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ТЕОРЕТИЧЕСКАЯ И ПРИКЛАДНАЯ
ЮРИСПРУДЕНЦИЯ
Theoretical and Applied Law

Laws must go hand and hand with the progress of the human mind.

Thomas Jefferson

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Contents

Foreword of the Editor-in-Chief

The North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration is launching the publication of a new legal journal "Theoretical and Applied Law". As the title implies, the journal has a wide profile and will publish articles, essays and reviews on current issues in the theory of law and branch sciences. The need for it seems undisputable today. Despite a large number of periodicals (including such reputable and long-standing ones as "State and Law" [Gosudarstvo i pravo] and "Law" [Pravovedenie]), jurisprudence is still short of multidisciplinary journals, the pages of which could become a platform for discussions with representatives of various branches of jurisprudence.

While being reflective of the internal fragmentation of legal knowledge in terms of subject, such situation inhibits the development of research thought. This becomes especially noticeable in the context of a paradigm shift and legal thinking pluralism, apparent not only at the general theoretical, but also at the sectoral level. That is why further progress while overcoming commonly acknowledged recessionary trends is possible only with prior coordination of sectoral approaches on fundamental issues of conceptual significance.

Essential to that is the reception of key achievements in the foreign science of law, enabling to overcome self-isolation (due to political and ideological reasons), in which the jurisprudence of our country has been for most of the past century. Loss of the former influence by the Marxist-Leninist doctrine of law has certainly stimulated an appeal to the Western scientific discourse, which is reflected in the perception of fundamentals of the analytical jurisprudence, phenomenological theory of law, various versions of legal structuralism and poststructuralism.

Nonetheless, these trends are mainly sporadic in nature and, as it appears, have not yet led to the appropriate approaches widely used in legal practice. In particular, many representatives of branch sciences continue to develop traditional views that emerged in the 19th century, often expressing skepticism about the possible reception of ideas of the modern Western (primarily, Anglo-American) jurisprudence, which allegedly does not go along with the specifics of the Russian legal system. Moreover, in some cases calls are made to create a science of law that would be fully oriented towards national cultural values and ideals. There is no need to elaborate the insolvency and utopianism of such ideas. In fact, the objective of any science (and the science of law is not an exception here) is to identify universal laws that manifest themselves in various ways under certain specific conditions, but are not completely dependent on these conditions. That is why attempts to get confined to a narrow national framework, the rejection of the broadest possible contacts with the foreign scientific thought can only lead to the degradation of legal knowledge.

These considerations enable to sum up the basic principles of the journal's editorial policy. These include, firstly, the desire to synthesize general legal theory and sectoral doctrines, secondly, the involvement in publications of both scientists and practicing lawyers, whose elaborations are of significant value in solving specific tasks, and, thirdly, the placement on the pages of the journal of the most important and interesting articles of colleagues from abroad. It is submitted that with the consistent implementation of these principles, the journal "Theoretical and Applied Jurisprudence" would be able to make a significant contribution to the development of not only scientific research, but also legal education. Indeed, a truly efficient training of future lawyers within the walls of higher educational institutions is possible only through deep assimilation of the results of scientific research thought.

Editor-in-Chief
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Legal Doctrine as a Means of Constructing Legal Reality

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ABSTRACT
The article deals with the problem of the law-making meaning of legal doctrine. According to the author, the doctrine is an internally coherent segment of juridical science, with the ability to not only provide the juridical community generally accepted interpretation of legal phenomena, but also to establish mandatory for members Society of behavior patterns. As the legal science in general, the doctrine is a collection of semiotic forms (texts), which construct the juridical reality. As a source of law doctrine creates legal rules on the basis of typification of subjective rights and responsibilities of individuals. Implementation of regulatory functions is carried out by doctrine, according to the author, in three ways, namely, through legislation, jurisprudence and law enforcement practitioners.
Keywords: juridical science, doctrine, post-classical rationality, post-industrial society, the juridical reality, law-making, subjective rights, law practice.

The new journal, the first issue of which has been submitted to the judgement of a wide legal community, is intended to satisfy the growing need for intensified legal research, as well as introduce its results to interested parties, including scholars, legal practitioners, university teachers and students. This task is particularly relevant in the context of the transition of the legal sciences (primarily, the sciences of the theoretical and legal cycle) to the postclassical ideal of rationality,[1] which in turn contributed to the formation of a new type of legal thinking.[2]

A necessary prerequisite for post-classical legal thinking is the qualitative transformation of the scientific and legal discourse, which implies a radical rejection of the conceptual framework and the very thinking style of both classical positivism and the "Marxist-Leninist general theory of law".[3] These are being replaced by a system of basic categories, having developed under the decisive influence of phenomenology, analytical philosophy, poststructuralism and social constructivism, which form, with all restraints,[4] the ideological and methodological mainstream of modern socio-humanitarian knowledge.

On this basis, it becomes possible to rethink the entire range of doctrinal ideas of law, the state, legal and socio-political phenomena at the level of not only general theory, but also sectoral legal disciplines. The scale and significance of this work, which can stimulate the development of legal research in our country, has been repeatedly noted in recent years.

Thus, according to V. A. Chetvernin, the consistency and coherence of interpretations of the main legal categories can impart to the legal science a systematicity that it lacks, bridging the gap between

[1] A detailed description of postclassical (postnonclassical) rationality is found in the scientific studies of M. K. Mamardashvili, V. S. Stepin, and others. See: Stepin V. S. Self-developing systems and post-non-classical rationality [Samorazvivayushchiesya sistemy i postneklassicheskaya ratsional'nost'] // Problems of Philosophy [Voprosy filosofii]. 2003. No. 8. PP. 5–18. (In rus) *the same author.* Classics, Non-Classics, Post-Non-Classics: Criteria for Distinguishing [Klassika, neklassika, postneklassika: kriterii razlicheniya] // Post-Non-Classics: Philosophy, Science, Culture. [Postneklassika: filosofiya, nauka, kul'tura] / ed.-in-chief L. P. Kiyaschenko, V. S. Stepin. SPb.: Mir Publ., 2009. PP. 249–295 (In rus); Mamardashvili M. K. Classical and non-classical ideals of rationality. [Klassicheskii i neklassicheskii idealy ratsional'nosti.]. SPb. : Azbuka, Azbuka-Attikus Publ., 2010. (In rus)

[2] See in particular: Polyakov A. V. Post-classical Jurisprudence and the Idea of Communication [Postklasicheskoye pravovedeniye i ideya kommunikatsii] // News of Higher Educational Institutions. Jurisprudence [Izvestiya vysshikh uchebnykh zavedenii. Pravovedenie]. 2006. No. 2 (265). PP. 26–43 (In rus) Chestnov I. L. Post-classical theory of law [Postklassicheskaya teoriya prava]. SPb.: Alef-Press Publ., 2012. (In rus) Razuvaev N. V. The modern theory of law in search of the post-classical paradigm of knowledge [Sovremennaya teoriya prava v poiskakh postklassicheskoi paradigmy poznaniya] // News of Higher Educational Institutions. Jurisprudence [Izvestiya vysshikh uchebnykh zavedenii. Pravovedenie]. 2014. No. 5 (316). PP. 136–153 (In rus); Post-classical ontology of law: Monograph [Postklassicheskaya ontologiya prava: Monografiya] / Ed. I. L. Chestnov. SPb. : Aletheia Publ., 2016. (In rus) and others.

[3] In particular, V. M. Syrykh, who declares in his fundamental works a return to authentic Marxism (see: Syrykh V. M. Materialist Theory of Law: Selected Writings [Materialisticheskaya teoriya prava: Izbrannoe]. M.: Publishing House of the Russian Academy of Justice, 2011), is in fact the creator of the non-classical version of the materialistic legal thinking, virtually free from the influence of the Marxist-Leninist ideology.

[4] See: Vakhshtayn V. S. Curiosities and Paradoxes of Phenomenological Intervention [Kur'ezy i paradoksy fenomenologicheskoi interventsii] // Sociology of Power [Sotsiologiya vlasti]. 2014. No. 1. PP. 5–9. (In rus)

the general theory of law and intermediate-level theories generated by sectoral legal disciplines.[5] The harmfulness of such gap clearly manifests itself in higher legal education, which is able to convince students that the "high" theory is invariably inconsistent with the urgent tasks of sectoral legal research, not to mention law enforcement and other practical activities.

However, speaking of sectoral theories, one cannot fail to note a serious lack of scientificity of the latter, due to the vagueness and sometimes fictitiousness of the subject of sectoral research, which is often understood as a totality of regulatory legal acts and the provisions contained in them, which, supposedly, should be covered by any branch science. It is easy to observe that with such understanding, sectoral research turns into the interpretation of and commenting on laws, essentially losing its scientific content.[6] As a result, there is a discrepancy not only between the general theory of law and branch legal theories, but also between the legal science as a whole and the needs of practice, such discrepancy being harmful to both sides. The science, while ignoring the demands of practical activity, runs the risk of degenerating into a scholasticism engaged in pointless discussions about abstract and unverifiable substances (such as, in particular, "legal spirituality", "ethno-national mentality", etc.).[7] At the same time, practice, not guided by scientific conclusions and methodology, often turns out unable to answer the questions that are posed to it by the vital necessity itself.

This is reflected with all the clarity in the conditions of a postmodern (post-industrial) society, which is characterized by an unprecedented acceleration of social dynamics that contributes to the emergence of the previously non-existing relationships and non-standard life situations.[8] The novelty and ingenuity of the facts that form the empirical basis of the legal reality in the postmodern epoch require a practicing lawyer to have an original creative way of thinking that helps to solve problems that are by no means routine. The non-standard and creative nature of legal regulation in a postmodern society (poorly consistent with the established understanding of the "legal regulation mechanism") sometimes creates the illusion of the essential uncertainty of the law itself.[9]

In particular, G. Agamben, speaking of the limited possibilities of normative regulation in a situation where stable, long-term and regularly reproducible social ties between members of a society are replaced by single and unique life circumstances that are not amenable to repeated reproduction, comes on that basis to the conclusion that a state of emergency is "normal" for such communities.[10] It is apparent, however, that a state of emergency, destroying the coherence of the social and legal space, will adversely affect, in the long run, the dynamics of the human community as a self-developing system. Anyway, it is hardly permissible for a lawyer to ignore the obviously unlawful nature of the state of emergency concept, built on the total denial of human freedom and of the subjective rights of individuals derived from it.

At the same time, there are grounds to assert that the nature of legal regulation inevitably undergoes qualitative transformations. The individual law enforcement activity has a growing role and places high demands on the qualifications of practicing lawyers. The latter cease to be merely handlers of regulatory prescriptions and, instead, become active creators of legal reality. Under such circumstances, legal science, which forms the basis of the law-making and law enforcement activity, becomes of particular regulatory significance. Therefore, it is by no means accidental that the discussions on legal science

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[5] See: Second philosophical and legal readings in the memory of V. S. Nersesyants (libertarian legal project) [Vtorye filosofsko-pravovye chteniya pamyati V. S. Nersesyantsa (libertarno-yuridicheskii proekt)] // Yearbook of libertarian legal theory [Ezhegodnik libertarno-yuridicheskoi teorii]. 2009. No. 2. PP. 6–8. (in rus)

[6] See: Belov V. A. Subject-methodological problems of civil science [Predmetno-metodologicheskie problemy tsivilisticheskoi nauki] // Civil Law: Actual Problems of Theory and Practice [Grazhdanskoe pravo: aktual'nye problemy teorii i praktiki] / Ed. V. A. Belov. M. : Yurayt Publ., 2007. PP. 134–135. (In rus)

[7] See in particular: Bayniyazov R. S. Spiritual and Cultural Approach to Legal Awareness and Law [Dukhovno-kul'turologicheskii podkhod k pravosoznaniyu i pravu] // New Legal Thought [Novaya pravovaya mysl']. 2003. No. 1. PP. 2–6 (In rus); Mordovtsev A. Yu. Features of legal thinking in modern Russia: the formation of a new discourse [Osobennosti pravoponimaniya v sovremennoi Rossii: formirovanie novogo diskursa] // Philosophy of Law [Filosofiya prava]. 2011. No. 3. PP. 13–17 (In rus); Gulyaikhin V. N. Legal mentality of Russian citizens [Pravovoi mentalitet rossiiskikh grazhdan] // NB. Law and Policy Issues [NB. Voprosy prava i politiki]. 2012. No. 4. PP. 108–133 and etc. (In rus)

[8] See in particular: Beck U. Risk Society: Towards a New Modernity. M. : Progress-Tradition Publ., 2000. P. 113 (trans. from germ.) Bell D. The coming of post-industrial society: A venture of social forecasting. M. : Academia Publ., 2004. PP. 159–162 (trans. from eng.)

[9] See: Chestnov I. L. Legal communication in the context of post-classical epistemology [Pravovaya kommunikatsiya v kontekste postklassicheskoi ehpistemologii] // News of Higher Educational Institutions. Jurisprudence [Izvestiya vysshikh uchebnykh zavedenii. Pravovedenie]. 2014. No. 5 (316). PP. 31–41. (In rus)

[10] Agamben J. Homo sacer. State of emergency [Homo sacer. Chrezvychainoe polozhenie]. M. : Evropa Publ., 2011. P. 9 (In rus)

(doctrine) as a source of law in general and as a source of modern Russian law in particular apparently become more active.

At the same time, a number of researchers deny the semantic identity of the concepts of doctrine and legal science, believing that only a few scientific studies in the legal sphere are of doctrinal nature. Thus, according to I. S. Zelenkevich, "the greatest harm to the recognition of a legal doctrine as a source of law is caused exactly by the merging of the concepts "legal science" and "legal doctrine", their use as synonyms... It is necessary to clearly distinguish between these concepts that are undeniably related, but still are not identical".[11] Thus, unlike legal science in general, substantially including any research aimed at generating new knowledge in a relevant field, a doctrine is a collection of the most authoritative opinions on current issues of theory and practice that are of regulatory importance and are universally recognized.[12]

In other words, a doctrine is an internally coordinated (consolidated) segment of legal science, having the ability not only to give an interpretation of legal phenomena that is generally recognized in the legal community, but also to establish for members of a society behavioral patterns of varying degrees of bindingness, from recommended to unconditionally imperative. It is the final result of cognitive activity incorporating all discussions and contradictions (including such significant ones as the dispute on legal thinking) that are present at the doctrinal level already "as removed". Doctrine and legal science in general construct legal reality, which can be defined as an orderly set of legally relevant social phenomena and the relationships between them.

Like any other area of the existence of nature or society,[13] legal reality can be considered in synchronous and diachronic (historical) dimensions.[14] In the first aspect, it is the result of construction by various means of a predominantly semiotic character, in the second, it incorporates evolutionary processes leading to regular transformations of both semiotic systems themselves and methods of semiotic construction of reality phenomena. Specific semiotic means of constructing legal reality include legal values (freedom, justice, formal legal equality and other legal contexts), legal norms, subjective rights and obligations.[15] The most important feature of the listed semiotic means is their particular relevance, enabling to demarcate the phenomena of legal reality from other manifestations of the sociocultural semiosis. Substituting the acts of actual behavior of society members in communication processes,[16] the signs ensure mutual understanding and agreement of individuals in matters of law,[17] transmit infor-

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[11] Zelenkevich I. S. Legal doctrine and legal science: some aspects of correlation and use as sources of law. [Pravovaya doktrina i pravovaya nauka: nekotorye aspekty sootnosheniya i ispol'zovaniya v kachestve istochnikov prava] // North-Eastern Scientific Journal. [Severo-Vostochnyi nauchnyi zhurnal]. 2010. No. 2. P. 43. (In rus)

[12] See: Bosho S. Doctrine as a form and source of law [Doktrina kak forma i istochnik prava] // Russian Law Journal [Zhurnal rossiiskogo prava]. 2003. No. 12. P. 72 (In rus); Puzikov R. V. The Essence of Legal Doctrine as a Source of Law [Sushchnost' yuridicheskoi doktriny kak istochnika prava] // Legal Policy and Legal Life [Pravovaya politika i pravovaya zhizn']. 2003. No. 4. P. 137 (In rus); Zelenkevich I. S. Op. cit. PP. 34–36.

[13] See: Husserl E. Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy. M.: Akademicheskii Proekt Publ., 2009. P. 45; Patkul A. B. The concept of a region in the phenomenology of E. Husserl and M. Heidegger [Ponyatie regiona v fenomenologii Eh. Gusserlya i M. Khaideggera] // Logos. Philosophical literary journal [Logos. Filosofsko-literaturnyi zhurnal]. 2010. No. 5 (78). P. 78. (In rus)

[14] See on this, in particular: Koseriu E. Synchrony, diachrony and history: the problem of language change [Sinkhroniya, diakhroniya i istoriya: problema yazykovogo izmeneniya]. Ed. 3rd. M.: Editorial URSS Publ., 2009. (In rus)

[15] See more details: Razuvaev N. V. Right: a social constructivist approach [Pravo: sotsial'no-konstruktivistskii podkhod] // News of Higher Educational Institutions. Jurisprudence [Izvestiya vysshikh uchebnykh zavedenii. Pravovedenie]. 2015. No. 5 (322). PP. 97–98. (In rus)

[16] According to A. V. Polyakov, "the subject of communication always deals with a certain text, i. e., an orderly system of signs that refer to another reality. In this sense, any communication is always mediated by text. The text is a certain integral semiotic system that carries a certain meaning. Social is always mediated by texts, it is a way of social existence" (Polyakov A. V. Normativity of legal communication // Polyakov A. V. Communicative understanding of law: Selected Works [Kommunikativnoe pravoponimanie: Izbr. trudy]. SPb. : Alef-Press Publ., 2014. P. 146 (In rus))

[17] It should be noted that the communicative approach to understanding social reality is in line with the very old political and legal tradition founded by Aristotle and Cicero. Aristotle is known to have defined the polis as "a kind of communication" (Aristotle. Politics // Aristotle. Cit. in 4 vols. Vol. 4. M. : Mysl' Publ., 1983. P. 376 (In rus)). According to the well-known definition of Cicero, "the state is the property of the people, and the people are not any combination of people gathered together in any way, but the union of many people, connected by their consent in matters of law and common interests". (Cicero M. T. Dialogues. About the state. About the laws. M.: Nauka Publ., 1966. P. 20 (In rus))

Keeping to the same convention, modern scientists are increasingly inclined to consider the human community as a space of individuals and their communications, constructed by semiotic means. See in particular: Vakhshtayn

mation about possible, due and forbidden behavior and, ultimately, form legal reality as one of the dimensions of a socium.

Legal science, primarily in its doctrinal manifestations, performs a number of functions that ensure the organization of legal reality and its historical dynamics. Firstly, it is designed to identify and describe a multitude of legally relevant facts that form the empirical basis of the legal reality,[18] and separate them from facts that do not have such relevance (selective function). Secondly, legal science provides the semantic content of the phenomena of legal reality and, ultimately, forms the semantic structure of the latter (semantic function).[19]

Thirdly, under certain conditions, namely, in the absence or weak development of positive law, a doctrine that, as a rule, simultaneously interprets sacred texts, is found capable of replacing it by directly establishing rules of conduct legitimized in such case by the authority of the Holy Scripture on which it relies (prescriptive function). Religious legal frameworks are among examples of the performance by the doctrine of this function.

In particular, it is known that an important rule-making function in the Muslim law of the 8th-11th centuries was performed by the legal science in general (ijtihad), including, in particular, the coordinated opinion of reputable lawyers (ijma),[20] that functioned "as a unique tool, way to fill in the gaps in the Muslim law where neither the Quran nor the Sunnah could give a convincing answer on emerging issues".[21] And although the "closing of the gate of Ijtihad" in the 12th century and the secularization of the legal systems of the Islamic world of the New Age led to the loss of this function by the legal science, the doctrine, according to some scholars, still has a significant impact on the legislation and judicial practice of a number of Muslim countries.[22]

Fourthly, when describing legally relevant facts, the science simultaneously sets as its goal the identification of regular causal relationships between them, thereby organizing the legal reality in accordance with the theoretical model laid down in its foundation (constitutive function). It is noteworthy that this function is rooted in neurophysiological processes that occur in the human brain as it constructs the surrounding reality. Scientists have proven that in the course of cognition and stable practical interaction of an individual with objects of the external world, neural connections are formed in the human's brain that correlate to the relations that exist between facts of reality.[23]

Based on this, there is reason to believe that the knowledge that, following K. Popper, can be regarded as the "World 3",[24] forms both the brain structures of the cognizing subject and the cognitive world of objects, thereby constructing both objective and subjective reality. And, fifthly, the improvement of mechanisms and tools for acquiring new knowledge, leading to its quantitative and qualitative growth,[25] allows the science to influence legal reality, ensuring its transformation, including directional transformations in accordance with the doctrinally developed regulatory ideal (dynamic function).

V. S. Conceptualization of the community: once again on residency or work on errors [K kontseptualizatsii soobshchestva: eshche raz o rezidentnosti, ili rabota nad oshibkami] // Sociology of Power [Sotsiologiya vlasti]. 2013. No. 3. P. 24. (In rus); Anikin D. A. Topology of Social Space: from Geography to Social Philosophy [Topologiya sotsial'nogo prostranstva: ot geografii k sotsial'noi filosofii] // Izvestiya of Saratov University. New Series. Series: Philosophy. Psychology. Pedagogy [Izvestiya Saratovskogo un-ta. Novaya seriya: Filosofiya. Psikhologiya. Pedagogika]. 2014. Vol. 14. Issue 1. PP. 5–6. (In rus)

[18] In this sense, the well-known statement of L. Wittgenstein is quite applicable to legal reality, from an empirical point of view: "The world is a totality of facts, not of things. The world is determined by the facts, and by these being all the facts." (Wittgenstein L. The Logical and Philosophical Treatise // Wittgenstein L. Philosophical Works. part. I. M.: Gnosis Publ., 1994. P. 5. (trans. from germ.))

[19] Schütz A. The Meaning Structure of the Social World // Schütz A. Selected Writings: A World that Glows with Meaning. M.: Rossiyskaya politicheskaya entsiklopediya (ROSSPEN) Publ., 2004. P. 996 (trans. from germ. and eng.)

[20] See: Novikova G. R. Religious and legal doctrine of Islam in the context of the legal regulation of the financial relations of modern states [Religiozno-pravovaya doktrina islama v kontekste pravovoi reglamentatsii finansovykh otnoshenii sovremennykh gosudarstv] // Courier of the Kutafin Moscow State Law University (MSAL) [Vestnik MGYUA im. O. E. Kutafina]. 2016. No. 3. P. 169 (In rus)

[21] Marchenko M. N. The course of comparative law [Kurs sravnitel'nogo pravovedeniya]. M.: OOO Gorodets-izdat Publ., 2002. P. 1027 (In rus)

[22] Rayanov F. M. The Muslim legal doctrine and its modern dimension [Musul'mansko-pravovaya doktrina i ee sovremennoe izmerenie] // The Problems of Oriental Studies [Problemy vostokovedeniya]. 2013. No. 2 (60). P. 13. (In rus)

[23] See: Purves D. Neuroscience. 5th ed. Sunderland (Mass.): Sinauer, 2011. P. 507 ff.

[24] Popper K. Knowledge and psychophysical problem: In defense of interaction. M.: LKI Publ., 2008. P. 81 (trans. from eng)

[25] See: *Popper K.* Evolutionary Epistemology // Evolutionary Theory: Paths into the Future / Ed. by J. W. Pollard. New York : John Wiley&Sons, 1984. P. 240.

It is easy to see that at different stages of historical development, the proportion between these functions was not the same. Depending on the specific conditions that determine the needs of society, and on the level of development, as well as the historical features of scientific knowledge itself, some of its functions were of predominant importance, while others played an auxiliary (subsidiary) role. In the traditional legal systems of the Ancient World and the Middle Ages, when doctrine was an undeniably recognized source of law, primary for it were the selective and semantic functions. The foregoing is clearly illustrated by the example of Roman jurisprudence.

Having arisen at the turn of the 3rd and 2nd centuries, B. C.,[26] the Ancient Rome jurisprudence initially had no law-making significance. In the preclassical period of the history of the Roman law, lawyers solved purely applied problems, namely, drafted lawsuits and transactions (cavere), dealt with cases in court (agere) and advised citizens on legal issues (respondere).[27] Thus, the doctrine, in terms of its historical genesis, initially grew out of purely practical actions, inseparable from those relations and facts that formed the substantial basis of the legal order. Naturally, inseparable from these actions were reflective moments, implying a comprehension of the relevance of legally significant behavior. In other words, legal science at the time of its inception represented a meaningful practical work of lawyers having sufficient qualifications for that.

Only with the passage of time, as the legal order, and, in the context of the latter, the intellectual, creative activity of legal experts evolved, did the differentiation of scientific thinking and practice happen, the latter becoming the gnosiological object of the former. The Roman legal doctrine is known to have reached fullest flower in the 1st-3rd centuries, A. D., when the works of influential lawyers (Gaius, Ulpian, Papinianus, Modestinus and Julius Paulus) receive official recognition as sources of law. However, even at that time, the doctrine did not meet the strict criteria of scientificity in the modern sense.[28] The activities of classical Roman jurists were mainly reduced to the formulation of general principles of legal regulation (the combination of which was called ius naturale, natural law) and to the description on their basis of specific life circumstances (casus), as well as subjective rights and duties arising in such circumstances.

Noteworthy are the features of the presentation of the material in the works of Roman lawyers. According to V. A. Savelyev, "Roman lawyers most often began the description of a casus with the formulation "it is asked ..."(quasitum est), followed by an account of the circumstances of the casus. And then the actual "response" of the lawyer, beginning with the words "responded that..." (respondi) followed. Sometimes respondi was followed by another characteristic formulation: "such is the right" (quid iuris sit)".[29] At the same time, as far as one can judge, the concept of a norm as a rule of conduct, general valid, universally binding and multiply repeatable, was generally alien to the lawyers of the classical period. The casuistry of their thinking, among other things, is evidenced by the specifics of the method they used, in particular, the desire to give accurate definitions of concepts, the invariable commitment to the methods of generic-specific classification of the facts being studied, borrowed from Aristotle's works, and the use of other formal logical and linguistic interpretation methods to which sometimes the legal research itself was reduced.[30]

Thus, the lawyers of Ancient Rome did a tremendous job, designed to give, if possible, a comprehensive description, systematization and cataloging of jural facts, from which the legal reality was formed at the empirical level. This contributed to the typification of such jural facts, the formulation of exemplary casus, guided whereby the judges could make decisions on specific cases. As A. A. Malinovsky

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[26] Novitsky I. B. Foundations of Roman civil law [Osnovy rimskogo grazhdanskogo prava]. M.: Prospekt Publ., 2015. PP. 24–26 (In rus)

[27] The listed tasks of the early Roman jurisprudence turned out so firmly connected with it that even in the middle of the 1st century, B. C., Cicero (Cic. de. orat. 1. 48. 212), answering the question of who can be called a lawyer, remarked that the jurist is "the one who is learned in the law (and practice of its application), that is used by individuals in the civilian community, and in giving answers, and conducting business in court, and drawing up formulations (qui legem, et consuetudinis eius, quia private in civitate uterentur, et ad respondendum, et ad agendum, et ad cavendum, peritus esset)".

[28] See: Berman G. J. Western rights tradition: the era of the formation. M.: Publishing house of Moscow state University, Infra-M — Norma Publ., 1998. PP. 131–132 (trans. from eng.)

[29] Saveliev V. A. Legal technique of the Roman jurisprudence of the classical period [Yuridicheskaya tekhnika rimskoi yurisprudentsii klassicheskogo perioda] // Russian Law Journal [Zhurnal rossiiskogo prava]. 2008. No. 12. P. 108. (In rus)

[30] See on this, in particular: Peretersky I. S. Digesta Justiniana. Essays on the history of compilation and general characteristics [Digesty Yustiniana. Ocherki po istorii sostavleniya i obshchaya kharakteristika]. M.: Gosyurizdat Publ., 1956. P. 68 (In rus) Garcia Garrido M. H. Roman private law: incidents, lawsuits, institutions. M. : Statut Publ., 2005. P. 89 (trans. from spain)

writes, "an exemplary casus was a model for resolving a typical legal dispute arising under identical or similar factual circumstances... The appearance of exemplary disputes indicates a sufficiently high level of development of the Roman jurisprudence. Its representatives were able to identify the typical in legal reality, precisely determine the legal essence of the dispute, abstracting from a variety of factual nuances, tried to create a theoretical model for resolving similar disputes by applying the method of analogy".[31]

The typification of specific life situations, that was carried out by the Roman jurisprudence, sheds light on the particularities of doctrinal law-making and on the specifics of the legal system in traditional societies, including the society of Ancient Rome. A characteristic feature of such legal systems, in our opinion, was the underdevelopment of the normative component, in connection with which the function of the main means of constructing legal reality was performed by subjective rights and obligations inextricably linked with specific life situations from which they directly flowed. It was in subjective rights and obligations that the semantic structure of the corresponding actual situation was represented and formalized, which semantic structure allowed participants in legal communication to psychologically perceive subjective rights as legal claims, enabling to demand certain behavior from the obligated persons.

Formulating exemplary causus, lawyers were guided by the premise that, in situations of equal relevance, subjects would behave similarly, which enabled to create typical models of subjective rights and obligations applicable to many similar factual situations. In this sense, the typification by lawyers of legal reality broadened the horizons of such reality, enabling to move from singularity to an aggregation of facts, united by common relevance and characteristic features.[32] At the same time, the cognitive activity of Roman lawyers became a logical continuation and development of the processes of constructing reality, the origins of which are rooted in the pre-predicative structures of the life world[33] and in the ordinary legal awareness of subjects of legal communication.

Reception of the Roman law in medieval Western Europe starting from the 11th century entailed not only the assimilation by Western European jurists of the scientific achievements and results of ancient legal scholars, but also the revival of the law-making significance of the legal doctrine.[34] Moreover, under conditions of local particularism inherent in medieval law, it was the lawyers who created the common rule of law (jus commune).[35] In this regard, the European monarchs' desire to impart binding force to their writings does not seem profoundly accidental.[36]

This tendency manifested itself especially clearly in the period of the 13th–14th centuries, marked with the activities of post-glossators (commentators),[37] who, unlike glossators, were not only university

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[31] Malinovsky A. A. Rome Jurisprudence: Methodology and Didactics [Rimskaya yurisprudentsiya: metodologiya i didaktika] // Russian Law: Education, Practice, Researches [Rossiiskoe pravo: obrazovanie, praktika, nauka]. 2017. No. 4 (100). P. 31. (In rus.)

[32] See: Schütz A. Reflections on the problem of relevance // Schütz A. Selected Writings: A World that Glows with Meaning. P. 281. (trans. from germ. and eng.)

[33] About the life world see: Husserl E. Crisis of the European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy // Edmund Husserl. Philosophy as Rigorous Science. Novocherkassk: Saguna Publ., 1994. P. 87.

[34] See more details: Kotlyar I. A. "Jus commune" as a medieval model of the all-European law and order (XI–XIV centuries) ["Jus commune" kak srednevekovaya model' obshcheevropeiskogo pravoporyadka (XI–XIV veka)]. Abstract of dissertation of the candidate of Juridical sciences, M., 2011. (In rus); Mikhailov A. V. The Genesis of Continental Legal Dogma [Genezis kontinental'noi yuridicheskoi dogmatiki]. M.: Yurlitinform Publ., 2012. (In rus)

[35] See: Fedorov A. N. Fragmentation or interaction: on the particularism of the law of medieval Western Europe [Razdroblennost' ili vzaimodeistvie: o partikulyarizme prava srednevekovoi Zapadnoi Evropy] // Bulletin of Chelyabinsk State University [Vestnik Chelyabinskogo gosudarstvennogo universiteta]. 2015. No. 23 (378). Ser.: Right [Ser.: Pravo]. Issue 44. P. 20. (In rus)

[36] Under conditions of the emerging absolutist statehood of the early New Age, the monarch as the supreme sovereign of the nation becomes a key figure in jus commune, which made doctrinal provisions binding in terms of law enforcement practice (Kotlyar I. A. Sovereign as an institution of European medieval jus commune [Gosudar' kak institut evropeiskogo srednevekovogo jus commune] // Bulletin of Moscow State University. Ser. 11: Right [Vestnik MGU. Ser. 11: Pravo]. 2011. No. 4. P. 106 (In rus)). At the same time, the state itself, on whose authority the doctrine rested, at the time of its inception represented the result of the efforts of lawyers to generalize and conceptualize the phenomena of legal reality. See P. Bourdieu From the "royal house" to state interest: a model of the origin of the bureaucratic field // Bourdieu P. Sociology of social space. M .: Institute of Experimental Sociology. SPb .: Aletheia Publ., 2005. P. 279 (trans. from fr.)

