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ТЕОРЕТИЧЕСКАЯ И ПРИКЛАДНАЯ ЮРИСПРУДЕНЦИЯ

Theoretical and Applied Law

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

Thomas Jefferson

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Contents

Foreword of the Editor-in-Chief

This is the next, already the third issue of The Theoretical and Applied Law Journal coming out. The topics of the articles published in this issue are timed to coincide with the conference of The Constitution of Russia: Yesterday, Today, Tomorrow held in December last year, organized jointly by the Law Faculty of the North-West Institute of Management of the Russian Academy of National Economy and Public Administration under the President of the RF, the Boris Yeltsin Presidential Center Foundation, the Commissioner for Human Rights in St. Petersburg and the B. N. Yeltsin Presidential Library.

The conference participants discussed a wide range of issues of particular relevance to the contemporary Russian legal order, including the prospects for the development of federal relations in the Russian Federation, the state of human and civil rights and freedoms, as well as local self-government institutions in Russia and in the world. The comprehensive reports of some participants formed the basis for the articles prepared by them which are of scientific relevance and practical significance. Particularly close attention of the authors of the issue was drawn to various aspects of the democratic political regime, considered both in the legal and in the broader socio-political context.

The article by Revekka Mikhailovna Vulfovich, Professor at the North-West Institute of Management, discusses the phenomenon of the so-called "varied democracy" and draws some conclusions about the possibilities of implementing this form of democracy in the Russian conditions. Of undoubted interest is the work of Professor of the Higher School of Economics Andrey Nikolaevich Medushevsky dedicated to the globalization dimension of constitutional democracy. Considering the causes of erosion and the prospects for the transformation of democratic institutions, A. N. Medushevsky comes to the conclusion about their viability subject to the consistent implementation of discursive procedures and conceptual models designed to ensure the formation of mechanisms of deliberative democracy that best meets the needs of the post-industrial society.

The topical problems of protection of human rights and freedoms have been comprehensively analyzed by Associate Professor of the Russian Academy of National Economy and Public Administration Victoria Viktorovna Filatova, who considers the impact of the decisions of the European Court of Human Rights on the implementation of the constitutional guarantees of fundamental rights. The role of the ECHR in ensuring human rights and freedoms at the international and national levels is beyond doubt. A number of decisions of the recent years open up new prospects in the development of the constitutional status of an individual, creating the preconditions for the recognition of the rights and freedoms of the so-called "fourth generation" (in particular, the right to be forgotten). And although the Russian legal system is currently experiencing serious difficulties in creating effective guarantees of even basic, personal, political, socio-economic rights, it should be hoped that in the future the positive international experience will be recognized in our country as well.

The Theoretical and Applied Law Journal continues publishing the works of foreign colleagues. This issue will include an article by Patrick Terry, Dean of the Faculty of Law of the University of Kehl (Germany), dedicated to the problem of the independence of judges in the countries of the European Union. It is hoped that the readers' interest will be aroused by the review of the materials of the conference of The Constitution of Russia: Yesterday, Today, Tomorrow to be published by us in the second issue of 2020.

The journal will continue informing its readers in detail about noteworthy scientific events held in St. Petersburg. In particular, we expect to devote one of the next issues to the publication of articles by the participants of the Second Interuniversity Scientific and Practical Conference "Baskin Readings "Changes in Law: Innovation and Continuity"", scheduled by the Law Faculty of the North-West Institute of the Russian Presidential Academy of National Economy and Public Administration for October this year. These publications are expected to give an impetus to scientific research and also to contribute to the expansion of the geography of interuniversity cooperation, which ultimately will help the integration of the scientific legal community.

Editor-in-Chief
Nikolay Viktorovich Razuvaev

Judicial Independence in Germany within the European Context

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ABSTRACT
At a time when judicial independence, or rather the lack of it in various European states, such as Poland or Hungary, is discussed, this seems an opportune moment to briefly reflect on judicial independence as it exists in Germany. While Germany has certainly gone a long way in trying to ensure judicial independence, it cannot be overlooked that the German system has some major deficiencies that threaten judicial independence. Despite much criticism in and outside of Germany, there has so far been no serious attempt in Germany to finally bring its rules on judicial independence more in line with European standards. This short article will first explain how judicial independence is guaranteed in Germany, before examining the system's weaknesses.
Keywords: judicial independence, Professional independence, personal independence, the German judiciary

1. Professional and personal independence (Article 97 Basic Law)

The principle of the independence of judges in Germany is rooted in Article 97 of the German Basic Law (Grundgesetz) of which the first paragraph refers to the *professional independence* of judges, the second to their *personal independence.*

Interpreted very generously, *professional independence* means that a judge is responsible to nothing but the law when administering justice. Neither the legislative[1] nor the executive,[2] nor even higher-ranking members within the judiciary[3] can tell a judge how to decide a case.

Indeed, it goes further, for it applies to the whole handling of a case, so as to ensure the judge is wholly free from outside influence when coming to a decision. Thus, according to the practice of the Constitutional Court, the highest instance in Germany, all the procedural decisions taken by a judge before and after judgement, such as when to hear a case, or which witnesses to hear, are a matter of professional independence.[4]

Judges are free to determine the order in which they hear cases of comparable urgency[5] and free to decide how often their court is convened, provided the minimum number of sessions is completed.[6] Moreover, the judges at a given court must decide themselves which judge gets which case according to guidelines established by the judges themselves or their elected representatives at an annual meeting of the steering committee of the respective court.[7]

Furthermore, and most controversially,[8] professional independence grants judges the right to decide where and when they fulfil their respective duties. Judges cannot be required to work in their office or be generally available during office hours. Provided the judge is present when his or her duties require it, mainly during court hearings, he/she is otherwise free to work at home, for instance.[9]

Crucially, beyond this professional independence, *personal independence* is seen as the only effective way of guaranteeing professional independence.[10] It means that judges cannot be dismissed or

[1] BVerfGE 12, 67, at 71 (Decision by the Constitutional Court of 17 January 1961; Case Reference: 2 BvL 25/60); BVerfGE 38, 1, at 21 (Decision by the Constitutional Court of 27 June 1974; Case References: 2 BvR 429/72, 641/72, 700/72, 813/72, 9/73, 24/73, 25/73, 47/73, 215/73).

[2] BVerfGE 3, 213, at 224 (Decision by the Constitutional Court of 17 December 1953, Case Reference: 1 BvR 335/51).

[3] BVerfG NJW 1996, 2149–2150 (Decision by the Constitutional Court of 29 February 1996; Case Reference: 2 BvR 136/96).

[4] Hans-Juergen Papier, "Die richterliche Unabhängigkeit und ihre Schranken", 1–13, at 2–3, 5–6. http://www.hefam.de/koll/pap200402.html; last accessed 2 December 2019.

[5] BGH NJW 1988, 421, at 422 (Decision by the German Federal Court of 16 September 1987; Case Reference: RiZ(R) 5/87).

[6] BGH NJW 1988, 421, at 422 (Decision by the German Federal Court of 16 September 1987; Case Reference: RiZ(R) 5/87).

[7] BGH NJW 1995, 2494 (Decision by the German Federal Court of 7 April 1995; Case Reference RiZ(R) 7/94). The right of judges to assign incoming cases among themselves once a year is also seen as a means of ensuring the right of due process as far as the principle of the lawful judge is concerned (guaranteed in Article 101 Basic Law).

[8] Opposing the Federal Court's decision in this respect, for example: W. Hoffmann-Riem, "Über Privilegien und Verantwortung", AnwBl. 1999, 2–9, at 6; Konrad Redeker, "Justizgewaehrungspflicht des Staates versus richterliche Unabhangigkeit?", NJW 2000, 2796–2798, at 2797.

[9] BGHZ 113, 36, at pp. 40 (Decision by the German Federal Court of 16 November 1990; Case Reference: RiZ 2/90).

[10] Papier, no. 5, 1.

transferred to any other court without their agreement, which ensures that judges cannot be sanctioned for decisions the executive disapproves of.[11] Solely in cases of clearly defined and grave misconduct can a judge be dismissed or transferred and then only by a court decision.[12]

2. Limits to judicial independence

Nevertheless, there are some limits to judicial independence. The president of a court, for example, when engaged in office management, dealing with non-judicial staff or travel expenses, cannot claim to be protected by the principle of judicial independence when carrying out these duties.[13]

Should judges not fulfil their professional duties, disciplinary action can be taken against them by the Ministry of Justice,[14] but even then a judge can apply for a court decision by the Judges' Disciplinary Court to defend himself or herself against such disciplinary actions by arguing that his/her judicial independence has been infringed on.[15] There are regular evaluations of each judge, for example every four years,[16] but such appraisals must be limited to general comments for they may not infringe on the judge's professional independence. Specific comments on specific decisions are prohibited.[17]

In the event of conflicts of interests, judges are required to recuse themselves or at least declare to the parties involved any circumstances that might lead to the suspicion of a conflict of interest.[18] Should they fail to do so, they can be subject to disciplinary action or indeed criminal proceedings. In keeping with that, judges may not work as lawyers or legal consultants.

In the event of any negligence in coming to a decision, judges cannot be prosecuted[19] and the State is not liable for compensation if the judgement is "incorrect."[20] This is a key aspect of professional independence. However, if a judge intentionally passes a wrong judgement then he or she is subject to criminal charges of "perversion of the course of justice" (Section 339 Code of Criminal Law) with a minimum sentence of one year in prison, which in turn automatically leads to the judge's dismissal. In this event, the State is liable to pay compensation for damages incurred.[21] A judge, however, is personally never liable to pay damages to the parties involved in a case, although the State, if forced to pay damages due to the judge's misconduct, may attempt to take recourse against the judge.[22]

The guarantee of *professional* independence applies to all judges. However, the guarantee of *personal* independence applies only to judges with tenure. Germany's judiciary operates on a system of career judges so that once you have passed both state exams in law you are eligible to become a judge.[23] Thus, newly appointed judges will normally be in their late twenties and in their first job. They are appointed as "judges on probation" for a minimum of three[24] up to a maximum of five years,[25] before being granted tenure. Probationers are not granted *personal* independence. Therefore, during this period, they can be transferred or dismissed without their consent.[26]

3. Criticism of the German system

The German system is certainly not without its critics. The practice of appointing probationary judges, for instance, means that people are both very young and not truly independent on appointment. They are thus potentially subject to pressure from the executive, that is, political pressure, due to their desire to be granted tenure. During the probationary period they are also dependent on the executive,

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[11] BVerfGE 87, 68, at 85 (Decision by the Constitutional Court of 8 July 1992; Case References: 2 BvL 27/91 and 31/91); Papier, no.5, 1.

[12] Section 24 Deutsches Richtergesetz (German law that defines the judiciary).

[13] Papier, no.5, 2.

[14] Papier, no.5, 5–10.

[15] Section 26 para. 3 Deutsches Richtergesetz.

[16] This is a matter the Federal States are entitled to regulate; see, for example, section 5 para. 1 LRiStAG (Baden-Württemberg)- a law defining judges' and prosecutors' rights and duties in the State of Baden-Württemberg.

[17] Section 5 para. 3 LRiStAG (Baden-Wuerttemberg).

[18] See, for example, section 41 ZPO (German Civil Procedural Code); section 22 StPO (Criminal Procedural Code).

[19] Section 339 StGB (German Criminal Code).

[20] Section 839 para. 2 BGB (German Civil Code).

[21] Section 839 para. 2 BGB (German Civil Code).

[22] Article 34 Grundgesetz (Basic Law).

[23] Section 5 Deutsches Richtergesetz.

[24] Section 10 para. 1 Deutsches Richtergesetz.

[25] Section 12 para. 2 Deutsches Richtergesetz.

[26] Section 22 Deutsches Richtergesetz.

as far as their salary and their general professional future are concerned. Many European countries adopt this approach, though, for example, the UK does not, where at least 5-7 years legal experience are required before an individual can become a judge.[27]

Public prosecutors in Germany are granted neither professional nor personal independence, but instead are civil servants. Their actions can be subject to a veto by the regional Ministry of Justice. In high profile, politically charged cases this has led some to argue that judicial independence is inadequate if the executive can intervene through the prosecutor.[28] In contrast, the Italian constitution extends judicial independence to public prosecutors,[29] a fact many believe has led to some success in disentangling connections between justice, politics, and organised crime.[30]

A comparable concern is that the power to determine who is appointed as a judge, and who is promoted and when, lies in the hands of the executive.[31] Even though an elected self-governing council of judges must grant its consent, promotions initially are always recommended and can finally only be granted by the Ministry of Justice.[32] Moreover, the Ministry of Justice has the sole power to determine the first appointment of a judge (on probation). In many Southern and Eastern member states of the EU such decisions are the prerogative of independent Councils, usually consisting of elected parliamentarians and judges.[33] Indeed, some have argued that aspects of the German system would not be acceptable in a state now applying for EU membership.[34]

To conclude, the German system of judicial independence is a keystone for applying justice but there is undoubtedly room for adjustment and improvement, especially as far as public prosecutors are concerned. Germany is currently at risk of joining states, such as Poland, that have not yet fully realized the principle of judicial independence.

References

1. *Bernd Brunn* (formerly Judge at the German Federal Administrative Court). Richterliche Unabhängigkeit und ihre Gefährdung durch (die Art und Weise von) Beförderungen // Lecture 20 January 2005 [Электронный ресурс]. URL: https://betrifftjustiz.de/wp-content/uploads/texte/Brunn_richterl_unabh.pdf (дата обращения: 02.12.2019).
2. *Giuseppe Di Federico.* Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective [Электронный ресурс]. URL: http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf (дата обращения: 02.12.2019).
3. *Hans-Juergen Papier.* Die richterliche Unabhängigkeit und ihre Schranken. P. 1–13. [Электронный ресурс]. URL: http://www.hefam.de/koll/pap200402.html (дата обращения: 02.12.2019).

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[27] „Becoming a Judge", *Courts and Tribunals Judiciary*, available at: https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/becoming-a-judge/; last accessed 2 December 2019.

[28] „*Nullum ius sine actione*"; Annelie Kaufmann, Markus Sehl, „EuGH zu Europäischem Haftbefehl, Deutsche Staatsanwälte nicht unabhängig genug", Legal Tribune Online, 27 May 2019; available at: https://www.lto.de/recht/justiz/j/eugh-europaeischer-haftbefehl-deutsche-staatsanwaelte-nicht-unabhaengig/; last accessed 2 December 2019.

[29] Giuseppe Di Federico, "Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective", available at: http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf; last accessed 2 December 2019.

[30] Winfried Maier, „Vortrag anlässlich der 6. Speyerer Demokratietagung der Hochschule Speyer zum Thema ‚Korruption in Politik und Verwaltung', Wie unabhängig sind die Staatsanwälte in Deutschland?", 24/25 October 2002, 1–5, at 4; available at: https://menschenrechtsverfahren.files.wordpress.com/2013/07/dr-winfried-maier-wie-unabhc3a4ngig-sind-staatsanwc3a4lte-in-deutschland.pdf; last accessed 2 December 2019.

[31] Bernd Brunn (formerly Judge at the German Federal Administrative Court), "Richterliche Unabhängigkeit und ihre Gefährdung durch (die Art und Weise von) Beförderungen", Lecture 20 January 2005; available at: https://betrifftjustiz.de/wp-content/uploads/texte/Brunn_richterl_unabh.pdf; „Richterernennungen: Unabhängigkeit der Justiz in Gefahr", SPD Baden-Württemberg, available at: http://www.spd.landtag-bw.de/index.php?docid=1968; Markus Sehl, „VG-Richter zweifelt an Unabhängigkeit seines Gerichts", Legal Tribune Online, 9 May 2019; available at: https://www.lto.de/recht/justiz/j/vg-wiesbaden-6k101615-vorabentscheidung-eugh-vorlage-unabhaengigkeit-gerichte-justiz/; all last accessed 2 December 2019.

[32] A Prussian Minister of Justice (Adolf Leonhardt, 1815–1880) is often quoted as having said: "As long as I decide who is promoted I am happy to concede to judges their so-called judicial independence"

[33] John Adenitire, „Judicial Independence in Europe- The Swedish, Italian and German Perspectives*"; University College London*; available at: https://pdfs.semanticscholar.org/c7fc/34a90d3f46501ec271ee5feea0998279fb80.pdf; Ignacio Pando Echevarria, "The Spanish Judiciary: Structure, Organization, Government"; available at: https://csd.bg › fileSrc; both last accessed 2 December 2019.

[34] Heribert Prantl, "Entfesselt die deutsche Justiz!", *Süddeutsche Zeitung*, 31 May 2019; available at: https://www.sueddeutsche.de/politik/kolumne-prantl-deutsche-justiz-unabhaengigkeit-europaeischer-gerichtshof-1.4469352; last accessed 2 December 2019.

