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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

Paul B. Stephan
The Future of International Human Right Law - Lessons from Russia

D. I. Lukovskaya
Validity of Law in its Actual and Ideal Measurements: Specifics of Modern the Ories of Natural Law

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Subjective Rights in the Light of the Reform on Public Servitudes

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Debt Release in the Context of Philosophical and Economic Aspects of Legal Regulation

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Foreword of the Editor-in-Chief

The regular issue of the journal “Theoretical and Applied Law” has a thematic character and is dedicated to the problem attracting the high attention of both legal theorists and specialists in specific legal disciplines. The problem discussed is the problem of subjective rights, and scientific and practical relevance of the problem is increasing in conditions of the anthropological turn that has affected other social and human sciences and jurisprudence as well.

The anthropological turn has brought the legal profession to recognize the “harmony of the individual-state relationship” in law owing to the seemingly trivial fact that all legal phenomena result from creative activity of the human society members and is created by them in the process of communication maintained with the use of symbols (signs) and in the process of other social communications. Therefore, the true creator of law is a man in complete set of human psychological, social and cultural characteristics, rather than the nature and state understood in abstract terms. The law is created to satisfy the human needs and to protect human interests, to secure realization of the human freedom, which has been always inherent in the human person.

The aforesaid considerations explain the relevance of legal (subjective) rights, which being initially the subject of study by civil law scholars, gradually became a universal category making the foundation for the whole of the modern legal consciousness. It is logical that experts in constitutional law actively discuss the nature of basic human and civil rights and freedoms as a special category of subjective rights. Administrative law scholars, as well as experts in the field of criminal law, regularly address the problem of legal (subjective) rights. Scholars specializing in the theory of law have approached closely to creation of the general doctrine of legal (subjective) rights to be a conceptual basis for sectoral research.

The faculty of law of the Russian Presidential Academy of National Economy and Public Administration actively participates in studying the problem of legal (subjective) rights. In April this year, the faculty held the first Baskin’s Readings, a scientific and practical conference dedicated to fundamental and applied aspects of legal (subjective) rights in private and public law. The conference, the results whereof were covered in the previous issue of the journal, was participated by professors, postgraduates and graduate students of the North-Western Institute of Management, other universities of St. Petersburg, and by legal practitioners. It appears that such a high interest is indicative of the enduring relevance of the subjective rights category in its multiple manifestations.

The issues addressed in the discussions unfolded during the conference “Baskin’s Readings” were raised again in the second issue of the journal “Theoretical and Applied Law”. I am proud to note a wider thematical range of the articles in this issue, and inter alia, a wider geographical coverage upgraded to international level. The opening article of this issue is written by Paul B. Stephan who dedicated his work to the lessons learned from Russia in international legal protection of human rights and freedoms. Articles by I. L. Chestnov and by D. I. Lukovskaya deal with philosophical and legal aspects of subjective rights doctrine, presented within the scope of the dialogue of traditional and innovative ideas. Issues of implementation of subjective rights in the fields of private and public law (in works by V. B. Spitsnadel, T. S. Krasnova, D. A. Zhestovskaya, L. V. Shvarts), as well as in international law (E. T. Mayboroda) were also given a full coverage.

Having attached a substantial attention to dogmatic developments in the field of subjective rights, the authors of the articles seek to deal with this category in the broad social and psychological context. In this regard, the discussion paper by V. S. Bredneva is worth noting, as it is dedicated to the causes of deformation of the professional consciousness of legal profession, and hopefully this work will become a suitable occasion for constructive discussion in the next issues. We will continue publishing works of legal practitioners, and the good beginning was the review article by S. A. Bikmetova in this issue.

I wish it would become a good tradition for the journal to publish new works by foreign and Russian scholars and practitioners who represent multiple approaches to resolution of the most relevant problems of today in modern law science.

Editor-in-chief
Nikolay Viktorovich Razuvaev

We express our deep gratitude to the author of the article, Paul B. Stefan,
and the journal «*Law and Contemporary Problems*», *Duke University School of Law (USA),*
for the opportunity to publish the article and its translation in the journal
«Theoretical and Applied Law».

The Future of International Human Rights Law — Lessons from Russia

Paul B. Stephan
University of Virginia*

I

Introduction

This volume raises two broad and closely related questions. What do we mean when we talk about international human rights law? How should researchers investigate international human rights law? One is a matter of subject, the other of object. The papers in this symposium indicate multiple approaches to both. Rather than synthesizing these contributions or adjudicating among them, this intervention both embraces and challenges them. My main point is commonplace to the point of banality, that what you see depends on where you stand. The perspective I offer to make this point is Russian.

Russia matters because the foundational moment for international human rights law — the *lieu de memoire* of the field, with apologies to Pierre Nora — occurred in the context of the U.S.-Soviet relationship through enactment of the human rights provisions of the Helsinki Final Act.[1] Russia later became a place for testing the claim that international human rights law has its greatest impact in the disassembly of authoritarian regimes. Finally, the work of economists who sought a rigorous explanation for their failures in Russia in the 1990s gave an enormous boost to the empirical turn in the study of the effect of legal institutions on societal outcomes — a close relative to the empirical study of the impact of international human rights law. A reconsideration of the Russian context thus brings to light ways to think about the origins of international human rights law, and what its consequences — more unintended than not — have been.

The first part of this paper reviews the Russia experience, drawing shamelessly on my own adventures. Personal narrative presents challenges, not the least being the high likelihood that the audience does not find the author's life as fascinating as he does. I will try to overcome these hurdles. The second part proposes ways of understanding this experience that can shape our approach to both the subject and object of international human rights law. I argue in particular that local knowledge based on deep understanding of the society affected is indispensable to the human rights project, and that the specifics of local histories and values may defeat the expectations of the promoters of human rights. Although agnostic as to the future of this field, I hope to enrich the agenda of human rights workers and researchers going forward, whatever their methodological commitments.

II

Russia and the Concept and Practice of International Human Rights Law

Specialists in international human rights law will find a focus on Russia odd, if not off-putting. Western human rights workers tended to see the Soviet Union as a negative space, embodying an antithesis of human rights. During the flowering of this field in the 1970s and 1980s, mainstream activists and

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[1] Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter The Final Act], *reprinted in* 73 Dep't State Bull. 323 (1975); Samuel Moyn, The Last Utopia: Human Rights in History 148–55 (2010).

academics typically sought to establish their anticommunist credentials as a predicate to launching critiques of what they framed as human rights abuses in the West.[2] Since the end of the Soviet Union in 1991, they have paid little attention to Russia except as a somewhat backward place, a rival with Turkey for the greatest source of complaints brought to the European Court on Human Rights. They see Russia as peripheral, not central.[3] But Russia has been, and remains, more interesting than the mainstream view allows. The concept of international human rights law — human rights as a set of obligations resting on international law, not simply as an expression of values — was forged in the postwar struggle for hegemony between the Soviet bloc, with Russia at its center, and the so-called capitalist world. The supposed triumph of the West in turn put the ideological claims to the test, as the struggle's losers, first and foremost Russia, purported to assimilate the practice of human rights through international law enforcement. The many-sided disappointment of Western liberals with the results, especially in Yel.tsin's Russia, energized a new body of empirical scholarship exploring the relationship between legal institutions and economic development. The empirical turn in international human rights scholarship is not exactly a direct offshoot of the legal-origins literature, but it bears a strong family resemblance.

A. Helsinki and the Soviet-American Competition

A turning point — Samuel Moyn has argued convincingly that it is the turning point — in the history of international human rights law was the Helsinki Final Act, signed in the summer of 1975[4]. A legal formalist might find this observation surprising: By its terms, the Final Act was a political declaration, not a legal instrument. Its signatories proclaimed merely "their determination to act in accordance with the provisions contained in the above texts."[5] The principal purpose of the Final Act was to ratify the borders of postwar European states, in particular the western extension of the Soviet Union approved at Tehran and Yalta but thereafter deplored by the West.[6] The human rights provisions, denominated as Basket III, became the price for Western accession to the Final Act. Stipulating that the Final Act was a political, but not legal, commitment allowed the Western states to give political comfort to the Soviet Union with respect to its borders without requiring these states to accord legal recognition to the absorption of the Baltic states or the revision of borders with Finland, Germany, Poland and Romania.[7] Symmetrically, its political status meant that the Final Act imposed no new legal obligations regarding human rights on the Soviet Union or its satellites.[8]

Yet, as Moyn demonstrates, this legal formalism proved no obstacle to a transformation in the prestige and practice of the field of international human rights law.[9] Especially — but not only — in Central and Eastern Europe, activists elided the distinction between political and legal commitments to advance a new agenda of international human rights. The Carter Administration, which took office in 1977, elevated this movement to U.S. policy and further blurred the line between the political and the legal. What previously had been strands of thought in postwar Western liberalism became an international legal movement.[10]

My involvement in these events was as a fly on the wall. In 1975, I worked as a specialist in Soviet politics in the Soviet Internal Branch of the Central Intelligence Agency's Office of Current Intelligence. This Branch had functioned since the Agency's founding as the home of the U.S. government's close expert study of the Soviet Union's internal dynamics.[11] At that time, its leader and a plurality of its analysts had worked there since its creation. During the late spring and early summer of 1975, the Branch was asked to assess the likely domestic impact in the Soviet Union of the human rights provisions of the Final Act.

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[2] Moyn finds this anticommunist grounding in western human rights practice even earlier. *Id*. at 44–45.

[3] Alternatively, they locate Russia as the home of a backlash against international human rights law. *See* Lauri Malksoo, *Introduction — Russia, Strasbourg, and the Paradox of a Human Rights Backlash*, *in* Russia and the European Court of Human Rights: The Strasbourg Effect 3, 5 (Lauri Malksoo & Wolfgang Benedek eds., 2018).

[4] Moyn, *supra* note 1, at 148–49.

[5] The Final Act, *supra* note 1. The Final Act also stipulated that it was not eligible for registration with the United Nations pursuant to Article 102(1) of the UN Charter, further indicating that it lacked the status of a treaty under international law. *See id.*

[6] *Id.*

[7] Japan was not a party to the Final Act, which therefore did not address the issue of the Soviet Union's eastern borders.

[8] *Id.* § 1-a-VII.

[9] Moyn, *supra* note 1, at 122.

[10] *Id.* at 121.

[11] Sibling branches focused on Soviet foreign policy (Soviet External) and the Eastern bloc, making up a division within the Office.

I do not recall the specifics of the Central Intelligence Agency's ultimate assessment of the Final Act. Like most official pronouncements, it was forged through negotiations among the various clusters of experts (an internal interagency, if you will), with hard edges rounded off and strong claims muted. Given the preeminent position and, to put it gently, self-confidence of then-Secretary of State Henry Kissinger, one may doubt whether anything coming out of the Agency would have had much impact on the U.S. posture toward the Final Act. What I do recall, however, are the views of the Branch, delivered in oral form in the course of the interagency negotiations.

The Branch, comprising the government's best experts on Soviet politics, was deeply skeptical about the enterprise.[12] It predicted that foisting on the Soviet regime a set of concepts for which they lacked an intellectual vocabulary would breed resentment and reaction. Internal critics of the regime — the dissidents — would likely suffer, rather than be empowered, as the rulers sought to demonstrate that the new words do not mean any change in power relations. It was beyond the Branch's remit to consider whether the human-rights concept might function as a wedge between the Soviet Union and Central and Eastern Europe. I do not recall whether the Branch predicted that the regime would create its own human rights vocabulary, establishing institutions to build counternarratives about international human rights law.[13] The Branch was clear, however, as to the bottom line: Foisting human rights obligations on the Soviet Union would degrade the quality of dissident life in the short term and would probably accomplish nothing over the long term.

I am not sure if I ever knew, and I certainly do not recall now, whether the Branch's views were incorporated into the reports prepared at a higher level of the bureaucracy and ultimately delivered to the agency's clients, namely the country's political leadership. One might dismiss this episode as an example of the inherent conservatism of experts. People who have invested in the mastery of a complex system do not like to see their human capital depreciate. Yet the core insight of the Branch's position deserves consideration. The experts believed that Soviet society as a whole lacked a way of understanding human rights in the forms propounded by the West. The few individuals in that society who embraced these concepts were radical exceptions, outliers who worked beyond the boundaries of acceptable public discourse.[14] As the experts understood it, Soviet state structure had not suppressed an inherent longing for western-style liberties in the Soviet population. Rather, it had succeeded in making these liberties incomprehensible for the vast majority of the population.

Thanks to Helsinki, once the idea of international human rights came into play in the Soviet Union, it branched into two streams. The first involved the official public sector. There the idea functioned as an empty vessel into which approved thinkers could pour content that served the status quo. Individual freedom — according to the approved thinkers — meant belonging to a society that realized economic justice in the form of full employment, guaranteed housing, health care, and education, suppression of economic inequality, and repression of social relations that led to exploitation. Accordingly, speech or political action that frustrated the fulfillment of these goals as administered by the approved technical elite (as selected by the Party) represented attacks on human rights.

The second stream involved everyone else in the Soviet Union. For the small and embattled sector that might be called civil society, human rights represented whatever existing Soviet reality was not. For the large disillusioned majority, both the official and unofficial sectors seemed beside the point. The Russian silent majority lacked the means to distinguish international human rights from other Western imports, such as Marxism-Leninism, that seemed to promise so much yet delivered so little. Exhausted and alienated, Russian society as a whole did not offer fertile soil for new idealisms rooted in Western rationalist traditions.

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[12] When I say "best," I mean people with both great experience and access to sources of information not widely available elsewhere (and in some instances not available at all), either within government or in the public domain. They still suffered from blind spots. In particular, they lacked access to knowledge gained by their political masters in the course of direct dealings with Soviet leaders. At the time, the Secretary of State conducted an especially personal form of diplomacy and held closely to his own impressions. My colleagues described briefing the Secretary to an oral defense of one's graduate thesis, with the briefee assessing how well the briefer did in capturing what he already knew.

[13] Shortly after the signing of the Final Act, the U.S.S.R. Academy of Science's Institute of State and Law created an international human rights section under the leadership of Viktor Mikhailovich Chchikvadze, a former head of the Institute famous for his conservatism.

[14] *Cf*. Kai T. Erikson, Wayward Puritans: A Study in the Sociology of Deviance (1966). Soviet dissidents had begun to invoke the term "human rights" in the late 1960s as a means of capturing their comprehensive opposition to the Soviet status quo. In many cases they had learned the vocabulary from Western sources, to which they had intermittently privileged access. The Soviet landscape, however, denied them a context for envisioning what implementing these ideas would look like in their lived world. Rather, the concept took on the character of a negative identity, meant to describe exactly what Soviet reality excluded.

B. International Human Rights Law and the Dismantling of the Soviet System

Fast forward fifteen years. International human rights law had become a "thing." Within the legal academic community, a cottage industry had emerged, replete with clinics, chairs, and NGOs devoted to publicizing, lobbying and litigating. Especially, but not only, in Central and Eastern Europe, the idea of human rights had become a node for opposition to Soviet domination. In the Western Hemisphere, a distinct human rights tradition served as a channel for organizing the surrender of authoritarian, mostly military regimes and the restoration of democratic, but not necessarily liberal, states. Human rights also became part of the vocabulary of opposition to the apartheid regime in South Africa, which was beginning to unravel in tandem with events in the Soviet Union.

Human rights talk did crop up in the Soviet transition, which one might arbitrarily date from the 1986 adoption of *perestroyka* (reconstruction) as the official policy to the closing down of the Soviet Union at the end of 1991.[15] The dominant discourse, however, differed significantly from that heard further west. The establishment reformers (Gorbachev and those who attached themselves to him) propounded the concepts of law-based state and universal values, rather than the particularities of human rights enshrined in the Helsinki Final Act. Although some Western audiences mistook the aforementioned concept of law-based state for the Anglo-American concept of "rule of law," what the establishment reformers had in mind was the German *rechsstaat*, a commitment to transparency and stability rather than to the liberty of the subject.[16] As for "universal values," the reference to values rather than rights had the effect of separating reconstruction from international legal obligation. For radical reformers, many of whom aligned with Boris Yel.tsin and his team — in power as leaders of the Russian Federation from the middle of 1990 — human rights again served as a means to distinguish their aspirations from the status quo but mostly lacked concrete programmatic content. What joined the radicals to Yel.tsin was a shared desire to be done with the Soviet Union, a goal accomplished sooner than anyone anticipated.

Two private conversations with leading Russian legal figures at this time illuminate some of the peculiar roles of international human rights law in these events. The first conversation concerned the pronouncements of the U.S.S.R. Committee on Constitutional Supervision, the Soviet Union's first stab at a constitutional court.[17] Several of its initial cases addressed issues that came within the ambit of international human rights law. One considered the right of access to courts to review job dismissals, another the assignment of the burden of proof in criminal cases, and the third the publication of secret decrees governing individual rights and duties.[18] In each instance, the Committee principally relied on

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[15] An alternate translation is "restructuring," suggesting more of a corporate work-out and less of a society's fundamental reform. I prefer the translation in text. I first wrote about the concept in Paul B. Stephan, *Perestroyka i Sovetologiya* [*Perestroyka and Sovietology*], 3 SShA – Ekonomika Politika Ideologiya [Usa – Econ. Pol. and Ideology] 30 (1989) (journal of the Institute for United States and Canada Studies of the U.S.S.R. Academy of Sciences). An excellent overview of the period can be found in William Taubman, Gorbachev: His Life and Times (2017).

[16] *See* Paul B. Stephan, *Further Thoughts on the Rule of Law and a New World Order*, 26 J. Marshall L. Rev. 739, 739 (1993) (explaining the distinction between the Soviet concept of law-based state and the Anglo-American concept of "rule of law").

[17] Like the Appellate Committee of the British House of Lords (transformed into a Supreme Court only in 2009), the Committee on Constitutional Supervision was a component of the legislature and thus lacked the capacity to issue mandates on its own behalf. Whether it would have acquired a reputation for integrity and authority that would have obligated the legislature to automatically implement its judgments, as British tradition required with respect to the Appellate Committee, will never be known. *See* Herbert Hausmaninger, *From the Soviet Committee on Constitutional Supervision to the Russian Constitutional Court*, 25 Cornell Int'l L.J. 305 (1992).

[18] Zaklyucheniye Komiteta Konstitutsionnogo nadzora SSSR, 0 nesootvetstvii norm zakonodatel'stva, isklyuchayushchikh dlya ryada kategoriy rabotnikov sudebnyy proyadok rassmotreniya individual'nykh trudovykh sporov, polozhennyam Konstitutsii SSSR zakonov SSSR. mezhdunarodnykh aktov o pravakh cheloveka [Conclusion of the USSR Committee for Constitutional Supervision, on the insufficiency of legislative norms that exclude categories of workers from judicial review of individual labor disputes, based on the Constitution of the USSR, the laws of the USSR, and international acts on human rights], Vedomosti S"Ezda Narodnykh Deputatov SSSR I Verkhovnogo Soveta SSSR [VED. SSSR] [Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR] 1990, No. 27, Item 524; Zaklyucheniye Komiteta Konstitutsionnogo nadzora SSSR, 0 nesootvetstvii norm ugolovnogo i ugolovno-protsessual'nogo zakonodatel'stva, opredelyayushchikh osnovaniya i poryadok osvobozhdeniya ot ugolovnoy otvetstvennosti s primeneniyem mer administrativnogo vzyskaniya ili obshchestvennogo vozdeystviya, Konstitutsii SSSR i mezhdunarodnym aktam o pravakh cheloveka [Conclusion of the USSR Committee for Constitutional Supervision, on the insufficiency of norms of criminal and criminal-procedure legislation involving release from criminal responsibility conditioned on the application of measures of administrative punishment or social pressure, based on the USSR Constitution and international acts on human rights], Vedomosti S"Ezda Narodnykh Deputatov Sssr I Verkhovnogo Soveta SSSR [Ved. SSSR] [Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR] 1990, No. 39, Item 775; Zaklyucheniye Komiteta Konstitutsionnogo nadzora SSSR, 0 pravilakh, dopuskayushchikh primeneniye neopublikovannykh normativnykh aktov o pravakh, svobodakh i obyazannostyakh grazhdan [Conclusion

international treaties as the basis for invalidating the domestic legislation at issue, although it also cited domestic constitutional provisions to complement the international rules.

In early 1991, I met with Sergey Sergeyevich Alekseyev, the chair of the Committee, in Moscow. I asked him about his tribunal's reliance on international human rights treaties as a means of invalidating domestic legislation, when the formal provisions of the U.S.S.R. Constitution might have provided a sufficient basis for these decisions. One-on-one he was disarmingly frank. "We cannot rely on our domestic law," he explained, "because it has no legitimacy within our society. Only international law gives us hope that people will respect our decisions."[19] He seemed to believe that the function of judicial review, by which experts nullified acts of the legislature, required sources of legitimacy located abroad. At least at this critical juncture, norms did not migrate from international law, rather internationalism empowered specialists to enact outcomes that otherwise were beyond their reach.

A second encounter occurred a year later, after the Russian Federation had superseded the Soviet Union. At a cocktail party I chatted up Vadim Konstantinovich Sobakin, a man I had first met when he served in a senior position in the Central Committee apparatus and then worked with when he became a member of the Committee on Constitutional Supervision. In 1992, he had migrated to the staff of the new Constitutional Court of the Russian Federation. The time was near the anniversary of the 1941 German invasion, perhaps the Soviet Union's greatest trauma. As he was a veteran of that conflict, I asked him which was worse, then or now. He answered immediately and emphatically that now was worse. "Then we had an enemy."[20]

What I took Sobakin to mean is that the crisis that had overtaken and then ended the Soviet Union was deeply disturbing precisely because there was no external actor that could serve as a way of relieving Russians of the responsibility for their current confusion and disarray. Sobakin believed that the other nations of the former bloc had it easier, because they could blame the Russians for their troubles. But Russians had to look to themselves to understand how they had fallen, a much harder task.

I regard these anecdotes as authentic, although certainly incomplete. Both men, as leading legal actors, managed to find important roles in the Yel.tsin regime, but they had made their careers under Soviet power. What these encounters reveal is part of the story of international human rights law and the reconstruction of a superpower. What the men expressed was an understanding of international human rights law as the face of the other. For Alekseyev, the content of international law did not matter so much as the fact that it was not domestic law, and therefore not associated with the discredited and disillusioning status quo. For Sobakin (and perhaps this is a stretch), it served as an anchor for opposing an adversary. Because Russia's tragedy was internal, international human rights law did not help organize ways of thinking about the situation, much less mapping the way out.

There were other voices in the legal community, including those that talked in ways that seemed congenial to the West. Invitations to travel to, and publish in, the West came readily to these people. In particular, Soviet specialists who were lucky enough to have a Baltic identity managed to migrate to, and then flourish in, societies that had closer ties with the West, including its human rights discourse. Within Russia, however, the ways of talking about human rights law that seemed so sensible in Europe proper remained largely peripheral, both politically and intellectually.[21]

The grave diggers of the Soviet state did not completely ignore the concept of human rights. In the interval between the August 1991 failed coup that destroyed Gorbachev as a political force and the formal seizure of the main strands of Soviet power by the Russian Federation in December, the Russian legislature adopted a "Declaration of the Rights and Freedoms of Person and Citizen."[22]

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of the USSR Committee for Constitutional Supervision, on rules for issuing unpublished normative acts with respect to the rights, freedoms and obligations of citizens], Vedomosti S"Ezda Narodnykh Deputatov SSSR I Verkhovnogo Soveta SSSR [Ved. SSSR] [Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR] 1990, No. 50, Item 1080. For my contemporaneous discussion of these decisions, see Paul B. Stephan, *Revisiting the Incorporation Debate: The Role of Domestic Political Structure*, 31 Va. J. Int'l L. 417, 433–35 (1991).

[19] Of course, there is no transcript; this is the best that my memory offers.

[20] Again, fallible memory is my only source.

[21] For an extension of this cultural incomprehension argument from human rights to property rights and other legal concepts associated with liberal markets, see Uriel Procaccia, Russian Culture, Property Rights, and the Market Economy (2007).

[22] Postanovlenie Verkhovnogo Soveta RSFSR o Deklaratsii prav i svobod cheloveka i grazhdanina [Resolution of the RSFSR Supreme Soviet on a Declaration of the Rights and Freedoms of Persons and Citizens], Vedomosti S"Ezda Narodnykh Deputatov Rsfsr I Verkhovnogo Soveta Rsfsr [Ved. RSFSR] [Bulletin of the Congress of People's Deputies of the Russian Soviet Federal Socialist Republic and Supreme Council of the RSFSR] 1991, Issue No. 52, Item 1865. *See also* Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 Am. J. Int'l L. 451, 461 (1994). Five month later, in April 1992, the extant constitution was amended to give the Declaration constitutional status. *Id.*

This declaration drew heavily on international law and stated in particular that "the generally recognized international norms concerning human rights" had priority over the content of domestic legislation.[23] The 1993 Constitution authorized a Commissioner for Human Rights who would serve as an ombudsman for enforcing the Declaration.[24] Accession to the European Convention on Human Rights followed in 1998. But none of these measures can be linked to specific steps taken by or against the Russian state to change concrete aspects of social life. Rather, they served to dress up Russia, to declare and confirm a break with the past but not to establish a program for social or political change.[25]

For someone steeped in Russian history, the flirtation with international human rights law in the 1990s seems another instance of the enduring tension in Russian culture between admiration of, and a desire to belong to, the West, and the Slavophile assertion of a unique national identity rooted in Byzantium and periodic triumphs over foreign invaders, whether Mongol, Lithuanian-Polish, French, or German. The nod toward international human rights law was a westernizing gesture. By the latter half of the 1990s, however, influential Russian specialists in international relations recast international human rights as an example of Western animus toward Russian ideals. For these critics, international human rights law was simply another club wielded by the West to thwart Russia's realization of its unique historical destiny.[26]

C. The Blunders of Shock Therapy and Empirical Research into Legal Institutions

The latter-day Slavophiles returned to prominence in the 1990s largely because the Western-backed restructuring of the Russian economic system had become, in popular perception at least, a disaster. The so-called Washington consensus, at the time simply the popular wisdom but today considered the neoliberal fallacy, prescribed rapid privatization as the precondition to the creation of markets.[27] As a contract consultant to the U.S. Treasury, the OECD, the IMF and the World Bank, I spent these years bumping heads with the Western specialists (economists, accountants, and lawyers) who implemented the shock therapy program, the dismantling of Soviet-era economic institutions in advance of the creation of public and private institutions that a liberal economic system needs to function. Many of these figures seemed to assume that those institutions would arise spontaneously, as if private property and free markets represented a state of nature rather than a particular cultural and historical artifact.

