargement, Kluwer Law International, 2006, p. IV/31.

[29] More on the powers of the President of Estonia in H. J. Uibopuu: Die Kompetenzen des estnischen Staatspräsidenten nach der Verfassung 1992, in: Recht in Ost und West (ROW), 37 (1993) 3, pp.65-77 and issue 4, pp.107-118.

promulgation and its coming into force[30]. This does not represent a constitutional veto but an *ex post* constitutional review of a law. As an instrument for protecting constitutionality, such a constitutional review is less effective than constitutional veto, which can prevent an unconstitutional law from coming into force. The President of Lithuania has the least power regarding this, as they only hold the right to demand a review of constitutionality and legality of the Government acts[31].

Conclusion

The parliamentary system is in place in all the examined new EU democracies. Although the President's powers in such a system primarily tend to reside in representation and launching initiatives, the study has revealed that the extent of the legislative powers of the President varies in modern systems.

In the powers examined in the legal area we can conclude by saying that they represent an important set of presidential powers. Although individual Presidents (Hungarian, Polish, Lithuanian, and Latvian) have a legislative initiative at their disposal, in practice it is rarely exercised.

The most important power that the President can use to affect the wording of an act is the right of suspensive veto. Namely the President in all the examined systems promulgates laws, and in doing so also has (except in Slovenia) the right of legislative veto, which parliament can "circumvent". Here the weight of the President's veto depends on the number of deputies who must support the law in order for it to be adopted. The effect the President has on the wording of a law is also dependent on whether or not it is permitted for a vetoed law to be amended before a new round of voting or not. In all the systems, it is the case that if the parliament once again approves the law, the President no longer has the right of legislative veto. In Romania, Estonia, Poland, and Hungary the President also has the power of constitutional veto. The President in the systems examined in general must decide whether to use constitutional or legislative veto. Estonia and Hungary are exceptions here, as it is possible to use both vetoes for the same law. In systems where the President does not

[30] Article 17 of the Latvian Constitutional Court Law (of 5 June 1996, with subsequent amendments and additions); Articles 12, 16 of the Bulgarian Constitutional Court Act (State Gazette 67/1991, with subsequent amendments and additions); Article 87 Of the Czech Constitution and Article 64 of the Czech Constitutional Court Act (**182/1993 Sb., with subsequent amendments and additions)**; Article 125 of the Slovak Constitution and Article 18 of the Slovak Constitutional Court Act (of 20 January 1993, with subsequent amendments and additions).

[31] Article 106 of the Lithuanian Constitution.

hold the right of constitutional veto as a type of an *ex ante* review of constitutionality they have the right to request a constitutional review of the law after its promulgation and its coming into force.

The Slovenian system is an exception, as it does not recognize the President's right of legislative or constitutional veto in the legislative process, nor even the right to request a review of constitutionality. The Slovenian President, considering the legislative powers, has by far the weakest position among the countries examined. In order to follow the characteristics of the parliamentary system and the principle of separation of powers, certain constitutional changes are necessary.

OUTER SPACE LAW

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Abstract
This article provides a summary of current law governing the legal status of outer space and the law governing outer space activities.

Keywords: outer space law, UN Treaties, legal status of outer space.

Background

Outer Space Law, or simply Space Law, are terms employed to describe both international law and national law applicable to the legal status of outer space and the law governing outer space activities.

The relevant law includes both international law (that is, primarily, the law applicable to the relations between States and international organizations such as the European Space Agency) and national law (that is, the law laid down by States to govern the activities of individuals and private law organizations)[1].

International law relating to outer space has been developed largely through the United Nations and its specialized agencies (notably the International Telecommunications Union). It is generally taken to comprise the following:

- international treaties (that is to say agreements between States, which may be given other names, such as agreements, conventions or protocols)[2];
- international custom,

[1] "Law" in this sense means primarily rules which are treated as binding upon the States, individuals or organizations to which they apply. These are sometimes known as "hard" law. In addition, there are many instruments containing recommendations or guidance which do not have binding force but may be morally persuasive (especially as regards those who participated in their adoption), may help to interpret relevant provisions of hard law, or may if followed develop over time into hard law. These instruments are often referred to as "soft" law. They are particularly important in the field of international law, where the number of players makes treaty-making challenging. Resolutions of the UN General Assembly are typical examples of soft law.

[2] The interpretation of treaties is largely governed by the Vienna Convention on the Law of Treaties, 1969: 1155 United Nations Treaty Series (UNTS) 331.

- the general principles of law recognized by States,
- judicial decisions, and
- juridical writings[3].

The above legal bases are listed in a broadly hierarchical order. Treaties establish rules which are binding on the parties to them. Customs develop from common practices of States which can be shown to have been followed on an understanding that they are obligatory, and may include rules established by treaties which are followed by States which are not parties to them.

The enforcement of international law can prove problematical. It may be dependent on political sanctions applicable by international and regional organizations in which States participate, notably the United Nations, or by judicial mechanisms such as the International Court of Justice, or by arbitration.

National law contains both the making and enforcement of legislation governing activities within national jurisdiction and laws governing the resolution of disputes relating to activities in other jurisdictions (the so-called private international law or conflict of laws). The legislation may extend to activities in or relating to outer space, but the extent may be uncertain if not specifically provided for, at any rate as it concerns activities taking place in outer space (as opposed to actions in a State's territory which controls activities in space).

As indicated, international law governs primarily the relations between States, which means that it does not normally create rights and obligations directly for individuals and corporations unless it is given effect either generally or in particular cases by national law. National laws, including both civil and criminal laws, have considerably more effective enforcement provisions than international law, including procedures for detecting and prosecuting infringements and court and arbitration systems to settle disputes. The application of domestic law is typically restricted to the national territory, as well as the acts of a State's citizens abroad and the effects of overseas activities on the national soil, but may be extended more widely (e.g. to permit the prosecution of acts which are regarded as international crimes). And civil courts may exercise jurisdiction in a wide range of circumstances where they would be regarded as a convenient form and then apply the laws of other countries which are relevant to a dispute (for example,

[3] *See* Article 38 of the Statute of the International Court of Justice: http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

where the parties to a contract have agreed to apply the law of another country to determine disputes arising from the contract).

National laws specifically relating to outer space are primarily laid down by national Parliaments but extensive powers may be conferred on governmental agencies (such as, in the USA, the Federal Aviation Administration (FAA) or in Russia, *Roscomos*) or in some cases regional space agencies (such as the European Space Agency)[4].

Application to Outer Space

(1) International Law

(a) UN Treaties

Interest in the law governing activities in outer space really appeared following the success of the *Sputnik 1 mission* in 1957. The UN General Assembly established, in 1959, the Committee on the Peaceful Uses of Outer Space (UNCOPOUOS) which has elaborated five treaties on the subject, namely:

- Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967) (Outer Space Treaty)[5];
- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968) (Rescue Agreement)[6];
- Convention on International Liability for Damage Caused by Space Objects (1972) (Liability Convention)[7];
- Convention on Registration of Objects Launched into Outer Space (1976) (Registration Convention)[8]; and
- Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979) (Moon Treaty)[9].

[4] Authorities other than space agencies may also have relevant functions, notably radiocommunication authorities in relation to the allocation of spectrum.

[5] 610 UNTS 205

[6] 672 UNTS 205

[7] 961 UNTS 187

[8] 1023 UNTS 15

[9] 1363 UNTS 3

The first four of these treaties have received widespread adherence, but the Moon Treaty has been less successful. Subsequent deliberations in UNCOPOUOS have not resulted in further hard law, but a number of important recommendations have resulted in non-binding resolutions of the UN General Assembly, including the space debris mitigation guidelines mentioned later.

Outer Space Treaty

This treaty contains high-level provisions covering most of the concerns which were apparent in 1967, and remains the corner stone of space law. The key provisions are the following:

• Province of all mankind - the exploration and use of outer space shall be the "province of all mankind" and shall be carried out for the benefit and in the interests of all countries; outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use, occupation or by any other means;

• Freedom of exploration - outer space shall be free for exploration and use by all States on a basis of equality and in accordance with international law; there shall be freedom of access to all areas of celestial bodies, and freedom of scientific research; and States must facilitate co-operation in scientific investigation;

• De-militarisation: States parties shall not place any weapons of mass destruction in orbit round the earth, shall use the Moon and other celestial bodies exclusively for peaceful purposes and shall not place any military installations on them;

• Cooperation and mutual assistance: States parties shall conduct all their activities in outer space with due regard to the corresponding interests of all other States parties: astronauts shall be regarded as envoys of all mankind and shall be given all possible assistance in the case of accidents, and space objects found outside the territory of the State party on whose registry they are carried shall be returned to that State;

• Environmental protection: exploration of outer space shall be conducted so as to avoid harmful contamination of the Moon and other celestial bodies and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter;

• Liability: States parties shall bear international responsibility for national activities in outer space. They shall retain jurisdiction and control over space

objects on their registries and any personnel thereof while in outer space and shall be internationally liable for damage to another State party or to its natural or juridical persons by an object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

Comment

The Treaty makes no attempt to define "outer space", in particular to establish a boundary between outer space and the air space above national territories in which, as has been generally accepted, the sovereignty of States extends[10]. The International Aeronautical Federation has taken the von Karman line (100 km above the Earth) as marking the boundary, but it is not clear that this has gained sufficient acceptance by States to have hardened into a customary rule. Most activities in space have taken place well beyond that boundary so the question has not become critical, and States have not objected to the transit of space objects through their air spaces which may mean that a customary right to transit has become established.

The concept of a common province of mankind can be compared with that of the "common heritage of mankind" as employed in the UN Law of the Sea Convention (UNLOSC)[11] with regard to the deep seabed. It effectively supersedes the customary rules of international law governing the acquisition of unclaimed territory (*terra nullius*), which are based on discovery, use and occupation[12]. However, unlike UNLOSC, the Outer Space Treaty contains no mechanism for balancing the need for equal access against the potential value of exploiting the environment of space, including the natural resources of planetary bodies. There is a possible loophole for private "space mining" in that the Treaty only speaks about "national" appropriation; some entrepreneurs have already relied on this limitation to "sell" plots on the Moon.

As regards de-militarization, there is some uncertainty as to whether the Treaty prohibits the placing of military equipment in the orbit. The question was relevant in particular to the USA's SDI initiative announced in 1983 but terminated ten years later. While the operative provisions of the Treaty refer only to the

[10] Note, however, that following the launch of Sputnik 1 States have generally acquiesced in the transit of launch vehicles through their air space, and the right to transit may have hardened into a customary rule of law.