4. *Heribert Prantl.* Entfesselt die deutsche Justiz! // Süddeutsche Zeitung. 31 May 2019 [Электронный ресурс]. URL: https://www.sueddeutsche.de/politik/kolumne-prantl-deutsche-justiz-unabhaengigkeit-europaeischer-gerichtshof-1.4469352 (дата обращения: 02.12.2019).
5. *Ignacio Pando Echevarria.* The Spanish Judiciary: Structure, Organization, Government [Электронный ресурс]. URL: https://csd.bg › fileSrc (дата обращения: 02.12.2019).
6. *Konrad Redeker.* Justizgewaehrungspflicht des Staates versus richterliche Unabhangigkeit? NJW 2000. P. 2796–2798.
7. *Markus Sehl.* VG-Richter zweifelt an Unabhängigkeit seines Gerichts // Legal Tribune Online. 9 May 2019 [Электронный ресурс]. URL: https://www.lto.de/recht/justiz/j/vg-wiesbaden-6k101615-vorabentscheidung-eugh-vorlage-unabhaengigkeit-gerichte-justiz/ (дата обращения: 02.12.2019).
8. Nullum ius sine actione; *Annelie Kaufmann, Markus Sehl.* EuGH zu Europäischem Haftbefehl, Deutsche Staatsanwälte nicht unabhängig genug // Legal Tribune Online. 27 May 2019 [Электронный ресурс]. URL: https://www.lto.de/recht/justiz/j/eugh-europaeischer-haftbefehl-deutsche-staatsanwaelte-nicht-unabhaengig/ (дата обращения: 02.12.2019).
9. *Ohn Adenitire.* Judicial Independence in Europe — The Swedish, Italian and German Perspectives // University College London [Электронный ресурс]. URL: https://pdfs.semanticscholar.org/c7fc/34a90d3f46501ec271ee5fea0998279fb80.pdf (дата обращения: 02.12.2019).
10. *W. Hoffmann-Riem.* Über Privilegien und Verantwortung. AnwBl. 1999. P. 2–9.
11. *Winfried Maier.* Vortrag anlässlich der 6. Speyerer Demokratietagung der Hochschule Speyer zum Thema, Korruption in Politik und Verwaltung', Wie unabhängig sind die Staatsanwälte in Deutschland? 24/25 October 2002. P. 1–5. [Электронный ресурс]. URL: https://menschenrechtsverfahren.files.wordpress.com/2013/07/dr-winfried-maier-wie-unabhc3a4ngig-sind-staatsanwc3a4lte-in-deutschland.pdf (дата обращения: 02.12.2019).

Possibilities of Using Forms of "Diverse (Varied) Democracy" in the Conditions of Contemporary Russia: Constitutional Principles and Political Reality

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ABSTRACT
In the 21st century the place and role of different social institutions are changing significantly. An independent and self-sufficient person increasingly becomes a political actor and demands a broader right to participate both in public activities and specifically in making the most important decisions affecting him/her. In this connection, as well as in the conditions of active informatization and digitalization of all processes, there is a rapid increase in the volume of individual actions and an increase in the role of individual rationality, which can have both positive and negative consequences. Local self-government as an institution being the closest to citizens and able to better channel their needs is also undergoing transformation. In Russia, the aforesaid processes are taking place in a more complex and contradictory political and legal context, which requires special attention to all decisions taken on local self-government issues. The problems of local self-government are manifested especially acutely in connection with the poor understanding in the society of the role and place of this level of power in ensuring the optimal uniform quality of life in the territory of municipalities. The Constitution of the RF is currently a strong, although not free from contradictions, support of local self-government in our country.
New trends in the development of local self-government in systems with a longer history are manifested in various forms which have received the name of "diverse" (varied) democracy in the relevant studies. Its importance for the development of local democracy as a whole may become decisive in the near future.
Keywords: political actor, participation, political decision, individual rationality, transformation, support, Constitution, diverse democracy

1. Introduction

The fate of democracy in the XXI century is constantly under threat. This threat comes both from totalitarian and authoritarian political regimes and from the political and social actors who are actually the carriers of its basic ideas. The latter should primarily include the independently-minded and self-sufficient citizens who do not need any constant tutelage of the paternalistic state and are ready to solve the problems of groups of different levels and quantitative composition of participants on their own responsibility, often using their own resources or those obtained as a result of their efforts.

Based on the principle of subsidiarity, the most solution of any problem can be the most effective if it is made and implemented as close to the place of the problem occurrence as possible. Accordingly, what cannot be objectively resolved at an individual or collective level (public organizations, for example) becomes the main subject of the activities of the municipal authorities, local self-government as the closest to real life in particular territories.

As shown by the world practice, the process of making strategic decisions that determine the development of a municipality in the present and the future becomes increasingly complex and complicated today, since it is taking place in a clash of conflicting interests of various social groups and their political preferences. The two main types of local democracy, the representative and the direct one, turn out to be insufficiently high-quality tools to obtain an effective result, that is, to achieve a balance of interests and develop an algorithm that will be supported by citizens. Consensus building is impossible in many cases.

All of the above phenomena are typical for countries with a high level of development of democracy and the desire of the state authorities to use the potential of the municipal power to optimize the quality of life throughout the country at a uniform level. They are all the more vividly manifested in the conditions of imperfect democracy developing over an insufficiently long period to obtain a high-quality result, as well as the democracy emerging in the unfavorable conditions of the absence of significant historical experience and the constant desire of the state to subdue the local power.

Our article will consider the following aspects of the problem:

1. The principle of subsidiarity as the general theoretical basis for the formation and development of "diverse democracy".
2. The concept of "diverse (varied) democracy". The practice of "diverse democracy" in European countries and contradictions in its manifestations.

3. Correlation of constitutional provisions in the RF with the principles of the European Charter of Local Self-Government which are objectively the basis of local democracy and its development in the future.
4. Possibilities of spreading of various forms of "diverse democracy" in Russian municipalities and forecasting of their impact on the political situation in the country as a whole, as well as on improving the quality of life of citizens.

2. Local democracy and municipal administration as a problematic field of studies of different scientific disciplines

It is increasingly difficult to single out the subject of research of one particular scientific discipline in the science of the XXI century. Analysis of the problems of local self-government as a political institution (a power entity) and as a level of public administration (local manager) includes an assessment of the political situation in the municipality (the process of determining and implementing the strategy of socio-economic development; formation of local self-government bodies, including by organizing and holding elections; the activities of political parties and public movements to pursue certain types of policy, building relationships with state authorities, both federal and regional, involving citizens in the process of political decision-making, etc.), identifying economic and financial problems (attraction of investments, formation and execution of the local budget, provision of tax incentives, etc.) and, finally, the social component (assessment of the effectiveness of local self-government activities in determining the achievement of the main goal: the optimal uniform quality of life both on the basis of objective quantitative indicators and according to the citizens' subjective opinion).

All these aspects are addressed in numerous studies. A brief overview of some of them will be given below. Throughout the entire period of development of local self-government in contemporary Russia, the problem of choosing a model for the national system of local self-government, as well as the direct model of governance for a particular municipality, remains relevant. This issue is addressed quite in detail and systematically by Elena Vodyanitskaya in her article "Local Government"[1].

The choice of the model is not the only political issue. Another issue of a pronounced political nature is that of the principles of the organization and functioning of local self-government which were formulated in the 1980ies and became the basic principles of the European Charter of Local Self-Government[2]. At present the principle of the right to local self-government is formally enshrined in the Constitution of the RF (Art. 2, Chapter 1; Chapter 8). It has been similarly implemented in most countries that have signed the document. Much more problems are related with the implementation of the principles of general competence (giving substantial autonomy to municipalities) and subsidiarity (prohibiting the state to interfere in local government affairs without its own initiative). The principle of subsidiarity, its interpretation and the process of implementation, is the subject of a number of works by researchers from different countries. South African researcher Mayibuye Magwaza[3] emphasizes the interrelation of this principle with its original idea of the Catholic social doctrine formulated by Pope Pius XIX in 1931, and the complexity of its implementation within the framework of the struggle of local self-government (hereinafter — LSG) for the right to provide services directly affecting the quality of life. The topical issues of understanding of the principle of subsidiarity both as a principle of decentralization of power and management with the transfer of powers to the local level, and as the moral basis for human dignity and the creation and distribution of public goods are considered by such authors as Australians J. Drew and B. Grant[4], as well as by a group of researchers of the Council of Europe led by A. Delcamp[5].

A major complex problem of the relationship between the levels of power and government is the subject of the book "Control and Power in the Relationship of the Central and Local Levels" by British

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[1] *Vodyanitskaya E.* Local Government. Max Planck Encyclopaedia of Comparative Constitutional Law [Electronic resource]. December 2016. URL: https://mgimo.ru/upload/iblock/e67/MPECCOL_Local%20Government.pdf (accessed on: 05.11.2019).

[2] European Charter of Local Self-Government. Adopted by the Council of Europe 15.10.1985 [Electronic resource]. URL: http://base.garant.ru/2540485/ (accessed on: 05.11.2019).

[3] See: *Magwaza M.* Local Government and Subsidiarity. Southern African Catholic Bishops' Conference. July 2015 [Electronic resource]. URL: http://www.cplo.org.za/wp-content/uploads/2018/01/BP-387-Subsidiarity-and-Local-Government-July-2015.pdf (accessed on: 015.11.2019).

[4] *Drew J., Grant B.* Subsidiarity: More than a Principle of Decentralization — a View from Local Government. Publius: The Journal of Federalism, Vol. 47, Is. 4, Fall 2017. P. 522–545.

[5] *Delcamp A.* Definition and Limits of the Principle of Subsidiarity. Local and Regional Authorities in Europe, No. 55 [Electronic resource]. URL: https://rm.coe.int/1680747fda (accessed on: 17.11.2019).

scientist R. W. A. Rhodes [3] who defines these relationships as built on a rational basis in connection with the fact that all levels of the exercise of power proceed from the interests of development of the relevant political sphere, but emphasizes their "ambiguous" and "confused" nature manifested in the difficulties of exercising control, for example, over the spending of the local budget funds. The author's conclusions are still relevant despite the rather long period that has passed since the publication of the book.

The numerous studies and analytical materials presenting topical problems of local self-government in various contexts of national states are devoted to both the development of local democracy (involvement of citizens in the local policy, transparency of the activities of local self-government bodies)[6] and the process of providing municipal services as the basis for ensuring a high quality of life in the territory of the municipality and the observance of the citizens' rights[7]. In the conditions of an unstable external environment (political, social, economic and natural), the ability of municipalities to boost the creativity of citizens and organizations to respond to the complex challenges of the relevant period (the concept of building resilience to external disturbances as a tool of municipal policy) acquires special significance[8].

3. Principle of subsidiarity as the general theoretical basis for formation and development of "diverse democracy"

In the "state-centric" Russian thinking, the very idea of a "fishing rod" to be given to the hungry for them to catch fish themselves and satisfy their hunger, has not taken root over 26 years since the adoption of the current constitution. At present, citizens, especially older people, still have prevailing paternalistic expectations regarding the state, capable and ready to create favorable conditions for life, work and rest. Moreover, this does not mean the regulatory legal basis for active and effective activities, but social payments, free services and other forms of state support. In this context, residents least of all rely on the municipality, that is, the level of power closest to them, as a support: they expect help from the region (subject of the Russian Federation) at best, and more often from the federal center. Suffice it to recall in this regard the "Direct Lines" annually held by the President of the RF, an appeal to which usually leads to the solution to a problem that must often be solved by organizations and institutions, rather than by authorities, especially of this level.

The roots of the principle of subsidiarity go back to the remote past, but it is still relevant in the XXI century: in the new conditions of the increasingly widespread use of network structures and digital tools there is a growing demand for providing a person with independence in solving his problems and a delicate balance of all social processes with a view to forming the person's ability for such functioning, as well as the ability to create groups to resolve both individual and collective problems. Self-government in the meaning of self-management and self-control, without which it creates additional threats and risks, are becoming the dominants of the contemporary world.

The past years have witnessed a certain progress in this area. For example, citizens have learned at least sometimes to go to court in acute situations, including the magistrate court, which is designed to resolve domestic and other relatively limited conflicts. They are also learning to be organized and united within self-organization to resolve local problems. However, municipal power is still perceived as something abstract, that is, incapable of effectively solving the problems of the territory. It is difficult to assess such a variant of local self-government as a "strong institution" in the sense that it plays a decisive role in ensuring the optimal uniform quality of life in the territory of the municipality.

The "power of local self-government" is significantly limited by the current state legislation. The adoption of FZ-154 "On the General Principles of Organization of Local Self-Government in the RF" in 1995 was a significant step in concretizing the provisions of the Constitution of the RF where the principle of subsidiarity was enshrined along with other principles of implementation of local self-government of the European Charter. However, further on, there was a significant shift from these principles, especially when the new federal law was adopted and enacted in 2003. The opinion that it was just a "revised

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[6] *Adiputra I. M. P.* et al. Transparency of Local Government in Indonesia [Electronic resource]. URL: www.emeraldinsight.com/24434175.htm (accessed on: 22.112019); Bradford A. Community Engagement and local Government. 2016 [Electronic resource]. URL: https://ro.uow.edu.au/theses/4881/ (accessed on: 22.11.2019).

[7] Council of Europe. Best Practice in Local Government. 2015 [Electronic resource]. URL: https://rm.coe.int/bpp-best-practice-programme-for-local-governments/1680746d97 (accessed on: 18.11.2019); *Atkins Gr.* Et al. Performance Tracker 2019. A Data-Driven Analysis of the Performance of Public Services [Electronic resource]. URL: https://www.instituteforgovernment.org.uk/sites/default/files/publications/performance-tracker-2019_0.pdf (accessed on: 18.11.2019).

[8] *Robinson D., Platts-Fowler D.* Community Resilience: a Policy Tool for Local Government? 2016 [Electronic resource]. URL: http://shura.shu.ac.uk/12235/5/Robinson%20Community%20resilience.pdf (accessed on: 05.12.2019).

version" seems absurd already after comparing Art.1 "Basic Notions and Terms" of FZ-154[9] and Art.2 "Basic Notions and Terms" of FZ-131[10].

Creation of a two-tier system of local self-government as a mandatory one for the entire territory of Russia excludes the possibility of subsidiary functioning and responsibility of municipalities in many regions, which is fully confirmed by the subsequent practice of law enforcement and the latest events of 2019: the adoption of an amendment to FZ-131 which consolidated the creation of a new type of a municipal entity, "municipal district", for sparsely populated rural areas, which returns them to the single-tier system of FZ-154. Moreover, this system was not mandatory: the subjects of the RF had the right to determine the structures of local self-government in their territory independently.

4. Concept of "diverse (varied) democracy. Practice of "diverse democracy" in European countries and contradictions in its manifestation

The concept of "diverse" democracy introduced by the German researcher[11] seems fundamentally important and useful to us as a tool for analyzing the current processes both in Russia and in other countries. Carrying out the "catch-up" political and economic modernization, our country often forcedly resorts to innovative tools, as if "skipping" over a number of stages of development and progress towards the set goal. In the case of non-interference or very "soft" influence of the state, through legislation as the most general framework and providing the subjects of the RF with opportunities for a more complete consideration for their specific features, this could give positive results. In the case of tough, rather, administrative regulation and abandonment of the local initiative, the effectiveness of the introduction of a new autonomous institution of local government turned out to be minimal, while the content of the local government was emasculated.

However, as R. Roth shows in his work, having gone through several stages of development the "traditional" local self-government in Germany which embarked on this path much earlier [4], remains, firstly, a kind of a "chimera", i. e. an institution with a twofold essence: political and administrative, and, secondly, the opportunities provided to citizens for active participation in making political, i. e., the most important decisions of strategic and tactical significance, do not satisfy their need for direct influence on the course of processes.

In this regard, representative (through local self-government bodies) and direct (within the framework of elections of local self-government bodies, referendums) democracy is supplemented with deliberative (advisory) instruments generally initiated by state bodies, local self-government bodies, as well as by various actors (for example, large private companies interested in active support from the population) in the implementation of large infrastructure and other projects that directly affect the interests of the population.

In cases when such instruments are not used, there are frequent protests, civil initiatives and social movements which the author also refers to as forms of "diverse democracy". One of the most vivid examples of this kind was the mass protest of the residents of Stuttgart against the construction of a railway station in the city center which resulted in damage to its historical appearance and the environment[12].

Standing out among all the forms of "diverse democracy" is also the activity of citizens manifesting itself in a variety of forms that provide for the solution of seemingly small private problems (the concept of "small matters"). However, in a number of cases, it is this activity of one or several persons that becomes a support for an individual and forms the foundation of local self-government as a democratic institution capable of coming into play in situations when the state, due to its scale and much greater conservatism, does not "see" the problem or is not able and not ready to get involved in its solution.