Most Russians then and since saw the 1990s as a time of troubles (*Smutnoye Vremya*), a term with deep historical resonance.[28] The term refers specifically to the collapse of the Muscovite state in the early seventeenth century and the occupation of its territory by the Lithuanian-Polish kingdom. That Russians compared the social and economic disruption and omnipresent Western presence in the 1990s to Russia's historical nadir and national humiliation indicates how badly the reforms went. Life expectancy dropped alarmingly and social inequality exploded. Many Russians perceived the improbable reelection of Yel.tsin as President in 1996 as evidence of corruption of the electoral process funded in part by the West, rather than as a legitimate expression of the popular will. The civil war in Chechnya, with

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[23] Ved. RSFSR, *supra* note 22.

[24] Konstitutsia Rossiikoi Federatsii [Konst. RF] [Constitution] art. 103(1)(f) (Russ.).

[25] The closest thing to a concrete change in social practice associated with international human rights law was the abandonment (but not the abolition) of the death penalty. Russia signed but did not ratify Protocol 6 of the European Convention and hence had no binding international legal obligation to stop executing people. The Constitutional Court of the Russian Federation nevertheless referred to Protocol 6 in the course of interpreting domestic law as barring future use of capital punishment. Bakhtiyar Tuzmukhamedov, *Doing Away with Capital Punishment in Russia: International Law and the Pursuit of Domestic Constitutional Goals*, *in* Comparative International Law 353 (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, eds., 2018).

[26] *See e.g.*, Sergey Vladimirovich Kortunov, *Kholodnaya Voyna: Paradoksy Odnoy Strategii* [*The Cold War: The Paradoxes of One Strategy*], Mezhdunarodnaya Zhizn' 23 (No. 5, 1998), *translated in Is the Cold War Really Over?* 44 Int'l. Aff. 142 (No. 5, 1998). I discussed the significance of Kortunov's views (he was one of Yel.tsin's senior advisors) in Paul B. Stephan, *The Cold War and Soviet Law*, 93 Am. Soc'y. Int'l L. Proc. 43, 50 (1999). I returned to this topic, and pointed out Kortunov's affinity with President Putin, in Paul B. Stephan, *The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy*, *in* The Legal Dimension in Cold War Interactions: Some Notes from the Field 141, 156 (Tatiana Borisova & William B. Simons eds., 2012). For a more recent framing of Russian attitudes toward international human rights in terms of the westernizing-Slavophile dyad, see Mikhail Antonov, *Philosophy Behind Human Rights: Valery Zorkin v. the West?*, *in* Russia and the European Court of Human Rights: The Strasbourg Effect, *supra* note 3, at 150.

[27] For more on this, see Umut Ozsu, *Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World*, 81 Law & Contemp. Probs. No. 4, 2018, at 139 (2018).

[28] *See* Allen C. Lynch, How Russia Is Not Ruled Reflections on Russian Political Development 85–127 (2005).

terrorist consequences for Moscow and other heartland Russian cities, added another level of torment and dismay.

One of the principal architects of the shock therapy program was Andrei Shleifer, a rising star on the Harvard economics faculty. Shleifer worked in Russia through the Harvard Institute for International Development (HIID) and was funded through U.S. AID, then an independent agency of the U.S. government. That something was wrong with the shock therapy project must have been clear to Shleifer by 1997, when U.S. AID shut down the HIID program in Russia because of alleged misconduct by him and his principal aide, Jonathan Hay.[29] In 1998, Shleifer published the first of the pathbreaking papers on legal origins, an econometric inquiry into the effect of legal institutions on economic development.[30] These papers transformed the study of the behavioral consequences of law. As Samuel Moyn indicates in his paper, the legal origins literature frames, even if it did not directly bring about, the quantitative analysis of international human rights law that appeared at the beginning of this century and that several of the papers in this symposium explore.[31]

I can only speculate on what led to this shift in Shleifer's research. It seems plausible, however, that the principal premise of shock therapy — that legal structures necessary for the functioning of a liberal society will emerge spontaneously in response to privatization of state assets — was seriously incomplete, and that this deficiency had become clear to him. I imagine him coming out of the Russian experience recognizing that institutions could not be assumed, but rather rested on specific conditions that required intense empirical study to be understood, much less created. In other words, I believe, although I cannot prove, that Russia gave the impetus for an intellectual inquiry that led the way to the quantitative analysis of international human rights law, just as it provided the *lieu de memoire* for the field itself.

After the 1990s, Russia enjoyed, if not a Thermidor, at least a restoration. Vladimir Putin, as President and, intermittently, Prime Minister, emerged as a strong leader in place of the exhausted, decrepit Yel.tsin. An oil price boom, coupled with brutal but definitive resolution of the Chechnya conflict and political stability based on recentralization of power in the Kremlin, brought Putin to new heights of domestic popularity.[32] Without expressly disavowing international human rights law, the Russian state increasingly distanced itself from the concept. A defining moment came when the European Court on Human Rights determined that Russia's nationalization of Yukos, what had been the country's largest energy company, transgressed the European Convention.[33] In response to what was the largest judgment in the European Court's history in favor of a human rights victim, the Russian Federation empowered the Constitutional Court to review such judgments for their constitutional validity. The Constitutional Court obligingly ruled that Russia was constitutionally barred from honoring the European Court's judgment in this case.[34] Without denouncing the Convention, Russia has effectively disavowed its obligations under it.[35]

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[29] These events imperiled a program I had put together to bring Russian judges to the United States. HIID had agreed to fund the trip before the ax fell on its Russian work. At the last minute U.S. AID agreed to release money for my event, allowing several members of the High Arbitrazh Court to spend a week at the U.S. Tax Court. The U.S. government initially brought criminal charges against Shleifer and Hay, accusing them of abusing their positions in the federally funded program for private gain. It then dropped those charges but obtained a substantial civil settlement from Shleifer, Hay, and Harvard. JANINE R. WEDEL, SHADOW ELITE: HOW THE WORLD'S NEW POWER BROKERS UNDERMINE DEMOCRACY, GOVERNMENT AND THE FREE MARKET 144 (2009).

[30] *See* Rafeal LaPorta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON., no. 6, Dec. 1998, at 1113.

[31] *See* Samuel Moyn, *Beyond the Human Rights Measurement Controversy*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 121.

[32] ALLEN C. LYNCH, VLADIMIR PUTIN AND RUSSIAN STATECRAFT 53–64 (2011).

[33] OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R. (2011). Whenever I discuss that dispute, I am constrained to disclose that I have participated in multiple proceedings as an expert witness on behalf of Yukos and its investors, although I did not take part in the case before the European Court. One should discount my views accordingly. *See* Paul B. Stephan, *Taxation and Expropriation — The Destruction of the Yukos Oil Empire*, 35 HOUSTON J. INT'L L. 1 (2013).

[34] Konstitutsionnyy sud Rossiyskoy Federatsii Postanovlenie ot 19 yanvarya 2017 g. N. 1-P [Resolution No. 1-P of the Constitutional Court of the Russian Federation of January 19, 2017], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federal Collection of Legislation] 2017, No. 1-P, 180, http://www.ksrf.ru/en/Decision/Judgments/Documents/ 2017_January_19_1-P.pdf [https://perma.cc/G7HX-4H5Q] (official English translation).

[35] The judgment provoked Bill Bowring, otherwise a vigorous defender of Russia's engagement with European Convention and the Strasbourg Court, to admit that "it may be that the recent Yukos judgment of the Russian CC provokes a final rupture in relations between Russia and the [Council of Europe]." Bill Bowring, *Russia's Cases in the ECtHR and the Question of Implementation*, *in* RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT, *supra* note 3, at 188, 221.

III

International Human Rights Law in Light of the Russian Experience

This episodic account of Russian encounters with international human rights law has four purposes. First, it illustrates the importance of case studies that draw on intensive local knowledge. Second, it supports a characterization of international human rights law as both geographically and temporally contingent. Third, and in connection with the second purpose, it indicates ways in which international human rights law can be used instrumentally for purposes other than the advancement of human dignity. Fourth, it suggests some challenges to quantitative analysis of national practice with respect to international human rights law.

A. The Importance of Local Knowledge

One of the collateral effects of the end of the Cold War was the sudden unfashionability of area studies as an academic approach to international relations. This has not been a complete loss: Area-studies experts suffered from insularity and too often resisted making connections between what they knew well and broader social issues. But the bundling of historical, cultural, and political knowledge that the best area-studies people deployed could deliver insights that other methodologies could not. There may be such a thing as too much context. But the use of resonance as a means of making sense out of discrete observations gave us something that fancy theory and quantitative analysis do not. I do not mean to disparage either theory or empirical work. Scholarship without theory is journalism, an unreflective and uncritical account that engages neither other scholars nor the world at large. Empirical work makes it possible to challenge and revise theory. My concern is that the turn against area studies in the early 1990s in the United States, if not elsewhere in the academy, abandoned an essential element of empirical work and foreclosed a particularly important theoretical move — local variation. At its best, deep local knowledge complements and extends what we can get from fancy theory and quantitative analysis. It brings authenticity and additional possibilities for falsification of theory-driven claims. It can also guide quantitative inquiries, as I discuss below. Deep local knowledge is, in sum, a useful and perhaps indispensable means for studying any significant social phenomenon, the societal effects of international human rights law included.

B. The Contingency of International Human Rights Law

The Russian story serves another purpose. It represents one piece of evidence undermining the more grandiose claims for international human rights law. It indicates that international human rights law does not represent a widely accepted consensus on fundamental principles about good societies. Rather, at least for Russia, what gets put into the international human rights basket depends a great deal on the place and time.

This finding opens the door for further references to local knowledge: What about China, India, Brazil, South Africa, Japan, Indonesia, and Malaysia (just to focus on large countries outside the traditional West)? How thin is the cloak of words ascribing human rights law, and how thick are the local interpretations and implicit understandings of these words? What changes over time, and in what direction? Is the conception of international human rights law as universal norms — widely understood if not necessarily widely honored — misleading, perhaps even a mystification?

As someone who has spent too much time in Russia, both physically and intellectually, the idea that international law often, and perhaps largely, represents local claims rather than universal norms comes naturally to me. Long before the human rights moment of the 1970s, Soviet and U.S. specialists advanced fundamentally different visions of what constitutes international law and what results from the existence of an international legal obligation.[36] The collapse of the Soviet Union led some triumphalists to assert that a new era of universal liberal values, largely inscribed in international law, had emerged. A quarter century on, liberal internationalism seems a passing impulse, no longer dominant even in the western capitals (first and foremost Washington) where it originated.

Reflecting these changes, a new field has emerged, comparative international law, that explores the foundations of variation in claims about international law among states and regions. Research has uncovered both systematic differences in the claims and striking contrasts in the cultures and training of international lawyers.[37] Much work remains, but it seems clear that both structural state incentives of the sort that rational-interest international-relations scholars investigate and cultural structures of the sort that constructivists explore have much to do with what passes for international-law claims in various parts of the world.

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[36] *See e.g.*, Leon Lipson, *Peaceful Coexistence*, 29 Law & Contemp. Probs. No. 4, 1964, at 871; Leon Lipson, *The Rise and Fall of "Peaceful Coexistence" in International Law*, *in* Papers on Soviet Law 6 (Leon Lipson & Valery Chalidze eds., 1977).

[37] Comparative International Law, *supra* note 25; Anthea Roberts, Is International Law International? (2017); Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Exploring Comparative International Law*, 109 Am. J. Int'l L. 467 (2015).

This general phenomenon has particular significance for international human rights law. Much of the normative pull of this body of norms rests on its aspirations to universality. The claim that these rights derive ultimately from natural law or deep moral commitments seems hollow if what we observe in the world is not simply a dispersion of legal rights but systematic differences in how states not only apply, but conceive of these institutions. The Russian story fits into a larger narrative that unmasks universality as pretentious, and perhaps hegemonic.

As I have argued elsewhere, proponents of international human rights law need not be dismayed by this news.[38] Divergence in the content and conception of this body of law indicates its importance, not its irrelevance. If international human rights law had no bite, states would have no difficulty embracing it and would have no need to adapt it to local conditions. That adaptation occurs suggests that states take the law seriously.[39]

This argument, however, is inferential rather than empirical. It may be that states, even as they adapt, also circumvent or ignore these obligations. The results of comparative international law, to which my Russian story adds an exclamation point, underline the importance of serious study of how international human rights law manifests itself in different societies.

C. Instrumental Uses of International Human Rights Law

The Russian story suggests another side to advocacy of international human rights. Between 1990 and 1993, a fierce political struggle unfolded over control of the state and its resources. The first stage involved a contest between those wielding authority under the auspices of the U.S.S.R. (led by Gorbachev) and those associated with the reconstructed R.S.F.S.R. (led by Yel.tsin). This contest ended in December 1991 with a deal under which Yel.tsin relinquished claims to the non-Russian part of the U.S.S.R. in return for the agreement of ten other components of the Soviet state to leave the Union and thus surrender their claims on Russia (four other Republics already having declared their independence). The second stage fit into a long tradition in Russian history, as the prevailing group in Russia fought amongst itself for suzerainty over what it had wrested away from the U.S.S.R. The conflict reached its climax in October 1993, when the presidential administration carried out an armed attack on the parliament that resulted in hundreds of deaths and the political (but not physical) liquidation of Yel.tsin's adversaries.[40] International human rights law did not play a major role in these battles, but it did appear on the periphery. As noted above, in the first stage the U.S.S.R. Committee on Constitutional Supervision, on the one hand, and the Russian legislature, on the other, signaled their loyalty to the idea of international human rights law. These signals were more conceptual than programmatic. They reflected an intuition that embracing an "other," however incompletely understood and however undefined the embrace, would work better than using illegitimate domestic practice to make particular reform programs more attractive. The question became which side could more credibly claim to have broken with the past, with a supposed submission to international human rights law serving as an indicator of the break.

The second stage of the struggle put these claims in a new and darker context. One dimension of the conflict between Yel.tsin and his opponents was the rule of law, an idea laced with human-rights implications. The Soviet legacy was one of arbitrary fiat, of legality serving to dress up assertions of power. The new regime promised that it would adhere to a Western notion of law-based governance. The problem, however, was that the extant Russian Constitution, although amended many times since 1990, still subordinated presidential authority to parliamentary control. The Constitutional Court, which was supposed to embody this new approach to legality, sided repeatedly with the parliament in opposing presidential seizures of power. In response, Yel.tsin shut down the Court just as he sent in the tanks to oust the parliament. He allowed the Court to reopen only in 1995, with a new chair and now suitably chastened. Twenty-two years on and counting, the Court has yet to pose a serious barrier to actions that the executive has indicated to be important.[41]

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[38] Paul B. Stephan, *Comparative International Law, Foreign Relations Law and Fragmentation: Can the Center Hold?*, *in* Comparative International Law, *supra* note 25, at 53.

[39] *Id.* at 67.

[40] Narratives about the 1993 uprising vary radically. For the United States, it represented a commendable suppression of reactionary forces by well-intended reformers in tune with U.S. policy. A more critical view is expressed in Lynch, *supra* note 28, at 136 ("[T]he distinguishing mark of Yel.tsin's presidency is his use of Russian tanks in October 1993 to destroy the Russian parliament, thereby resolving Russia's most important dispute over policy and the nature of the regime by the bullet rather than the ballot. Russia's authoritarian constitution, which vests highly concentrated powers in the hands of the (elected) executive, is a direct consequence of that failure of policy.").

[41] In one of the paradoxes of history, Valeriy Dmitriyevich Zor'kin, the Constitutional Court chair whose ouster Yel.tsin procured in 1995, was restored to the chair under Putin and has become an articulate proponent of the idea that Russian legal thought represents national exceptionalism to which Western legal thinking is inimical. Antonov, *supra* note 26, at 155–59.

Perhaps one need say nothing more about this episode than that transplanting of international human rights law into Russia in the early 1990s was sincere but incomplete. Yet it has an air of bait-and-switch, of opportunistic invocation of abstract foreign ideals as a way of smoothing a regime change. Although only a datum, it is consistent with the feint hypothesis about international human rights law, namely that states may undertake human rights obligations to deflect outside scrutiny of their authoritarian practice.[42]

This raises the possibility that international human rights law might, in particular contexts, have perverse effects and that state actors could use them for their own purposes. The task of the scholar becomes connecting the misdirection to the intended effect. Establishing intentionality can be difficult, even with thick description. Quantitative analysis also poses difficulties, given the significant gap between correlation and causation. Work that focuses on talk to the exclusion of behavior confronts especially great challenges.[43]

Perhaps one can dismiss the Russian story as an outlier. States that act in bad faith may be rare and uninteresting. Perhaps such conduct gets caught sufficiently often to make the payoff of its discovery too slight, in light of the damage that the bad-faith narrative does to the project as a whole. Yet this loose end remains troubling, especially if one entertains the possibility that conventional human rights claims serve largely as distractions from more fundamental questions of social and economic justice.

D. Challenges for the Quants

Like any methodology, empirical work can have its shortcomings. Its practitioners can fall in love with deep dives into rich data sets and lose track of the reasons for interrogating the data. They can let the ease of coding drive their agenda, thereby neglecting critical but difficult-to-measure phenomena. They may focus on irrelevant results simply because they are obtainable. Yet for all this, quantitative tools, used wisely, can unlock secrets and upend our beliefs about social life. The arguments for quantitative analysis fall into two categories. First, there is the compared-to-what point. Nonquantitative analysis has its own problems. Scholarship is, in essence, a way of talking, and talk about talk seems to me unsatisfyingly circular. This is what academics do when they write about each other. War, misery, and indignity deserve more.[44] The practice of war and degradation, and not how we talk about it, merits our attention.[45] Second, quantitative empirical work at its best is democratic and egalitarian in a way that talk scholarship is not. To be sure, there can be biases in what one chooses to observe and how one defines an observation. But once one lays out one's approach, others can test it for replication.[46] There is something satisfying in imposing this discipline on even the most exalted and honored of scholars. As well as democratic, empirical work can also be egalitarian. Studying talk necessarily favors the articulate and arresting; observations, by contrast, can focus on the mundane but meaningful. There is no question that quantitative empirical work can hide behind equations and numbers as a means of intimidating critical responses. The garbage-in-garbage-out risk is ever present. But, if done with care and imagination, it can expose the lives and concerns of those that, exactly because they are inarticulate, drop out of talk scholarship.

That said, the Russian story remains a cautionary tale for those seeking to apply quantitative analysis to law, especially international human rights law. How does one code for the chasm between formal commitments (constitutional commitment to international human rights law as a source of higher-order,

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[42] *See* Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). As Moyn notes, this is a leading article in the field of quantitative analysis of human rights practice. Moyn, *supra* note 31, at 3.

[43] *See e.g.*, Hyeran Jo & John Niehaus, *Through Rebel Eyes Rebel Groups, Human Rights, and Humanitarian Law*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 101. To be clear, establishing what significant actors say is an essential part of any study of legal institutions. But without some way of linking expressions to actions, one can miss a great deal.

[44] I am unclear, for example, as to the constitution of the dependent variable in Cosette D. Creamer & Beth A. Simmons, *A History of Self-Reporting: The Impact of Periodic Review on Women's Rights*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 31. Is the point that periodic reporting leads to better reporting, or that better reporting translates into an increase in enforcement resources and better life opportunities for women? How are better life opportunities measured, and how does one segregate the effects of reporting from other variables such as income growth, restructuring of the labor market, educational opportunities, etc.? Better reporting alone is simply talk; life outcomes are, I would have thought, what we want to measure. Perhaps the data sets they use get at this, but a reader, at least, goes away uncertain.

[45] Thus, as much as I admire Oona Hathaway and Scott Shapiro, I regret the arc traced from Hathaway, *supra* note 42, to OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW THE WORLD (2017). The first work, however controversial, made a stab at getting past talk to identify the revealed preferences of particular regimes. The new book, by contrast, equates talk about remaking the world with remaking the world itself. No doubt both projects are contributions, but the former seems to me invaluable in a way that the latter is not.

[46] Barbara A. Spellman, *Science in Spite of Itself*, 544 NATURE 414 (2017).

judicially enforceable norms) and the institutional enforcement structure (housebroken judiciary, including the Constitutional Court)? Does resistance to Western conceptions of human rights norms count as a violation, or instead expose the complexity and indeterminacy of the international regime?[47] In the field of human rights, is Russia a scofflaw or a norm entrepreneur?

These questions suggest at least two challenges for quantitative empirical analysis. First are coding issues that arise when official actors adopt a Potemkin-village response to legal obligations. Astute observers may be able to swap out action (what lurks behind the facade) for talk (the facade), but knowing when and how to do so requires considerable local knowledge. Second, and even more problematic, is the possibility that local conditions so completely dominate a country's outcomes as to make comparative analysis irrelevant. Local knowledge might lead us to conclude that observations made at a particular time and place represent outliers that do not belong in a respectable data set.

None of these points should be seen as rejecting quantitative empirical work as such. To say that it can be hard to do this kind of research well is not to say that it should not be done. At the end of the day, much good can come out of assembling well-conceived data sets and then addressing them with smart questions. It all depends on what we consider well-conceived and smart.

This provokes a final point. There is an argument, in this symposium most clearly stated by Samuel Moyn, that quantitative empirical work can distract the researcher from the really important questions.[48] The satisfaction gained from elegant exploration of the world as we find it may substitute for thinking about what a good society should look like. We must be clear about the preconditions and constitution of justice, the argument goes, before we consider whether the marginal effects of our legal instruments make the world a better place. Studying these effects, in the absence of an inspiring vision of the good, becomes a waste of valuable intellectual energy.

I take Moyn's argument as more about the political economy of the academy in rich countries than a categorical claim about the pursuit of knowledge as such. Justice-imaginers and bean-counters compete for scarce academic resources. Academic bureaucrats may be lulled into a false comparison of quantitative empirical social science work with the more prestigious accomplishments of hard science. These bureaucrats also may resist supporting really challenging inquiries into the fundamentals of justice, as that work raises uncomfortable questions about the status quo that entrenched academics prefer to ignore.

I have no doubt this is true. But I wonder to what extent the rich world's academies are the right place to look for transformative visions and compelling new politics. For those of us who work in the Russian tradition and the upending of social relations and the creation of a new kind of politics that have occurred there, the contribution of university professors seems sparse indeed.[49] Herzen, Marx, Engels, Bakunin, and Kropotkin, as well as Plekhanov, Zasulich, Martov, Trotsky and Lenin, did journalism and published articles and books, but to my knowledge none ever held an academic position. They were members of the intelligentsia, but not of academia.

Of course, it very well may be that this observation demonstrates a poverty of imagination about the academia. Whatever the role of the academy in the late nineteenth century West, the contemporary university serves as a pillar of the information economy. Exactly because of the academy's importance in serving the status quo, it has the capacity to challenge and even transform the knowledge-based global society. Yet I wonder.

IV

CONCLUSION

As to how the academy should proceed in the study of international human rights, I am agnostic. Perhaps the future of international human rights law is to open up new visions of a just and human global order, to transcend both talk-about-talk and bean-counting and to provoke concrete action across many dimensions. Perhaps academic researchers will play a leading, or at least helpful, role in all this. It remains my conviction, however, that local knowledge will be indispensable to this enterprise. By this I do not mean that it won't be dispensed with, but rather that without confronting, embracing, and extending local knowledge the enterprise is not likely to end well.

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[47] *Cf.* Kevin L. Cope, Charles Crabtree & Christopher J. Fariss, *Conceptualizing Repression*, 81 Law & Contemp. Probs. No. 4, 2018, at 185.

[48] Moyn, *supra* note 31, at 3.

[49] *See generally* YURI SLEZKINE, THE HOUSE OF GOVERNMENT (2018) (documenting the transformation and the transformers).

Validity of Law in Modern Theoretical Discourse

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ABSTRACT
The article deals with important category of “validity of law”, which is not sufficiently deeply and fully elaborated in juridical literature. The author gives a detailed overview of interpretations of this category in the works of foreign philosophers of law (R. Alexy, R. Kaufmann and others). As a result of the analysis, the author concludes that a combination of positivist and jusnaturalist approaches that complement each other is necessary to adequately understand the validity of the law. This provides an opportunity to build an integrative theory based on the understanding of the validity of law as an order uniting the natural and will-established beginnings.
Keywords: validity of law, positivism, jusnaturaism, human rights, law, judgment, integrative theory of law

The validity of law is its essential feature. An invalid law is “outside the law” or even “contrary to the law”. Solely a valid law guides the addressees of legal norms towards a certain behavior. “If invalidated, — G. V. Maltsev wrote, — a rule of law ceases to be a law, and is no longer capable to regulate social interactions”[1]. The effectiveness of law is one of the most important criteria for validity thereof, although this does not imply the identity of the concepts of validity and effectiveness of law.

The issue of validity of law arises or may arise in law-making practice solely in relation to particular norms (institutions), novel legislation. Legal validity of the entire relevant regulatory system can only be a point at issue in extreme instances only, where the social order as a whole appears to be under a threat of destruction. Then, it may well be the case where we have to state the existence of “beyond the law” and “against the law” status (E. Fechner).