[11] 1833 UNTS 3

[12] Cf Judgment of the Permanent Court of International Justice (predecessor of the International Court of Justice) relating to the Legal Status of Eastern Greenland, 1933 PCIJ (series A/B) No.53

demilitarization of the Moon and other celestial bodies, its preamble refers generally to the "common interest of all mankind in the progress of exploration of outer space for peaceful purposes". However, the US took the view that SDI being a defensive measure could properly be treated as being for peaceful purposes.

As regards scientific cooperation, the Treaty contains a provision for advance notification of space launches which helps to protect against obstruction or interference. However, continually increasing numbers of such launches is giving rise to collision risks, discussed further below.

International responsibility for outer space activities is borne by States parties to the Treaty whether these are carried out by governmental agencies or non-governmental entities. The activities of non-governmental entities require authorization and supervision by their State. When activities are carried out by international organizations, responsibility for compliance with the treaty is borne by the international organization and the States parties participating in such an organization. A State which launches or procures the launching of an object into outer space, and each State from whose territory or facilities an object is launched, is internationally liable for damage to another State or to its natural or juridical persons on the Earth, in air space or in outer space.

Rescue Agreement

This Treaty carries forward the provisions of the Outer Space Treaty, for example, by requiring States on whose territory space objects or their component parts are found to notify the UN Secretary General and to return them or hold them at the disposal of the launching authority, and by requiring the launching authority to pay the expenses of recovery.

Comment

The Treaty does not deal with the obligations of States in respect of accidents in space or private space objects and launches from the high seas. The UN publishes a record of notifications under the Treaty, there having been upwards of 80 to date.

Liability Convention

Again, this Treaty carries forward the provisions of the Outer Space Treaty on liability for damage caused by space objects. It creates two regimes, namely *absolute liability* (subject to gross negligence) for damage caused on the surface

of the Earth or to an aircraft in flight, and *fault liability* for damage caused elsewhere. There are further provisions for joint and several liability in respect of joint launches, time limits for claims, quantification of damages and dispute settlement. Damage caused by nationals of the launching State or foreign nationals participating in the launch is not covered by the Treaty.

Comment

The Treaty probably applies only to physical damage caused by a space object. A notable example of such damage occurred when in January 1978 *Cosmos 954* disintegrated and deposited radioactive debris on the Canadian soil. The claim presented by Canada for damages for the cleanup costs was settled in 1981 for the sum of 3 million Canadian dollars. By contrast, the Treaty probably does not apply to harmful radio interferences, but see below for the role of the International Telecommunications Union.

Registration Convention

The Registration Convention complements the Liability Convention by facilitating the identification of space objects for the purpose of claiming compensation for damage which they may cause. Any State which launches a space object, or from whose territory a space object is launched, must register the object in a national registry and notify the UN Secretary-General of particulars of the object, including its orbital parameters and of any designator applied to the object. All States, in particular those with space monitoring and tracking facilities, are obliged to respond to the greatest possible extent to a request by a State for assistance in the identification of an object which has caused damage to it or to any of its natural or juridical persons or which may be of a hazardous or deleterious nature. A provision is made for joint launching States to determine which one of them shall register the space object.

Comment

In the negotiations leading to this Treaty there were proposals that it should include a requirement for marking space objects in a manner which would assist in the identification of components. However, in the end the draftsmen decided that such a requirement would be impracticable, although mention was made of the possibility of considering technological developments which might assist, in

the context of any review of the Treaty. The register kept by the UN[13] includes particulars of satellites employed for military intelligence gathering, navigation and communications purposes.

Moon Treaty

This Treaty reaffirms and develops many of the provisions of the Outer Space Treaty. In particular, under Article 11.3:

"Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place, shall become the property of any State, international governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the Moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the Moon or any areas thereof".

Article 11.3 is however expressed to be subject to Article 11.5 which provides for the establishment of an international regime to govern the exploitation of the natural resources of the Moon. Article 7 declares that the main purposes of the international regime shall include an equitable sharing by all States parties in the benefits of those resources, special consideration being given to the interests and needs of the developing countries as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon.

Comment

The Moon Treaty has been ratified by only a few States, including none of the main space-faring nations, who it appears have preferred not to have their hands tied in the exploration of outer space, particularly in regard to "space mining" or other methods of exploiting natural resources.

(b) International Telecommunications Union (ITU)[14]

While the Registration Agreement establishes no machinery for coordinating the launch and operation of space objects, the ITU serves as a partial proxy for such machinery, since most such objects will need to use the radio spectrum, either for operational control or for the transmission of services, e.g. for mobile communications, navigation (including GNSS) or remote sensing. The ITU was

[13] http://www.unoosa.org/oosa/en/spaceobjectregister/index.html

[14] For the ITU Constitution and Convention, see the Collection of Basic Texts of the International Telecommunications Union, adopted by the Plenipotentiary Conference, 2011 Edition.

originally established in 1865 to standardize telegraphy equipment and set uniform operating rules but has since expanded to cover the whole ICT sector, and enjoys widespread adherence. It is divided into three sectors, of which the Radiocommunications Sector (ITU-R) is the most important for space-related activities. The Radio Regulations contain both standardization and allocation provisions. As regards allocation, they apply primarily a "first-come, first-served" procedure. The right to use frequency spectrum resources for a satellite network or system is acquired through:

- the advance submission by any participating administration to the Radiocommunication Bureau of a planned satellite network,
- coordination with other administrations whose existing or planned services night be affected, and (following the resolution of any difficulties)
- notification by the Bureau in a Master International Frequency Register.

However, a certain amount of frequency spectrum is set aside for future use by all countries, in particular those which are not in a position to make use of these resources.

Comment

The rapid escalation of space activities, including small satellites with a short development cycle and short lifetime, is increasing the pressure on the availability of the radio spectrum. The subject has been uppermost on the ITU's recent agenda, and so far solutions to potential congestion have been found in technological advances, prompted in large measure by the work of the Space Frequency Coordination Group, comprising all of the main space agencies and related national and international organizations. The ITU does not deal with launch activities or for example the in-orbit operations of space craft, for which the more general responsibilities of States, particularly under the Outer Space Treaty and the Registration Convention, remain applicable. But cooperation is also promoted by a number of other fora, including, for example, the International Committee on Global Navigation Systems.

(c) Space Debris Mitigation Guidelines

The provisions of the Outer Space Treaty governing assistance and cooperation extend in principle to a requirement upon States to reduce the risk of damage caused by space objects. However, more specific guidelines governing risks

resulting from space debris, i.e. non-functional objects and fragments, were first produced by the Inter-Agency Space Debris Coordination Committee (IADC) in 2002[15] and then by UNCOPOUS in 2007[16]. The UNCOPOUOS Guidelines, adopted by a General Assembly Resolution in 2008, contain the following elements:

- Space systems should be designed not to release debris during normal operations;
- Spacecraft and launch vehicle orbital stages should be designed to avoid failure modes which may lead to accidental break-ups;
- The probability of accidental collision with known objects during a system's launch phase and orbital lifetime should be estimated and limited;
- Intentional destruction of spacecraft or launch vehicles or other activities that generate long-lived debris should be avoided;
- To avoid accidental break-ups, all on-board sources of stored energy should be depleted or made safe when they are no longer required for mission operations or post-mission disposal;
- Spacecraft and launch vehicle orbital stages that have terminated their operational phases in orbits that pass through the low-Earth orbit region should be disposed of in orbits that avoid their long-term presence in that region; and
- Space craft and launch vehicles that have terminated their operational phases in orbits that pass through the geosynchronous Earth orbit region should be left in orbits that avoid their long-term interference with that region.

Comment

The IADC and UNCOPOUS guidelines are purposive in nature, without prescribing any very specific technical specifications. A number of (non-binding) technical specifications relating to debris mitigation have however been developed since 2011 by the International Organization for Standardization (ISO)[17], a voluntary organization comprising representatives from national standard setting authorities. However, while these specifications should help to reduce the growth of debris arising from launches following their inception, they do not address the

[15] Published by the United Nations Office for Outer Space Affairs (UNOOSA): http://www.unoosa.org/documents/pdf/spacelaw/sd/IADC-2002-01-IADC-Space_Debris-Guidelines-Revision1.pdf

[16] http://www.unoosa.org/pdf/publications/st_space_49E.pdf

[17] https://www.iso.org/standard/57239.html

problem of accumulation from previous launches. Considerable research has gone into methods of resolving this problem through active debris removal (ADR); for example, the European Space Agency through its Clean Space Initiative[18] is examining the required technology, including advanced image processing, complex guidance, navigation and control and innovative robotics to capture debris.

(d) Planetary Protection Policy

The environmental protection provisions of the Outer Space Treaty apply to reduce the risk of harmful contamination of both the space environment (outward contamination) and the Earth environment (backward contamination). While the scope of these provisions may extend more widely, the primary concern has been on biological contamination. The concern has been addressed by the Committee on Space Research (COSPAR), a part of the International Council for Science, which is a non-governmental body comprising national scientific bodies and international scientific unions. In 2002, the Committee, which is also a consultative body to UNCOPUOS, adopted a Planetary Protection Policy[19]. This has since been updated and includes a set of Principles and Guidelines for Human Missions to the Mars. The Policy distinguishes between five categories of target body and mission type combinations and proposes different protection requirements for each, depending upon the perceived risk of contamination and ranging from simple documentation to the terminal sterilization of entire flight systems.

Comment

The Planetary Protection Policy was recently brought into focus when the *Cassini* spacecraft was de-orbited into the Saturn's atmosphere to prevent an accidental crash that could contaminate one of the Saturn's moons where native life may exist or evolve. Proposals have been made to extend the policy to cover non-biological risks.

(e) Remote Sensing

The provisions of the Outer Space Treaty relating to environmental protection have been enhanced by the Resolution on Remote Sensing Principles adopted by the UN General Assembly in 1986[20]. These principles encourage:

[18] http://www.esa.int/Our_Activities/Operations/Space_Debris/Active_debris_removal
[19] https://cosparhq.cnes.fr/sites/default/files/pppolicydecember_2017.pdf
[20] http://www.un.org/documents/ga/res/41/a41r065.htm

- the sharing of benefits of remote sensing among States;
- the conduct of remote sensing activities in a manner that is not detrimental to the rights and interests of the sensed State;
- the sharing of data collection and storage facilities; and
- the disclosure of information that may help avert harm to the environment.

Comment

The Remote Sensing Principles are complemented by the International Disaster Charter[21] established between space agencies and other operators, which provides a mechanism for the supply of relevant data and other services to States which are threatened by natural or technological disasters, and creates a unified system for the acquisition and distribution of data.