In Italy, water supply was traditionally provided by many small municipal enterprises. Since the 90ies after the adoption of the Galli Act in 1994, the water supply was reorganized to stimulate competition and

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[9] On general principles of organization of local self-government in the Russian Federation: Federal Law of the RF dd. 28.08.1995 No. 154-FL. Repealed [Electronic resource]. URL: http://www.consultant.ru/document/ cons_doc_LAW_7642/ (accessed on: 05.11.2019).

[10] On general principles of organization of local self-government in the Russian Federation: Federal Law of the RF dd. 06.10.2003 No. 131-FL. Condition as of 04.12.2019 [Electronic resource]. URL: http://www.consultant.ru/document/cons_doc_LAW_44571/ (accessed on: 05.11.2019).

[11] "Diverse democracy" is a term introduced by German researcher Roland Roth in his work. See: *Roth, R.* Kommunale Demokratie — Schimare oder Hoffnungstrager? In: *Kuhlmann S., Schwab O.* (Hrsg.) Starke Kommunen — wirksame Verwaltung. Fortschritte und Fallstricke der internationalen Verwaltungs- und Kommunalforschung. Wiesbaden : Springer, 2017. Pp. 143–171.

[12] The protests have continued for many years since the beginning of the construction in 2011. See: *Susanka S.* Proteste gegen Stuttgart 21-400 Mal Unverstandnis und Wut. 15-01-2018 [Electronic resource]. URL: https://www.zdf.de/nachrichten/heute/vierhundertste-montagsdemo-gegen-stuttgart-21-100.html (accessed on: 06.12.2019).

to create private enterprises like large French companies. Under the Berlusconi government, an attempt was made to prepare a legislative basis for the relevant reforms through the adoption of the Ronchi decree in 2009 aimed at broad privatization of the water supply. This development trend was opposed by the decisions of the national referendum on June 11, 2011 which ruled out the privatization of the water supply by an absolute majority. The political campaign preceding the referendum and initiated by the *Forum Italiano die Movimenti per l'Acqua*, a broad, largely left-wing movement comprising 150 municipalities and various political group, reflected the growing national and international politicization of the drinking water issue [5].

Such broad social movements and other forms of "diverse democracy" contain both great opportunities and serious dangers and risks, since they can lead to uncontrollable processes that require constant attention of local governments and their active participation.

5. Correlation between constitutional provisions and the principles of the European Charter of Local Self-Government objectively being the basis of this type of democracy and its development in the future

One of the main ideas of the European Charter is the independence of local self-government expressed in the principle of general competence, closely related to the principle of subsidiarity and arising from the principle of guarantee of the right to local self-government. In the Constitution of the RF of 1993, all three principles are enshrined in Art.12 Ch. 1 "Foundations of the constitutional order" and in Ch. 8 "Local government". However, the constitutional document also contains contradictions and potential conflicts as a kind of delayed-action mines that explode at acute moments. For example, the issues of organizing the system of local self-government are referred to joint jurisdiction of the Russian Federation and the subjects of the RF.

In the process of forming and changing the legislation throughout the entire period of the Constitution, this led to the replacement of 154-FL which generally conformed to the provisions of the Charter and the Constitution with 131-FL, its problems both in terms of law enforcement and formation of the correct understanding of the substance of local self-government being evidenced by irrefutable facts. The adoption of the law in 2003 was the starting point of this process. It took the subjects of the RF six years to form a system of local self-government in their territory in accordance with its provisions. Numerous amendments to the law were attempts to adapt it to reality.

The latest amendment which introduced a new type of municipal formation, a "municipal district", which actually means the return of rural areas to a single-tier system, is another evidence of the imperfection of the law and its negative impact on the real processes[13].

The idea of achieving a walking distance between LSG bodies and the population throughout the country, initially laid down in the law, was a priori impracticable, given the degree of diversity of the territorial structure and the settlement system. In the process of discussing the law (even before 2003), when asked about the walking distance, the head of the future rural settlement, Ust-Vym village of the Komi Republic, answered philosophically: "If it is summer, they will get there overnight, and in winter it is better to go by helicopter."

It was 131-FL that led to the ultimate governmentalization of LSG and the emasculation of its functions, since the state represented by the federal center and the subjects of the RF, fails to fulfill its obligations (stipulated by the Charter) to financially support municipalities for high-quality solution of local issues by them. As for the cities of federal significance, the system created in them can hardly be considered to be local self-government, but is rather a continuation of the state power of the subject of the federation. This is also evidenced by the wording of local issues in the laws of the subjects.

6. Possibilities of spreading various forms of "diverse democracy" in Russian municipalities and forecasting their impact on the political situation in the country as a whole and on improving the quality of life of the citizens

Considering the forms of diverse (varied) democracy in Section 2, we tried to emphasize that at all stages of its history the institution of local self-government has had a dual nature: on the one hand, it was to consolidate the citizens' interests and serve as a kind of a mediator in their relations with the state. It was the municipal elections that turned into the most democratic procedure, since they often gave citizens an opportunity to choose people whom they knew well and whom they trusted to be their representatives.

[13] See: *Kidyaev V.* The municipal scheme cannot be rebuilt with infringement of the rights of the population. 25.01.2019 [Electronic resource]. URL: http://www.er-duma.ru/news/viktor-kidyaev-munitsipalnuyu-skhemu-nelzya-perestraivat- s-ushchemleniem-prav-naseleniya/ (accessed on: 05.11.2019).

It was municipal democracy in America that impressed French aristocrat Alexis de Tocqueville and made him believe in the possibility of democracy in principle. LSG became a school for future prominent political figures: Jacques Chirac (he was the first publicly elected mayor in the history of Paris); at the moment, former New York City mayor Michael Bloomberg has joined the presidential race in the United States.

However, local self-government also played a pragmatic role in ensuring the quality of life in the territory of the municipality, which is far from always possible for objective reasons, especially in the conditions of a strong modern infrastructure requiring high costs and large territories, as well as large masses of population (taxpayers). Back in the early XIX century the Prussian city regulations brought the cities of the kingdom out of the absolutely depressive state after the Napoleonic wars. The Russian county council whose political activities were resisted by the tsarist government in every way, nevertheless developed public education and health care, built schools and hospitals, and also dealt with statistics, recording crop failures, periods of hunger and demanding help to the peasants from the state, and it was destroyed by the totalitarian political regime just at the moment when it could begin full-fledged activities and gradually bring up independent and self-sufficient rural residents.

In the present conditions, local self-government can become a locomotive for the development and formation of a new attitude to life and to solving major problems of the modern society, including using new forms of democracy that arise in the context of globalization, information revolution, individualization of the process of making decisions and their implementation. Approaches, techniques and individual instruments may change, but the principles enshrined in the Charter are still relevant and should be the basis for the relations of the state power with the local authorities, as well as with the society and all groups of interests and social strata included in it.

7. Conclusions

The position of local self-government as a level of democratic government and a major actor in ensuring the optimal quality of life in the territory of the municipality is currently under threat. The crisis phenomena in the economies of most countries, financial deficits, the desire of states to strengthen control over the activities of municipal bodies often justified by the need to allocate subsidies, subsidies and subventions from the local budget, as well as citizens' dissatisfaction with the quality of life and their disbelief in the ability of the municipal government to conduct an effective policy independent from the state undermine the basic principles of its organization and functioning.

The essence of local self-government is being emasculated; it acquires a formal and increasingly abstract character. In different conditions, this can lead to directly opposite consequences, but in all cases this situation requires a search for new approaches to the implementation of local power and ensuring its autonomy, its real impact on the processes. Increasing the general activity of citizens and expanding the range of forms of their participation in making strategic and even tactical decisions, the desire of local government bodies to intensify the feedback with the local community and constant efforts for its closer integration are necessary to overcome, on the one hand, the social apathy and indifference to local problems, and on the other hand, to direct the protest activity which can take destructive and dangerous forms into a constructive direction.

In this regard, the concept of "civic culture" introduced by Gabriel Almond and Sydney Verba [1] in the 1960ies may become relevant again. A responsible, self-sufficient, active citizen also capable of acting within the framework of the law and at the same time capable of influencing the law should become the support of the municipality and the state in the process of achieving the main goal of the whole society as a whole: creating and maintaining an optimal uniform quality life in his municipality.

References

1. *Almond, A. G., Verba S.* The Civic Culture. Political Attitudes and Democracy in Five Nations. Princeton : Princeton University Press, 1963. Pp. 1–45.
2. *Drew, J., Grant B.* Subsidiarity: More than a Principle of Decentralization — a View from Local Government. Publius: The Journal of Federalism. Vol. 47. Iss. 4. Fall 2017. Pp. 522–545.
3. *Rhodes, R. W. A.* Control and Power in Central-local Power Relations. Routledge, 1981.
4. *Roth, R.* Kommunale Demokratie — Schimare oder Hoffnungstrager? In: *Kuhlmann S., Schwab O.* (Hrsg.) Starke Kommunen — wirksame Verwaltung. Fortschritte und Fallstricke der internationalen Verwaltungs- und Kommunalforschung. Wiesbaden : Springer, 2017. Pp. 143–171.
5. *Wollmann, H.* Offentliche Dienstleistungen zwischen munizipalem und privatem Sektor — „Comeback" der Kommunen? In: *Kronauer M. / Siebel W.* (Hrsg.) 2013. Polarisierte Stadte. Soziale Ungleichheit als Herausforderung fur die Stadtpolitik. Campus : Frankfurt-am-Main. Pp. 242–271.

Constitutional Democracy in Globalization Dimension: Causes of Erosion and Prospects for Changes

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ABSTRACT

The globalization process provoked the deep transformation of international law, political affairs and governance with controversial consequences. From the one hand, it stimulated the cosmopolitan project of global constitutionalism — transnational integration and unification of democratic standards; from the other hand, it resulted in fragmentation of international affairs, deterioration of constitutional democracy and the feeling of democracy deficits on national and international level of governance. Trying to balance the impact of these opposite trends, the author analyses positive and negative effects of globalization on constitutional development regarding such issues as transnational constitutionalization, democracy and national sovereignty, the changing place of multilayer constitutionalism, separation of powers, and system of global governance in the establishment of transnational constitutional democratic legitimacy.

Keywords: globalization, global constitutionalism, international and national law, constitutionalization, democracy, national sovereignty, multilayer constitutionalism, separation of powers, global governance, transnational constitutional legitimacy

The topic of this paper is the prospects for constitutional democracy in the globalized world[1]. Globalization is a process that includes opposite trends (towards integration and disintegration of international affairs) which determine the interaction of international and national public law, as well as the priorities of global governance. As stated in literature, the process of legal globalization can go both in the direction of expanding constitutional democracy and its restriction; however, insufficient attention is paid to the practical consequences of this. Therefore, the issue of the influence of the conditions of globalization on the modern democratic process is relevant: what are the specific problems of constitutionalism caused by globalization, how are they related to the revision of the role of national states, the emergence of new actors and mechanisms of solutions at the global level?

In this perspective, it is important to reconstruct the new trends in the world constitutional development that determine the positive or negative vector of democratic transformation, the factors of the erosion of representative democracy, as well as changes in the interpretation of its key concepts. These changes have already proved to be so significant that they make one think about the very possibility of applying the classical theory of constitutionalism to the description of the new social reality, or, at least, require specification of the research tools.

From these positions, the paper examines the new trends in the interpretation of the key concepts and institutions of constitutionalism: integration and disintegration trends, democracy, civil society and the rule of law state, sovereignty, hierarchy of norms, separation of powers, federalism, political participation, global governance. This analysis allows outlining the forms and ways of legitimizing constitutionalism in a transnational context.

1. Globalization: balance of integration and disintegration trends in transnational constitutionalism

The processes of legal globalization which have been especially intensive since the beginning of the XXI century, have caused expectations of the opposite direction.

Proponents of integration have put forward the theory of cosmopolitan or global constitutionalism based on the possibility of synthesis of international and national constitutional law in transnational law[2]. The following assumptions are relevant within the frames of this theory:

- admissibility of describing globalization processes in the categories of constitutionalism;
- agreement that the categories of global, supranational and transnational constitutionalism express different levels of the global system of legal regulation;

[1] The article was prepared in the course / as a result of research / work (project No. 20-01-006) within the framework of the Program of "Science Foundation of Higher School of Economics National Research University" (HSE NRU) in 2020–2021 and within the framework of the state support for the leading universities of the Russian Federation "5-100".

[2] *Lang A. F., Wiener A.* (eds.). Handbook on Global Constitutionalism, Cambridge: Edward Elgar Publishing, 2017; Atilgan A. Global Constitutionalism. A Socio-Legal Perspective. Heidelberg, Springer, 2018, et al.

- belief that its normative content is determined by the process of constitutionalization of international law, that is, incorporation of a number of elements of traditional constitutional law, primarily guarantees of fundamental rights and freedoms, into it.

The cosmopolitan ideal determines the directions of constructing, the content of the choice, the boundaries of its implementation on a planetary scale, in regional associations of states and in a national state, as well as ways of implementation. For optimists, the very statement of the question is a confirmation of the acceptance of the classical liberal principles of the rule of law and parliamentarism[3] by the international community. For pessimists, on the contrary, this is a confirmation of the uncertainty, if not a crisis, of international law, accompanied by criticism of the negative aspects of legal integration: its undemocratic nature, unification, crackdown on the rights of minorities and teleologism[4].

The resolution of the dispute is determined by analysis of the competing processes of integration and fragmentation of international legal affairs, the idea of which trend is prevailing. From the one hand, the preponderance of integration processes contributes to spreading of liberal democracy in the form of constitutionalization of its principles[5]. From the other hand, there is a trend towards fragmentation of the international order, which most researchers believe to dominate today and to be often related with the retraditionalization of the liberal principles of the rule of law[6]. International legal constitutionalization poses a challenge to the traditional international legal order and, in particular, the position of the state in it, the role of which is consistently declining[7], puts the problem of limiting the rights beyond the state point-blank[8], while practice does not confirm the assumption that political power at the global level becomes more subordinate to the principles of the supremacy of the law, democracy and respect for human rights.

Thus, the previously dominant optimistic ideas about the progressive growth of integration processes and the linear development of constitutionalization demonstrating the progressive expansion of parliamentary democracy are now being questioned. Firstly, when describing integration processes, they largely indulge in wishful thinking, facing a reproach of "false unification" and "illusory legitimacy" of international representative institutions and practices. Secondly, the thesis about the end of the era of nation states turned out to be greatly exaggerated and does not explain their predominant role. Thirdly, the international law is stated to weaken, with the preponderance of the processes of fragmentation over integration. Fourthly, the assumption that normative constitutionalization at the international level will stimulate constitutional democracy at the domestic level is debatable (often the opposite is true). Fifthly, the general question of the advantages of constitutionalization remains: after all, international law, as it has developed historically, is intrinsically unfair and undemocratic (as opposed to constitutional law), and the main problem is the lack of legitimacy of representative power at the global level.

Striking the balance of globalization processes leads to ambivalent conclusions. From the one hand, international law continues developing demonstrating the need for a unified positive system of international constitutional and legal regulation, and the existing conflicts and violations do not negate its significance (since the parties are ultimately forced to appeal to its norms). From the other hand, international norms and institutions (including those of a representative type) are a product of an agreement between states regarding the regulation of international affairs: the leading states are especially interested in reducing the importance of international law to achieve their goals, and international legal cooperation does not exclude the use of force as a weighty argument. Therefore, this is not so much about the creation of a new cosmopolitan world order, but, on the contrary, about the fragmentation and hierarchization of the traditional order: creation of a "multipolar world" with emergence of new centers of power in the form of the leading states.

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[3] *Halmai G.* Perspectives on Global Constitutionalism: the Use of Foreign and International Law. The Hague : Eleven International Publishing, 2014.

[4] *Schwobel C. E. J.* Global Constitutionalism in International Legal Perspective. Leiden and Boston : Martinus Nijhoff. 2011.

[5] *Tsagourias N.* (ed.). Transnational Constitutionalism: International and European Perspectives. Cambridge : Cambridge University Press, 2009.

[6] *Delpano R.* Fragmentation and Constitutionalization of International Law. A Theoretical Inquiry // European Journal of Legal Studies, 2013. Vol. 6. No. 1. Pp. 67–89.

[7] *Klabbers J., Peters A., Ulfstein G.* (eds.). The Constitututionalization of International Law. Oxford : Oxford University Press, 2009.

[8] *Cabrera L.* Diversity and Cosmopolitan Democracy: Avoiding Global Democratic Relativism // Global Constitutionalism, 2015. Vol. 4. No. 1. Pp. 18–48.

2. Democracy: revision of the classical paradigm of representative government

The problem of promoting representative democracy at the global level includes three options: should it be carried out at the level of traditional participants of the international process, i. e. national states, at the level of international organizations, or does it imply some kind of "dual democracy"[9]: interaction of internal and external legal regulation? Who is the main subject of these processes at the global level: the civil society, international institutions or states?