The problem of the validity of law is complex and multidimensional. This problem is discussed in the context of the debate about the types of legal consciousness, about evolution of multiple theoretical approaches to law[2]. Therewith, the “focal” meaning (D. Finnis) of the problem of the validity of law is seen in some particular aspects of this problem: “…naturalists readily use the “validity of law” term, emphasizing the ideal nature of law; positivists tend to investigate the “normativity” and the formal aspect of law; representatives of psychological branches of law study the “binding force” of and even the sense of “being binded with” the law; legal realists seek to discover “effectiveness” of law”[3]. The question of the ideal nature of law as a basic concept of naturalism is actualized in modern theoretical discourse in discussions between advocates of positivist and non-positivist approaches to law, distinguished by recognition or non-recognition of moral values in law.[4]

Modern theories of the validity of law, including natural law theories, should be evaluated, bearing in mind their representatives’ strive towards integrative (integral) conceptual, as well as methodologically overcoming (with appropriate particular positions substantiated) the pluralism of theoretical views on law. In this natural law doctrine this is expressed in the trend towards alignment of a priority ideal measurement for the given law branch with its real measurement, its naturality with the positiveness thereof, its validity with its effectiveness, towards finding a balance between them and thereby avoiding the dualism of the natural law and the positive law as the two normative systems opposed to each other, which is specific for classical theories of the natural law. Thus, according to the famous German legal theorist R. Alexy, various elements of the concept of law and concepts of reality — social reality (effectiveness), moral and legal validity, which correspond to the said elements, should be balanced and counterweighted in the unified structure of law.[5] The ultimate basis for the validity of law is the “claim

[1] Maltsev G. V. Social Grounds of Law [Sotsial’nye osnovaniya prava]. M., Norma Publ., 2007. PP. 589–590. (In rus)

[2] See information on the discussion of this problem in the context of legal positivism: Timoshina E. V. The Concept of Normativity of L. I. Petrazhitsky and the Problem of the Validity of Law in Legal Positivism of the Twentieth Century [Kontseptsiya normativnosti L. I. Petrazhitskogo i problema deistvitel’nosti prava v yuridicheskom pozitivizme XX v] // Jurisprudence [Pravovedenie]. 2011, No. 5. PP. 46–71. (In rus)

[3] Vasilyeva N. S. The Problem of Legal Validity in The Anti-Metaphysical Approach (Alf Ross’s Conception) [Problema deistvitel’nosti prava v antimetafizicheskoi traditsii (kontseptsiya Al’fa Rossa)] // RUDN Journal of Law [Vestnik Rossiiskogo universiteta druzhby narodov. Seriya: Yuridicheskie nauki]. 2017. Vol. 21, No. 3. P. 397. (In rus)

[4] See: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). Moscow — Berlin, Infotropic Media, 2011. PP. 3-4 (Trans. from germ)

[5] About the author’s given definitions of the validity of law; see ibid. PP. 105–108.

to correctness".[6] Such balancing, according to Alexy, "is in the very foundation of law. This balancing is a part of the nature of law".[7]

The idea of duality of law (rather than dualism) is based upon in unity and integrity of law and order sought for by R. Alexy through balancing of its multiple elements — positivity and naturality of law (correctness, moral justification). Positivity of law, as R. Aleksy emphasized, is necessary. It is not exclusive by nature, nevertheless. Otherwise, the aspiration of law to have substantive correctness (justice), which does not disappear even after institutionalization of law, would appear to be undervalued[8] Such substantive correctness applies solely to ideal dimension of law. Correctness of a different kind ("second- order" correctness, according to Alexy) applies to both justice and legal certainty, which is achievable solely in the sphere of positivity (the real dimension of law).[9] Justice as a "second-order" correctness sanctions the necessity in positivity of law, since this necessity itself "is proceeding from the moral requirements to avoid side-effects of anarchy and civil war and to achieve the advantages of social coordination and cooperation."[10] Therewith, R. Alexy believes, it is possible to link both the moral principle of justice and the formal principle of legal certainty with law. Their correct correlation is a condition for the harmony of the legal system.[11]

The most important element of the positivity of law, along with its proper establishment, is, according to Alexy, the social effectiveness (social validity) of law. According to him, norms that are not socially valid, cannot be legally valid either.[12] Criteria of social validity: compliance with norms and application of sanctions for non-compliance thereof.[13] These criteria are assumed from the principle of legal certainty and do not extend beyond the real dimension of law. Meanwhile, R. Alexy emphasizes that in contrast to positivism, according to which only elements of social reality are included in the concept of legal reality, in his non-positivist theory, this concept also includes elements of moral reality.[14]

R. Alexy builds his construction of law and order from the standpoint of the moral philosophy of law as a proponent of "soft" internalist non-positivism theory, following the famous G.Radbruch "formula". He echoes G. Radbruch asserting that, if the norms extend beyond a certain threshold of injustice, they lose their legal nature.[15] In a modern democratic constitutional state such "threshold" consists in the basic human rights, such as the right to life and security of person.[16]

R. Alexy builds his conception of human rights on the basis of the discourse theory of law, which he develops taking sue from J. Habermas. R. Alexy is the author of its original version as a procedural theory of practical rationality. According to Alexy, a discourse procedure is rational if it complies with certain rules concerning the adequate use of legal arguments (requirements for comprehensiveness of the argument, non-contravention, terminological clarity, etc.) and ensuring impartiality of the line of reasoning. The rules guarantee the freedom and equality of parties in the discourse as the basis of human rights.[17] "The underlying principles of a democratic constitutional state, i.e. freedom and equality, comply with these universal rules".[18] R. Alexy connects institutional procedures for legal framing with discursive ones.[19] At the same time he is governed by criteria of rationality of the discourse and the legal system's aspiration to correctness as a moral justification of the basic human rights.

According to Alexy the human rights are not being introduced from the outside but should be justified in the course of a rational discourse. Rights are valid if they exist, while existence of the rights consists in their justified status with respect to each and every one, who expresses a desire for participation

[6] See ibid. PP. 41-42.

[7] Alexy R. The Dual Nature of Law [Dual'naya priroda prava] // Jurisprudence [Pravovedenie]. 2010, No. 2. P. 146. (Trans. from eng)

[8] See ibid. P. 145.

[9] See ibid.

[10] See ibid.

[11] See ibid. P. 146.

[12] See: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). P. 107

[13] See ibid. PP. 105-107.

[14] See ibid. PP. 107-108.

[15] Alexy R. The Dual Nature of Law [Dual'naya priroda prava] // Jurisprudence [Pravovedenie]. 2010, № 2. P. 59. (Trans. from eng)

[16] See ibid. P. 80.

[17] See: Alexy R. Legal Argumentation as a Rational Discourse [Yuridicheskaya argumentatsiya kak ratsional'nyi diskurs] // Russian Yearbook of the Theory of Law [Rossiiskii ezhegodnik teorii prava]. 2008, No. 1. SPb., 2009. PP. 446–456. (Trans. from eng)

[18] See ibid. P. 453.

[19] See ibid. P. 454.

in the rational discourse.[20] The constitutional rights shall "prevail over all other regulations".[21] But the existence of rights is not determined by a constitution, and inters alia, in a democratic constitutional state. The existence of rights is determined solely by their validity as a result of the intersubjective rational discourse. R. Aleksy's natural law concept, due to its debatable nature and in this meaning of its procedural construction, is not in line with classical natural law theories and thereby seems to have lost the absolute scale value, which is specific for natural law (ius naturale), for assessing the validity of law.

R. Alexy, however, insists that human rights as moral rights (moral requirements) "belong exclusively to the ideal dimension of law".[22] And further: "Their transformation to constitutional rights, i.e. to positive rights, constitutes an attempt to combine the ideal dimension with the real one".[23] The balance of ideal and real dimensions of the law seems to be achieved. But it is achieved within the framework of the positive law. Although the rational discourse is repeatedly renewed time and again, as moral requirements of the rights, which were not previously recorded in the Constitution are emerging, Alexy's ideal dimension of the law is destined to be absorbed by its real dimension, i.e. by the positive law. Non-positivism gives way to positivism.

The concept of procedurality of the natural law (according to Alexy, this is a rational discourse process), which is specific for the modern natural law, originates from the well-known formula of "the natural law with changing content" by R. Stammler.[24] At the same time, as early as in the beginning of the 20th century, the thesis of classical natural law theories about once and forever granted natural human rights was also questioned. The question of the existence of human rights outside the positive law still arises today when it comes to recognition of the human rights, which are not stipulated in the legislation.[25] This question is particularly relevant for constitutional law and constitutional justice theory.[26] The international law is not an exclusion here, the generally recognized principles and rules of international law, which have been currently referred to in international legal acts are deemed to be exhaustive. Beyond the scope of these acts, according to V.V. Lapaeva, "there will always … remain some particular concepts, principles and rules, which have not been yet recorded in official documents, but, nevertheless, are already deemed (or may be deemed) recognized in the international community".[27] From the standpoint of the natural law such unipositive ideas, principles and rules are referred to ideal dimension of law. Should not we, therefore, also agree to the argument that "the natural law will always be featured by legal dualism, which had accompanied this approach throughout the whole history of development".[28]

The general theoretical discussions about the relationship between law and justice (law and morality) that erupted after the Second World War have not received the same attention in recent decades. More and more noticeable is the desire to shift this "key issue" of theoretical jurisprudence into the legitimation space of justice. This trend is supported by the idea of the integrity of law, which also covers law enforcement practice.

Thus, R. Alexy includes also the law enforcement procedure in the concept of law, distinguishing between rules (norms) and principles of law after the American philosopher of law R. Dvorkin. The law, he says, includes legal principles and normative documents that serve to justify the decision of an executor of law in the area of uncertainty of the law in order to comply with the claim to correctness. In this situation, R. Alexy's idea of balancing various aspects of law means balancing of rules (the real dimension of law) and principles (the ideal dimension). In substance, the judge renders a decision based on moral norms (principles) and in the form, he acts on the basis of legal principles.[29]

According to R. Alexy, the balance is also required between the principles themselves. This does not cause difficulties for the executor of law when it comes to the Constitution of a democratic and social state governed by the rule of law, which provides for the fundamental principles of personal dignity, freedom, equality, etc. The task of the judge then is to achieve a balance between the principles through

[20] See: Alexy R. The Existence of Human Rights [Sushchestvovanie prav cheloveka] // Jurisprudence [Pravovedenie]. 2011, No. 4. PP. 21–31.

[21] Alexy R. The Dual Nature of Law [Dual'naya priroda prava]. P. 149.

[22] See ibid. P. 150; see also: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). P. 129.

[23] Alexy R. The Dual Nature of Law [Dual'naya priroda prava] P. 150.

[24] See: Stammler R. The Essence and Tasks of Law and Jurisprudence [Sushchnost' i zadachi prava i pravovedeniya]. M., 1908.

[25] See, for example: Gadzhiev G. A. Ontology of Law [Ontologiya prava]. M., Norma, 2013. P. 143. (In rus)

[26] See ibid. PP. 143–144.

[27] Lapaeva V. V. Types of Legal Understanding: Legal Theory and Practice [Tipy pravoponimaniya: pravovaya teoriya i praktika]. M., Russian Academy of Justice, 2012. P. 122. (In rus)

[28] See ibid.

[29] See: Alexy R. The Concept and Validity of Law (Reply To Legal Positivism). P. 96; see details: PP. 86–102.

their optimizing.[30] However, in other legal systems, a judge's decision implies a claim to correctness as correct moral validity. R. Alexy emphasizes referring to I. Kant, the regulative nature of the idea of correct morality as a goal to be pursued.[31] In this sense, human rights as morally justified demands for freedom, equality, justice and personal dignity, according to R. Alexy, take the universal form as a potential criterion for the validity of modern constitutional normative orders, which indicates the "right" way.

Has the natural law finally managed to find the "third way" — the way of synthesis of the natural law and positivism? A. V. Polyakov tends to believe that it was done successfully, for example, by German jurist A. Kaufmann (in the interpretation of his theory by A.V. Polyakov).[32] Indeed, A. Kaufmann, a representative of the phenomenological and existentialist philosophy of law,[33] proceeding from the polarity of natural and positive law, altogether emphasizes that the polarity does not mean their antinomicity. The ontological structure of the law becomes apparent in the duality of the essence and existence of the law, its naturality and positivity.[34] The reality of the law is "realized through the connection of the essential and existential elements, the naturality of the law with positivity, so that it becomes clear that the justice and the rule of law, the validity and the effectiveness, the lawfulness and the power, the legitimacy and the legality are not identical, antinomic but are interrelated as polar forces and are fruitfully changeably bound".[35] A. Kaufmann attention is not distracted from positivistic (sociological positivistic) nature of the criterion value of law effectiveness for determination of its validity. In contrast to positivism, A. Kaufmann writes, which perceives the validity of a rule as a pre-determined reality, the natural law doctrine recognizes reality as a criterion of validity.[36]

A. Kaufmann constantly reminds that the positivity and the essence of law (which is equitable by origin) cannot be separated from each other, and the essence of law is not super positive.[37] However, it turns out that as a possibility of law (in the Aristotelian sense) the essence is still super positive, although in its ideal being, according to Kaufmann, it does not yet possess the validity, which is first acquired through positivation.[38] First — in a positive law but finally and completely — in a "correct" law enforcement decision. Only in justice (acts of executive authorities, etc.) does the law become fully valid.[39] And thus, according to Kaufmann, it becomes effective as well.

According to Kaufmann's theory the law is just in nature, since it stems from the nature of things.[40] But the following question is unavoidable: how can we work out its oughtness for a legislator, a judge from the natural beingness of the law? A. Kaufmann has to resort to the natural rule (not natural law) concept as a ground rule, to the principle of logically (not ontologically) primary stage of the establishment of the law preceding the stages of positive law and law enforcement decision.[41] His special focus is on the fact that this is a law, not a right, that the law is primary logically not ontologically.[42] After all, the author himself criticized "all attempts to justify, along with the actual positive law, an ideal super-positive law (the essence of law)".[43]

Ultimately in order to overcome the dualism of the natural and positive law A. Kaufmann is trying to double the concept of justice (and legitimation): the rule, being an emanation of the will of the legislator, is "just in law," and the law is "just in nature".[44] That said the justice of the rule "in law" assumes that it is based on the principles and values of the law, which the legislator simply "believes to be given".[45] However, these principles and values, according to Kaufmann, are not in themselves a law, but in a

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[30] See ibid. P. 97.

[31] See ibid. P. 102.

[32] See: Kozlikhin I. Yu., Polyakov A. V., Timoshina E. V. History of Political and Legal Doctrines. Textbook. Ed. St. Petersburg State University [Istoriya politicheskikh i pravovykh uchenii. Uchebnik. Izd. Sankt-Peterburgskogo gosudarstvennogo universiteta], 2007. PP. 466–467. (In rus)

[33] A.V. Polyakov refers A. Kaufmann to hermeneutical branch in the philosophy of law (see ibid., P. 466).

[34] See: Kaufmann A. Ontological Structure of Law [Ontologicheskaya struktura prava] // Russian Yearbook of the Theory of Law [Rossiiskii ezhegodnik teorii prava]. 2008, No.1. P. 145.

[35] See ibid. P. 157.

[36] See ibid. P. 156.

[37] See: Kaufmann A. Ontological Structure of Law [Ontologicheskaya struktura prava] // Russian Yearbook of the Theory of Law [Rossiiskii ezhegodnik teorii prava]. 2008, No. 1. PP. 159 and etc. (Trans. from germ)

[38] See ibid. P. 158.

[39] See ibid. P. 173.

[40] See ibid. P. 171.

[41] See ibid. P. 173.

[42] See ibid. P. 172.

[43] See ibid. P. 159.

[44] See ibid. P. 171.

[45] See ibid.

"frozen" rule that does not possess, as he believes, a normativity, the law is not yet fully valid. But, one objects, it is through rules that the essence of the law is being actualized in the specific law enforcement decision, which as a creative product, "always stems from the nature of things".[46] So, "starting with the ontological structure of the law, Kaufmann unwittingly arrives at axiology. After all, the existence of law (making the right decision in a particular situation, taking into account the nature of things) is possible only on the basis of the law, that is, as it should be in the context of the values, which justify the law."[47]

If in the discursive theories, the procedurality of the natural law is determined by the discourse, in the context of Kaufmannische existence of universals the dynamism, procedurality is a way of the very existence of law as its never-ending updating and specialization, ultimately — in the "correct" decision of executors of the law. The law (the natural law), A. Kaufmann writes, is not static, it "possesses a temporal structure of historicity" and "should be constantly re-implemented in order to arrive at itself, it is not a finished law but at all times a becoming law".[48] The naturality and positivity of the law exist, he emphasizes, only against each other, and this is the relationship of continuous actualization, bringing them again and again in line with what should have been realized. On this count Kaufmann perceives the true meaning of the natural law problem.[49]

Legal doctrine of A. Kaufmann is human-centered. He reinterprets the natural law category of human nature from the personalistic philosophical standpoint, based on the proportionality of law and man as an individual (person) — both spiritual individuality and social individuality.[50] But Kaufmann still cannot possibly avoid in his theory a constant perceptible dualistic tension between spirituality and sociality of an individual, between the essence and the existence –the "appearance" of the essence, for example, to the judge as "given" in the nature of things and at the same time "foretold", in which, however, lies what "should have been realized". The consequence of such tension, which disturbs the ontological relativistic unconditionality of the existence of the natural law only in its relation to the positivity of the law, the ideal dimension of the law with its real dimension, is the inevitable absolutization of the axiological component of the law prevailing at ius naturale.[51] At the very least, it remains questionable whether Kaufmann was able to solve a problem task he set for himself, namely, "to find a synthesis between absolutivism and relativism, between significance and being…".[52]

The dualism of natural and positive law was significantly shaken in the natural law concepts of the early 20th century. (V. S. Solovyov, A.S. Yashchenko). It has not been overcome to date. Nevertheless, in the basic, "focal" sense the dualism of natural and positive law still is not in line with ontological natural law doctrines. The law and the rule appear in such doctrines in the existential-ontological relationship and, contrary to the criticism of H. Kelsen, not "on the other side of the positivity". In the unified structure of the law, the natural law concept quite organically coexists with the positivity of the law. This is especially noticeable in the doctrine by R. Alexy, who hardly hides his fluctuations between the natural law and the positivism.

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[46] See ibid. P. 169.

[47] Stovba A. V. Arthur Kaufmann: in Search of "Whole" Law [Artur Kaufmann: v poiskakh "tselogo" prava] // See ibid. P. 147.

[48] Kaufmann A. Ontological Structure of Law [Ontologicheskaya struktura prava]. PP. 165, 169.

[49] See ibid. P. 169.

[50] See ibid.

[51] A.V. Polyakov, having found the "third way" in the concept of A. Kaufmann, however, in his later general description of the natural law retains a reference to the absolutization of the axiological component of law inherent in ius naturale (see: Polyakov A. V. Communicative-Phenomenological Concept of Law // Non-Classical Philosophy of Law: Questions and Answers [Kommunikativno-fenomenologicheskaya kontseptsiya prava // Neklassicheskaya filosofiya prava: voprosy i otvety]. Kharkov, 2013. P. 103. (In rus)

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Subjective Right in the Post-Classical Legal Science

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ABSTRACT

The writer formulates the content and characteristics of a subjective right in post-classical legal science context. Post-classical jurisprudence develop rethinking the objectivity of law. Therefore, objective and subjective law complement each other. The content of subjective law is formed by the legal actions of people, the results of actions and mental processes that mediate these actions.

Keywords: subjective right, post-classical legal science, legal action, legal frames and scripts

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Post-classical legal science involves rethinking the main legal phenomena from the perspective of a new view of the world. This applies, among other things, to a different interpretation of subjective law in relation to the objectivity of law. Objectivity as the independence of social phenomena and processes is problematized by its human content and the sociocultural context in which the law exists. The interpretation of law as some kind of Platonic Eidos or “nature of things” means essentialism or vulgar naturalism that reifies legal reality. Today, this approach is overcome by recognition of the intersubjectivity of the social world and law as well. Law exists only in the case in which it is constructed by people (although not at their own discretion, but subject to external social and natural factors or circumstances). Further, the right exists only if it (as a set of rules of conduct) is fixed in a symbolic form, at least in the form of a custom or tradition, myth or ritual. It is also important that the existence of law presupposes the reproduction of the relevant rules of behavior by mental and behavioral practices of the broad population. Thus, human-centricity, constructiveness, semantic mediationality, sociocultural contextuality, and practical reproducibility are the main characteristics that distinguish the post-classical view of law.

A particularly important role in the post-classical concept of law is played by subjective law, which is found in a dialogic relationship with the objective law. Post-classical legal methodology does not deny, but reinterprets, the objective law. The latter does not exist without or out of relationship with the subjective law. This is due to the fact that the social world, including the world of law, is not people, actions, results of actions and objects (things) that mediate people’s actions, but the meaning and import attributed by people to their actions, to themselves, the results of actions and objects. Thus, the external as “objective” or “material” (the “objective element” of lawful or unlawful behavior) is supplemented with internal, mental or mental aspect of the existence of the law (the “subjective element”). It is important that it is the mental aspect that motivates an individual to perform an action, acting as its “cause”[1] in the appropriate socio-cultural context.

Subjective law from the standpoint of post-classical legal science is the implementation of objective law, the implementation of deontic possibilities (what is allowed, required or prohibited) in legally significant behavior. At the same time the subjective law is a process of understanding the situation from the standpoint of personal motivation (a mental complex that includes interiorization of values, goals, interests, needs, and motives).

The importance of the study of the subjective law is that only through the subjective element of legal cases (legally significant practices) the external “objective” factors affect the law. How exactly? This is what the new post-classical theory of the subjective law is designed to explicate. In addition, it is focused on clarifying the way how the law acts.

The law itself does not “act”. In our, hopefully, the best of all worlds, only people act. In this sense the subject of law in the empirical legal reality is always an individual. In some cases (legally significant situations) a man acts on his own behalf and in his own name, and in such case a person is legally recognized to be an individual. In other cases, a particular individual acts on behalf of and under a commission of a position held; in such case, he / she is legally referred to as an officer. Sometimes an individual acts (as a rule, enters into legal relationship) on behalf of a collective subject; technically from the standpoint of the classical dogmatics of law, this means that a legal action is performed by a collective subject, although in fact such person is a man made “of flesh and blood”.

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[1] I believe that there are no causes in the direct, literal sense of the word or “mechanical causation” in the social world. Behavior is conditioned by mental or mental phenomena and processes, namely, goal, interests, needs, motives.

The “act” of the law in this case means a correlation of personal expectations and behavior of a particular individual as a bearer of the subject of law status with the information formulated in the rule of law. Proceeding from such prospective of the subjective law analysis, the structure of the latter is formed by: people — holders of the subjects of law status, their interactions, result, mental mediation, including motivation of actors, understanding and evaluation of the interaction and result by actors and the observer from the positions of the prevailing legal values — legal social representations. In this sense, the trains of thought by representatives of the instrumental theory of private law B.I. Putinsky and S.Yu. Filippova are interesting and long-ranged in realization.

From the classical and traditional point of view the subjective law is defined as a measure of a person’s legal freedom. In this connection such measure of freedom includes:

1) law as a measure of possible behavior of the subject;
2) the right as a possibility to demand certain actions (non-action) from the obligated subject.

At the same time, it is intended “not just a certain measure or a possibility but a legal possibility, i.e. a possibility secured by the coercive force of the state”.[2] Such approach is based on a purely dogmatic, formal approach to interpretation of legal relationship, when the latter is considered as a “method of scientific thinking”. “A legal relationship is an ideal (speculative, conceivable) “bundle” of rights and obligations, which represents reflection in the mirror of legal rules of specific actual relationship. The actual social relationship is an objectively existing relationship (for example, economic) between individuals, which is manifested in certain conduct (actions). With some of these actions the law associates the emergence of rights and obligations. Rights and obligations are ideal categories. They are inaccessible to human perception through the sensory organs. Nevertheless there is no doubt about their objective existence: regardless of whether people perceive them or not, a particular person has a certain opportunity provided by the coercive power of the state, i.e., a subjective right. Similarly, there are responsibilities, regardless of people’s awareness of this fact. But legal relationship do not exist — they are only thought of. To think a subjective right together (in unity, in connection) with one’s own support (as a rule — a legal obligation), i.e. within a single system, which receives the name of the relationship, is just convenient; it is this convenience which ultimately determines the use of the concept of legal relationship in scientific use as well as in the practical activities of the legal profession.”[3]

Under this approach the legal relationship is deprived of the status of actual being (existence), which is directly proclaimed by its authors. Legal in this case is a kind of model of actual social relations, an intellective structure that is easy to use.[4] How does such a model-legal relationship differ from a model-rule of law? Moreover, the subjectively right as a “certain possibility”, “existing objectively regardless of whether people perceive them or not”, is an objective right! It turns out that the subjective law is a kind or an element of the objective law, isn’t it?

I believe that the sociological approach, rather than a formal legal (dogmatic) approach[5] to analysis of both the subjective law and legal relations is much more promising. In the sociology of law the legal relationship is not a model of social relationship (the latter must be interpreted as specific interactions between two or more individuals, i.e. actors) but is the actual interaction itself, which is legally meaningful. Its “materiality” is expressed in specific behavioral acts and their results, accompanied by mental processes[6]. The model of social relationship is found in the rule of law, which is implemented in the legal relationship and/or simple forms of exercise of the rights, namely, compliance, performance or use (depending on the deontic modality of the corresponding rule of law, prohibiting, obliging or allowing certain conduct). In this case, the subjective right is not just a potential possibility formulated in a normative legal act or declaration that enshrines human rights but the actual implementation of this opportunity or measure of freedom.

Roughly in this manner this problem is approached by S.Yu. Filippova, who actively developed an instrumental approach (I would say a social and instrumental approach) in private law. She proceeds from the fact that “legal activity is only a moment of common human activity, which is unified in its integrity and meaning. This is due to the fact that in real life, the legal activity is not a special activity that

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[2] Civil Law: Actual Problems of Theory and Practice [Grazhdanskoe pravo: aktual’nye problemy teorii i praktiki] / Ed. V. A. Belov. M. : Yurayt Publ., 2007. P. 217 (In rus)

[3] Op. cit. PP. 210–211.

[4] In some ways, this resembles postmodernism (which, most likely, is beyond awareness of the authors of the stated point of view) — for example, R. Rorty’s pragmatism or J. Baudrillard’s simulacrum.

[5] This approach, of course, also has a right to exist, but at least it must be be supplemented by sociological approach in order to complete the picture of the subjective law.