[37] Poldnikov D. Yu. Stages of development of the jus commune scientific doctrine in Western Europe in the XII–XIV centuries [Ehtapy razvitiya nauchnoi doktriny jus commune v Zapadnoi Evrope v XII — XIV vv.] // Bulletin of Moscow State University. Ser. 11: Right [Vestnik MGU. Ser. 11: Pravo]. 2013. No. 1. P. 90 (In rus)

professors, but also active participants in political life. The recommendations formulated in the works of the most influential post-glossators, such as Baldus de Ubaldis, Franciscus Accursius, Bartolus de Saxoferrato and others, were subject to mandatory application in the courts, which enabled to curb, to a certain extent, the arbitrariness of judges and create conditions for harmonization of urban, municipal, community and other local customs.[38]

Legal constructs created in the writings of the representatives of the scientific doctrine of jus commune claim not only typification, but generalization of factual material and, therefore, general validity as components of legal reality. Thus, the selective function is no longer the main one for medieval legal doctrine, such function being replaced by the constitutive function associated with the constitution of the rule of law and its main segments. The results of a thorough doctrinal study are the categories of the state, public authority, legal entities, contract law, etc. practically unknown to the Roman law.[39]

It is thanks to the law-making activities of lawyers that the further theorization and conceptualization of legal reality takes place, laying the foundations for the formation of national legal systems in the New Age. The latter became a natural result of the normalization of legal orders, leading to the formation, on the basis of subjective rights and obligations typified by lawyers, of universally valid rules of conduct that extended their effect to all participants in legal communication. It is easy to see that the leading role in the normalization of legal orders culminating in the creation of codifications of the 19th century, was played by legal science, including its doctrinal aspect. The great lawyers of the early New Age (in particular, J. Althusius, H. Grotius, W. Blackstone, D. Coke, J. Bodin, J. Cujas, C. Beccaria and others), who can rightfully be called the creators modern scientific method,[40] formulated a theoretical idea of the norm of law as a rule of behavior, which has found application in the legislative regulation of public relations.

With the final formation of the normative dimension of legal reality, the doctrine loses its inherent significance as a source of law. This was assisted, among others, by mechanistic models of legal regulation that have become widespread in the law-making and law-enforcement practice of the New Age, which was indirectly, but very actively influenced by the classical natural science picture of the Universe and was subjected to the effect of natural laws, representing a universal causal relationship of facts established in experience. As a result, the main means of constructing the modern legal order come to be represented by legal norms, that are considered as official-authoritative prescriptions, having signs of general bindingness, formal certainty, repeated applicability, and extend their effect to an indefinite number of people and to an unlimited number of typical social relations.[41]

With all the clarity, such mechanistic ideas about the normativity of law manifested themselves in the concept of the "legal regulation mechanism" developed by a number of Soviet lawyers, which is a process of unilateral impact of the norms established by the state on the behavior of members of society by endowing the latter with subjective rights and obligations.[42] At the same time, legal

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[38] See in particular: Kotlyar I. A. The concept of "jus commune" in the European legal tradition [Ponyatie "jus commune" v evropeiskoi pravovoi traditsii] // Bulletin of Moscow State University. Ser. 11: Right [Vestnik MGU. Ser. 11: Pravo]. 2009. No. 5. PP. 89–100. (In rus) Marey A. V. To comprehending the reception of Roman law: the formation of jus commune in Western Europe in the XII–XIV centuries [K osmysleniyu retseptsii rimskogo prava: formirovanie jus commune v Zapadnoi Evrope XII–XIV vv.] // State and law [Gosudarstvo i pravo]. 2012. No. 5. PP. 96–102. (In rus)

[39] Speaking of the influence of the medieval legal doctrine on the development of contract law, D.Yu. Poldnikov highlights its fundamental importance. According to him: "Contrary to the existing stereotype... the Roman law was not familiar with the general theory of contract, based on the consensual model of the contract, a single terminological designation of the contract, its bindingness, contractual freedom... How did it turn out that such a fragmented Roman contract law formed the basis of the modern contractual theory? In our view, the key role here was played by the theoretical concepts of the representatives of the medieval jus commune" (D.Yu. Poldnikov Stages of formation of the civilistic contract theory *jus commune* [Ehtapy formirovaniya tsivilisticheskoi dogovornoi teorii jus commune] // State and law [Gosudarstvo i pravo]. 2012. No. 6. P. 108 (In rus)).

[40] See in particular: Chicherin B. N. Political thinkers of the Ancient and New World [Politicheskie mysliteli Drevnego i Novogo mira]. SPb.: Lan' Publ., 1999. P. 150 (In rus) Batiev L. V. Political and legal doctrines of the XVII century. [Politicheskie i pravovye ucheniya XVII veka] SPb. : Yuridicheskiy tsentr Press Publ., 2006. PP. 5–11 (In rus) Zanin S. V. Birth of the doctrine of natural law during the epoch of Modern Period: Johannes Althusius and Hugo Grotius [Rozhdenie uchenii o estestvennom prave v ehpokhu Novogo vremeni: Ioann Al'tuzii i Grotsii] // History of State and Law [Istoriya gosudarstva i prava]. 2013. No. 14. PP. 24–27. (In rus)

[41] See more details: Leist O. E. The essence of law. Problems of the theory and philosophy of law [Sushchnost' prava. Problemy teorii i filosofii prava]. M. : Zertsalo Publ., 2002. PP. 51–58. (In rus)

[42] Kazimirchuk V. P. The Social Mechanism of the Law [Sotsial'nyi mekhanizm deistviya prava] // Soviet State and Law [Sov. gosudarstvo i pravo]. 1970. No. 10. PP. 37–44. (In rus); Yavich L. S. General Theory of Law [Obshchaya teoriya prava]. L.: LGU Publ., 1976. P. 246 (In rus); Tikhomirov Yu. A. Legal System of the Developed Socialist Society

science, the main task of which began to be seen in identifying the general prerequisites and regularities of normative regulation, interpreting norms and developing recommendations for their application, is being squeezed out into the sphere of pure knowledge.[43] The law-making possibilities of the doctrine, whose provisions are becoming more abstract and theoretically loaded as the modern legal order becomes more complex, are generally assessed skeptically by researchers,[44] despite the reservations that the doctrine is an important way of law formation in any society, "a comprehensive form of law" , a secondary, non-traditional source of law, etc.[45] The only exception is the Anglo-Saxon (Anglo-American) law, where, for several historical, systemic and sociocultural reasons, the doctrine retained (although to a limited extent) the significance of the source of law.[46]

It appears that the considered trends in the historical dynamics of the science of law reflect the most important regularities of transformation of the semiotic means of constructing legal reality in the evolutionary dimension. This is due to the very nature of legal science, which is a collection of texts, i. e., semiotic complexes that organize, arrange, and represent the phenomena of legal reality based on the semantic structure inherent in the latter. We have observed that the basic law of the evolution of legal reality consists in the development of the latter towards the increasing general significance of the signs that form it, correlating with the formation of a single semantic structure that pervades this reality.

Namely, the relevances (which arose initially in the pre-predicative horizons of the life world), which form the semantic core of specific life situations,[47] are universalized during evolution, apply to many similar facts and homogeneous social relations, demanding similar behavior from their participants. In terms of the semiotic form, the evolution of legal reality is manifested in the formation, on the basis of subjective rights and obligations, of norms of general action, addressed to an unlimited scope of participants in legal communication.

Thus, legal norms, being an attribute of a developed legal order, are the result of the typification of subjective rights and obligations and the sedimentation of legally relevant experience of many specific individuals.[48] The result of the processes being considered is the formation of a legal reality space common for all individuals, representing a single field of intersubjective communications. The legal science in general and the doctrine in particular, due to their inherent high reflective potential, as well as the

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[Pravovaya sistema razvitogo sotsialisticheskogo obshchestva] // Soviet State and Law [Sov. gosudarstvo i pravo]. 1979. No. 7. P. 39. (In rus); Alekseev S. S. General Theory of Law. [Obshchaya teoriya prava] In 2 vols. Vol. II. M. : Yuridicheskaya literatura Publ., 1982. PP. 25–30 (In rus)

[43] Similar views on the purpose and designation of the science of law were already held by thinkers of the 17th-18th centuries, who believed that lawyers did not create legal reality, but only cognized the regularities that were objectively inherent in it and were compared with the laws of nature. See: Hobbes T. Basics of Philosophy // Hobbes T. Works in 2 vols. Vol. 1. M.: Mysl' Publ., 1989. PP. 237, 272 and etc.; Montesquieu Sh. L. On the Spirit of Laws // Montesquieu Sh. L. Selected works. M.: Gospolitizdat Publ., 1955. P. 163 and etc. (trans. from fr.)

[44] See for example: Grimm D. D. On the question of the concept and source of the binding legal norms [K voprosu o ponyatii i istochnike obyazatel'nosti yuridicheskikh norm] // Journal of the Ministry of Justice. [Zhurnal ministerstva yustitsii] 1896. No. 6. PP. 26–27. (In rus); Khvostov V. M. The general theory of law. Elementary essay [Obshchaya teoriya prava. Ehlementarnyi ocherk]. M.: Tip Vilde Publ., 1914. PP. 107–108 (In rus); Vinogradov P. G. Essays on the theory of law [Ocherki po teorii prava]. M. : Tip. t-va A. A. Levenson Publ., 1915. PP. 124–125 (In rus); Tebbit M. Philosophy of Law: An Introduction. London; New York : Routledge&Kegan Paul, 2005. PP. 36–52.

[45] See in particular: Rozhnov A. P. Unconventional sources of law in the legal system [Netraditsionnye istochniki prava v pravovoi sisteme] // Bulletin of Volgograd State University [Vestnik VoLGU]. 2001. Ser. 5. Issue 4. P. 29. (In rus); Voplenko N. N. Sources and forms of law [Istochniki i formy prava]. Volgograd: Volgograd State University Publ., 2004. P. 23 (In rus); Lyubitenko D. Yu. Legal doctrine in the system of sources of Russian law [Pravovaya doktrina v sisteme istochnikov rossiiskogo prava] // Bulletin of the Volgograd Academy of the Ministry of Internal Affairs of Russia [Vestnik Volgogradskoi akademii MVD Rossii]. 2010. No. 4 (In rus); Malko A. V., Khramov D. V. System of non-traditional sources of Russian private law [Sistema netraditsionnykh istochnikov rossiiskogo chastnogo prava] // Leningrad Legal Journal [Leningradskii yuridicheskii zhurnal]. 2010. No. 1. P. 38 and etc. (In rus)

[46] See: Romashov R. A. Legal doctrine in the Anglo-American, Muslim and Russian law: the problem of understanding and forms of expression [Pravovaya doktrina v anglo-amerikanskom, musul'manskom i rossiiskom prave: problema ponimaniya i formy vyrazheniya] // Problems of the methodology and philosophy of law. Collection of articles of participants of the II International Round Table [Problemy metodologii i filosofii prava. Sb. statei uchastnikov II Mezhdunarodnogo kruglogo stola] / Ed. S. N. Kasatkin. Samara: Samarskaya gumanitarnaya akademiya Publ., 2015. PP. 33–34. (In rus)

[47] See more details: Stovba A. V. Legal situation as the source of being law. [Pravovaya situatsiya kak istok bytiya prava]. Kharkov: LLS Publ., 2006. (In rus)

[48] See: Berger P., Luckmann T. The Social Construction of Reality: A treatise on sociology of knowledge. M. : Medium Publ., 1995. PP. 157–170 (trans. from eng.); Schütz A. Reflections on the problem of relevance. P. 295; Divisenko K. S. Social studies of the vital world [Sotsial'nye issledovaniya zhiznennogo mira] // Sociological Journal [Sotsiologicheskii zhurnal]. 2014. No. 1. P. 7. (In rus)

authority enjoyed by legal scholars, can significantly accelerate this process, becoming a powerful catalyst of evolutionary changes in legal reality.

The evolutionary dynamics of legal reality and the participation of scientific knowledge in it are not random and not arbitrary, but deeply regular, confirmed by the example of the evolution of other semiotic means of constructing reality (languages). This refers, in particular, to natural human languages,[49] which are initially composed of occasionally motivated individual signs that have a maximum degree of specificity and designate single objects. Hand gestures, which, according to some scholars, were the first way of semiotic communication, are the simplest (and earliest) example of such signs.[50] As the sound language evolved and developed, the elements of sign communication were preserved in its structures in the form of emphatic stresses, exclamatory intonation,[51] and, particularly, the so-called deictic words, playing, as K. Buhler showed, an important role in the construction of the speaker's spatial relations.[52]

The individual and, therefore, extremely concretized nature of the primary forms of sign communication, confined to individual communicative situations, is reflected in idiolects, making, according to some linguists, the language of any human community at the early stages of development.[53] As W. Humboldt asserted, "all people speak kind of one language, and, at the same time, each person has their own specific language. It is necessary to study live spoken language and the speech of a specific individual".[54] In the course of evolution, on the basis of many idiolects, a single language is formed, mandatory for all members of the linguistic community. At the same time, individual differences, reflected in idiolects, without losing their overall significance, become leveled to a degree. The normalization processes occurring in any language that has reached a certain stage of development play an active role here.

One of the most significant prerequisites for normalization is the loss by the semiotic means used by the language of direct figurative expressiveness, and their transformation into signs that can signify large classes of objects that have common signs.[55] The studies of A. M. Hokart demonstrated that the evolution from sign-picture to sign-symbol has a common cultural significance and affects any spheres of communication interwoven with the natural language, for example, political and legal rituals practiced in ancient societies.[56] An important role here is played by scientific knowledge that contributes to the

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[49] There have been multiple attempts in the literature to identify common regularities of evolution of law and language due to their close interaction and interweaving in the processes of semiotic communication. See for example: Kasatkin A. A. The history of language and the history of law (on the material of some Romance languages) [Istoriya yazyka i istoriya prava (na materiale nekotorykh romanskikh yazykov)] // News of the Academy of Sciences of the USSR. Ser. literature and language. [Izvestiya AN SSSR. Ser. literatury i yazyka]. 1964. Vol. XXIII. Issue 2. PP. 113–124. (In rus); Proskurin S. G. The evolution of law in the light of semiotics [Ehvolyutsiya prava v svete semiotiki] // Bulletin of the Novosibirsk State University. Series: Linguistics and Intercultural Communication [Vestnik NGU. Ser.: Lingvistika i mezhkul'turnaya kommunikatsiya]. 2008. Vol. 6. Issue 1. PP. 48–53. (In rus)

[50] Attempts to substantiate the theory of the emergence of language from signs were made as early as in the ancient era by philosophers like Epicurus, Lucretius and others (see: Verlinsky A. L. Ancient teachings on the emergence of language [Antichnye ucheniya o vozniknovenii yazyka]. SPb: St. Petersburg State University Publ., 2006. P. 333). One of the subsequently most active supporters of the theory of gesture communication was N.Ya. Marr, who saw in it the starting point of the evolution of not only language, but also a number of other social institutions (Marr N. Ya. Language [Yazyk] // Marr N. Ya. Main questions of linguistics [Osnovnye voprosy yazykoznaniya]. M.: Sotsekgiz Publ., 1935. P. 129. (In rus)). Currently, this concept is considered marginal and is somewhat rightly criticized. However, there is another view, pointing to the indisputable merits of the sign theory, which allows to explain the effect of the basic psychophysiological mechanisms that underlie all the more complex forms of semiotic communication. See: Ivanov V. V. Odd and even: Brain asymmetry and dynamics of sign systems [Nechet i chet: Asimmetriya mozga i dinamika znakovykh sistem] // Ivanov V. V. Selected works on semiotics and cultural history [Izbr. trudy po semiotike i istorii kul'tury]. Vol. I. M. : Yazyki russkoy kul'tury Publ., 1999. P. 487 and etc. (In rus)

[51] See: Bloomfield L. Language [Yazyk]. Ed. 2nd. M. : Editorial URSS Publ., 2002. P. 116 (In rus)

[52] See: Buhler K. Theory of language. The representational function of language. M., Progress Publ., 2002. P. 82 and etc.

[53] See: Bogdanova E. V. On some aspects of the study of the term idiolect in Russian and Western linguistics [O nekotorykh aspektakh izucheniya termina idiolekt v otechestvennoi i zapadnoi lingvistike] // Bulletin of the Leningrad State University named after A. S. Pushkin [Vestnik LGU im. A. S. Pushkina]. 2009. Vol. 1. No. 4. PP. 100–108. (In rus)

[54] Wilhelm Humboldt. On Language: The Diversity of Human Language-Structure and its Influence on the Mental Development of Mankind // Humboldt W. Selected works on linguistics. M.: Progress Publ., 1984. P. 45.

[55] See: Ivanov V. V. Linguistics and humanitarian problems of semiotics [Lingvistika i gumanitarnye problemy semiotiki] // News of the Academy of Sciences of the USSR. Ser. literature and language [Izvestiya AN SSSR. Ser. literatury i yazyka]. 1968. Vol. XXVII. Issue 3. P. 241. (In rus)

[56] Hocart A. M. Kings and Councillors. Cairo : Egyptian University Press, 1936. P. 151. It is worthwhile to note that among earliest were studies of H. S. Maine on the influence of the processes under consideration on the insti-

conceptualization of culture and the formation of terminology, with the help of which semantic uniformity of various spheres of cultural reality, including legal reality, is ensured.[57]

This circumstance, in relation to linguistic semantics, is described by V. V. Ivanov, according to whom: "The development from specific images to symbols in languages is in line with a similar shift of theoretical interests in relation to language. For the early stages of consciousness (in particular, reflected in myths), the main problem was the relationship between the sign and the object, reflected in the legends about the name of things... Modern linguistic semantics, the development of which began with the study of signs denoting concepts, is least concerned with this a range of issues".[58] The same is true of the legal science, the law-making significance of which is in forming a system of means for the semiotic construction of legal reality, creating conditions for normalizing the latter.

Even in modern conditions, wherein the legal science in general (and the doctrine in particular), as we have seen, is not normally classified as sources of law, their significance is still especially high where the norms of positive law are not an expression of the arbitrariness of the prevailing clique, but reflect the laws of social life, as well as the general will and public interest of all members of society. In such conditions, the doctrine inevitably comes to the fore among not only legal factors, but also among the sources of law in a strict (formal-legal) sense.[59] Indirectly, this circumstance is officially recognized in a number of regulatory legal acts, so far only in relation to the norms of foreign law on the territory of the Russian Federation (clause 1 of article 1191 of the Civil Code of the Russian Federation, clause 1 of article 14 of the Arbitration Procedure Code of the Russian Federation, clause 1 of Article 166 of the Family Code of the Russian Federation).[60]

Moreover, in the situation of the emergence of a qualitatively new legal order, due to its inherent features mentioned above, the importance of the doctrine as a source of law will apparently increase. Therein, taking into account the specifics of the legal science, including in its doctrinal manifestations, there are reasons to assume that the main function relevant to the post-modern legal order will be the dynamic function, the implementation of which will allow to actively impact the legal order, bringing it in line with general principles developed on doctrinal level. The constitutive impact of legal science on legal order may cover several directions at a time, namely through law-making, judicial practice and law enforcement activities of practicing lawyers.

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tutions of civil and criminal law of the societies of the Ancient World, deducing the pattern of evolution of the legal order — from specific prescriptions established by the will of the ruler, through the dominance of law of custom to codifications that embody the will of all members of society (Maine H. S. Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas. Ed. 2nd. M.: KRASAND Publ., 2011. (trans. from eng.)). In this regard, it would be appropriate to assume that the evolutionary dynamics of legal orders on a world-historical scale testifies to the development of the deep structures of human thinking, contributing to the growth of personal self-awareness and, ultimately, the progress of freedom in both its individual and general social manifestations. See more about this in our article: Razuvaev N. V. The development of personal identity as a driving force for the evolution of the states of the Ancient World and the Middle Ages [Razvitie lichnostnogo samosoznaniya kak dvizhushchaya sila ehvolyutsii gosudarstv Drevnego mira i Srednikh vekov] // One Hundred Years to the Ural State Law Institute (1918–2018): in 2 vols. Vol. 1: The Evolution of the Russian and Foreign States and rights: historical and legal research [Sto let Ural'skomu gosudarstvennomu yuridicheskomu institutu (1918–2018 gg.): v 2 t. T. 1: Ehvolyutsiya rossiiskogo i zarubezhnogo gosudarstva i prava: istoriko-yuridicheskie issledovaniya] / Ed. A. S. Smykalin. Ekaterinburg: Ural State Law University Publ., 2019. PP. 134–150. (In rus)

[57] On various aspects of the conceptualization of cultural semantics, see in more detail: Problems of functional grammar: Categorization of semantics [Problemy funktsional'noi grammatiki: Kategorizatsiya semantiki] / ed.-in-chief A. V. Bondarko, S. A. Shubik. SPb.: Nauka Publ., 2008.

[58] Ivanov V. V. Linguistics and humanitarian problems of semiotics [Lingvistika i gumanitarnye problemy semiotiki] P. 241. (In rus)

[59] See in particular: Razumovich N. N. Sources and form of law [Istochniki i forma prava] // Soviet State and Law [Sov. gosudarstvo i pravo]. 1988. No. 3. P. 21 (In rus); Granat N. L. Sources of law [Istochniki prava] // Lawyer [Yurist]. 1998. No. 9. PP. 6–11 (In rus); Boshno S. V. Op. cit. PP. 70–79; Neshataeva T. N. On the question of sources of law — judicial precedent and doctrine [K voprosu ob istochnikakh prava — sudebnom pretsedente i doktrine] // Bulletin of the Supreme Arbitration Court of the Russian Federation [Vestnik VAS RF]. 2003. No. 5. PP. 91–97. (In rus); Vasilyev A. A. Legal doctrine as a source of law: historical and theoretical issues. [Pravovaya doktrina kak istochnik prava: istoriko-teoreticheskie voprosy]. Abstract of dissertation of the candidate of Juridical sciences, Krasnoyarsk, 2007. (In rus)

[60] See: Family Code of the Russian Federation. Appr. by The Federal Law No. 223-FZ of December 29, 1995 // Collection of Legislative Acts of the Russian Federation. 1996. No. 1 Article 16; 2018. No. 1 P. I. Article 22; Civil Code of the Russian Federation. Part three. Appr. by Federal Law No. 146-FZ of November 26, 2001 // Collection of Legislative Acts of the Russian Federation. 2001. No. 49. Article 4552; 2017. No. 14. Article 1998; Arbitration Procedure Code of the Russian Federation. Appr. by the Federal Law No. 95-FZ of July 24, 2002 // Collection of Legislative Acts of the Russian Federation. 2002. No. 30. Article 3012; 2018. No. 53. Part 1. Article 8411.

The mutual connection and influence of the doctrine on law-making was already present in the early stages of the evolution of legal reality, becoming especially close during codification works, which required comprehensive understanding of the structure of the legal order, the principles of its systemic organization, the ratio of specific elements, etc. Only legal science could form such understanding, which is why the leading role played by scientists in preparing codified legislative acts is not accidental. To verify this, it is enough to recall only a few of the most famous examples. Thus, according to historians, the ancient Babylonian Laws of Hammurabi (18th century, B. C.) were already the result of thorough doctrinal development, generalization and systematization of law of custom, court decisions, royal decrees and other sources.[61]

The influence of legal science on the codification of Roman law throughout the entire existence of the latter is well known. The commission of decemvirs for the compilation of the Twelve Tables included persons who stood out for their knowledge of law (first of all, Appius Claudius, the chair of the college). Further codification works were led by leading lawyers of the day too: in particular, Salvius Julianus (2nd century, A. D.), by order of the emperor Adrian, systematized the norms of praetorian law, preparing the so-called Eternal Edict (Edictum perpetuum). But the contribution of legal scholars was especially significant in the preparation of the Justinian Code of Civil Law, in which the largest scholars of their time were involved.[62] This tradition was continued in Byzantium, where lawyers (such as, for example, Constantine Harmenopoulos) were as actively involved in the creation of legislative acts as in the Roman Empire.[63]

It does not need special proof that all the most important codifications of the Modern and Contemporary Times (the French Civil Code, the Complete Code of the Laws of the Russian Empire, the German Civil Code, the Civil Code of Italy, etc.) were ultimately the product of doctrinal creativity, in relation to which the state authority performed only an auxiliary, authorizing role.[64] That is why one should agree with the statement of J. Schapp that "the doctrine in the broad sense is not something "attached to the law", on the contrary, the law is its content. However, this circumstance does not change anything in that access to law is possible only through the doctrine".[65] Doctrinal law-making can also be performed intra legem, through doctrinal interpretations of legislative norms, contextually becoming part of the interpreted norm itself and subject to judicial application along with it.

This is exactly the case with French law, where the works of F. Planiol, L. Michaux, R. Saleille, J. L. Ortolan and others enjoy official recognition. In the legal systems of the Netherlands and former Dutch colonies, primarily South Africa, the works of glossators, post-glossators, as well as lawyers of the 17th-18th centuries (H. Grotius, A. Vinius, I. Vet and others) are used to fill in the gaps in the acting legislation.[66] Finally, in Germany, where the doctrine is not used to directly regulate legal relations, the works of lawyers (in particular, F. C. Savigny, A. Tour, G. Puchta, B. Windscheid, H. Dernburg, J. Baron and others) constitute the theoretical basis of legislation, having a decisive influence on judicial practice.[67] The role of doctrinal interpretations in international law, namely in the practice of international courts, guided by the writings of leading lawyers (F. Vitoria, B. Ayala, F. Gentile, E. Vattel, V. F. Malinovsky and others) is significant.[68]

Nothing, we believe, prevents the direct application of doctrinal provisions in the law enforcement practice of lawyers. Moreover, right now, the significance of the doctrine is becoming especially important for law enforcers who have to deal with facts and relationships that were absent at the earlier stages of social development and require intense intellectual efforts for their understanding and legal

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[61] See: History of the Ancient East. The origin of the most ancient class societies and the first centers of slaveholding civilization. P. I. Mesopotamia [Istoriya Drevnego Vostoka. Zarozhdenie drevneishikh klassovykh obshchestv i pervye ochagi rabovladel'cheskoi tsivilizatsii. Ch. I. Mesopotamiya] / Ed. I. M. Dyakonov. M. : Nauka Publ., 1983. P. 372 (In rus)

[62] See more details: Lipshits E. E. Law and court in Byzantium in the 4–7th centuries [Pravo i sud v Vizantii v IV–VII vv]. L.: Nauka Publ., 1976. (In rus)

[63] See: Medvedev I. P. Legal culture of the Byzantine Empire [Pravovaya kul'tura Vizantiiskoi imperii]. SPb.: Aletheia Publ., 2001. P. 215 and etc. (In rus)

[64] See on this: Kabriyak R. Codification. [Kodifikatsii]. M. : Statut Publ., 2007. PP. 322–324 (In rus)

[65] Schapp J. System of German civil law. M.: Mezhdunarodnye otnosheniya Publ., 2006. P. 41. (trans. from germ.)

[66] See: Zweigert K., Kötz H. Comparative private law. Vol. 1–2. M.: Mezhdunarodnye otnosheniya Publ., 2011. PP. 236–239.

[67] Schapp J. Op. cit. P. 30.

[68] See: Vasilyev A. A. Legal doctrine as a source of law: pros and cons [Pravovaya doktrina kak istochnik prava: za i protiv] // Altai Messenger of State and Municipal Service [Altaiskii vestnik gosudarstvennoi i munitsipal'noi sluzhby]. 2010. No. 5. PP. 44–45. (In rus)

qualifications. An important sign of the post-industrial (informational) society, noted by many researchers,[69] is the expansion of scientific knowledge in all areas of social practice, including legal practice. Therefore, it is no coincidence that practicing lawyers strive to generalize their experience and draw scientifically significant conclusions and recommendations from such experience. Thus, the doctrine, closely interwoven with legislative, judicial and law enforcement activities, is increasingly involved in the construction of legal reality. In this regard, one should agree with the proposals in the legal literature to officially recognize the doctrine as a source of law.

However, such recognition implies an increased social responsibility of the legal science.[70] It is known, in particular, of the skeptical, not to say sharply negative, attitude of I. A. Pokrovsky to the idea of free judicial law-making, which, according to the scientist, discredited the idea of natural law, on whose behalf the judges took the liberty to speak. I. A. Pokrovsky treated the most important disadvantage of judicial law the possibility of arbitrariness that increases multiple times where the legal consciousness of judges is at a fairly low level. According to him: "If the theory of free judicial law-making contains an organic and unavoidable danger of judicial arbitrariness, if it raises the very uncertainty and ambiguity of law to a principle, it obviously goes against the interests of a developing human person".[71]

Although the legal science, which, by its very nature and social purpose, acts as a medium of exemplary legal awareness, should in principle avoid this danger, there is no reason to a priori consider scholars to be free from the shortcomings inherent in other representatives of the professional legal community. The substantive value and quality of research can, in particular, be markedly reduced by the political or ideological bias of legal thought, leading to the substitution of significant goals of scientific knowledge. In such case, the place of the search for scientific truth and the development of sound recommendations for law enforcement and judicial practice is occupied by the serving of the interests of those in power. The legitimate consequences of this trend are the justification of arbitrariness, the preaching of legal nihilism, the denial of the value of the human person, the basic inalienable rights and freedoms of the person, etc. One more ideological flaw in jurisprudence is the tendency toward abstract theorization rendering scientific works obviously useless for practicing lawyers.

It is submitted that overcoming the indicated systemic shortcomings of the legal science would be an important step towards its transformation into a source of law. Therein, the tasks of the legal science should include not only the formation of a consolidated doctrinal position on issues to be resolved, but also the creation of an all-encompassing theoretical model of legal reality. Such model, based on a system of general scientific, philosophical and legal views, should serve as a basis for legal regulation. In addition, the doctrine, acting as a source of law, cannot be limited only to the creation of a "general theory" that is left at the mercy of legislators, judges and law enforcers. No matter how good such theory may be, it will not replace specific regulatory prescriptions, which the doctrine is also called upon to develop in one form or another.

In other words, the legal science (primarily in its doctrinal aspect) should be present at all stages of legal regulation — from formulating the most fundamental general principles to offering specific solutions to any practically significant issues. Only in such case will legal science be able to successfully perform the law-making function, which is its most important social mission.

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[69] See in particular: Druker P. Post-Capitalist Society // New Post-Industrial Wave in the West: An Anthology / Ed. V. L. Inozemtsev. M.: Academia Publ., 1999. P. 71. (trans. from eng.)

[70] See more details: Antonova L. I. Serving the law — the holy duty of a lawyer [Sluzhenie pravu — svyataya obyazannost' yurista] // Administrative consulting [Upravlencheskoe konsul'tirovanie]. 2011. No. 4. PP. 65–73. (In rus)

[71] Pokrovsky I. A. Basic problems of civil law [Osnovnye problemy grazhdanskogo prava]. M.: Statut Publ., 1998. P. 105 (In rus)

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Constitutional Reform in the Russian Federation: for and Against

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ABSTRACT

The article discusses the prospects for constitutional reform in the Russian Federation and the arguments of supporters and opponents of the reform. Considering the basic models of republican government in the modern world, the author comes to the conclusion that the presidential-parliamentary republic, which is the basis of the Constitution of the Russian Federation, is optimal for our country. According to the author, the French model of a semi-presidential republic is closest to the Russian one. The author also formulates proposals for improving the constitutional legislation of Russia.

Keywords: Constitution of the Russian Federation, presidential-parliamentary republic, constitutional reform, President, Government, federalism

Each time when the country faces unresolvable social and political contradictions, the society turn to transformation of the constitutional arrangement in Russia. Before long, the degree of discussions goes up to making claims that a new constitution has to be adopted. We cannot but agree that a new constitution represents an unflinching break with the past, but the future will require a clear-cut and straight answer to the question why we are not comfortable with the current constitution, what should be changed and how, and what should be preserved, fought back in the forthcoming political battles.

1. Claims against the current constitution

If we try to summarize the main claims against the constitution, they may be presented as follows.

First, it is the choice of the model of a republic. Out of three "standard models" — presidential (USA), parliamentary (Federal Republic of Germany) and semi-presidential (French Republic) — our constitution is based on the semi-presidential republic. In recent times, there are a lot of proposals to change to the parliamentary republic.

Secondly, from time to time discussions about "excess powers" of the president, up to statements about the autocratic nature of the constitution, resume. Actually, the discussions very rarely come down to the constitutional model of the president's activities — they usually touch upon everyday practice being sort of a melting pot of laws and our "ideas" about the traditional role of a "leader".

Third, certain policies suggest the revision of the federal structure and at the same time discreetly evade describing details on how they are going to redraw the map of Russia.

Lately, a number of high-status politicians (D. A. Medvedev, V. D. Zorkin, V. V. Volodin) expressed their viewpoint that in general the constitution is satisfactory but may be subject to "selective adjustment" in order to take social changes into account.

The article by the Chairman of the Constitutional Court V. D. Zorkin entitled "The letter and spirit of the Constitution" puts forward the main thesis that there are no indications for a radical change of the constitutional model. "Presumptions ... that a radical constitutional reform can turn the current of events in a more correct direction are not only shallow and short-sighted but are also dangerous as they can result in harsh social and political destabilization. Those who are talking that the structure of life can be changed only by legal solutions are just naive idealists, if not worse".[1] V. D. Zorkin proposes to rely on the "living constitution" doctrine, to adapt the text of the constitution to changing social and legal realities. However, he points out a number of "shortcomings" in the constitution, which he thinks may be eliminated by "selective amendments" of the constitution. "Of course, our constitution has shortcomings. They include biased checks and balances in the system, bias towards the executive branch, insufficiently distinct distribution of powers between the president and the government, insufficiently clear determination of the status of the presidential executive office and the authorities conferred to the public prosecutor's office. The structure of article 12 of the constitution gives rise to the opposition of local self-government bodies to public authorities (including representative agencies of state power), where-

[1] Zorkin V. D. The letter and spirit of the Constitution [Bukva i dukh Konstitutsii] // Russian Newspaper [Rossiyskaya Gazeta]. 10.10.2018. No. 226 (7689).

as in contrast local self-government bodies by their nature are just a lower, local tier of public authority in the Russian Federation. There are shortcomings in the division of jurisdictions and powers between the federation and its constituent entities".[2] A detailed critical review of proposals made by V. D. Zorkin can be found in my article entitled "What is necessary and what should not be changed in the Constitution".[3]

If we give a second glance to the above-mentioned claims about essential change, out of nine chapters and 137 articles of the constitution, the said changes will affect no more than four chapters (three, actually: "President", "Federal Assembly", and "Government") and fundamentally no more than twenty articles. But the constitution has such fundamentally important chapters as "Foundations of the Constitutional Order", "Rights and Liberties of an Individual and a Citizen", "Federative Framework", "Local Self-Governance", which to a great extent determine the spirit of the constitution. Everyone who proposes to blow off the current constitution and to start from scratch should ask themselves: are they sure that the scope of rights and liberties declared in the constitution would be preserved under pressure of authoritarians, the scope of local self-government and regional government powers under pressure of centralization adherents. One can easily engage with the constituent assembly, but when leaving it, one can lose freedom and Russia.