In this perspective, the issue of the formation of a global civil society is relevant. One group of analysts believes that the global society already exists, or at least is at the stage of formation, and sees the solution of the problem in the use of its institutions and network communications. Another group believes that in the globalized world, the civil society turned out to be structurally weakened, the 1960s should be considered the golden age of the civil society in Europe, and later the political activity of the "public" has been weakening. Finally, the third group completely denies the existence of the global civil society as a subject of reality, declaring it to be a construction that, basically, cannot be applied to international law[10].

The search for priorities is related with understanding of the collective self-determination of the civil society and elites in the global (transnational) perspective: what determines the individual choice and how it becomes collective; whether the individual choice is individual or is determined by the already existing collective preferences, the predominance of one of them, or a combination of an individual interest with one of these preferences in the collective space. Therefore, very different constructions of the identity of the civil society and the choice itself are possible, which ultimately tips the scales in favor of constitutional democracy or against it. Considered from the positions of the civil society are theoretical constructions, such as: eternal peace, the law of peoples, a global democratic state, a global democratic federation, democratic world, cosmopolitan democratic law, etc. The concept of global constitutionalism is presented which understands it not as a result of statutory achievements, but as a process of a permanent dialogue of its major actors (international organizations, states and transnational non-governmental humanitarian organizations [NHOs]) about a global "social contract", its only condition being their consent to its continuation[11]. An independent important part of the discussion is the construction of an Internet constitution, virtual state, electronic parliaments and governments, their implementation experience still being ambiguous[12].

The democratic principles facing the challenge of globalization are considered to be: the concept of limited sovereignty, the possibility of a deliberative parliamentary democracy beyond the states, and the role of judicial assessment. Globalists believe that the challenges are to be countered by the international law, democracy within and outside the states, the deliberative (network) structure of communications and the human rights policy representing international majority groups, the parliamentary principle of democracy, and the adoption of the doctrine of politically solvable issues. The ways to solve the problem are seen in the idea of transnational constitutional power, participatory democracy and representative institutions of political power outside the states, the political concept of global justice[13]. All of this, however, looks like a set of theoretical schemes rather than a realistic concept fit for practical application.

The way suggested for circumventing nation states in solving these problems is the pluralistic concept of global governance designed to determine the balance of the correlation of traditional actors (states) and new ones, non-state actors, in it. According to its proponents, there already exists a global constitutional community made up of individuals, states, international organizations, parliamentary assemblies, courts, NHOs and business actors. The determinant trend of changes leads to the creation of a global identity and transnational citizenship. The interference of non-state actors in the production of law and its implementation is deemed to be an important additional source for the legitimization of the global governance. It should be consistently expanded, structured and formalized[14].

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[9] *Peters A.* Dual Democracy // *Klabbers J., Peters A., Ulfstein G.* The Constitutionalization of International Law. Oxford : Oxford University Press, 2009.

[10] See Materials of the Round Table: *Steinbeis M., Poll R.* Krise, Kritik und Globaler Kostitutionalismus // Center for Global Constitutionalism. Verfassungsblog [Electronic resource]. URL: https://verfassungsblog.de/tag/global-constitutionalism/ (accessed on: 27.10.2020).

[11] *Rosenfeld M.* Global Constitutionalism. Meaningful or Desirable? // European Journal of International Law, 2014. Vol. 25. No. 1. Pp. 177–199.

[12] *Medushevsky A.* Internet Constitution: Idea, Projects and Perspectives // Social Sciences and Modernity, 2019. No. 1. Pp. 71–86.

[13] *Wheatley St.* The Democratic Legitimacy of International Law. Oxford : Hart Publishing, 2010.

[14] *Peters A.* Membership in the Global Constitutional Community // *Klabbers J., Peters A., Ulfstein G.* The Constitutionalization of International Law. Oxford : Oxford University Press, 2009.

The mechanism of institutionalizing the new trends is: constitutionalization of sectoral legal regimes, introduction of interstate parliamentary assemblies, and expansion of the "parliamentary" powers of international organizations beyond their existing (purely consultative) powers. This is a controversial thesis, given the fact that international organizations (including parliamentary ones) represent states rather than the global civil society.

3. State: boundaries of the principle of sovereignty

Globalization reduces the importance of nation states: new players emerge in the global governance process (international organizations and citizens); sovereignty is diluted (issues are resolved beyond the state borders); the structural parameters of governance of the states themselves change[15]. The question is how far these processes have gone; whether they are creating a new international configuration of centers of power and how the traditional concept of parliamentarism should response.

These topics are presented in a concentrated form by discussions about the correlation between international and state law, post-national law, the prospects of the Westphalian system in international law, but above all, about the fate of the principle of sovereignty. International law and the principle of state sovereignty in the history of their relationship are an extremely conflict area, including the opposite narratives of the participants of the conflicts, colonial and anti-colonial forces. The periodization of international law from the positions of restriction of sovereignty schematically includes three stages: from the Treaty of Westphalia to the creation of the UN (the rule of sovereignty); from the creation of the UN to the present (with the growing predominance of a limited range of international norms over sovereignty), as well as, in the current perspective, the formation of the third stage: a global (cosmopolitan) constitution (capable of radically restricting the principle of state sovereignty, if not supplanting it)[16]. However, international law is widely criticized as an unfair expression of the interests of the most powerful states, and the new parameters of relations between them are used as a method of revising it[17]. The old image of the international order as a pyramidal structure with the nation state at the top is considered by critics to be more unsustainable when faced with universal factors: the expansion of human rights and global trade. New independent regimes with a highly specialized area of norms stand out: diplomatic law, EU law, human rights instruments as unique subsystems of international law, expansion of international institutions through globalization[18].

The traditional Westphalian concept of constitutionalism is based indeed on the principles of sovereignty, the supremacy of law and democracy. But since the beginning of the XXI century global constitutionalism has been challenging the constitutional ideology and the very design of the Westphalian constitutional law. The basis of this phenomenon is recognized to be: the "information revolution", the emergence of "global space, order and values", including the rejection of the old "Westphalian constitutional geometry", overcoming the historical and cultural boundaries of constitutional cultures, the formation of global governance[19]. From these positions, the concept of the end of the era of nation states (and sovereign parliaments) is introduced, with emergence of the "post-Westphalian" concept of limited sovereignty.

The integration of international and constitutional law is differently assessed from the positions of sovereignty. Firstly, within the framework of the cosmopolitan paradigm, it is considered to be a transitional process of the society's movement towards a new type of association: an international organization with the maintained (for an indefinite period) principle of state sovereignty[20]. Secondly, within the framework of the theory of a dualistic world order it acts as "constitutional pluralism": the interaction of the international community of states and institutions of global governance[21]. Thirdly, in the theory of global governance it is expressed by the construction of global administrative law. This way is supposed

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[15] *Benvenisti E.* Law of Global Governance. The Hague : Hague Academy of International Law, 2014.

[16] *Somek A.* The Cosmopolitan Constitution. Oxford : Oxford University Press, 2014.

[17] *Chimni B. S.* Third World Approaches to International Law: A Manifesto // International Community Law Review, No. 3. P. 3.

[18] *Suami T., Kumm M., Peters A., and Vanoverbeke D.* (eds.). Global Constitutionalism from European and East Asian Perspectives. Cambridge : Cambridge University Press, 2018; et al.

[19] *Belov M.* (ed.). Global Constitutionalism and Its Challenges to Westphalian Constitutional Law. London : Hart, 2018.

[20] *Fassbender B.* The Meaning of International Constitutional Law // Transnational Constitutionalism. Ed. by N. Tsagourias. Cambridge : Cambridge University Press, 2009. Pp. 307–328.

[21] *Cohen J. L.* Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism. Cambridge : Cambridge University Press, 2012.

to achieve interaction of various regional integration projects: Europe, Asia, and Latin America. The key instrument of the integration of international legal regimes are recognized to be the UN, the WTO, the Bretton Woods system (World Bank, GATT [General Agreement on Tariffs and Trade], etc.), the system of the international criminal court and certain tribunals. The constitutionalization of international affairs expresses the unity of the norms and practice of relations between states in their dynamics: movement from diplomacy to law[22]. Finally, there is an idea of separating constitutionalism from sovereignty at the national level in order to overcome its historical ties with national statehood and creating ways of normative integration of the institutional set-up at the transnational level[23].

The logic of transnational regulation reflects the contradictions in the interpretation of the principle of sovereignty, it demands that states should integrate international norms at the level of domestic law, allowing citizens to become part of global regulation and to use its results, but at the same time causes "erosion of statehood" (sovereignty) which poses a serious challenge to the established processes of internal democratic constitutionalism. The result is weakening of national parliamentarism faced with a limited choice of becoming a mere vehicle for decisions of international structures; entering a more general system of transnational parliamentarism as an integral part of it, or generally losing its independent significance. Hence, weakening of state sovereignty means weakening of parliamentary sovereignty.

4. Principle of separation of powers: from hierarchy to heterarchy

The division of the power structure between state and international institutions is part of the process of constitutionalization of international law. Within the framework of international constitutionalism, there are several alternative models of the separation of powers which enter into contradictory relationships: geographical model (based on the regional principle); hierarchical model (based on the levels of constitutional and legal regulation); functional model (along the line of compensatory interaction of international and national norms and institutions); sectoral model (based on the areas of structural organization).

At the global level, this leads to a revision of the classical theory of separation of powers: the correlation between vertical division (territorial centers with separate levels of governance) and horizontal (the classic triad: legislative, executive and judicial power), and the general trend is defined as a shift of the regulation vector from horizontal to vertical separation of powers which brings up the issues of the hierarchy and structure of global (and national) governance in a new way. The traditional understanding of the vertical separation of powers (as a justification of federalism) is considered by many people to be a past stage, since the focus is shifting from the national understanding of constitutional power (based on sovereignty) to the transnational one.

The transnational system of vertical separation of powers differs from the standard understanding of federalism by a number of parameters: firstly, it presupposes geographical division into regions (rather than separate states); secondly, it means a more differentiated hierarchy of legal regulation subdivided into at least five main levels (represented at the local, regional, state, continental and global levels); thirdly, it stimulates the decentralization of governance (redistribution of financial, legislative and administrative powers from the central parliament to regional parliaments or legislative assemblies of different levels). This actualizes the search for quasi-federal models of the transnational territorial structure exemplified by the EU integration project, experiments with devolution (United Kingdom), as well as various concepts of regionalization and autonomization based on the national, cultural, administrative, economic, functional principles implemented in different countries of the world which are perceived by their proponents as a promising form for new international integration regimes.

In this perspective, the traditional hierarchical structure of the separation of powers is replaced with a heterarchical structure which includes a wider range of its carriers with different legal nature. There is a problem of diffusion of the constitutional powers of the state to international non-state institutions of different levels and preservation of the state as a center of governance. According to the proponents of this approach, in the process of international constitutionalization the state will be unable to maintain its place as the sole focus of legally constituted power, especially when international organizations achieve significant control. Separation of powers necessitates a shift in the balance of power within international law and the recognition that ultimately regional and global organizations can also be seen as carriers of constitutional power. Following this logic, as the constitutionalization of international law

[22] *Bhandari S.* Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World. Leiden, Boston, Brill : Nijhoff, 2016.

[23] *Preuss U. K.* Disconnecting Constitutions from Statehood. Is Global Constitutionalism a Viable Concept? // The Twilight of Constitutionalism. Ed. By P. Dobner and M. Loughlin. Oxford : Oxford University Press, 2010.

proceeds, states (national parliaments) will be relocated from the center of international decision-making and production of law to its periphery. They will survive but will have to give way to differentiated systems of governance that form democratic legitimacy and civil society at the transnational level[24].

In the aggregate, these processes are expressed by the concept of "multilevel constitutionalism" comprising its international, regional and national manifestations, and the goal is to see their relationship in harmonization (but not substitution). This concept which has almost become the official doctrine of the EU is causing growing criticism due to the unification of legal diversity, the relativization of democratic participation and the transnational phenomenon of "the rule of judges" (substitution of decisions of elected parliaments with verdicts of non-elected international courts). One of the consequences of bureaucratization is the response of populist movements to it defending the so-called national "legal identity"[25].

There still remains the undecided problem of which institutions represent the civil society in the global legal construction and whether they can become the basis of global governance. The position of the extreme supporters of global constitutionalism sees the solution in the consistent ousting of states from the constitutionalization process at the international level. The predicted result will be a revision of the concept of global governance as focused exclusively on the state in favor of non-state network models and interactions in the global system. An unpredictable (much less talked about) side effect may, however, be the erosion of the constitutionalism of nation states with the prospect of increasing authoritarianism[26].

5. Constitutionalism in the global governance system: institutions, actors and strategies of modernization

With the general awareness of the deficit of control at the global level, the proposals for its elimination include both theoretical and practical steps.

The first way is seen in the legal identification of special international (transnational) regulatory areas or regimes. In the context of globalization, the principle of popular sovereignty has overcome the boundaries of national group rights and is beginning to be seen as a legitimizing basis of organization of territorial power in the global society, allowing operation of transnational regimes, their model of regional organization primarily being the EU, and the model of sectoral organization being the WTO. A parallel is drawn between the self-determination of peoples and the emerging self-determination of international regimes included in the system of global governance[27]. In the context of international regulation, the determinant themes are deemed to be the immunity of states (especially after the establishment of the International Court of Justice), international organizations, institutions of commercial activities and public officers[28].

The second way is constitutionalization of international organizations, that is, endowing them with the role, functions and some features of constitutional institutions (including legislative assemblies)[29] and transfer of constitutionalism to the international level determining the order and hierarchy, regulating strengthening and, at the same time, restriction of international actors[30]. While acknowledging that the projects of global constitutionalism are not feasible in an abstract form, some believe that they can only get practical implementation at the level of institutional reforms: the UN, the WTO and especially the EU. The basis of the process is the UN Charter and the decisions of the Security Council on key

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[24] This review of the positions is given based on the paper: *O'Donoghue A.* International Constitutionalism and the State // International Journal of Constitutional Law, 2013. Vol. 11. Issue 4. Pp. 1021–1045.

[25] *Sajo A., Uitz R.* The Constitution of Freedom: An Introduction to Legal Constitutionalism. Oxford : Oxford University Press, 2017. Discussion see in: *Medushevsky A.* Freedom and suspicion: how to protect liberal constitutionalism from its opponents // Comparative constitutional review, 2018. No. 3 (124). Pp. 124–135.

[26] *Coradetti C., Sartor G.* (eds.). Global Constitutionalism Without Global Democracy? San Domenico di Fiesole : EUI (European University Institute). Working Paper. Law. 2016. No. 21.

[27] *Skordas A.* Self-determination of Peoples and International Regimes: a Fundamental Principle of Global Governance // Transnational Constitutionalism. Ed. by N. Tsagourias. Cambridge : Cambridge University Press, 2009. Pp. 207–268.

[28] *Peters A., Lagrange E., Oeter S., Tomuschat Ch.* (eds.): Immunities in the Age of Global Constitutionalism. Leiden : Nijhoff, 2015.

[29] *Dunoff J., Truchtman J. P.* (eds.). Ruling the World: Constitutionalism, International Law and Global Governance. Cambridge : Cambridge University Press, 2009.

[30] *Walker N.* Postnational Constitutionalism and the Problem of Translation // Weiler J. Y. Y., Wind M. (eds.) European Constitutionalism Beyond the State. Cambridge : Cambridge University Press, 2003. Pp. 27–54.

issues of war and peace. Constitutionalism is interpreted as a strategy for searching for adequate legal forms of the international order and a tool for "reforming this order" along the line of global, sectoral and regional institutions of the parliamentary and quasi-parliamentary type[31].

The third way is to transform the traditional electoral democracy at the transnational level by analogy with corporate governance. New theories of transnational democracy offer models for exercising "people's" control different from the electoral mechanisms of authority reporting. Their proponents speak of shareholder democracy as the antithesis of the state, where one institution (parliament) represents the "demos" trying to control the unified executive power. According to its proponents, the corporate governance system includes more decentralization, offering diversification of control systems: interaction between management, institutions, committees, etc. in the decision-making process in corporations. The organization of a transnational civil society according to this scheme is based on a set of norms, rules of the game and use of network communications, their general meaning being to overcome the monopolization of control (represented in traditional parliaments): separation of its centers and participants with expanded discussion of decision-making[32]. Nothing, however, guarantees that this scheme cannot be used for undemocratic decisions generally characteristic of the corporate sector.