[6] Not always conscious, but always mental, psychic.

differs from other types of human activity. ...In our opinion, it is impossible to think of independent, separate from legal, human activity. In every action, law and "non-law" coexist, i.e. both legal and non-legal aspects co-exist."[7] The legal activity under the instrumental approach is "the embodiment of legal means in the movement towards achievement of a legal goal". The features of legal activity, according to S.Yu. Filippova, include the following ones: "1) mutual relationship (interdependence) of a subject and object of the activity. The relationship between the subject and the object represents a single, integral system; 2) the legal activity, like any activity, consists in movement, change. This means that the actions of the subject represent activities only when certain changes appear in the external world for the subject; 3) expediency of the activity — the purpose and field of the activity is formed by an individual — a subject of the activity based on his understanding of the world around him; 4) only a person can be a subject of the legal activity, since only he can realize his own independence in relation to the rest of the world, set a goal and develop a path thereto. ... 5) the legal activity is a system."[8]

Important in this approach is the analysis of the goal-setting process, which includes: "1) the emergence of a need; 2) awareness of the need (in our opinion, this stage can be called the emergence of interest); 3) the appearance (setting) of a goal."[9] Why this point is important? Because, as it was correctly noted by S.Yu. Filippova, "if people, together with their interests and goals, are excluded from the sphere of law, then it is quite understood that the jurisprudence is unable to recognize their possibility to "create the law". This appears to be unnecessary, since the state knows all human needs (in a purified, generalized and dissected form), and therefore only it, the state, by virtue of its status, can create the best models. ...The verbal expression of wishes of the legislator will only affect the behavior of subjects when they themselves, by their behavioral and mental act, include the appropriate means in their own activities for setting and achieving legal goals."[10] I believe that this approach can be developed and refined by getting focused on the mental processes of perception, categorization and evaluation (legal qualification) of thee behavioral aspect of subjective law, and by analyzing how exactly external social phenomena and subjective law are interdeterminated. The perception of a legally significant situation is realized through its correlation with schemes available in the legal consciousness of the individual — frames and scripts, scenarios that form the content of typical models of such situations. Simultaneously with perception, the process of categorization or typing is performed — bringing of the sensible in accordance with the individual's narrative of a typical ("normal") situation and behavior therein. This, from a legal point of view, includes the process of qualification, which in a sociological perspective can be described as the correlation of one's own observation with the position of a socially significant ("normative") Other person — with the position of a supposed external observer.

"A frame is such a cognitive structure in the phenomenological field of a person," says well-known researcher of discourse analysis, M.L. Makarov, "which is based on probabilistic knowledge of typical situations and associated expectations about the properties and relationships of real or hypothetical objects. Structurally, the frame consists of a vertex (theme), i.e. a macroproposition, and slots or terminals that are filled with propositions. This cognitive structure is organized around a concept, but unlike a trivial set of associations, such units contain only the most essential, typical, and potentially possible information that is associated with this concept."[11]

"A scenario or, in other words, a scenario frame contains a standard sequence of events caused by a certain recurrent situation. Scenarios organize behavior and its interpretation. Scenarios are characterized by situational attachment and conventionality. Both the frame and the scenario must be interpreted in terms of memory. These are not only information structures, they report results, final states, which are remembered by us, because these are mechanisms that explain the achievement of understanding using previously accumulated knowledge, and preliminary knowledge is the type of information that is stored in memory.

The most remarkable thing about this argument is that the scenarios are not actually stored in memory in a "ready-state". Applying a scenario to discourse analysis represents reconstructions that we ourselves build scripts when the necessity arises, in the process of speech perception, in order to in-

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[7] Filippova S.Yu. Instrumental Approach in the Science of Private Law [Instrumental'nyi podkhod v nauke chastnogo prava]. M. : Statut, 2013. PP. 184-185. (In rus)

[8] Filippova, S.Yu. Op. cit. PP. 181-182.

[9] In this case, the motivation, according to S.Yu. Filippova, refers to awareness of the need. (See: Op. cit. PP. 42–43).

[10] Filippova, S. Yu. Op. cit. PP. 180, 119.

[11] Makarov M. L. Fundamentals of the Theory of Discourse [Osnovy teorii diskursa]. M.: Gnosis, 2003. P. 153 (In rus)

terpret the discourse, using the experience we have accumulated previously and information placed on different levels of memory."[12]

Through these scenarios (frames and scripts), social representations about external factors that set the context of a legal situation and how it is evaluated by a socially significant Other person (as it is legally qualified) are internalized. At the same time, social legal values acquire an individual meaning when they are correlated with personal motivation and expectations, i.e. expectations of "normal" behavior from the counterparty in this particular situation.

The foregoing seems to clearly indicate the need for further research on the subjective law. At the same time, the most promising approach to the study of subjective law today is the post-classical methodology of law.

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[12] Makarov M. L. Op. cit. PP. 154–155.

Subjective Rights in the Light of the Reform on Public Servitudes

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ABSTRACT

The article is dedicated to the results of the land law reform which was carried out in 2018, namely the introduction of updated provisions on public servitudes to the Land Code of the Russian Federation. It can be argued that today in the Land Code of the Russian Federation there are rules governing the two types of public servitudes — for the benefit of any number of unspecified persons (art. 23) and in favour of certain persons (Ch. V.7). Therewith, both types of public servitudes are established in accordance with the Land Code of the Russian Federation, i. e. the provisions of the Civil Code of the Russian Federation are inapplicable to the legal relationship created in connection with establishment, implementation and termination of public servitudes. In this connection the question of the legal nature of updated public servitudes arises, in particular, whether they are subjective property rights or not. The author of the article offers answers to this and some other questions.

Keywords: subjective right, property right, servitude, public servitude, bounds (limits) of subjective right

I. Introductory provisions

Federal law No. 341-FZ of 03.08.2018 “On Amendments to the Land Code of the Russian Federation and Some Particular Legislative Acts of the Russian Federation in Terms of Simplifying Construction of Infrastructural Facilities” (hereinafter — Law No. 341-FZ), came into force on September 1, 2018. The main goal of the reform was to create a legal framework to simplify construction of particular infrastructural facilities on other person’s land plots.

It is noteworthy that Law No. 341-FZ is the implementation of the draft Federal law No. 187920-7, “On introduction of amendments to some particular legislative acts of the Russian Federation with regard to construction, renovation, overhaul and (or) operation of infrastructural facilities” enacted on May 29, 2017 in the State Duma of the Federal Assembly of the Russian Federation by the Government of the Russian Federation (hereinafter referred to as the draft law No. 187920-7)[1]. Reformers earlier addressed the issue of simplification of the construction of particular infrastructural facilities on other people’s land plots. Nevertheless, both the previous draft laws and draft law No. 187920-7 were subjected to substantial criticism by the RF Presidential Council for codification and improvement of the Civil Code of the Russian Federation[2]. Meanwhile, this did not prevent draft law No. 187920-7 from becoming the federal law[3].

According to clause 2-3 of article 23 of the Land Code of the Russian Federation, a servitude may be established by a decision of an executive state authority or a local administration authority to satisfy state or municipal needs, and the needs of the local population, without confiscation of land plots (public servitude). A public servitude is established in accordance with the Land Code of the Russian Federation. Legal relationship created in connection with the establishment, implementation and termination of a public servitude, provisions of the Civil Code of the Russian Federation with regard to servitude and provisions of chapter V.3 of the Land Code of the Russian Federation shall not apply.

[1] See text: Available at: http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgen t&RN=187920-7&02 (accessed 15.09.2019).

[2] See text : Available at: http://privlaw.ru/sovet-po-kodifikacii/2017-2/obzor2017-7/ (accessed 15.09.2019).

[3] Commentaries to Law No. 341-FZ are given in particular by: Boltanova E. S. Public Easement for Construction Activities: Addressing Citizens’ Constitutional Rights and Balancing Interests [Publichnyi servitut v tselyakh stroitel’stva sooruzhenii: voprosy konstitutsionnykh prav grazhdan i obespecheniya balansa interesov] // Law [Zakon]. 2019. No. 2. PP. 45–55. (In rus); Krasnova T. S. Public Easement for Placing a Linear Object: Commentary on the Novels of the Land Code of the Russian Federation [Publichnyi servitut dlya razmeshcheniya lineinogo ob”ekta: kommentarii k novellam Zemel’nogo kodeksa Rossiyskoy Federatsii] // The Herald of Commercial Justice of Russia [Vestnik ehkonomicheskogo pravosudiya RF]. 2019. No. 3. PP. 124–144. (In rus); Melnikov N. N. A Critical Analysis of the Federal Law on the Simplification of the Placement of Linear Objects and the Implied Easement as a Mechanism for Eliminating Identified Shortcomings [Kriticheskii analiz Federal’nogo zakona ob uproshchenii razmeshcheniya lineinykh ob”ektov i podrazumevaemyi servitut kak mekhanizm ustraneniya vyyavlennykh nedostatkov] // Business and Law [Khozyaistvo i pravo]. 2018. No. 10. PP. 64–73 (In rus); A New Life of Public Easements. Event. Comments of experts [Novaya zhizn’ publichnykh servitutov. Sobytie. Kommentarii ehkspertov] (A. A. Ivanov, A. O. Rybalov, R. S. Bevzenko, etc.) // Law [Zakon]. 2018. No. 10. PP. 17– 37. (In rus)

Therefore, the public servitude is not regulated by the rules of servitude set out in articles 216, 274-277 of the Civil Code of the Russian Federation, as well as the rules of law governing servitudes, as set out in chapter V. 3 of the Land Code of the Russian Federation. This raises questions about the legal qualification of a public servitude:

- Is a public servitude a subjective right?
- Is a public servitude a subjective property right?
- Does a public servitude determines the scope (limits) of a subjective right? Let's attempt to clarify these points.

II. Two types of public servitudes

Based on the systematic interpretation of the rules of the Land Code of the Russian Federation, in particular article 23 and chapter V. 7, it can be concluded that public servitudes are established either in the interests of an indefinite number of persons, or to the benefit of a particular person.

In the interests of the indefinite circle of persons public servitudes are established for vehicular and pedestrian traffic through a land plot, and inter alia, to provide free access for individuals to a common use water body and to its foreshore; for land marks to be fixed on a land plot, for geodetic points of geodetic networks, for gravity stations, for levelling points and the access ways to them; for execution of work for construction of drainage facilities on the land plots; for withdrawal (removal) of water resources from water bodies and for watering; for run of farm animals across the land plot; for hay purposes, for grazing agricultural animals in the prescribed manner on the land plots within the timeframe which corresponds to the local conditions and customs; for use of land plots for hunting, fishing, and aquaculture (fish farming) (subclause 1-7, clause 4 of article 23 of the Land Code of the Russian Federation).

Public servitudes are established to the benefit of particular individuals for placing of infrastructural facilities, for their integral process parts, if such facilities have the federal, regional and local status, or are required for organization of electricity, gas, heat, water supply and sanitation, connection to utilities, or relocated in connection with the seizure of land plots whereon they were previously located, for public purposes; for stockpiling of construction and other materials, for placement of temporary or auxiliary structures (including fences, cabins, sheds) and (or) construction equipment required for support of construction, renovation, repair of transport infrastructure of the federal, regional, local status, for the period of the said construction, renovation, repair; construction of crossings of highways or railway tracks with common use rail tracks on the land plots held in state ownership, within the boundaries of railway precincts, and for construction of crossings of motor roads or rail tracks crossings with motor roads or junctions of motor roads to other motor roads on the land plots held in public property, within the boundaries of the right of way; construction of motor roads and railway tracks in tunnels; conducting engineering surveys for preparation of documentation for planning of the territory, providing for accommodation of infrastructural facilities of the federal, regional, local status, for engineering surveys to be carried on for construction and reconstruction of the said facilities, and aforesaid infrastructural facilities (subclause 8, clause 4 of article 23, chapter V.7 of the Land Code of the Russian Federation).

There are also differences in the procedures for establishing the two types of public servitudes. The first ones (in the interests of indefinite number of persons) are created on the basis of decisions of executive state authorities or local administration authorities (clause 2 of article 23 of the Land Code of the Russian Federation). It should be noted that previously such servitudes were established in a more strict manner — by law or other regulatory legal act of the Russian Federation, by a regulatory legal act of a subject of the Russian Federation, by a regulatory legal act of a local administration authority, with allowance for results of public hearings. In our view, simplification of the procedure for establishing public servitudes in the interests of an indefinite range of persons is unreasonable, since the previously applied procedure did not always effectively protect the rights and legitimate interests of the owners of servient land plots. The new regulation will hardly change this situation.

The second public servitudes (in favor of certain persons) are created on the basis of decisions of the authorities of the relevant levels upon requests of certain persons being the subjects of natural monopolies; communication organizations; owners of transport infrastructural facilities of the federal, regional, local status; organizations provided for in clause 1 of article 56.4 of the Land Code of the Russian Federation and who submitted applications for withdrawal of land plots for public needs (clause 18 of article 23, chap. V.7 of the Land Code of the Russian Federation).

At the same time, it is worth noting the fact that, despite the difference in the goals of public servitudes, both types are established in the imperative manner — by decisions of the state authorities. We fundamentally disagree with this procedure for establishing servitudes for a number of political and

legal reasons. In particular, this is associated with the need to focus on the fundamental relevance of the autonomy of the will in servitude law, and specifically, on the priority of the voluntary and voluntary-compulsory disposal of the property right to real estate, on conditions agreed with the property owner, with allowance for specific characteristics of the real estate property. However, this is a topic for a separate publication[4].

III. Legal qualification of a public servitude in the interests of an indefinite range of persons

Regarding the legal qualification of public servitudes, the following should be noted.

When considering public servitudes that are established in the interests of an indefinite range of persons, we find out that the reform did not affect the legal nature of this institution. Public servitude of this type both before and currently provides the possibility for indefinite range of people to use someone else's land plot on limited terms. In this regard, in the civilist doctrine, there is almost a unanimous opinion that when a public servitude is established in the interests of an indefinite range of persons, a subjective property right is not created, but the boundaries (limits) of the property right to employee land plot do arise. Today, this conclusion is confirmed, for example, by the fact that, by virtue of clause 3 of article 23 of the Land Code of the Russian Federation, public servitude is not regulated by the rules of the Civil Code of the Russian Federation.

The negative attitude, which was formed in the doctrine to the qualification of the public servitude in the interests of the indefinite range of persons as an encumbrance of the property right to real estate property, i.e., as a limited real right, is substantiated by the provisions set out below. The legal treatment applicable to public servitude in the interests of the indefinite range of persons is determined by the rules of public rather than by private law; such a servitude does not require dominant tenement and servient estate, and does not imply specific servitude holders[5]. Apart from the aforesaid, if a public servitude in the interests of the indefinite range of persons violates the rights and legitimate interests of the owner of the servient land plot, the owner may challenge in court the act establishing the deed of the servitude or may file a negatory claim with a court to protect the right of ownership to the servient land plot. In the event of violation of the entitlement created on the basis of such public servitude to limited use of the servient land plot, such entitlement, as a rule, is protected by public legal methods and solely in rare cases by a non-compensatory claim (and even in such cases indirectly).

It is noteworthy that in pursuance with articles 295, 295.2 of the Draft Federal law No. 47538-6 "On making changes to parts one, two, three and four of the Civil Code of the Russian Federation, as well as in pursuance with some other particular legislative acts of the Russian Federation" it is also proposed to qualify a public servitude in the interests of the indefinite range of persons as the boundary (limit) of the property right to real estate. Therewith, the authors of this Project propose rules for public servitude in the interests of an indefinite range of persons, as stipulated in article 23 of the Land Code of the Russian Federation, be slightly modified and transferred to the Civil Code of the Russian Federation.

We cannot accept that public servitude in the interests of an indefinite range of persons is proposed to be used as a tool setting the boundaries (limits) of property rights to real estate. This conclusion is connected at least with the fact that this public servitude in the imperative manner gives everyone the possibility to use someone else's private land plot in a limited way, often indefinitely and free of charge. In this connection the right of the owner of the land plot is unreasonably violated.

At the same time, the rejection of the unsuccessful legislative regulation should not entail the rejection from securing the objectively existing interests of the indefinite range of persons in the limited use of someone else's real estate. In our view, the legal means for satisfying these interests should not be imperatively established boundaries (limits) of the ownership right to real estate, but dispositively or dispositively-imperatively established subjective property rights. For the purpose of implementation of this idea, and inter alia, for the "public servitude" concept, the appropriate meaning corresponding to its origin shall be attached to it.

Therefore, a public servitude in the interests of the indefinite range of persons could be qualified as a special servitude — a public real right, i.e. a subjective real right established in favor of an indefinite

[4] Krasnova T. S. Autonomy of Will and Its Restriction in Easement Law [Avtonomiya voli i ee ogranichenie v servitutnom prave]. M., 2019. PP. 50–144 (In rus)

[5] Rybalov A. O. Legal Easement in Russian Law [Legal'nyi servitut v rossiiskom prave] // Civil Law Review [Vestnik grazhdanskogo prava]. 2010. No. 5. PP. 7–8. (In rus). Certain Issues of Establishing Public Easements (as Illustrated by Courts Practice) [Nekotorye voprosy ustanovleniya publichnykh servitutov (na primerakh iz sudebnoi praktiki)] // Law [Zakon]. 2016. No. 6. PP. 42–52. (In rus)

group of persons, similar to particular servitudes that exist in some particular western legal systems. For example, in Germany, all proprietary legal relationship (both in private and public law) are based on a single private legal understanding of property, which is modified, depending on the subjects, objects, and goals of establishing legal relationship. In case of establishing encumbrance of the right of ownership to real estate in the form of the possibility of limited use by indefinite range of persons, the real right of limited use is created, which is protected by absolute private legal means, i.e. a public real right, qualified as a "modified" subjective real right (right in rem).[6]

This direction is seen to be interesting for both theoretical and practical research. It is interesting for both because, on the one hand, it is traditionally considered that the existence of a subjective property right for everyone is unacceptable. On the other hand, administrative and judicial practice have demonstrated that the refusal to qualify such rights as subjective real rights entails their qualification as public legal restrictions (boundaries [limits] of right), which does not meet the interests of specific subjects of civil turnover, who are at least able to protect these rights in private law action.

In this sense, a dispositive or dispositive-imperative introduction of the public servitude to the benefit of the indefinite range of persons would help to ensure the inalienable rights and freedoms of various participants in civil turnover: on the one hand, on private legal grounds, to oppose an servitude to the owner of servient estate (and inter alia, with the private legal claim-an analogue of *actio popularis*) granted to such owner, on the other hand, to agree on the terms of such opposition with such owner in the manner established by private law (by way of entering into an agreement or on the basis of a court ruling).

It is interesting that in draft law No. 187920-7, which was not successful as a whole, there was made a noteworthy attempt to qualify the rights of the indefinite range of persons to use in a limited manner other person's land plots as subjective property rights of servitude type. It's a different matter that the provisions of draft law No. 187920-7, which are relative to the aforesaid provisions, are beneath the criticism. In particular, it is impossible to agree with the imperative order of establishing such servitudes; with the refusal to take into account the target purpose and permitted use of the servient land plots; with the provision of the possibility to the servitude holders to demand commensurable fees for the establishment of servitudes solely in cases of significant difficulties in the use of servient land plots; with the lack of provisions on protection of such servitudes. It cannot be excluded that the grant of subjective property rights to an indefinite number of persons was a technical error in draft law No. 187920-7 and its developers did not put such a deep meaning into the above provisions.

IV. Legal qualification of a public servitude in favor of a particular person

Several interesting questions arise with regard to public servitudes established in favor of particular individuals.

On the one hand, these public servitudes cannot be defined as introducing boundaries (limits) of property rights to real estate, at least for the reason that they are established in favor of certain persons listed in chapter V. 7 of the Land Code of the Russian Federation. It is important to emphasize here that when a public servitude is established in favor of a particular person, such person directly exploits someone else's land plot in order to achieve specific goals (for example, for construction of infrastructural facility) and solely indirectly satisfies the interests of the society (for example, for obtaining a particular resource) In this connection, the term "public" in relation to the servitude arising on the basis of chapter V.7 of the Land Code of the Russian Federation is a subject of disputes. On the other hand, it is also difficult to define these public servitudes as subjective property rights of the servitude type, since, as expressly stated in clause 3 of article 23 of the Land Code of the Russian Federation they are not subject to the servitudes rules of the Civil Code of the Russian Federation and chapter V. 3 of the Land Code of the Russian Federation.

It is a well-known fact that the list of property rights in article 216 of the Civil Code of the Russian Federation is not formally closed. Thus, it would be possible to assume that a public servitude in favor

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[6] Vinnitsky A. V. Public property [Publichnaya sobstvennost']. M., 2013. PP. 22–180, 405–445. (In rus) Interesting discussions on this and related topics see, in particular, here: Bogusz B. Land: Balancing Competing Economic and Social Interests // Modern Studies in Property Law / Ed. by W. Barr. Oxford — Portland, Oregon. 2015. Vol. 8. PP. 85–95; Parchomovsky G., Bell A. Land Burdens in the Service of Conservation // Towards a Unified System of Land Burdens? Intersentia Antwerpen — Oxford, 2006. PP. 137–162; Resta G. Systems of Public Ownership // Comparative Property Law. Global Perspective; ed. by M. Graziadei, L. Smith. Cheltenham, UK, 2017. PP. 216–257; Van Erp S., Akkermans B. Cases, Materials and Text on National, Supranational and International Property Law. Oxford and Portland, Oregon, 2012. P3. 137–138, 251–252, 319–329.

of a particular person is a separate limited property right. The aforesaid could be confirmed by the rule stated in clause 3 of article 5 of the Land Code of the Russian Federation, whereunder the owners of a public servitude are persons who have the right of limited use of land and (or) other people's land plots, established in accordance with chapter V. 7 of the Land Code of the Russian Federation.

That is, according to the thought of the legislator, where a public servitude is established in the interests of an indefinite range of persons, no holders of subjective rights will emerge, while where a public servitude is established in favor of a particular person, such holders do emerge.

However, it is not clear whether it makes sense to create a new limited real right, which is so similar to servitude, and even to call it servitude.

It is also important that a public servitude in favor of a particular person emerges in imperative manner, and specifically, by decision of the state authority. Whereas, as follows from clause 3 of article 2 of the Civil Code of the Russian Federation, civil law does not apply to property relationship based on administrative or other subordination of a party to the other party, including taxation and other financial and administrative relationship, unless otherwise is provided for by law. In accordance with subclause 2, clause 1 of article 8 of the Civil Code of the Russian Federation, civil rights and obligations arise from acts of authorities that are provided for by law as the basis for emergence of civil rights and responsibilities. Therefore, it cannot be excluded that, unless it is specifically stated otherwise in the law, public servitude is not subject not only to the rules of the Civil Code of the Russian Federation applicable to servitudes, but is neither subject to any other rules of civil law, and inter alia, rules applicable to real rights.

On the basis of the aforesaid, it can be asserted that currently the provisions on subjective real rights that are established imperatively and that are not subject to the norms of civil law appeared to be stipulated in chapter V. 7 of the Land Code of the Russian Federation. In our view, such decision is far from being obvious and clearly does not meet the interests of a number of parties of civil law transactions.

V. Conclusion

Summing up the aforesaid in this article, it should be concluded that, according to the legislator, servitudes currently function in the Russian law and order as:

- traditionally understood servitudes granting subjective property rights to the servitude holders (articles 216, 274-277 of the Civil Code of the Russian Federation);
- modified servitudes treated in their traditional meaning, intended to be established in respect of public land plots and granting subjective real rights to the servitude holders (chapter V. 3 of the Land Code of the Russian Federation.
- public servitudes that are not actually servitudes, but set the boundaries (limits) of the property right to real estate, i.e., they do not grant subjective property rights (subclause 1-7, clause 4 of article 23 of the Land Code of the Russian Federation);
- public servitudes for direct realization of the interests of particular persons and for merely indirect realization of public interests, essentially granting subjective property rights, but it is not formally clear, what kind of rights exactly — private or public (subclause 8, clause 4 of article 23, chapter V.7 of the Land Code of the Russian Federation).

And the aforesaid list of servitudes is not a complete list of servitude encumbrances, because there are also servitudes (including public ones) that are stipulated in particular federal and regional laws. In this context, we put the following question to the readers in the end of this article: To what extent such complication of the Russian servitude law is justified?

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Debt Release in the Context of Philosophical and Economic Aspects of Legal Regulation

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ABSTRACT

The reform of the rules on debt release (article 415 of the Civil Code of the Russian Federation) in 2015 raised the question of whether this novelty changed the fundamental principles of civil law. Amendments to the article do not require the consent of the debtor to forgive the debt. Is this a step to the rule that it is not required the consent of the donee in the donation? The author analyzes these amendments on the base of philosophical studies of S. S. Alekseev and assesses its role in the development of civil law.

Keywords: donation, debt release, consent, unilateral transaction

Is the consent of a person required for a benefit in his favor?

In the context of the Russian legislation, this issue may seem irrelevant. The most common legal concept that mediates a benefit by one person to another is a donation agreement. The law establishes the contractual structure of the legal relationship. This means that the consent of the donee to the benefit in his favor is necessary. Thus, the law in its legal constructions reflects the value in the rule of law of the basic principle of personal autonomy — imposed beneficence is unacceptable.[1]

At the same time, not all Soviet jurists agreed with this qualification of the donation relationship. B.B. Cherepakhin believed that the contractual structure of the donation is a fiction that covers the essence of the donation relationship, which should be qualified as a unilateral deal.[2] However, this position is not given here for historical reference. Despite the fact that the law regarding the regulation of gift relations remains unchanged, the reason to raise this issue at the present stage of development of civil law still arose. The reform of the Civil Code of the Russian Federation in 2015 has changed article 415 of the Civil Code of the Russian Federation addressed to the debt release. Even without addressing the details of the problem of differentiating the donation arrangements and debt release, it is difficult to deny that debt release as well as donation mediates the relationship of benevolence. However, as a result of the reform, the need to obtain the debtor's consent for the debt release was called into question. Clause 2 of article 415 of the Civil Code of the Russian Federation is formulated as follows:

"The obligation is considered terminated **upon receipt by the debtor of the creditor's notice of debt forgiveness**, ***unless*** **the debtor within a reasonable time sends the creditor an objection** to debt forgiveness."

The debtor does not have to express its consent but can send an objection to the debt forgiveness. In the doctrine, this innovation is interpreted in different ways. The position is expressed that debt forgiveness is a unilateral transaction.[3] A number of authors continue to see the debt forgiveness transaction as bilateral, but with a presumed acceptance of the debtor.[4] In any case the attitude to the will of the debtor in the new construction changes. The will of the debtor is either not needed or is presumed. These fine-tuning of the debt forgiveness institution is backed by civil law principles and theoretical foundations of legal regulation. A localized change in the rule on one of the grounds for termination of obligations can raise a question of the degree of implementation of the principle of individualism and autonomy of will in the national law.

Maybe the principle of autonomy of will ceases to be an indisputable value of the civil law?