2. Constitutional model of a republic in the Russian Federation

Discussions on the choice of the model of a republic are the most profound subject of the stated claims. This choice can be compared with the choice when Prince Vladimir decided which religion to choose for Rus'. Any of the world religions could be chosen, but only the religion that best fits into the public traditions and understanding of life would settle and take roots.

The humanity has developed three stable and effective models of a republic, which are used with certain variations in different countries.

Perhaps, the most advanced and the most rare one in the world is a parliamentary republic. Its feature lies in the fact that all power (except for the judiciary, which I am not going to touch upon further) is concentrated in the parliament. A winning party or a coalition of parties forms a government from among the deputies. The president being the head of the state possesses nominal power, does not interfere with the current political process, acts as a moral authority for the nation and a crisis manager — makes decisions if the formation of a coalition and government reaches an impasse. This model places the highest demands on the political culture and democratic traditions of citizens and politicians. Here there is no separation of legislative and executive power — to the victor go the spoils. Formally, it is quite easy to snuff out the opposition "in a lawful manner". Authoritative transformation may be challenged by established democratic traditions of the society, freedom of the media, culture of participation in the political life. Politicians need a highly developed sense of proportion and responsibility, an ability to reach and observe arrangements. Otherwise, the system becomes unstable: it either leans towards the dictatorship of one party (Weimar Germany, advent of Hitler's rule) or goes the chaotic state of conflicting parties and shaky governments (French Fourth Republic, Italy). This model of a republic sets the highest requirements for the maturity of political culture in the society.

The presidential republic was born in the USA. The Fathers of the American Constitution created a mighty executive power headed by the president. The president acts both as the head of the state and as the government executive. But they balanced the structure with an equally mighty legislative power and a highly independent judicial power. The model based on the principle of separation and cooperation of powers turned out to be quite effective and rather stable. Any two powers, when they unite with each other, are able to prevent the third one from absolute supremacy. But it is cooperation, an ability to reach compromises that are the main abilities in this system. The president and their executive office spend much of time and efforts on negotiations with the congress, search for mutually acceptable solutions, especially if at least one of the houses is not controlled by the party which won the presidential election. The presidential republic is the most common model in the world; it is used by about two thirds of republican countries. Results vary. In a number of countries in Asia and Africa, in combination with "leaderism" culture, the system snaps into an autocratic spin. In order to resist this, proper balance of power and a negotiation political process should be constantly maintained. It is finally a republic's people committed to freedom and people's rule that becomes the main stabilizer here.

[2] Op. cit. Zorkin V. D.

[3] Tsyplyaev S. A. What is necessary and what should not be changed in the Constitution [Chto nado i chto ne nado menyat' v Konstitutsii] // Vedomosti, 23.10.2018 Available at: https://www.vedomosti.ru/opinion/articles/2018/10/22/784356-chto-ne-nado-menyat-v-konstitutsii (accessed 03.06.2019).

The Russian Constitution is based on **the semi-presidential republic**.

In the standard version of this model, an executive power is exercised by the government headed by the prime minister. The government is formed by the president and is responsible to the parliament, which is reflected in the name of the republic. The president is the head of the state but is not the chief executive. The president stands above the three powers possessing part of authorities in each of them. The key task of the president in such model is arbitration, provision of coherent functioning of all powers. The structure is complex: in addition to the judiciary, it has three centres of power between which sharpness and cooperation lines are established. It is the semi-presidential republic that lots out power to the maximum extent.

This model is poorly maneuverable, speeds are moderate, but it is stable and safe for novice democratic nations.

3. The republic Russia needs

The fact that Russia has chosen the French model is hardly random and is caused by the proximity of the peoples' cultural traits. Our intransigence, warlike character and emotionality required the creation of absolute monarchies. In response to this, Russia and France gave practically all great revolutions to the world. As a consequence, they have come to a similar state structure.

In my opinion, even this model has room to grow into for us. The key problem is that the country cannot possibly go beyond the simplest social technology named "a chief and a tribe". It is used literally everywhere: in political parties, scientific and educational institutions, creative unions, business organization. Tribespeople instinctively determine who is the chief and guided by his or her orders, rather than by external laws. Any formal structure is smoothly deformed to a customary scheme.

To this end, the parliamentary republic is of no help for us. Should the president be made a symbol, the prime minister (a. k. a.) will become a permanent chief which is fraught with consequences described above. Quite recently, in 2008–2012, we tried a four-year experiment and actually lived in the parliamentary republic. The president confined himself to endeavors in forming the country's political agenda and did not have a significant impact on the current governance processes. The absolute government wielded an executive power relying on the massive parliamentary majority. To make the picture complete, people in government were to be provided with deputy's seats (i. e., with immunity) just to realize that for the prime minister there were no restrictions concerning his term of office. What lies in the basis of the faith that a new text of the constitution would change the voting process, customs and traditions in wielding power? The Soviet history has taught us that a wonderful constitution being extremely detached from reality and cultural traditions of self-organization turns into a monument and completely loses its regulating capacity.

In the early 90s we tried to create a version of the presidential republic. It was extremely unbalanced and biased towards the legislative power. As such, the Supreme Soviet earlier elected directly by the citizens was the parliament, a legislative body. But in 1988 in the union constitution, and in 1989 in the Russian constitution, in addition to the Supreme Soviet, a specific body emerged — the Congress of Peoples' Deputies. Article 104 of the Constitution of the RSFSR declared: "The highest agency of state power in the RSFSR is the Congress of Peoples' Deputies of the RSFSR. The Congress of Peoples' Deputies of the RSFSR is authorized to admit for its examination and to resolve any question falling within the jurisdiction of the RSFSR". This is not just a separate, albeit the leading one, branch of power in the system of separation of powers. This is an absolute dictator which "performs the people's duties".

We may state two effects of this absolute power.

The first one is permanent constitutional instability. By voting, the Congress passed a whole set of constitutional amendments which immediately came into effect so that the next day we already had another country. Sometimes, fundamental changes were introduced "by a speaker" from the dais at the convention hall. As the people's deputy of the USSR, the author was personally engaged in making such an amendment to article 49 of the USSR's Constitution which opened doors to creating political parties in the country.

The second effect stems from the first one. The leader of the Congress of Peoples' Deputies became a key power figure in the political system. Public leaders M. S. Gorbachev and B. N. Yeltsin thought that they strengthened their positions when they assumed the president's office and were vested with personal authorities. At the same time, they left their positions of chairmen in the collegiate bodies and lost control over the Congress of Peoples' Deputies, i. e. the most important lever of power. For M. S. Gorbachev the consequences did not have a chance to be on full display, the situation in Russia explicitly demonstrated this institutional conflict. The Congress of Peoples' Deputies chaired by R. I. Khasbulatov

started to gradually mitigate the president's reformatory drive and then came to putting restraints on the presidential power. Not a parliament stood against the executive power, but a much more powerful body — the Congress of Peoples' Deputies. This predetermined the strain of the conflict. The outcome of the "battle" within the framework of the current legislation was practically assured — a resounding defeat of the presidential power and its turning into a decorative structure.

The last attempt to avoid a political crisis was a Constitutional Meeting, which opened in the Kremlin in summer in 1993. The proposed draft constitution approved separation of powers in the form of a semi-presidential republic model.

There were no legal means for limitation of absolute dominance of one branch of power. Searching for a compromise is not our method. Rather quickly it became clear where we were going to. The riot of the executive power ended with tanks firing and adopting a new constitution at the referendum on December 12, 1993.

4. In defense of federalism

Each time when they start talking about special constitutional rights of republics and autonomous entities, I ask to refer to the articles in which they are stated. The list usually ends with a statement that they have a constitution and a president, and we have a charter and a governor; there is chaos, indeed: constituent entities of the federation are named differently.

The crowning achievement of the 1993 Constitution was a constitutional (not fixed by treaty) federation with full equality of its constituent entities. The only notable exception is the right of republics to establish their own official languages in addition to the Russian language. Besides, clause 2, art. 66 of the Constitution additionally regulates adoption of charters (in contrast to constitutions) by a legislative (representative) agency of state power of a constituent entity. Is it an object of envy?

We had a rough ride to get all this. At the Constitutional Meeting I got to consult, write constitutional texts and preside over the second regional subpanel. One day we had an ultimatum of krais and regions (oblasts) — either full equality of constituent entities or we will leave the meeting. On another day we had one more ultimatum: republics and autonomous entities require a "controlling stake" in the Federation Council and require to recognize the so-called federal treaty as the basis and original part of the constitution. The constitution uses proven mechanisms for balancing the rights of citizens and the rights of constituent entities of the federation. It is a bicameral parliament — each deputy in the State Duma represents a roughly equal number of voters, in the Federation Council two persons represent a constituent entity irrespective of its size. Federal constitutional laws stipulated by the constitution require three thirds of votes of the Federation Council's members, which allows a group consisting of one fourth of constituent entities to block adverse amendments to these essential laws. The most important thing is delineation of powers with the federal center and independence of regions beyond the federation's powers.

Destruction of federalism and turning Russia into a unitary state with a liquidated independent level of governance in the regions will lead to stronger concentration of powers and finance in the federal center, intensification of ethnic contradictions, final alienation between the government and the public. If people cannot get on with their life on their own and have to go to their director with a cap in hand begging for money and the supreme assent, then we have a space, but the country is dying. This is a dead end we faced several times. Russia resolved this deadlock each time decreasing in size.

The brightest, clamant contradiction between the Constitution of the Russia Federation and the traditional management culture lies in the term "federalism".

Traditionally, we build management systems in the form of a hierarchical chain of command. A superior is "bossier" than a subordinate and may change any decision of the latter. Order and execution prevail in such a chain. An optimal strategy for an official to "survive" in the chain is "to keep a low profile". The main trait of an ideal subordinate is loyalty to the superior; the rest is not so important. Professionals, leaders are detrimental; they are too enterprising and are "full of themselves". On the whole, the system is geared towards the willpower of the leader, ensures mobilization for military and other simple and clear directions on a small scale.

The task of federalism is quite opposite. It proceeds from the understanding of complexity, diversity and multitasking of social life. If we read the constitution carefully, we can see that it describes another power arrangement model — a horizontal one. A decentralized system consisting of independent decision-making centers playing by common rules established by the constitution is built. Federalism encourages lead, creative thinking, responsibility to the electorate rather than to the chief.

All public authority is sliced into relatively independent layers. The first horizontal separation of power is the government and local self-government. "Local elf-government is independent within the

scope of its powers. Bodies of local self-government are not included into the system of government bodies" (art. 12 of the Constitution). The second separation is connected with the fact that we have a federated state, which means that it is two-layered: the federation and constituent entities of the federation. Both the federation and its constituent entities are government agencies; here mandatory laws are passed — federal and local ones.

It would be a mistake to think that federal laws are always higher and more important than local laws, and they may regulate anything at all. The constitution demarcates the responsibilities and authorities between the two levels of power. There is a clearly defined, limited list of issues which refer to the exclusive competence of the federation (art. 71), for example, foreign policy and international relations, defense and security, and here only federal regulation is effective.

There is a fixed list of items referring to the joint competence of the federation and constituent entities (art. 72). Everything that is not included into these two lists refers to the "area of responsibility" of a constituent entity of the federation. Here only normative acts of a constituent entity may be issued; the federation may not intrude into this territory. In truth, when developing the constitution, the federal center made all efforts to preempt maximum authorities.

Within the joint competence framework, both legislative establishments run things independently, but the federation has the first option. If it has issued a law, local norms may not contravene such law. There is no doubt that in the course of time the federation will densely built up this neutral territory with its laws. But the main thing remains — this is independent actions of the two levels of powers.

The vertical implies that power "streams" from top downward, and the source of power is on the very top. We are absolutely sure about this, address any problems to the president and require his interference with all everyday issues. And the constitution declares that "it is the multiethnic people of the Russian Federation who holds the sovereignty and is the only source of power in the Russian Federation" (art. 3). It vests all horizontal levels of power with authorities; moreover, it does this independently.

Art. 11 (part 2) of the constitution specifically underlines that "governmental power in the constituent entities of the Russian Federation is exercised by government bodies established by such entities". This article is included in the chapter entitled "Foundations of the Constitutional System"; this means that no other provisions of the constitution may not contravene the foundations of the constitutional system (art. 16). This excludes the possibility for an acting governor to be appointed from the federal center. Only government bodies established by a constituent entity itself may exercise power in the constituent entity. Should a governor stand down, the constitution or the charter of the constituent entity of the federation establishes who and for what term will act as the governor until a new governor is elected.

Similarly, federalism is not in line with one more "vertical invention" — dismissal of a governor from their office by the president "for loss of trust". The governor has earned mandate from the people and is responsible to them. And what if the president and a governor belong to diametrically different political powers? What if a governor is the president's future challenger at the presidential election? An exceptional condition is when a governor commits material offences; then an impeachment procedure is initiated in the constituent entity of the federation. At most, the right to initiate an impeachment procedure may be assigned to the federal center within the bounds of decency in federalism.

If an extreme case occurs, for example, a denial to fulfill the constitution, a federal interference institution is involved engaging legislate enforcement tools, up to the use of armed force.

The constitution allows neither of these, but anyway we do it because we do not see other ways to do. Our management culture is fairly simple: I appoint subordinate managers, issue orders, require their fulfilment and loyalty. If all this is not your case, I dismiss you. This is what we call a "management vertical". More complex technologies — management of independent players by means of laws, budgeting, ideological influence — are for us something to be worked on and, thus, are rejected as "rotten liberalism".

In a closed hierarchical pyramid, corrupt practices inevitably flourish; it does not have space for self-starters who possess independent nature and leadership potential. We can see the results already — still waters and "there is nobody to replace".

Centralization is very comfortable until there is an "unflagging sack of carrots" on top. Everybody expresses personal gratitude to you for monarchical favors. But the concentration of power means the concentration of responsibility. When carrots are over, it becomes clear that you have nobody to share your responsibility with. Focused "tidal waves" coming from the citizens to one point blow up the management center with all the consequences that come with it — something that we could observe in the USSR.

The Constitution of the Russian Federation provides required legal capacities for reasonable decentralization of power and responsibility. The country's potential for development is not exhausted and not

yet mastered. The start site is quite clear, too: it is the launch of a "new zemstvo" — local self-government. It needs freedom, authorities and money. Alexander II started with this; this will give growth to a Russian citizen, rather than to just a layperson. Governmental levels of power can be naturally added on the foundation of social self-organization.

5. What should be changed in the current constitution

The task too challenging for our society is **provision of timely, scheduled, non-violent rehatting of political and management elite**. It is not about certain persons or political ideas, it is the course of nature. Due to the finiteness of our life, any social institute can exist for a long time if it ensures self-renewal, succession of generations. Only if a manager has a theoretical capability to preserve the power for an unlimited period, he or she starts playing the "master of a heap" and eliminates possible competitors in the far reaches (either by driving them out or literally) and thus prepares personnel degeneration in the system. In such a way, the creator becomes a grave digger for his or her favorite occupation. If such person knows that quitting is inevitable after some pre-established time, he or she starts thinking about successors, followers, rather than about an elixir of immortality. The greatest physicist Albert Einstein left his management position at the chair at Princeton University at the age of 65 because this is a rule and nobody is an exception. The Chinese elite made conclusions from the lifetime rule of Mao and very dangerous destabilization of the regime after his death. Every ten years, though it was an undemocratic, from-among-the-elite way, generations of leaders changed, and this fact preserved the stability of the regime. Recently the Chinese leadership have decided to back out of mandatory alternation proposed by Deng Xiaoping. In the nearest years we will be able to assess the consequences of this step. Our history also gives the richest sources for analysis of this issue.

The first task is refinement of part 3, art. 81 of the Constitution: "one person may not hold the office of the President of the Russian Federation for more than two successive terms". The provision concerning "two terms", which was added practically in the same wording to the French constitution in 2008, does not work in our case. A new interpretation was proposed for this provision: the number of calls is infinite, but each of them shall not exceed two terms. The spirit of the article aimed at restricting one person from staying in power may be restored in different ways.

The first option is to amend the text of the article. For instance, to state the end of the article as follows: "… for more than two terms, with such terms being successive". It is not unthinkable that a discussion on how the word "term" should be interpreted would occur. If the president leaves their office early, should such term be counted for? The constitutional experience of the USA can be of certain use here. In 1951, The US Congress passed the Twenty-Second Amendment, which prohibited to elect one person as the president for more than two times. That is, the fact of election is sufficient, the interpretation of a term is inessential. That was a response to American citizens' breaking from the tradition not to stay in the presidential office for more than two term, which was established by George Washington. Franklin Delano Roosevelt died several months after his fourth election victory. The excuse was the World War.

The second option is that the Constitutional Court can interpret the article upon requests of government bodies vested with this right by the constitution.

The second task is to return a four-year electoral cycle instead of a six-year one introduced in 2008 for the president and a five-year one for the deputies of the State Duma. The dynamics, energetics of the country's movement greatly depends on the rhythm of a political cycle. The President of the USA is elected every four years, and Members of the House of Representative (counterpart of our State Duma) go to elections every two years!

Yes, the president need to work actively in order to make a great deal; yes, it is a pity to part with a good president, but in this case a mistake can be corrected more quickly, and a bad president will not stay in power for too long. The political staff of the parliament should adapt to the political preferences of citizens more quickly and accurately. The French traditionally had a seven-year presidential term. But in 2000, they held a referendum and reduced the term to five years to give more dynamics to the state machinery. The most common terms in the world are 4 and 5 years. For Russia now to loaf and wait for a miracle is dangerous, so 8 years (two four-year terms) is an epoche and a chance to work down to the wire for an effective president.

As the last stand for protection of unchangeable power, it is argued that there is nobody to elect from. I think this is a direct offence to our people, a claim about the historical doom of the country. The leader leaves, and then there is a desert, death to Russia? I would never believe that among one hundred and forty-three million fellow citizens there are no several dozens of people who are able to run

the country. Why do other nations find such people, and we do not have them? The problem lies not in the inferiority of the nation; it is just that "beds" where leaders grow "are razed to the ground". Competitive, "unfiltered" elections of governors, members of the Federation Council, mayors, deputies of various levels in single-mandate districts will quickly reveal real leaders, and electors will learn to unmistakably differentiate between leaders for building and leaders for destruction. Recall the eighties, absolute political still waters; where were fresh faces from, how had we known them, loved them or hated them? Each elected and effective chief of Moscow, Saint Petersburg, the Moscow, Sverdvlovsk, Samara and other large regions may aspire to get the highest appointments in the government. And the free press will tell us about them all it knows. Creation of a modern election system needs legislative execution. I would like to highlight that virtually the constitution does not regulate the system of election. Such system is established by federal and local laws, so all our fair and fundamental claims about whom and how we elect should be addressed principally to the lawmakers, and we should fight for a competitive and fair system of election relying upon the constitution. Even popular-vote elections of members of the Federation Council can easily be arranged without making any amendment to the constitution, given the will.

The constitution bears a stigma of the political battles from 1992–1993 in the fire of which it was born. There is one essential deviation from a typical model; we have a broken government which is practically completely controlled by the president, with decreased rights of the parliament in making decisions about the future of the government. The imbalance should be eliminated, and **the constitutional status of the government should be strengthened**.

The key item is formation and resignation of the government. In a semi-presidential republic it is the result of agreement between the president and the parliament. But what if no agreement can be reached, and the country must not be left without a legitimate government for a long period? Who has the last word?

In Russia, if no agreement is reached, the president appoints the chairman of the government, dismantles the State Duma and calls a new election. It is the president who has the last word. In France, the last word belongs to the parliament; the government cannot be formed without the parliament's approval. This gives rise to "coexistence" regimes when the president and the prime-minister belong to different parties, often to major political competitors. But such is the will of electors, and it cannot be ignored.

The President of Russia can dismiss the government at their own initiative. The President of France may not do it. If the government maintains confidence on the part of the National Assembly (counterpart of the State Duma), it will work, unless it tenders its resignation. At first glimpse, it is a trifle, but let us recall the government headed by E. M. Primakov. It enjoyed firm support from the State Duma and would have worked until the end of the presidential term and made further experiments with bride-shows of prime-ministers as future successors impossible.

Amendments should be made to a number of articles, the meaning of which would come down to the following: the president will dismiss the government if the State Duma has impeached its credit to the government, or the government has tendered its resignation. The right to appoint the chairman of the government without the consent of the State Duma shall be excluded. The remaining body of rules in our constitution concerning formation of the government, in general, gives the same capabilities as the French constitution does, although it is a far cry from elegance in terms of its wordings. For example, a senseless and dangerous for the weight of power public auction in the form of three-times consideration of a candidate of the government chairman.

The second essential difference from the "standard model". In such model the president may issue only decrees which are agreed with the government (ordinances), except for the own authorities of the president stipulated by the constitution. Such rule provides for a matched line of the president and the government. This may be extremely difficult if the president and the government represent different parties; here high political art of compromise is needed. Limited rule-making of the president has certain advantages and disadvantages and requires public discussions. I think that in order to avoid deadlocks and bias, this amendment should be regarded together with correction of the third essential difference from the standard model. The President of France is entitled, at their own initiative, after consultations with the prime-minister, chairmen of both houses, to dissolve the lower house of the parliament and to call a new election. This is not a dismiss of the parliament, but an address to the nation to review the composition of their representatives. Such rule pours oil on troubled waters and helps to overcome political deadlocks in the president—parliament—government triangle. Today the president may dissolve the State Duma only in two cases: a three-times disagreement with the candidate of the Chairman of the Government or non-confidence in the Government.

The other constitutional authorities of the president do not go beyond the generally accepted framework and in aggregate cannot be described by the term “excessive authorities”.

A scrupulous eye will find even more constitutional provisions which may be worded better and more accurately. To start with, the above-mentioned changes are enough, as the main problem has nothing to do with the constitutional text.

6. Citizens of the republic required

The analysis of the constitution made by a researcher who does not know our realities will give a standard result: the strongest power is the parliament. It enacts the budget. What can the executive power do within constraint bounds of the law and without money? The weakest power is judicial, and it should ne strengthened legislatively.

We just do not pay attention that lawmakers have the last word. It was the Supreme Soviet of Russia that in 1992 in a practically unanimous vote ratified a treaty for denunciation of the Soviet Treaty, on the creation of the CIS. It was the Congress of People’s Deputies that in 1991 overwhelmingly adopted a far-reaching economic reform program which included immediate price liberalization. A fresh example: it was the Federal Assembly that ratified the Protocol of Accession of Russia to the WTO signed by the Minister of Economic Development. It does not matter whether we uphold these decisions or not, but we cannot forget that they were adopted by the representatives elected by us. Why doesn’t the parliament use its power? Because people who have become the members of the parliament do not want or cannot do it. We can give even more authorities to the parliament, but the parliament will remain a democratic setting until there appear independent deputies attached to their dignity and the country instead of just nominal numbers from the party list.

This unsophisticated researcher will not find the term “an instruction of the president” in the constitution. He or she would be surprised to see letters to the president from workers and refined people with requests and claims going far beyond the president’s constitutional authorities. We are to overcome the psychology of loyal subjects requiring to turn the leader into a dictator. The characteristic feature of civil maturity is the condition of self-governance — the foundation and school of democracy and self-organization. As for the said feature, we are tightly stuck in lower grades.

A thorough analysis of most controversial issues suggests than we do not need the revision of the constitution, but a more complex and long-term task — reset of the political culture. The constitution is tailored well “with room to grow into”. Do we want to grow? No constitution works by itself; it lives in the mind and heart of responsible citizens of the republic. We should just recall a simple motto more frequently, which refers to all of us: “Respect your constitution!”

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Legitimacy as the Sign of the Right

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ABSTRACT
Legitimacy constructs and constitutes society, including the law. Here possible conclusion, that legitimacy is the feature of the law. However not all agree with this point. For representatives of legal positivism, as for jus natural supporters legitimacy is not the feature of the law. Classical law sociology stand legitimacy as feature of the law, but not takes her power, constructed by nature. From post-classical methodology point, features of law are human proportionality, iconic mediation, construction of law, the contextual and dialogic features of law. All these features of the law assume the legitimacy as their content. Legitimacy as recognition of the rule of law is a condition of its existence.
Keywords: legitimacy of law, legal understanding, post-classical right methodology

Legitimacy in its broad sense is a condition for perdurance of a society.[1] Mutual recognition of the other fact constructs and constitutes sociability. Special significance is given to mutual recognition of a risk in the postmodern society when, owing to ontological and epistemic uncertainty, unavailability of direct access to the reality (to be more precise, with constructed social reality), one has to trust the authority of an agency: the scientific community (science), the power, a reference group. So, today the role of culture increases, the most important function of which is a legitimizing one — "legalizing", giving a phenomenon the status of accepted / adopted / worthy, justifying and establishing its necessity. <...> The legitimizing function of the culture is directly connected with the creation of a system of references (both positive and negative) by the community, including through the approval of a certain register of references. <...> In general, we may say that through the approval / disapproval of these or those events, actions, behavior by the community, through imposing certain evaluations on certain representatives, through enforcement of certain rules and certain patterns, the community creates / preserves / transforms its system and hierarchy of values, which are an integral part of any culture".[2]

Does legitimacy refer to the legal range of problems, to the subject of legal science? Is legitimacy the sign of law, or "a normal lawyer" (in the parlance of M. V. Antonov) and jurisprudence in general perceive it — the sign of law being interpreted like that — as excessive? In the opinion of M. V. Antonov, "legitimacy of law reveals plenty of meanings which are in conflict with each other and render accurate scientific use of this term difficult..." In his opinion, legitimacy performs the function consisting in "cancellation of rules of law on account of their illegitimacy".[3] I think that theoretically, this problem is quite important, though it is appropriate to stick to less rigorous understanding of the concept "legitimacy of law": the current legislation (in a broad sense including all forms of external manifestation of law) shall be observed and fulfilled by everybody, and those who wish may use it. Nonetheless, the criticism of legislation is possible and even necessary, if only to amend it in due time. One of the variants of such a critical theoretical approach is establishing correlations between "the law which is properly established by lawful authorities" and those insights into its legitimacy which evolve among the public and executors of law. If the law is recognized (legitimate), then it is positively assessed, repeatedly and commonly used and, as a rule, demonstrates its effectiveness. So, we may assess

[1] "The category "recognition", Yu. A. Vedeneev writes, forms a universal social and cultural concept, institute and process which accompanies virtually all aspects of organization and functioning of social and political systems in both traditional and modern societies". — Vedeneev Yu. A. Grammar of Law: monograph [Grammatika pravoporyadka: monografiya] / science editor V. V. Lazarev. M. : RG-Press Publ., 2018. P. 113 (In Rus).

[2] Krasnykh V. V. Psycholinguoculture as the science of a person speaking through the prism of linguoculture [Psikholingvokul'turoloriya kak nauka o cheloveke govoryashchem skvoz' prizmu lingvokul'tury] // (Neo) psycholinguistic and (psycho) linguistic cultural studies: a new science about a person speaking. [(Neo)psikholingvistika i (psikho)lingvokul'turologiya: novye nauki o cheloveke govoryashchem]. I. A. Bubnova, I. V. Zykova, V. V. Krasnykh, N. V. Ufimtseva / Ed. V. V. Krasnykh. M.: Gnozis Publ., 2017. P. 215, 2016. (In Rus)

[3] Antonov M. V. Legitimacy, recognition, validity and repeal of legal norms in legal usage [Legitimnost', priznanie, deistvitel'nost' i otmena pravovykh norm v yuridicheskom slovoupotreblenii] // Russian Journal of Legal Studies. [Rossiiskii zhurnal pravovykh issledovanii]. 2018. No. 2. P. 119. (In Rus).

as reasonable the statement by N. V. Varlamova that the force of legal regulation "arises out of its legitimacy and effectiveness".[4]

Revealed illegitimate law, in my opinion, should not be considered as a basis for its non-observance or non-fulfillment, but should become a matter of discussion (deliberation) for further correction by an authorized body, including, for example, popular initiatives or experts' recommendations. So, I do not agree with the statement about the triviality of the term "legitimacy of law" — "law will be legitimate if it is established according to the current law and order".[5] Even if we agree that it is true etymologically, the meaning of this term when it is used by discursive practices in various "language games" (according to L. Wittgenstein) is not equal to legality today, but rather supposes official law evaluation. A. V. Polyakov criticizes such a positivistic approach thoroughly and in detail and gives strong, convincing arguments in favor of the fact that legitimacy is an essential sign of law. However, before we can speak about legitimacy as a sign of law, it may be appropriate to consider its other modes of existence. A meaning as the application or use of a sign is the principle idea of the philosopher L. Wittgenstein.

Traditionally, the signs of law in legal positivism include its derivativeness from the rule-making of state authorities, formal definition (textual fixedness) and provision of public enforcement. However, without denying the importance and significance of these characteristics of law, we cannot but accept their limited nature. Thus, for example, legal customs and international legal rules are not created by state authorities. Formal definition is an important principle of positive law. However, today it stands as an ideal, rather than as reality. Permanent variability of legal reality, its dependence on the social and cultural and political context force us to admit that the real condition of law is more of uncertainty than of logical completeness, stability and consistency.[6] Moreover, full and completed systems cannot be logically relevant as K. Gödel proved in 1931, and any attempt to give a complete and accurate substantial definition to anything stumbles on the "Münchhausen trilemma" stated by H. Albert in 1970.[7] Thus, formal definition is always a relative sign of law. The same refers to compulsoriness of law. Enabling rules of law cannot be enforceable by default: they provide for mutual and free will of subjects; under duress, enabling legal regulation is technically impossible. Moreover, non-fulfillment of an enforceable mandatory provision in the form of a penalty stipulated by the legal norm sanction (it is such enforcement that is provided for by legal positivism as an essential sign of law) does not cause enforcement as a penalty: here we need reformulation of non-fulfillment of an obligation as a prohibitory rule of law. In most cases, such reformulation takes place, but not always. In any case, not all rules of law are enforceable in the formal legal sense, but only prohibitory ones. That is why, this sign of law is also a relative one.

The most difficult issue, however, for acknowledging the adequacy of the signs of law formulated by legal positivism is that they do not allow for assessing the current legislation. Any act adopted by a competent authority in accordance with the established rule-making procedures is declared a legal act, irrespective of its content. In this case, can we think that fascist legislation is legal, for example? From the formal legal — positivistic — point of view, yes, of course. However, not everybody agree with such way the question is put. Thus, naturalists actively argues against identification of law by its formal signs attributed by positivists. They postulate an immanent relation between law and morals. With the knowledge that in a modern, highly structured society it is quite difficult to find positive content of justice, naturalists, thanks to G. Radbrukh, as a criterion for evaluation of legislation, take "negative justice" — such rules which are perceived by all or by an overwhelming majority of the population as extreme injustice, or "crying justice". The law turns "unjust" "when the current law becomes incompatible with justice to such extent that the law as "unjust law" denies justice".[8] This formula (which is interpreted by legal liberalism as "prohibition against aggressive violence") may be used in a society which has a

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[4] Varlamova N. V. Heterarchy of the Modern Legal Systems and Post-Soviet Theory of Law [Geterarkhichnost' sovremennykh pravovykh sistem i postsovetskaya teoriya prava] // Problems of Post-Soviet Theory and Philosophy of Law: collection of articles. [Problemy postsovetskoi teorii i filosofii prava: sb. statei]. M. : Yurlitinform Publ., 2016. P. 46. (In Rus).

[5] Antonov M. V. Op. cit. P. 119.

[6] A famous Canadian philosopher and legal theorist B. Melkevik states that law exists in the modern society "in all its multivaluedness, incompleteness, if not to say, in all its relativeness". B. Melkevik. Legal practice in the mirror of legal philosophy / ed.-in-chief M. V. Antonov. SPb.: Alef-Press Publ., 2015. P. 53. (trans. from fr. and eng.)

[7] The principle of adequate substantiation as a postulate of classical rational thinking is unreachable as complete substantiation including substantiation and knowledge to which the substantiated point of view comes down leads either to regression to infiniteness, or to a vicious circle, or to an interruption of the substantiation process. — Hans Albert. Traktat über kritische Vernunft. Tübingen: J. C. B. Mohr (Paul Siebeck), 1970. P. 41.

[8] Radbrukh G. Legal philosophy. M. : Mezhdunarodnye otnosheniya Publ, 2004. P. 234 (In rus).

moral consensus concerning "intolerable violations" of human rights. But even in this case it is not applicable to moral evaluation of most regulatory legal acts because in most cases they are morally neutral. Even such a marquee event as destruction of the Twin Towers in New York on September 11, 2001, was perceived by some people as the most grievous tragedy, while other people (residents of European countries who had come from Muslim states and went on welfare) perceived it as the triumph of justice — so, what moral consensus can we talk about?