(f) De-militarization

Before 1967, there had been considerable international efforts to prevent the use of outer space for military purposes, including:

- the Partial Test Ban Treaty (1963)[22], which prohibited States from carrying our nuclear explosions in the atmosphere, under water or in outer space; and
- UN General Assembly Resolution 1884 (XVIII) which called on States to refrain from placing in the orbit around the Earth any objects carrying nuclear weapons or other weapons of mass destruction, installing such weapons on celestial bodies or stationing such objects in outer space.

Resolution 1884 was effectively incorporated in the de-militarization provisions of the Outer Space Treaty. Since then, a series of further de-weaponization proposals discussed within a committee of the Conference on Disarmament called the Committee on Prevention of an Arms Race in Outer Space (PAROS). The most recent of these was a Russian/Chinese Joint Proposal in 2014 for a Treaty on Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects[23]. These proposals have typically contained a prohibition on the testing, deployment or use in outer space of any weapons against objects in outer space or on the Earth, with an exception for the inherent right of States to individual or collective self-defense

[21] https://disasterscharter.org/web/guest/home;jsessionid=10D01E89E78C83096F4F551A8BD26F6B.jvm1

[22] 480 UNTS 43

[23] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/050/66/PDF/G1405066.pdf?OpenElement

under Article 51 of the Charter of the UN Charter. None of these proposals has yet gained formal acceptance due to a variety of objections by the USA and others, such as the absence of a definition of outer space and space weapons and the lack of an effective verification system. But there has been better progress towards non-binding instruments, in particular the Hague Code of Conduct against the Proliferation of Ballistic Missiles (2002)[24] under which subscribing States commit, *inter alia*, to the pre-notification of ballistic missiles and space launch vehicles, and annual declarations of their policies. This Code has been signed by 138 countries up to September 2017, although, for example, China has not yet signed it.

Other proposals for instruments of a non-binding character include an EU proposal for an international Space Code of Conduct[25] which contains a number of transparency measures of a confidence building nature, including notification of scheduled maneuvers, collision risks and break-ups, exchange of information on national space policies and familiarization visits to space launch facilities and consultation mechanisms. And a Russian initiative which encourages States, especially space-faring nations, not to be the first to place weapons into space has been embodied in the UN General Assembly Resolution 69/32[26], although with the notable dissent of the US based on objections similar to their objections to the Russian/Chinese proposal mentioned above.

Comment

Continuing distrust between the major powers seems likely to prevent any further treaty-based obligations being introduced in the near future to secure against military uses of outer space. If any allowance is made for self-defense, that would seem to open a significant element of uncertainty in terms of the scope of that expression (pre-emptive strikes, etc). Nevertheless, there is now a considerable volume of soft law pertaining to the subject which will create political pressure on any State seeking to deploy weapons in space and may even be treated as having created elements of a customary law precluding such an action.

[24] https://www.hcoc.at/?tab=background_documents&page=text_of_the_hcoc

[25] https://eeas.europa.eu/headquarters/headquarters-homepage/14715/eu-proposal-international-space-code-conduct-draft_en

[26] https://gafc-vote.un.org/UNODA/vote.nsf/511260f3bf6ae9c005256705006e0a5b/7bf7b15e993f988185257dc10070d788? OpenDocument

(g) Bilateral and Sectoral Treaties

In addition to the multilateral treaties mentioned above, there is a considerable number of treaties and arrangements relating to outer space which are bilateral or regional in nature or restricted to a limited number of signatories, including:

- a number of bilateral treaties entered into by the USA relating to compatibility and interoperability between the GPS and other global navigation systems;
- the Convention establishing the European Space Agency[27]; and
- the 1998 Agreement between the USA, the Russian Federation and other Governments concerning Cooperation on the International Space Station (ISS)[28].

(2) National Laws

As indicated above, international law only governs the relations between States. Since activities in outer space were initially conducted only by executive authorities of States, this did not give rise to much difficulty, since the acts or omissions of those authorities would result in the direct liability of the relevant State, and the responsibilities of private sector participants in the construction, launch or operation of space objects could be secured by contract. However, the growth of private sector initiatives has been deemed to require specific legislation in an increasing number of countries, particularly to ensure certainty and transparency and to enable States' obligations under the UN treaties mentioned above to be enforced more effectively against private sector organizations[29]. The need for specific legislation is reinforced by States' obligations under the Outer Space Treaty to ensure that activities of non-governmental entities are subject to authorization and continuing supervision, and to ensure that their obligations under the Liability and Registration Conventions are met. Typically, the legislation will require that any person wishing to launch or operate a space object must obtain a license to do so from the responsible space agency[30] in the country from whose territory the object is to be launched or the territory of which the operator is a national, or both, and the applicant for a license will need to give prescribed particulars, including particulars relating to:

- the nature of the space activity the applicant is proposing to carry out;

[27] 1297 UNTS 161

[28] https://www.state.gov/documents/organization/107683.pdf

[29] See http://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html

[30] The space agency will typically need to consult with other authorities on several aspects of the application, e.g. defence and environmental implications.

- the financial standing of participants and mission costs;
- insurance arrangements: different States set different levels of required cover and generally guarantee protection above that level on an unlimited basis or up to a specified amount;
- technical details of launch: the launch services contract, the structural, propulsion, electrical and avionic system of any launch vehicle and ground system specification;
- technical details of payload: name and class, physical dimensions and weight, orbital parameters;
- end life disposal arrangements;
- risk management and emergency procedures;
- radio frequencies and powers;
- safety, public health and environmental standards (which may include relevant ISO standards);
- political and national security considerations.

Compliance with the license conditions is typically ensured by including monitoring and intervention rights by relevant authorities, and criminal liability for any breach of conditions. Exemptions from licensing requirements may be granted in certain cases, for example, if national operators engage foreign launch services to be carried out on a foreign territory, or means and facilities falling under the jurisdiction of a foreign State, they may be exempted from certain requirements if the national and international commitments of the foreign State are regarded as adequate to cover those requirements.

Comment

The licensing procedures mentioned generally assume that private relationships between participants in a space venture will be governed by the general law applicable in the jurisdiction of the parties. For example, the enforceability of any insurance contract backing the venture will be dependent on the law applicable to such contracts, such as its rule governing the impact of non-disclosure or breach of warranty on the validity of the contract. But the terms of the contract will be affected by the licensing requirements, especially those relating to the scope and minimum level of insurance. These vary from State to State, some States requiring insurance to cover only the launch operator and not the in-space operator, others requiring it to cover all operators throughout the life of the

project. It is usual for the liabilities of different contractors to be channeled by inter-party waivers and waivers of subrogation towards a single insurer or syndicate. Similarly, the general laws of States will apply to copyright, patents and other intellectual property rights in property arising in the course of space activities. Such rights are usually accorded protection in the territory where they are registered. But the legislation of some States has made clear that inventions made aboard a spacecraft can be registered in the territory of the State with which the spacecraft has been registered. This principle is recognized in the ISS agreement in relation to activities occurring on a flight element entered on a State party's registry. That agreement also recognizes the right of participating States to exercise criminal jurisdiction over personnel who are their citizens.

Conclusion

This summary will have shown that there is a diverse and increasing body of law and practice governing activities in outer space, at both international and national level. Although the Outer Space Treaty remains the backbone of this law, continuing discussion of the principles which it lays down has led to their progressive refinement and their development into more operable rules.

ENERGY CONSUMPTION AS THE OBJECT OF ENERGY RELATIONS

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Abstract
If the subject of economic relations of energy supply is not the resource itself as a material form, but the energy it contains, measured, as a rule, in special units of reference fuel, then any relations of energy supply, whether they are the relations built on the model of supply or the relations built on the model of delivery, extend to the sphere of consumption in one form or another.
Energy supply is defined not only by extension of relations in the sphere of production (supply) to the sphere of energy consumption, but also by the reverse process - participation of energy consuming entities in the production of energy and, hence, extension of competence of consuming entities to the sphere of production (supply).
The economic and legal process of energy supply is, in fact, cooperation, joint activity of energy producing and energy consuming entities.

Keywords: energy; energy resources; the subject of economic relations of energy supply; energy consumption; cooperation of the producer and consumer of energy resources.

The backbone factor of division of public material production into major activities is increasingly becoming not only and not so much the specificity of the used production means and homogeneity of technological processes, as the specificity of the end product of activity of a certain nation-wide integrated production unit aimed at satisfaction of the target material demands of production[1]. A similar trend is also discernible in the fuel and energy complex where it is underpinned by a unity of an end purpose of the FEC industries which consists of supplying consumers with energy resources possessing an overall use value – an attribute of an energy carrier and intersubstitutability. The energy market is formed in the process of functioning of the country's fuel and energy complex as a system of interconnected energy

[1] *See*: Unified National Economic Complex and its Improvement in the Developed Socialist Society. L., 1984, pp.11-12.

industries, enterprises and organizations which are based on the unity of functions performed by them related to prospecting, exploration, mining (production), processing, conversion, storage, transportation, distribution and consumption of energy carriers and energy resources with the aim to cover the demands of the country's population and economy for energy resources. FEC is the priority industry of the national economy, an essential element of the economy, an economic integrator of the country[2].

Being the product of electric power industry, nuclear and fuel industry, which includes oil, gas, shale and peat industries, energy resources are nothing else but a material carrier of energy converted in the fuel and energy balances drawn up in the process of activity planning of the FEC entities into a reference fuel as a unit of measurement of the quantity of energy in a specific energy source[3]. It is the energy resources which are the carriers of different types of energy which determine the specificity of public relations which subject-matter is energy[4].

Economic relations pertaining to energy supply take two main forms – supply through connected network and deliveries. The fact that the sphere of consumption is covered by economic relations between a supplying organization and a recipient of energy resources is generally recognized in the economic literature; a different matter is that it concerns only energy supply through connected network (electric grids, gas mains and pipelines).

With respect to electric power, it was mentioned in the literature that coincidence in time of the processes of energy generation and consumption is the key technological peculiarity of electric power, and it is attributable to the impossibility of a large scale commercial accumulation of energy in conjunction with a high speed of transport of energy carriers, the mode of energy generation is definitely determined by the mode of its consumption. In practice, this means that in case of chronological irregularity

[2] *See*: P.G. Lakhno, Energy Law of the Russian Federation: Formation and Development. - M.: Publishing House of the Moscow University, 2014, pp.160-161.