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[1] Alekseev S. S. Legal Constructions — a Key Link in Law (in the Manner of Statement of the Problem) [Yuridicheskie konstruktsii — klyuchevoe zveno prava. (v poryadke postanovki problemy)] // Civilistic Notes: Interuniversity Collection of Scientific Papers [Tsivilisticheskie zapiski: Mezhvuzovskii sbornik nauchnykh trudov]. M., 2001. P. 7. (In rus)

[2] Cherepakhin B. B. Donation under the Civil Code R.S.F.S.R. Civil Law Works. Book Four [Darenie po Grazhdanskomu kodeksu R.S.F.S.R. Trudy po grazhdanskomu pravu. Kniga chetvertaya]. M., 1923. P. 47. (In rus)

[3] Contractual and Law of Obligations (General Part): Article-by-Article Commentary on articles 307–453 of the Civil Code of the Russian Federation [Dogovornoe i obyazatel'stvennoe pravo (obshchaya chast'): postateinyi kommentarii k st. 307–453 Grazhdanskogo kodeksa Rossiiskoi Federatsii] / V. V. Baibak, R. S. Bevzenko, O. A. Belyaeva [and others]; ed.-in-chief A. G. Karapetov. M., 2017. P. 796. (In rus)

[4] See ibid.

In support of the new approach of the legislator to debt forgiveness the following argument may be offered. How many debtors will refuse to have their debt forgiven? Such debtors, of course, will exist, but they are in the minority. Civil law should meet interests of the majority not the majority. What is more common should be the general rule. If most debtors would accept debt forgiveness, why set the default rule to require consent? Such regulation requires additional costs for the coordination of wills and, therefore, is economically inefficient.

Economic analysis of law versus the philosophy of law

It is clear from the institutions of donation and debt forgiveness that the legal regulation may have different bases. Such foundations include, in particular, the economic analysis of law and the philosophy of law. In the science of economic analysis of law, the concept of majoritarian default rule (majority dispositive rule) is formulated. This is a dispositive rule that corresponds to the will of the majority.[5] Such approach to the formulation of dispositive rules reduces the transaction costs of agreeing terms and conditions of an agreement other than the dispositive rule.[6] And saving transaction costs, in turn, leads to increased economic efficiency, which is one of the goals of the legal regulation. If you follow the logic of economic analysis, you can reduce costs by using a model that does not require the expression of the will of the donee to receive a donation and the will of the debtor to forgive the debt. If the majority of persons, in whose favor the act of benefiting is performed, agree to the same, the rules that mediate such a good act should be constructed according to a unilateral transaction model.

Thus, the possible justification for making amendments to article 415 of the Civil Code of the Russian Federation consists in the choice of the economic basis of legal regulation by the legislator. At the same time the donation remains a contractual structure. What can be the basis of this legal regulation of the donation institution?

The philosophy of law formulates the following principle: “No one can impose an unsolicited benefit on another.” This principle was clearly manifested in the Roman law, in which there was a “alteristi pulari nemo protest” maxim.[7] It meant that everyone can acquire what they are interested in only on their own. It is on the basis of this maxim such institutions as representation and contracts in favor of a third person were disclaimed in Roman law.[8] The formulation of this principle is related to the philosophical context of the extreme individualism of Roman jurisprudence.

However, in continental law with the development of institutions of representation and contracts in favor of a third party this Roman maxim was revised. The dogmatic principle has given way to the needs of the economy.[9] Is there a chance that the same fate awaits the donation agreement, which is transformed into a unilateral transaction based on the economic analysis of law? Or are the needs of the economy not always able to replace approaches of law and order based on the black letter law and the philosophy of law?

Economic analysis and philosophy of law: together or separately

The sociological understanding of law is of particular importance in the context of the philosophy of law. S. S. Alekseev noted that the law has the ability to respond to changing conditions of public life[10]. The law not only mediates social relations but is also a product of social interaction. It turns out that the law is something that is actually encountered in public relations, is widespread therein and is in demand. And then we come back to the idea of the law as the right of the majority. The rule constructed by the legislator should be a generalization of the practice of social interaction. And therefore, such a rule should be a majoritarian default rule — a majority dispositive rule, i.e., the rule, which corresponds to the prevailing social model of behavior. However, the basis of the majoritarian default rule here is not the principle of economic efficiency but the sociological understanding of the law.

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[5] Karapetov A. G. Economic Analysis of Law [Ehkonomicheskii analiz prava]. M., 2016. P. 429 (In rus)

[6] Posner R. A. Economic Analysis of Law. 8th ed. New York: Aspen Publishers, 2010. P. 119.

[7] D. 45.1.38.17.

[8] See: Bibikova E. V. Contract in Favour of a Third Party in Russian and European Private Law: A Comparative Account [Dogovor v pol’zu tret’ego litsa v rossiiskom i evropeiskom chastnom prave (sravnitel’no-pravovoi obzor)] // Contracts and Obligations: a Collection of Works of Graduates of the Russian Chamber of Public Law [Dogovory i obyazatel’stva: sbornik rabot vypusknikov RSHCHP]. Vol. I. PP. 77–78 (In rus)

[9] See ibid. PP. 93–94.

[10] Alekseev S. S. The Social Value of Law in Soviet Society [Sotsial’naya tsennost’ prava v sovetskom obshchestve]. M., 1971. P. 126.

An interesting metamorphosis is also demonstrated by the approach of B. B. Cherepakhin. He deduces the donation construction as a unilateral transaction dogmatically, based on narratives of a legally significant will.[11]

It turns out that both the philosophy of law and the economic analysis of law may lead to the same results and are not necessarily in irreconcilable contradiction. It follows from the above arguments that both economic analysis and legal philosophy can justify the unilateral nature of transactions that mediate an act of benefiting.

At the same time it should be noted that the sociological approach to the law does not always preclude the choice of a legal regulation model.

S.S. Alekseev believed that the task of the philosophy of law was to explain the essence and purpose of law through the world view of the society, from the perspective of social values.[12] He called the philosophy of law the integration of philosophical ideas and legal data.[13] In his research the scientist noted that the private law is based on the philosophical ideas of equality, personal freedom and autonomy of will.[14]

The principle of autonomy of the will is revealed in essays by M. M. Agarkov. The scientist believes that if a person's name is used in a positive context, for example, some heroic actions are attributed to him, he still has the right to protect his name.[15] Otherwise, it would violate his right to be himself. The name in its legal meaning, according to M. M. Agarkov, is a separation of individualization, and its philosophical basis is the moral property of an individual.[16] This example shows the importance of the value and independence of the human person in determining their non-property and property status, even if someone wants to improve this situation.

It is difficult to deny that the principle of personal freedom and autonomy of the will is the philosophical basis of private law today, either. These values form the free autonomous person as a subject of law, which itself has the right to make a decision whether it wants to receive a benefit or not. It follows that the values existing in society do not allow economic analysis to determine the choice of normative legal structures.

At the same time when choosing the philosophy of law as the basis of the legal regulation, an interesting metamorphosis arises once again. S.S. Alekseev notes that the fundamental value of freedom is first of all of economic importance. It is the value of freedom that underlies the principles of freedom of competition and freedom of contract, i.e. the underlying principles of the market economy that determine the economic efficiency of exchange.[17] Thus, the construction of the legal regulation based on dogmatic principles makes it possible to achieve the goals set by the economic analysis of the law. In the context of the problem of imposed benevolence the principle of freedom of the individual does not allow establishing unilateral character of transactions mediating the act of benefiting as a general rule.

Based on these arguments we can conclude that the economic analysis of the law and the philosophy of the law are not conflicting prerequisites for legal regulation construction. Any legal rule may be based on a philosophical value and at the same time ensure achievement of economic efficiency. The choice of a specific model of the legal regulation should be determined by a balanced ratio of philosophical and economic values for the long run.

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[11] Cherepakhin B. B. Op. cit. PP. 46–48.

[12] Alekseev S. S. Philosophy of Law [Filosofiya prava]. M., 1997. P. 2 (In rus)

[13] See ibid. P.12.

[14] Alekseev S. S. Ascent to the Law. Searches and Solutions [Voskhozhdenie k pravu. Poiski i resheniya]. M., 2001. PP. 161, 729. (In rus)

[15] Agarkov M. M. The Right to a Name [Pravo na imya] // Collection of Articles on Civil and Commercial Law. In Memory of Professor Gabriel Feliksovich Shershenevich [Sbornik statei po grazhdanskomu i torgovomu pravu. Pamyati professora Gabriehlya Feliksovicha Shershenevicha]. M., P. 143 (In rus)

[16] See ibid.

[17] Alekseev S. S. Ascent to the Law. Searches and Solutions [Voskhozhdenie k pravu. Poiski i resheniya]. M., 2001. PP. 728–730. (In rus)

3. Alekseev S. S. The Social Value of Law in Soviet Society [Sotsial'naya tsennost' prava v sovetskom obshchestve]. M. : Yuridicheskaya literatura Publ., 1971. 223 p.
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10. Posner R. A. Economic Analysis of Law. 8th ed. New York: Aspen Publishers, 2010. 787 p.

Business Activity on the Internet: Main Sources and Prospects of Legal Regulation

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ABSTRACT
The current Russian legislation defines the Internet as a kind of information and telecommunication network. The article is devoted to the problems of legal regulation of business use of the Internet. One of the main issues today in the context of relations "business — Internet" is the question of the ratio of the application of existing legislation and the adoption of special regulations that take into account the specifics of the world wide web. According to the author, there is no need to give a special status to the conclusion and execution of transactions through the Internet space, adopting special laws; it is enough to develop the provisions of existing ones, developing a mechanism for the use of Internet technologies.
Keywords: Internet, business activity, legal regulation, legislation

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Internet space is actively filled in with commercial content managed by entrepreneurs. Intensive move of trade from "physical" market to the network market is ongoing, and previously non-existent forms of entrepreneurship are emerging in the market due to new developed and launched Internet technologies. This actually spontaneous economic reform was responded by development of the regulatory framework that regulates specific relationship in the Internet both at the international level and at the level of particular States.

In this context, it is worth to mention the UN Convention adopted on November 23, 2005 (hereinafter referred to as the "Convention") on the use of electronic communications in international contracts.[1] The Convention member states are obligated to recognize the legality of electronic communications used in contracts, and to keep record of the place and time of messages sent. The Convention also defines the concept of "electronic terms", the introduction whereof in the terms of the contract means for the parties that they recognize the exchange of electronic messages as a tool for business negotiations and recognition of such negotiations status as a valid transaction. For Russia, the document entered into force on August 1, 2014.

The World Intellectual Property Organization actively participates in regulating Internet entrepreneurship, its core business is protection of intellectual property, which is also relevant for e-commerce. For example, the "Agreement on trade-related aspects of intellectual property rights", was developed jointly with the World Trade Organization (WTO), and it is known as "Agreement on TRIPs, which has been in force in Russia since August 8, 2012.[2] It establishes and enables regulation of international trade in intellectual property in the global world market within the framework of the WTO.

The World Trade Organization has also developed and concluded the Agreement for communication information technologies (CIT) whereunder tariffs for goods directly related to information technologies are to be decreased.[3]

Directive No. 2011/83/EC "On Consumer Rights" and Directive 2000/31/EC "On Particular Legal Aspects of Information Services in the Internal Market, in particular, on e-commerce" are in force within the European Union.[4] According to these documents, each consumer is entitled to use legal remedies available in the country of permanent residence.[5] In fact, the European Union has made all the necessary preliminary steps towards the formation of the legal framework for development of e-commerce. And, despite the fact that Russia has not participated in this process, the European experi-

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[1] The Convention is published in Russian on the official web portal of legal information Available at: http://www.pravo.gov.ru (accessed 18.09.2019).

[2] Collection of Legislative Acts of the Russian Federation. 10.09.2012. No. 37 (appendix, part VI). PP. 2818–2849.

[3] See: Zagashvili V. S. World Trade Organization in the Face of New Challenges [Vsemirnaya torgovaya organizatsiya pered litsom novykh vyzovov] // Russian Foreign Economic Journal [Rossiiskii vneshneehkonomicheskii vestnik]. No 7. M., 2016. P. 17. (In rus)

[4] Official website of the European Union Legislation. As of 25.08.2017. Available at: http://eur-lex.europa.eu (accessed 10.09.2019).

[5] See: Arkhipov V. V., Kilinkarova E. V., Melaschenko N. V. Problems of Legal Regulation of Circulation of Goods on the Internet from Distance Selling to Virtual Property [Problemy pravovogo regulirovaniya oborota tovarov v seti Internet: ot distantsionnoi torgovli do virtual'noi sobstvennosti]. M.: Law [Zakon]. 2014. No 6. P. 121. (In rus)

ence of legal regulation is of particular importance, since our country belongs to the same legal family as the majority of the European countries.

The United Nations Commission on international trade law developed the UNCITRAL model law, i.e. United Nations Commission on International Trade Law, UNCITRAL on electronic signatures[6], the UNCITRAL Model Law on Electronic Commerce.[7] The UNCITRAL model law on electronic signatures does not make much sense for Russia, since the Federal law "On electronic signature" has already been adopted. The model law on electronic commerce is more interesting for Russian legislators and entrepreneurs due to the lack of the appropriate law in the Russian legal system, and as such law affects the matters of electronic commerce as a whole, administration of legal requirements with regard to messages, transmission of data, shipping documents, and transportation of cargoes.

For the purpose of interpretation of the aforesaid legislative acts their international origin and the need to facilitate uniformity in their application and adherence to fair performance principles shall be taken into account.

Regarding the organization of online business within the country, it should be noted that notwistanding the rejection of the draft law No. 11081-3 "On Electronic Commerce"[8] by the legislators, there is currently a certain legal framework established for online business carried on via Internet in Russia, and this business demonstrates the trend for further continuing expansion and detalization.

The key source of legal regulation of business activities is the Civil Code of the Russian Federation. As a whole, the civil law does not define online business carried on online, but it appears that online commerce has the same set of features as the generic concept, but the difference lies in the means of such activity — it is carried on in Internet space. Therefore, Internet entrepreneurship includes business activities carried on through Internet, permeating all lines of business, such as insurance, trade, e-money, marketing, banking, and information exchange.

The legislator sets special requirements to business carried on via digital space also in the laws regulating particular legal relationship, for example: In the Federal Law No. 149-FZ of July 27, 2006 "On information, information technologies and information protection"[9], Law of the Russian Federation No. 2300-1 of February 7, 1992, "On Consumer Rights Protection",[10] Federal law No. 38-FZ of March 13, 2006, "On advertising".[11]

Thus, a kind of intermediary services in Internet is represented by the business of the organizers and owners of the website (software) copying the "uber" concept.[12] In Russian law, participants in such Internet relationships are referred to as owners of aggregators, and specifically: The law of the Russian Federation "On Consumer Rights Protection" introduced the general concept of the aggregator, while the Federal law "On information, information technologies and information protection" uses the term "news aggregator", by the Order of the Government of the Russian Federation of April 28, 2018 under No. 824r the concept of the "unified trade aggregator" was introduced, and customers using this term may effect procurement operations to satisfy public and municipal requirements. In the theoretical research works the following definition was given to this term: owners of aggregators are "organizations or individual entrepreneurs who are not real sellers, but act as intermediaries and direct recipients of funds transferred by consumers towards payment of the goods presented on their websites".[13]

"Intermediary sites" are very popular both among business entities and private entrepreneurs and among ordinary individuals, and this fact is explained primarily by simplicity of the search; for organizations

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[6] The document was not published. Available at: https://www.uncitral.org/pdf/russian/texts/ electcom/ml-elecsig-r.pdf (accessed 18.09.2019).

[7] The model law in Russian is published in the edition: UN Commission on International Trade Law. Yearbook. 1996, Vol. XXVII. New York: United Nations, 1998. PP. 319–323.

[8] In 2004, the draft Federal law was rejected in the second reading. Despite the rejection of the legislative draft, the provisions contained therein are essential for understanding specific terminology, as well as for interpretation of existing civil law norms in the context of e-business and are accepted by many entrepreneurs as illegal definitions and even to some extent a kind of behavior model, although not established at the level of the law, but being perceived as "common".

[9] Russian Newspaper [Rossiyskaya Gazeta]. 29.07.2006. No. 165.

[10] Russian Newspaper [Rossiyskaya Gazeta]. 16.01.1996. No. 8.

[11] Russian Newspaper [Rossiyskaya Gazeta]. 15.03.2006. No. 51.

[12] The term "uber" is derived from the name of the US company — Uber Technologies Inc. Uber is a company organizing transportation of passengers and baggage, while Uber itself is not a carrier and does not incur responsibility as a carrier under the general rule. Uber performs as intermediary between a customer and a carrier, and such business model has become very popular (inter alia, with different features and in different markets), while the name "Uber" is a common name.

[13] Leiba A. The State of Competition in Retail Internet Trade [Sostoyanie konkurentsii v roznichnoi internet-torgovle] // Competition and Law [Konkurentsiya i pravo]. No 3. M., 2016. P. 45. (In rus)

providing such services, the profit from such activity is very high. Nevertheless, because of the lack of clear-cut legal regulation of their activities, business entities and private entrepreneurs who own websites and are not classic sellers (contractors) did not actually bear the burden of compliance with consumer rights to the information about the seller (manufacturer, contractor), on products sold and services offered. Anyway, they perform as immediate recipients of cash funds, so they must be included into legal relationship between the contractor (seller) and the customer.

In the Directive of the European Parliament and the Council of the European Union of October 25, 2011 2011/83/EC, On Consumer rights, this trend was taken into account, and the said Directive defines the concept of "remote contracts" (organized schemes for remote sales of goods or remote provision of services without the need for concurrent physical presence of the seller and the consumer, with the exclusive use of one or several remote communication facilities until the moment when a contract is entered into).[14] It is expressly stipulated in article 8 of the Directive that the intermediary, who is the organizer of the remote sale scheme, must provide complete and reliable information about the product (service) before entering into the contract, as well as information about the seller (contractor).

Following the principle of promoting the proper functioning of the internal market by achieving a high level of consumer protection, the Russian legislator has compensated the lack of the rule of law by establishing the requirement to the effect that the organizer of the information disseminated in Internet (the owner of the social network or messenger), who, on the one hand, does not interfere in activity of its users, but, on the other hand, when providing Internet space, in case of violation of private or public interests must act as a person who is obligated to undertake actions required by law, and this obligation also corresponds to the status of the intermediary.

As for the necessity to introduce liability for the owners of aggregators for accuracy of information and for control over the sellers, it should be noted that the legislator has introduced substantial changes to the Law "On Consumer Rights Protection".[15] This, in accordance with part 2.1 of article 12 of this law "the owner of the aggregator, who provided the consumer with false or incomplete information about the product (service) or about the seller (contractor), relied upon by the consumer at the time of signing a sale-purchase contract (a contract for payable services) with the seller (contractor), is liable for losses caused to the consumer as a result of such information provided to it. The list of the instances wherein owners of aggregators are liable is not limited by the changes made, and the position for possible liability to be incurred by the aggregators on other legal grounds was reaffirmed in the explanations of the RF Supreme Court.[16]

Another essential aspect is worth noting here. An organizer of information disseminated via Internet is obligated to comply with requirements of the laws with regard to protection of intellectual property, but unlike the "ordinary" website owner, who on its own determines and fills up such website with content, the organizer primarily provides such possibility to registered users. Therewith provided that liability for posting unauthorized content shall be incurred by the person who has access to the website and posts information in such person's name. The organizer is required to assist in removing property items from public access. For violation of these requirements, the organizers will be held administratively responsible, and their websites will be blocked. It is a known fact that Internet enables users to quickly and uncontrollably post information, which circumstance in couple with a large number of Internet resources makes it almost ineffective to control the unauthorized distribution and use of intellectual property items. At the same time, possession of intellectual property plays an important role in entrepreneurial activity (business operations). Intellectual property enables uniqueness of an entity, attractiveness of an entity for counterparties, and it makes it possible to derive passive income.

A special category of intellectual property disputes is presented by disputes connected with a domain name. In the Russian law, a domain name is not currently regarded to be an item of intellectual property. In the draft version of the Federal law No. 47538-6 "On amendments to parts one, two, three and four of the Civil Code of the Russian Federation, as well as to some particular legislative acts of the Russian Federation" a domain name was recognized to be a means of individual identification, it was defined and it was stipulated that the exclusive right to a domain name arises with effect from its registration. Nevertheless, these provisions were removed during consideration of the draft law. V.I. Ere-

[14] Directive of the European Parliament and European Council dated 25.10.2011. 2011/83/EC Available at: http://www.wipo.int/ (accessed 10.09.2019).

[15] On amendments to the Law of the Russian Federation "On Consumer Rights Protection": Federal law No. 250-FZ of 29.07.2018 // Collection of Legislative Acts of the Russian Federation, 30.07.2018, No. 31, article 4839.

[16] On some aspects in application of laws governing truck carriage of cargoes, passengers and luggage and on contracts for cargo forwarding services: the resolution of the Plenum of the Supreme Court of the Russian Federation No. 26 of June 26, 2018 // Russian Newspaper [Rossiyskaya Gazeta]. No. 142, 04.07.2018.

menko, Doctor of Law, a former head of the Law Department of the Eurasian patent office, commented on this issue as follows: "Such outcome is logical, since no exclusive right to a domain name is officially recognized anywhere in the world, and inter alia, at the international level".[17]

Nevertheless, among interim measures available pay a party in a domain-related dispute, it is possible to provide for a prohibition for the administrator from performing any actions with the domain name, and also alienation, refusal, change of a registrar, as well as prohibition for the Registrar to cancel the domain name and to transfer the rights of administration of domain name to other person.[18] Another important aspect for resolving such disputes is involvement of the domain name administrator is a co-respondent (co-defendant) in the legal proceedings. Thus, in pursuance with article 1253.1 of the Civil Code of the Russian Federation, an information intermediary under the general rule is liable for violation of intellectual rights in the IT and telecommunications network on general grounds if the guilt is proved.

Federal law No. 63-FZ of April 6, 2011 "On electronic signature" plays a significant role in making civil transactions in the Internet space.[19] The introduction of electronic documentation flow in almost all fields of activities has made it necessary to have a digital analogue of the common physical signature. The law establishes the basic concepts used in these relationships. Thus, an electronic signature is understood as information in electronic form attached to other information in electronic form (signed information) or otherwise associated with such information and is used to identify the person signing the information. The law also defines the types of electronic signatures and establishes the procedure for such signatures to be obtained and used. As a whole, this act was adopted in order to ensure integrity of authenticity and accuracy of electronic documents and information certified by the electronic signature of the signatory, subject to the requirements stipulated in the law.

In this regard, I would like to note that on August 13, 2019 the Federal law No. 286-FZ of August 2, 2019 "On amendments to the Federal law on state registration of real estate"[20] came into force, and thereunder it is prohibited to consider an application filed in electronic form for state registration of a transfer of title or termination of title to a real estate property owned by an individual, if no information is available in the Unified state register of real estate about the possibility for filing such application in the form of electronic document and (or) electronic image of such document, signed by enhanced qualified electronic signature. Thus, it became impossible to submit documents for registration of a transfer of ownership in remote access, without the proprietor's permit, thereby minimizing the risks of fraudulent transactions with real estate.

In Russia as well there was adopted Federal law No. 161-FZ of June 27, 2011 "On the national payment system", which introduces key concepts for electronic commerce, such as "electronic payment instrument", "electronic money", "electronic money operator", etc. Electronic payment systems are organized by business entities, which, as a rule, are non-banking credit organizations whose activities are regulated by the Federal law No. 395-1 of December 2, 1990 "On banks and banking operations", acts of the Central Bank of the Russian Federation.

In its turn, the Code of the Russian Federation of administrative offences establishes liability for breaches of requirements applicable to business activities carried on both in general and via Internet. Thus, since September 2018, the legislator established administrative liability for non-compliance with the requirements related to prohibition on use of information networks for bypassing blockages, and search engines are required to connect to the Roskomnadzor (the Federal service for supervision of communications, information technology and mass communications) Unified register of prohibited websites, to follow the suit of the mobile operators who are already doing it. Also, providers will now be responsible for a failure to submit or for a late submission to Roskomnadzor of the relative data enabling Roskomnadzor to identify the owner of software and hardware used for accessing restricted information resources or networks. This rule will apply to information about notices given to the owner of such facilities about the need to post data that will enable identification of such owner (article 19.7.10 of the Russian Federation Code of Administrative Offences).

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[17] See: Eremenko V. I. On Improving the Legal Regulation of Domain Names in the Russian Federation [O sovershenstvovanii pravovogo regulirovaniya domennykh imen v Rossiiskoi Federatsii] // Legislation and Economics [Zakonodatel'stvo i ehkonomika]. No 10. M., 2012. P. 42. (In rus)

[18] On approval of the reference information to be provided on some particular issues related to the procedure established for interim measures be applied in a domain-related dispute: the resolution of the Presidium of the Court of intellectual property rights No. SP-23/3 of October 15, 2013. The document was not published. Available at: http://www.ipc.arbitr.ru/ (accessed 20.09.2019).

[19] Russian Newspaper [Rossiyskaya Gazeta]. 08.04.2011. No. 75.

[20] Russian Newspaper [Rossiyskaya Gazeta]. 07.08.2019. No. 172.

When talking about the prospects for development of business operations via the Internet, we will highlight the following two important documents. By the Decree of the President of the Russian Federation No. 203 of May 9, 2017 "On the strategy for development of information society in the Russian Federation for 2017–2030" the national interests in the field of digital economy have been approved.[21] By the order of the Government of the Russian Federation No. 1632-R of July 28, 2017, in pursuance with the aforesaid Decree of the President of the Russian Federation, the state program for digital economy of the Russian Federation was approved.[22]

For the purpose of implementation of the program's objectives, the State Duma Expert Council for digital economy and blockchain technologies under the Committee for economic policy, industry, innovative development and entrepreneurship commenced work in spring 2017.

Owing to the initiative of the Expert Council, Federal law No. 34-FZ of March 18, 2019 "On amendments to parts one, two, and article 1124, part 3 of the Civil code of the Russian Federation" came into force on October 1, 2019.[23] Article 141.1 "Digital rights" was incorporated in chapter 6 of part 1 of the Civil Code of the Russian Federation, and in pursuance with the said article the digital rights shall be understood as binding and other rights identified as such in the law, the content and conditions of exercising whereof are determined in accordance with the rules of the information system satisfying criteria established by the law. Accordingly, digital rights have been added to the objects of civil rights within the property rights (article 128 of the Civil Code of the Russian Federation). Implementation, disposal, and inter alia, transfer, pledge, charge, encumbrance of the digital right in other ways or restriction of the disposal of the digital right is possible solely in the information system without applying to a third party.