The fourth way is an attempt to relocate some of the constructs of constitutionalism from the national level to the supranational one. One method of achieving this goal, "deliberative democracy", is primarily related with "extrinsic" legitimacy: a discursive process of developing rational decisions over parties and private interests (for example, a bilateral dialogue between management and trade unions in the EU). Another method, corporatism, is related with "derived" legitimacy, since legal norms are formulated through the process of their development in practice through the functional interaction of management and public organizations in the formation of norms adequately reflecting the conflicting social interests (for example, a trilateral dialogue of the government, entrepreneurs and workers within the ILO [International Labor Organization – Editor's note])[33].

The fifth way is restructuring of the system of global governance and administrative law on new foundations and with account of the current tasks. Three areas of legal regulation are stated in this area: planetary problems (global warming and ecosystem erosion, water shortage); the state of humanity (poverty, conflict prevention, global infectious diseases); and, actually, the problems of control (proliferation of nuclear materials, toxic waste, intellectual property rights, rules of genetic research, rules of trade, finance and taxation). If those who argue that the world is moving away from the Washington Consensus (and the economic policy based on it) are right, then the transition to a broader understanding of the tasks and institutions of global governance that go beyond parliamentarism is justified[34].

In general, there is a contradiction between two main theoretical approaches to governance: from the positions of global constitutionalism and global administrative law. The first approach focuses on the principles of constitutionalism and sees the goal in the constitutionalization of governance; the second focuses on ensuring political legitimacy (transparency, participation, accountability, judicial examination) and solves the problems of governance effectiveness (for example, distribution of water resources among different states)[35]. However, both theories suffer from idealism, failing to offer a solution to the central problem of the global governance crisis: ensuring its legitimacy.

Conclusions: prospects for ensuring legitimacy of constitutionalism at the transnational level

The conflicts related with the determination of global legitimacy include the following topics: determination of democratic forms; lawmaking at the international and national level; correlation of values and interests, institutional aspects of parliamentarism.

The construction of the global political identity has faced the decline of liberal democracy, showing the limits of its spreading beyond the classical models and the Western historical oecumene. General

[31] *Engstram V.* International Organizations, Constitutionalism and Reform // Finnish Yearbook of International Law. Vol. 20. Pp. 9–33.

[32] *Singer A., Ron A.* Models of Shareholder Democracy: A Transnational Approach // Global Constitutionalism. 2018. Vol. 7. No. 3. Pp. 422–446. See especially pp. 431–432.

[33] *Novitz T.* Challenges to International and European Corporatism Presented by Deliberative Trends in Governance // Transnational Constitutionalism. Ed. by N. Tsagourias. Cambridge : Cambridge University Press, 2009. Pp. 269–304.

[34] *Held D.* Reframing Global Governance: Apocalypse Soon or Reform! // New Political Economy, 2008. Vol. 11. No. 2. Pp. 157–158.

[35] *Ambrus M.* Through the Looking Glass of Global Constitutionalism and Global Administrative Law. Different Stories about the Crisis in Global Water Governance? // Erasmus Law Review, 2013. No. 1. Pp. 32–49.

questions have not been resolved in the international discussion: how is the approximation of international and constitutional law possible with account of the fundamental differences in their nature and structure; are the concepts of justice (primarily based on history and tradition) and legitimacy (with legal arguments prevailing in its rationale) identical; how can the historical injustice of international law (related with the predominance of the most powerful states) be overcome; can the different moral grammars of the regions of the world be reconciled; what constitutes the subject of transnational constitutionalism?

The focus is on the problem of "false universalism": a formal system of international principles and norms hiding the significant differences between international and national legal regimes. It is important to determine the criteria of the legitimacy of new transnational and national structures with account of the fact that the electoral structures of the major international organizations prevent full implementation of democratic practices of parliamentarism, to rethink the contribution of multilevel constitutionalism and the vacuum of legal regulation generated by it, when the remoteness of states (and national parliaments) from transnational decision-making structures (for example, international legislative assemblies) reduces trust and their impact on the result.

It is still to be determined whether the dominant criterion for assessing the legitimacy of institutions is the classical legal ideal of European states (democracy, elections, a rule-of-law state, autonomy of the personality) or also the orders of states not committed to these values, since the role played by non-democratic states in international law is still very significant. It is important to understand the way to treat the cultures where parliamentary democracy will not take root in an authentic form (at least in the foreseeable future), and the way to solve the issue of the correlation between global, regional, national identity, as well as real and constructed identity of constitutionalism. All these obstacles challenge the thesis that the interests of states will be legitimately represented by the constituent power in the international constitutional regime.

The recommended instruments of legal globalization are the concepts of deliberative democracy (and diplomacy), constitutionalization of international law, the compensatory model of regulation (the mutual complementarity of international and national law), multilevel constitutionalism, regional regimes and the limitation of the principle of sovereignty (by international and constitutional norms), subsidiarity (the principle of complementarity), the pluralistic concept of global governance (interaction of state and non-state actors) generally proceeding from the preservation of constitutional guarantees at the transnational level.

However, all these instruments can be practically implemented provided that a number of conditions are met: rethinking of the global public law ethics based of universal values; ensuring the independence of transnational justice; understanding of international constitutionalism both as a legal and a political theory; creation of authoritative independent institutions for mediation of conflicts, as well as a transnational social movement and centers for its promotion. Bringing these issues into the sphere of ethics, political constitutionalism and global governance can strengthen the arguments for a democratic interpretation of transnational constitutionalism countering the growing threat of a global Leviathan.

References

1. *Atilgan, A.* Global Constitutionalism. A Socio-Legal Perspective. Heidelberg : Springer, 2018.
2. *Belov, M.* (ed.). Global Constitutionalism and Its Challenges to Westphalian Constitutional Law. London : Hart, 2018.
3. *Bhandari, S.* Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World. Leiden, Boston, Brill : Nijhoff, 2016.
4. *Benvenisti, E.* Law of Global Governance. The Hague : Hague Academy of International Law, 2014.
5. *Cabrera, L.* Diversity and Cosmopolitan Democracy: Avoiding Global Democratic Relativism // Global Constitutionalism, 2015. Vol. 4. N. 1. Pp. 18–48.
6. *Coradetti, C., Sartor G.* (eds.). Global Constitutionalism Without Global Democracy? San Domenico di Fiesole: EUI (European University Institute). Working Paper. Law. 2016. No 21.
7. *Halmai, G.* Perspectives on Global Constitutionalism: the Use of Foreign and International Law. The Hague : Eleven International Publishing, 2014.
8. *Klabbers, J., Peters A., Ulfstein G.* (eds.). The Constitututionalization of International Law. Oxford : Oxford University Press, 2009.
9. *Lang, A. F., Wiener A.* (eds.). Handbook on Global Constitutionalism. Cambridge : Edward Elgar Publishing, 2017.
10. *O'Donoghue, A.* International Constitutionalism and the State // International Journal of Constitutional Law, 2013. Vol. 11. Issue 4. Pp. 1021–1045.
11. *Sajo, A., Uitz, R.* The Constitution of Freedom: An Introduction to Legal Constitutionalism. Oxford : Oxford University Press, 2017.

12. *Schwobel, C. E. J.* Global Constitutionalism in International Legal Perspective. Leiden and Boston : Martinus Nijhoff. 2011.
13. *Somek, A.* The Cosmopolitan Constitution. Oxford : Oxford University Press, 2014.
14. *Suami, T., Kumm, M., Peters, A.,* and *Vanoverbeke D.* (eds.). Global Constitutionalism from European and East Asian Perspectives. Cambridge : Cambridge University Press, 2018.
15. *Tsagourias, N.* (ed.). Transnational Constitutionalism: International and European Perspectives. Cambridge : Cambridge University Press, 2009.

Constitutional Framework of Activities of Nonprofit Organizations Producing Public Goods

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ABSTRACT

The basic human needs include the needs for public goods, their satisfaction stipulated by the Constitution of the Russian Federation. The State cannot be the sole producer of such goods, as the state monopoly in the public sector has a negative impact on the quality of public goods. Their production should be based on the competitive activities of nonprofit organizations (NPO). The participation of the state and local governments in the public sector should be primarily limited to financing the citizens' expenditure for the consumption of public goods, as well as to the regulation and control of the activities of NPO.

The constitutional framework for the creation of membership-based NPO is the right to association guaranteed by Art. 30 of the Constitution of the Russian Federation. Creating conditions for the exercise of the citizens' right to association requires a system of guarantees including socio-economic, political, legislative and other guarantees. A special role among the guarantees of the citizens' right to association is played by its judicial protection against the misconduct of the state and local self-government. Such protection should be aimed at the application of liability measures to public entities, their bodies and officers in the event of violation of the rights and legitimate interests of nonprofit organizations or their members.

Keywords: *social state, public sector of economy, public goods, citizens' right to association, nonprofit organizations*

1. Introduction

The twenty five years that have passed since the adoption of the current Constitution of the Russian Federation is a relatively short period by historical standards. However, over this short period Russia has undergone profound transformations of social life which would have taken many decades in other conditions. The prerequisite for such rapid transformations was the consolidation of the foundations of the constitutional system alongside with development of the model of relations between the state and the individual which is fundamentally new for our country.

Its ideological foundation was the concept of an individual formulated in the Constitution of the Russian Federation and designed to ensure the person's individual freedom and autonomy in the natural and social world as a system of sovereign rights inherent in each individual. The central place in this system is occupied by the need for personal space, as well as the closely related needs for freedom, spiritual creativity and other intangible values. It seems by no means accidental that a person, his free will and fundamental, inalienable rights enshrined in the country's fundamental law, are recognized as the highest value (Article 2 of the Constitution of the RF)[1].

Among other things, the Constitution of the Russian Federation guarantees the inalienable human rights to access to public goods, such as life, health, education, security, and cultural values. The rights and freedoms that are significant in a socially oriented market economy include the right to work in the conditions meeting the safety and hygiene requirements[2], the right to health protection, to education and other rights listed in Art. 37-43 of the Constitution of the Russian Federation. Of great importance is the exercise of cultural rights and freedoms enshrined in Art. 44 of the Constitution, namely the freedom of literary, artistic, scientific, technical and other types of creativity, teaching, as well as the right to participate in cultural life, to use cultural institutions and to access cultural values[3].

This circumstance was reflected in the ruling of the Constitutional Court of the Russian Federation dated November 16, 2004 No. 16-P where cultural rights and freedoms, including the rights in the field of communi-

[1] Constitution of the Russian Federation (adopted by a nationwide vote on 12.12.1993). As amended by the laws of the RF on amendments to the Constitution of the RF dated 30.12.2008 No. 6-FCZ, dated 30.12.2008 No. 7-FCZ, dated 05.02.2014 No. 2-FCZ, dated 21.07.2014 No. 11-FCZ // CL of the RF. 2014. No. 31. Art. 4398.

[2] For more details see: *Fabricius F.* Hum Human Rights and European Politics: Political and Legal Situation of Workers in the European Union. M.: Ed. Moscow State University, 1996.

[3] See: *Ivakina D. S.* The Concept and System of Human and Civil Cultural Rights and Freedoms in Russia // Constitutional and Municipal Law. 2018. No. 9. P. 146.

cation, are defined as necessary elements of the constitutional status of an individual[4]. Constitutional scholars also consider the provision of cultural rights and the production of the relevant goods to be a condition for the dynamic development of the present-day Russian society. In their opinion, the task of a democratic social state at the present stage of development is to create conditions for comprehensive creative self-fulfillment of the person since cultural creativity is an important aspect of individual and social freedom[5].

2. Constitutional doctrine of the social state: pro and contra

The listed constitutional rights are the individual's claims to public goods necessary for the full and comprehensive fulfillment of human freedom in social life that have been established and legally guaranteed by the basic law. The world's experience shows that the production and provision of such goods cannot be put on a purely market basis. The nature of public goods and their characteristic features (such as, in particular, indivisibility, non-competitiveness in consumption, impossibility of excluding the so-called "free riders" from the consumers) make their production knowingly loss-making and irrelevant for profit-making organizations and individual entrepreneurs whose activities are focused on profit-making.

The obligation to produce public goods can be forcibly imposed on these market agents by the law. However, this path only leads to a significant decrease in the quality of the goods produced and the services provided to the consumer. This circumstance was noted by a number of economists (in particular, J. St. Mill, J. Ledyard, M. Blaug, L. I. Jacobson, etc.) who suggested recognizing the natural monopoly of the state[6] in the production of public goods to overcome the "market failures". This resulted to emergence of the doctrine of the "welfare state" emerged which dominated the economic policy of Western countries in the second half of the last century.

This idea was most fully translated in the principle of the social state, as enshrined in paragraph 1 of Art. 7 of the Constitution of the RF which proclaimed the Russian Federation a social state, its policy aimed at creation of the conditions ensuring a decent life and free development of the person. According to the basic law, the main activities of the social state include protection of labor and health of people, establishment of a guaranteed minimum wage, state support for the family, motherhood, fatherhood and childhood, the disabled and the elderly, development of a system of social services, establishment of state pensions, benefits and other measures of social protection of the population[7].

These areas naturally require an appropriate economic base which is the so-called public sector of the economy. It is no coincidence that many theorists considered the public sector an almost monopoly sphere of economic activities of the social state. Based on this, it was generally accepted that the property component of the public sector is public (state and municipal) property recognized and protected on an equal basis with the private property of citizens and legal entities, as well as state and municipal finances, primarily budget funds.

Over time, however, there were revealed systemic shortcomings and contradictions of the "welfare state" experiencing as many failures as the free market[8]. In the process of production and provision of public goods the state appeared to be facing an acute shortage of information being, due to its asymmetry[9], an irreplaceable resource in the conditions of centralization inherent in state structures. As a

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[4] Resolution of the Constitutional Court of the Russian Federation dd. November 16, 2004 No. 16-P on the case of verification of the constitutionality of the provisions of paragraph 2 of Art. 10 of the Law of the Republic of Tatarstan "On Languages of the Peoples of the Republic of Tatarstan", part 2 of Art. 9 of the Law of the Republic of Tatarstan "On State Languages of the Republic of Tatarstan and Other Languages in the Republic of Tatarstan", paragraph 2 of Art. 6 of the Law of the Republic of Tatarstan "On Education" and paragraph 6 of Art. 3 of the Law of the Russian Federation "On Languages of the Peoples of the Russian Federation" in connection with the complaint of citizen S. I. Khapugin and the inquiries of the State Council of the Republic of Tatarstan and the Supreme Court of the Republic of Tatarstan // CL of the RF. 2004. No. 47. Art. 4691.

[5] See: *Chetvernin V. A.* Democratic Constitutional State: Introduction to Theory. M.: Ed. The Institute of State and Law of The Russian Academy of Sciences [IGP RAN], 1993. Pp. 3–11.

[6] See: *Blaug M.* Blaug M. Economic Thought in Retrospect. M.: Delo, 1996. P. 196; *Jacobson L. I.* The Public Sector of the Economy: Economic Theory and Politics. M.: State University Higher School of Economics [GU VShE], 2000. Pp. 17–18; *Ledyard J.* Failures of the Market. M.: Infra-M, 2004. Pp. 501–508.

[7] See: *Umnova-Konyukhova I. A.* The 1993 Constitution of The Russian Federation: The Constitutional Ideal Evaluation and its Implementation in Light of International Experience // Lex russica. 2018. No. 11. P. 27.

[8] See: *Yakovleva E. E.* Economics of the Public Sector in Russia and in the World // Izvestiya TRTU. 2006. No. 17 (72). P. 118.

[9] See: *Arrow K. J.* Uncertainty and the Welfare Economics of Medical Care // The American Economic Review. 1963. Vol. 53. No. 5. Pp. 941–973.

consequence, the low quality of the public goods provided by the state becomes a problem. In addition, the idea that it is the state that is the main, if not the only, producer of public goods gives rise to paternalistic ideas about its role and place in public life which are almost the main disadvantage of the social market economy negating the advantages of this concept.

Stimulating the state paternalism, as well as the welfare mentality of the general public, the doctrine of the social market economy ideologically substantiates the unlimited expansion of the state and the suppression of private initiative under the plausible pretexts of ensuring "social justice", support of the poor and vulnerable members of society, etc. In its turn, the government intervention in the economic life has a far-reaching negative impact on the private sector, creating a threat of stagnation and inefficiency in solving the problems faced by it. An alternative to such a situation is the widest possible introduction of *quasi-market* structures into the public sector, these structures being created by attracting private property and private producers into this sphere.

3. Nonprofit organizations as the major producer of public goods

There are reasons to assert that production of public goods is to be the primary focus of the activities of nonprofit organizations (NPOs) which do not consider profit-making to be their main purpose and do not distribute the profit received among the participants (paragraph 1 of article 50 of the Civil Code of the RF)[10]. At the same time, since the constituent documents of all NPOs, in one way or another, presuppose the implementation of the activities aimed at profit-making, they can be participants both of the market and various quasi-markets formed in the public sector of the economy. In its turn, the participation of the state and local self-government bodies in the public sector should be mainly limited to financing of the expenses of public goods consumers choosing their private producers independently and on a competitive basis[11].