From the perspective of the sociology of law, the signs of law are rooted in the society: in social assumptions of law and in the effect the law has in the society. Law exists not for itself — in order to be formally consistent, logical, completed — but for normal functioning of the society. That is why by analyzing the society we can reveal the signs of law. We may reasonably refer here social conditioning of law and its effectiveness. From the perspective of the sociology of law, legitimacy should be regarded as an essential sign of law as legitimacy demonstrates that law meets people's expectations, that law adequately expresses social suppositions and is effective. At the same time, while accepting that it is the sociology of law, out of all classical types of legal consciousness, is the most substantiated and adequate for the modern society theory of law, we cannot but note that it is — in its classical version — free from certain shortcomings. These should include the fact that in the classical sociology of law, the signs of law are postulated as some objective reality opened by the all-knowing lawyer Hercules (the image of W. Blackstone actively promulgated by R. Dvorkin). From the perspective of post-classical philosophy an theory of law, "objective reality" is intersubjective acceptance of existence. We may say in another way: what is perceived as real is real. Thus, the signs of law are something that the authority (in a broad sense including the scientific community) attributes as the signs of law. In this connection, we can agree, subject to certain reservations, with B. Melkevik's ambitious statement: "…law has no real or empirical "existence" in this world. Law has no physical or material existence in the social or political world, and even less — existence from the perspective of availability or reality, still less to be or to have, and finally, that one should act and think in an appropriate manner... The modality of "existence" is not applicable to law. In this sense, there is no "object" which is called "law". In the real, material, actual or just "tangible" world law is not anything "in itself" or does not have this attribute, and we do not possess such a means of scientific cognition which would allow us to establish what is a real, actual or objective correspondence for this symbolic representation called "law". <…> We should better state that the issue about law is resolved in practice in the real world with people flesh and blood and, eventually, is the conclusion of a dispute settled in a procedural, discursive, persuasive, dialectic way through a relevant court ruling. <…> Law is established in practice and *post factum* (retrospectively — Latin) by jurisprudence in a single form, and that is all!"[9] I think that real or empiric existence of law can be seen in such manifestations as legal texts or actions (legal relations, simple forms of enforcement of law). What is different about it is that actually external fixation of law manifestations depends on the position of an observer granted with an authoritative status of official or unofficial (theoretical) description, categorization and qualification which provide attributes for such phenomena and processes considered and accepted as legally significant. That is why we can agree that "talking of the word "law", one can state that it exists in a definable form only due to "a new narrative about law" (Orwell's language — *I. Ch.*)… Conflicting tendencies inside the "new legal narrative" compete with each other for the right to determine a specific choice in this respect, <…> It must be understood that language is Power! One can master the word "law", — not within the framework of a law suit in front of an independent arbitrator, i. e. in front of a state or non-state judge, — and use it as an ideological element and as a weapon for discouragement and horrification, as a powerful symbolic sword which (if we use a literal allegory) can efficiently strike enemies".[10]

Post-classical methodology postulates pluridimensionality and potential inexhaustibility of law attributes as its modes of existence. Law interacts with all other social phenomena (and not only social ones) and cannot simultaneously reveal all its properties. In this regard, law is inexhaustible in its actual relations, so the attributes of law ascribed to it by power and science are also potentially inexhaustible. From the perspective of the post-classical social and cultural dialogical approach developed by the author for the last 15 years, law possesses not only the attributes discussed above but also such characteristics as human-sizedness, sign-oriented and symbolic mediation and discursiveness, structuredness, contextuality, dialogueness. All these characteristics are somehow connected with legitimacy.

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[9] B. Melkevik. Legal practice in the mirror of legal philosophy / ed.-in-chief M. V. Antonov. SPb.: Alef-Press Publ., 2015. PP. 139, 147. (trans. from fr. and eng.).

[10] See ibid. PP. 79–80.

The intrinsic property of law is primarily its *human-sizedness.* A human being is a basis, a center of the legal system: it is a human being who forms (constructs) it and reproduces — legitimates — with their practices and mental activities (narratives and meanings). It is a human being, rather than an abstract, impersonal subject or "a person in general" (according to M. M. Bakhtin), that is an irremovable substance of legal reality.[11] A human being is included into the social and cultural context, so behavior (including legally significant behavior) is determined by a complex combination of cognitive and situational components (assessment of a situation). A fundamental mistake of attribution is disregard of the most important role of the situational context where a certain human being is included.

Another characteristic of law giving concrete expression to its formal definition is *sign-oriented and symbolic mediation, discursiveness of law.* A human being thinks with the use of signs. So, significance is an immanent aspect of sociality, and consequently, of law in any of its interpretations: beyond or without denotation (nomination and lodgment with meaning), no social (and legal) phenomenon is possible as such.[12]Discourse as "pronouncing a text" provides for the use of language in legal practices. At the same time, discourse acts as a means of constructing and legitimating rules of law through checking their claim to legal significance, as defined by J. Habermas.

We cannot but mention such an aspect of law existence as its *structuredness.* The post-classical paradigm in the socio-humanistic knowledge and in jurisprudence, in particular, draws attention to structuredness, rather than to the givenness of the social world (and, consequently, of law). Social constructivism, by denying the givenness of the social world (and the world of law), acknowledges its variety, its ability to change for the better and, consequently, personal responsibility for its modern state. By opposing "naive social realism", it prohibits to pass private, individual interests and endeavors off as public and, in such a way, to speak for the society.

Another sign of law, in my opinion, is *its social and cultural contextualism.* Law is a social and cultural phenomenon. Its social and cultural conditioning is expressed primarily in its social nature. Law does not exist for itself (that is why the system of law cannot be self-sustaining, self-referential). Law is constructed for provision of normal functioning of the society, and in this its functional significance manifests itself. Moreover, the criterion of "normality" is defined based on the prevailing values by which the social reality is evaluated and by which the law policy is supported (law nomination or denotation of social situations). This gives us an important conclusion: *there are no "pure" legal phenomena (laws, regulatory and individual legal acts, legal relations) that are not simultaneously mental (as L. I. Petrazhitsky once wrote), economic, political etc. — in a broad sense — social and cultural phenomena.*

The aspects of law existence outlined above demonstrate its internal *dialogueness,* which manifests itself in the interdependence of the considered aspects of law existence, and particularly of a legally significant act and a legal structure as a social image of legal due in the law reproduction mechanism. The content of law dialogueness is its *legitimacy* — recognizance by people, bearers of the status of a legal subject. The substantiation of this thesis is worth looking at.

If we look at law as an aspect of the society, the process of reproducing a regulatory order in the society ensuring,[13]in my opinion, its — the society's — self-preservation, then an immanent attribute of law is mutual acknowledgment of legal interactions (legal rights and obligations), which is correctly stated by A. V. Polyakov,[14]legal institutions and a legal system of the society in general. Law cannot be

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[11] "One should always take into account that law is performed through actions and through actors performing them — everything that is performed as "law" is performed by us and for us," — B. Melkevik rightly states. — See ibid. P. 4.

[12] "In its intrinsical essence, a legal text, — Yu. A. Vedeneev rightly states, — is, first of all, the meaning and name of social practices in terms of this or that legal language by means of which they exist and reproduce themselves. Legal reality manifests itself and represents itself in the system of legal names — categories and definitions, classifications and qualifications. To name means not only to confirm, but also to construct new legal practices. That is, to admit the fact of their formal existence — emergence of new legal subjects and objects, legal discourses, new regulatory bounds in conversation systems". — Vedeneev Yu. A. Grammar of Law: monograph [Grammatika pravoporyadka: monografiya] / science editor V. V. Lazarev. M.: RG-Press Publ., 2018. P. 98 (In Rus).

[13] "Legal, or regulatory due is such a fundamental property of social reality which ensures existence of a social order in the form of a legal order as the most adequate and regulatory supported form of order per se. <...> The existence of any society is connected and defined by the system of legal networks or communications. ... Certain forms of legal discourse are the derivatives of historical context of law existence — social and political practice and legal culture". — Vedeneev Yu. A. Grammar of Law: monograph [Grammatika pravoporyadka: monografiya] / science editor V. V. Lazarev. M.: RG-Press Publ., 2018. PP. 66, 93 (In Rus).

[14] "Law itself is regarded in this case as the field of human interaction and mutual understanding, agreement and compromise, freedom and responsibility, equality and justice, which provides for its development and improvement to that effect. <...> Such coordinated interaction between legal subjects based on the interpretation of legitimate

reduced to formal "sources" only — forms of external expression of legal standardization. Legal reality is formed by executors of law, ordinary people who, by a twist of fate, turned out to be in the field of law, their actions, including legal acts, consequences, implements used by people. It is people's actions that construct rules, institutions, branches, a system of law. Law, however, exists as a social phenomenon only if rules — patterns of legally significant behavior — are realized in practices of people being the bearers of legal statuses. Social reality of law, according to R. Alexy, is more important that positive and even moral reality.[15]

It is this very important moment — social reality as effectualness — is ignored by legal normativism. In fact, a practicing lawyer need not to bother with issues on how effective an applied, observed, fulfiled or used rule of law is. However, legal science cannot ignore this question if it aspires to propose projects for improvement of the legal system. If a social effect of legal influence is not known, we cannot speak of evaluation and, moreover, of changing of the existing legal order.

On the other hand, the term of a rule of law cannot but include a procedural aspect of its social effect as a legal rule is a variety of social rules, and the attribute of standardization is defined by the prevalence, multiple use and positive assessment of a behavior pattern. Moreover, from the perspective of J. Habermas's communicative approach, which is supported by B. Melkevik, "a claim to effectualness of rules can be satisfied only if a rule has got universal evaluation from the perspective of universal turn of the tables in order to satisfy the interests of all and everybody".[16]

The above inevitably lead to the conclusion: a rule of law will be a common, repeatedly used and positively assessed behavior pattern only if it is legitimate — accepted by both its actual and potential actors. In a fundamental study of a communicative action, J. Habermas writes: "A rule exists or has social significance (*soziale Geltung*) if it is accepted as efficacious (*gueltig*) or legitimate to its addressees. … The fact that a rule acts in an ideal plane means that it deserves consent of all interested persons as it regulates issues associated with the act in their common interests. The fact that a rule actually exists means that a claim to signifiance contained therein is acknowledged by all interested persons, and this intersubjective acknowledgment justifies the social reality of the rule".[17]

Thus, we can draw the conclusion: *legitimacy as recognition of law is an internal, mental (subjective) side of standardization expressed in positive assessment or psychological recognition of legal rules, institutions, a system of law, the whole legal reality. Legitimacy is an existence condition for a rule of law and normativity of a legal system of any society.*

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Right of Access to Information and Media Security

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ABSTRACT
The right of access to information in post-industrial society is of fundamental importance for achieving the goals of sustainable development. Changes in the system of realization of rights to intellectual property reflect the main trends in the formation of cultural capital. Firstly, the production and sale of copies of works remains an actual way of exercising intellectual rights, but is complemented by interactive formats of interaction between authors and their audience. Secondly, the popularity of specific authors and rightholders allows them to exercise subjective rights in the global information space. Thirdly, the role of the author — an individual will decrease as the modules of artificial intelligence become more and more integrated into the creative industry. With the development of virtual law institutions, the priority of media security is to preserve the superiority of creative works created by man over the results of computer processing of information. In this sense, the right of individuals to access information technologies, as well as the possibility of direct evaluation of the authors' creativity by a mass audience, may become critical interests for humane technical progress in the global information society.
Keywords: intellectual property, copyright law, contract, freedom of speech, human rights, humanism, producer, artwork.

Introduction. The works by the Western lawyer Daniel J. Gervais demonstrate that "with transfer of various activities related to creation, distribution and consumption of content from the physical medium to the digital online space, copyrights are no longer sold exclusively by professionals such as authors, issuers, producers and distributors and among them. Innovations in the field of digital technologies allow Internet users to participate actively in modification, distribution, adaptation of works and thus to become authors of derivative works".[1] It is practically undoubtful that "as the Internet continues to change our world online, the structure of copyright in its current state becomes inadequate and inappropriate for use".[2] At the same time, national governments adopted the idea of "the right to access information" or "freedom of information" as "the most important element of civil rights to freedom of expression required for credibility of public discourse and transparent, accountable and open government".[3] Professor V. P. Talimonchik clearly demonstrates the existence of legal obligations of "nations not to prevent human freedom to search for, obtain and distribute information",[4] while a famous expert in intellectual property E. A. Voynikanis argues that "issues concerning free access to information and knowledge and development of information technologies are closely interrelated".[5]

Information transfer technologies and forms of implementation of creative projects establish the essence of legal relations required for effective protection of intellectual activity results and regulation of various informational legal relations.[6] Legislative recognizance of the economical importance of intellectual activity result largely depends on the format of interaction with authors which is generally practised by their potential target audience on the national level.

[1] Gervais D. J. The Economics of Collective Management / Research Handbook on the Economics of Intellectual Property Law: Vol. 1: Theory. Vol. 2: Analytical Methods / ed. Ben Depoorter, David Schwartz, Peter S. Menell. 2019. 1512 p.; Gervais D. J. The Machine as Author // Iowa Law Review, Vol. 105, 2019. PP. 1–61; Gervais D. J. (Re) structuring Copyright: A Comprehensive Path to International Copyright Reform. Edward Elgar Publ., 2017. P. 185.

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Practical application of the rules of law on security to intellectual property issues is conditioned by some peculiarities of the modern creative process, which are regarded as quite perspective objects of comprehensive doctrinal analysis. Russian scientists V. B. Naumov and V. V. Arkhipov, when investigating legal relations in the virtual world, note that "the Internet of Things is regarded as a phenomenon which in general expands the information space to the world of physical objects acting as "a bridge" between various levels of human development in the information society".[7] The paradigm of "the Internet of Things" [8] is actively developing towards commercialization of relations in the virtual world [9] and provision of security in the information space;[10] however, the issues concerning the right to access information and protection of intellectual rights are developing independently which often gives rise to collisions and anachronisms.

In accordance with Federal Law of Russian Federation No. 149-FZ of July 27, 2006, "On Information, Information Technologies and On Protection of Information" (as amended on March 18, 2019), citizens and organizations are entitled to search for and obtain any information in any forms and from any sources provided that legal requirements are observed (art. 8). A liberal approach to information resources is widely adopted in the global practice of regulating informational relations. The countries of the Anglo-American system of law were the first to formalize free access to information. Thus, in Canada the 1985 Access to Information Act has been adopted; in Great Britain the 2000 Freedom of Information Act is valid. Recently, developing countries have been passing laws on free access to information. Thus, for example, the Islamic Republic of Pakistan passed the 2017 Right of Access to Information Act, and in Sierra Leone a similar law has been effective since 2013.[11] Under the conditions of general recognition of free distribution of information, protection of intellectual rights may remain a legal implement for restricting access to intellectual property and creative information just as it was in the last quarter of the 20th century.[12]12 Modern studies of intellectual property issues show that the right to access information and intellectual property are closely interrelated.[13]A more detailed study of political and legal regulation of enjoyment of the access right usually touches upon special issues of communications networking, for example, connected with the use of print and electronic educational information resources,[14]or functioning of scientific mass media.[15]

For comprehensive analysis of the problem concerning provision of the right to access information with effective guarantees of protection of the right holders' legal interests, it is necessary to account for the interests of all participants of information exchange in a balanced way as well as the social and economic circumstances which allow for the earning of an income from the results of intellectual work, with bypassing most of intermediaries emerging between the authors and producers of artistic works. The protectability of creative and technical solutions directly depends on the form of an artistic solution used for its creation and publication. The peculiarities of the intellectual property legal regime in the post-industrial society are determined by the nature of legal relations in the virtual space. The following thesis formulated by V. V. Arkhipov is of certain interest: "the main subject of virtual law is legal aspects of virtual worlds — spaces simulated by computer-aided means which ensure the possibility for interac-

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tion between the users".[16]Certain legal points of view from the perspective of which virtual worlds are regarded are of significant scientific interest as they predetermine the conditions of development of modern creative industry.

1. The multimedia format of modern works makes it difficult to differentiate between literature and audiovisual works as the perspective of reworking and screen adaptation of any successful creative project is a subject of focus for the market. Modern journalism perceives visualization as a creative technique which allows attracting attention of a broader target audience. The group of Russian scientists have reason to believe that "spreading of digital devices, their integration into all spheres of everyday life has led to emergence of a new professional field — designing and programming of human-computer interfaces".[17] An interface is a creative solution within the field of copyright; at the same time, multimedia systems touch upon a set of economic issues[18] and an information security problem.[19]

Art studies provide the idea that "direct and virtually uncontrolled influence on the human physiology and mind is realized on the backs of interactivity of modern electronic processes. Art allows creating any imaginary associative environment providing the ability to work way through the most fantastic spaces and experience sensations in no way different from real ones".[20] New capabilities of digital technologies transform old and create new intellectual property which should be seamlessly integrated into the field of civil law.

2. The interactive character of digital television and the Internet will provide for the development of new forms of co-authorship involving the audience and developers of media projects. Further updating of the problem concerning protection of the audience's interests against the developers' abused discretion may lead to the creation of "virtual justice"[21] aimed at introduction of fairness into the social reality of digital networks. By accepting the obviousness of the fact that "a game responds to deep needs of a person being a contemporary of post-modernity",[22] the Russian scientist I. I. Volkova fairly notes that "active development of interactive game projects at information portals is inevitable; this reflects both the nature of the World-Wide Network and the nature of virtual space".[23]

It is quite rational that social interaction in multimedia projects gives rise to peculiar sets of rights and obligations in the global information space, which are not completely regulated by international law and national legislation. Thus, for example, "we can hardly speak about a well-established system of international contracts aimed at protection of copyright in TV broadcasting as system relationships between contracts are not always clearly traced. The basis of international protection of copyright in radio broadcasting, television and in the use of electronic telecommunications is one and the same author's authority — the right to disclosure for general public".[24] Protection of computer program authors' and developers' rights must be in harmony with guarantees of the rights belonging to consumers of interactive works of art.

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3. The creative potential of artificial intelligence is updated with the development of technical progress towards creation of large-scale neuronets and smart machines.[25] The legal standing of artificial intelligence elements will always be open to question, despite their ability to learn and create. The competition between authors and technologies of artificial intelligence can destroy fragile trusted and naive space where the author communicates with the spectator and the reader; at the same time, collaboration of a competent author with smart machines is able to provide for a jump in the development of technologies, artistic works and new technical solutions.

Interestingly, "after several years of working with robots on stage, the actress Midzuho Nodzima thinks that gradually actors begin to treat their mechanical colleagues as if they were flesh and blood".[26] Indeed, the following question is currently topical: "in perspective, should the most advanced free-standing robots get a special legal status of electronic persons — with their special rights and obligations, including the obligations to compensate for any harm inflicted by them",[27] but, of course, this problem does not have a simple solution. Legal doctrine features "certain background for considering a possible similarity between robots and legal entities";[28] however, artificial intelligence can provide for empowerment of transnational corporations in the cultural sphere of social life and facilitate discrimination of authors and other workers in intellectual property industry.

4. Software (soft) is quite often represented as an item of property of its developers. An absurd idea of appropriation of intangible items does not top corporations which produce computer programs in their intent to justify the exclusivity of their own rights for the source code, interface and design. The interests of free access to the technologies on the part of software programmers, designers and users do not have special commercial significance, and at the same time turn out to be well protected by natural properties of information and communication practices.

In the practical plane of the problem concerning software legal protection it is noted that "recently, there has been an increased number of copyright items based on information and communication technologies, namely: ... programs for computers, databases, multimedia products, among which are video games".[29] The law-maker's attitude to programs as to works of literature does not reflect the role of software in the development of institutions of the information society.

If "objects in the external world are phenomena formed in the process of their intentional perception by the subject",[30] there is no doubt that the reality formed by computer software can become the domain of legal rules. By acknowledging exclusive rights for commonly available software, the law-maker involuntarily excludes a considerable and least well-to-do part of members of the society from the list of subjects acting in the legal field of the virtual world.

5. Exclusive rights of producers has considerable social and economic and cultural significance. Producers are legal entities: artels, companies, business entities and transnational corporations. Economic capabilities of producers are of crucial significance as the competition among global business structures and local enthusiasts of artistic endeavor is developing only in the professional field. Preferences of mass viewing audience are shaped under the influence of the most well-to-do in economic respect producers which dominate at the high end market.

On the one hand, it is no wonder that "Russian case law cannot give examples of claims for acknowledgment of a person who organized the creation of a complex object as the author of such object. Unambiguous interpretation of statutory regulations is explained by the fact that complex items covered

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by copyright must be "freely transferable", and attempts to establish whether a certain subject is the author of the item, correspondingly, prevent this".[31] On the other hand, no claims to the authorship do not exclude acknowledgment of neighboring rights of legal entities and producers.

Research in the field of international intellectual property law showed that "the availability of uniform standards for protection of intellectual property rights guarantees that companies can maintain a high level of financing of research activities to repair economic losses caused by investments which do not lead to the creation of a commercial product";[32] exclusive rights, however, must not limit vital interests of the public, for example, the right to access medical technologies.[33]

6. Artistic merits of works are a legally indifferent circumstance only from the formally legal perspective, while in practice novelty and originality are indisputable advantages of any result of intellectual work. Courts and other judiciary bodies proceed from the provision that originality of a creative solution is necessary for its legal safeguard, and the attention of the audience and professional community defines economic and reputational effects from a rational creative project. It is obvious that the quality of creative work results has considerable legal significance when providing state support to creative projects.[34]

Novelty of artistic solutions and extensive public interest to creative ideas and endeavors do not guarantee public utility of an intellectual work result, but under modern economic conditions popularity can provide a considerable and stable income. The informal character of people's likes and media interest gives rise to abuse of artistic freedom on the part of authors and performers. The creative sphere of social life being attractive from the economic point of view creates possibilities for corrupt conduct, which may manifest itself both in the performers' inability to do their job to a high quality and effectively and in the producers' striving to fraud against investors.

Possible criminalization of the creative sphere and intellectual property industry in general jeopardizes media security. Openness of information about creative projects is also rather dangerous as the right to access the information may be used for assessment of intellectual work results only after their making available to the public for the first time. Intellectually intensive projects are usually confidential at the development stage. Under the conditions of criminalization of the information space, confidentiality can become a means for disguising evil deeds. Actually, only authors' and producers' goodwill enables them to protect their works against destructive impact of economic maleficence. High quality and artistic merits of projects in the creation of intellectual property ensure security of investments in culture and technical progress.

7. The price of intellectual rights is a material provision of license contracts in relation to intellectual property, while being extremely difficult for accurate estimation. After the rights for the intellectual property have been exercised, their price becomes obvious for the majority of post-industrial market professionals. At the same time it is extremely difficult to evaluate works of art and technical solution at the stage of their creation as exposure to loss in the field of intellectual property with increasing competition at the information technology market remains persistently high.

The venture character of producers' business creates multifaceted threats, including criminal manifestations: fraud, laundering of illegal earnings, corrupt delicts. A considerable possibility for creative failures and a high probability of misuse of creative freedom condition a high value of success for creative projects. It seems rational that "methods based on the assessment of competition and assessment of utility makes prices for information products and services flexible by using various systems of discounts and markups: for the novelty, additional features, reductions for corporate accounts, etc.";[35]

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[31] Grin E. S., Alekseeva V. A. Organizer of Creation of a Complex Object of Intellectual Property Rights: Problems of Theory and Practice [Organizator sozdaniya slozhnogo ob"ekta intellektual'nykh prav: problemy teorii i praktiki] // Actual problems of Russian law [Aktual'nye problemy rossiiskogo prava]. 2018. No. 7 (92). P. 123. (In rus)

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at the same time, it is quite difficult to formalize the cost of an intellectual property item prior to its entry into the market. High prices for intellectual property have a negative impact on the right to access high-tech items.

8. Copyright neighboring rights often turn out to be even more importance when it comes to provision of the right to access a work than exclusive rights of the author. In patent law, the problem of manufacturing application of a technical solution has always been central and is likely to remain such. Neighboring rights in the information society are closely connected not only with masterly performance but also with the title to real property.[36] The renown and popularity of performers only partly define the location of a work in the cultural sphere of social life and the value of the author's work. The expenses, renown and technical capabilities of motion picture companies and recording studios quite often make a landmark contribution to the success of directors, composers, actors and musicians.

A conceptional question is the possibility for appropriation of intangible results of acting skills; the answer to this question is especially ambiguous considering the popularity of imitations and impressions. The mass audience always has a natural right to access creative work of those who, on the basis of someone else's intellectual property, create rather interesting items of neighboring rights and derivative works. It would be unfair to deprive the mass audience of the pleasure to get acquainted with (maybe, unsuccessful) attempts to ridicule and do an imitation of the work of authors, performers and producers. There is no doubt that derivative works can influence earnings of the right holders of original works; however, in a number of cases it is incomprehensible why the state should legislatively protect entrepreneurs against possible decline in profits caused by the fact that their competitors also demonstrate their ability to effectively interact with readers, spectators and other users of intellectual property.

9. Extremistic discourse associated with intellectual property always influence the perception of results of authors' creative activities. The right to access political information should not be limited under the pretence of its extremistic content; on the contrary, while prohibiting felonious propaganda, it is necessary to assess extremistic materials fairly with safeguarding of interests of mass audience representatives against specific messages constituting a critical threat to media security. It is obvious that extremist communities overindulge into freedom of expression;[37] at the same time, certain people of art feature remonstrative thinking, which can be rationally explained and is based on real-life examples. Epigrams and epatage do not only lie in the legal plane of art but are also its most interesting part. The emotionality of cynics and radicals should not be equated to criminal attempts to destroy the constitutional order. Culturology has proven the psychological nature of creative remonstrance. Thus, for example, "an unprecedented act was needed to return self-esteem to Mandelstam and to make a stir. Such an act was the creation of the poem "We live without feeling the country beneath our feet…"".[38] When analyzing the works of the Silver Age thoroughly, it is argued that "Yesenin and Mandelstam, when being refracted in Pushkin's Stances and in this refraction being dissonant with literary and pseudoliterary interpretations of the personality and works of Pushkin, hinder the propaganda machine from making Pushkin 'an insider' roughly and quickly, from shaping an 'appropriate' image of him".[39] In this context we can acknowledge the accuracy of Professor N. V. Razuvaev's observations on how Plato "condemned Homerical poetry severely";[40] though it is obvious that such condemnation in the information society must not limit the mass audience's right to access debatable information.

10. Securitization of creative activities occurs in two directions. On the one hand, earning from intellectual property can facilitate redistribution of power in the structure of government bodies and civic institutions.[41] On the other hand, the competition between nations and corporations in the global media space can create social and political conditions under which the existence of a national culture

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in the plane of global policy will directly depend on the competitiveness of national creative projects.[42] The development of the information sovereignty doctrine shows that the supremacy of power and the quality of mass information are in a direct political dependence.[43]

Participation of extremist movements in creation of multimedia content also contributes to securitization of the media sphere and limitation of access to information based on the public law rules.[44] Recessionary manifestations in neoliberalism, however, highlight the significance of natural law rules for sustainable development of the modern society.[45] State institutions, by intruding into the space of the virtual world, can expect to succeed only provided their actions would be regarded by the media community as rational and fair when it comes to guaranteeing free access to information. Media security is inseparably connected with the state of national economy as high-quality creative projects require considerable costs of resources and highly skilled labor.

Conclusion. The access right and intellectual rights have the common object of legal protection — new and original approaches to solving artistic, business and technical tasks. Exercise of the right to access information impacts the subjective aspect when assessing novelty of intellectual property. Recognition of an artistic or technical solution as new for certain specialists may be accompanied by the fact that for other members of the professional community such technology would be trivial and self-evident. Moreover, the content of intellectual rights is defined by constructive attention of the viewership ready to pay for and consume intellectual property, rather than by actual novelty of intellectual activity results.

Modernization of a universal intellectual property right is implemented in the information society in order to create formal rules ensuring more fair legal communications based on the flexible and balanced interests of all parties in legal respect[46] [11]. Interrelations between intellectual property legal doctrines, virtual things (Internet of Things) and the right to access information reflect a critical state of the knowledge infrastructure in the modern society. Provision of media security is associated with sustainable development of digital economy which, as it grows, needs more extensive legislative formalization of the rules and regulations according to which social relations are successfully realized in the virtual world.

Inclusion of producers, software developers, active users of virtual resources and other stakeholders in the development of national legislation reflects the ability of the state to adapt to new realities of the digital era. Flawed and unfair rules can have a depressive impact on the development of virtual structures in the information society. Loss of the competitive capacity of national culture project at the global intellectual property market is the most obvious and dangerous threat to media security in developing countries; developed states, however, cannot completely rely on the accumulated cultural capital.

Criminal motives of many art entrepreneurs and ultimate striving to deconstruction of the state and civic institutions on the part of extremist communities create legal conditions under which aberrations of legislative and executive powers in their battle with the evident evil lead to threats to sustainable development. The right to access information in the open society guarantees each of its members an opportunity to use the results of technical and cultural progress, contributes to the development of critical thinking required for further progress, ensures fair social and economic evaluations as legislatively accepted forms of intellectual property's being as well as the being of new items which inevitable emerge due to the development of artificial intelligence technologies.

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Dualism of Law: Historical Analysis, Current Trends, a Combination of Private and Public Principles in Civil Law

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ABSTRACT

The article is devoted to the perception of private and public law in the tradition of the Romano-German legal family. With the use of formal-logical, sociological-legal and retrospective methods of research the author studies the transformation of views on the grounds of differentiation of private and public law, analyzes the current trends in the development of scientific thought on the problem of dichotomy of law, the combination of private and public principles in civil law is studied. The conclusion is made about the development of two interrelated processes in the modern legal systems of Russia and Europe — "publicization" of private law and "commercialization" of public law.

Keywords: dichotomy of law, private law, public law, convergence theory of private and public law, combination of private and public principles in civil law

The dualism-of-law doctrine as inherent in the Romano-German (continental) legal family separation of law into private and public law provoked numerous discussions, gave birth to various theories and paradigms, was the subject of academic interest for many jurists throughout its history. Attention to the issue on the most correct, proper, methodologically substantiated criterion of differentiation between private law and public law in different historic periods one day weakened, another day came up with a bang, and now, in addition to getting the balance in combination of private and public fundamentals, it attracts keen interest of the academic community again.

By now, legal science has created plenty of theories, even schools have been formed, but there is still no unanimity of opinions on the necessity and practical relevance of dividing law into private and public, not to say about the criteria of such division.

The idea of dividing law into private and public was born in the structure of Roman law which was formed in the 5th century B.C. in Ancient Rome and is traditionally connected with the works of the ancient Roman lawyer D. Ulpian, who laid the idea of interest in the basis of law division: public law refers to the interests of state as a whole, while private law refers to the interests of an individual as such ("publicum jus est quo-dad statum rei romane spectat privatum quod ad singulorum utilitatem").[1] In our opinion, even though Ulpian's, Aristotle's and Demosthenes' statements contained separate provisions on consideration of law from the two perspectives, division of law into private and public was not systemic and was to be used for convenience in studying law, rather than for practical application.

The unprecedented legal system of ancient Romans was somehow inherited by a number of states which were formed after the breakdown of the Roman Empire. Although the early Middle Ages saw official and customary law of continental European states to drive back the positions of Roman law significantly, starting from the 12th century legal higher education in European countries is practically completely based on research in the Roman legal tradition, where special attention is given to Digests — an extensive collection of statements of Roman lawyers on the legal aspects of property, testaments, contracts, delicts, on crime and punishment as well as city law.[2] Division of law into public and private was also perceived and was based on the following common concept: legal relations occurring in the field of public law and private law are different in their nature and required different ways of rulemaking and regulation. The teaching methods based on the reception of Roman law gradually shaped lawyers' legal consciousness based on the dichotomy-of-law postulate, which became the basis for the Romano-German legal family.

In the period from the end of the 17th to the beginning of the 18th centuries, the doctrine on division of law into private and public was actively studied by scientists from Western Europe, where the dualism of law became a symbol of separation of an emerging civil society from state institutions. Citing of the classical Ulpian's idea did no longer meet the needs of legal thought development caused by the

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influence of the Enlightenment and later the French Revolution. In the 19th century, western civilists positively opposed public law to private law, the state — to the civil society, seeing in private law the source of an individual's freedom from the state dictatorship.

Striving to clearly structure law into private and public subsystems, which was peculiar to German scientists in the 19th–20th centuries, engaged the Russian academic community, which, up to the known events in 1917, actively investigated the doctrine of dividing law into public and private.

In the 20th century, general theory of law developed a considerable number of theoretical structures formulating law division criteria or denying the necessity of such division.

Within the framework of the positivist theory, the ground for demarcation of law into public and private was the subject and method of legal regulation. Private law covered regulation of legal relations in the field of interests of individuals, both natural persons and legal entities, that is, social relations between formally equal subjects expressing their personal interest, with a dominating discretionary method of legal regulation based on the consideration of the initiative coming from the participants of the regulated relations, their independence in the choice of actions.[3] Public law covered regulation of social relations reflecting the interest of the state and society, with a dominating mandative method of legal regulation, being strictly obligatory, which did not allowed for deviations from the legally established requirements. The French lawyer L. Duguit (1859–1928), when regarding the issue of dualism of law through the lens of solidarism, expressed his assuredness in firm, inescapable replacement of private law fundamentals with public law principles and, as a consequence, in turning all law into public law.[4]

The representative of the sociological theory of positivism N. M. Korkunov (1853–1904), while denying the interest as an acceptable criterion for demarcation of law, sees the difference between public law and private law in differentiating their dual legal form — division of an object as differentiating between "mine" and "yours" and adaptation of an object to combined effectuation of differentiated interests. "It is quite easy to prove, — N. M. Korkunov wrote, — that, by building the differentiation of private and public on the differentiation of division and adaptation, we can easily explain the availability of private rights for the state as well. If the state is provided with the authority over an object for its adaptation to the usage, we are speaking of public law: such is the state's right to roads. On the contrary, if an object is provided to the state only to be used by the government itself to get some means out of it for adaptation of other object, we are speaking of private law: such is, for example, the state's right to public property the earnings from which are spent for satisfying these or those state administration tasks".[5] Private law by referring objects to private possession allows the subject to determine the method of their management at free discretion, that is, it regulates only distribution rather than consumption and production, while public law by adapting an object to joint use regulates both consumption and production.