Terms and conditions applicable to determination of the owner of digital rights are regulated. It was established that the transfer of a digital right on the basis of a transaction does not require the consent of the person who assumed obligations under such digital right.

In addition, the law establishes conditions for compliance with the written form of the transaction effected with the use of electronic or other technical means enabling such person to reproduce contents of a transaction on a tangible carrier in unchangeable form, therewith the requirement to the existence of the signature shall be recognized to have been complied with if any method enabling to reliably identify a person who expressed his/her will is used (article 160 of the Civil Code of the Russian Federation). It appears that a possibility to reproduce the contents of the transaction on a physical carrier, among other things, means the ability to select the terms of the transaction into a separate file that can be saved (for example, on a hard disk of a server or a device) and print it.

As regarding the performance of the obligation arising upon occurrence of circumstances stipulated by the terms of the transaction, the creditor's will can now be expressed through the use of information technologies (article 309 of the Civil Code of the Russian Federation).

Part 2 of the Civil Code of the Russian Federation has been revised as well in connection with the said law adopted. It is established that the retail purchase and sale agreement is considered to be concluded in the proper form from the moment when the seller gives the buyer an electronic or other document confirming payment made for the goods with the use of remote methods of selling goods (ordering work, services) (article 493 of the Civil Code of the Russian Federation).

In Law No. 34-FZ contains provisions regulating the procedures for collection and processing of anonymized information about users. For example, chapter 39 was supplemented by article 783.1, which defines specifics of the contract for provision of information services, and, in particular, such contract (agreement) may incorporate a clause binding the parties to withhold from actions for a certain period if such actions may result in disclosure of such information to third parties. It is worth noting that similar confidentiality rules already exist, for example, in articles 771, 1032, 1467, 1470 of the Civil Code of the Russian Federation. Initially, the new rule was supposed to regulate the features of big data turnover, altogether modifying the concept of "database" in article 1260 of the Civil Code of the Russian Federation. The concept of database, however, has remained unchanged, and the issue of legal regulation of big data has remained open, and in connection therewith the reason for introduction of a separate rule is not clear.

It is also stipulated in the law that a nominal account agreement, and insurance agreement may also be entered into in the form of single electronic document signed by the parties, or by exchange of electronic documents by the parties (article 860.2 and 940 of the Civil Code of the Russian Federation).

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[21] Collection of Legislative Acts of the Russian Federation. 15.05.2017, No. 20, article 2901.

[22] Collection of Legislative Acts of the Russian Federation. 07.08.2017, No. 32. article 5138.

[23] Russian Newspaper [Rossiyskaya Gazeta]. 20.03.2019. No. 60.

At the same time, it is prohibited to make a will using electronic or other technical means (article 1124, part 3 of the Civil Code of the Russian Federation).

Therefore, at present, contractual and other rights to objects can be certified by digital rights, content and terms whereof are determined in accordance with the information system by model describing a security in article 142 of the Civil Code of the Russian Federation, while obligations under transactions can be performed in automatic mode. The legislator did not include self-executable contracts (so-called smart contracts) in the Civil Code of the Russian Federation as a separate type of contracts, but defined them as a subtypes of a written form of transaction. Under such approach the need to change the already existing legal models, as well as their implementation in the legal system and in the minds of law enforcement agencies has been eliminated.

The aforesaid innovations in the provisions of the Civil Code of the Russian Federation as amended by Federal law No. 34-FZ of March 18, 2019 “On amendments to parts 1, 2 and article 1124 of part 3 of the Civil Code of the Russian Federation” shall apply to legal relationship, as well as to those rights and obligations that were created after October 1, 2019.

In addition, commencing from January 1, 2020, Federal law No. 259-FZ of August 2, 2019 “On attraction of investments using investment platforms and on amendments to some particular legislative acts of the Russian Federation” will come into force.[24] As stated in the Explanatory note to this draft law, it was developed within the scope of the implementation of the IVth Strategy for development of small and medium-sized businesses in Russia for the period up to 2030, s approved by the Government of the Russian Federation. In line with the said strategy, solutions related to the development of an alternative source of financing for small and medium — sized businesses-collective financing (crowdfunding and crowd investing) shall be proposed. As noted by A. Aksakov, the Chairman of the State Duma Committee for the financial market: “This is already happening, we just set the rules to regulate this process. Individuals already invest in multiple projects, having watched good advertising, they invest money and sometimes they earn something, but often their profits are lost. And inter alia, because this process is not regulated by laws”.[25] In this regard, this act regulates legal relationship in attracting investments with the use of information technologies, as well as those with operators of investment platforms for organizing retail financing, that is, regarding crowdfunding. It is stated in Law No. 259-FZ that solely Russian companies and individual entrepreneurs — operators of investment platforms, may attract money for small and medium-sized businesses for retail financing purposes. They will arrange for attraction of investments through investment platforms-special online platforms. Under the new rules the capital of the investment platform operators must be at least 5 million rubles The Bank of Russia will maintain a register of such operators. The law also regulates a number of other issues, such as follows: restrictions on attracting investments (one person can attract no more than 1 billion rubles per year); specific features of investments made by individuals (unqualified investors are not allowed to invest more than 600 thousand rubles within one calendar year within the scope of all investment platforms in the Russian Federation), etc. In this order, the following digital rights (utilitarian digital rights) can be acquired, alienated and exercised in the investment platform next year: The right to demand transfer of a thing (things); the right to require the transfer of exclusive rights to results of intellectual activity and (or) rights to use the results of the intellectual activities; the right to require execution of work and (or) provision of services. A separate article is dedicated to utilitarian digital rights in the Federal law No. 259-FZ of August 2, 2019. Taking the provisions thereof into account, as well subject to provisions of the digital rights Law, utilitarian digital rights should be understood as mandatory digital rights that are not subject to state registration, were initially created as digital rights, and circulation whereof is possible solely in the investment platform.

A possibility for depository accounting of utilitarian digital rights is stipulated in the Law. This means that not only the emerged and circulated utilitarian digital rights, but also the issuance and circulation of non-issue grade and non-documentary securities certifying utilitarian digital rights (digital certificates), which the depositary can dispose of, and securing the rights of the owners thereof to claim from such depository to provide services for exercising utilitarian digital rights and (or) dispose of them in a certain way, are regulated.

Federal law No. 259-FZ of August 2, 2019 introduced corresponding changes to a whole number of legislative acts; in particular, changes were made to the Law on advertising. It is established that advertising of investment assistance services using the investment platform must contain the following details: Address of the website whereon information is disclosed by the operator of the investment

[24] Russian Newspaper [Rossiyskaya Gazeta]. 07.08.2019. No.172.

[25] Available at:http://duma.gov.ru/news/27031/ (accessed 07.10.2019).

platform; a statement to the effect that conclusion of contracts via an investment platform, whereunder investments are to be attracted, is highly risky and may entail a loss of invested funds in full amount. Advertising related to attraction of investments in the following ways through an investment platform is prohibited: grant of loans; acquisition of placed shares of a non-public joint-stock company and issue-grade securities convertible into shares of a non-public joint-stock company; acquisition of utilitarian digital rights.

Changes have been introduced also to the Law on the national payment system: Therefore, in particular, funds received by organizations engaged in operations for arrangement of investments attraction are no longer deemed to be electronic funds.

It stated in the final provisions of the law that activities for organization of investments attraction through investment platforms after 01.01.2020 is allowed for persons whose information is included in the register of operators of investment platforms. This requirement, however, does not apply to organizations carrying on this activity as of January 1, 2020. The aforesaid organizations are required to bring their activities in compliance with the established requirements before July 1, 2020.

As a whole, requirements set by the law for participants of the investment platform are reasonable. Restrictions for individuals to the total volume of investments will protect them from reckless investments into risky projects. However, it is now clear that the existing platforms do not fit into the framework of the new regulation, as they imply attraction of investments in the form of cryptocurrencies, rather than fiat ones. Therefore, one of the regulation purposes is legalization of investments into tokens, is not achieved in fact, platforms and foreign investors will not rebuild their infrastructure and technology they use to meet the requirements of the Russian legislator.

Among other things, the liability aspect remains unclear. The law contains an article stipulating responsibility of the investment platform operator for losses incurred due to disclosure of inaccurate, incomplete or misleading information, for violation of rules prescribed in the law, as well as for the platform non-conformity to requirements of the law. The law does not contain information about other liability. At the same time, the law contains a whole number of prohibitions, for example, a ban on attracting investments into real estate through the platform. In this regard, it is not clear what type of responsibility will be borne by operators in case of violation of the established imperative prohibitions?

In addition, another draft law related to amendments to the Civil Code of the Russian Federation — No. 419059-7 “On digital financial assets and on amendments to some particular legislative acts of the Russian Federation” (on regulation of accounting and circulation of digital rights) is currently pending adoption. This law was expected to come into force on October 2019, as well as law No. 34-FZ. As indicated in the explanatory note to the draft law No. 419059-7, submitted to the State Duma of the Russian Federation on March 20, 2018, its purpose is “to legislate in the Russian legal field the definitions of the most widely used financial assets created and / or issued using digital financial technologies, which the draft law includes a distributed register of digital transactions…”.[26] If, however, the first version of the draft law fully corresponded to this explanation, thereinafter its content has undergone material changes. A big glossary was removed from the project. Solely the definition of “digital financial assets” was left in the first article, while the rest of the concepts used in the document are not disclosed separately. As a whole, it can be noted that the draft law has a short but rather nonlinear history, which largely reflected the ambiguous attitude of state authorities to the technology of distributed registers and tools related to the said technology. Russian state authorities still can’t decide what they should do with cryptocurrency. The law on digital financial assets seems to be almost ready, but new initiatives continue emerging. For example, the Ministry of Finance of Russia proposed cryptocurrencies be split into the following three categories: virtual assets, technical tokens, and digital financial assets, thereby increasing the effectiveness of regulating relationships between token holders.[27] The Ministry of Finance and the Bank of Russia oppose the status to be obtained by the cryptocurrency as a legal tender as they believe the crypto may compete with the ruble. It is stated explicitly in the draft law that digital assets are not a legal tender. It is assumed that the initiators of the draft law are willing to attach a legal status of property to cryptocurrency. At the same time, the token/cryptocurrency is not recognized as a security, but the requirements applicable to them actually copy the requirements established in the securities laws.

The analysis of the draft law also showed that many provisions of the draft law are declarative in nature, without providing for changes to the currently applicable legislation. It is stated in the certificate

[26] See: The explanatory note to the draft version of the Federal law on digital financial assets. Available at: http://www.asozd.duma.gov.ru/ (accessed 14.09.2019).

[27] The Ministry of Finance has found a way to regulate cryptocurrencies Available at: https://yandex.ru/news/story (accessed 15.09.2019).

to the draft law that the adoption of the draft law will not entail the need to make changes to the industry-specific legislative acts. However, in such case the draft law appears to be “torn off” from the Russian legal system. Therewith, “excessive” duplicating regulation of this sphere is visible. It is obvious that this draft law, in addition to the internal discrepancies, corresponds to the already adopted laws in the field of the digital economy in key aspects (also with regard to the terminological apparatus), and to the currently applicable Russian laws.

It was not accidentally anticipated that the legal regulation of relationships related to digital assets should be systemic. Even if the draft law on digital financial assets is passed, there is a high probability that cryptocurrencies will be banned as a legal tender in the territory of Russia. Therefore, the adopted law on crowd investing regulates investment in the form of traditional assets, with crypto assets intentionally left aside.The new rules should work for a certain time, and then after summarizing the existing practice, it will become clear how to use this novelty correctly. In consideration of the aforesaid, it is worth noting that that legal basis for doing business via the Internet in the territory of Russia. It is not accidentally occurred that the argument against the adoption of the law on electronic commerce was the lack of expediency of introducing rules regulating the already regulated public relationships. The increasing complexity of the legislation in itself does not entail any advancement of digital commerce in the Russian Federation, but creates additional difficulties for the law enforcement branch because the Civil Code of the Russian Federation is composed in such a way that it includes universal basic provisions, while the complexity is solely in correct interpretation and application thereof.

Therefore, the root cause is not a lack of a legal framework (the current legislation does not establish prohibitions on business carried on in the digital environment), but the lack of practice in doing business via Internet. It appears that it is accumulation of experience (administrative, judicial, business) evolving into established practice of interpretation that will enable development of the digital economy, instead of increased complexity of the legislation. This approach will enable us to take into account all trends in the regulation of e-commerce at the level of international organizations and the best foreign experience in regulating this phenomenon.

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Social and Legal Conditionality of Deformation of Professional Legal Consciousness of Lawyers

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ABSTRACT
Structural elements of legal consciousness of lawyers can be deformed under the influence of various factors, which creates adverse consequences for the individual, the state and society. Law enforcers have the ability to reduce the impact of certain deforming factors, to prevent the risk of professional burnout, if the choice of professional legal activity (profession) will correspond to their moral ideas.
Keywords: professional legal consciousness, deformity, legal activities, professional burnout, the factor

The deformation of professional legal consciousness did not occur at once. Lawyers, like other members of society, are affected by the external environment: a huge variety of economic, political, and cultural factors influence the formation of rational ideological, social and psychological, and behavioral elements of legal consciousness or awareness.

The formation of legal values and standards of legal behavior continues throughout the whole of our lives. A person acquires skills and learns standards of normative behavior, learns the first legal regulations in the process of games, reading fairy tales, and gradually develops his or her own picture of legal life in a simplified form since childhood.

Further on, people pick up behavioral models in the process of special education — legal education: by way of targeted influence, professional legal knowledge, skills and competencies are formed[1].

Elements of legal awareness have not been fully formed in modern society, they are unstable, which contributes to reinforced trends for illegal behavior, even upon a slight aggravation of the social and economic situation. Social relationships in the human society are largely based on morality. The population that lawyers work with does not generally possess legal knowledge, and therefore, an action undertaken within the legal space is perceived as unusual and forced one for subjects of trivial daily legal awareness; realization of rights and interests by individuals is complicated.

Ongoing economic crises cause adverse effect on the formation of legal consciousness. The following regularity can be discovered: the ongoing economic crises cause an adverse effect on the formation of legal awareness (inter alia, on the professional one).

Such problems are recognized by the government and reflected in the Order of the Government of the Russian Federation No. 1662-r of November 17, 2008 (version dated February 10, 2017) “On the Concept of long-term social and economic development of the Russian Federation for the period up to 2020”: “The effectiveness of institutional changes depends on the extent to which the adopted legislative norms are supported by the effectiveness of their application in practice. A substantial gap has been created in Russia between the formal norms (laws) and informal norms (real behavior of economic subjects), which is reflected in the low level of administration of justice and in the tolerant attitude to such conduct from the side of the government, business and the wide masses of population, that is, in legal nihilism. Such situation substantially complicates the formation of new institutions, including those required for the development of the innovative economy”.[2]

Therewith, the “deformation of legal awareness” itself may be perceived by subjects of law (by legal profession due to the education obtained), but the subjects of law perceive their “abnormal perception of law and deviant behavior in the field of law” as a way of adapting to the complex unfavorable environment.

It is most dangerous when disrespectful attitude to the law is demonstrated not merely by subjects of trivial legal consciousness, but also by some particular officers responsible for law administration (law

[1] Bredneva V. S., Khudoykina T. V. The Limits of the Concept “Professional Legal Awareness Deformation” from the Psychological and Legal Perspectives // The Limits of the Concept “Professional Legal Awareness Deformation” from the Psychological and Legal Perspectives. // ESPACIOS. 2018. Vol. 39. No. 27. PP. 1–7. Available at: http://www.revistaespacios.com/a18v39n27/18392701.html (accessed 10.08.2019).

[2] On the Concept of the long-term social and economic development of the Russian Federation for the period to 2020 (together with “the Concept of long-term social and economic development of the Russian Federation for the period to 2020”): order of the Government of the Russian Federation dated No.1662-r November 17, 2008 (version dated February 10, 2017).

enforcement). Researchers noted a long-term trend towards deformation of professional legal awareness, which is manifested in the formation of criminal attitudes and orientations.[3]

For the period from 2011 to 2016 investigators verified about 200 thousand reports of corruption crimes. About 120 thousand criminal cases were opened. Nearly 50 thousand criminal cases were referred to courts for trial. 3,360 persons having a special legal status under chapter 52 of the Code of Criminal Procedure of the Russian Federation were brought to trial as accused in corruption-related crimes. Among the accused persons were 1,113 heads of municipalities of local administration authorities, 1,133 deputies of local authorities, 395 investigators and heads of investigative bodies, 286 lawyers, 82 prosecutors, 58 deputies of legislative bodies of the subjects of the Russian Federation, and 23 judges.[4]

Another problem is that in Russia, the level of compulsory execution of judgements does not exceed 52%.[5]

It becomes obvious that a society in which the rules of law are violated by public officials, state officers, state authorities, representatives of the government, cannot be convinced of the expediency and usefulness of prescriptions of law.

The deformation of professional legal awareness in various forms is manifested in increasingly pronounced manner, in particular, in the criminalization of multiple areas of society life, preventing the formation of the effective legal system in the state. A high level of legal awareness of the individual implies a negative attitude to the violation of law and order, to violation of the subjective rights and freedoms of citizens.

It should not be assumed that the deformation of professional legal awareness is specific for domestic legal profession only. Similar issues are raised in scientific papers published in English language.[6]

In many legal systems, a lawyer is traditionally seen as a client's advocate. The task of the subject of professional legal awareness is only representation and protection of the client without analyzing whether the behavior of the represented person is right or wrong, moral or immoral. It is assumed that the arguments are to be evaluated by court.

This comprehension of the lawyers' role ignores the issue of to what extent the personal interests of the represented person should affect the professional behavior of lawyers. Consequences of behavior of lawyers who defend the interests of clients, contrary to their morals and will are rarely analyzed in the scientific papers. Psychologists describe multiple mechanisms of the resulting deformation of legal awareness in such case.

There is a mechanism for "attitude support" of a contradictory position — these are unintended, subconscious effects, changes in rational and ideological, emotional elements of legal awareness, occurring in the process of persuasion of other people.

If a lawyer presents arguments contradicting his personal views, nonverbal forms of communication, communicative behavior may express such doubts beyond the will of the lawyer. The lawyer's arguments become more persuasive if he or she shares the beliefs expressed in the speech delivered. A special subject who defends a position will attempt to find all the possible arguments to support his/her position and to impair the value of the other party's arguments.

A subject of professional legal awareness subconsciously seeks to achieve consistency of all his/her views and opinions. When an inconsistent thought is expressed, a person experiences an unpleasant psychoemotional state caused by the internal conflict. To avoid this discomfort, the lawyer will seek to

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[3] Saulyak O. P. Legal Nihilism as an Invariant of Domestic Legal Consciousness [Pravovoi nigilizm kak invariant otechestvennogo pravosoznaniya] // Russian Justitia [Rossiiskaya yustitsiya]. 2009. No. 9. P. 3; Fedorenko M. P., Stepanov K. V. To the Issue of the State of Legality and Discipline in the Light of the Requirements of the Appeal of the Minister of Internal Affairs of Russia to the Employees of Internal Affairs Bodies [K voprosu sostoyaniya zakonnosti i distsipliny v svete trebovanii obrashcheniya Ministra vnutrennikh del Rossii k sotrudnikam organov vnutrennikh del] // Bulletin of the Yuzhno-Sakhalinsky branch of the Far Eastern Law Institute Ministry of Internal Affairs of the Russian [Vestnik Yuzhno-Sakhalinskogo filiala DVYUI MVD Rossii]. 2005. No. 2. PP. 3–7. (In rus)

[4] Kozlova N. Alexander Bastrykin: the Investigative Committee of Russia is Extremely Tough on Bringing to Criminal Liability for Corruption Crimes [Aleksandr Bastrykin: SKR predel'no zhestko podkhodit k privlecheniyu k ugolovnoi otvetstvennosti za korruptsionnye prestupleniya] // Russian Newspaper [Rossiiskaya gazeta]. 24.07.2016. Federal issue [Federal'nyi vypusk] No. 7030 (162). (In rus) Available at: https://rg.ru/2016/07/24/bastrykin-ochishchenie-riadov-sk-i-drugih-vedomstv-prodolzhitsia. html (accessed 10.08.2019).

[5] On the Federal target program "Development of the Russian judicial system" for 2007–2011 period: Order of the Government of the Russian Federation No. 583 of September 21, 2006, Moscow.

[6] Chemerinsky E. Protecting Lawyers from their Profession: Redefining the Lawyer's Role, 5 J. Legal Prof. 31 (1980) Available at: https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3808&context=facpu bs (accessed 10.08.2019); Helm L. Mental Health and Legal Profession: a Preventative Strategy. Law Institute of Victoria Ltd. P. 67 Available at: https://www.liv.asn.au/PDF/For-Lawyers/Member-Benefits-adn-Privileges/MentalHealthReportSummary.aspx (accessed 10.08.2019); Susan S. Silbey. Legal Culture and Legal Consciousness, Editor(s): James D. Wright. International Encyclopedia of the Social & Behavioral Sciences (Second Edition), Elsevier, 2015, PP. 726–733. Available at: https://doi.org/10.1016/B978-0-08-097086- 8.86067-5 (accessed 10.08.2019).

reduce the contradiction and to find a balance. In logical terms, this situation will be presented by the following formula: I believe Y, but I represent the person who is not Y.

Psychologists determine many variables resulting in the probability of changes in attitude to the situation and to behavior. For a lawyer, these may be different incentives, variations in the interpretation of legal and moral norms, which will enable a person to change his/her behavior to make personal views and beliefs matching the professional position.

Sometimes a lawyer has to make a lot of effort to justify his/her work, especially if the subject understands that his/her actions may cause harm to public or to the environment. For example, a lawyer who adheres to the concept of environmental protection but is forced to represent the industry in a confrontation with regulatory authorities who oversee environmental protection, will have to make great efforts to justify himself/herself by choosing devious methods of persuasion.

The more effort is spent on "attitude support", the more internal conflicts and subsequent self-persuasion effort will develop.

When a lawyer accepts a professional task conflicting with his personal view, he becomes a hostage of the situation, being temporarily motivated to think through all the positive arguments and to suppress thoughts about the negative aspects. This psycho-behavioral mechanism increases the possibility for adopting a new position that was previously regarded unacceptable.

A number of authors believe that emotional attitudes determine behavior.[7] Accordingly, the emotional and psychological elements of professional legal awareness determine behavioral ones.

Therefore, the lawyer is likely to adopt a new view on the legal system, and this will affect the professional behavior. Researchers admit the fact that it is difficult for people to choose one thing and believe in another one. In the end, either the relative action will be commensurable with the views (for example, where the lawyer refuses to handle the case, which he/she recognizes to be immoral), or the lawyer will change his/her views. In some particular instances, the amount of the fees may be a decisive factor. The role of the state and educational institutions is to convince lawyers that they should not engage in professional practice, if it is immoral, does not correspond to the views of the subject, and is in conflict with essential moral values.

Apart from the aforesaid, to overcome the deformation of professional legal awareness, the lawyer must choose those areas of activities that minimize the likelihood of obtaining clients whose retainer will force the layer to trigger the "attitude support" mechanism.

The commitment undertaken by a special subject to himself and to his/her personal views must prevail. The choice of basic values and ideas is formed along with the experience gained in the process of manifestation of multiple social activities and predetermines a person's behavior in the future. Such fundamental beliefs constitute the integral part of self-realization and self-determination.

The choice of the line of specialization in professional activity should not be determined by occasional factors. If the lawyer's role is considered solely in serving the interests of other subjects, then the personal beliefs and professional behavior of the lawyer will change subconsciously, intrapersonal conflict will develop, and the deformation of professional legal awareness will increase.

This approach may seem selfish, but it is targeted on protection of mental and physical health of legal profession and on overcoming the deformation of legal awareness. A legal practitioner merely preserves his/her personal views and his/her inner self. Such approach guarantees that a lawyer will not work against his/her idea of the ideal kind of society.

Refusing to give arguments, for example, for support of non-compliance with health safety standards or fire safety rules, the lawyer thereby helps the society.

The social role of lawyers is protection of socially important relationships and maintenance of law and order.

The views of lawyers should be fully formed and clear for the employer and clients, moral and legal contradictions should not arise in the process of legal work as they may create a working conflict and risks of criminal liability for the lawyer. For example, in a situation where a lawyer is admitted to a position with the employer to re solve corporate problems and is requested to register limited liability companies forming questionable financial schemes.

Legal systems of different countries and society itself are based on the idea that a person actually has the freedom to choose different alternatives among values and beliefs. These provisions are established in constitutions and international legal acts.

Even in the above example of a lawyer protecting the industry from liability, has alternative options for justifying the decisions made. We cannot say that the environmental situation is one of the unimpor-

[7] Daryl J. Bem, H. Keith McConnell. Testing the Self Perception Explanation of Dissonance Phenomena, 74 Journal of Personality and Social Psychology. Vol. 14. No. 1. PP. 23–31. 1970. Available at: http://dx.doi.org/ 10.1037/h0020916 (accessed 10.08.2019).

tant factors in the formation of ideas and behavior. But it is quite possible to assume a scenario where a lawyer in the system of hierarchy of his/her individual values may consider it more important to preserve the only city-forming enterprise and protection thereof from initiated bankruptcy.

Values may be formed as a result of upbringing, education, and under the influence of a relative social environment, but this does not mean that it is necessary to allow all formed values to fully control the professional activity of the subject. The main idea is to make every effort and to choose what is objectively suitable for the subject of professional legal awareness.

Where this principle is implemented in practice the following question is raised: who will represent unpopular views? And what course of conduct should be undertaken by those lawyers who, by virtue of article 49 of the Code of the Criminal Procedure of the Russian Federation[8] are not authorized to reject the undertaken obligation to protect a suspect or the accused?

As for lawyers, it is possible to agree with the proposition to amend the Code of the Criminal Procedure of the Russian Federation and permit to reject such representation.