It is important to emphasize that the expenditures from the state and municipal budgets are not the only source of financing of public goods consumption. A considerable share of the finances accumulated by the public sector are private funds, including the funds of the consumers themselves, which allows increasing the interest of the latter in the quality of the provided goods. Such a system focused on the competition of private producers of public goods seems to be more efficient than their production directly by the state or state financing of a limited number of oligopolistic producers[12]. As noted by researchers, "private property in a competitive environment stimulates more efficient use of resources and meets the needs of consumers better than the state property"[13].

Widely known is the British experience of formation of quasi-market structures in the public sector of the economy. A distinguishing feature of the British model of organizing the public sector is the use of vouchers, that is, a special type of securities giving their holders the right to demand the provision of an appropriate share of public goods. The vouchers were designed to promote solution of the problems arising from the very nature of public goods, thereby ensuring their targeted provision to consumers[14]. The result was the formation of quasi-markets that worked well in practice for the widest range of public goods and services, primarily in the field of education, health care, utilities, etc. in Great Britain in the 1980s-1990s.

By comparison, in our country, quasi-market mechanisms in the public sector of the economy are being formed more slowly, the rates varying in its various segments. One of the actively developing quasi-markets is the housing and utility sector where more than 50% of the housing stock were already serviced by management companies by the beginning of the current decade, and in some constituent entities of the Russian Federation (for example, in Moscow region) this figure was 80%[15]. At the same time, the functioning of management companies of the housing and utility sector is fraught with a number of systemic difficulties, the ways to overcome them not being fully outlined.

This experience which was successfully applied both in the UK and in other countries enabled some theorists to come up with the suggestion to go even further, extending the market or quasi-market

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[10] Civil Code of the Russian Federation. Part 1. Approved by Federal Law dated 30.11.1994 No. 51-FZ // CL of the RF. 1994. No. 32. Art. 3301; 2018. No. 1. Part 1. Art. 43.

[11] See: *Le Grand J., Bartlett P.* Quasi-markets and Social Policy. London : Macmillan Press, 1993.

[12] See: *Burchardt T., Hills J., Propper C.* Private Welfare and Public Police. New York : J. Rowntree Foundation, 1999. P. 14.

[13] *Andrushchak G. V.* Quasi-markets in the Economy of the Public Sector // Economics of Education. 2008. No. 3. P. 214.

[14] See: *Klein R.* Privatization and the Welfare State // Lloyd Bank Review. 1984. Jan. P. 12–29.

[15] See: *Kitsay J. A.* Role of Management Companies in Housing and Communal Services: Foreign and Domestic Experience // Theory and Practice of Social Development. 2012. No. 1. P. 162.

principles to the production of any public goods, including those that were traditionally included in the sphere of responsibility of the state, its bodies and executives (for example, law enforcement, justice, crime prevention, etc.). Such recommendations certainly look quite utopian and hardly feasible in practice. Their main shortcoming seems to be the naive confidence in the possibility of solving the problems requiring comprehensive solutions by economic means only. In particular, it seems obvious that police lawlessness and violence are not overcome by the privatization of the police, but by the formation of the mechanisms of democracy, also including civil control over the activities of law enforcement agencies, that is, over the quality of the public goods produced by them.

At the same time, this concept contains a rational kernel. Namely, it is fundamentally wrong to see the state as the main producer and supplier of public goods, with the exception of those that, like justice or crime prevention, cannot be provided privately (although the participation of private individuals in this cannot be completely excluded). A different approach to the public sector of the economy seems to be more correct as it sees a sophisticated interweaving of market and quasi-market mechanisms in it. According to this approach, the provision of many public goods (for example, reimbursable educational or medical services) can be commercialized in order to improve their quality.

The goods that cannot be provided to the consumer solely on a market basis due to their non-property nature should be produced by quasi-market structures, their main participants being NPOs based on private property, which will minimize the participation of the state in the public sector. Therefore, the issue is the decentralization of decision-making processes and the transfer of the primary responsibility for the production of public goods to NPOs. Being independent subjects based on private property, NPOs are not built into the system of hierarchical ties, and therefore are free to choose the optimal strategies for public goods production. That is, conditions arise both for improving the quality of the public goods provided, and for developing optimal principles of interaction between the state and private producers of these goods in the public sector of the economy.

4. Citizens' right to association and its legal guarantees

In the light of the above, there is an important practical task of ensuring and protecting the citizens' right to association stipulated by Art. 30 of the Constitution of the Russian Federation. The right to association is the constitutional basis for the creation and operation of NPOs based on the participation of citizens and organizations in it (such as non-governmental organizations, associations, consumer cooperatives, real estate owners 'associations, including homeowners' associations, etc.)[16]. Comprehensive implementation of this right by individuals and legal entities is likely to become an important incentive for the development of civil society structures in our country and will also allow stimulating public goods production by private entities.

As already noted, ensuring the citizens' right to association requires an integrated approach aimed at creating a system of guarantees, including socio-economic, political, legislative and other guarantees[17]. However, it is to be admitted that this system has not fully taken shape in the Russian Federation, which hinders the NPOs' activities of providing public goods and at the same time hinders the development of the public sector of the economy based on civil initiative. Among the various reasons, one should highlight the limited sources of funding of the activities of non-profit organizations, the presence of legislative contradictions and gaps, and the insufficient effectiveness of judicial guarantees.

No less important is the lack of a clear understanding of the legal nature of NPOs, as well as of the goals and objectives of their activities. Thus, one cannot agree with the widespread statements (based on the literal interpretation of paragraph 2 of article 2 of the Federal Law "On Non-profit organizations")[18], according to which the latter are to be completely deprived of the right to carry out other activities, apart from those aimed at achieving social, charitable, cultural, educational, scientific and managerial purposes, in order to protect the health of citizens, to develop physical culture and sports, to meet the spiritual and other intangible needs of the citizens, to protect the rights, legitimate interests of citizens and organizations, to resolve disputes and conflicts, to provide legal assistance, as well as other purposes related to the production of public goods. Thus, this is the question of an almost complete ban on the performance of income-generating activities by NPOs under the pretext

[16] See: *Lysenko V. V.* Law on Union into the Public Associations and Noncommercial Organizations // State and Law. 2011. No. 6. Pp. 92–95.

[17] For more detail see: *Agishev R. A.* Constitutional Base and Guarantees of Human and Citizen Rights to Association in the Russian Federation // Leningrad Law Journal. 2014. No. 3 (37). Pp. 41–42.

[18] On Non-Profit Organizations: Federal Law dated 12.01.1996 No. 7-FZ. As revised by federal law dated 29.07.2018 No. 260-FZ // CL of the RF. 1996. No. 3. Art. 145; 2018. No. 31. Art. 4849.

that the contents of such activities "remained legally uncertain, which is certain to create possibilities for various kinds of abuse"[19].

Meanwhile, it should be understood that performance of income-generating (profit-making) activities is not an end in itself for NPOs, but contributes to the achievement of the main goals of their activities. Being deprived of an important source of income, NPOs will lose their financial and economic independence, which will lead to their increased dependence on the state which is already considerable. That is why it is difficult to agree with the lawyers who, striving for the dogmatic purity of concepts, believe that income generation cannot be among the activities of NPOs due to the non-commercial nature of the latter. Actually, it is not the contents of the activities, but only the gradation of its main goals, that makes it possible, in our opinion, to distinguish between profit-making and non-profit organizations, including at the level of legislative regulation.

The aforesaid also determines one more direction of improving the legal status of NPOs which has to be dwelt on only briefly. This is about endowing non-profit organizations engaged in the production and provision of public goods with general legal capacity. In accordance with paragraph 1 of Art. 49 of the Civil Code of the RF, the legal capacity of an NPO is known to be special. They can only have the subjective rights and obligations that correspond to the main objectives of the activities stipulated by the constituent documents. This is the difference between NPOs and profit-making organizations having general legal capacity and any rights and obligations not prohibited by the law.

This limitation of the freedom of NPOs' activity gained momentum in judicial practice. The ruling of the Constitutional Court of the RF dd. February 19, 1996, No. 5-O established that the limits of the NPOs' activities were set both by the constituent documents and the duty to comply with the laws[20] formulated in paragraph 2 of Art. 15 of the Constitution of the RF. Thus, a "rubber situation" was established, since the obligation to comply with the Constitution of the RF and Russian laws is universal extending both to citizens and organizations and to the state, as well as other public legal entities. Therefore, in our opinion, emphasizing this obligation in relation to NPOs can only contribute to the introduction of a regime of mandatory regulation of their activities in law enforcement and judicial practice. In order to avoid such a situation, it seems expedient to legislate the norm according to which NPOs primarily involved in the activities related to the production and consumption of public goods, including consumer cooperatives, associations (unions), charitable and other foundations, autonomous non-profit organizations, etc., may have any rights and obligations not prohibited by the applicable law, including, of course, the obligation stipulated by paragraph 2 of Art. 15 of the Constitution of the RF.

A special role in the system of guarantees of citizens' right to association seems to be played by its judicial protection at all levels. It is obvious that the violations of this right requiring judicial intervention are diverse. Such violations include both unlawful actions of individuals and legal entities (for example, chicanery prohibited by Article 10 of the Civil Code of the Russian Federation: the exercise of civil rights solely with the intention of causing harm to another person, actions bypassing the law with a knowingly illegal purpose, as well as other knowingly dishonest exercise of civil rights), and above all, the arbitrariness of public authorities.

It is no secret that the actions of the state, its bodies and officials aimed at preventing citizens from exercising their right to association are extremely common at present. In particular, this is about the unjustified denials of state registration of NPOs which become possible in a situation when the procedure itself at the legislative level is unnecessarily complicated compared to the state registration of profit-making organizations. This creates the preconditions for the arbitrary discretion of the competent authorities in the issue of denying registration for an NPO. In this regard, the proposals of a number of lawyers to simplify the procedure of state registration of NPOs by extending general regulations on state registration of profit-making organizations to the latter (with account of the specifics of their activities, of course) seem quite reasonable and justified.

Nevertheless, the creation of legislative guarantees of the right to association, as well as the conditions stimulating the public goods production activities of NPOs is a necessary, but far from sufficient requirement. It is important already now to strive for the formation of a stable judicial practice preventing unjustified denials of state registration for NPOs, as well as denials of registration on the grounds not applicable to profit-making organizations. In other words, the judicial authorities should contribute

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[19] *Lysenko V. V.* Op. cit. P. 93.

[20] Determination of the Constitutional Court of the RF dated February 19, 1996 No. 5-O on the refusal to accept for consideration the complaint of Ural independent territorial trade union of workers of various forms of ownership as not meeting the requirements of the federal constitutional law "On the Constitutional Court of the Russian Federation" // Legal reference system (SPS) "Consultant Plus".

to the development of a unified procedure of state registration for all organizations, both profit-making and non-profit. Moreover, a guarantee of the right to association implemented in the activities of the judicial power would be the establishment of the most favorable treatment for state registration of the NPOs primarily involved in production and provision of public goods.

In addition, in accordance with the provisions of Art. 11 and 12 of the Civil Code of the RF, judicial protection is the main means of ensuring the property independence of NPOs. It is the courts that play the leading role in protecting the property rights of this category of entities, including in cases of its forced termination on the grounds stipulated by the law. Such grounds include, for example, execution upon property for the obligations of the owner (Art. 237 of the Civil Code), termination of the person's ownership of the property that cannot be owned by the person (Art. 238 of the Civil Code), alienation of immovable property due to seizure of the site on which it is located (Art. 239 of the Civil Code), alienation of real estate in connection with the seizure of the land plot for state or municipal needs (Art. 239.2 of the Civil Code), etc.

In all these cases, arbitrary actions on the part of the state, its bodies and officials are certain both to undermine the stability of property relations and to have an extremely negative effect on the exercise of the right to association, contributing to a decrease in the quality of the public goods produced by NPOs. Creation of effective means of judicial protection is supposed to help overcome the negative trends emerging in this area. In the long term, the goal to be achieved by the legislation, judicial practice, as well as by the efforts of the scientific legal community and other representatives of the civil society is the formation of the mechanism of responsibility of the state and other public legal entities to individuals, including non-profit organizations.

Thus, the judicial protection of NPOs from unlawful or other unfair actions on the part of the state and local self-government bodies, like no other, will contribute to ensuring the implementation of the constitutional right to association and, as a result, the development of civil society institutions, as well as improving the structures of the public sector of the economy.

References

1. *Agishev, R. A.* Constitutional Base and Guarantees of Human and Citizen Rights to Association in the Russian Federation // Leningrad Law Journal [Leningradskiy yuridicheskiy zhurnal]. 2014. № 3 (37). Pp. 37–46. (In rus)
2. *Andrushchak, G. V.* Quasi-markets in the Economy of the Public Sector [Kvazirynki v ekonomike obshchestvennogo sektora] // Economics of Education [Ekonomika obrazovaniya]. 2008. № 3. Pp. 214–225. (In rus)
3. *Blaug, M.* Economic Thought in Retrospect [Ekonomicheskaya mysl' v retrospektive]. M., 1996. (In rus)
4. *Ivakina, D. S.* The Concept and System of Human and Civil Cultural Rights and Freedoms in Russia // Constitutional and Municipal Law. 2018. № 9. Pp. 145–148. (In rus)
5. *Kelsen, H.* Pure Theory of Law. 2nd editon. Transl. from German by Mikhail Antonov and Sergey Loesov. St. Petersburg : Alef Press Publishing House, 2014. 542 p. (In rus)
6. *Kitsay, J. A.* Role of Management Companies in Housing and Communal Services: Foreign and Domestic Experience // Theory and Practice of Social Development. 2012. № 1. Pp. 162–164. (In rus)
7. *Ledyard, J.* Failures of the Market [Nesostoyatel'nost' (provaly) rynka]. M. : Infra-M, 2004.
8. *Lysenko, V. V.* Law on Union into the Public Associations and Noncommercial Organizations // State and Law. 2011. № 6. Pp. 92–95. (In rus)
9. *Umnova-Konyukhova, I. A.* The 1993 Constitution of The Russian Federation: The Constitutional Ideal Evaluation and its Implementation in Light of International Experience // Lex russica (Russian Law) [Lex russica (Russkiy zakon)]. 2018. № 11. Pp. 23–39. (In rus)
10. *Fabricius, F.* Human Rights and European Politics: Political and Legal Situation of Workers in the European Union. M. : Ed. MSU [MGU], 1996. (Translation from English)
11. *Chetvernin, V. A.* Democratic Constitutional State: Introduction to Theory [Demokraticheskoye konstitutsionnoye gosudarstvo: Vvedeniye v teoriyu]. M. : Ed. The Institute of State and Law of The Russian Academy of Sciences [IGP RAN], 1993. (In rus)
12. *Jacobson, L. I.* The Public Sector of the Economy: Economic Theory and Politics [Gosudarstvennyy sektor ekonomiki: ekonomicheskaya teoriya i politika.]. M.: State University Higher School of Economics [GU VShE], 2000. (In rus)
13. *Yakovleva, E. E.* Economics of the Public Sector in Russia and in the World [Ekonomika obshchestvennogo sektora v Rossii i v mire] // News TRTU [Izvestiya TRTU]. 2006. № 17 (72). Pp. 117–125. (In rus.)
14. *Arrow, K. J.* Uncertainty and the Welfare Economics of Medical Care // The American Economic Review. 1963. Vol. 53. № 5. Pp. 941–973.
15. *Burchardt, T., Hills, J., Propper C.* Private Welfare and Public Police. New York : J. Rowntree Foundation, 1999.
16. *Klein, R.* Privatization and the Welfare State // Lloyd Bank Review. 1984. Jan. Pp. 12–29.
17. *Le Grand, J., Bartlett, P.* Quasi-markets and Social Policy. London : Macmillan Press, 1993.

Constitutional Legislation Developments in the Russian Federation for Sustainable Development Goals

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ABSTRACT

The improvement of constitutional legislation at the national level is impossible without taking into account the progressive transformations in the international system that predetermine progress in solving the political problems of our time. Democracy as a non-alternative political regime and the rule of law as the principle of social organization guarantee the legitimacy of decisions of the public authority of the state as long as the level of legal culture of the people allows remaining within the legal framework, updating the interpretation of formal requirements of the constitutional law. The historical context of the modernization of the legal foundations of the state system affects legal awareness only to the extent that changes in the law give rise to progressive practices of protection of the fundamental human rights and freedoms. Many ambitious political projects and current reforms have not been properly developed due to the fact that the practical results of the modernization of the constitutional system strongly contradicted the picture of social justice that formed the ideological basis for the humanitarian policy. Preserving legal traditions while updating the interpretation of the provisions of constitutional acts in the practice of constitutional justice can contribute to the achievement of sustainable development goals to a much greater extent than those changes in the text of constitutional acts that carry the risks of political instability and violation of human rights.