The famous Russian scientist K. D. Kavelin (1818–1885) did not recognized the traditional for the Roman legal thought dualism of law based on private or public interest as he denied the very possibility for clear demarcation between public and private law. "We cannot imagine, — K. D. Kavelin wrote, — any legal relation — however insignificant it may seem, however it appeared to be limited exclusively to one or several individuals, which would, at least indirectly, at least to the smallest possible scale, not deal with public living, not have an impact on it. Private living, private relations reside in the public domain, they do not exist beyond the public domain, and thus, they cannot but have an impact on the public domain; similarly, private relations, as they exist in the society, are inevitably under the influence of public living. This gives rise to continuous interaction between private and public elements, though it rarely reveals itself and stares in the face, but usually is realized quietly, out of the observer's sight, and manifests itself only in its actions and results".[6] Thus, we may speak only about reasonable balance and a well-proportioned combination of these elements. According to K. D. Kavelin, to balance private and public is a non-trivial problem as, at first sight, even a contract between two citizens has private character. However, we cannot but agree that such a deal has always a public side as its subject may be a thing limited for civil circulation or withdrawn from it, which gives public significance to such deal. Thus,

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[3] Vasiliev O. D. Problems of Separation of the Right to Public and Private in the Russian Positivistic Theory of Law in the Late XIX — Early XX centuries [Problemy razdeleniya prava na publichnoe i chastnoe v russkoi pozitivistskoi teorii prava v kontse XIX — nachale XX vv.]: Dissertation of PhD in Juridical sciences. Blagoveshchensk. 1999. 142 p. (In rus.)

[4] Duguit L. General Transformations of Civil Law from the Time of Napoleon's Code / Ed. and with foreword: A. G. Goyhbarg, Trans from fr.: M. M. Sievers. M. : Gos. izdatelstvo Publ., 1919. 110 p.

[5] Korkunov M. N. Course of lectures. [Kurs lektsii]. SPb.: Yuridicheskiy tsentr Press Publ., 2004. P. 162. (In rus.)

[6] Kavelin K. D. Civil Law. History of the Russian judicial system [Grazhdanskoe pravo. Istoriya russkogo sudoustroistva]. M. : Yurayt Publ., 2018. PP. 2, 12, 38. (In rus.)

the border between private and public interests may be disturbed, and "we cannot state with full confidence about the exclusiveness of private or public nature of legal regulation in civil relations, but we can say about their equal combination".[7]

The representative of the historical school of law F. K. Savigny proposed to divide private and public law based on the purpose, though he did not develop the idea of the purpose. In public law a separate individual plays only a subordinate role as the purpose is the whole, while in private law "a separate individual is the purpose in themselves, and any legal relation relates to their existence or special state as a means", Friedrich Carl von Savigny wrote in 1840.[8]

The founder of the imperative theory, well-known German civilist and legal theorist August Thon (1839–1912) proposed to use a legal regulation method as a criterion for demarcation of public and private law: if safeguard is provided exclusively upon request of a person which right was infringed, then this right should be regarded as private; if an infringed right is safeguarded only at the initiative of the state, even beyond the affected person's will, this is the sphere of public law.[9]

The widely known statement of V. I. Lenin about non-recognition of anything private in economy expressed on behalf of the communist party for many years defined the standpoint of Soviet scientists on this problem. However, we cannot say that in the Soviet period there were no theoretical insights into dualism of law. It was as early as in 1920 when, in his studies on the value of private law for the society and individual, the interaction of private law and public law, Professor M. M. Agarkov proposed to classify all the available theories into four groups: theories based on the material criterion, theories based on the formal criterion, theories combining the two first criteria, and theories rejecting dualism of the system of law.[10]

By developing the ideas of M. M. Agarkov, the Soviet civilist B. B. Cherepakhin publishes his work entitled "On the Issue of Private and Public Law" in 1926, where he analyzed the main schools of thought concerning the issue on where is a demarcation line between private and public law and came to the conclusion that the demarcation should be based on the formal criterion — the demarcation should be realized depending on the way legal relations are built and regulated. Thus, as B. B. Cherepakhin thinks, "a private law relation is based on coordination of subjects; private law is a system of decentralized regulation of living relations. A public law relation is based on subordination of subjects; public law is a system of centralized regulation of living relations".[11] The theories based on the material criterion proceed from the premise that the criterion for demarcation of private and public law is, first of all, a response to the question which interest — of the state or of an individual — is the subject of regulation; second, which interests are protected by the rules of law — property or personal interests. Variable content of legal rules and relations caused by social, political, economic changes in the society does not allow for finding such a material criterion that would pass the test from the historical and doctrinal perspective, which, according to B. B. Cherepakhin, makes the ideas of supporters of this criterion baseless.

A rising tide of interest to the considered problem in the Russian scientific community took place in the 90s on the background of perestroika political processes, active development of civic institutions and attempts to intergrate alien western civil rules into the Soviet system of law. On the wave of global social and economic changes, the interaction of private and public law in Russia, starting from the 90s, acquires new facets. Thus, Decree of the President of Russian Federation No. 1473 of July 07, 1994 approves the Program entitled "Development of Private Law in Russia" (hereinafter — the Program), the provisions of which enact measures on restoration and development of private law. The Program underlines that the legal system of the totalitarian past, which was based on the nationalization of economy, is replaced with regulation of relations based on commonly accepted principles of private law: private independence and autonomy, acknowledgment and protection of private property, contractual freedom. As private law has not become common for the legal practice and has not come into the mind of participants of economic relations, it is necessary to take a number of actions to create a legislative basis

[7] Anisimov A. P. Civil Law of Russia. The general part: a textbook for academic bachelor [Grazhdanskoe pravo Rossii. Obshchaya chast': uchebnik dlya akademicheskogo bakalavriata] / A. P. Anisimov, A. Ya. Ryzhenkov, S. A. Charkin; under total ed. A. Ya. Ryzhenkov. 4th ed., revised and enlarged edition. M.: Yurayt Publ., 2016. P. 38. (In rus.)

[8] Duguit L. General Transformations of Civil Law from the Time of Napoleon's Code / Ed. and with foreword: A. G. Goyhbarg, Trans from fr.: M. M. Sievers. M.: Gos. izdatelstvo Publ., 1919. P. 67.

[9] Korshunov N. M. The Convergence of Private and Public Law: Problems of Theory and Practice: a monograph [Konvergentsiya chastnogo i publichnogo prava: problemy teorii i praktiki: monografiya]. M.: Norma: INFRA-M Publ., 2015. 240 p. (In rus.)

[10] Agarkov M. M. The Value of Private Law [Tsennost' chastnogo prava] // Jurisprudence [Pravovedenie]. 1992. No. 1. PP. 25–41. (In rus.)

[11] Tikhomirov Yu. A. Public Law [Publichnoe pravo]. Textbook [Uchebnik]. M. : BEK Publ., 1995. P. 33. (In rus.)

for private law relations. Such actions include: development of a civil code and other acts of civil legislation (laws on the incorporation of legal entities, registration of immovable property and real property transactions, on joint-stock companies, on mortgage, etc.) as the primary source of private law in Russia; training of specialists in private law.

The terms "private" and "civil" law in the Program are used as synonyms. These terms are widely used as synonyms in legal science, but we cannot agree with such an approach as such artificial mixing neutralizes criteria for individualization of law branches and misrepresent the idea of demarcation of private and public law. In our opinion, it is more appropriate to speak of a combination of private and public elements in civil law, where civil law is a branch of private law, including law of persons, natural persons and legal entities (to the extent it regulates their legal capacity), law of obligations and contracts, law of property, law of inheritance as well as personal non-property rights.

Going back to the schools of legal thought in Russia from the start of the 90s, let us note that reversion to the supremacy of law, the priority of an individual's and a citizen's rights and liberties ramped up interest in private law. Public law being a synonym to state law underwent serious critical re-evaluation. At the origins of studying modern problems of public law and the onset of the public law scientific school in 1995, there stood the Soviet and Russian legal scholar Yu. A. Tikhomirov. The scholar claimed to refuse opposition of private to public law as they are naturally connected and are interrelating with each other. By laying an emphasis on historically proven mobility of border between public and private law, malignancy of clear prevalence of either public or private law, Yu. A. Tikhomirov proposes to perceive the term "public law" on the whole, as the specifics of "law in the socially important sphere, i. e. in the sphere on which the existence, functioning, development of the society, and the state, and organized gangs, corporations, associations, and citizens depend".[12]

"Public law, — the scholar writes, — embraces a lot of spheres. This is the mechanism of the government and power, the field of governance and arrangement of self-governance, the expression of public interest as an averaged sum of social interest in each of the spheres — economic, social, etc. This is generally accepted goal-setting for actions of all subjects of law, laying the groundwork and maintaining the functioning of the legal system, providing common law-making and law enforcement principles".[13]

By developing the ideas on addition and interaction of private and public law structures, N. M. Korshunov has developed the convergence theory. The essence of the theory lies in the recognition of interaction between independent branches of law — private and public, without their interference and, particularly, without their absorption of one another. By possessing common system attributes and specific peculiarities, private and public laws interact "by means of a combination of private law and public law methods of their regulation", that is, in the domain of public law one may use contractual methods (for example, public private partnership), and for the exercise of certain private subjective legal rights one should establish a special procedure (for example, civil registration of births, deaths and marriages, incorporation, state registration of rights to immovable property and transactions involving such property, licensing of certain types of activities).[14] By interacting, both branches of law completely preserve their specific features, system attributes and legal essence. Tearing into the convergence theory, T. A. Solodovnichenko noted that the use of a single objective criterion for demarcation of the legal regulation method (private law or public law) excluded the possibility for convergence of private and public law. This standpoint is disputable.[15] Of course, it is difficult to deny that as an optimal criterion for demarcation between public law and private law, only the legal regulation method is of little use. N. M. Korshunov himself agrees with this and makes the conclusion that in the modern world, "purely" public or private branches of law do not exist; consequently, it would be logically sound to accept the theory of convergence of private and public law as the one that provides balanced understanding of the private and public borders in law.

Addressing to the issue of convergence of private and public elements in modern civil law, we can see active intrusion of public elements in the field of private law. Although in the period when the Civil Code of the Russian Federation was developed, based on the postulate that civil law is only private law, the necessity to reject the preservation of public interest, i. e. rules considering the interests of the state

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[12] Solodovnichenko T. A. Critical Assessment of the Theory of Convergence of Private and Public Law [Kriticheskaya otsenka teorii konvergentsii chastnogo i publichnogo prava] // Herald of OMSK University. Series: Law [Vestnik OmGU. Seriya: Pravo]. 2018. No. 2 (55). P. 38. (In rus.)

[13] See ibid.

[14] Korkunov M. N. Op. cit.

[15] Bogdanov E. The Correlation of Private and Public in Civil Legislation [Sootnoshenie chastnogo i publichnogo v grazhdanskom zakonodatel'stve] // Russian Justitia [Rossiiskaya yustitsiya]. 2000. No. 4. PP. 23–24. (In rus.)

and the whole society, was repeatedly discussed, and emphatically insisting on the exclusively private law nature of civil law in the current realities is at least naive.

Without disputing the standpoint of S. Alekseev, who thought that "until civil legislation, laws on property, entrepreneurship, all similar laws are not be accepted and constructed in social and legal being as private law, we will not have actual private property, entrepreneurship, private initiative, peasants' right to land",16 let us recall that "publicization" always existed in civil law to a greater or lesser degree in all countries. Originally, such condition was connected with the state's capability to guarantee the very enforcement of private law, and individuals could freely conclude contracts as they wished. In the course of time, the role of public law has been growing. Being the basis of governance in the state, expressing the basic principles of the society organization and the status of an individual and a citizen, it expresses interdependent relations between members of the society and guarantees the viability of the structure as it is not always possible to discern a goal of public nature behind individual, parochial interests.

That is why in civil law both in Russia and in other countries there are provisions of public law nature. This manifests itself as follows: 1) in arresting the principle of contractual freedom — a prohibition against a person's refusal to conclude a public agreement is described as well as the obligatoriness of concluding an agreement for the party to which an offer is sent; obligatory contracts (insurance), regulated contracts (for example, for electricity supply, limiting the rights of natural monopolies), contracts without the right to free choice of a partner (pre-emptive right) are provided; in establishing the procedure for concluding, amending and terminating a contract and its form; 2) in limiting property rights — the requirement about obligatory state registration of title and other proprietary interests in immovable things and the obligatoriness of obtaining permits for construction and building on are enshrined; servitudes are provided as well as possibilities for forcible withdrawal of property from the owner (levy of execution upon collateral, alienation of property, including construction in progress, redemption, seizure, appropriation, court-ordered forfeiture of property, money, valuables and earnings thereon to the Russian Federation, privatization, nationalization), retortions in relation to property rights of citizens and legal entities of foreign states; 3) in limiting types of activities — a prohibition on free (without any license) production (planting) and sale of a number of goods is established, there are obligatory production quotas; 4) in a limited and exhaustive list of entity types; 5) in the right of the state and state formations to be participants of civil relations; 6) in limiting the freedom of testament — there are rules on an obligatory portion, there are certain limitations for inheritance of national awards, badges of honor and memorial signs; 7) in limiting personal non-property and exclusive rights — retortions in relation to personal non-property rights of citizens and legal entities of foreign states, compulsory license; 8) in establishing formal requirements for individuals — participants of civil law relations (age, capacity, requirement for registration of births, deaths and marriages); 9) in establishing boundaries for exercising civil rights — law-skirting actions pursuing illegal purposes, exclusively with the intention to inflict harm on another person, abuse of right, limitation of competition, abuse of market dominance are not acceptable; 10) in the necessity to pay taxes on any economic transactions, even on "absolutely" free ones.

This is by no means an exhaustive list of manifestations of public elements in civil law. "Publicization" of civil law if caused by a number of objective reasons. For example, when performing its social function, the state limits the rights of monopolies, thus supporting citizens—consumers; having established specific significance of certain civil matters (natural resources, land, weapons, toxic substances, drugs and psychotropic agents, currency) for the society, the state establishes special rules for their turnover, thus ensuring economic development and safety in the society; public property is used for implementation of social projects as well. The fact that private, civil, law includes an increasing number of compulsory rules is the result of law socialization as in order to protect universal interest one has to trench on individual freedom.

Introduction of public elements into civil law does not lead it to the loss of private law nature; private law rules, even compulsory ones, do not become rules of public law. Consent remains a fundamental element of the free will doctrine in civil law. A contract as the main source of civil obligations remains a legal instrument based on consensus. Even when a contract is a legal obligation, law cannot replace the consent of the parties completely. Cases when consent is actually not required are very rare and

[16] Vasiliev O. D. Problems of Separation of the Right to Public and Private in the Russian Positivistic Theory of Law in the Late XIX — Early XX centuries [Problemy razdeleniya prava na publichnoe i chastnoe v russkoi pozitivistskoi teorii prava v kontse XIX — nachale XX vv.]: Dissertation of PhD in Juridical sciences. Blagoveshchensk. 1999. P. 15. (In rus.)

are justified by public convenience considerations. However, the opinion that civil law is only private, which can have nothing of public nature, leads to disorientation of both lawmaking and law enforcement activities, causes tension in the society.

Upon completion of the investigation of the issue, we find it possible to draw the following conclusions.

First, from the moment of problem statement by ancient Roman scholars and up to the present moment, science has not worked out clear approaches to any of the aspects within the framework of the dualism-of-law doctrine. There is no unanimity of opinion on the used terminology (for example, whether it is acceptable to use the terms "private" and "civil" law as synonyms); a single approach to the choice of criteria for demarcation of private and public law has not been worked out; a universal, logically consistent system of criteria for division of the dichotomous system of law into branches has not been developed (for instance, such branches as employment law, forest law, mining law, insurance law, international private law are referred to private law by some scholars, while others refer them to public law, still others consider them neutral, not referring to any of the branches); the appropriateness of duple division of law is discussed. It is curious that, irrespective of various approaches, the very division of law into public and private law has been remaining relatively stable in the system of the Romano-German legal family for many years. This effect was noted by G. F. Shershenevich who wrote that "despite the routine character of the said division, from the scientific perspective it is still not completely established where a demarcation line between civil and public law is, what are peculiarities of private law constituting the subject matter of special science.

This differentiation that was established historically and is persistently maintained is perceived instinctively, rather than is based on absolute criteria".[17]

Second, the dualism-of-law doctrine is conceptual only for the Romano-German legal family. The Anglo-Saxon legal system and the Muslim legal family did not adopted the idea of dividing law into private and public. Attempts to find rudiments of doctrinal division of law into private and public in case law and sharia law were taken, but they did not gain widespread as lawyers of Anglo-Saxon and Muslim law do not recognize practical applicability of this approach. Thus, the idea of dichotomy of law is neither universal nor fundamental. As A. M. Mikhailov wittily noted, "if the theoretical Romano-German "problem" concerning division of law into private and public were ontologically rooted in the life of society and had character objectively caused by the needs of legal practice, it would hardly be ignored by some reputed scholars and "pedalled" nec plus ultra by others. Could at least one legal scholar, when stating the theoretical basics of statehood, exclude such an attribute of the state as the state territory from studies, or completely ignore a tax system?" [18]

Third, all array of approaches to dualism of law can be conditionally divided into material approaches, in which the private and public law demarcation criterion is the content of social relations, the subject of regulation of a legal rule; formal approaches, in which the division is based on the combination of techniques and methods of regulating legal relations; nihilistic approaches denying dualism of the law system as an academic category and considering the whole system of law, depending on the author's world view, as either public law or private law; mixed approaches, in which scholars say about the necessity to combine various demarcation criteria to understand the essence of law dualism; and convergence theories, in which interrelation, interdependence of private and public elements are stressed out as well as practical aspects of convergence of private and public law rules with the preservation of their independence.

Fourth, at the moment, in the legal systems in Russia and Europe two interrelated processes are running rampant — "publicization" of private law and "commercialization" of public law. There is an increasing number of compulsory rules in private law because the freedom of an individual has to be limited for the protection of universal interest. Conversely, in some cases relations between the state and individuals are regulated by private law rules. Civil law cannot go without the use of compulsory rules and prohibitions which are established both to the benefit of separate groups and to the universal benefit. Civil law has never been and will not be "purely" private; it is always subject to public limitations. The boundaries of influence of private and public elements in civil law are constantly fluctuating. Fifth, it must be admitted that the search for a universal boundary between private and public law has come

[17] Cherepakhin B. B. On the Issue of Private and Public Law [K voprosu o chastnom i publichnom prave] // Collection of works of professors and lecturers of the Irkutsk State University [X cb. trudov professorov i prepodavatelei Irkutskogo gos. un-ta]. Irkutsk, 1926. P. 9. (In rus.)

[18] Kurbatov A. Ya. The Combination of Private and Public Interests in Legal Regulation of Entrepreneural Activities. [Sochetanie chastnykh i publichnykh interesov pri pravovom regulirovanii predprinimatel'skoi deyatel'nosti]. M. : YurInfoR Publ., 2001. P. 85. (In rus.)

to a deadlock and no longer meets the needs of modern legal science and practice. We think it naive and utopian to speak of the dualism-of-law doctrine as of an obligatory condition for providing the priority of human rights and liberties and democratization of social life. While admitting the need to study the legacy and highly appreciating the contribution made by scholars to the development of insights into the essence of law, for now we think it necessary to concentrate on searching for the most appropriate formula combining private and public elements in civil law and studying public and private law convergence mechanisms to balance the rights of an individual, the society and state.

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Conditions for Exercise by Foreign Citizens of Some Fundamental Social Rights as Subjective Rights

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ABSTRACT

With a high migration attractiveness of Russia, the issue of the exercise of fundamental social rights by foreigners, including minors, in Russia is important. The author reviewed the existing regulations, enshrining the right to health and medical care, education, housing and social security, and the practice of the Children's Rights Ombudsman in St. Petersburg. The ways of solving the identified problems in practice and eliminating conflicts in the legislation of Saint Petersburg are proposed.

Keywords: foreign citizens, children, fundamental human rights, right to health and medical care, right to education, right to housing, right to social security.

The modern social realities are characterized by the large-scale migration processes.[2] According to the 2017 study by the UN Department of Economic and Social Affairs, the number of international migrants in the world has grown by 49% and made 258 million since 2000. The Russian Federation (hereinafter referred to as the RF) takes the forth place among the five countries with the largest number of inhabitants-external migrants.[3]

In particular, migration processes are caused by people's search for better living conditions: shelters, places to escape from natural disasters or military conflicts, permanent and highly paid work, etc.[4] In the XXI century, the world community recognized migration as one of the tools to achieve sustainable development.[5]

The stable socioeconomic status, preservation of the historical and cultural ties of the peoples of the member states of the Commonwealth of Independent States, mutual visa-free travel, and the establishment of the Eurasian Economic Union are key factors of the migration attractiveness of the Russian Federation.[6] The latter is eloquently confirmed by official statistics of the Russian Ministry of Internal Affairs. For instance, 15,710,227 people were registered as migrants foreign citizens and stateless persons (hereinafter referred to as foreign citizens) in the Russian Federation in 2017.[7] The number of

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[3] Gordeev V. The number of migrants in the world has increased by almost 50% since the beginning of the century [Kolichestvo migrantov v mire vyroslo s nachala veka pochti na 50 %]. // RBC News Feed Internet Portal: [Novostnoi internet-portal "RBK"]. [19.12.2017]. Available at: https://www.rbc.ru/politics/19/12/2017/5a38670d9a7947cbce6346bb (accessed 29.03.2019).

[4] Prudnikova T. A. Theoretical, methodological and legal bases of regulation of migration processes (on the example of Russia and the member States of the European Union): Monograph [Teoretiko-metodologicheskie i pravovye osnovy regulirovaniya migratsionnykh protsessov (Na primere Rossii i gosudarstv — chlenov Evropeiskogo Soyuza): monografiya]. // Law and Right [Zakon i pravo]. M.: YUNITI-DANA Publ., 2015. P. 40. (In rus.)

[5] Andrichenko L. V., Plyugina I. V. Migration Legislation of the Russian Federation: Development Trends and Practice of Application [Migratsionnoe zakonodatel'stvo Rossiiskoi Federatsii: tendentsii razvitiya i praktiki primeneniya]. M. : Norma INFRA-M Publ., 2019. 391 p. (In rus.) Access from the legal reference system "ConsultantPlus".

[6] The Concept of State Migration Policy of the Russian Federation for 2019–2025: approved by Decree of the President of the Russian Federation dated October 31, 2018, No. 622 // Collection of Legislative Acts of the Russian Federation. 2018. No. 45. Art. 6917.

[7] Selected indicators of the migration situation in the Russian Federation for January-December 2017 with a breakdown by country and region [Otdel'nye pokazateli migratsionnoi situatsii v Rossiiskoi Federatsii za yanvar'-dekabr' 2017 goda s raspredeleniem po stranam i regionam] // Official website of the Ministry of Internal Affairs of the Russian Federation [Ofitsial'nyi sait Ministerstva vnutrennikh del Rossiiskoi Federatsii]. Available at: https://xn--b1aew.xn--p1ai/Deljatelnost/statistics/migracionnaya/item/12162171/ (accessed 29.03.2019).

foreigners arriving in the Russian Federation increased by more than two million people in 2018: 17,764,489 migrants were registered.[8]

The main tasks of the demographic policy of the Russian Federation by 2025 include attracting migrants according to the needs of demographic and socio-economic development, taking into account the necessity of their social adaptation and integration.[9]

Since the beginning of the 1980s, the science has recognized that these are not individuals who are involved in migration processes, but groups of interrelated people (families or households) who decide to migrate not only to improve their material well-being but to enhance their social status.[10]

The practice of various government bodies, namely those providing public services in the area of migration, competent in protecting the rights of minors, as well as state healthcare and educational institutions and diplomatic missions of foreign countries, evidences that families of foreign citizens with minor children are actively involved in migration processes. At the same time, migrant parents take the education their children get in Russia as a vertical social elevator for the latter,[11] which confirms the thesis about the use of migration mechanisms to increase the family social status.

Rights and freedoms of a person and citizen are recognized and guaranteed in Russia subject to generally recognized principles and rules of international law and in accordance with the Constitution of the Russian Federation. Fundamental human rights and freedoms are inalienable and belong to everyone from birth (parts 1–2 of article 17 of the Constitution of the Russian Federation, adopted by nation-wide voting on December 12, 1993,[12] hereinafter referred to as the Constitution of the Russian Federation).

Human rights are rights that belong to every person regardless of their nationality, that is, to foreign citizens and stateless persons. At the same time, part 1 of article 17 of the Constitution of the Russian Federation enshrines the priority of universally recognized principles and rules of international law when establishing human rights standards, which gives rise to well-defined obligations for the legislative, executive, and judicial authorities. Therefore, the Constitution of the Russian Federation, while obliging to recognize human rights, imposes an obligation on the state to enshrine human rights existing before and outside the state, as well as to reproduce international human rights standards in Russian legislation.[13]

Pursuant to part 1 of article 7 of the Constitution of the Russian Federation, the Russian Federation is a social State whose policy is aimed at creating conditions for a worthy life and a free development of man.[14] In view of the foregoing, it seems relevant to study the regulatory framework governing the foreign citizens' exercising of certain social rights stipulated by international regulations and enshrined in the Constitution of the Russian Federation, which are extremely important for the life order of families of external migrants in the Russian Federation, taking into account the legal status of foreigners in the Russian Federation and their age.

It should be noted that the logic of presentation herein is determined by the following. Together, St. Petersburg and the Leningrad region ranked second in terms of migration flow in 2018 after Mos-

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[8] Selected indicators of the migration situation in the Russian Federation for January-December 2018 with a breakdown by country and region [Otdel'nye pokazateli migratsionnoi situatsii v Rossiiskoi Federatsii za yanvar'-dekabr' 2018 goda s raspredeleniem po stranam i regionam] // Official website of the Ministry of Internal Affairs of the Russian Federation [Ofitsial'nyi sait Ministerstva vnutrennikh del Rossiiskoi Federatsii]. Available at: https://xn--b1aew.xn--p1ai/Deljatelnost/statistics/migracionnaya/item/15851053/ (accessed 29.03.2019).

[9] The Concept of Demographic Policy of the Russian Federation until 2025: approved by the Decree of the President of the Russian Federation dated October 9, 2007, No. 1351: as amended by the Decree of the President of the Russian Federation dated July 1, 2014, No. 483 // Collection of Legislative Acts of the Russian Federation. 2007. No. 42. Art. 5009; 2014. No. 27. Art. 3754.

[10] Balashova T. N. Constitutional and legal problems of formation of migration policy [Konstitutsionno-pravovye problemy formirovaniya migratsionnoi politiki]. SPb.: Yuridicheskiy tsentr Press Publ., 2011. PP. 37–38. (In rus.)

[11] Section 2.3 "Foreign Citizens' Children" of the Annual Report of the Children's Rights Ombudsman in St. Petersburg for 2018 [Razd. 2.3 «Deti inostrannykh grazhdan» Ezhegodnogo Doklada Upolnomochennogo po pravam rebenka v Sankt-Peterburge za 2018 god] // Official website of the Children's Rights Ombudsman in St. Petersburg [Ofitsial'nyi sait Upolnomochennogo po pravam rebenka v Sankt-Peterburge]. Available at: http://www.spbdeti.org/files/doklad2018/2_3.pdf (accessed 29.03.2019).

[12] Constitution of the Russian Federation, adopted by nation-wide voting on December 12, 1993 (as amended by the Laws of the Russian Federation on amendments to the Constitution of the Russian Federation No. 6-FKZ of December 30, 2008, No. 7-FKZ of December 30, 2008, No. 2-FKZ of February 5, 2014, No. 11-FKZ of July 21, 2014) // Russian Newspaper [Rossiyskaya Gazeta]. 1993. December 25, No. 237; 2008. December, 31 No. 267; 2008. December, 31 No. 267; 2014. February, 07 No. 27; 2014. July, 23 No. 163.

[13] Comment to the Constitution of the Russian Federation [Kommentarii k Konstitutsii Rossiiskoi Federatsii] / Ed. V. D. Zorkin. 2nd ed., revision. M. : Norma: INFRA-M Publ., 2011. P. 170. (In rus.)

[14] Constitution of the Russian Federation.

cow.[15] Regarding basic rights of minor children, foreigners most often appeal to the Office of the Children's Rights Ombudsman in St. Petersburg as to the medical care (hereinafter referred to as MC) and education for their children.[16] Therefore, these are precisely the rights to health protection and MC, as well as the right to education (as those causing the most problems while exercising them) that the consideration of the conditions for the foreign citizens' exercising of certain fundamental rights will commence with.

We also need to make a number of theoretical and legal observations in respect of the categories of "subjective right" and "person subject to law" understanding. We believe it possible to agree with Yu. Ya. Baskin, according to whom "when we talk about law, we should make a preliminary remark that it (law) is subjective in nature (both while created and when acting)".[17] The scholar recognized the view of law as a product of human activity to be correct.[18] Analyzing the V. S. Nersesyants's scientific heritage, Yu. Ya. Baskin noted that "the law reflects the will of the body that issued it".[19] Indeed, laws and statutory instruments are created by specific people, i. e. officers of state bodies vested with the relevant competence. They are guided not by their personal beliefs but by the state's social and political situation, economic conditions, as well as the need to exercise the rights and legitimate interests of the people living there in the course of the rule-making process.

Moreover, the requirements of laws and statutory instruments as a set of existing legal norms are objective in nature for participants in legal relations, for whom subjective rights as a set of legal powers arise based thereon.[20]

Part 2 of article 17 of the Constitution of the Russian Federation grants fundamental rights to every person from birth.[21] That is, from that moment on, all people have the corresponding subjective rights regardless of their citizenship. At the same time, we believe it is correct to define the person subject to law only as a reasonable person with free will. The person subject to law is traditionally denoted in legal literature by the category of "person", an "individual" person. The person subject to law as an active participant in legal relations and this category are correlated as follows: the pattern of an individual enshrined in law is an auxiliary means of thinking, the most convenient arrangement of regulatory material. The recognition of minor children as persons subject to law is a legislative fiction. The rule of law grants rights to them, but the true persons subject to law in the exercise of children's rights will be their legitimate representatives — sane people[22] with full legal capacity, that is, the ability to independently exercise their subjective rights and obligations,[23] the age limit of which achievement is enshrined in the relevant sectoral legislation.[24] Parents (or legal representatives within substitute families) taking care of children, both in the physical sense and in the legal one, who are aware of the sense and nature of the

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[15] Selected indicators of the migration situation in the Russian Federation for January-December 2018 with a breakdown by country and region [Otdel'nye pokazateli migratsionnoi situatsii v Rossiiskoi Federatsii za yanvar'-dekabr' 2018 goda s raspredeleniem po stranam i regionam] // Official website of the Ministry of Internal Affairs of the Russian Federation [Ofitsial'nyi sait Ministerstva vnutrennikh del Rossiiskoi Federatsii]. Available at: https://xn--b1aew.xn--p1ai/Deljatelnost/statistics/migracionnaya/item/15851053/ (accessed 29.03.2019).

[16] Section 2.3 "Foreign Citizens' Children" of the Annual Report of the Children's Rights Ombudsman in St. Petersburg for 2018 [Razd. 2.3 «Deti inostrannykh grazhdan» Ezhegodnogo Doklada Upolnomochennogo po pravam rebenka v Sankt-Peterburge za 2018 god] // Official website of the Children's Rights Ombudsman in St. Petersburg [Ofitsial'nyi sait Upolnomochennogo po pravam rebenka v Sankt-Peterburge]. Available at: http://www.spbdeti.org/files/doklad2018/2_3.pdf (accessed 29.03.2019).

[17] Baskin Yu. Ya. Essays on the philosophy of law: studies. Allowance [Ocherki filosofii prava: ucheb. posobie]. SPb. : Leningrad State University named after A. S. Pushkin [Leningradskii gosudarstvennyi universitet im. A. S. Pushkina], 2006. P. 91. (In rus.)

[18] Baskin Yu. Ya. Op. cit. P. 4.

[19] Baskin Yu. Ya. Op. cit. P. 46.

[20] Polyakov A. V., Timoshina E. V. The general theory of law: a textbook [Obshchaya teoriya prava: uchebnik]. SPb. : Publishing House of St. Petersburg State University, publishing house of the faculty of law of St. Petersburg State University [Izdatel'skii Dom Sankt-Peterburgskogo gos. universiteta, Izdatel'stvo yuridicheskogo fakul'teta Sankt-Peterburgskogo gos. universiteta], 2005. P. 369. (In rus.)

[21] Constitution of the Russian Federation.