In conditions of high competition in the market of legal services, it appears to be unlikely that there will be problems arising with such representation. Even if no lawyer can be found who would sincerely approve the client's actions, there are likely to be lawyers who will be neutral in their evaluation of the situation, who will see their task in commensurable and fair punishment, in satisfying the client's rights during the investigation and trial, rather than in acquittal of the accused.

On the other hand, no one can be formally sure, what is good and what is bad from a legal point of view until the facts are established by the court.

Therefore, the deformation of legal awareness is predetermined by unfavorable economic factors. In general, the traditional role of a lawyer emphasizes obligations to clients, the employer, and the legal system. Therewith, the problem of the lawyer performing professional duties in conflict with his/her own beliefs is omitted in the legal doctrine and practice. Such a situation causes a deforming effect on the legal consciousness of lawyers, causes negative changes in rational and ideological, emotional, and behavioral elements.

Based on the research performed, lawyers are encouraged to choose professional activities based on their own moral views in order to overcome the deformation of professional legal awareness. Revision of the currently established approach to professional duties of a lawyer at various levels will improve the efficiency of legal activity and will make it possible to achieve a higher social result.

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[8] Code of the Criminal Procedure of the Russian Federation of 18.12.2001 No.174-FZ (version dated August 2, 2019).

The Genesis of the Institute of Criminal Punishment in Forced Works

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ABSTRACT

The article is devoted to the peculiarities of the formation of the legal basis for the execution of this type of criminal punishment, like forced labor. The scientific paper uses formal-logical, historical and comparative-legal research methods. The history of the appearance and development of this type of punishment is analyzed, the study of the houses of correction, workhouses and correctional arresting units as a prototype of current correctional centers is conducted. The results of the first year of forced labor in the Russian Federation were summed up. The main problems and difficulties associated with the execution of punishment in the form of forced labor are indicated.

Keywords: forced labor, houses of correction and workhouses, a correctional center, the sentence

A characteristic feature of the state's penitentiary policy at the present stage is the reduction in the application of imprisonment sentences, with substitution for sentences not related to isolation of convicts from society. The agenda of the second Congress of the Union of Criminalists held in Bern in 1890 included the issue of forced labor as an alternative to short-term imprisonment. Although consensus on the significance of compulsory labor as a penal sanction and its place in the system of penalties has not been achieved, nonetheless, two approaches to the implementation of forced labor as an independent penal sanction have developed: supporters of the first approach believed that forced labor should limit the right to freedom of labor and not the personal freedom of the convict, while supporters of the second approach believed that without restricting freedom for a sufficient period, the significance of the sanction as a disciplinary measure gets lost. At subsequent congresses of the Union of Criminalists, the issue of this type of punishment was not discussed.

With the adoption of Federal Law No. 420-FZ on December 7, 2011, forced labor as a new type of punishment appeared in the Criminal Code and the Penal Code of the Russian Federation, along with the already existing mandatory and corrective labor. The first version of the law provided for the start of the application of this type of punishment from January 1, 2013, however, the term was postponed twice — to January 1, 2014 and January 1, 2017. The main reason for the postponement was the significant cost of imposing the sentence and organizing its execution, since, according to the legislator, the court decision on punishment by forced labor had to be executed in correctional centers in the region of residence or sentence.

It should be noted that forced labor is not an absolutely innovative norm for Russian law. A punishment of similar content was used in Russia in the era of Peter the Great. This period of development of the penal system of the Russian state was characterized by an increase in the number of prisoners, a limited number of detention facilities and a lack of funds for their maintenance. Therefore, standards on compulsory forced labor for arrestees were introduced to the articles of war of 1715 and the General Regulations of 1720. Thus, the arrestees, serving their sentences in isolation from society, were used as free labor for various works carried out in places of detention.

In the first half of the 18th century, the task of extracting benefits from the labor of those sentenced to imprisonment becomes a priority for officials. Houses of correction and workhouses, as well as correctional detention centers originate as prototypes of current correction centers.

In 1721, the Handbook of Instructions of the Main Magistrate in several cities established houses of correction for men and spinning houses for women so that detainees would provide their own food as a minimum.[1]

The legislative act "Institutions for the Governance of the Governorates of the All-Russian Empire" adopted on November 7, 1775 in the reign of Empress Catherine II passed the houses of correction and

[1] Fumm A. M. Criminal Executive Standards as the Basis of the Penitentiary Policy of the Russian State of the XVIII Century [Ugolovno-ispolnitel'nye normy kak osnova penitentsiarnoi politiki Rossiiskogo gosudarstva XVIII v.] // Criminal Executive System: Law, Economics, Management [Ugolovno-ispolnitel'naya sistema: pravo, ehkonomika, upravlenie]. 2014. No. 4. P. 27. (In rus)

workhouses to the supervision of the Welfare Board, and it was assumed that houses of correction would accept "people of obscene or intemperate living" (clause 391), while the workhouses were intended for the maintenance of the poor "in order to provide sustenance through work" (clause 390).[2]

People who "inflicted shame and disgrace on society" were accepted by houses of correction for the time being or permanently at the "command of the viceroy regimen", or at the verdict of other courts, or at the request of fathers or mothers, or at the request of the landowner or host.

The concept of workhouses was to help the poor, needing at least some kind of income, as well as to teach the pests of society to work. If in need, one could get to the workhouse voluntarily or forcibly — the police would bring idle and professional beggars there. These looked-after people were conditionally divided into those of "reliable" and "unreliable" conduct. The former were given simpler work, the latter were assigned a guard and were forbidden to leave the premises.

By a decree of April 3, 1781, given to the Senate "On trial and punishment for theft of various kinds and on establishment of workhouses in all the Governorates," the circle of people in workhouses was expanded to accept those guilty of theft-stealing in the amount of up to 20 rubles.

Both workhouses and houses of correction were intended for work and punishment of "all lazy mob, those without passport, serfs and servants on the run, healthy beggars, drunkards, bullies, promiscuous people, loafers, and so on".[3] The nature of the work was at the discretion of the Welfare Board and was dependant on gender, age, physical fitness, crime and benefit, the work received.

With the emergence of workhouses and houses of correction, labor acquires elements of correctional impact and comes to be considered as a means that could distract from bad habits and inclinations. Initially, houses of correction were intended for those who were not criminals, and, therefore, they were not considered a place of serving a sentence, however, the Criminal and Correctional Penalties Code of 1845 subsequently designates the temporary stay in a house of correction as a correctional punishment, stipulating that those sentenced to detention in workhouses and houses of correction would be used only for work specified in the charters of these houses.

The terms of temporary detention in a house of correction with the loss of certain rights and benefits were set in the range from one year to three years, and if without limitation of rights and benefits — from three months to a year. The length of stay in the workhouse depended on the reason why the looked-after person got into the house. So, those sent for committing theft served a sentence depending on the value of the stolen item, their labor was rated at five cents per day; those on the run and without passport had to stay there until solicited by someone.[4]

On August 15, 1845, the "Additional Rules to the Charter on Detainees" were adopted, including provisions on Convicts to be Detained a Workhouse and on Convicts to be Detained in a House of Correction.[5] It was established that workers would receive one and a half pounds of flour, one and a half garnets of cereal and two pounds of salt per month. Upon performance of the labor assigned to them, they would be entitled to rest or work for their own benefit.

In the penal system of the Criminal and Correctional Penalties Code of 1885, detention in a house of correction is already absent.

The arresting companies of the civilian department were established in 1830 and until 1864 they were supervised by the Main Directorate of Railways and Public Buildings and were intended to contain and correct the behavior of people of the taxable classes. The government developed a typical design for the buildings of the arresting companies of the civilian department, which was approved and recommended for use in all governorates on August 5, 1839.

The Criminal and Correctional Penalties Code of 1845 stipulated that those sentenced to a temporary submission to correctional arresting companies of the civilian department could be used in urban and all other kinds of work. In the penal system of the Criminal and Correctional Penalties Code of 1885,

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[2] Hereinafter cit.: The Complete Collection of Laws of the Russian Empire. Coll. 2nd. [Polnoe sobranie zakonov Rossiiskoi imperii. Sobranie vtoroe]. Vol. XX. 1845. The First Branch. SPb. 1846. 1045 p. (In rus)

[3] Georgi I. G. Description of the Russian-Imperial Capital City of St. Petersburg and Memorials in the Vicinity Thereof, with a Plan [Opisanie rossiisko-imperatorskogo stolichnogo goroda Sankt-Peterburga i dostopamyatnostei v okrestnostyakh onogo, s planom] / I. G. Georgi. [B. m.]: Adamant Media Corporation, 2001. P. 283. (In rus)

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[5] See: The Complete Collection of Laws of the Russian Empire. Coll. 2nd. [Polnoe sobranie zakonov Rossiiskoi imperii. Sobranie vtoroe]. Vol. XX. 1845. The First Branch. SPb. 1846. PP. 1027, 1031. (In rus)

the time of work in correctional arresting units was determined based on the extent of fault classified into five degrees: minimum of one year, and maximum of four years.

The arresting companies accepted: criminals according to court verdicts; tramps and runaways representing taxable classes or commoners (raznochinets), by order of the government; “people having fallen from depraved life into tax arrears, for working out such arrears and for their moral correction”, by verdicts of urban and rural communities; evil people for correcting their behavior, by verdicts of communities and the order of the landowning class.[6]

The arresting companies operated as follows: the military management of each troop was concentrated in the hands of the troop commander, who also ensured that each arrestee would master several crafts, the governorate construction commission provided them with work, and the troop’s noncommissioned officers supervised the arrestees around the clock during work and rest, officers and soldiers from the governorate troop of the internal guard ensured the external security of the troop’s building, the priest took care of the moral correction.

The issues of keeping arrestees in the company and their use in the works were covered by the Regulation on Correctional Arresting Companies of the Civil Department adopted on August 15, 1845. The main goals of creating the arresting companies of the civilian department were declared to be their assistance in the work in the city, the reduction in the number of people sent to Siberia and the costs of their convoy. A six-day working week was set for arrestees, and on Saturday, work continued until lunch. The arrestees’ labor was paid “by the day at the set rates that were 30–40% lower than reference rates.” Thus, for instance, the work of a stonecutter in the Ryazan governorate in 1846 was paid at the rate of 45 kopecks per day, while the same labor a company arrestee was estimated at 32 kopecks. However, the use of the arrestee labor remained economically unprofitable for the governorate authorities, since it did not pay back the financial costs of maintaining the arresting company. The expediency of the existence of correctional arresting companies was also questioned because there was no possibility to provide arrestees with work all year round. For the winter, urban work, as a rule, was suspended, and the issue of the employment of arrestees was acute. Another problem of the existence of arresting companies was the difficulty in providing arrestees with qualified work, for which they would be paid enough and which could subsequently become a means for free independent activity.

This led to the dissolution in 1870 of all the arresting companies and the formation on their basis of a new type of penal institutions — correctional arresting units. The militarized regime there was abolished, external work for arrestees was discontinued, the main emphasis was placed on the development of work in workshops inside places of detention. Correctional arresting units were included in the unified system of execution of criminal sentences and subordinated to the Main Prison Department of the Ministry of the Interior, created in 1879.

As we see, in Tsarist Russia attempts were made to reach a compromise between the state need to use punishment as a means of deterrence, the economic need to spend as little money as possible on the maintenance of penitentiary facilities, and, ideally, even make a profit, and the social obligation of re-education and social adaptation of the convicts. The state tested various types of punishments, where the restriction of freedom served as a means of bringing to work. The arresting companies were characterized by rather severe conditions of the detention regime, and the labor of arrestees was mainly used by the governorate construction committees and commissions. At the same time, the workhouses and houses of correction were an easier form of punishment, wherein detainees had more comfortable conditions of work and labor compared with correctional arresting companies.

The Soviet period of development of penitentiary law was characterized by the use of forced labor in decrees and other legal acts preceding the drafting of unified laws. For the first time at the legislative level, forced labor was enshrined in the Decree of the Council of People’s Commissars of the RSFSR of May 8, 1918 “On bribery”, which established that the person guilty of giving a bribe or accepting a bribe was to be sentenced to the most difficult, unpleasant and forced labor.

Forced community service was featured as punishment in the Decree of the Council of People’s Commissars No. 3 of July 20, 1918 “On the Court”, the Decree of the Council of People’s Commissars of July 22, 1918 “On Speculation”, and the Decree of the Council of People’s Commissars of September 19, 1918 “On Enhancing Criminal Persecution for Transportation, in Circumvention of Postal Departments,

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[6] Ostrovsky A. A. The Legal Basis for the Creation and Activities of Arresting Companies of Civilian Departments in the Russian Empire [Pravovye osnovy sozdaniya i deyatel’nosti arestantskikh rot grazhdanskogo vedomstva v Rossiiskoi imperii] // Scientific Notes of the Crimean Federal University Named after V. I. Vernadsky [Uchenye zapiski Krymskogo federal’nogo universiteta imeni V. I. Vernadskogo]. 2015. No.1. P. 97.

of Letters, Money and Small Parcels", Resolution of the Council of Workers' and Peasants' Defence of December 25, 1918 "On Desertion".

In this period, forced labor was twofold: firstly, it intensified the punitive content of imprisonment and was assigned as part of the overall punishment; secondly, in some cases, taking into account the role of those responsible for committing a crime, it was assigned as the main type of punishment.

The procedure for execution of the type of punishment in question was established by the Decree of the All-Russian Central Executive Committee of June 16, 1919 "Organization of forced labor camps". The forced labor camps were managed by the Department of the People's Commissariat of Internal Affairs. People were sent to them on the basis of decisions of units of departments of extraordinary commissions, revolutionary tribunals, people's courts and other Soviet bodies. All detainees were appointed to work, the type of which was determined by the camp administration, and engaged in physical labor during the term of serving their sentences. Each convict had a personal account and a record-book, which enabled to regulate the income of convicts taking into account earnings and the need to maintain the camp.

Forced labor as a form of punishment was featured in the Guidelines on Criminal Law of the RSFSR of December 12, 1919 (forced labor without placement into a place of imprisonment), the Criminal Code of the RSFSR of 1922 (forced labor without detention) and the Criminal Code of the RSFSR of 1926 (forced labor without imprisonment).

Chapter IV of the RSFSR Correctional Labor Code of 1924 contained provisions on the activities of the Bureau of Forced Labor without Detention. The indicated bureaus, having the rights of a separate unit, were part of the governorate (regional) inspectorate of places of detention. The costs of their maintenance were covered by deductions from the wages of convicts.

Bureau officials kept records of those sentenced to forced labor; assigned them to work; exercised general oversight of their compliance with the rules established at the time the forced labor was served; submitted to the distribution commission applications for early release. The work was carried out in enterprises for managing places of detention and their bodies or in other institutions and enterprises in agreement with the People's Commissariat of Labor (PCL) and its local bodies. The working conditions of the convicts were regulated by the RSFSR PCL and the articles of the Labor Code. Those serving sentences were given time to prepare for dinner, lunch and afternoon rest, as well as a two-week vacation once a year, sick leave and maternity leave. Of the wages received by convicts, 25% was retained for a special fund of the main administration of places of detention of the RSFSR and was spent on organizing work and improving the life of people serving sentences.

Those registered in the forced labor bureau did not have the right to change their place of residence without permission to move to another job.

As in Tsarist Russia, forced labor was aimed at the full, appropriate, beneficial use of labor and self-sufficiency. When organizing the execution of the punishment in the form of forced labor, it was supposed that local state institutions and state enterprises would widely use the labor of persons serving sentences to carry out maintenance tasks, i.e., reclamation, road works, repair of schools, orphanages, which would allow for great savings in carrying out a number of significant social projects.

In such circumstances, the state recommended that the courts more actively use forced labor, in connection with which the proportion of those convicted to forced labor in the total number of convicted persons grew rapidly: it increased from 15.3% in the first half of 1928 to 57.7% in the second half of 1929 and remained above 50% in the first half of 1930. The pressure on judges was such that in 1930, 20% of all murderers, 31% of rapists, 46.2% of robbers and 69.7% of thieves were sentenced to forced labor without detention.[7]

The organization of forced labor depended on the term of punishment: persons sentenced by orders of administrative bodies to the short-term (from one day to one month) serving of forced labor were sent to group work that did not require qualifications (snow removal, landfill clearing), and persons who were assigned long-term forced labor by a court verdict (from one month to one year) were involved in work in special enterprises (for example, tin and sackcloth workshops) or in large road construction work. A task work system was applied with the accounting of the time given for the task regardless of the time actually spent on it.

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[7] Kozlov D. S. Forced Labor as a Form of Punishment in the Historical Aspect [Prinuditel'nye raboty kak vid nakazaniya v istoricheskom aspekte] // Bulletin of Yaroslav the Wise Novgorod State University [Vestnik Novgorodskogo gosudarstvennogo universiteta im. Yaroslava Mudrogo]. 2013. No. 73. Vol. 1. P. 137. (In rus)

sent to group work that did not require qualifications (snow removal, landfill clearing), and persons who were assigned long-term forced labor by a court verdict (from one month to one year) were involved in work in special enterprises (for example, tin and sackcloth workshops) or in large road construction work. A task work system was applied with the accounting of the time given for the task regardless of the time actually spent on it.

As we see, in the period from 1918 to 1933 an active attempt was made in the RSFSR to organize the execution of forced labor on the basis of economic profitability and sufficient repressiveness.

In the RSFSR correctional labor codes of 1933 and 1970, the legislator transformed forced labor into correctional labor work. In the process of development of the penal system of the Soviet society, such forms of involvement in labor were used as conditional release from detention facilities with mandatory involvement in labor (1964–1993) and conditional conviction to imprisonment with mandatory involvement in labor (1970–1993).

From 1933 until 2011, the term "forced labor" was not used in the national legal system.

The Federal Penitentiary Service of Russia began to execute a new type of punishment in the form of forced labor from January 1, 2017.

By this time, pursuant to the Government Order No. 2392-r of November 12, 2016 "On the Creation of Federal Budgetary Institutions", four correctional centers were created and opened: in Tyumen Region on the base of the correctional facility No. 6 (Ishim) with 100 places; in Stavropol Territory on the base of the juvenile correctional facility in Georgievsk with 144 places; in Tambov Region on the base of the correctional facility IK-3 (Zeleny settlement) with 70 places; in Primorsky Krai on the base of the penal settlement No. 51 (Ussuriysk) with 150 seats. In addition, seven sites were created for those sentenced to forced labor: in the Republic of Bashkortostan at the penal settlement-5 (Ufa) with 100 places, in Trans-Baikal Territory at the correctional facility IK-10 (Krasnokamensk) with 50 places, in Samara Region at the correctional facility IK-10 (Volzhsky settlement) with 35 places, in Smolensk Region at the correctional facility IK-I (Anokhovo village) with 55 places, in Arkhangelsk region at the correctional facility IK-21 (Severoonezhsk settlement) with 50 places, in Novosibirsk region at the correctional facility IK-8 (Novosibirsk) with 92 places, in Karelia at the correctional facility IK-7 (Segezha) with 50 places. Thus, the limit for filling correctional centers and sites for those convicted to forced labor is 896 places throughout the country.

The subject of activity of correctional centers is the execution in accordance with the legislation of the Russian Federation of criminal punishment in the form of forced labor; main tasks: supervision of convicts, educational work, material and living arrangements for convicts, involvement of convicts in work, employment of convicts in organizations of any legal form, organization of access control in the facility.

The procedure for the assignment and execution of this type of punishment is regulated by article 53.1 of the Criminal Code, chapter 8.1 of the Penal Code of the Russian Federation and Order of the Ministry of Justice of the Russian Federation No. 329 of December 29, 2016 "On approval of the Internal Rules of Correctional Centers of the Penal System".

It was established that those sentenced to forced labor would serve their sentences in special facilities — correctional centers or isolated areas created at correctional facilities. The place of serving the sentence is to be within the territory of a constituent entity of the Russian Federation in which the convicted person lives or is sentenced; if involvement in labor under this rule is not possible, then the convicted person is to be sent to correctional centers located in the territory of another constituent entity of the Russian Federation. The person is to arrive at the place of execution of punishment independently at the expense of the state, with the exception of persons who are in custody at the time the sentence comes into force (such persons are to be convoyed and must be released from custody upon arrival at the correctional center). In case of evasion of the person convicted to forced labor from receipt of an order, such person is declared wanted.

The period of forced labor shall be calculated from the date the convict arrives at the correctional center. The time of serving the sentence does not include the time of unauthorized absence of the convict at work or at the correctional center for more than one day.

Those convicted to forced labor are under supervision and are required to comply with the internal rules of correctional centers; work where they are sent by the administration of the correctional center; constantly reside within the territory of the correctional center; live, as a rule, in hostels specially designated for them, not leave them at night or non-working hours, on weekends and holidays without the permission of the correctional center administration; participate, without remuneration, in the improvement of buildings and the territory of the correctional center in order of priority during non-working hours of no more than two hours a week; constantly carry a document of an established form proving the identity of the convict.

To solve urgent issues, the administration of the correctional center may allow convicts to leave the territory for up to five days.

A number of prohibitions are established for convicts. It is forbidden to:

1) acquire, store and use objects, products and substances withdrawn from civil circulation; all types of weapons, ammunition, explosive, flammable, radioactive and toxic substances; all kinds of alcoholic beverages, yeast, beer; narcotic substances, psychotropic toxic and potent substances, their analogs and medicinal substances with narcotic effects with no medical prescription; materials, items and videos of erotic and pornographic content; extremist materials and symbols of an extremist organization; playing cards; tattoo machines and their accessories;
2) be in the hostels in which they do not reside without the permission of the administration of the CC (correctional center);
3) refuse the work assigned by the administration of the CC;
4) engage in gambling in order to extract material or other benefits;
5) smoke in places not designated for this purpose;
6) acquire, manufacture, store or use prohibited items and substances;
7) wash, dry clothes, clean clothes and shoes in places not designated for this purpose;
8) refit the living rooms;
9) prepare and eat food in places not designated for this purpose;
10) make self-made electrical appliances and use them;
11) transfer to other persons a document proving the identity of the convict, and a pass with the right to leave the CC.

The premises in which the convicts live may be searched, and belongings may be examined. If prohibited items or substances are discovered, they are subject to seizure by order of the head of the correctional center and transferred to storage or destroyed.

Convicts who do not commit violations of the internal rules and have served at least one third of the sentence may be allowed to live with their family on a rented or own living space within the municipal entity in whose territory the correctional center is located. Convicts in good standing are allowed to travel outside the correctional center for the period of annual paid leave. Convicts are entitled to participate in sporting events, to engage in creativity and to study by correspondence in professional educational organizations and higher education institutions located within the municipal entity in whose territory the correctional center is located.

The standard living space per convict is no less than four square meters. Those convicted to forced labor get clothes, shoes (with the exception of clothes and shoes being personal protective equipment) and food at their own expense. If the convicts do not have their own means, they are provided with clothes, shoes and food at the expense of the federal budget in accordance with the norms established by Decree of the Government of the Russian Federation No. 514 of May 25, 2012.

Convicts receive the necessary medical and preventive and sanitary-preventive assistance.

Convicts are involved in work in organizations of any legal form in accordance with the labor legislation of the Russian Federation, with the exception of the rules for hiring, dismissal from work, transfer to another job, refusal to perform work, and leave. After six months of serving the sentence, the convict is granted annual paid leave of 18 calendar days. Annual paid leave shall not be granted to persons convicted to forced labor who are not provided with work. The law provides for 5% to 20% withholdings from the wage of the convicts, which deductions shall be transferred to the account of the territorial body of the penal system.

Educational work is carried out with convicts by the administration of the correctional center, incentives and penalties are applied. Supervision over the serving of a sentence is carried out by the administration of the correctional center, including with the use of audiovisual, electronic and other technical means of supervision, and consists in monitoring and monitoring the behavior of convicts in the correctional center, at the place of work, as well as in other places their stay. Without dwelling on the specifics of assigning forced labor as a criminal punishment, since this issue is beyond the scope of our study, we turn to the problems that identified themselves during the first year of the execution of this type of punishment.

First, the mechanism for attracting to labor in institutions, organizations, enterprises of various forms of ownership is not well developed. Employment of convicts in Tsarist Russia, which by now has turned out to be the most difficult aspect of the execution of sentences associated with involvement in work. A number of state-owned companies are certainly interested in the work of convicts, but in the modern world almost any type of work requires at least the minimum professional skills and capabilities that “marginal convicts”, who have lost social ties and have never worked before, do not possess. Therefore,

there arises the issues of organizing training for the performance of work, the resolution of which is assigned by law to the administration of organizations where those convicted to forced labor are engaged.

However, the procedure for completing this training has not been established. Quotas of workplaces for convicts are not provided for either. And the clause in the law stating that annual paid leave shall not be granted to persons convicted to forced labor who are not provided with work enables to conclude that the legislator initially envisaged a situation where people serving forced labor would not actually work. This situation alleviates the educational impact and the repressive function of this punishment.

The second problem is inextricably linked with the first one — the statutory 5% to 20% withholding from the wage of a convict implies at least decent pay, however, according to the Federal Penitentiary Service, the average wage of those convicted to forced labor is from 8 thousand to 15–20 thousand rubles per month. Thus, the goal of saving budgetary funds for the maintenance of prisons seems to be very utopian. Unskilled labor excludes good wages, which reduces the ability to stimulate the behavior of prisoners socially useful for society. In addition, there is competition for jobs between prisoners and workers, which in the current socio-economic situation can lead to increased tension in society.

Third, it is impossible to officially employ convicted foreigners under current legislation, since in order to work in Russia they must have a patent, and it is forbidden to issue such patent to convicts.

Fourth, there is significant doubt about the use of the term "forced labor" in the law, partly because forced labor is prohibited both at the international level (Convention of the International Labor Organization No. 29 of July 28, 1930 "Concerning Forced or Compulsory Labour"; Convention of the International Labor Organization No. 105 of June 25, 1957 "Concerning the Abolition of Forced Labor" [105-ILO]) and in national legislation (part 2 of article 37 of the Constitution of the Russian Federation, article 4 of the Labor Code of the Russian Federation).

In conclusion, it is should be noted that the initiative to revive forced labor as a form of criminal punishment in the legislation of the Russian Federation is quite controversial. Forced labor is a specific type of punishment, which consists, on the one part, in restricting freedom and, on the other part, in restricting legal capacity for work. In relation to those convicted to forced labor, there are no sizable exemptions from the general legal status of citizens. They are actually limited only in two constitutional rights: the right to freedom of movement and choice of residence and the right to freedom of choice of work. Historical experience shows that in the execution of sentences it is practically impossible to combine two mutually exclusive functions — persecution and self-sufficiency. Therefore, when implementing the type of punishment like forced labor one should not forget about the experience and, based on it, evaluate the practicality of the stated goals.