[3] Reference fuel is the unit which is accepted in technical and economic calculations and regulated in the standards and regulations which serves for comparison of a calorific value of different types of organic fuel. Both in national and international practice it is accepted that the calorific value of 1 kg of reference fuel is equal to 7,000 kcal/kg. One tonne of reference fuel/oil equivalent (TOE) – conversion of genuine fuel into oil equivalent is made according to the calorific equivalent by multiplication of the amount of genuine fuel by a ratio of the lowest calorific value of this kind of fuel to the calorific value of 1 kg of the reference fuel, i.e. 7,000 kcal/kg according to a special formula. *See* https://ru.wikipedia.org/wiki/.

[4] *See*: O.A. Gorodov, Introduction to the Energy Law: Study guide. M.: Prospekt, 2012, pp.7, 11.

of power consumption, the demand for it should be covered at each certain moment of time in strict accordance with the load schedule of a specific consumer. Due to inseparability of electric power production and consumption, its quality is determined not only by the producer (its generation, transformation, transmission and distribution equipment), but by the consumer as well, performance figures of its energy receiving equipment[5].

Along with power industry, which includes electric power industry, as well as supply with heat power in the form of hot water and steam, there is one more subsystem in the general structure of the fuel and energy complex – gas supply which is also characterized by a rigid interrelation of the processes of production, transport and consumption. Such systems are termed as physical and technical systems because physically their couplings represent hydraulic circuits[6]. Direct relationship between power and gas generation and consumption as well as critical influence of consumption process on the process of generation of the mentioned products is primarily determined by the missing stage of accumulation of products between these technical and technological processes. In economic relations of the parties the latter circumstance acts as an actual absence of the moment when the commodity – electric, heat power and gas – is on the market, in circulation, as a result of which the time of circulation in economic power and gas supply relations is equal to zero. Thus, in power and gas supply the stage of power circulation coincides in time with the stage of its generation which determines direct impact and critical influence of the mode of energy consumption upon the mode of its generation[7].

At the same time, as we have already shown in our previous publications[8], economic relations pertaining to supply through connected network with other energy resources, in particular, oil and petroleum products, are often built under the above-mentioned model, too. In contrast to power and gas supply relations, in a

[5] *See*: L.D. Gitelman, B.E. Ratnikov, Energy Business: Study Guide. M.: Delo, 2006, pp.47-49.

[6] *See*: A.A. Makarov, L.A. Melentyev, Methods of Research and Optimization of Power Utilities. Novosibirsk: Nauka SO, 1973, p.6; I.Ya. Furman, The Economics of Main Gas Transportation, M.: Nedra, 1978, p.9.

[7] *See*: A.Ya. Avrukh, The Problems of Prime Cost and Price Formation in Power Industry. - M.: Energiya, 1977, p.61; L.A. Melentyev, Optimization of Development and Management of Large Energy Systems. - M.: Vysshaya Shkola, 1976, p.6.

[8] *See* in more detail: A.M. Shafir, Model Contract for Power Supply through Connected Network and Specificity of Economic Relations Mediated by it. – In the book: State and Contractual Regulation of Entrepreneurial Activity: multi-authored monograph / under academic supervision of Professor V.S. Belykh. – Moscow: Prospekt, 2015, p.205 – 236 p.; A.M. Shafir, Energy Resource Market and its Legal Regulation. Monograph. M.: Prospekt, 2018. – 109 p.

situation of supply with other energy resources through connected network there is no aforementioned rigid interconnection of the processes of resource generation, transport and consumption, since the links between elements of the system of supply through connected network do not represent in physical terms hydraulic circuits. Say, the relations pertaining to supply with oil and petroleum products are structured in such a way that the availability of oil reserves on-site, for consumers, on a number of pumping stations is a mandatory prerequisite for normal operation of the whole system of oil production, transport and processing. In these cases consumption has no direct influence on the activity of oil supplying organizations due to the presence of a rather long-lasting circulation stage in economic relations pertaining to oil supply which can be either extended or reduced depending upon specific conditions of production and consumption[9]. Here, oil supply relations are, respectively, the relations pertaining to delivery, since they are limited by the stage of realization of products against payment and do not extend to relations during resources consumption.

If, however, the relations between an oil supplying organization and its consumers are built in such a way that oil and petroleum products are burnt by the consumer directly after they have been transferred through connected network and as a result irregularity of resources consumption is compensated not by a respective increase or decrease of the volume of consumer's reservoirs of oil and petroleum products storage but by the activity of a supplying organization related to regulation of the process of consumption of such resources, there are then economic relations of the parties built under the model of energy supply. As is the case with energy and gas supply, a specific feature of such relations pertaining to oil supply through connected network is direct relationship and interdependence of the activity of a supplying organization and a consumer and the resulting extension of economic relations of the parties to the stage of consumption of oil and petroleum products.

Thus, two types of economic relations are formed in the process of energy supply – the relations built under the model of energy supply (in case of transfer of energy resources through connected network) and the relations of delivery. Whereas in economic relations of delivery "a contract of delivery as a deal between a buyer and a seller represents an operation pertaining to the market, circulation sphere" and has

[9] *See*: S.S. Ushakov, T.M. Borisenko, Economics of Fuel and Energy Transport. - M.: Energiya, 1980, p. 181; M.Ya. Ginsburg, Operative Control and Reliability of Supply of National Economy with Petroleum Products. – M.: Nedra, 1980, p.24.

nothing to do with consumption which starts "only when the act of trade has been completed and finalized"[10], then in case of power and gas supply the process of consumption becomes an inherent part of the sphere of circulation, of "the act of trade" in products, securing and ultimately making "the act of trade" itself possible. It is emphasized in the legal literature that if the legal relations are concerned which object is not the energy contained therein but the resources themselves in their tangible form, their transfer to the buyer (consumer) through connected network is the only one of the possible ways to discharge obligations[11]. At the same time, supply with energy resources as energy carriers through connected network is characterized by the fact that energy is in constant motion and has no time to become a thing (*res*), and the process of consumption of energy resources by the recipient can be described as the right to use special properties of the substance[12].

Extension of circulation to the sphere of consumption of energy resources as energy carriers leads to the fact that consumption itself becomes an "act of trade" and this is the main peculiar feature of economic relations and the relevant legal relations built under the model of energy supply. The inferred conclusion is proved by various facts of ever wider application of the mechanisms of legal regulation of consumer's activity related to limitation of its rights to use the resources received from a supplying organization.

In the German legislation there even appeared the concept of "active consumption control" which is aimed at securing for a network operator or other entities authorized to control the network a definite degree of discretion within which the consumption of energy resources by a recipient can be reduced in case of impending excess load[13]. The legislator proceeds from the insufficiency for resource recipients of incentives alone to re-distribute their consumption, therefore it uses the instruments which enable active influence on the control of consumers' devices suspended by a supplying organization, thus decreasing or increasing energy consumption in the interests of the entire energy system.

The first provisions about active consumption control in Germany appeared in the Energy Law in August 2011. The purpose of this novel was to grant to network

[10] *See*: K. Marks, F. Engels, Literary Works, Volume 25, part 1, p.285: Volume 23, p.598.

[11] *See*: V.V. Vitryanskiy, A Sale Contract and its Separate Types. M.: Yuridicheskaya Literatura, 1999, pp.157-158.

[12] *See*: P.G. Lakhno, Energy Law of the Russian Federation: Formation and Development. pp.94-95

[13] *See*: Energy Law and Energy Efficiency in Germany and Russia / edited by B. Holznagel, L.V. Sannikova. M.: Infotropik Media. 2013. pp.90-93.

operators a possibility to reduce energy consumption by end users in the periods of high network load. To this end distribution network operators must calculate the cost of consumed energy at lower tariffs with energy suppliers and its end users with whom they entered into contracts for network utilization in exchange for the possibility to control certain consumers' equipment with a view to reduce network load. As the owner of the equipment the Law considers a supplier or an end user of energy who entered into a contract for network utilization with a distribution network operator. The consumer equipment is controlled directly by a network operator or indirectly by third parties on the instruction of a cellular network operator.

The mentioned provisions of the Law apply to the so-called "interruptible" user facilities, e.g. heat pumps, accumulators, electric vehicles. Common for such facilities is that they do not require uninterruptible operation or charging. An indispensable pre-requisite for such equipment is a separate metering point of the consumed energy for its due accounting. "Interruptible facilities" can be temporarily shut off or the level of consumed energy can be reduced, as a result their potential can be involved for reduction of the network load. On the other hand, many interruptible user electricity-generating facilities can be purposefully connected to the network in such time intervals when, e.g. on windy days, there is an excess of electric power, for instance, transfer of energy to refrigerating chambers for the purpose of regulation far below the required minus 18 degrees. If there is no more excess of electric power, refrigeration can be switched off for a longer period of time which contributes to the network load reduction. If an operator of an interruptible user facility provides to an operator of the distribution network the possibility to control it, the latter is obliged in his turn to reduce the energy charge[14].

Analyzing the above-mentioned practice of active consumption control, in other words, prescriptive intervention of a supplying organization in the process of energy utilization by a consumer, it should be noted that the stage (moment) of energy storage does not have a separate meaning here, it has an auxiliary, supporting nature for a *per se* continuous process of supply with resources of all consumers of this energy supplying organization. An "interruptible user facility" is by its technical and economic nature a storage tank of a power supplying organization which uses it as may be necessary.

[14] *See*: ibid.

The aforementioned experience of the German legislator was adopted by the Russian legislators as well. Ruling of the RF Government No.699 of 20 July 2016 "On Introducing Amendments to the Rules of Electrical Energy and Power Wholesale Market"[15] introduced a mechanism of "price-dependent consumption" of electrical energy (power) in Russia. According to this Law, participants of the wholesale market of electrical energy (power) may file applications for participation in the competitive capacity offtake (CCO) with indication of the planned volume of consumption reduction. Upon selection of the application for CCO, they assume obligations to reduce consumption with special requirements to secure readiness of the power receiving equipment for such reduction. As a result of performance of obligations assumed by a participant of the wholesale market, the volume of power purchase formed at month-end in respect of such a participant is reduced by the volume of price-dependent reduction of consumption which was taken into account during the CCO. The established mechanism enables active participation of consumers of the wholesale market of electrical energy in regulation of demand for electrical energy and power and has been developed with a view to increase the level of energy efficiency of the wholesale market of electrical energy.

An administrative and legal "component" of state intervention into the processes of energy supply, including the stage of consumption of energy resources, can be also traced in Ruling of the RF Government No.701 of 20 July 2016 "On Introducing Amendments to the Regulation on Federal State Energy Supervision"[16], according to which consumers of electrical energy are included into a range of persons subject to federal state energy supervision.