[22] Petrova A. A human embryo — a subject or object of law? [Chelovecheskii ehmbrion — sub"ekt ili ob"ekt prava?] // Law, society, state: questions of theory and history: collection of materials all-Russian student scientific conference, Moscow, 24–25 apr. 2015 [Pravo, obshchestvo, gosudarstvo: voprosy teorii i istorii: sb. materialov Vseros. stud. nauch. konf., Moskva, 24–25 apr. 2015 g], M. : RUDN [Rossiiskii universitet druzhby narodov], 2015. PP. 257–259. (In rus.)

[23] Polyakov A. V., Timoshina E. V. Op. cit. P. 383.

[24] Vitruk N. V. The general theory of the legal status of the individual [Obshchaya teoriya pravovogo polozheniya lichnosti]. M. : NORMA Publ., 2008. 448 p. (In rus.) Access from the legal reference system "Consultant-Plus".

rights granted to children, and who assess the need for their exercising, attach the body of legal relations to children, who can personally continue participating therein as they grow older.[25]

Thus, the general conditions for the foreigners' exercising of fundamental rights as legal ones are their consciousness and will, which allow them to independently assess the situation that requires the exercise of their rights, as well as reaching the age limit of legal capacity. i. e. the legal age allowing them to independently exercise their rights. The pre-condition, premise for the exercise of fundamental rights by children will be the availability of their legal representatives who temporary compensate for the lacking legal capacity.

The Universal Declaration of Human Rights adopted by the UN General Assembly on December 10, 1948 (hereinafter referred to as the UDHR) and the documents adopted in furtherance thereof, in particular, the International Covenant on Economic, Social and Cultural Rights, adopted on December 16,1966 by Resolution 2200 (XXI) at the 1496th Plenary Meeting of the UN General Assembly (hereinafter referred to as the Covenant), attach the right to health protection, education, housing, social security, which, inter alia, is associated with the protection of motherhood and childhood (article 25, 26, 16, 22 of UDHR,[26] articles 12, 13, 11, 10 of the Covenant[27]). In the legal literature, these fundamental rights are classified as social ones.[28]

Moreover, already at the level of international treaties, the possibility of restrictive conditions for foreign citizens' exercising of such rights is enshrined. Thus, pursuant to subclause "c", clause 1 of article 8 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by Resolution 40/144 of the United Nations General Assembly on December 13, 1985 (hereinafter — the Declaration), aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the right to health protection, medical care, social security, social services, and education, provided that undue strain is not placed on the resources of the State.

With regard to the exercising of the right to housing, the issue is resolved therein a follows. Pursuant to subclause "d", clause 2 of article 5 of the Declaration, foreigners may own property subject to the restrictions provided for by the state's domestic legislation.[29] Thus, external migrants can resolve their housing problem through the acquisition of housing.

According to part 1 of article 41 of the Constitution of the Russian Federation, everyone shall have the right to health protection and medical aid. Medical aid in state and municipal health establishments shall be rendered to individuals gratis, at the expense of the corresponding budget, insurance contributions, and other proceeds.[30] That is, the Constitution of the Russian Federation already limits the possibility of MC provision on a gratis basis to persons not being Russian citizens.

The Federal Law (hereinafter — the Federal Law) No. 323-FZ of November 21, 2011 "On Basics of Health Protection of the Citizens in the Russian Federation", (hereinafter — the Federal Law "On Basics of Health Protection of the Citizens in the Russian Federation") is fundamental in the sphere of regulating the protection of public health in our country (article 3 of the aforementioned Federal Law). The fundamental principles of health care under article 7 of this Federal Law include the priority of children's health protection.

Pursuant to article 19 of the Federal Law "On Basics of Health Protection of the Citizens in the Russian Federation", the right of foreign citizens residing and staying in our country to MC is established by the legislation of Russia and relevant international treaties of the Russian Federation. Stateless persons permanently residing in the Russian Federation enjoy the right to MC on equal terms with Russian citizens, unless otherwise provided for by international treaties of the Russian Federation. The procedure

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[25] *Petrova A.* Op. cit. PP. 259–260.

[26] Universal Declaration of Human Rights: was adopted by the United Nations General Assembly December 10, 1948 [Vseobshchaya deklaratsiya prav cheloveka: prinyata General'noi Assambleei OON 10 dek. 1948 g.] // Russian Newspaper [Rossiyskaya Gazeta], 1995. April 5, No. 67.

[27] International Covenant on Economic, Social and Cultural Rights: adopted by Resolution 2200 (XXI) at the 1496th Plenary Meeting of the UN General Assembly on December 16, 1966 [Mezhdunarodnyi pakt ob ehkonomicheskikh, sotsial'nykh i kul'turnykh pravakh: prinyat Rezolyutsiei 2200 (XXI) na 1496-om plenarnom zasedanii General'noi Assamblei OON 16 dek. 1966 g.] // Gazette of the Supreme Soviet of the USSR [Vedomosti Verkhovnogo Soveta SSSR]. 1976. No. 17 (1831). Art. 291. (In rus)

[28] Constitutional law of Russia: a course of lectures [Konstitutsionnoe pravo Rossii: kurs lektsii] / Yu. L. Shulzhenko [and others]. M.: Yurlitinform Publ., 2013. PP. 289–290 (In rus.) (Constitutional law of the Russian Federation)

[29] Current International Law [Deistvuyushchee mezhdunarodnoe pravo]. Vol.1. M.: Moskovskiy nezavisimyy institut mezhdunarodnogo prava Publ., 1996. PP. 255–259.

[30] Constitution of the Russian Federation.

for providing MC to foreign citizens is determined by the Government of the Russian Federation.[31] The Rules for the Medical Care Provision to Foreign Citizens in the Russian Federation, approved by Decree No. 186 of the Government of the Russian Federation dated March 6, 2013 (hereinafter — the Rules) are currently in force.

According to the Rules, external migrants are insured persons pursuant to Federal Law No. 326-FZ of November 29, 2010 "On Compulsory Medical Insurance (hereinafter — the CMI) in the Russian Federation" and are entitled to get MC free of charge in terms of the CMI.[32] According to article 10 of the aforementioned Federal Law, they include a number of categories of foreign citizens temporarily and permanently residing in the Russian Federation,[33] i. e. those possessing a temporary residence permit (hereinafter referred to as the TRP) and a residence permit (hereinafter referred to as the RP) allowing to reside in the Russian Federation, respectively (article 2 of the Federal Law No. 115-FZ of July 25, 2002 "On the Legal Status of Foreign Citizens in the Russian Federation"),[34] including children from birth until they reach the age of 18. Insured persons also include persons entitled to MC under the Federal Law No. 4528-1 of February 19, 1993 "On Refugees" (hereinafter — the Federal Law "On Refugees"), that is, foreigners applying for refugee status, whose application is being considered on the merits, and their family members, including children under 18; persons recognized as refugees and their family members, including children under 18; as well as persons who have received temporary asylum and their family members, including children under 18 (unless otherwise provided by international treaties of the Russian Federation).[35]

Emergency medical care in situations that pose a threat to the patient's life is provided to foreign citizens free of charge. Emergency MC, including a specialized one, is provided to external migrants in situations, which require urgent medical intervention but do not pose a threat to the patient's life. State and municipal medical establishments of the systems provide this type of MC to foreign citizens free of charge.

Emergency medical care (with the exception of emergency, including secondary emergency medical care) and elective medical care are provided to external migrants on the basis of agreements for paid medical services or voluntary medical insurance agreements and / or agreements concluded in favour of foreign citizens who are insured persons under the Federal Law No. 326-FZ of November 29, 2010 "On Compulsory Health Insurance in the Russian Federation" in the field of CMI.

Elective MC is subject to the external migrant's submission of the written guarantees to fulfill the obligation to pay the actual cost of medical services or prepay for medical services based on the estimated scope of such services (except when the MC is provided to foreign citizens who are insured within the scope of the compulsory medical insurance).[36]

With regard to providing MC to children under 18, including external migrants, the following legal problem arises. Pursuant to part 2 of article 54 of the Federal Law "On Basics of Health Protection of the Citizens in the Russian Federation", as a general rule, children over the age of 15 or drug addicted minors over the age of 16 are entitled to give the informed consent to medical intervention or to reject it.[37]

Based on the foregoing, we can conclude that adolescents are considered capable with respect to solving the basic issues of providing MC to them until they are 18.

We find it possible to agree with the position of the Children's Rights Ombudsman in St. Petersburg, according to which this circumstance contradicts the Family Code of the Russian Federation, which states

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[31] "On Basics of Health Protection of the Citizens in the Russian Federation": Federal Law of the Russian Federation No. 323-FZ of November 21, 2011: as amended by Federal Law of the Russian Federation No. 18-FZ of March 6, 2019 // Collection of Legislative Acts of the Russian Federation. 2011. No. 48. Art. 6724; 2019. No. 10. Art. 888.

[32] The Rules for the Medical Care Provision to Foreign Citizens in the Russian Federation, approved by Decree No. 186 of the Government of the Russian Federation dated March 6, 2013 // Collection of Legislative Acts of the Russian Federation. 2013. No. 10. Art. 1035.

[33] "On Compulsory Medical Insurance in the Russian Federation": Federal Law of the Russian Federation No. 326-FZ of November 29, 2010: as amended by the Federal Law of the Russian Federation No. 6-FZ of February 6, 2019 // Collection of Legislative Acts of the Russian Federation. 2010. No. 49. Art. 6422; 2019. No. 6. Art. 464.

[34] "On the Legal Status of Foreign Citizens in the Russian Federation": Federal Law of the Russian Federation No. 115-FZ of July 25, 2002: as amended by the Federal Law of the Russian Federation No. 528-FZ of December 27, 2018 // Collection of Legislative Acts of the Russian Federation. 2002. No. 30. Art. 3032; 2018. No. 53. Part 1. Art. 8454.

[35] "On Refugees": Federal Law of the Russian Federation No. 4528-1 of February 19, 1993: as amended by the Federal Law of the Russian Federation No. 528-FZ of December 27, 2018 // Russian Newspaper [Rossiyskaya Gazeta]. 1997. June 3. No. 126; 2018. December 29. No. 295.

[36] The Rules for the Medical Care Provision to Foreign Citizens in the Russian Federation.

[37] "On Basics of Health Protection of the Citizens in the Russian Federation".

that a person under 18 years of age (full age) is recognized to be a child. Rights and legitimate interests of the child are protected by the parents (persons replacing them). Parents are responsible for the upbringing and development of their children; they are obliged to take care of health, physical, mental, spiritual and moral development of their children (articles 54, 56, 63 of the Family Code of the Russian Federation).[38] S. Yu. Agapitova, Children's Rights Ombudsman in St. Petersburg, repeatedly appealed to the Ministry of Health of the Russian Federation for amendments to this regulation. However, the position of the Russian Ministry of Health is that minors are able to make independent decisions regarding their health by the age specified.

A number of tragic incidents, which happened to young residents of our city suggest that this is not so.[39] This imperfection of the legislation also poses a threat to the well-being of foreign teenagers while their staying in our country.

The fundamental right to education is reflected in article 43 of the Constitution of the Russian Federation. Pursuant to part 4 of the above-mentioned Article, basic general education is mandatory. Parents or persons in law parents shall enable their children to receive a basic general education.[40] Let us consider the conditions for the external migrants' implementation of the right to education at Russian schools.

Pursuant to Federal Law No. 273-FZ of December 29, 2012 "On Education in the Russian Federation" (hereinafter — the Federal Law "On Education in the Russian Federation"), foreign citizens have equal rights with the citizens of the Russian Federation to receive primary general, basic general and secondary general education on a public and free of charge basis (part 2 of article 78 of the aforementioned Federal Law).[41] Thus, the legal status of external migrants in our country is not a factor determining the conditions for the exercise of the right to general education. Moreover, based on the Federal Law "On Refugees", persons recognized as refugees are entitled to assistance when enrolling their children in educational establishments (article 8 of the aforementioned Federal Law).[42] People granted temporary asylum have a more restricted list of rights than refugees. The current statutory instruments do not grant this right to them on an equal basis with refugees, as well as the rights to be considered in the future.[43]

As a general rule, the "consumers" of state services in the field of general education are minors who are enrolled to Russian schools starting from the age of 6.5 years in the absence of contraindications for health reasons, but no later than 8 years old (part 1 of article 67 of the Federal Law "On Education in the Russian Federation").[44]

According to the Procedure for Admitting Citizens to Study Based on the Programs of Primary General, Basic General and Secondary General Education, approved by Order No. 32 of the Ministry of Education and Science of Russia dated January 22, 2014, a set of documents for admitting a child to an educational establishment is submitted by his/her legal representatives.[45] Thus, to start the exercising the child's right to education, it is required that the parent compensates for his/her lack of legal capacity. In accordance with the aforementioned Procedure, foreign children who are legally staying in

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[38] Family Code of the Russian Federation dated December 29, 1995, No. 223-FZ: as amended by the Federal Law of the Russian Federation No. 35-FZ of March 18, 2019 // Collection of Legislative Acts of the Russian Federation. 1996. No. 1. Art. 16; 2019. No 12. Art. 1225.

[39] Svetlana Agapitova presented the Report for 2018 at the Legislative Assembly [Svetlana Agapitova predstavila v ZAKSE Doklad za 2018 god] // Official website of the Children's Rights Ombudsman in St. Petersburg [Ofitsial'nyi sait Upolnomochennogo po pravam rebenka v Sankt-Peterburge]. Available at: http://www.spbdeti.org/id7617 (accessed 29.03.2019).

[40] Constitution of the Russian Federation.

[41] "On Education in the Russian Federation": Federal Law of the Russian Federation No. 273-FZ of December 29, 2012: as amended by the Federal Law of the Russian Federation No. 17-FZ of March 6, 2019 // Collection of Legislative Acts of the Russian Federation. 2012. No. 53. Part 1. Art. 7598; 2019. No 10. Art. 887.

[42] "On Refugees": Federal Law of the Russian Federation No. 4528-1 of February 19, 1993: as amended by Federal Law of the Russian Federation No. 528-FZ of December 27, 2018 // Russian Newspaper [Rossiyskaya Gazeta], 1997. June 3. No. 126; 2018. December 29 No. 295.

[43] 1) On Refugees; 2) The Procedure for Providing Temporary Asylum in the Russian Federation: approved by Decree No. 274 of the Government of the Russian Federations dated April 9, 2001: as amended by Decree No. 631 of the Government of the Russian Federation dated May 25, 2017 // Collection of Legislative Acts of the Russian Federation. 2001. No 16. Art. 1603; 2017. No. 23. Art. 3330.

[44] "On Education in the Russian Federation"

[45] The Procedure for Admitting Citizens to Study Based on the Programs of Primary General, Basic General and Secondary General Education, approved by Order No. 32 of the Ministry of Education and Science of Russia dated January 22, 2014: as amended by Order No. 19 of the Ministry of Education of the Russian Federation dated January 17, 2019 // Russian Newspaper [Rossiyskaya Gazeta]. 2014. April 11, No. 83; The official Internet portal of legal information http://www.pravo.gov.ru, February 5, 2019.

the Russian Federation are enrolled to Russian educational institutions.[46] However, according to article 5 of the Federal Law No. 115-FZ of July 25, 2002 "On the Legal Status of Foreign Citizens in the Russian Federation", the period of temporary stay of migrant children who arrived in the Russian Federation on a visa-free basis may not exceed the total of 90 days during each period of one hundred and eighty days.[47] At the same time, the Federal Law "On Education in the Russian Federation" does not include the end of the period of legal stay of a migrant child in the Russian Federation into the grounds for early expulsion of a student from an educational institution.[48]

To comply with the migration regime, foreign children are often have to travel to their homeland in the middle of the school year. A three-month break in the process of education can adversely affect the quality of their learning of the educational program.

In the interests of foreign children, the Directorate for Migration Affairs of the Main Administration of the Ministry of Internal Affairs of the Russian Federation for St. Petersburg and Leningrad Region is considering extending the stay of children of migrants who arrived in the Russian Federation without a visa for the purpose of employment, as well as those who received temporary residence permit, residence permit, or who have already acquired the citizenship of the Russian Federation, when applying to the territorial departments of the authority before the legal period of the child's stay in Russia expires. In each case, the legal grounds for the stay of the child and his parents in the Russian Federation, as well as the circumstances of the family's life order in our country, are assessed.[49] The position on the possibility to extend the stay of foreign children was developed by the Office of the Federal Migration Service of Russia for St. Petersburg and the Leningrad Region in cooperation with the St. Petersburg Prosecutor's Office and continues to be implemented after the transfer of authority to provide public services in the field of migration to the Ministry of Internal Affairs of Russia.

Unfortunately, practice shows that foreign citizens inappropriately care about the exercise of their children's rights while in Russia. For example, they refuse to pay for medical services provided to their children, which is subsequently reported by the healthcare institutions to the Office of the Children's Rights Ombudsman in St. Petersburg, whose experts inspect such situations. Moreover, adult foreigners, having legalized their stay in the Russian Federation for a long period, do not timely care about the legalization of a child's stay in our country,[50] which actually takes the child out of the legal environment thus posing a threat to his/her well-being.

The position of the Children's Rights Ombudsman in St. Petersburg seems to be fair. According to the position, the adult migrants' ignorance of the Russian legislation regarding the most important issues of the life order of their children in the Russian Federation should be eliminated through awareness-building among newly arrived foreigners in Russia carried out by the relevant agencies (in St. Petersburg this is Multicultural Relations and Migration Policy Implementation Committee).[51] Such an approach will allow external migrants to timely assess the possibility and risks of a child moving to Russia and make an informed and grounded decision on family migration to the Russian Federation with children.

Article 40 of the Constitution of the Russian Federation secures everyone's right to housing.[52]

Moreover, according to part 3 of the above-mentioned article "Low-income people and other persons mentioned in law and in need of a home shall receive it gratis or for reasonable payment from the state, municipal and other housing stocks according to the norms fixed by law".[53] The limitation of the circle of persons entitled to obtain housing from public funds by citizens of the Russian Federation is worked out in the Housing Code of the Russian Federation. For instance, residential premises are not provided to foreign citizens and/or stateless persons under contracts of social rent (part 5 of article 49 of the Housing Code of the Russian Federation). Moreover, residential premises are not provided to foreign citizens and/or stateless persons under lease agreements for residential premises of the housing fund

[46] See ibid.

[47] Federal Law No. 115-FZ of July 25, 2002 "On the Legal Status of Foreign Citizens in the Russian Federation".

[48] "On Education in the Russian Federation"

[49] Section 2.3 "Foreign Citizens' Children" of the Annual Report of the Children's Rights Ombudsman in St. Petersburg for 2018 [Razd. 2.3 «Deti inostrannykh grazhdan» Ezhegodnogo Doklada Upolnomochennogo po pravam rebenka v Sankt-Peterburge za 2018 god] // Official website of the Children's Rights Ombudsman in St. Petersburg [Ofitsial'nyi sait Upolnomochennogo po pravam rebenka v Sankt-Peterburge]. Available at: http://www.spbdeti.org/files/doklad2018/2_3.pdf (accessed 29.03.2019).

[50] Children of Migrants Suffer from Parents' Irresponsibility [Deti migrantov stradayut iz-za bezotvetstvennosti roditelei] // Official website of the Children's Rights Ombudsman in St. Petersburg [Ofitsial'nyi sait Upolnomochennogo po pravam rebenka v Sankt-Peterburge]. Available at: http://www.spbdeti.org/id7125 (accessed 29.03.2019).

[51] See ibid.

[52] Constitution of the Russian Federation.

[53] See ibid.

for social use (part 3 of article 91.3 of the Housing Code of the Russian Federation). Exceptions to these rules may be provided for by an international treaty of the Russian Federation.[54]

Article 35 of the Constitution of the Russian Federation guarantees the right to private property.[55] Current Russian legislation does not restrict foreign citizens' right to enter into civil law contracts for residential premises (in particular, contracts for their purchase and sale and/or lease from private individuals). Thus, external migrants can resolve the housing issue in respect of themselves and their minor children, which they are obliged to take care of, by entering into relevant transactions. For foreign citizens who have a residence in Russia, that is, those who have a temporary residence permit or residence permit, as well as refugees, this provision is strengthened by art. 1195 of the Civil Code of the Russian Federation according to which their personal law is Russian law.[56] In accordance with clause 2 of article 20 of the Civil Code of the Russian Federation, the place of residence of children, who have not reached 14 years of age, shall be recognized as the place of residence of their legal representatives.[57] As regards minors temporarily staying in the Russian Federation together with their parents of a similar legal status, from the formal legal point of view, we believe it is correct to note that they should live with the parents because of the family relationship imposing duties on the latter to care for the children.

Moreover, pursuant to article 8 of the Federal Law "On Refugees", refugees have the right to use residential premises from the housing fund for temporary settlement[58] included into residential premises of the specialized housing fund (clause 6, part 1 of article 92 of the Housing Code of the Russian Federation).[59]

Pursuant to article 39 of the Constitution of the Russian Federation "everyone shall be guaranteed social security at the expense of the State in old age, in case of an illness, disableness, loss of the bread-winner, for upbringing of children and in other cases established by law. State pensions and social allowances shall be established by law".[60]

The previously prepared thesis on prosecutor's supervision of the implementation of legislation in the field of migration notes that "a child of a migrant worker has equal rights with the citizens of the state of employment <...> to receive social benefits. Taking the objects into account, they can be classified as social payments (pensions, benefits, compensation, etc.)".[61] At the same time, according to the current pension legislation (part 1 of article 3 of the Federal Law No. 166-FZ of December 15, 2001 "On the State Provision of Pensions in the Russian Federation",[62] part 3 of article 4 of the Federal Law No. 400-FZ of December 28, 2013 "On Insurance Pensions"[63]), as a general rule, the right to receive pensions is granted to foreign citizens and stateless persons permanently residing in the Russian Federation, that is, those who have obtained a residence permit (article 2 of the Federal Law No. 115-FZ of July 25, 2002 "On Legal Status of Foreign Citizens in the Russian Federation"[64]). Refugees are also entitled to pensions[65]. Thus, taking into account the current legislation, it does not seem possible to

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[54] Housing Code of the Russian Federation dated December 29, 2004, No. 188-FZ: as amended by the Federal Law of the Russian Federation No. 60-FZ of April 15, 2019 // Russian Newspaper [Rossiyskaya Gazeta], 2005. January 12, No. 1; 2019. April 17, No. 84.

[55] Constitution of the Russian Federation.

[56] Civil Code of the Russian Federation. Part III dated November 26, 2011, No. 146-FZ: as amended by the Federal Law of the Russian Federation No. 292-FZ of August 3, 2018 // Collection of Legislative Acts of the Russian Federation. 2001. No. 49. Art. 4552; 2018. No. 32. Part I. Art. 5085.

[57] Civil Code of the Russian Federation. Part I dated November 30, 1994, No. 51-FZ: as amended by the Federal Law of the Russian Federation No. 339-FZ of August 3, 2018 // Collection of Legislative Acts of the Russian Federation. 1994. No. 32. Art. 3301; 2018. No. 32. Part II. Art. 5132.

[58] "On Refugees"

[59] Housing Code of the Russian Federation.

[60] Constitution of the Russian Federation.

[61] Dobysh M. A. Prosecutor's supervision over the execution of laws in the sphere of migration relations [Prokurorskii nadzor za ispolneniem zakonov v sfere migratsionnykh otnoshenii]: Dissertation of PhD in Juridical sciences: 12.00.11. M., 2012. P. 58. (In rus.)

[62] "On the State Provision of Pensions in the Russian Federation": Federal Law of the Russian Federation No. 166-FZ of December 15, 2001: as amended by the Federal Law of the Russian Federation No. 536-FZ of December 27, 2018 // Collection of Legislative Acts of the Russian Federation. 2001. No. 51. Art. 4831; 2018. No. 53. Part 1. Art. 8462.

[63] "On Insurance Pensions": Federal Law of the Russian Federation No. 400-FZ of December 28, 2013: as amended by the Federal Law of the Russian Federation No. 25-FZ of March 6, 2019 // Collection of Legislative Acts of the Russian Federation. 2013. No. 52. Part 1. Art. 6965, 2014. No. 2. Part 2 (amendment); 2019. No. 10 Art. 895.

[64] "On the legal status of foreign citizen in the Russian Federation".

[65] "On Refugees".

acknowledge the statement that a child of an external migrant temporarily residing in the Russian Federation, like his/her parent, is entitled to obtain pensions.

Adolescents who have reached the age of 14 are entitled to apply for a pension on their own.[66] Moreover, as mentioned above, the personal law of these categories of foreigners is Russian law, which also applies when determining their civil capacity (clause 1 of article 1197 of the Civil Code of the Russian Federation).[67] Therefore, they are entitled to dispose of their pension independently subject to article 26 of the Civil Code of the Russian Federation.[68] Adults independently get and spend their pensions in their interests.

As for underage children, their legal representatives qualify for pensions. Funds are credited to a separate nominal account opened by the legal representative and are spent in the interests of the child (clause 1 of article 28 of the Civil Code of the Russian Federation, clause 1 of article 37 of the Civil Code of the Russian Federation).[69]

In addition to pensions, Russian law provides for a wide range of social support measures. Let us dwell on the conditions for the provision of the benefits stipulated by the Federal Law No. 81-FZ of May 19, 1995 "On State Benefits to Citizens with Children" to foreign citizens, depending on their legal status. According to article 1 of the aforementioned Federal Law, benefits are provided to foreign citizens and refugees permanently residing in the Russian Federation, as well as those temporarily residing in the Russian Federation and foreign citizens subject to compulsory social insurance for temporary disability and in connection with the motherhood.[70] Thus, the possibility of providing such benefits to temporarily staying foreign citizens, including those who arrived to work, is not observed.

Let us dwell on social support measures provided for by the law of St. Petersburg, where a contradiction was revealed in the legal regulation thereof.

Pursuant to clause 1 of article 17 of the Law of St. Petersburg No. 728-132 of November 22, 2011 "Social Code of St. Petersburg", a number of child allowances are provided to refugees and foreign citizens residing in St. Petersburg.[71] In turn, the Decree of the Government of St. Petersburg regulating the provision of such allowances provides for their payment only to people possessing a residence permit.[72]

Thus, St. Petersburg regulations contain a contradiction in terms of determining the circle of foreigners living in St. Petersburg to be provided with child allowances. We believe that it should be eliminated. Moreover, in terms of its meaningful content, we believe it possible to mention the thought of V. S. Soloviev, whose work was highly appreciated by Yu. Ya. Baskin: positive law is "a compulsory requirement to implement the certain minimum good".[73] Given that the regulatory framework is formed by a public territorial entity subject to its social, economic and political conditions, as well as that persons who have

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[66] Rules for applying for an insurance pension, a fixed payment to an insurance pension subject to the increase of a fixed payment to an insurance pension, a funded pension, including those provided by employers, and a pension as part of state pension provision, their purpose, establishment, recalculation, and adjustment, including to persons without permanent residence in the Russian Federation; as well as rules for the verification of the documents required for the pensions establishment and/or transferring from one type of pension to another in accordance with the Federal Laws "On Insurance Pensions" and "On funded Pension" and "On the State Provision of Pensions in the Russian Federation": approved by order No. 884n of the Ministry of Labour of the Russian Federation dated November 17, 2014: as amended by Order No. 43n of the Ministry of Labour of the Russian Federation dated January 28, 2019 // Russian Newspaper [Rossiyskaya Gazeta], 2015. January 16. No. 6; The official Internet portal of legal information http://www.pravo.gov.ru, February 21, 2019.

[67] Civil Code of the Russian Federation. Part 3.

[68] Civil Code of the Russian Federation. Part 1.

[69] See ibid.

[70] "On State Benefits to Citizens with Children: Federal Law of the Russian Federation No. 81-FZ of May 19, 1995; as amended by the Federal Law of the Russian Federation No. 264-FZ of July 29, 2018 // Collection of Legislative Acts of the Russian Federation. 1995. No. 21. Art. 1929; 2018. No. 31. Art. 4853.

[71] St. Petersburg Social Code: Law of St. Petersburg dated November 22, 2011, No. 728-132: as amended by the Law of St. Petersburg dated April 11, 2019, No. 175-38 // Newsletter of the Administration of St. Petersburg [Informatsionnyi byulleten' Administratsii Sankt- Peterburga]. 2011. No. 46; The official website of the Administration of St. Petersburg https://www.gov.spb.ru/, April 16, 2019.

[72] On the implementation of Chapter 5 "Social Support for Families with Children" of the Law of St. Petersburg "St. Petersburg Social Code": Decree of the Government of St. Petersburg dated May 22, 2013, No. 343: as amended by the Decree of the Government of St. Petersburg dated December 17, 2018, No. 946 // Official website of the Administration of St. Petersburg https://www.gov.spb.ru/, May 27, 2013; December 20, 2018.

[73] Soloviev V. S. Works: in 2 volumes. [comp., Total. Ed. and entry. Art. A. F. Losev and A. V. Hulygi; note S. L. Kravets [and others] [Sochineniya: v 2 t. /sost., obshch. red. i vstup. st. A. F. Loseva i A. V. Gulygi; primech. S. L. Kravtsa [i dr.]]; Academy of Sciences of the USSR, Institute of Philosophy [AN SSSR, Institut filosofii]. M. : Mysl' Publ., Vol. 1. 1988. P. 450. (Philos. Heritage. T. 104). (In rus.)

received TRP should take measures to improve their family's life in order to avoid the TRP cancellation (clause 1 of article 7 of the Federal Law No. 115-FZ of July 25, 2002 "On the Legal Status of Foreign Citizens in the Russian Federation"),[74] we believe that this conflict can be resolved both by providing statutory benefits to foreign migrants who have received TRPs as stipulated by the legislation of St. Petersburg, and by creation of consistent regulation, securing their payment only to persons with a residence permit.

Legal representatives of children shall apply to the Administrations of the districts of St. Petersburg to arrange the benefits. A number of benefits paid to children under 7 are transferred to plastic cards issued to parents and can be spent to pay for children goods at qualified trade entities.[75] This secures the interests of preschoolers as final "beneficiaries" of the benefits.

The study proves that external migrants who have created strong legal ties with the Russian Federation, i. e. permanent residents, as well as refugees, possess the largest range of opportunities. The latter need special support due to extremely intensive changes in their legal status, which happen against their will, and need to quickly adapt to the conditions of the host community.[76]

Summing up, we would like to note that family migration is assessed as allowing both to increase the benefits of a change of place of residence and to minimize the risks of failures associated with migration.[77] Successful adaptation of external migrants to the conditions of the host Russian community is possible with their timely familiarization with the legislation of the Russian Federation. Important adaptation factors include the creation by the state apparatus of conditions for the foreigners' exercising of their basic rights, namely, the observance of the statutory instruments requirements, which may be the basis of external migrants' subjective rights, by the agencies involved in ensuring the rights of full-age foreigners and their children in the field in question (providing relevant public services) and the proper exercise by the prosecution authorities of supervisory powers in respect of them, taking into account special way of foreign citizens' exercising the rights arising from their legal status.

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[74] "On the Legal Status of Foreign Citizen in the Russian Federation".

[75] 1) St. Petersburg Social Code; 2) On the implementation of Chapter 5 "Social Support for Families with Children" of the Law of St. Petersburg "St. Petersburg Social Code".

[76] Public prosecutor's supervision over the implementation of migration legislation: current issues: handbook [Prokurorskii nadzor za ispolneniem migratsionnogo zakonodatel'stva: aktual'nye voprosy: posobie] / A. V. Palamarchuk [and others]; Prosecutor General's office of the Russian Federation, Academy of the Prosecutor General's office of the Russian Federation [Gen. prokuratura Ros. Federatsii, Akademiya Gen. prokuratury Ros. Federatsii]. M., 2014. P. 71. (In rus.)

[77] *Balashova T. N.* Op. cit. P. 37.

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Subjective Collective Will In the Management of Shared Agricultural Land and Its Consequences

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ABSTRACT

A new stage in the development of relations in the management of agricultural land plots has replaced the initial privatization of agricultural land. Its difference is the change in the composition of the participants in the share ownership and the presence of economically strong economic counterparties-tenants of land. The composition of new owners is socially heterogeneous and, as a result, it does not have a legal instrument allowing to form the collective will of the general meeting according to the goals of property management, since the heterogeneity of the composition prevents the emergence of the possibility of unity of management goals. The expression of subjective collective will must have a legal instrument to prevent the possibility of its usurpation by an economically strong subject. It seems that such an instrument should be the differentiation of the types of disputes related to the formation of collective will on the management of common ownership and the procedural peculiarities of their resolution.

Keywords: subjective rights at collective will; agricultural land; common ownership; general meeting; civil law community.

Target setting

Since 2002, Federal Law No. 101-FZ of July 24, 2002 "On Agricultural Land Turnover" (hereinafter – the "Law") has been in force following the institutional reform of land relations in the Russian Federation. It is to be recalled that the reform consisted in changing the form of ownership and the distribution of agricultural land between collective farm participants and state owned farm workers pro rata their working experience in the collective farm and state owned farm, respectively. Subsequently, social officers in rural areas, i. e. those of healthcare, education, culture fields, etc. were equated with persons entitled to receive a farmland allotment. Following the privatization of 1991–1993, a class of land share owners has been formed, which together had the title in agricultural land. At the same time, the right of ordinary property privatization for the same persons, as well as for other participants in the voucher privatization, was supposed to be transformed into common ownership of the means of production: real estate, agricultural machinery, etc. Further public relations development dynamics led to the preservation of shared ownership of land, but to the actual loss of the share ownership of the property of privatized collective farms and state owned farms. The course of time itself has led to a generational change and today the shared ownership of land plots belongs to other persons, not the participants in their initial privatization: as a rule, heirs in the manner established for inheritance in civil law. The new farmland allotments owners are not carriers of consciousness fixing the value of the collective form of agricultural production as collective (cooperative) agricultural production is not the dominant form thereof. The lack of dominant value in the mass consciousness — the advantages of the collective form of economic management in agricultural production results in the differentiation of the social group of land share owners that is taking place right now. In our opinion, such a differentiation is a new social relation, the regulation of which is the legislative problem of the modern development of agricultural land circulation regulation.