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International Jurisdiction on Fighting Against Corruption

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ABSTRACT
The urgency of the article is stipulated by the importance to form international legal institutes aiming at fighting against corruption and the problem related to implementing international regulations of the anti-corruption purposefulness in national legal systems. The use of formal legal methods allowed to research the following groups of the most important anti-corruption regulators: international anti-corruption standards and principles, international and legal mechanisms of monitoring the fulfillment of anti-corruption conventions, and international legal measures to prevent corruption. Empiric data show that the lack of the system counteraction to corruption as a negative social and legal phenomenon causes the erosion of legal institutes, and finally, their full non-operability. It is necessary to further integrate international cooperation in this area. It must result in the formation of the standard unanimity of institutes of national jurisdiction in fighting against corruption.
Keywords: fights against corruption, national legal systems, international anti-corruption standards and principles, international organizations

Global and regional interaction in international processes affects not only modern states, but also various structures and organizations, such as political and economic communities. Such multi-purpose and multi-vector institutions quite harmoniously coexist and interact thanks to integration processes, which is the essence of the modern world order. The concept of “integration” cannot be used in any particular aspect without taking into account all the components of globalization as a process of hyperintegration. In this case, it is difficult to distinguish the absolute dominants of this process, they change depending on the permanent determinants of objective and subjective conditionality. Particularly noteworthy is the process of internationalization and the negative integration of illegal phenomena that are characteristic of almost all national-social and international innovation events that do not have historical experience and the established methodology for their implementation. At the same time, it is necessary to admit that the integration of international organizations with different goals successfully counteracts threats to global security, including in combating corruption.

Today, it is difficult to find more controversial issues in international legal practice than determining the regularities of forms of corruption, methods to legitimize combating corruption, fixing the conceptual apparatus, and more. First of all, this is due to conflicts in the correlation of collective interests and individual state needs, determined by national and economical mental features, the level of national self-identification of each state with unconditionally emotional and propaganda overestimation, and sometimes exclusion of their role in certain events and processes of international character.

For the first time, the problem of corruption and the need to counter it became the subject of consideration at the international level at the V United Nations Congress on the prevention of crime and the treatment of offenders (Geneva, 1975). According to S.A. Loshakova, corruption in the 1970–80s was considered more as a national problem than a transnational one.[1] But the global, transnational nature of corruption began to be noted in the 1990s, with the intensification of integration processes in the global economy began. At the modern stage, research is focused on international anti-corruption standards[2] — a new form of global regulation in the field of combating corruption, which “go beyond the boundaries of a single state” and aimed at establishing certain compliance rules designed to systematize the activities of cross-border companies in the context of business ethics.[3]

[1] Loshakova S. A. International Legal Cooperation of States When Fighting against Corruption as a Factor of Providing Safety in Europe [Mezhdunarodno-pravovoe sotrudnichestvo gosudarstv v bor’be s korruptsiei kak faktor obespecheniya bezopasnosti v Evrope] // Business security [Bezopasnost’ biznesa]. 2014. No. 4. P. 36. (In rus)

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Resolution VIII of the UN Congress on Corruption in Public Administration noted that "the problems of corruption in public administration are universal and that although they have a particularly detrimental effect on countries with vulnerable economies, this effect is felt all over the world".

The UN development programme defines corruption as a threat to the stability and security of society, undermining democratic institutions and values, ethical values and justice, and damaging sustainable development and the rule of law.

Clause 52 of the outcome document of the UN Summit on the "Millennium Development Goals", which was held as part of the 65th session of the General Assembly, notes that "priority should be given to the fight against corruption both at the international and national levels. This is because corruption significantly hinders the effective mobilization and distribution of resources and diverts them from activities that are essential for eradicating poverty and fighting hunger and ensuring sustainable development."[4]

Almost all international anti-corruption legal acts contain a large number of administrative law norms that determine the organizational and managerial aspects of the implementation of these conventions. Particular provisions of the UN Convention Against Corruption deserve the most attention. Article 12 establishes the obligation of participating states to take measures to prevent corruption in the private sector and establish responsibility for non-compliance with such measures. This Article also obliges states to adopt rules aimed at preventing conflicts of interest. As a result, such norms have been incorporated into state legislation, as well as into codes of business ethics and anti-corruption policies of companies.

Currently, the identification of founders and managers is mandatory when registering legal entities in the states-members to the convention. Restrictions on the professional activities of former public officials are a requirement of the Convention. These provisions are implemented in the Russian Federation laws by the adoption of the Federal Law No. 273-FZ of December 25, 2008 "On Combating Corruption".[5]

The Organization for International Development and Cooperation (OIDC), its Development Center, and the Development Support Committee (DSC) play a significant active role in developing anti-corruption mechanisms. In cooperation, these structures, each in its competence, carry out a comprehensive impact on the problem of corruption by creating their own anti-corruption standards in order to implement their provisions in their national legislation.[6]

The fight against corruption reached its peak in 1999 with the adoption of the Convention Against Corruption by foreign government officials in the implementation of international transactions. This document is the result of a long and routine process, the engine of which was the activity of the Organization for International Development and Cooperation Working group on corruption in international trade transactions. The working group prepared a package of anti-corruption documents, among which were recommendations developed in 1994, 1996 and 1997, and the convention itself. The purpose of the adoption of these documents is for the countries of the world, as subjects of international law, to recognize the fact of bribery of foreign public officials as a criminal offense, and to develop the necessary asymmetric measures aimed at countering corruption in the implementation of transactions in international trade. The Development Support Committee has focused its efforts on combating corruption schemes in various financial projects implemented by donor countries in third-world and developing countries. Supervision of the distribution of funds is the key to effective economic assistance, which has clearly become clear as a result of the work of various international organizations with the countries of the former Soviet Union. The high percentage of corruption of the national elites of these states has shown the need to use special anti-corruption measures in bilateral supervision of the distribution of financial assistance from both the donor and the recipient. The adopted recommendations of 1996 expanded the field of activity of the member countries of the Development Support Committee in the fight against the corruption component in the system of international economic cooperation. This was reflected in the desire of the countries-members of the Development Support Committee to submit their legislative anti-corruption proposals for the legal supervision of the distribution of economic and financial assistance.

Currently, the priority directions in the activities of the Organization for International Development and Cooperation and the Development Center are global measures and the development of a unified policy to neutralize corruption in the system of economic activity and the formation of public institutions in order to accelerate the integration of countries with the transition economy into the global world economy. Monitoring of the impact of corruption on the economic development of Senegal, Mali and

[4] UN Resolution A/65/1, 2010. Available at: https://www.un.org/ru/ga/65/docs/65res1.shtml (accessed 10.02.2019).

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[6] Klyukovskaya I. N., Galstyan I. S., Lauta O. N., Mayboroda E. T., Cherkashin E. Y. International Organizations on Fighting against Corruption: Legal Means and Methods of their Implementation in National Legal Systems // Journal of Advanced Research in Law and Economics. 2016. No. 7. P. 1737.

Mozambique,[7] analysis of the Hong Kong anti-corruption campaign have formed an understanding of the futility of using the template method for all countries.

The US Agency for International Development (USAID) oversees non-military assistance to other countries that are part of the segment of “US national interests” in the following areas: support for trade, agriculture, economic growth and its monitoring, healthcare.[8] Since 1989, USAID has been involved in anti-corruption activities to prepare a special project aimed at creating transparent and controlled territories in the zone of vital interests of the United States for the implementation of various business projects by the American financial elite.

To do this, USAID worked hard to create “free” media, to create a so-called civil society in a particular country, a legal framework within which it would be possible to carry out its economic activities.

An insurmountable obstacle to the creation of unified global market governance mechanisms is the corruption of national governments of countries to which various international organizations, including American ones, have allocated money for economic reforms. To monitor the situation with corruption in public authorities, law enforcement agencies, and economic activities, USAID holds conferences on fraud and corruption, one of which was funded through the project to improve regional financial management in Latin America and the Agency’s Caribbean office. Regular workshops were held in Panama, Nicaragua, and Haiti to analyze vulnerabilities in the work of the General Auditor’s office in the fight against corruption.

The priority area for the USAID is the Latin American region, Central and Eastern Europe, and the CIS. In this regard, the Bureau of Latin American Countries, An important component of the World Bank (hereinafter — the “Bank”) is the promotion of innovative development of states and regions in order to achieve sustainable economic growth, with the ability to solve social, economic and environmental problems. The ultimate goal of the Bank’s strategy to help countries address the effects of corruption is not to completely eradicate corruption (which seems utopian in modern conditions of the world), but to support these countries in breaking from systematic corruption to creating optimal governance conditions that would minimize the negative effect of corruption on social development. The Bank’s strategy is based on three directions:

- implementation of reforms in the economic sphere;
- the strengthening of civil society institutions;
- international activity.

The Council of Europe's interdisciplinary group on corruption proposed the following definition: "Corruption is bribery and any other behavior of persons who are entrusted with the fulfillment of certain duties in the public or private sector, which leads to the violation of obligations imposed by the status of a public official, private employee, independent agent, or other kind of relationship and is aimed to obtain any illegal benefits for the person itself and other persons".[9]

The UN Convention against transnational organized crime (2000) laid the modern foundations for understanding corruption as not just a negative, but a criminal phenomenon.[10]

The UN Global Compact, which is based on the principle that "business communities must resist all forms of corruption", should be considered as generally accepted international standards for combating corruption.[11] By 2018, more than 9 thousand companies and 4 thousand non-profit organizations joined it, including more than 50 of the largest Russian organizations (Vnesheconombank, Rosneft, Russian Railways, Lukoil and others).[12]

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[7] Collection of reports at a joint conference of the Asian Development Bank — Organization for Economic Cooperation “Combating Corruption in the Asian and Pacific region”. Available at: http:// www.adb.org (accessed 10.02.2019).

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The most important prerequisites for the success of international cooperation in the field of combating corruption are the following areas:

- law enforcement cooperation in the procedural and forensic fields (for example, Interpol);
- its scientific validity (for example, the coordinating activity of the United Nations Interregional Crime and Justice Research Institute — UNICRI);
- activities of non-governmental organizations (in particular, Transparency International).

Use of the comparative legal approach and the methods of legal comparative analysis included in it made it possible to compare international anti-corruption conventions adopted both under the auspices of the international universal organization — the United Nations, and at the level of a number of international regional organizations: Council of Europe, European Union. Empiric data show that the lack of the system counteraction to corruption as a negative social and legal phenomenon causes the erosion of legal institutes, and finally, their full non-operability. The legally present, but actually not functioning social and legal institutions are an element of its constant destabilization. It is necessary to further integrate international cooperation in this area. It must result in the formation of the standard unanimity of institutes of national jurisdiction in fighting against corruption.

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Special Rules Governing the Rights of the Parties to the Results of Scientific and Technical Activities Obtained in the Performance of Research, Development and Technological Works at the Expense of the Russian Federation

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ABSTRACT
The article analyzes the special rules governing the legal relations between state customers and contractors on the distribution of the rights of the parties to the results of scientific and technical activities obtained in the performance of research, development and technological works at the expense of the Russian Federation. It is shown that, in general, the evolution of the regulatory framework in this area has both positive and negative trends. Conclusions are drawn that the system of legal regulation of legal relations concerning distribution of the rights to the results of scientific and technical activity received at performance of research, developmental and technological works at the expense of the Russian Federation, developing, being improved, is still in a formation stage, it cannot be considered complete.
Keywords: intellectual property, the results of scientific and technical activities, contracts for the implementation of research, development and technological works, the state customer

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The need for special regulation of legal relations in this area is determined by the need to specify the general provisions of the law in special regulatory legal acts, since one of the parties in the legal relations is a special entity that has a special legal status, namely the Russian Federation represented by its representatives.

The issues of regulating relations regarding the results of intellectual activity created at the expense of the state arouse the interest of researchers and practitioners, and have repeatedly become the subject of scientific research, as well as separate articles, which indicates the relevance of the topic under consideration. In this regard we should note the works of A.V. Atamas, E.G. Baklanova, V.F. Evstafiev, D.V. Orekhov, L.N. Khitrova, and Yu.A. Kovalev.

As a general rule (articles 1298, 1373, 1432, 1464, 1471 of the Civil Code of the Russian Federation), the rights to results of intellectual activities created at the expense of the Russian Federation shall belong to a company that perform government contract (to the contractor), unless the state contract stipulates that this right belongs to the Russian Federation on behalf of which the state customer acts, or jointly to the contractor and the Russian Federation.

Special regulations governing legal relations between state customers and contractors regarding the distribution of the rights of the parties to the results of scientific and technical activities obtained during the study, development and technological work at the expense of the Russian Federation are reflected in a number of by-laws.

A systematic analysis of laws in this area revealed that these norms are contained in more than fifty regulatory acts, including acts of ministries and departments, which, of course, creates difficulties in law enforcement.

Decrees of the President of the Russian Federation No. 556 of March 14, 1998 “On Legal Protection of Results of Military, Specialty, and Dual Purpose Research and Development, and Technological Works”[1] laid the foundation for the formation of the system of special regulations in the field under consideration (became void due to the issuance of the Decree of the President of the Russian Federation No. 673 of May 24, 2011) and No. 863 of July 22, 1998 “On the State Policy on Involvement in Economic Turnover of Results of Scientific and Technical Activity and Objects of Intellectual Property in the Field of Science and Technologies”.[2] These decrees, the Government of the Russian Federation instructed to ensure the implementation of organizational measures aimed at the implementation of legal protection of the state interests in the process of economic and civil law circulation of the results of intellectual activity obtained in the performance of state contracts (agreements); determine the procedure for using the results of

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[1] Russian Newspaper [Rossiyskaya Gazeta].19.05.1998, No. 94.
[2] Russian Newspaper [Rossiyskaya Gazeta]. 28.07.1998, No. 141.

scientific and technical activities obtained when conducting research, development and technological work for state needs under state contracts.

Also, when implementing the state policy on involvement the results of scientific and technological activities and intellectual property in the economic circulation, the following directions in science and technology have been prioritized: those providing a balance of rights and legitimate interests of legal entities, including the state, in the field of creation, legal protection and use of the results of scientific and technological activities and intellectual property in science and technology.

Of course, these decrees became a significant guide for public authorities, as concerns about the state of affairs in this area were expressed and the vector of development of the legal framework was set.

A regulatory act expressing the state's policy on the regulation of relations related to the implementation of scientific and technical solutions created at the expense of the federal budget is the Order of the Government of the Russian Federation No.1607-r of November 30, 2001 "On the Main Directions of the Implementation of the State Policy on Involving Results of Scientific and Technical Activities in Economic Circulation".[3]

The Order determined the direction of state regulation of legal relations in the field of the circulation of rights to the results of scientific and technical activities obtained under state contracts and agreements for the implementation of research, development and technological work for federal state needs.

In particular, the Order noted that developments containing protected intellectual property objects and other results of scientific and technical activities that provide the greatest socio-economic efficiency, as well as solving problems of strengthening the country's defense capability, are the priority for the state. In conditions of limited budget resources, the state can bear the costs associated mainly with the first stage — the creation of results of scientific and technical activities in priority areas of science and technology.

The Order stipulates that the state must be guaranteed rights to intellectual property objects and other results of scientific and technical activities created at the expense of the Federal budget, which, first, are directly related to ensuring the country's defense and security, and secondly, the state is responsible for bringing them to the stage of industrial application.

The Order also contains an important statement about the need to introduce the rights of the state to the results of scientific and technical activities in the economic circulation by transferring them either to the developing organization, or to the investor, or to another business entity.

It was noted that when transferring to business entities the rights to the results of scientific and technical activities created at the expense of the federal budget, the state does not consider the reimbursement of the costs of financing this activity as the main goal. Issues related to the regulation of the state's rights to the results of scientific and technical activities should be defined in state contracts for the performance of works for state needs, and other contracts (agreements) provided for by law. Moreover, contracts and agreements, one of the parties to which is the state and which provide for the subsequent transfer of rights to the results of scientific and technical activity, should provide the state with the opportunity to receive a non-exclusive, irrevocable and free license to use the results of scientific and technical activity for state needs.

These contracts and agreements should provide for specific obligations of organizations to which the state's rights to ensure that the developments are brought to the stage of industrial application and sale of finished products are transferred, the procedure for material incentives for contracting organizations, the procedure for paying remuneration to authors, as well as specific obligations of the party implementing the result of scientific and technical activities in the production practice, and sanctions for failure to fulfill these obligations.

The significance of Order No.1607-r is that the government proposed mechanisms for introducing the state's rights to the results of scientific and technical activities in the circulation. The Decree of the Government of the Russian Federation No. 982 of September 02, 1999 "On the Use of Scientific and Technical Activities"[4] defines the basic provisions governing the activities of state customers in resolving issues related to the use of the deliverables.

Firstly, the decision entrusts state customers under state contracts and agreements for the performance of research, development and technological works for federal state needs, while securing to the Russian Federation the rights to the results of scientific and technical activities obtained during the implementation of these state contracts and agreements, disposal of these rights on behalf of the Rus-

[3] Collection of Legislative Acts of the Russian Federation, 10.12.2001, No. 50, art. 4803.

[4] Russian Newspaper [Rossiyskaya Gazeta]. 17.09.1999, No. 183.

sian Federation. Secondly, it is established that the use of intellectual property in the field of science and technology for Federal state needs is usually carried out on the basis of a free non-exclusive license provided by the state customer.

Under the Decree of the Government of the Russian Federation No. 342 of April 22, 2009 "On Certain Questions of Securing the Exclusive Rights to the Results of Scientific and Technical Activities" (as amended by Decree of the Government of the Russian Federation No. 1024 of December 8, 2011), federal executive bodies and organizations acting as state customers for research, development and technological works under state contracts for state needs (hereinafter referred to as the "state contracts") on behalf of the Russian Federation, when concluding state contracts, shall provide conditions for securing exclusive rights to inventions, utility models, industrial designs, selection achievements, integrated circuit topologies, programs for electronic computers, databases and production secrets (know-how) (hereinafter — "the results of scientific and technical activities") under the established procedure:

- for the Russian Federation, if:

1) the results of scientific and technical activities are withdrawn from the circulation;
2) The Russian Federation took the responsibility for the financing of work to bring the results of scientific and technical activities to the stage of practical application, culminating in the stage of launching products into production, including preparation of production, production of the installation series and qualification tests;
3) the contractor did not ensure the completion of all the measures necessary for him to recognize or acquire exclusive rights to the results of scientific and technical activities until six months after the end of scientific research, experimental design and technological work;
4) the results of scientific and technical activities were created in the course of research, development and technological work carried out in compliance with the international obligations of the Russian Federation;

- for the Russian Federation or, by decision of the state customer, jointly for the Russian Federation and the organization performing research, development and technological work (the contractor):

1) if these results are directly related to the defense and security of the state;

- for the contractor on the terms determined by the state contract, in other cases.

Thus, Decree No. 342 defined the criteria for securing exclusive rights to the subjects of legal relations, which was an important step in the development of legal regulation in this field.

Of particular importance is the Decree of the Government of the Russian Federation No. 233 of March 22, 2012 "About Approval of Rules of Implementation by the State Customers of Management of the Rights of the Russian Federation to Results of Intellectual Activities of Civil, Military, Special and Dual Purpose"[5] (as amended by the Decree of the Government of the Russian Federation No. 384 of March 30, 2019), which determined what shall be included in the management of the rights of the Russian Federation to the results of intellectual activity, namely:

a) the implementation of measures to formalize the rights of the Russian Federation to the results of intellectual activity used and (or) created under the state contracts;
b) state registration of results of research, development and technological works of civil, military, special and dual-use purposes;
c) the organization of work on the valuation and adoption of accounting rights to the results of intellectual activity;
d) disposal of the rights of the Russian Federation to the results of intellectual activity;
e) the organization of the use of the results of intellectual activity.

A significant contribution to the regulation of issues related to the use of the results of scientific and technical activities obtained at the expense of the Russian Federation was made by Decree of the Government of the Russian Federation No. 9[6] of January 26, 2012 (as amended by Decree of the Government of the Russian Federation No. 1397 of November 18, 2017)

"On Monitoring and Supervision of the Sphere of Legal Protection and Use of the Results of Intellectual Activity of a Civil Purpose, Created at the Expense of the Budget Allocations of the Federal Budget, as well as Control and Supervision in the Established Field of Activity in and Government Customers and Organizations — Public Contracts Involving Conduct Research, Development and Technological Work."

The resolution approved the "Regulation On Monitoring and Supervision of the Sphere of Legal Protection and Use of the Results of Intellectual Activity of a Civil Purpose, Created at the Expense of

[5] Collection of Legislative Acts of the Russian Federation, 02.04.2012, No. 14, art. 1637.

[6] Russian Newspaper [Rossiyskaya Gazeta]. 01.02.2012, No. 20.

the Budget Allocations of the Federal Budget, as well as Control and Supervision in the Established Field of Activity in and Government Customers and Organizations — Public Contracts Involving Conduct Research, Development and Technological Work".

In accordance with the decree, federal state supervision refers to the activities of the Federal Service for Intellectual Property aimed at preventing, detecting and suppressing violations of requirements established by the legislation of the Russian Federation in the field of intellectual property by state bodies, governing bodies of state extra-budgetary funds, and federal treasury institutions, or other recipients of federal budget funds placing orders for the implementation of science but research, development and engineering works under civil government contracts, and organizations implementing government contracts and agreements, which are financed at the expense of federal budget allocations.

To develop the regulatory framework on introducing into the economic circulation of the results of scientific and technical activities obtained at the expense of the Russian Federation, the Decree of the Government No. 1275 of December, 26, 2013 (as amended by the Decree of the Government of the Russian Federation No. 1465 of December, 02, 2017) "On Approximate Terms and Conditions of State Contracts under the State Defense Order", the "Regulation on the Model Terms of State Contracts under the State Defense Order" was approved. Clause 22 of the Decree determined that the state contract for the performance of research and development works may include conditions for securing the right of ownership of the results of research and development works, including in relation to the results of intellectual activity obtained during the performance of the state contract, the distribution and procedure for securing rights to the created protected results of intellectual activity. Also, under clause 22, the following conditions may be included in contracts:

1) the responsibility of the chief contractor to ensure legal protection of the created results of intellectual activity in accordance with the decision of the state customer, by:
- performing legally significant measures on registration of rights to the created results of intellectual activity on the territory of the Russian Federation and on the territories of foreign states;
- taking measures to preserve the confidentiality of information that constitutes the secret of production (know-how);

2) the obligation of the state customer to provide the head contractor with a free simple (non-exclusive) license to use the results of intellectual activity, the exclusive right of which belongs to the Russian Federation, to perform work under the state contract.

The Decree of the Government of the Russian Federation No. 606 of July 2, 2014 “About Procedure for Development of Standard Contracts, Standard Conditions of Contracts, and also About Cases and Conditions of their Application”[7] (as amended by the Decree of the Government No. 663 of May 30, 2017), the Rules for developing standard contracts, standard terms of contracts were approved, according to which the state contract must provide for conditions on the rights of the parties to the results of intellectual activity created during the performance of works.

We should also mention “Guidelines for Reflecting in State Contracts of Issues of Legal Protection and Use of Results of Scientific and Technical Activities”[8] approved by Rospatent on March 02, 2006, which set out recommendations on the issue of implementing provisions in state contracts that establish the rights and obligations of the parties to secure the rights, legal protection and use of the created results of scientific and technical activities.

The Guidelines indicate that the following provisions must be settled by the parties:

1. Securing rights to the results of scientific and technical activities obtained during the performance of works under the contract.
2. Obligations of the contractor to ensure state interests.
3. Obligations to ensure legal protection of the results obtained by issuing patents or using the trade secret regime.
4. Obligations of the contractor to conduct patent research in full under GOST R 15.011-96.
5. Obligations of the state customer and the contractor regarding the use of previous intellectual property or rights and information owned by third parties.
6. Obligations of the owner of the rights to created intellectual property objects to pay remuneration to their authors.

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[7] Collection of Legislative Acts of the Russian Federation, 14.07.2014, No. 28, art. 4053.

[8] Guidelines for Reflecting in State Contracts of Issues of Legal Protection and Use of Results of Scientific and Technical Activities [Metodicheskie rekomendatsii po otrazheniyu v gosudarstvennykh kontraktakh voprosov pravovoi okhrany i ispol’zovaniya rezul’tatov nauchno-tekhnicheskoi deyatel’nosti] // Patents and licenses. Intellectual Rights [Patenty i litsenzii. Intellektual’nye prava]. No. 5, 2006. P. 47. (In rus)

The procedure for using the results of work obtained under the state contract. The decision on the distribution of rights between the state that finances intellectual activity and the performer of works must be made under the state contract (agreement).

A full and accurate indication of the rights and obligations of the state customer and the contractor in state contracts in relation to the created results of scientific and technical activities should contribute to further improvement of the contract system for the fulfillment of state orders, increase the responsibility of state customers for legal protection and the use of scientific and technical results created due to federal budget, protecting the interests of the state while involving the results of scientific and technical-economic activity and increase the efficiency of legal use of the created results of scientific and technical activities.

In general, the evolution of the regulatory framework in this area has, in our opinion, both positive and negative trends. The positive trend is that the state clearly expresses concern about the preservation of rights to results obtained at the expense of the budget, while striving to ensure a balance of rights and interests of participants in legal relations. As a negative trend, we should note the declarative nature of the norms available in legal acts, since the mechanism for their implementation is not defined. In particular, having determined that developments containing the safeguarding results of scientific and technical activities that provide the greatest socio-economic efficiency are priority for the state in securing their rights, the legislator did not disclose the mechanism for implementing this norm, and did not define efficiency criteria, therefore, of course, such standards do not work in practice. And there is an objective situation when, in the presence of a large array of regulatory acts, it is necessary to introduce new acts in order to explain the mechanism for implementing the previous ones. Of course, this situation does not ensure the sustainability of law enforcement in this area.

Summing up, we should note that the system of legal regulation of rights to the results of scientific and technical activities obtained during research, development and technological works at the expense of the Russian Federation, while developing and improving, is still in its infancy, and it cannot be considered complete.

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