The above-mentioned Russian and foreign practice of legislative regulation proves our conclusion that *in the energy supply relations storage is just an element of a continuous process of generation – supply – consumption of energy contained in energy resources,* which is ultimately dependent on the fact that in the energy supply relations the time of circulation is equal to zero. This is exactly the root of the main specifics of the relations concerned, storage here is only a stage, an interim result of the technical and technological process of supply – consumption, but not its ultimate economic and legal goal. This goal is the energy resource as the subject and object of

[15] *See*: Collection of Legislation of the RF, 1 August 2016, No.31, Art.5017.
[16] Collection of Legislation of the RF, 1 August 2016, No.31, Art.5019.

consumption, it is not without reason that both in the Russian and foreign literature the contracts in question are frequently called contracts of consumption[17].

The foregoing affords a conclusion that "active control of consumption" may take place not only during supply of energy resources through connected network but within certain limits during their delivery, too. L.D. Gitelman and B.E. Ratnikov noted that in Europe people with wind mills and solar cell panels discharge the excess of energy into a common network, thus turning from energy consumers into generating agents, so energy is generated jointly, according to torrent principles[18]. In Germany, accumulator plants used by consumers can be, on the one hand, activated for storage of excess surplus of energy, on the other hand, they give back the stored energy in the periods of high load in order to avoid energy shortage[19] and, thus, also participate in generation of energy which is *per se* a joint process with the supplying organization.

Hence, *the economic and legal process of energy supply is per se a cooperation, a joint activity of energy generating and consuming entities*. The fuel and energy balance is a legal form of planning and organizing such cooperation by way of identification of the uniform needs of supplying organizations and consumers and elaboration of decisions common for them. And a legal form of implementation of such cooperation is a contractual obligation to supply energy resources which encompasses the stage of consumption, irrelevant of whether such supply is made "through" (contract of energy supply through connected network) or "outside" (delivery contract) the network. Delineation of relations into economic and legal takes place here according to a criterion of what is delivered within such relations – energy contained in the resource (work of the resource), or the resource itself.

In other words, *supply with energy resources is characterized not only by extension of the sphere of generation to the sphere of energy consumption but also by a reverse process – participation of consumption entities in energy generation, and, therefore, extension of the authorities of consumption entities to the generation sphere*. The sphere of circulation in energy supply extends to the sphere of consumption both in the form of authorities of energy supplying organizations to operate user facilities

[17] In economic and legal terms this is still not "pure consumption" but "transmission-consumption" as a single process of energy supply passing two stages in its evolution. (*See* in more detail: A. Shafir, The System and Subject of Contracts for Power Supply through Connected Network "Russian Law: Theory and Practice", No.2, 2015. pp.47-59.)

[18] *See*: L.D. Gitelmann, B.E. Ratnikov, Energy Business, p.49

[19] *See*: Energy Law and Energy Efficiency in Germany and Russia, pp.90-93.

and control their use of energy resources and in the form of participation of consumers in generation of energy and, thus, in energy supply.

It should be emphasized that in this case the consumer does not turn into a supplying organization, since its actions here are no more than an element of a general process of supply with energy of all entities of the energy supplying organization, including the consumer itself. *The consumer does not supply with energy other entities of consumption; it just structures its sphere of consumption in such a way that its result becomes not only consumption but generation of energy resources as well.* Even remuneration is received by the consumer in this case not as payment for the energy supplied but as discounts on the tariffs for the energy resources supplied to it by the supplying organization[20].

The modern energy industry increasingly appears as the relations of voluntary (with the use of civil methods of regulation) or mandatory (with the use of administrative methods of regulation) limitation of consumers' rights in the sphere of consumption of the energy resources purchased by them. *A consumer in the energy industry sells (private law mechanism) or transfers (public law mechanism) its rights in the sphere of consumption* in exchange for discounts and other preferences or even without such for socially useful goals and interests set by the state. Consumption of energy resources is essentially a market; there is no non-market/extra-market consumption in the modern energy industry. In contrast to other relations, the relations of energy consumption are the regulated market or administrative mechanisms according to the nature of such relations.

The link between generation and transmission of energy resources with their consumption is most tellingly demonstrated in its classical form during supply of a consumer with energy resources through connected network which, as mentioned above, determines a direct interrelation and interdependence of the activity of a supplying organization and a consumer as well as the extension of their relations to the sphere of consumption. However, intervention of a recipient of energy resources into the consumption sphere can as well be determined by other reasons and factors – physical, technical and technological, economic and even legal. Out of these factors the key ones are physical properties of the transferred resource as the energy carrier. Among economic reasons is the need to save energy resources due to their exhaustibility. The technical and technological reason is substitutability of energy resources in the

[20] *See*: L.D. Gitelman, B.E. Ratnikov, Energy Business, pp.47-49.

process of resource use. Among legal reasons can be named the necessity to regulate the sphere of consumption of energy resources both by private and public law methods in connection with the extensive systems of centralized supply with resources within the nationwide unified systems, in particular, of energy, gas and oil supply, and extension of legal relations of the parties to the sphere of consumption of energy resources which determines the necessity of special regulation of consumer's activity.

Based on the foregoing, any type of economic relations pertaining to energy supply which subject-matter is transmission to the user of not a resource as such in its tangible physical form but only of the energy contained therein – the work of a resource - supposes to a certain degree extension of relations to the sphere of their consumption. *Therefore, energy supply relations cover the sphere of consumption of energy resources as well, though the volume and content of such coverage does not coincide with the nature and content of coverage of the consumption sphere in economic relations pertaining to energy supply through connected network.*

In economic and legal literature many authors qualify energy supply relations as the relations of energy utilization, energy consumption. The conclusion made by P.M. Lakhno in respect of electrical energy which, as he wrote, does not circulate either physically or legally, can be applied to the circulation of energy resources as energy carriers. Only the right to energy in circulation is transferred as a result of gratuitous or non-gratuitous agreements between counterparties. Moreover, the right of a special type – not the ownership right but the right of consumption in its own or another's interest of that quantity and quality which correspond to the amount of money paid for consumption or the value of the property transferred in exchange. It is impossible to purchase and use energy for purposes other than consumption, it cannot be legally processed, made the tool of wealth accumulation. Such a category of civil law as the ownership right is not applicable to energy. That what could be considered the ownership in energy does not have any characteristic of property rights. Therefore, even in the case when energy is purchased not with a view of its consumption by the buyer personally, but with a view of its re-sale, it is more correct to speak of the purchase and subsequent assignment for fee of the right to consume energy, i.e. again about circulation of the rights to energy[21].

The conclusions we have arrived at in this article can be summarized as follows: a vascular system of production within which the energy could only exist and be

[21] P.G. Lakhno, Energy, Energy Industry and Law //Energy law, 2006, No.1.

generated as a user value became a source, a forefather of new social and economic relations pertaining to energy supply through connected network which are characterized by interrelation and interdependence of production and consumption of energy resources and the resulting extension of economic and legal relations to the consumption sphere[22]. But *having arisen, these relations "had drawn" into their orbit the adjacent relations of supply with all other resources through connected network if such relations were built under the scheme of "transmission plus consumption minus circulation".* Economic and legal relations of the parties can be built as interrelations pertaining to resource transmission – receipt in a tangible form (supply relations) and as interrelations pertaining to resource transmission – consumption. In the latter case there are obligations to supply a consumer with the energy contained in the resource[23].

[22] A vascular system of production is a system of technical facilities where the products of chemical, physical and other technological processes (electrical energy, in particular) are produced, stored, transported and consumed, as well as the products which can be produced, stored, transported and consumed in industrial-scale volumes only in the vascular system of production (gas, heat energy in the form of water and steam). A peculiarity of the vascular system of production is that by virtue of a limited storage capability of electrical, heat power and gas at this stage of technological development, production and technical ties between a producer and consumer are structured in such a way as not to provide for a stage of product accumulation and warehousing (For more details *see*: A.M. Shafir, A Model Contract for Power Supply through Connected Network and Specificity of Economic Relations Mediated by it. – In the book: State and Contractual Regulation of Entrepreneurial Activity: multi-authored monograph / under academic supervision of Professor V.S. Belykh. – Moscow: Prospekt, 2015, pp.205-236.

[23] Hence, delivery of coal in tonnes is the purchase and sale, energy supply in units of reference fuel is the obligation to supply energy.

SOVIET MEDIEVAL JUSTICE

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Abstract
The coming to power of the Bolsheviks was defined by many intellectuals as the triumph of the new Middle Ages. However, previous studies considered only the degradation of the state. Nevertheless, simultaneously with the degradation of the state, the degradation of law also took place. The authors of the article use this paradigm and the comparative-historical method of investigation. The aim of the work is to distinguish elements of medieval law in Soviet law.
The article examines the development of Soviet law, and reveals the essence of Stalin's medieval justice. The authors come to the following conclusions. In the conditions of degradation of public and state institutions, the degradation of law and the archaization of justice became inevitable. Among the main medieval norms of Soviet law, the authors singled out: vague wording of the law, the class nature of law, the simplification of justice, the refusal of appeal, the restoration of medieval institutions of law (for example, mutual bail), the dominance of criminal law, the use of torture and others.

Keywords: Soviet law, Soviet justice, the degradation of Soviet law, Stalinist justice.

The problem of determining the consequences of the events of 1917 for more than a century torments many researchers in Russia and around the world. What was it? According to different and unrelated scientists, the events of the Third Russian Revolution were the victory of the traditional society over the bourgeois (civil in modern terminology). Warnings about the "premature" (if ever "planned") socialist revolution were expressed by many Marxists, including F. Engels[1] and G. Plekhanov[2].

[1] K. Marx, F.O. Engels, O sotsial'nom voprose v Rossii// Sobranie sochinenij [On the Social Issue in Russia// Collections of Works]. M., 1961, V.18, pp.537-548.

[2] G.V. Plekhanov, God na rodine. Polnoe sobranie statej i rechej 1917-1918gg. [A Year at the Motherland. Full Collection of Articles and Speeches in 1917-1918], Paris, J. Povolozky & Cie, 1921, V. 1, 247 p.

N. Berdyaev after 1917 conceptually formulated the problem of the "new Middle Ages". It should be noted that the great philosopher interpreted this idea somewhat differently than the authors of this article and other researchers have expressed[3].

A large number of scholars have discussed the problem of degradation of the Russian society in the post-revolutionary Russia. But the problem of degradation of justice remained on the periphery of scientific interest. In our view, it is necessary to disclose this aspect of degradation. The authors of this article offer several assumptions and ideas. These ideas are of a debatable nature. This article is a reflection, a designation of a scientific problem. Its main task is to identify the most striking phenomena of a medieval character in Soviet law. The tendency to archaize justice was only one of the tendencies of the Soviet legal reality. We must also bear in mind that many of the phenomena of Soviet justice had no analogues in the Russian history.