In the legal sense, the aforementioned Law as amended establishes the identity of the concepts of a farmland allotment and a share in the right to common ownership in a land plot. Such an identity allows us to apply not only special rules for the management of commonly owned land plots (if there are more than five owners), but also apply the rules of the civil legislation of the Russian Federation to the extent not governed by this Law.

The foregoing allows us to conclude that, firstly, modern land share owners are not identical to the owners of other real estate or shares in the title in other real estate. The land is in shared ownership, the cultivation tools are owned by the agricultural product producer, and these are different groups of owners. At the same time, property, both the land itself and the cultivation tools, have been obtained by the indicated groups not as a result of performance but on other civil law grounds and constitute property rather than labour value for the groups. Secondly, the owners of land shares do not constitute a socially homogeneous group like they did in the early 1990s. These are not persons who jointly created collective property but persons whose wealth, social and educational inequality is obvious, including

for themselves. Thirdly, the lack of basic values equality inevitably affects the essence of decisions made when managing shared ownership, which, in turn, necessitates the present analysis and proposals regarding changes to the management mechanism, i. e. the general meeting of the land-plot co-owners.

Autonomy of individual will of a party to relations and community of collective will

The chief principle of the civil legislation of the Russian Federation defined by article 1 of the Civil Code of the Russian Federation is that the citizens (natural persons) and the legal entities shall acquire and exercise their civil rights of their own free will and in their own interest. They shall be free to establish their rights and duties on the basis of an agreement and to define any terms of the agreement, which are not in contradiction with legislation.

Pursuant to article 2 of the Civil Code of the Russian Federation, civil law relations are based on the equality, the autonomous will and the property independence of their participants. The basis of relations on the equality of individuals and legal entities corresponds to the constitutional provision on the equality of all before the law and the court stipulated in part 1 of article 19 of the Constitution of Russia. The very idea of autonomy of will when determining agreement is taken *a priore*.[1]

However, the constitutional principle of equality itself does not exclude the possibility of establishing different legal conditions for different categories of persons subject to law. It is important that such differences should be enshrined in law and based on the objective characteristics of the respective categories of persons subject to law.

The subjects of relations associated with the turnover of agricultural land are listed in clause 1 of article 2 of the Law, according to which the participants in relations regulated by the specified Federal Law are citizens, legal entities, the Russian Federation, constituents of the Russian Federation, and municipalities.

Foreign citizens, foreign legal entities and/or stateless persons, as well as legal entities in whose authorized (share) capital of which the share of foreign citizens, foreign legal entities and/or stateless persons is more than 50% are actually a separate group of entities with curtailed rights in terms of a guarantee equality of rights with respect to the ordinary subjective circle. Such persons are not entitled to own agricultural land plots. In fact, they cannot also own shares in the title in the indicated land plots, following the law enforcement practice of this Law implementation.[2]

The Russian Federation, as a party to relations, unlike other public entities, actually follows the principle of English law that anyone who owns the land owns everything up to heaven and down to the center of the earth,[3] allocating subsoil and air into separate subjects of regulation.

Other ordinary entities: individuals and legal entities, are limited by the Law in terms of the owner's rights regarding the scope of rights in relation to other real estate. Such a restriction applies not only to the impossibility to change the type of permitted use of agricultural land plots as part of agricultural land, but also to the establishment of a limit in the scope of land that can be owned by one person.[4] At the same time, the public-law entity has a number of advantages in comparison to a private entity: e. g., the pre-emptive right to acquire a land plot,[5] the right to seize a land plot for public needs,[6] etc. That is, the subject composition of the relations in question is vested with certain properties that distinguish it from the ordinary legal identity of the civil circulation participants. Therefore, setting of the problem of the presence of immanent properties when forming the will of the subjects in such relations is not only of an economic nature of the rationale but also has regulatory and legal prerequisites for the allocation of such properties in a separate subject of study.

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[1] Nygh P. Autonomy in International Contracts. Oxford, 1999. PP. 13–14.

[2] Mayboroda V. A. Inheritance of a land share by a foreign citizen [Nasledovanie zemel'noi doli inostrannym grazhdaninom] // Inheritance law [Nasledstvennoe pravo]. 2018. No. 3. PP. 19–22. (In rus)

[3] Gray K. J., Gray S. F. Elements of Land Law. 4th ed. OUP, 2005. P. 18.

[4] Answer to question 5 in the Judicial Review of the Supreme Court of the Russian Federation for the fourth quarter of 2013, approved by the Presidium of the Supreme Court of the Russian Federation on June 4, 2014.

[5] See: Lipsky S. A. The legal mechanism of state regulation of market turnover of agricultural land in modern Russia: features of formation, trends and prospects [Pravovoi mekhanizm gosudarstvennogo regulirovaniya rynochnogo oborota zemel' sel'skokhozyaistvennogo naznacheniya v sovremennoi Rossii: osobennosti formirovaniya, tendentsii i perspektivy] // Law and Economics. [Pravo i ehkonomika] 2011. No. 12. PP. 18–24. (In rus.)

[6] See: Mayboroda V. A. Withdrawal of land plots for public needs [Iz"yatie zemel'nykh uchastkov dlya publichnykh nuzhd] // Legal Issues of Real Estate [Pravovye voprosy nedvizhimosti]. 2015. No. 1. PP. 28–32. (In rus)

The Law establishes a special rule that a land plot owned by 5 or more participants shall be possessed, used and disposed of in accordance with the decision of the joined interest owners taken at the general meeting of such joined interest owners. Clause 1 of article 246 and clause 1 of article 247 of the Civil Code of the Russian Federation should be considered to be general rules in respect of this special rule. According to the aforesaid provisions of the Civil Code of the Russian Federation, the property in common ownership shall be disposed, possessed and used by agreement of all the participants. In case of failure to reach the consent of the owners, the title in and use of property in shared ownership shall be in the manner established by the court.

The special rule of the Law combines all the powers of the owner of a share in a common ownership right into a single implementation procedure: through resolutions of the general meeting of participants in shared property.

In terms of the purpose of this study, it should be noted that the Law provides for two mechanisms for exercising the powers of possession, use and disposal of a common land plot:

1) the powers within the competence of the general meeting are exercised in compliance with the procedure for holding the general meeting and in the presence of a quorum sufficient for holding thereof;

2) other powers regarding the possession, use and disposal of the land plot are authorized by an agreement on the procedure for use, possession and disposal of the land plot. When concluding such an agreement, the positive will of each of the participants in the shared property must be expressed, in contrast to the expression of will on the matters within the competence of the general meeting of participants in the shared property.

A person who does not agree with the contract terms may separate regardless of the consent of the land holder. That is, the collective will in this rule is combined with individual interest (will) by means of an exception to the general rule for a land holder, who/which, by its/his consent (disagreement) to the allotment, preserves certainty conditions regarding the object being rented, i. e. the land plot. The dichotomy of collective / individual will (interest) in the lessor's transaction is permitted by the legislator at the tenant's expense.

Thus, the regulation in question indicates two forms of will expression: individual (interest) and collective expression of will. If, with respect to individual interest, its freedom to conclude an agreement is fixed by the above regulation of the fundamental principles of civil law, then regarding the collective will, we will not find the rules for its formation and expression of the direct rule on its autonomy and freedom to conclude an agreement either in general principles or special regulation.

The argument about the will autonomy is similar. The individual owner of the land share is fully endowed with it, and in the case of collective will expression, personal autonomy of will is supplanted by collective expression of the will of the majority of the general meeting participants, which should be followed by a minority with the only exception based on the implementation of the freedom of contract principle, i. e. disagreement with the lease agreement terms.

The formation of collective will when managing the shared ownership, i. e. agricultural land, is carried out by restricting the individual autonomy of each of the participants in shared ownership in the land plot. Such a structure is doctrinally developed in corporate law, but not in relation to civil law communities, which include participants in land common ownership. Such a substitution of autonomy of will by collective will is motivated in corporate law by economic feasibility in company management.[7] However, participants in the corporation voluntarily sacrifice autonomy of their will, losing their property autonomy in terms of their contribution to the authorized (share) capital. The participants of the shared ownership in the land plot are deprived of the attribute of autonomy by the law regulating relations on the circulation of agricultural land in case the minority follows the will of the majority.

In this connection, it is especially worth highlighting the fact that participants in shared ownership in the land plot, in contrast to the corporate community, are not based on the universal value of making profit using their property. As noted above, now it is a heterogeneous group of people without a single value platform for unifying wilful association at a general meeting. In case of the unity of values, it would be fair for the minority to follow the will of the majority, as is true in a corporate association. In the case under consideration, participants in shared ownership may have different goals: some are attracted by the value of the lease, others, on the contrary, consider the amount of the rent, the stability of its payment and other circumstances to be a disadvantage, since they aim at buying up land shares with the subsequent allotment thereof in a separate land plot. The less stable the lease, the lower is the price of the land share. Still others believe that the land plot in shared ownership is disproportionately uniting

[7] Roth G. H., Kindler P. The Spirit of Corporate Law. Core Principles of Corporate Law in Continental Europe. Munchen, 2013. PP. 113–115.

arable land, hayfields, pastures, deposits, and other lands, and aim to isolate the most valuable part of the common property ahead of the others.

Thus, in relations of shared ownership, the impairment of the autonomy of the will of the minority in favour of the will of the majority does not possess the unity of unifying values and cannot be fair in relation to the association as a whole.

The procedure for the collective will formation

The law provides for two forms of collective will formation: a general meeting of participants in shared ownership of a land plot and an objection to a land demarcation project proposed by one of the participants (group of participants). At the same time, the issue of renting a land plot in common ownership cannot be resolved otherwise than by the general meeting of participants in shared ownership.

The general meeting of participants in shared ownership cannot be attributed to corporate relations for an obvious reason: the absence of a corporation.[8]

In this regard, general meetings should be considered as an organizational element of the legal standing of one of the parties to the transaction in the lease agreement, i. e. the lessor. General meetings have organizational unity, but not unity of purpose.[9]

Pursuant to subclause 1.1, clause 1 of article 8 of the Civil Code of the Russian Federation, civil rights and obligations arise, inter alia, from decisions of the meetings in cases provided for by law. Moreover, by virtue of clause 2 of article 181.1 of the Civil Code of the Russian Federation, the resolution of the meeting, which the law relates civil law consequences with, gives rise to the legal consequences, which the resolution of the meeting is aimed at, for all persons who were entitled to participate in such a meeting (shareholders of a legal entity, owners, creditors in bankruptcy, and other- participants of the civil law community), as well as for other persons, if this is established by law or arises out of the essence of the relationship. Thus, the civil law establishes that one of the prerequisites for recognizing a resolution of a meeting to be the basis for the occurrence, change or termination of civil rights and obligations is the indication in the law of civil law consequences binding on all persons authorized to participate in such a meeting.

Clause 5 of article 14 of the Law stipulates that a participant in shared ownership who expressed his disagreement with the lease of a land plot in shared ownership or with the terms of a lease agreement for such a land plot at the general meeting of participants in shared ownership, in the event of lease of such a land plot, is entitled to allocate the land plot on account of his farmland allotment or allotments without a general meeting. In such a case, the consent of the tenant of the land plot or the pledge holder of the right to lease the land plot to allocate the land plot on account of a farmland allotment or allotments is not required and the lease agreement or agreement for pledge of lease rights in respect of the allocated land plot shall be terminated.

The foregoing allows us to conclude that the general meeting of participants in shared ownership of a land plot duffers in its nature from corporate meetings and other meetings of civil law communities, since not only it itself serves as the basis for the emergence of civil rights and obligations with regard to the issue of land plot lease and pledge of lease rights, but its course as well, that is, the procedure thereof is the basis for the emergence and / or termination of civil rights and obligations.

Therefore, the way of voting, i. e. the way of collective will formation, is more important for the meeting in question than for any other meeting.

Pursuant to clause 8 of article 14.1 of the Law, general meeting makes decisions by open ballot. Moreover, the Law indicates that the resolution is considered adopted if it was voted upon by the general meeting participants holding in aggregate more than 50% of the total number of shares of owners present at the general meeting (provided that the method of indicating the size of the land share allows the comparison of shares in the shared ownership right to this land plot), or the majority of the general meeting participants.

Open voting is the antithesis of ballot voting, which involves the use of means to hide individual expression of will, that is, ballots, voting booths, etc. Open voting means that there is a consolidation of voters at the physical level. Persons authorized to participate in the general meeting express their will

[8] See: Laptev V. A. Resolutions of Meetings and Transactions: Legal Regime and Differences [Resheniya sobranii i sdelki: pravovoi rezhim i otlichiya] // Lawyer. [Yurist]. 2016. No. 2. PP. 30–37. (In rus)

[9] See: Filipenko N. V. Legal personality of social communities illustrated by the practice of the constitutional court of the Russian Federation [O pravosub"ektnosti ob"edinenii grazhdan na primere praktiki Konstitutsionnogo Suda RF] // Law [Zakon]. 2017. No. 4. PP. 141–150. (In rus)

together by the general movement: by show of hands; by raising a registration document, etc. That is, general meeting participants in the general meeting are consubstantiated at the time of open voting, either approving or rejecting the corresponding agenda item.[10] In fact, it is the general meeting that is the only possible means to reach a consensus regarding the advantages and disadvantages of the land plot, including regarding the allotted land plot comparison with the land plot remaining in shared ownership. Such factors as land quality, availability (absence) of infrastructure, remoteness and quality of fertilizer use, availability and quality of windbreaks, the size of the arable "square" in relation to available agricultural machinery, etc. are taken into account.

All these circumstances should be grouped into simple "for" or "against", which inevitably leads to the formation of a short-term social community based on the unity of interest.[11]

Summarizing the above, we can conclude that the legal nature of the general meeting resolving the issue of land lease is dualistic in nature, combining the formation of collective will and the possibility of individual will opposing. The decision of the meeting on such an issue is both the basis for the emergence of rights and obligations under a lease transaction between lessors and a tenant and the basis for the emergence of a property right for a future land plot to be supposedly formed out of the farmland allotment (allotments) of the person who voted "against" the conclusion of the lease agreement or terms thereof.

With regard to resolving issues on the land plot allocation, the general meeting is solely the basis for the occurrence oe of rights and obligations.

The second form of the collective will formation is provided for in clause 14 of article 13.1 of the Law and constitutes the filing of objections as to the size and location of the boundaries of the land plot allocated on the account of the land share or land shares. In such a case, the objections are individual in the formal sense. However, in the actual situation, such objections are directed against the impairment of the shared property due to the separation of shares therefrom, that is, they are obviously an expression of a collective will, even if they are presented individually. The challenger supports common property, advocating the prevailing rule of law for its management. Participants in shared ownership are united not by the physical unity of voting but by the common value. And this unity is permanent, not short-term one.

The foregoing allows us to conclude that, regardless of the collective will formation, it is dominant in relation to the transaction by the owners of farmland allotments with their land plot and, in this sense, is the basis for the emergence of rights and duties, that is, obligations. Collective will in this case is a feature of binding relations. In the case of the farmland allotment (allotments) owner's voting against the terms of the lease agreement, such a decision made by him at the general meeting is the basis for the emergence of rights to the future thing, i.e. the land plot to be formed. Such an individual will is the basis for the emergence of a property relationship.

From the standpoint of civil regulation, such a division fully corresponds to the economic essence of the above decisions. The former can be characterized as decisions of economically dependent entities that rely on the use of their property by a third party for rent; the latter, as a rule, are decisions of economically strong entities that rely on their ability to produce agricultural products on the allocated land. Such positions are diverse in nature: the first case is about preserving the traditional socialist way of life; in the second, we observe the land share owner's recognizing the right to appropriate what he can control, taking advantage of it.[12]

Conclusions

The foregoing allows us to state with certainty that decisions of general meetings of participants in shared property should be differentiated by the range of issues included in the agenda.

Firstly, economic issues based on the need for separation can be considered according to the existing procedure but with the establishment of arbitration jurisdiction of such cases, since it is obvious that it is not the subjective composition of the legal relationship participants is the determining factor but

[10] Yampolskaya Ts. A. On the concept of public organizations in the USSR [O ponyatii obshchestvennykh organizatsii v SSSR] // Questions of the theory and history of public organizations [Voprosy teorii i istorii obshchestvennykh organizatsii]. M., 1971. P. 14. (In rus)

[11] See: Mayboroda V. A. On the possibility of notarizing the decisions of part owners of agricultural land plots [O vozmozhnosti notarial'nogo udostovereniya reshenii dolevykh sobstvennikov zemel'nykh uchastkov sel'skokhozyaistvennogo naznacheniya] // Judge. [Sud'ya]. 2015. No. 12. PP. 29–32. (In rus)

[12] Pound R. An Introduction to the Philosophy of Law. 1922. Reprinted by The Lawbook Exchange Ltd. 2008. P. 192.

the essence of the dispute, that is dispute on the land plot allocation out of the shared ownership. Separation entails economic effects for the remaining and separated land plots.[13]

The current differentiation of jurisdiction for this category of cases relates them entirely to the jurisdiction of courts of general jurisdiction.

Secondly, issues related to the lease of a common land plot represent a decision-making format for managing common property and can be considered through a local government by delegating to it the authority to provide a common land plot on the same conditions and in the same manner as the leasing of public property land, that is, at an auction.[14]

Such an approach will make it possible to introduce legal certainty into the status of an local authority official participating in the general meeting, bringing to a logical conclusion his exercise of public law powers in such relations.

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[14] See: Mayboroda V. A. The provision of public property land on the basis of the auction [Predostavleniye zemel' publichnoy sobstvennosti na osnove auktsiona] // Lawyer. [Yurist.] 2015. No. 19. PP. 40–46. (In rus)

Subjective Rights, Freedoms and Legitimate Interests of Convicted Persons to Imprisonment

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ABSTRACT

The article deals with the theoretical and law enforcement aspects of the subjective rights, freedoms and legitimate interests of convicts serving sentences in prison. The problem of the rights, freedoms and legitimate interests of convicts serving deprivation of liberty remains relevant and needs serious consideration, as it is an integral part of the problem of protection of human rights and freedoms of the individual and the citizen as a whole. Protection of the rights, freedoms and legitimate interests of convicts is an important area of work of lawyers in the conditions of the rule of law.

Keywords: subjective law, rule of criminal Executive law, deprivation of liberty, convicts, restrictions of rights, legal duty.

The legal status of convicts usually means a combination of subjective rights and legal duties being the elements of their legal status structure. However, there are positions according to which the structure of the legal status of convicts includes legitimate interests, legal restrictions, legal relations, legal identity, and legal liability. We share the traditional two-element composition of the structure of the legal status of convicts including subjective rights and legal obligations.

In our opinion, legitimate interest is a variety of the rights of a convicted person and it can hardly be considered to be an independent element of legal status. A legitimate interest, being a benefit provided for by law, or a variant of behaviour, the implementation of which depends on the prisoner's behaviour, on the one hand, and on the assessment of such behaviour, on the other hand. The legitimate interest is based on the prisoner's desire to obtain the social benefit of a material and non-material nature stipulated by law or to implement a certain variant of behaviour. The legitimate interest of a prisoner can be implemented following the positive assessment of his/her personality.

As for such elements as legal relations, legal identity, legal restrictions and legal liability, they are not the elements of the structure of the legal status of convicted persons. Legal restrictions act as the main sign of the legal status of convicts.

Criminal penalty application results in the change of the citizen's legal status. Even in the case of the most severe punishment, such as imprisonment, a prisoner always has the opportunity to exercise rights, freedoms and legitimate interests that make the scope of his/her permitted behaviour.

Pursuant to the Constitution of the Russian Federation, the rights and freedoms of a citizen can be restricted only by federal laws and only to the extent necessary to protect the fundamental principles of the constitutional system, morality, health, the rights and legitimate interests of other people, to ensure defence of the country and security of the State (part 3 of article 55). Signs of legal restrictions include the occurrence of adverse conditions for the implementation of the subject's own interests, narrowing of opportunities and freedoms.[1] The restriction of rights and freedoms due to the imprisonment is of a forced nature, since it is impossible to apply the means of corrective influence and the penalty itself without it.[2]

The greatest degree of restriction of human rights and freedoms is allowed in relation to convicts sentenced to deprivation of liberty [1, p. 68].[3] Convicted to imprisonment as a special category of citi-

[1] Malko A. V. Incentives and restrictions in law [Stimuly i ogranicheniya v prave] // General Theory of State and Law. Academic course. Vol. 2. Theory of Law [Obshchaya teoriya gosudarstva i prava. Akademicheskii kurs. T. 2. Teoriya prava]. M.: Zertsalo Publ., 1998. P. 496. (In rus)

[2] Vitruk N. The Rights of Convicts: Prospects for Development [Prava osuzhdennykh: Perspektivy razvitiya] // Crime and Punishment. [Prestuplenie i nakazanie].1993. No. 4–5. P. 21. (In rus)

[3] Brilliantov A. V. The legal status of the convicted person and the direction of reforms in the system of execution of criminal punishment [Pravovoi status osuzhdennogo i napravlenie reform v sisteme ispolneniya ugolovnogo nakazaniya] // Improving the legislation and practice of institutions that execute punishment, on the basis of the Constitution of the Russian Federation. Abstracts of reports and communications (June 1994) [Sovershenstvovanie zakonodatel'stva i praktiki uchrezhdenii, ispolnyayushchikh nakazaniya, na osnove Konstitutsii Rossiiskoi Federatsii. Tezisy dokladov i soobshchenii (iyun' 1994 g.)]. M., 1995. P. 68 (In rus)

zens have a special legal status of a convict, which is differentiated depending on the type of correctional facility.

The legal foundation for the status of convicts is the general civil legal status established by the Constitution of the Russian Federation and universally recognized international rules. Criminal penalty only limits the part of the general legal status of convicts. The greatest restrictions of the legal status of convicts are those of the prisoners.

The legal status of persons sentenced to deprivation of liberty reflects the particularities of development and the situation in the state and of society. Since deprivation of liberty is a form of imprisonment, those sentenced to deprivation of liberty constitute a category of prisoners. We will further define those sentenced to imprisonment as "convicted prisoners".

Criminal punishment in the form of deprivation of freedom means the creation of the most significant legal restrictions for a person and is applied to restore social justice, reclaim convicts and prevent the commission of new crimes, both by them and other persons. This demonstrates the punitive nature of imprisonment.

The legal status of convicted prisoners is not common for all categories; it differs depending on various criteria and the grounds for classifying convicts and differentiating the penal and correctional process. The classification of the legal status of convicted prisoners consists in distinguishing various groups or categories according to socio-demographic, criminal law, penitentiary, pedagogical, and other criteria.

Depending on the social and demographic criterion, the legal statuses of convicted men and women, adults and minors, foreigners, stateless persons, and former employees of the internal affairs bodies should be distinguished.

In accordance with the criminal law criterion, it is necessary to distinguish legal statuses of those sentenced for crimes of varying severity:

- convicted prisoners for negligent and intentional crimes;
- convicted prisoners in case of various forms of crime repetition;
- convicted prisoners sentenced to life imprisonment.

It is appropriate to single out the main categories of convicted prisoners held in correction facilities of various kinds. Juvenile convicted prisoners are held in juvenile correctional facilities. Adult convicted female prisoners are held in penal colony settlements and general penal colonies. Adult prisoners sentenced for negligent crimes and intentional crimes of low-to-medium severity, if they had not previously been imprisoned, are held in penal colonies. Adult male prisoners sentenced for serious crimes are serving sentences in general penal colonies, provided that they have not been previously imprisoned. Adult convicted male prisoners sentence for dangerous recidivism and for especially serious crimes are held in high-security prisons. Adult male prisoners convicted of crimes of especially dangerous recidivism, convicts, for whom the death penalty is replaced by imprisonment or life imprisonment, as well as those sentenced to life imprisonment, are held in correctional colonies of special regime. Separate categories of male prisoners convicted for especially serious crimes are held in prisons.

Depending on the observance of the imprisonment regime, convicted prisoners are divided into those who mend their ways, those who strongly mend their ways, and those who did not mend their ways. A convicted prisoner belonging to one or another group or individual status determines its content and can serve as a basis for changing the conditions of detention within a correctional facility or changing its type.

The subjective rights of convicted prisoners are the possibilities for the prisoner to exercise certain behavior and use social benefits provided by law and guaranteed by the state.

The peculiarity of the exercise of the rights of convicted prisoners lies in the fact that they are granted by the officials of the penal bodies based on their legal duties. For instance, the right to personal security of convicted prisoners is associated with the obligation of the management of penitentiary facilities to ensure the safety of the convicted prisoner in the event of a threat to his/her life or health. The subjective rights of convicted prisoners presuppose legal opportunities to use certain social benefits, to demand appropriate behaviour from others, and to behave properly.

Thus, the subjective rights of convicted prisoners correspond to the legal obligations of the correction facility management.

In correctional law, the rights of convicted prisoners are expressed in the form of duplication and concretization. Duplication of the rights of convicted prisoners concerns reproduction of certain human rights rules, reflected in the Constitution and other laws, in the correctional code.

Absolute rights are the right to life, dignity, inviolability, protection of one's honour and reputation, freedom of conscience and freedom of religion. The priority of absolute rights excludes any restrictions thereof during the period of imprisonment.

Article 12 of the Correctional Code of the Russian Federation stipulates the basic rights of convicts, including:

- the right to receive information on their rights and obligations;
- the right to courteous treatment by the staff of the facility;
- the right to make statements and complaints; the right to apply in the state language;
- the right to health protection;
- the right to psychological assistance;
- the right to social security;
- the right to legal assistance;
- the right to personal security;
- the right to freedom of conscience and freedom of religion.

The right to freedom of speech is a fundamental natural human right. Convicted prisoners, like other Russian citizens and stateless persons, in accordance with the Constitution of the Russian Federation, have the right to freely express their thoughts, opinions and beliefs on various problems and issues, with the exception of agitation and propaganda inciting racial, national or religious intolerance, hatred and aggression, as well as propaganda of racial, social, national, religious or linguistic superiority.

The Federal Law dated September 26, 1997 "On Freedom of Conscience and Religious Associations" grants prisoners the right to perform religious rites and ceremonies in prisons. Article 14 of the Correctional Code of the Russian Federation provides for the right of prisoners to communicate with the priest at request of the prisoners themselves. Thus, convicted prisoners are currently guaranteed freedom of conscience and freedom of religion.

Convicted prisoners are entitled to pension support in old age, in case of disability, loss of breadwinner, and in other cases stipulated by law. The payment of funds (pensions) is ensured by the social security bodies at the location of the detention facilities. The funds are transferred to the prisoner's personal account.

A variety of the rights of convicted prisoners are legitimate interests, as he possibility of obtaining benefits in case of their good behaviour, provided for by law. The legitimate interests of convicted prisoners include the rewards provided for in the law, as well as other benefits that are not formally rewards.

Convicted prisoners are primarily limited in freedom of movement and disposition of themselves, in freedom of communication, freedom of action, in the right to rest, as well as political and personal freedoms. The essence of the legal duties of convicted prisoners is expressed in the commission of certain actions, or refraining from the actions established by law. Convicted prisoners must fulfill the obligations established by law and comply with the established standards of behaviour.

One of the problems of ensuring the safety of convicted prisoners is accommodation and living conditions. In penal colonies, convicted prisoners are housed in dormitories of 150 people each, so there is a need for them to stay in separate rooms for the night. The European Prison Rules (EPR) recommend that convicted prisoners be placed in separate cells overnight, unless it is better to accomodate them together with other prisoners (14.5 EPR). In our opinion, it is necessary for convicted prisoners to be accommodated by two in the rooms, taking into account their psychological compatibility and further switch to sole accommodation for the night.

Convicted prisoners' freedom of movement is directly restricted. They must constantly stay in a correctional facility.

Convicted prisoners who do not have a profession (specialty), knowledge and skills that they can put into practice performing certain work in a correctional facility are required to receive primary vocational education or be trained in their specialty.

Convicted prisoners are deprived of the political right to participate in elections to government bodies. We consider such a situation to be unfair and think that it should not be included in the penalty in the form of deprivation of freedom. More than 600 thousand prisoners are in detention facilities, and it will be fair and useful if they take part in the elections of state authorities.

Improving the institution of the legal status of convicted prisoners is important for political and humanistic reasons, as it is an indicator of democracy and respected human rights. In modern conditions, the extension of the rights of convicted prisoners is relevant. Restrictions on the rights of convicted prisoners should be involuntary, therefore, punishment should be minimized.

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Letter Of Credit as a Payment Instrument of the Export-Import Deal

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ABSTRACT

Letter of credit — a financial term, one of the types of payment instruments between the participants of export-import contract. Today the letter of credit is recognized by financiers in all over the world as the most universal way of payment in foreign economic activity. The letter of credit allows the businessmen to solve several problems at once. The letter of credit guarantees: minimization of possible legal risks; additional insurance against unfair contractors in a foreign trade. Russian companies that have experience of working with international partners on the basis of long-term cooperation are able to reach an agreement on payment for products upon delivery. However, start-up companies have no chance to find a foreign company that would be willing to work on such conditions. In addition, payment in advance is unprofitable and not safe for the start-up traders, making the first steps in foreign markets. In this situation the letter of credit is an universal instrument of international payments.

Keywords: letter of credit, confirming Bank, advising Bank, issuing Bank, covered and uncovered letter of credit, revocable and irrevocable letter of credit.

Introduction

In accordance with the current legislation, all enterprises, institutions and organizations, regardless of the legal form, must settle accounts among themselves in a non-cash form. The bank makes settlements on customer accounts in accordance with payment documents provided for by law.

The legal regime for making settlements is determined by Chapter 46 of the Civil Code of the Russian Federation and the “Regulations on the Rules for the Transfer of Funds” (approved by the Bank of Russia on June 19, 2012, No. 383-P; as amended on October 11, 2018; Registered with the Ministry of Justice of Russia on June 22, 2012, No. 24667; as amended, into force since January 6, 2019).

According to article 847 of the Civil Code of the Russian Federation “the rights of the persons who implement the instructions of the client on the transfer and payment of cash from the account shall be certified by the client by means of presenting to the bank of statutory documents in conformity with the bank rules established by the law and the bank account agreement”.

In accordance with clause 1 of article 862 and clause 1.1 of the “Regulations on the Rules for the Transfer of Funds”, the following forms of cashless payments are established:

- payment orders;
- under a letter of credit;
- by check;
- by collection of payments;
- in other forms provided for by law, banking rules or customary practices used in banking.

Letter of credit payment method

A letter of credit is one of the most effective means of settlement when implementing trading transactions, mainly export-import ones. Such a document performs the function of enforcing a trade agreement and a credit function at the same time. "Thus, a letter of credit in the payment system is a powerful tool in trading operations that allows a skillful trading agent to refute the inevitability of loans in transactions and gain hope for success using situational information and a variety of letters of credit technologies".[1]

When entering into an export-import transaction, the parties often use various types of letters of credit as a payment instrument to make settlements between/among themselves. Such crediting was developed through commercial practice. The parties may choose one or another type of a letter of credit at their own discretion. However, indeed, the choice of a letter of credit depends largely on finan-

[1] Semikova P. V. Letters of credit as payment instruments [Akkreditivy kak instrumenty platezha] // Finance and credit [Finansy i kredit]. 2 (116), 2003. P. 11. (In rus)

cial reasons or on whether the buyer's country is subject to strict currency regulation. The degree of mutual trust of commercial partners can also be the reason for choosing a particular type of letter of credit. The use of various types of letter of credit is a common practice in the commercial world when entering into export-import transactions.

According to article 867 of the Civil Code of the Russian Federation "in payments by a letter of credit the issuing bank acting on behalf of the payer shall undertake to make payments to the recipient of cash or to accept or discount a bill of exchange issued by the funds recipient or to perform other actions required to honor the letter of credit upon the recipient's submission of the documents provided for by the letter of credit and under the terms of the letter of credit".

Settlements under a letter of credit, with the exception of the letter of credit honoring through payment, acceptance or discounting of bill of exchange, in accordance with clause 6.1 of section 6 of the "Regulations on the Rules for the Transfer of Funds" (approved by the Bank of Russia on June 19, 2012, No. 383-P; as amended on October 11, 2018; Registered with the Ministry of Justice of Russia on June 22, 2012, No. 24667; as amended, into force since January 6, 2019), are carried out by the bank acting by order of the payer on opening a letter of credit and in compliance with his instructions (hereinafter referred to as the issuing bank), which undertakes to transfer the funds to the recipient subject to the submission of documents stipulated by the letter of credit and confirming fulfillment of its conditions (hereinafter — payment under the letter of credit) or to empower another bank (hereinafter — the pating bank) to pay under the letter of credit.

Currently, the letter of credit, like other forms of settlement, has gained the next round of development, i. e. blockchain.

According to the draft "Regulations on the Rules for the Transfer of Funds" published by the Bank of Russia, the procedure for crediting funds to the recipient's bank account, as well as the features of the information exchange and the submission of electronic documents on a letter of credit using information systems, including distributed information systems (blockchain), have been determined.