Keywords: constitution, changes, legitimacy, principles, human rights, democracy

The Resolution of the General Assembly of the United Nations "Transforming Our World: The 2030 Agenda for Sustainable Development" dated September 25, 2015[1] adopted the Sustainable Development Goals (paragraph 59). Since then, special attention of the world community has been paid to the eradication of poverty, non-discrimination and protection of the natural environment. According to the Sustainable Development Goals, the priority task of the United Nations is to eradicate poverty and hunger (Goals 1 and 2, respectively). Political leaders of the world community declare their determination "to create conditions for sustainable, inclusive and progressive economic growth, universal prosperity and decent work for everybody with account of different levels of national development and opportunities" (paragraph 3), and the legislative bodies of the Russian Federation reaffirm their commitment to Sustainable Development Goals[2]. It is generally recognized that poverty, hunger and discrimination (including economic one) accompanying extreme poverty, impede the enjoyment of fundamental human rights and freedoms and negatively affect the quality of democracy[3].

Historical experience demonstrates the special influence of the state law on ideas about social justice. For example, the Great Charter of 1215 allows "ascertaining the generally recognized statement that law forms and teaches the society"[4]. The Great Charter emerges "as a result of resistance to arbitrariness on the part of the monarch, as an attempt to put the king in a certain legal framework. Subsequently, the provisions of the Great Charter greatly influenced *the development* (our italics — V. K., G. A.) of such human rights as the right to life and the right to freedom, as well as many procedural guarantees which, in their turn, played an important role in shaping the concept of the rule of law"[5]. In the context of the present humanitarian problems reflected in the fundamental documents of the United Nations, the improvement of the Russian constitutional legislation is be carried out with account of the progres-

[1] A/RES/70/1. [Electronic resource]. URL: https://undocs.org/A/RES/70/1 (accessed on: 06.01.2020).

[2] On the results of the parliament hearings of "The post-2015 UN Development Agenda" — practical aspects of implementation: Resolution of the Council of Federation of the Federal Assembly of the Russian Federation dd. March 2, 2016 No. 95-SF.

[3] O'Cinneide C. Democracy, Rights and the Constitution — New Directions in the Human Rights Era // Current Legal Problems, Vol. 57, Iss. 1, 2004. Pp. 175–211.

[4] *Khatunov S. Yu.* Magna Carta and Treaty of Henry Brackton "On the Laws and Customs of England" // Lex russica (Russian law). 2012. Volume 71. No 1. P. 26.

[5] *Temirbekov Zh.* Magna Carta — as the Conceptual Predecessor of the Rule of Law Concept in the Middle Ages // Law and State. No. 2 (67) 2015. Pp. 89–92.

sive foreign experience in solving the problems of poverty and economic discrimination that persist in the Russian society.

The concept of the transition of the Russian Federation to sustainable development (approved by the Decree of the President of the Russian Federation dd. April 1, 1996, No. 440) is basically devoted to the ecological aspect of structural transformations in the economy and only to some extent reflects the contemporary understanding of the problem of sustainable development. The attempts to solve acute social problems in detachment from the fundamental foundations of the citizens' participation in the state governance seem futile. Changing the basic law of the country is possible and even necessary in the cases where social progress requires normative transformation; however, the world experience has shown that the practice of amending constitutional acts does not always reflect the real interests of the people. For example, the Eighteenth Amendment to the US Constitution was adopted on December 18, 1917 (entered into force on January 16, 1919. See *Dillon v. Gloss*, 256 U.S. 368, 376 (1921)) under the influence of anti-alcohol movement activists; however, life showed the inconsistency of such regulation, and the twenty first amendment to the US Constitution adopted on February 20, 1933 annulled the dry law. Changing the constitution of a developed democratic state is always dictated by the desire of the political class to show concern for the people stating those ideals of justice that will predetermine social progress, but such efforts are sometimes futile and unsuccessful. Success in improving constitutional legislation seems to us to be based on the understanding of the historical experience that has led to the institutionalization of specific legal realities. Underestimation of political risks and inattention to the praxeological aspects of constitutional legislation can lead to legal errors preventing sustainable development.

The constitutional legal order In Russia is developing under the influence of the transformation of traditional European institutions, such as the European Court of Human Rights, its activities aimed at protecting a complex of humanitarian values in creation of a common policy of the member states of the Council of Europe[6]. The politicization of international law has a direct impact on the execution of decisions of the European Court of Human Rights. In the complicated foreign policy situation "a significant factor of instability and uncertainty is the undermining of the traditional international order, including geopolitical tensions and the renunciation of international coordination"[7]. Against the alarming background of the international agenda the Russian Federation still has a difficult economic situation: "The real disposable income of the population has been declining for the fifth year in a row. The population with an income below the subsistence minimum remains at a level close to 20 million people"[8]. In these conditions, there are calls from different sides to change the Constitution of the Russian Federation of 1993 in order to ensure greater stability and justice of the country's socio-political field.

The Russian mechanism of constitutional and legal protection of human rights centers around the political figure of the President of the Russian Federation. In accordance with paragraph 2 of Art. 80 of the 1993 Constitution of the Russian Federation the President of the Russian Federation is the guarantor of the Constitution, human and civil rights and freedoms. In his speech dedicated to the twentieth anniversary of the 1993 Constitution of the Russian Federation President of the Russian Federation V. V. Putin noted that "the tough and firm position of the Constitutional Court on upholding the constitutional foundations of our state is the pillar of Russia, because the erosion and shattering of the basic law means a forerunner to the erosion and shattering of the state itself ... one needs to care with respect to the basic law"[9].

In his article "Live Constitution of Development" Chairman of the State Duma of the Federal Assembly of the Russian Federation V. V. Volodin noted that "we are not talking about changing and revising the basic provisions of the constitution" and suggested that "the State Duma should at least participate in consultations when appointing members of the government", and such a procedure does requires "amending the constitution"[10]. The problem of modernization of the 1993 Constitution of the Russian Federation is being actively discussed. In the fair opinion of S. A. Zenkin, "in the conditions of the existing political realities the rigidity of the legal constructs of reforming the constitution is nominal"[11], since

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[6] *Cali B.* International Human Rights Law: One Purpose or Many? Reflections on Macklem's. The Sovereignty of Human Rights // Jerusalem Review of Legal Studies, Vol. 15, Iss. 1, June 2017. Pp. 77–88.

[7] *Mau V. A., Abramov A. E., Apevalova E. A.,* et al. Russian Economy in 2018. Trends and Prospects. Moscow, 2019. Volume 40. P. 20.

[8] Ibid. P. 26.

[9] Putin V. V. The constitution must be stable [Electronic resource]. URL: https://tass.ru/politika/828204 (accessed on: 06.01.2020).

[10] Volodin V. V. Living constitution of development // Parliamentary newspaper. 17.07.2019 [Electronic resource] URL: https://www.pnp.ru/politics/zhivaya-konstituciya-razvitiya.html (accessed on: 05.01.2020).

[11] *Zenkin S. A.* Modernization of the Constitution of the Russian Federation: Normative Model and Practice // Lex russica (Russian law). 2018. No. 11 (144). Pp. 40–62. DOI: 10.17803/1729-5920.2018.144.11.040-062. P. 54.

certain political forces have a constitutional majority in the Federal Assembly of the Russian Federation. Some scientists mistakenly believe that "there is a serious problem of the legitimacy of the current constitution"[12], while others reasonably analyze "some trends" of improving the basic law of the Russian Federation[13]. We seem to be facing a major task of preserving the traditional legitimacy of the 1993 Constitution of the Russian Federation by modernizing the effective practices of its interpretation and application for progressive humanization of administrative practices.

The 1993 Constitution of the Russian Federation is a landmark historical document that marked the final transition of Russia to the democratic form of governance and a rule-of-law state. After the collapse of the USSR, the Russian Federation had to rebuild its own statehood, as the romantic expectations from the political transformations were quickly replaced with the gloomy economic and political post-Soviet realities of the 1990s. Solving the problem of creating a basic law meeting the challenges of that time required the mobilization of almost all the intellectual and administrative resources of the country that existed at that time.

From 1990 till 1993 the Russian Federation had the Constitutional Commission: a permanent body of the Congress of People's Deputies of the Russian Federation for the preparation of the draft new Constitution of Russia. However, for a number of political reasons, these efforts failed to lead to the development of the text of the basic law that would meet all the interests of the Russian society. The working commission to finalize the draft Constitution of the Russian Federation was formed by the Decree of the President of the Russian Federation dated May 12, 1993 No. 660 "On Measures to Complete the Preparation of the New Constitution of the Russian Federation". In accordance with the Decree of the President of the Russian Federation dated June 2, 1993 No. 840 "On the Procedure for the Work of the Constitutional Conference", from June 5 to June 16, 1993 plenary sessions of the Constitutional Conference were held in the Marble Hall of the Kremlin, and a broad public discussion of constitutional drafts was initiated. During the sessions of the groups of representatives, the working commission and expert groups of the Constitutional Conference, it was decided to develop a text of the constitution that meets all the requirements of the rule-of-law state. The Public and State Chambers of the Constitutional Conference, as well as the Commission of Constitutional Arbitration began work.

More than 800 deputies participated in the Constitutional Conference. It comprised the most reputed Russian lawyers; the authors of the constitution drafts were S. S. Alekseev and S. M. Shakhrai, the first mayor of St. Petersburg A. A. Sobchak also worked on the basic law. He later wrote: "The greatest objections in the draft of the Constitutional Commission are caused by the continuity and interrelatedness with the previous Soviet constitutions both in the structure of the draft and in the presentation of the material. One of the most significant shortcomings is the expansion of the subject of constitutional jurisdiction. The Constitution is the main law of the state. But the draft proclaims it to be the fundamental law of the state and society. We are not in the rank of the Lord, the society has lived, lives and will live according to its own laws which are not akin to legal ones, but just have a legal character"[14].

As a result of the work of the Constitutional Conference, a new unified draft of the Constitution of Russia ready for publication was developed only by November 8, 1993. Suffice it to recall the events of September — October 1993 in Moscow related with the termination of the work of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation in order to understand the political situation in which the text of the constitution was worked on. However, despite all the political difficulties, the basic law was adopted based on the results of the nation-wide voting held on December 12, 1993. In 1993 the draft constitution was supported by more than 58% of those who took part in the voting, about 33 million citizens of Russia. The legitimacy of the document can raise no doubts, and this was the main result of the work of the Constitutional Conference. At the same time, the subsequent changes in the text of the basic law may challenge the legitimacy of the new wording of the document. The adoption of amendments to the constitution is always fraught with political risks. Provided that the new provisions of the basic law reflect the idea of justice and comply with the international law[15], there is still the problem of the correlation between the authority of the original text and later amendments, since it is obvious that the procedure of adopting a constitutional act differs significantly from the procedure of amending the text of the document.

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[12] Bondarev A. V. On the need to change the Russian constitution // Young Scientist. 2019. No. 21. Pp. 319–321. [Electronic resource] URL https://moluch.ru/archive/259/59683/ (accessed on: 28.11.2019).

[13] *Ovsepyan Zh. I.* Changes to the Constitution of the Russian Federation: Some Trends // Russian law: Education, Practice, Science. 2014. No. 2 (83). Pp. 79–83.

[14] *Sobchak A. A.* Russia without despotism and despots [Electronic resource]. URL: http://sobchak.org/site/112.html (accessed on: 05.01.2020).

[15] *Tasioulas J.* Human Rights, Legitimacy, and International Law // The American Journal of Jurisprudence, Vol. 58, Iss. 1, June 2013. Pp. 1–25.

In the course of the work on the draft constitution, normative structures and a system of public institutions responsible for their implementation were created. B. S. Ebzeev, a judge emeritus of the Constitutional Court of the Russian Federation, notes that the working group for the finalization of the draft new constitution made a decisive contribution to the creation of the text of the constitution[16]. The working group was managed by S. A. Filatov who summed up the work of the Constitutional Conference with account of certain historical experience in his article "Does Russia Live by the Constitution?" 15 years later noting that: "On the basis of the Constitution, the country managed to go through a most difficult period of large-scale, truly revolutionary transformations. It managed to go through and not to plunge into the chaos of endless conflicts of regions, authorities, ideologies. To go through without collapsing the society, without losing its statehood. In the constitution we got the legal foundation that ensured the political, economic, social integrity of Russia"[17]. The Constitutional Conference elaborated an effective mechanism of state and legal regulation; however, it took a long legislative work to adopt federal constitutional laws in order to fully achieve the potential of the basic law.

The work of the Constitutional Court of the Russian Federation had a significant impact on the understanding and application of the provisions of the constitution. Professor M. V. Baglay who headed the Constitutional Court from 1997 till 2003 precisely defined the principles of work that make it possible to successfully maintain the constitutional rule of law In Russia: "The Constitutional Court is out of politics — this is known. In the sense that the judges of the Constitutional Court are not engaged in political activities. Nobody belongs to political parties, and there are no political discussions, political approaches, considerations of expediency in our work. Legal criteria only"[18]. The authority of the Constitutional Court of the Russian Federation, its right to official interpretation of the constitution predetermines the need for the direct participation of judges of the Constitutional Court of the Russian Federation in the process of modernizing the constitutional legislation and its application in order to protect human rights and freedoms, as well as to counteract threats to sustainable development. The modernization of Russian democracy necessitates the activity of the leaders of the professional legal community in improving the constitutional legislation in view of the fact that the sustainable development of the Russian Federation as a leading world power, a permanent member of the UN Security Council, largely depends on the rationality of legislative decisions.

The 1993 Constitution of the Russian Federation as a live document of direct action changed gradually. A system was developed for introducing amendments to the constitution through special federal laws on amendments to the Constitution of the Russian Federation. For example, the law dated December 30, 2008 No. 6-FKZ "On Changing the Term of Office of the President of the Russian Federation and the State Duma" increased the term of office of the President to six years, and the State Duma to five years; the law dated December 30, 2008 No. 7-FKZ "On Supervisory Powers of the State Duma regarding the Government of the Russian Federation" obliged the Government of the Russian Federation to submit reports to the State Duma on the results of its activities. The law dated February 5, 2014 No. 2-FKZ "On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation" provided the grounds for the changes in the judicial system; the law dated July 21, 2014 No. 11-FKZ "On the Council of the Federation of the Federal Assembly of the Russian Federation" determined the powers of the President of the Russian Federation to participate in the formation of the upper house of the parliament.

Over a quarter of a century, the need for further reforming the constitutional mechanisms of regulating the functioning of the state apparatus became obvious. In his article "Letter and Spirit of the Constitution" in October 2018 V. D. Zorkin, Chairman of the Constitutional Court of the Russian Federation, noted that "our constitution has shortcomings. These include the lack of a proper balance in the system of checks and balances, a bias in favor of the executive branch of power, insufficient clarity in the distribution of powers between the president and the government, in determining the status of the presidential administration and the powers of the prosecutor's office"[19]. However, it is really important to learn to "live fully according to the constitution", since "without solving this general task, Russia will fail to get its new high and lasting place in an increasingly complicated and by no means kind global world"[20].

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[16] *Ebzeev B. S.* Constitution, Power and Freedom in Russia: the Experience of Synthetic Research. M. : Prospekt, 2013. 336 p.

[17] *Filatov S. A.* Does Russia Live Under the Constitution? // Znamya. No. 11. 2008. Pp. 115–121.

[18] Internet conference of Chairman of the Constitutional Court of the Russian Federation M. V. Baglay "To the 10th Anniversary of the Constitution of the Russian Federation: Protection of Citizens' Constitutional Rights and Freedoms". January 29, 2003 [Electronic resource]. URL: http://www.garweb.ru/conf/ks/20030129/ (accessed on: 06.01.2020).

[19] *Zorkin V. D.* The Letter and Spirit of the Constitution // Russian newspaper. 09.10.2018. № 226 (7689).

[20] Ibid.

It should be admitted that without decisive and timely amendments to the 1993 Constitution of the Russian Federation it was impossible to ensure the reunification of Russia with Crimea, to protect the rights of Russian people living on the territory of the peninsula. The Constitution is an integral part of the national security system which guarantees a legal response to any illegitimate political decisions.