If we proceed from the fact that in February 1917 the revolution took place, then in October 1917 the counter-revolution took place, the triumph of archaic principles. However, not quite traditional, rather marginalized-traditional. It was a return to the roots. As a disease, when the diseased turns into a simple being, living by reactions and focused solely on its pain. The way down was not an exclusively Russian phenomenon. The same could be observed in many other long revolutions. Usually a wave of traditionalist semi-congregations-half-lumpens, who either directly called for a return to a happy childhood, or clothed the dreams of this return to a beautiful shell about some ideal society, was rising. For example, true levelers or diggers (diggers) in England in the mid-17th century; "Frantic" in France in 1789-1794, etc. In some cases, these movements for a time achieved success.

We can argue that archaization was inherent in all totalitarian regimes. After the murder of the elite - the middle class, the most primitive social aspirations revived. In some cases, totalitarian regimes directly appealed to a happy archaic "right" society (Nazism, Islamism). Archaization of power was manifested, for example, in the domination of violence (the main instrument of government), in collective farms and forced communes, and so on.

How could the degradation of society affect the degradation of law and justice? Directly. Degradation was inevitable. Conditions for degradation were: the regression of moral norms after the Civil War and the dominance of the idea of violence in society, the party policy to simplify the law, a small number of qualified lawyers. The

[3] N.A. Berdyaev, Istoki i smysl russkogo kommunizma [Origins and Essence of the Russian Communism] M.: Nauka, 1990, 220 p.

concept of intuitive-proletarian law in the presentation of M. Reisner after the socialist revolution of 1917 became the ideology of the degradation of law[4]. Many philistines and Bolsheviks understood revolutionary legal consciousness as abolition of legal norms and the domination of a kind of "popular" consciousness, supposedly correctly understood the problems of our life and able to make decisions "in accordance with conscience". But under the "people's consciousness" everyone understood what he wanted. Peasants - the rule of patriarchal norms, lumpen - revenge "old classes", the Bolsheviks - the class interests of the proletariat.

The cancellation of the right and the liquidation of judicial authorities in accordance with court decisions No.1, 2 and 3 meant a direct celebration of pre-written, primitive consciousness. The application of revolutionary legal conscience to illiterate marginal judges could only result in a bacchanalia of verdicts based on some primitive ideas about the right in the style of the Russian Truth.

First of all, in the ancient period of our history there was no ownership of land and, naturally, "society" was pleased to accept the liquidation of landed property in Soviet Russia. The transfer of movable property in Kievan Rus was limited. Surplus of property (in inheritance law) either passed to the state, or was destroyed. The same happened in Soviet Russia.

An important feature was the class nature of the Soviet laws of 1918-1936. The advantage of origin from the proletariat was emphasized. According to S.A. Krasil'nikova there was a re-feudalization of society[5]. First of all, the birth of the "new nobility" - the nomenclature - took place. In justice, class was manifested in the implementation of the class approach in the selection of lay judges. There were class courts: party courts for party members, Soviet for state employees, separate tribunals for security officers, workers for workers, etc. They were outside the Soviet legal system.

In comparison with the universal suffrage of 1917, there was a return to the class-based electoral system of the 19th century. Some categories of the population were deprived of the right to vote, others (peasants) were limited. We see class, curia, and discriminatory restrictions. Deprivation of political rights resembled defamation

[4] M.A. Reisner, Pravo: Nashe pravo; Chuzhoe pravo; Obshchee pravo [Law: Our Law. Their Law. Common Law]. M.: Gosizdat, 1925, 276 p.

[5] S.A Krasil'nikov, Na izlomakh sotsial'noj struktury: Marginaly v poslerevoliutsionnom rossijskom obshchestve (1917 – konets 1930-kh) [At the Changing Points of the Social Structure: Marginals in the Post-Revolutionary Russian Society (1917– late 1930s). Novosibirsk: NSU, 1998, 84 p.

(declaring a scoundrel in the Russian law of the XVIII century.) Under the guiding principles of the criminal law of the RSFSR in 1919, the announcement was outlawed, in the Criminal Codes of 1922 and 1926 deprivation of political and civil rights. At first glance, this measure does not look like "medieval". The limitations of political and civil rights are widely practiced in the modern world. However, at that time the consciousness of the first Soviet citizens filled them with medieval content. The deportees were outlaws. They were not only deprived of political rights. These people could not live in any locality, be assessors and defenders in court, guardians, guarantors, did not receive pensions and benefits, were not members of trade unions, they did not receive food cards, their children could not attend high school and higher education institutions (universities, institutes), they were taxed with additional taxes, used for forced labor, dismissed from work. This meant additional sanctions, many times exceeding the sanctions of Article 31 of the Criminal Code of the RSFSR of 1926. It was possible to use them as an object for "draining away" people's irritation. In the society, the idea was spread that all the ills of Soviet power stemmed from the "rotten tsarist regime" and his "afterlife". Lishentsev was humiliated, "cleared" at various meetings.

A characteristic feature of Soviet law was the ambiguity and vagueness of the wording of the law, as well as the vagueness of the measures of responsibility, in the style of the Cathedral Ordinance of 1649. In the modern theory of law, such norms were called "rubber norms". For example, the Guiding Principles on Criminal Law of 1919 contained a passage about the period of imprisonment before the occurrence of certain events, for example, "before the victory of the world revolution". In the criminal legislation for the first 40 years of Soviet power, wide application was received by objective imputation, application of the law by analogy, application of the law with retroactivity. This was done on the basis of criminal laws. Some researchers sometimes point to resolutions of the Supreme Court (Supreme Court) of the USSR, which in 1930s-1950s repeatedly leveled the medieval rules of the criminal law. This can be stated that, firstly, such decisions were made during the "legality", and during the periods of terror they were easily canceled. Secondly, these instructions of the USSR Armed Forces were easily ignored not only by the Chekists, but also by the judges.

It is known that in ancient societies the process was a private matter of the plaintiff. In conditions when the Soviet justice took little account of the victim's

interest, the latter was forced either to resign or take the cause of justice in their own hands. In this case, bribed judges, militia friends or simply powerful and influential people, communists, new "princely men" could act as "justice" bodies. Of course, such a parallel is conditional.

The constant slogan of Soviet justice was simplification. At the same time, the simplification was combined with an endless prolongation of cases, the consideration of which was not at a particular time interesting for the state. Since 1918, there has been almost no application of appeal in Russia. Very popular was the simple cassation and supervisory review of the case. The cases were kept carelessly, and many of them were lost. The Justice Department and the People's Commissariats of Justice revived the revision procedure for the review of cases, typical for the era of Peter I. Such an order was not provided for by the existing procedural codes, but was widely used. Simplification was very convenient, as it allowed avoiding responsibility. Simple sentences and decisions corresponded to the simplicity of acts compiled in medieval Russia. The verdicts often indicated incorrect or fictitious data; often vague expressions were used, without reference to real facts and circumstances. Office work was poorly organized.

The foundation of the Secretariat of the Deputy Chairman of the Council of People's Commissars of the USSR A.Ya. Vyshinsky contained the documents of the case against the brilliant scientist A.L. Chizhevsky (1940). In the medieval process, under the chairmanship of A.Vyshinsky, the "lying bourgeois and anti-Soviet theory of ionization" was discussed. Taking into account the opinions of Soviet and foreign scholars A.Ya. Chizhevsky was "forgiven". He had to repent as G. Galileo in his "errors" and abandon his unique discovery. However, in 1942 he was still convicted under Article 58-10 of the Criminal Code of the RSFSR and served his sentence in Ivdelag and Karlage. You can give thousands of examples of such medieval processes during the Stalin period.

The composition of judges was not satisfactory as a result of the large staff turnover. As in the 17th – 18th centuries, the majority of judges were semiliterate, and some were absolutely illiterate. They looked at their posts as a prey. Many were rustic or rude people. The Bolsheviks took ten years to squeeze out workers of the imperial justice, at least from among the judges and prosecutors (with the resistance of local communities). It was for such officials that in due time Peter I issued decrees: "On the observance of deanery in all judicial places to judges and defendants and on

punishment for outrage" and "On the importance of state charters and non-negotiation by judges with ignorance of laws on the cases being made under the fear of fine". In 1930s, during continuous assessments, the people's judges were constantly unable to avoid the popular pamphlet by N. Krylenko "Soviet Law", consisting of extracts of Soviet laws that simply explained the legal acts. As soon as the movement of judicial personnel (according to the terminology of that time, such people could hardly be called judges) slowed down, they immediately developed clan ties and corruption began. Stalin helped with the repression to break up these feudal clans that had developed in the justice system by the end of the 1940s. The usual administrative and command procedure for the management of ships was maintained. The contrast with the post-reform courts of the imperial justice was striking.

The Central Committee of the party authorized the widespread use of torture. Since 1937, torture has even been "legalized" by the decision of the Political Bureau of the Central Committee. Confirmation of the right of repressive organs to use torture was contained in the well-known letter of I. Stalin (January 1939), where it was pointed out that it was necessary to apply "measures of physical influence" to the persons under investigation. Torture was successfully preserved in the Soviet punitive system until the end of the Stalin era. While in old Russia the list of tortures (condemned by the church) was relatively small, in Soviet Russia the pathology of the investigators developed many variants of painful mockery of prisoners. The wide dissemination, encouraged by a number of by-laws, received self-incrimination or voluntary confession of guilt as the only evidence in the process. Researchers know a lot of cases (from archival documents) of beating defendants in the process in the presence of a judge with the aim of forcing them to confess testimony, shootings of convicts in the presence of a judge. As in the 18th-first half of the 19th century, prisoners without conviction were kept in prisons for many years, every year thousands of people disappeared without leaving a trace in prisons.

In Stalin's Russia, the confusion of the courts' competence was an ongoing process. Transport courts engaged in counter-revolutionary affairs, the people's courts transport; military tribunals convicted hundreds of thousands of workers for labor crimes and tried prisoners, people's courts considered camp crimes (in 1935-1937). Judicial functions were appropriated even by party committees, Soviet and party control bodies, military councils of armies and fronts, NKVD bodies, political departments of MTS and other bodies. Such a chaotic confusion of judicial functions

in various bodies reminds of the inseparability of judicial and administrative institutions characteristic of the 15th-18th centuries. Moreover, the absence of a separation of powers was presented by V. Lenin as a great achievement of the proletarian revolution. In practice, it was only the degradation of justice.