A letter of credit is the bank's obligation to make a payment out of the client's funds within the specified amount and subject to the conditions specified in the payment order.

Settlement participants should provide the banks with links to information systems created on the basis of the blockchain, which contain documents on a letter of credit.

The Regulations provide for a number of conditions, under which the document will be deemed to be submitted. The bank that received it should be able to open it, read it and check for compliance with the terms of the letter of credit. The information system it was sent with should be identifiable and accessible during the period of its verification. Access to such a system may be restricted, including paid, if it is stipulated by the terms of the letter of credit, otherwise the document placed therein will not be considered submitted.

Recipients of funds under the letter of credit will be able to notify the paying banks of the completion of the submission of e-documents (including using the blockchain system) or hardcopies thereof.

Documents on letters of credit can also be stored on the basis of the blockchain created on the Central Bank's Masterchain platform. Masterchain is a platform for interaction between financial market participants. It allows you to quickly confirm the relevance of customer or transaction data, as well as quickly create various financial services enabling financial market participants to provide customers with fundamentally new services and products.

In addition to the Central Bank, the largest financial organizations participated in the Masterchain creation, including Sberbank PJSC, VTB PJSC, Alfa-Bank JSC, Gazprombank JSC, Otkritie FC PJSC Bank, QIWI Bank JSC, and NSPK JSC.

Types of letters of credit

The following types of letters of credit can be distinguished:

a) revocable or irrevocable
b) standby;
c) deferred;
d) transferable;
e) back-to-back;
f) red clause;
g) revolving; and
h) transit.

Revocable or irrevocable letter of credit

The very name "revocable" implies that such a letter of credit can be canceled by the buyer at any time before payment, which may cause great inconveniences for the seller. The overwhelming majority of export-import trade is based on an irrevocable and confirmed letter of credit due to the inherent advantages of such a letter of credit, namely, guaranteed payment by the buyer, after which the seller can complete in advance preparatory steps, often necessary for the manufacture or purchase of goods to be delivered. However, it should be emphasized that a letter of credit can be canceled, especially in cases where the importer (buyer) is not too sure of the seller's reliability as a trading partner, although his business reputation was checked in the usual manner. Therefore, entrepreneurs, of course, strive to conduct business on the basis of an irrevocable letter of credit. The letter of credit should clearly indicate whether it is revocable or irrevocable. In the absence of such an indication, the letter of credit will be deemed irrevocable (article 6 of the Uniform Customs and Practice for Documentary Credits; publication of the International Chamber of Commerce No. 600; rev. 1993, enforced on January 1, 1994; hereinafter referred to as ICC 600). [2]

In case of change or cancellation of a revocable letter of credit, the issuing bank must refund the bank, authorized by it to make a payment upon presentation, acceptance or negotiation under a revocable letter of credit, for any payment, acceptance or negotiation made by this bank upon receipt of a notice of change or cancellation, against the documents that, by their appearance, comply with the terms of the letter of credit (article 8 i of ICC 600). If prior to notification of revocation or change of the letter of credit, such a bank has accepted or agreed upon the documents that by appearance comply with the terms of the letter of credit, the issuing bank must provide a refund to the bank authorized by it to make payments by installments under the revocable letter of credit (article 8 ii of ICC 600). These provisions are designed to protect the second (other) bank.

An irrevocable letter of credit, on the other hand, represents a specific obligation of the issuing bank to make a payment, provided that the relevant documents are submitted either to the issuing bank or to confirming bank, if any, or to any paying bank. If the letter of credit provides for payment upon presentation, it must be paid upon presentation; if it provides for deferred payment, it must be paid after the expiration of the period specified in the relevant letter of credit.

The availability of a documentary letter of credit does not always mean that the beneficiary (exporter) can receive the payment immediately upon the presentation of the prescribed documents. Documents are considered by a confirming or advising bank. Despite the fact that the issuing bank undertakes to make a payment, the confirming bank will not make settlements with the exporter until it receives its refund (article 18 of ICC 600). If there is no confirming bank for this purpose, the exporter can submit documents to his service bank.

It should be noted that an irrevocable letter of credit may be confirmed or unconfirmed.[3] In order to confirm an irrevocable letter of credit, the issuing bank authorizes the confirming bank to provide its own confirmation, which constitutes a firm obligation of such a bank (confirming bank) in addition to the obligation already provided by the issuing bank. An unconfirmed irrevocable letter of credit will be based only on the issuing bank's obligation. In the case of such letters of credit, the advising bank merely advises the beneficiary (clause B of article 19 of ICC 600).

ICC 600 does not provide for "revocable" and "unconfirmed" letters of credit, apparently because the drafters believed that import-export trade was mainly based on confirmed irrevocable letters of credit. However, there are entrepreneurs who still enter into export-import transactions based on ICC 500 or ICC 400. ICC 500 provides for a "revocable" letter of credit, while ICC 400 provides for a "revocable" and "unconfirmed" letter of credit.

Standby letter of credit

Standby letters of credit (SBLC) are letters of credit that serve as a guarantee. Such letters of credit are often used when there is no full certainty that the importer will fulfill his contractual obligations. The issuing bank becomes obligated to pay under the letter of credit in case of the importer's violation of contractual obligations. The standby letter of credit difference from the guarantee is that the

[2] Uniform Customs and Practice for Documentary Credits (publication of the International Chamber of Commerce No. 600) [Unifitsirovannye pravila i obychai dlya dokumentarnykh akkreditivov (publikatsiya Mezhdunarodnoi torgovoi palaty № 600)] rev. 2007 // SPS Consultant Plus (accessed 12.12.2018).

[3] See: Alibuttaeva D. M. Types of letters of credit in the international practice. [Vidy akkreditivov v mezhdunarodnoi praktike]// Banking Law [Bankovskoe pravo]. 2004. No. 2. Available at: https://www.lawmix.ru/bux/113431 (accessed 12.12.2018)

standby letter of credit can be subject to the ICC 600 unified rules, which provide for certain standards for verifying the documents, which does not apply to the guarantee. Moreover, the submission of standby letters of credit to the ICC 600 unified rules eliminates the problems associated with the fact that guarantees are usually subject to the legislation of the country of the guarantor bank.

In order to use a standby letter of credit, the beneficiary (exporter) must submit to the bank a commercial invoice issued to the importer. Standby letters of credit are generally irrevocable, which is explained by the fact that the exporter expects to receive payment due to him for the delivered goods in any case. The importer, in turn, will strive to prevent such a letter of credit from being activated, because if to activate it, the obligating bank must pay against it, which in fact jeopardizes the business relationship between the importer and the bank. Such letters of credit are activated only in exceptional and unforeseen circumstances.

The usual practice, customs and application of standby letters of credit are shown in the International Standby Practices (ISP98). They establish separate rules for standby letters of credit. The practice of standby letters of credit is quite extensive, which indicates the seriousness and importance of this financial instrument.

ISP98 suggests a standard procedure for submitting electronic documents. The condition on the submission of e-documents must be indicated in the standby letter of credit itself. ISP98 applies if the parties have indicated this in the document itself. Therefore, some varieties of standby letter of credit may be subject to ISP98 and some — to ICC 600. To subordinate a standby letter of credit to ISP rules, it is necessary to include therein the phrase that this obligation is made in accordance with the 1998 International Standby Practices.Deferred letter of credit

As the name implies, a deferred letter of credit means that the payment thereunder is deferred for a specified period agreed between the beneficiary / supplier and the importer / buyer. One of the reasons for doing business based on deferred letters of credit is that it can help avoiding stamp duty on a bill of exchange, which can be very high in some countries. A deferred letter of credit differs from a “deferred payment”. Under the deferred letter of credit agreement, the exporter / seller is obliged to submit all the necessary documents to the advising / confirming bank; and payment will be made within the time limit agreed by the interested parties. The legal question whether the importer / buyer possessing a bill of lading can resell goods that are on their way by transferring the bill of lading to another buyer before payment of the transaction remains in abeyance. The problem is that before the funds arrive at the seller’s account, the initial sale and purchase transaction is considered incomplete.

Transferable letter of credit

According to article 48 of the ICC 600, “A transferable letter of credit is a letter of credit whereby the beneficiary (primary beneficiary) is entitled to authorize the bank making the payment or installment payment, acceptance or negotiation, or any bank authorized to negotiate the transferring bank, so that one or several other parties (second beneficiaries) could use the letter of credit in whole or in part”.

In order for a letter of credit to become transferable, the issuing bank must nominate it as such. In accordance with clause B of article 48 of ICC 600 “such terms as “divisible”, “fractional”, “assignable” and “negotiable” does not make the letter of credit transferable. If such terms are used, they should not be taken into account”. At or prior to the request for the transfer of the letter of credit, the first beneficiary should give irrevocable instructions to the transferring bank about whether he wants to retain the right to refuse the latter to advise the amendment for the second beneficiary (beneficiaries). If the transferring bank agrees to transfer the letter of credit under such conditions, it must inform the second beneficiary (beneficiaries) during the transfer of the first beneficiary’s instructions regarding the amendments. Unless otherwise specified in the letter of credit, a transferable letter of credit may be transferred only once. Thus, a letter of credit may be transferred only to the second beneficiary. However, it can be returned to the first beneficiary, while the reverse transfer to the first beneficiary does not contradict the conditions of transferability.

Such letters of credit are usually used in cases where the seller and the buyer enter into a commercial transaction through an intermediary. The intermediary is likely to prefer a transferable letter of credit, since this allows him to avoid investing his own funds in the purchase of goods. Having found the buyer and seller, the intermediary can set a condition of payments using a transferable letter of credit. The method of using transferable letters of credit can be explained as follows: the buyer opens a letter of credit in favour of the intermediary, the advising bank notifies the intermediary of the opening of the letter of credit in his favour. Further, the intermediary instructs to transfer the letter of credit in favour of the seller / goods supplier for an amount less than the amount of the letter of credit opened by the buyer. The supplier / goods seller, who becomes the second beneficiary, purchases or manufactures the goods and ships them either to the ultimate buyer or to an intermediary, to an agent or to a third party.

The second beneficiary submits transport documents and commercial invoices, which are the basis for the transfer of the letter of credit, to the bank. The intermediary also issues its invoices to receive remuneration, which is calculated as the difference in the amount of purchase and sale of goods. The advising bank, which receives the documents required by the applicant for the letter of credit, sends them to the issuing bank. If the first beneficiary fails to submit its commercial invoices, the relevant bank may send the documents it has to the issuing bank, including commercial invoices received from the second beneficiary.

Back-to-back letter of credit

A back-to-back letter of credit means that there are two letters of credit, the first and the second ones, which manage the compensatory system of the letter of credit. Based on this system, the second letter of credit is opened in favour of the second beneficiary / supplier, and the first letter of credit is opened in favour of the first beneficiary / intermediary. The reason for opening a back-to-back letter of credit arises in specific situations, which can be explained by an example.

A stockbroker in London (Party 1) received an order for the supply of a particular product to a company in Africa (Party 2). The payment should be made on the basis of an irrevocable letter of credit. The London-based stockbroker finds a supplier in a third foreign country (Party 3) who also wishes to deal with an irrevocable letter of credit.

The first letter of credit is opened by an African company (Party 2) in favour of the intermediary (Party 1). Party 1 opens a letter of credit in favour of the supplier (Party 3). Party 3 provides the specified documents to the bank; if the documents are accepted, the bank makes payment. Party 3 sends goods to Party 2.

The remuneration of the intermediary is the difference in the amount between the first invoice (invoice to the African company) and the supplier's invoice (this last invoice shows the amount less than that in the African company's invoice).

Features of back-to-back letters of credit:

- both letters of credit are independent of each other, since there are different beneficiaries;
- the second letter of credit is opened on the basis of the first, and the issuing bank takes into account the requirements of the first letter of credit;
- the second letter of credit is opened by the bank that advised the first letter of credit;
- the first letter of credit must be irrevocable and confirmed;
- goods are delivered directly from the second beneficiary to the applicant of the first letter of credit.

Having paid under the letter of credit to the supplier, the confirming bank submits the documents received from the supplier to the bank that issued the second letter of credit (intermediary bank). The bank that issued the second letter of credit is at the same time a confirming and advising bank for the first letter of credit. It replaces the supplier's invoices with the intermediary's invoices and sends the entire package of documents to the bank that issued the first letter of credit. The issuing bank of the first letter of credit deducts the entire amount payable under the trading contract from the buyer's account. Upon receipt of the amount of the letter of credit from the issuing bank, the confirming intermediary's bank closes the intermediary's loan account, and the amount exceeding the payment amount on the supplier's accounts becomes the intermediary's profit.

However, according to the compensatory method of payment under the letter of credit, the intermediary bank is responsible for paying under the second letter of credit, regardless of whether the payment under the first letter of credit has been received; this is due to the fact that these two letters of credit are completely separate instruments. The second letter of credit dates back earlier than the first one.

The two most important differences between a transferable letter of credit and a compensatory one are as follows:

- in the case of a transferable letter of credit, the buyer knows that he is dealing with an intermediary, while in the case of a compensatory credit, the buyer does not know about the intermediary;
- the intermediary and his bank are not liable for the transferable letter of credit, but in the case of a compensatory letter of credit, both parties remain responsible for paying under the second letter of credit.

Red clause letter of credit

According to the red clause letter of credit, a beneficiary (seller) is allowed to receive an advance payment (a certain percentage of the amount of the letter of credit) before the shipment of the goods and the submission of documents provided for by the letter of credit. This clause used to be high-

lighted in red, so this letter of credit is called a "red clause" letter of credit. Obviously, this financial privilege allows the seller to purchase materials for the production of goods intended for delivery, without the need to spend his own funds or to lend from other sources. However, following shipment, the seller submits documents to the bank in the usual way, in order to receive the final payment. The funds transferred as an advance are deducted from the last payment.[4] Advances under the “red clause” of a letter of credit can be secured or unsecured.

Secured Advances

In the case of secured advances, they are permitted only against certain documents confirming the availability of goods, namely, warehouse receipts and the obligation to provide bills of lading.

Unsecured Advances

When advance payment is provided against the beneficiary’s application, advance is required to pay for pre-shipment of goods.

If no payment is received from the buyer, the paying bank that has paid the letter of credit is entitled to apply to the issuing bank for compensation. Consequently, an advance payment of any nature should be made against the appropriate bank guarantees of the seller’s / supplier’s bank.

Revolving letter of credit

A revolving letter of credit is used in cases where trade relations are of long-term nature and deliveries are made regularly. Therefore such a letter of credit is automatically renewed after each delivery within the stipulated period. For example, a revolving letter of credit in the amount of € 50,000 for 6 months has been issued. When documents evidencing the shipment of goods are submitted to the bank, the letter of credit is renewed automatically. The number of write-offs for amounts within the indicated € 50,000 can be almost unlimited.

Transit letter of credit

A transit letter of credit is opened if the issuing bank contacts the intermediary bank in one country to confirm or advise the letter of credit in favour of the beneficiary resident of another country. The advising bank may send the letter of credit directly to the exporter or advise it through a selected agent in the exporter country. As a rule, a bank acts through an agent when it has no agency agreement with the seller’s bank or the seller’s bank is unknown to it.

Conclusion

Thus, the presented types of letters of credit and their functionality characterize the variety of their scope of application. The author believes, that a documentary letter of credit should chosen in order to meet the specific needs of the parties.

All types of letters of credit described herein are well known in commercial practice. They appeared as payment instruments necessary in international trade. Therefore, we believe that in the foreseeable future these tools are unlikely to undergo significant changes in terms of economic content, except for the technical improvement of the document flow.

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[4] See: Uniform Customs and Practice for Documentary Credits (publication of the International Chamber of Commerce No. 600) [Unifitsirovannye pravila i obychai dlya dokumentarnykh akkreditivov (publikatsiya Mezhdunarodnoi torgovoi palaty № 600)] rev. 2007 // SPS Consultant Plus (accessed 12.12.2018).

Principle of Freedom of Contract in the Laissez-faire Era

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ABSTRACT
The article discusses the level of development of Western European law and the operation of the principle of freedom of contract in the period of the XVIII–XIX centuries. The evolution and key changes in contractual freedom since the adoption of the Laissez-faire doctrine are displayed. The author connects evolution in positive law with the transformation of the economic and socio-ethical thought of society.
Keywords: freedom of contract, contract law, Laissez-faire, volitional theory

At present, it is difficult to determine the importance of the economic, social and ethical aspects in securing the freedom of contract idea weight. These factors in aggregate contributed to the absolute priority given to the freedom of contract principle in the XIX century.

The transition to a market economy and the rise of liberal values have contributed to the gradual abandonment of legal doctrines that prevent the subjects of civil turnover from fully carrying out of entrepreneurial activity. According to R. O. Halfina, "the freedom of contract and minimization of state influence on the market were a symbol of the bourgeoisie in its struggle against feudalism and absolutism, that tried to preserve the existing form of the state through paternalistic ideas".[1]

When gradually transiting from feudalism to capitalism, the legislation of European states started getting rid of the significant restrictions to the freedom of contract that existed in the absence of a market economy and liberal values. It has become possible in positive law to observe the elimination of mechanisms ensuring the substantive justice of contractual relations. This process is explained by the fact that the interests of the bourgeoisie came to the fore, as well as by the change in economic and socio-ethical views in society. Since feudal relations locked the economic life of European nations inside self-sufficient social enclaves in the Middle Ages, ethical attitudes of a small group had a great impact on it. In this regard, the participants in the contractual relations were under moral and social pressure if the agreement did not correspond to the public opinion about its proper content. Later, namely since the economy transition to commercial and industrial principles, the market volume has grown rapidly and the above characteristics have lost their significance. It is much easier to create the most favourable conditions for yourself and to take advantage of the counterparty's weakness in cases when an agreement is concluded between the parties located at a great distance from each other, separated by nationality, religion, traditions, rather than when the parties to the agreement live on the same territory.

In contrast to the Middle Ages where justice and morality of the agreement were of the prevailing importance, the principle of freedom of contract took their place under the new conditions.

Since the beginning of the XIX century, Western European countries have turned the vector of the law development in the direction of increasing freedom of contract and reflecting the needs of a market economy in legislation. Thus, according to many scholars, the principle of non-interference burst into the contract law of European states.[2]

Recognition of the legal force of the contract was necessary due to the rapid growth of capitalist relations, the stock market, corporations, and foreign trade. Thus, the basic contract model changed: a one-time exchange is replaced by the contract, which determines the rights and obligations of counterparties for the future and regulates the liability for violation of its terms. Civil turnover participants needed guarantees that the counterparty would comply with the terms of the contract, so the law began to provide them. The British scientist David Ibbetson notes that "a consensual agreement that generates counterparty obligations by virtue only of their will expressed in the agreement was a fundamental tool for private planning, displacing the structure of a unilateral contract to the periphery".[3] According to Patrick Atiyah, "the structure of a consensual agreement distributed the risks, associated with the contract performance, among the counterparties and also provided guarantees through the possibility of

[1] Halfina R. O. Contract in English civil law [Dogovor v angliiskom grazhdanskom prave]. M, 1959. P. 184. (In rus)
[2] Angelo A. H., Ellinger E. P. Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States // 14 International and Comparative Law Journal. 1991–1992. P. 455.
[3] Ibbetson D. J. A Historical Introduction to the Law of Obligations. 2006. PP. 74, 76, 220 ff.

the enforced fulfillment of obligations through the judicial authorities, thereby ensuring "control over the future".[4]

The application of the consensual agreements structure has contributed to drawing attention to the phenomenon of the occurence of obligations subject to judicial protection due to the mere fact of the will of the parties. In this regard, according to James Gordley, the forms of volitional theory that link the occurrence of legal consequences with the will of the parties to the contract became the main ones in the XVIII century in Western European countries.[5]

However, the popularity of volitional theory cannot be considered a drastic revolution, since its essence was recognized even in Roman law. Various technical problems, such as the recognition of unnamed contracts, were resolved as early as the XVI — XVIII centuries, helping to reinterpret the meaning of the consensual agreement. Thus, the volitional theory of the contract was based on scientific and legal knowledge developed by lawyers of the past. David Ibbetson notes the following changes that occurred in the XIX century: 1) the force with which the jurists preached the factor of free will; 2) the role assigned to the autonomy of the will of counterparties in the scientific literature and judicial practice; 3) the willingness of the legislature to codify the volitional nature of the contract.[6]

As volitional theory became more and more popular, the contract became independent of state intervention, since it was the will of the parties agreed upon by the contract. Thus, the innovation of the contract law of the era in question was in the formation of the element of the counterparties' will expressed in the contract as the fundamental principle that defines the essence of the private rules of contract law.

The idea proclaimed in Corpus Juris Civilis and not used in the Middle Ages on the possibility for the participants in contractual relations to legally smart each other and use their advantages to gain conditions for themselves that the counterparty voluntarily agrees to, became the basic principle of contract law in the XIX century.

On the contrary, the fairness and good faith of the agreement during the Laissez-faire era were not recognized as principles of contract law by most Western European states.

This approach extended the scope of the freedom of contract by eliminating the restrictions prescribed by Roman, christian, and feudal law, which impeded the rapid development of a market economy.

The foundation was laid for the development of scientific questions concerning freedom of contract. In the periods of Antiquity and the Middle Ages, the freedom of contract was studied only partly (issues related to unnamed agreements, admissibility of state interference in the regulation of certain types of contracts), and freedom of contract was not considered as the fundamental principle of private law.

The legislator had to develop contract law rules aimed at ensuring guarantees of the parties determined by the terms of the contract, since active participants in civil turnover need a stable legal environment allowing them to act within the framework of legal expectations for the possibility of building their own economic plans. Patrick Atiyah on this occasion notes that "the priority of long-term interests over short-term ones covered all the contract law of the Laissez-faire period in the XIX century".[7]

Legal formalism began to prevail in contract law. The role of the court was to remove unjustified barriers to the implementation of private agreements and to enforcement of the agreements reached between the parties.[8] Thus, the function of the court was passive and consisted in interpreting the agreements in accordance with their literal meaning. As E. McKendrick notes: "Adjustment of contractual conditions in order to ensure a fair balance of counterparties' interests was not the task of the court".[9] The essence of the changed approach is as follows: "What is based on the contract is fair".[10]

If the courts wanted to restrict and control the content of contracts, in order to hide government interference, they used a variety of artificial maneuvers. References to the doctrines of deception, violence, coercion, the causation of a transaction, the principles of interpretation of a contract, and other institutions of contract law that are not intended to protect a participant in contractual relations from unfairness of the transaction terms were subject to application. It is worth noting that due to the lack of legislative mechanisms for direct control of the fairness of contractual conditions, as well as due to

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[4] Atiyah P. S. The Rise and Fall of Freedom of Contract. 1979. PP. 420, 421.

[5] Gordley J. Contract, Property and the Will — the Civil Law and Common Law Tradition // The State and Freedom of Contract / Ed. by Harry N. Scheiber. 1998. P. 67.

[6] Ibbetson D. J. A Historical Introduction to the Law of Obligations. 2006. P. 232.

[7] Atiyah P. S. The Rise and Fall of Freedom of Contract. 1979. P. 354.

[8] Teeven K. M. A History of the Anglo-American Common Law of Contract. 1990. Ch. 6.

[9] McKendrick E. Contract Law: Text, Cases and Materials. 2nd edn., Oxford, 2005. P. 17.

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a change in attitude to state interference with private affairs, the scope of the above-mentioned practice is insignificant compared to the previous era of the Middle Ages.

In most Western European countries, legislative acts regarding the limitation of interest rates on loans have been repealed.

Back in the XVII century, the views on the sinfulness of the demand of remuneration for the provision of loans lost their significance. Later, some countries also refused to exercise control over interest rates. For example, the upper interest rate limit in Germany was cancelled in 1867.[11] In France, in connection with the state establishment of loan interest, the legislation setting the maximum loan interest was heavily criticized at the beginning of the XIX century.[12]

Legislative regulation of prices for goods and services in the XIX century was used in the form of targeted interventions in economic turnover. However, it was thought to be an exceptional measure, was criticized and was applied quite rarely. The current level of economic theory development proved the negative effect of such measures to the healthy development of economic turnover.

In this regard, the applied laesio enormis doctrine began to lose its popularity. J. Dawson notes that during the XVII — XVIII centuries there was a process in France of limiting the laesio enormis doctrine until its return to the framework given in Corpus Juris.[13] Jean Domat pointed out that it did not seem possible to apply the laesio enormis doctrine to all bilateral agreements in the XVII century, and allowed the reference to a disproportionate price to contest a transaction only in exceptional cases, e. g. the sale and purchase of real estate.[14] R. Pothier also pointed out the impossibility of applying the laesio enormis doctrine in the XVIII century in cases of difficulty when establishing a fair price.[15]

These processes are explainable. The development of economic thought raise doubts about the idea that economical goods have an objective internal value that would not depend on subjective assessments of specific parties to the contract. Moreover, the high day of volitive theory restrained government attempts to intervene with economic turnover in order to ensure fairness of the contract contrary to the will of counterparties reflected therein.

It is worth noting that private law have undergone other transformations aimed at expanding the freedom of contract. For instance, the law of Western European countries approved the creditor's right to assign to a third party, which was impossible during the Antiquity and the Middle Ages. As R. Zimmermann notes: "The legislation of countries with a capitalist economy could no longer put up with this obstacle" .[16]

Thus, European private law was modified under the influence of the active development of capitalism and the ethics of individualism.

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Subjective Rights in the Modern Legal Paradigm (According to the Results of the Inter-University Scientific-Practical Conference "Baskin's readings")

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ABSTRACT
Currently, public relations, government and legal regulation are undergoing transformation. Used legal institutions and instruments require rethinking and filling with new meanings. One of the legal categories that require in-depth theoretical analysis in order to adequately modern law enforcement conditions is the institution of subjective rights. The First Interuniversity Scientific-Practical Conference "Baskin's readings" was devoted to the analysis of this problem, according to the impressions of which this essay was written.
Keywords: subjective rights, legal paradigm, methods of scientific research, Baskin's readings, source of law, social claims

Humanity is developing by leaps and bounds: the Neolithic agricultural revolution, the emergence of statehood, the industrial revolution of the XVII century, and the technological breakthrough of the XX century. At the same time, the period of knowledge accumulation between transitions of social development to a new level is reducing more and more. At the present stage, on the one hand, the society has already stepped to a new level of social development at the beginning of the XXI century, into the so-called digital society, on the other hand, perhaps, we are already standing on the verge of moving to the next stage of development, the robotization age, when most human functions will be carried out through technology. The new stage of social development requires a new understanding and assessment of a person's place, features of human interaction, the position of new subjects of relations, for example, robots, artificial intelligence, cloned creatures, etc.

The legal reality of social existence cannot remain unchanged as well. It should be recognized that we still use the tools and institutions of the Ancient World, i. e. Roman law, which was conceptualized and gained new life in the Middle Ages, in the framework of the legal regulation of public relations.

Obviously, the use of old tools in the new reality does not always meet modern public interests. It became essential in these conditions to bring a scientific and philosophical understanding of the categorical framework, methods of studying and regulating social relations, filling the terminology with new meaning or adapting legal instruments and institutions to modern realities to a new level of significance.

In conditions of urbanization, the concentration of a large number of people within small territories, the complexity of interstate relations, which is associated with the globalization of international processes; changes in the role of interstate organizations and institutions, cross-cultural interaction, freedom of movement and the exchange of information provided by technological breakthrough, the issue of individual rights, the content and regulation of subjective rights and obligations, the determination of legal identity, the concept of the holder of subjective rights, and the scope of state intervention in the regulation of subjective rights of the citizens and other public relations participants issues is especially significant.

It is the issue of subjective rights that the First Interuniversity Scientific-Practical Conference "Baskin's Readings", organized by the North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration, held in St. Petersburg on April 25, 2019, was devoted to. The Conference brought together prominent legal scholars, in particular, in the field of the theory of government and law, such as A. A. Starovoytov, I. L. Chestnov, N. V. Razuvaev, S. B. Glushachenko, I. B. Lomakina, K. K. Lebedev, and many others. The interest in the event and the issues raised for discussion speaks to the fact that there is an understanding of the topic importance and the need for its discussion in the scientific community.

All conference participants indicated such problems of the science of law as the need to update the conceptual framework of the science, changing the methodological tools in the context of changing social relations paradigm from subject-object one to a paradigm of human activity balance.

Professor I. L. Chestnov noted that post-classical, modern thinking is characterized not by absolute abstract concepts, but by context-dependence. Different cultures and civilizations localizing the subject

provide a different understanding of the world. In such conditions, it is impossible to talk about the universal character of the laws of logic. The exercise of human rights will be influenced by many factors: political, cultural, demographic, mental, and others. Thus, statutory regulation cannot be universal, cannot predict and consider all possible variants of human behaviour but rather can use a limited set of standard models.

In such conditions, the development of institutions that would allow the most objective assessment of the significance and consequences of a particular act of a particular subject is required. Such an approach inevitably leads to the conclusion that regulatory public institutions, such as the executive and the judiciary branches, should be ready to non-standard decisions within the framework of the general principles of law. Statutory instruments cannot be understood as instructions and be literally interpreted under such conditions, which will apparently contravene to the current level of the society development and people's needs and will lead to an increase in public and social tension.

The new paradigm sets the issue of the conformity of the tradition of giving primary importance to legal rules that affect the rights and obligations of a particular subject in specific behavioural acts to modern conditions. Professor N. V. Razuvaev, when discussing the problem of the correlation of legal rules and subjective rights, drew attention to the fact that it is subjective rights as a semiotic means of constructing legal reality in the course of active communication of subjects that construct legal reality; the evolution of legal reality comes down to the fact that rules are formed out of subjective rights based on their typification. When considering the concept of subjective rights and obligations, special attention should also be paid to reinterpreting of the content of the rights of public entities and their correlation with subjective rights. The latter problem becomes especially relevant when analyzing the concept of statehood, studying the degree of state intervention in the life of citizens and public associations, the degree of regulation of economic relations and subjective rights.

Understanding the modern legal paradigm and updating of the conceptual framework require a new approach to the scientific methods of cognition. Professor M. O. Akishin drew attention to the problems of the methodology of scientific knowledge. He quite rightly noted that the method of scientific cognition, where it was believed that the subject of cognition was excluded from the process and did not affect the result of the study, failed to stand the test of time. It is already evident today not only within the humanities that a scholar in one way or another influences the result of the study and cannot remain absolutely impartial in respect of the phenomenon being studied.

Understanding of such a methodological consequence once again confirms the fact that the paradigm of social relations has changed, in particular, the absence of a certain unified truth, which humanity aimed to search. We can say that there are laws of the "theory of relativity" in social relations. The application of medieval legal structures at the present stage of social development does not meet our needs. The legal tools used require reinterpretation, given that the complication of social relations can shift the paradigm of the rule of law towards a social state, within which the issue of the relationship between subjective rights and obligations and public interests can be considered in a completely different way.

The questions of determining which rights are subjective, whether their list has changed, and how we can determine new types of subjective rights and their sources arise within the changed social relations.

G. Yu. Dorsky suggested to define subjective rights through their reflection in obligations, e. g., the right to life and death (the right to control one's life) correlates or does not correlate with the duty of a doctor to euthanasia. This approach allows to more accurately determine whether subjective law is declarative, whether it exists in the framework of social relations, and whether it can be exercised by the subject. The given example gives rise to the following issue: is our right to life absolute and are we completely free to exercise it?

Consequently, the fixing of subjective right in a specific rule does not always reflect the real existence of such a right and the objective conditions for its implementation in public relations. Professor M. G. Smirnova drew attention to the problem of "stillborn" rules, which are enshrined in statutory instruments but are not real social legal claims of citizens. It is the legal claims of citizens within the framework of the integrative theory of law that constitute one of the elements of legal awareness, can be identified through such sources of law as judgements of the Constitutional Court, court decisions, an individual contract as a non-typical source of law, and as a result get enshrined in objective forms. What are these claims of citizens? Have they changed over the past one hundred or two hundred years?

How free are people in the exercise of their rights in modern society? Where is the limit of public control and restrictions interference with personal life? These issues are becoming extremely essential. According to M. L. Nokhrina, the definition of the subjective right of personal freedom as the freedom

of behaviour of a person in a non-property sphere unrelated to the impact on material and property benefits becomes extremely important. These are such rights as the ability to play music, jog in the mornings, swim in the river, etc. As soon as we recall that any of these rights is conditional upon the security of their exercise, it becomes clear that the recognition of the existence of such subjective rights will allow to control the degree of their restriction permitted by society. For example, to what extent can the everyone's right to swim in the lake be limited by providing preferences to certain individuals to use the shore thus restricting access to water? How limited can our right of movement be, for example, the right to enter state institutions and organizations? Can our right to determine our appearance be limited? Let us recall situations when students at schools are forbidden to dye their hair or wear jewelry. Where is the point when prohibitions become permissible and does it exist in modern society? Is there a public request, the claim to establish such restrictions? For instance, with regard to personal right to choose a profession, they are more and more often talking about the need for career guidance before entering a higher educational establishment: will it become mandatory? Calls are increasingly being made to establish mandatory medical examinations, including medical examinations of potential spouses, as conditions for the exercise of individual rights as part of the personal right to health. Are those voicing these claims crossing the boundaries of public interest interference in the sphere of personal subjective rights?

All the above issues are of paramount importance for each of us as the path of public and social development of our civilization depends on the answers to them. The time is ripe for the reinterpretation of the legal paradigm, institutions, and tools. Ignoring this problem will lead social relations farther from the possibility of a conscious choice of a reasonable transformation of the social structure in compliance with the needs of the modern community.

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