The protection of ideological interests of the state was given special significance. A vivid example is Article 58-10 of the Criminal Code of the RSFSR. The article on anti-Soviet propaganda and agitation acted as the successor to a number of former crimes committed against the Orthodox and state ideology of the empire. Chapter 4 of the Criminal Code of the RSFSR was devoted to violations of the rules on the separation of church and state. These articles actually defended the new ideology from the "religious dope" and continued the historical tradition of crimes against the church of the 17th–19th centuries. Only now it is in the opposite sense.

An attempted crime (according to the Criminal Code of the RSFSR of 1922) was punished as a completed attempt, which is typical of medieval law. Collective responsibility was applied in many cases: to the foxes, to persons convicted of counter-revolutionary crimes (one can recall the decree of the Central Executive Committee of the USSR of 1 December 1934), etc. In general, already in 1918, the norm of medieval law on mutual guarantee is restored. Thus, on the night of November 29-30, 1918, the military situation and the post of Extraordinary Military Commissars were introduced on the railways of Soviet Russia. These commissars were entrusted with the highest administrative authority on the railways. They had the right even to issue special orders for entrusting the surrounding residents (within 25 versts on both sides of the alienation) of mutual guarantee for the integrity of the railway tracks, structures and telegraph[6].

In the 1930s, there was a criminal prosecution of members of the families of traitors to the Motherland (CSIR). In July 1937, the Politburo of the Central Committee of the CPSU(b) "On Family Members of Convicted Traitors to the Motherland" was adopted, according to which the wives of convicted traitors were sentenced to imprisonment of 5-8 years[7]. In December 1940, the Politburo of the Central Committee of the CPSU(b) "On Bringing to Justice the Traitors to the

[6] O vvedenii voennogo polozheniia na zheleznykh dorogakh [On Introducing the State of Military Law at the Railways] Decree CPC of the RSFSR of 28 November 1918 // SU RSFSR 1918, No.86, Art. 895.

[7] RF President Archive (AP RF). F. 3. Op. 58. D.174. L. 107.

Motherland and Members of Their Families" was also passed, according to which members of the families of traitors were to be exiled to remote areas of the USSR for 3-5 years with confiscation[8].

With regard to minors, a wider list of crimes was used than in the empire. The death penalty could be applied to people who reached the age of 12, and in the empire from 17 years (Elizaveta Petrovna) and from 21 years (Nicholas I).

Prosperity arose. The goal was achieved by excessive punishment. Huge terms were appointed for anecdotes, for spoiling portraits of state leaders, for theft of state property. For example, the regime that went bankrupt at the beginning of the war sharply increased terror against the irritated population. The apogee of the new campaign was the letter of the Deputy People's Commissar of Justice of the USSR I.A. Basavina released on the day of flight from Moscow – 15 October, 1941. According to the letter for any anti-Soviet utterance, part 2 of Article 58-10 of the Criminal Code of the RSFSR was used, that is, execution. According to this insane letter, several tens of thousands of people were shot. In the winter of 1941-1942, all the regional courts of the USSR were engaged, mainly, in one case - they carried death sentences to the chatterboxes. According to the Decree of the Presidium of the Supreme Soviet of the USSR of 15 April 1943, real and imaginary collaborators sentenced to cooperation with the Nazi regimes were subjected to medieval punishments - the death penalty through hanging or penal servitude. The hanging was public, that is, the crowd could enjoy revenge.

For a long time, Soviet jurists (largely because of the illiteracy of members of the Politburo) were forced to work in conditions of fuzzy criminal law. Numerous decisions of the Politburo and the government featured a nonexistent "judicial responsibility". That is, Soviet party workers could not separate criminal responsibility from other species. Apparently it was difficult for them to determine the subject of each crime.

In the 1920s-1950s, criminal law was simplified before that, for example, military crimes and crimes against the order of government sometimes fell into the counter-revolutionary. Labor crimes turned into military crimes, etc. For the refusal to pay tax there was criminal liability up to execution (as in the first half of the 18th century). For the petty theft of military property, only death penalty followed, and the guilty were considered enemies of the people! As with Peter I for the refusal to participate

[8] RF President Archive. F. 3. Op. 57. D. 59. L.54.

in the mobilization for labor, criminal liability followed. The theft of personal property during the war years was equated with banditry.

The usual practice was the appointment of disproportionate punishments. So, during the Civil War, some courts acquitted for rape, others condemned to death. According to the Decree of the Supreme Council of the USSR of 10 August 1940, for small thefts at enterprises, a term of imprisonment of up to one year in prison was imposed, and for ordinary thefts (in a larger amount) punishment was prescribed under the Criminal Code of the RSFSR and a non-custodial penalty could be applied. This meant the absence of systematic, chaos of norms, a contradiction of union and republican acts. The judges forgot the whole decrees, even the codes! The situation was typical for Russia in the 17th – 18th centuries.

Opponents may object that they say this is a wartime situation, etc. This raises several questions. First, why was a similar super-strict liability not introduced during the First World War? Second, why was it not abolished after World War II, but only after Stalin's death? Thirdly, many severe measures of responsibility were introduced in the 1930s. With whom then did the USSR fight? It should be noted that many criminal law measures during the Great Patriotic War, of course, were justified.

In this article, we are speaking only about exaggerated, excessive measures, the use of which indicated rather the illiteracy of Soviet leaders who hoped to intimidate Soviet citizens. Criminal-law repressions in the USSR, unlike Germany, were applied in full scale, as evidenced by statistics. Thus, they were used not only as a deterrent.

So, it can be argued that the Soviet society in the 20th century quickly ran through the stages of development. From the wild primitive (Civil War) through the era of early law (1920s), passing through the brutality of the late Middle Ages (1930s-1940s) to the revival of the legal system (1950s-1980s).

These processes were mixed quickly, simultaneously, superimposed on each other. We see a slow restoration of the institutions of law characteristic of the modern society. This slow process lasted for decades and ended in the 1990s with the victory of law.

The events of the first half of the 20th century give us a clear lesson about the possibility of multiple repetitions of historical processes. Given the decline and partial degradation of the modern Russian society, there are two tendencies: the tendency towards archaization, the restoration of traditional norms, the truth in their grotesque, disfigured, horrifying form, and the tendency towards the final growth of society, the acceptance of human rights, justice, and equality of opportunity.

The probability of new Middle Ages, including in the modern Russia, combined with large-scale extermination of people, is quite large. It is hard to be a visionary, but it seems that it can destroy Russia. There is no hope that numerous admirers of traditional societies, totalitarian regimes and violence understand that they can accelerate the decay and destruction of Orthodox (Russian) civilization.

LA ROSA DE FOC – BARCELONA 1937 – 2017. LESSONS OF SEPARATISM.

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Abstract
The article is devoted to separatism in Spain 1937-2017.

Keywords: separatism in Spain, Catalonia, 1937-2017.

Eighty years have passed since the end of the Civil War which claimed hundreds of thousands of lives of Spanish citizens. Spanish society was split, and the confrontation was irreconcilable until April of 1939 when the units of rebels entered Madrid and the leader of putschists F. Franco announced the victory of reaction forces over the republic. A new era of the so-called caudíllo F. Franco's regime began in Spain which lasted nearly forty years. Today, Spain is a constitutional monarchy, but it is still home for lots of socio-political problems that are sometimes fed by the ever burning flame of protest originating from separatism.

This article will reflect the stages in the development of separatism in Spain during different stages of its history of the XX century.

As a capital of Catalonia, Barcelona has always shown its special political position towards Madrid and the Spanish Crown. To the present day, universities use Catalan as a teaching language. Catalan citizens have always emphasized their special origin, their unique history and the desire to achieve the status of an independent republic.

Starting from 1931 after the fall of the monarchy, left-wing parties and public organizations, including anarchists, have taken an active part in the fight of the working class for their rights. Sometimes, as it happened in 1933, the strikes were suppressed with the help of the police and army forces and were accompanied with bloodshed. According to official figures, the suppression of the miners' strike in Asturias resulted in the death of 1,070 people. Also, 2,200 people were wounded, and 3,000 people were arrested. The strike was suppressed by the Spanish Foreign Legion and the Moroccan mercenaries. That same year the leader of the Catalan separatists

Lluís Companys announced the independence of Catalonia within the Spanish federation[1]. The parties actively participating in the Popular Front had been formed in Barcelona by 1936. In January 1936, the Popular Front won in the parliamentary elections forming the government of national unity. Economic and social spheres faced changes. The Land Reform was perhaps the most pressing issue in all of Spain. However, the calls for the sovereign republic were increasingly heard in the nationalist environment of the Catalonia citizens. These calls were often heard among the representatives of the Workers' party of Marxist Unification (POUM) belonging to the Trotskyist wing, a large group of monarchists, and nationalist intellectuals. Subsequent events temporarily united all sectors of the society and numerous party organizations for the fight against the enemies of the republic who revolted on 18 June 1936. A short telegram addressed to the commanders of the units involved in a conspiracy said: "18 at 18. Director." The telegram about the coup was signed by General Emilio Mola who was the chief coordinator of the military conspiracy. We note that the most part of the officers serving in the ground and navy forces took the side of the putchists. The recognized leader of the rebels General José Sanjurjo died in an aircraft accident. F. Franco was elected to take his place. He was named the Father of the Nation and got the title of caudillo. The rebels were going in four columns and thought that roads to Madrid were open. The regular army of the republic had no professional experience and professional officers, so it suffered losses and went back to the suburbs of Madrid. General F. Franco announced that he would enter the capital on a white horse on 7 November. M.E. Koltsov, special correspondent of the "*Pravda*" newspaper wrote that the government of the republic had left the capital in a rush and moved to Barcelona. It looked more like a stampede. But nevertheless, Madrid did not fall under the putchists attack in November 1936. The capital of Spain was defended due to heroism of unprofessional and undisciplined patriots who formed the units of new republican army – people's militia, international brigade, and the advisors from the USSR such as Ya.K. Berzin, D.G. Pavlov, G.M. Stern who practically directed the defense of the capital. The most modern machines delivered from the USSR within the "X" operation in October 1936 played a significant role in the defense of Madrid.

In April and May of 1937, the situation near Madrid became tense again. In such a tragic moment for the republic, battalions of anarchists and POUM members left the

[1] L. Vyshel'skiy. Madrid. 1936-1937. AST Publishing House. Moscow. 2002, p.19.

trenches near Madrid and entered the city in the attempt of coup. During three days of fierce fighting with the units faithful to the republican government they were partially killed, dispersed, and most of them were captured. Rebel leaders were brought to trial, forty of them were shot. A. Nin, popular leader of the Trotskyist POUM party was abducted from the prison and killed. This operation was held by A.M. Orlov (L.L. Feldbin), the head of the NKVD (the Peoples' Commissariat of Internal Affairs of the Soviet Union) residency in Spain. He was the senior advisor of the republic on internal security and counter-intelligence. Among other claims, monarchists and Trotskyists rebelling in Barcelona wanted to grant the status of an independent republic to Catalonia. The investigation of this rebel documented irrefutable evidence about the relations of the Trotskyist leaders (A. Nin) with the intelligence (F. Franco). Republican newspapers published this information compromising Trotskyism as the accomplices of fascism. The extent of A. Nin's betrayal of the republic is difficult to evaluate. One thing is undeniable: the battalions of anarchists and Trotskyists that had left the front stabbed heavily in the back of the republic. The said could have led to the total victory of the putchists in summer of 1937.

L.P. Vasilevsky in his book "The Spanish Chronicle of Grigory Grande" describes this tragic episode: "in May 1937, 1,500 anarchists and 1,000 Trotskyists from the POUM's 29th Division left the front, entered Barcelona and began the armed rebellion against the republican government and communists. Fierce fighting of putchists with the government troops lasted for two days. During this short period of time 950 people were killed and 2,600 people were wounded in the streets of the city"[2].

M.E. Koltsov is known to have fulfilled not only the functions of the special correspondent of the "*Pravda*" newspaper in Spain, he was also the advisor of the republican government on political matters. His authority was great. He spoke about this rather frankly on the pages of his diary which was published in the USSR in 1938. It had a huge print-run and became a bestseller. M.E. Koltsov himself became the hero of the youth and the example of an uncompromising fighter with fascism. Now we have no reasons not to trust M.E. Koltsov's information about the relations of POUM leaders with F. Franco's intelligence. M.E. Koltsov in his book "Spanish Diary" wrote: "A new fascist intelligence organization was discovered in Madrid, the traces of which led to Barcelona as well. Old reaction aristocracy, "Spanish Falange", and the POUM leaders took part in the spy organization. Apart from spy activities, they

[2] Publishing House Fund "Kreativ", "Liki Rossii". Saint-Petersburg, 2013, p.100.

prepared the armed fascist revolt in Madrid streets which could take place at a certain time"[3].

M.E. Koltsov in his diary gives the text of the telegram addressed to F. Franco personally. It was decrypted by the counter-intelligence of the republic. The telegram says: "Your order concerning the mingling of our people with extremists and POUM members is carried out successfully. We are lacking the propaganda leader who started this work independently to act more safely. Carrying out your order, I was in Barcelona to meet with "N" – a leading POUM member. I told him about your instructions. The lack of communication between you and him is due to the breakage of his radio transceiver that started to work again when I was there. You have probably got the answer to the question of your interest. "N" urges you and your foreign friends to make me the only person to come in contact with him. He promised me to send new people to Madrid to intensify the POUM work. Due to these measures, POUM will become the real support of our movement in Madrid as it became in Barcelona[4]. I think this fact can hardly be refuted".

As special correspondents of "*Pravda*" and "*Izvestiya*" newspapers M.E. Koltsov and I.G. Erenburg noted, the defeat of the republic in April 1939 and putchists' victory were mainly promoted by the so-called "fifth column" which remained active in such cities as Madrid and Barcelona.

A fatal role was played by the betrayal of senior officers of the republican army, so Madrid was surrendered to advancing units of putchists without resistance in April 1939. The same role was played by the duplicity of the political leaders who had conspired with the enemies of the republic as it happened in May 1937 with the leaders of anarchists and Trotskyists acting under the slogan of "self-determination".

The duplicitous and inconsistent policy of the leaders of the republic led to the decision made in 1938 about terminating the activities of international brigades. It was made under the pressure of countries conducting non-intervention policies, mainly England and France.

Between 1936 and 1938, 35,000 internationalists fought in Spain for the side of the republic, and 5,000 of them died. 30,000 volunteers professing fascism from European countries fought for F. Franco. Against their background, the importance of international brigades was more a psychological factor for the republic. So, it

[3] Publishing House "Sovetskij Pisatel'" [Soviet Writer]. Moscow, 1958, p.516.
[4] Publishing House "Sovetskij Pisatel'" [Soviet Writer]. Moscow, 1958, p.517.

should be mentioned that Italian volunteer corps of 150,000 people, German "Condor" corps of 7,000 people and the Portuguese brigade of 20,000 people fought for the Francoists.

During the period of Civil War, the USSR sent 3,000 specialists to Spain. Their role in the defense of the republic from foreign intervention was significant. All major operations were planned and carried out by Soviet military advisors such as G.M. Stern, Ya.S. Smushkevich, D.G. Pavlov, N.G. Kuznetsov, and R.Ya. Malinovsky. During the Civil War, the USSR supplied republican Italy with the most modern military equipment and thousands of tons of humanitarian aid.

The residence of NKVD foreign intelligence headed by the most experienced member A.M. Orlov (senior officer since 1936) oriented its resources on organizing state security institutions of the young republic, defeating enemy underground, identifying putchists' agents, preventing the attempts of coup d'etat, and organizing the 14th partisan corps whose tactics was based on surveillance and intelligence activities.

However, the Soviet government objectively appraising military and economic powers of fascist international states made the decision to stop operation "X" and to withdraw military advisors. The last group headed by senior advisor S.A. Vaupshasov left Spain in April 1939.

Despite the process of economic changes especially in the sphere of internal policy (freedom of speech, press, activity of the parties and organizations) the government of the republic did not come to terms with Basque nationalists and Catalonia within the scope of granting sovereignty up to full separation from Spain.

A new phase of the Spanish history began in 1939. It was connected with the name of F. Franco. In 1947, Spain became a monarchy, and caudillo declared himself a regent of Juan Carlos. During that time there was the strictest dictator regime which ended with the death of caudillo in 1975. F. Franco treated separatists and any form of underground work very severely up to using capital punishment.

Since 1975 the political life in Italy was full of a great variety of political parties including communist and socialist parties which acquired a legal status, trade-unions were formed, and dozens of newspapers, journals and magazines appeared. The extremist wing of the Basque nationalists from the outlawed organization ETA went on the path of the political terror demanding the status of a sovereign state.

In Barcelona, public organizations of different political views several times stood in favor of complete independence of Catalonia from the central government.

Again, as it happened in May 1937, in spring and summer of 2017, Catalan citizens living in Barcelona demonstrated the joint spirit of enthusiasm to become citizens of independent republic. Again, under the arches of a famous Gaudi temple one could hear the calls of the trade unions for the unification of all political parties to fight for complete independence and for the legitimate methods of political sovereignty. However, as was always the case in the history, blood was shed during the clashes between protesters and law enforcement forces. Formally, 90 percent of the referendum participants voted for the separation from Spain. But Madrid did not like this result, so the results of the referendum were deemed invalid.

Having gone back into the Spanish history, we can make a conclusion that not only one sovereign government (the form of government is meaningless) with the best interests of the state will foil any attempt of separatism by all available means. In the post-Soviet space, we can recollect the example of two Chechen wars and civil war in the south-east of the Ukraine. Separatism, as history has shown, leads to destabilization in the society, finally to the civil war, moral and psychological destruction, and a possible loss of sovereignty by the participants of the conflict.

The huge Catholic cross carved from stone stands in the Valley of the Fallen near Madrid. It was erected during the life of F. Franco in the memorial complex commemorating the memory of those who died during the Spanish Civil War. But this monument has not become the amulet protecting from the following socio-political shocks and the world tendency of nationalists from different countries who are willing to get independence from metropolitan countries.

THE BAR ASSOCIATION OF SVERDLOVSK REGION "BELYKH AND PARTNERS"

The Bar Association of Sverdlovsk Region "Belykh and Partners", hereafter referred to as "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, Honored Worker of Science of the Russian Federation, Director of the Institute of Law and Entrepreneurship of the Ural State law Academy, Head of Entrepreneurial Law Subdepartment, Honored Advocate of Russia, Arbitrator of International Commercial Arbitrage at the RF Chamber of Commerce and Industry, a Bar member since 2003.

In 1985-1986 V.S. Belykh participated in a research programme in the Centre for Commercial Law Studies at Queen Mary School of Law, University of London.

Specialization: Entrepreneurial (Commercial) Law; Banking; Bankruptcy (Insolvency) of business subjects; Contract Law; Investment activities; Equity market; Insurance Law.

V.S. Belykh has a great experience of analytical work.

Mission of the Bar Association: comprehensive legal support of business at all stages of the "life-cycle" of a production process: from the 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, and energy.

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ЕВРОПЕЙСКО-АЗИАТСКИЙ ПРАВОВОЙ КОНГРЕСС

EURO-ASIAN LAW CONGRESS

The Association of Lawyers of Russia
supported by
Plenipotentiary Representative of the Russian Federation President in the Ural Federal District,
Governor and Legislative Assembly of the Sverdlovsk Region,
on the basis of the Ural State Law University
will hold the XII session of the Euro-Asian Law Congress
"Law and Justice: Global Challenges"
(September 13 - 14, 2018)

Venue: World Trade Center Yekaterinburg (44 D Kujbysheva St., Yekaterinburg)

The Euro-Asian Law Congress is the largest international forum in Russia for discussing topical issues, which are in high demand for the lawyers' community. Such a huge legal forum is not accidentally held in Yekaterinburg, which, being the capital of the Middle Urals, is located on the border of Europe and Asia and represents one of the key centers for providing the implementation of the Russian policy in the spheres of industry, economy, education, science and culture.

Main themes of the expert groups and round-tables of the XII session of the Euro-Asian Law Congress:

- The world order: problems of formation and implementation
- Legal maintenance of interstate partnership and integration in the sphere of economy, finance, taxation and customs relations
- Economic and legal means of protecting national interests of Russia
- Information technologies: new challenges for modern law
- Global challenges to modern labor relations: the search for legal measures
- Equity in private law
- Criminal-law protection of economic interests in the system of global stability factors
- Interaction of legal systems: modern international legal discourses
- Modernization of legislation on control and supervision activities and legislation on administrative violations in the Euro-Asian legal space
- Human rights in the domestic philosophical thought
- Experience, traditions, continuity in legal education: devoted to the 100th anniversary of the Ural State Law University.

Exceptionality of the XII session of the Congress is related to the 100th anniversary of the Ural State Law University - one of the leading scientific and educational Russian centers for training highly qualified legal specialists. The business program of the Congress is organized in the form of a plenary meeting, basic expert groups and round tables.