The progress in the protection of human rights became one of the most significant achievements in the implementation of the provisions of the 1993 Constitution of the Russian Federation. The constitutional norms allowed building the initially difficult relations between the Russian Federation and the Council of Europe. According to the well-grounded opinion of Professor S. M. Shakhrai, "the provision on the supremacy of the constitution is directly and clearly formulated in the basic law. The subordination of the norms of international treaties to the constitution itself and federal constitutional laws was enshrined."[21] At the same time, it is obvious that "full implementation of constitutional principles in life requires both compliance with formal procedures and the availability of proper political and legal culture, respect for the rule of law, uniform understanding of the ideas of the basic law by political elites and civil servants."[22]. Undoubtedly fair is the thesis of S. M. Shakhrai about the initiatives aimed at changing the Constitution of the Russian Federation, which "have been and are not legal, but political, since the current basic law still has a significant potential. The constitutional norms do not have any direct prohibitions on political creativity, and therefore the consensus of the elites is sufficient to legalize the majority of the innovations in our social and political life"[23]. At the same time, the fundamental role in building a modern rule-of-law state is played by the values having the consensus of the political class with other elites.

The constitutional system of the Russian Federation is substantially influenced by the crisis of the neoliberal model of the national economy[24]. In conditions when the status of the subject of legal relations is determined by its economic viability, a significant part of strategic initiatives critical for national security and social justice do not get proper support. Since the citizens' rights and freedoms are to remain in the center of the mechanism of constitutional regulation[25], guarantees of equality and social justice will determine the trend in the modernization of the constitutional law of the Russian Federation. In the context of traditional legitimacy it will be useful if it is the interpretation of the main law that predominantly changes while the changes in the text will be limited in the practice of rule-making, since the 1993 Constitution of the Russian Federation has become a kind of symbol of contemporary Russia.

Characterizing the impact of the 1993 Constitution of the Russian Federation on the Russian society, S. S. Alekseev was undoubtedly right maintaining that "in any state the Constitution Day is one of the major holidays. Perhaps it is the constitution that contains our national idea so persistently sought"[26]. Constitutional ideals and democracy In Russia are certain to develop for the country to conform to the principles of justice and equality, as well as the goals of sustainable development formulated at the international level. The principles of the state structure enshrined in the 1993 Constitution of the Russian Federation both enabled the state to get out of the political crisis and formed a solid foundation for sustainable development In Russia. Improvement of the mechanisms of the rule-of-law state directly depends on the political priorities that the governing bodies at various levels of public authority are guided by[27]. It is obviously necessary to limit subjectivity in the application of the norms of the constitutional law[28], at the same time, it is the professional legal consciousness and legal culture of judges of the Constitutional Court of the Russian Federation that guarantees the legality, preservation of traditions and protection of human rights In Russia.

Improvement of the constitutional legislation must be carried out with account of the law enforcement practice of the European Court of Human Rights and the existing challenges to equality and justice faced

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[21] *Shakhrai S. M.* Changing the constitution is like breaking down the foundation // RIA Novosti. 14.08.2015. [Electronic resource] URL: https://ria.ru/20150814/1183677399.html (accessed on: 01/05/2020).

[22] *Shahray S. M.* 25 Years of the Constitution of the Russian Federation: Implementation and Development of Constitutional Models // Lex Russica (Russian law). 2018. № 11 (144). P. 14.

[23] *Shahray S. M.* Creative Potential of the Constitution of the Russian Federation // Journal of Russian Law. 2018. No. 12 (264). Pp. 33–39.

[24] *Kirilenko V. P., Alekseev G. V., Pacek M.* Natural Law and the Crisis of Liberal Legal Order // Bulletin of St. Petersburg University. Law. 2019. Volume 10. No. 1. Pp. 38–54.

[25] *Avakyan S. A.* Problems of Ensuring Constitutional Public-Political Rights and Freedoms of Citizens of the Russian Federation: New Realities // Moscow University Herald. Iss. 11: Law. 2017. № 1. Pp. 3–34.

[26] Alekseev's law // Rossiyskaya Gazeta. 16.07.2009. Ural No. 0 (4954) [Electronic resource]. URL: https://rg.ru/2009/07/16/reg-ural/alekseev.html (accessed on: 01/05/2020).

[27] *Avakyan S. A.* Modernization of Public and Political Relationships and Constitutional Reformation: Issues and Prospects // Constitutional and Municipal Law. 2019. № 9. Pp. 3–6.

[28] *Avakyan S. A.* Government Relations: Existence Regularities, Regulation and Law Enforcement Subjectivism // Constitutional and Municipal Law. 2018. № 5. Pp. 3–11.

by everyone in the present international system. Achievement of sustainable development goals cannot be ensured without timely and legitimate political changes; however, one cannot stay in the legal field, constantly changing the norms of constitutional legislation without clearly explaining to the civil society how changes in the constitutional legislation will improve the lives of ordinary citizens. Any attempt to change the constitution has a symbolic meaning and requires a certain political caution, which, undoubtedly, does not preclude the need to bring the provisions of the sources of the constitutional law into line with the realities of life that affect the sovereignty and national interests of the Russian Federation.

Constitutional norms and principles are to remain not just formal criteria of the rule-of-law state, but they are meant to regulate social relations in essence, guaranteeing the fundamental status of a citizen in relations with the state. Unless the modernization of the constitutional legislation is aimed at finding realistic ways to solve the current problems of the implementation of fundamental human rights, sustainable development will inevitably be slowed down due to injustice generated by the imperfection of the law. In this context, the goals of sustainable development and the interests of effective protection of human rights in the Russian Federation dictate the need to exercise restraint in the issue of changing the constitutional legislation and require that the constitutional supervision bodies pay close attention primarily to ecological well-being, eradication of poverty and ensuring the welfare of households protecting their right to ownership.

References

1. *Avakyan, S. A.* Modernization of Public and Political Relationships and Constitutional Reformation: Issues and Prospects // Constitutional and Municipal Law [Konstitutsionnoye i munitsipal'noye pravo]. 2019. No. 9. P. 3–6. (In Rus)
2. *Avakyan, S. A.* Government Relations: Existence Regularities, Regulation and Law Enforcement Subjectivism // Constitutional and Municipal Law [Konstitutsionnoye i munitsipal'noye pravo]. 2018. No. 5. P. 3–11. (In Rus)
3. *Avakyan, S. A.* Problems of Ensuring Constitutional Public-Political Rights and Freedoms of Citizens of the Russian Federation: New Realities // Moscow University Herald. Iss. 11: Law. [Problemy obespecheniya konstitutsionnykh publichno-politicheskikh prav i svobod grazhdan Rossiyskoy Federatsii: novyye real'nosti // Vestnik Moskovskogo universiteta. Seriya 11: Pravo]. 2017. No. 1. P. 3–34. (In Rus)
4. *Zenkin, S. A.* Modernization of the Constitution of the Russian Federation: Normative Model and Practice [Modernizatsiya konstitutsii rossiyskoy federatsii: normativnaya model' i praktika] // Lex russica (Russian law) [Lex russica (Russkiy zakon)]. 2018. No. 11 (144). P. 40–62. DOI: 10.17803/1729-5920.2018.144.11.040-062. (In Rus)
5. *Zorkin, V. D.* The Letter and Spirit of the Constitution [Bukva i dukh konstitutsii] // Russian newspaper [Rossiyskaya gazeta]. 09.10.2018. No. 226 (7689). (In Rus)
6. *Kirilenko, V. P., Alekseev G. V., Pacek M.* Natural Law and the Crisis of Liberal Legal Order // Bulletin of St. Petersburg University. Law [Vestnik Sankt-Peterburgskogo universiteta. Pravo.] 2019. Volume 10. No. 1. P. 38–54. DOI: 10.21638/spbu14.2019.103. (In Rus)
7. *Mau, V. A., Abramov A. E., Apevalova E. A.*, et al. Russian Economy in 2018. Trends and Prospects [Rossiyskaya ekonomika v 2018 godu. Tendentsii i perspektivy]. Moscow, 2019. Volume 40. (In Rus)
8. *Ovsepyan, Zh. I.* Changes to the Constitution of the Russian Federation: Some Trends [Izmeneniya v Konstitutsiyu RF: nekotoryye tendentsii] // Russian law: Education, Practice, Science [Rossiyskoye pravo: obrazovaniye, praktika, nauka]. 2014. No. 2 (83). P. 79–83. (In Rus)
9. *Temirbekov, Zh.* Magna Carta — as the Conceptual Predecessor of the Rule of Law Concept in the Middle Ages // Law and State [Pravo i gosudarstvo]. No. 2 (67) 2015. P. 89–92. (In Rus)
10. *Filatov, S. A.* Does Russia Live by Constitution? [Zhivet li Rossiya po konstitutsii?] // Banner [Znamya]. P. 115–121. (In Rus)
11. *Khatunov, S. Yu.* Magna Carta and Treaty of Henry Brackton "On the Laws and Customs of England" [Velikaya khartiya vol'nostey i Traktat Genri Braktona "O zakonakh i obychayakh Anglii"] // Lex russica (Russian law) [Lex russica (Russkiy zakon)]. 2012. Volume 71. No. 1. (In Rus)
12. *Shahray, S. M.* 25 Years of the Constitution of the Russian Federation: Implementation and Development of Constitutional Models // Lex Russica (Russian law) [Lex russica (Russkiy zakon)]. 2018. No. 11 (144). P. 9–15. DOI: 10.17803/1729-5920.2018.144.11.009-015. (In Rus)
13. *Shahray, S. M.* Creative Potential of the Constitution of the Russian Federation // Journal of Russian Law. 2018. No. 12 (264). P. 33–39. DOI: 10.12737/art_2018_12_3. (In Rus)
14. *Ebzeev, B. S.* Constitution, Power and Freedom in Russia: the Experience of Synthetic Research [Konstitutsiya, vlast' i svoboda v Rossii: opyt sinteticheskogo issledovaniya]. M. : Prospekt, 2013. 336 p. (In Rus)
15. *O'Cinneide, C.* Democracy, Rights and the Constitution — New Directions in the Human Rights Era // Current Legal Problems. Vol. 57. Iss. 1. 2004. P. 175–211. DOI: 10.1093/clp/57.1.175.
16. *Cali, B.* International Human Rights Law: One Purpose or Many? Reflections on Macklem's The Sovereignty of Human Rights // Jerusalem Review of Legal Studies. Vol. 15. Iss. 1. June 2017. P. 77–88. DOI: 10.1093/jrls/ jlx010.
17. *Tasioulas, J.* Human Rights, Legitimacy, and International Law // The American Journal of Jurisprudence. Vol. 58. Iss. 1. June 2013. P. 1–25. DOI: 10.1093/ajj/aut001.

Impact of the Judgments of the European Court of Human Rights on the Implementation of Constitutional Guarantees of Human Rights

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ABSTRACT

The article is devoted to the implementation of the constitutional right of citizens of the Russian Federation to appeal to interstate bodies for the protection of human rights. The implementation of this right is considered on the example of the European Court of human rights and its rulings. The author gives an assessment of the changes in the Russian legislation made on the basis of European Court rulings, as well as the difficulties faced by the state when reforming its legal system.

Keywords: The Constitution of the Russian Federation, the European Court of human rights, changes in the legislation of the Russian Federation, the constitutional right to protection in interstate bodies, ECHR resolutions

2018 marks the 25th anniversary of the Constitution of the Russian Federation. This is the period allowing assessment of the practical implementation of many constitutional norms and making some forecasts for the future. The Russian Federation is currently heading for changes. On January 20, 2020 the President of the Russian Federation sent Draft Law No. 885214-7 to the State Duma of the Russian Federation: Law of the Russian Federation on Amendments to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of Organization of Public Authority"[1] which, along with other significant changes, provides for a new wording of Art. 79 of the Constitution of the RF[2]. If the amendments are adopted, this article will be supplemented with the following provision: "The decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation inconsistent with the Constitution of the Russian Federation shall not be executed in the Russian Federation"[3], which may entail changes both in the interpretation of the constitutional norms and in their practical application. Such changes may lead to an increasing number of judgments of the European Court of Human Rights recognized by the Constitutional Court of the Russian Federation as unenforceable. The Constitutional Court of the RF is currently vested with this right[4]. A reasonable balance seems to be necessary between the implementation of a citizen's constitutional right to protection in interstate bodies and the protection of the state sovereignty. This is necessary lest the constitutional norm on the protection of rights in interstate bodies should turn into an "illusory" norm.

In this regard, it seems important to analyze the existing experience of appeals of citizens of the Russian Federation to interstate bodies for the protection of human rights, in particular, to the European Court of Human Rights (hereinafter — the ECHR), as well as to assess the impact of judgments of the European Court on the Russian legal system which is positive despite the difficulties faced by the state in their implementation.

It is to be recalled that according to Part 3 of Art. 46 of the Constitution of the RF, upon exhaustion of all available national legal remedies everyone can apply to interstate bodies for the protection of human rights and freedoms on the basis of international treaties of the RF. This constitutional guarantee is most actively used by the citizens of the Russian Federation through the European Court of Human Rights.

Over the more than 20-year-long history of Russia's participation in the system of the European Court, a significant number of judgments have been issued, most of them acknowledging violations of certain articles of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter — the Convention) by the Russian Federation. The relationship is traced: the larger the country,

[1] [Electronic resource]. URL: https://sozd.duma.gov.ru/bill/885214-7 (accessed on: 29.01.2020).

[2] Note: Art. 79 of the Constitution presently reads as follows: "The Russian Federation can participate in interstate associations and transfer part of its powers to them in accordance with international treaties, unless this entails restrictions on human and civil rights and freedoms and contradicts the foundations of the constitutional system of the Russian Federation" / / Constitution of the RF. Corpus of Legislation of the RF, 04.08.2014, № 31, art. 4398.

[3] [Electronic resource]. URL: https://sozd.duma.gov.ru/bill/885214-7 (accessed on: 29.01.2020).

[4] See: On Constitutional Court of the Russian Federation: Federal Constitutional Law dd. 21.07.1994 No. 1-FKZ (as amended on 29.07.2018), Ch. XIII.1 "Consideration of cases on the possibility of executing judgments of the interstate body for the protection of human rights and freedoms" // SPS Consultant +.

the more judgements there are against it[5]5. The term "judgments" is used in the meaning specified in Art. 46 of the Convention as the final document delivered on the merits of the case and binding on the parties. Based on the ECHR judgments, changes are made to the legislation of the RF, the state reports on the enforcement of judgments to the Committee of Ministers of the Council of Europe.

Although ECHR judgments are often criticized by the legal community, many of them influenced the reforming of the Russian legal system and generally strengthen the legal guarantees for the protection of the rights of citizens of the RF.

It is appropriate to mention "pilot judgments" of the ECHR against the RF in which the state is ordained to take general measures to solve a systemic or structural problem in order to prevent repeated violations of the Convention in the future.

In particular, the pilot judgment "Burdov v. Russian Federation" (No. 2) dated January 15, 2009[6]6 drew attention to the long-term non-enforcement of court judgments by government bodies. In pursuance of this resolution, Federal Law No. 68-FZ dd. 30.04.2010 "On Compensation for Violation of the Right to Judicial Proceedings within a Reasonable Time or the Right to Enforcement of a Judicial Act within a Reasonable Time"[7]7 was adopted which made it possible to apply to national judicial authorities in case of long-term non-enforcement of court rulings. This law was subsequently supplemented with norms that expanded its effect on non-property claims, for example, on the state's obligations to provide an apartment or fulfill other obligations in kind[8], which was a response to the pilot judgment in "Gerasimov and Others v. Russian Federation".

As a result of the work carried out to amend the legislation of the RF, a new national legal remedy was created, and the flow of complaints to the ECHR about non-enforcement of court judgments practically dried up.

Positive influence on the Russian legal system was also exerted by the pilot judgment in the case of "Ananiev and Others v. RF" of 2012 concerning the conditions of detention in pre-trial detention facilities. The problem of the conditions of detention in pre-trial detention facilities has been quite topical for the Russian Federation. The first case in which the European Court drew attention to the conditions of detention in penitentiary institutions was the judgment on "Kalashnikov v. Russia" of 2002.[9] Apart from the monstrous conditions of detention, one of the major issues was that of the reasonableness of confinement. Courts in the Russian Federation practically did not state the reasons for the extension of the terms. From the moment of the ruling in the Kalashnikov case, reforms of the penitentiary system began aimed both at improving the conditions of detention and at strengthening the constitutional guarantees of citizens' rights, in particular, the right to a fair trial.

Despite the efforts made by the Russian authorities, namely in pursuance of the judgment on "Ananiev and Others v. Russian Federation", nine federal laws, one resolution of the Government of the Russian Federation and a number of departmental normative legal acts were adopted[10, 11]. For example, one of such acts was Order of the Ministry of Construction of Russia dated April 15, 2016 No. 245/pr "On Approval of the Set of Rules "Pretrial Detention Facilities of the Penal Enforcement System. Engineering Rules"11 which, among other things, provides for an increase of the norm of exercise yards, the number of shower heads, as well as the arrangement of the premises for a psychologist and group work, complete isolation of the bathroom in cells, etc.

Nevertheless, the conditions of detention in penitentiary institutions are still classified by the European Court as torture conditions[12]. This situation leads to the issuance of new resolutions regarding the

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[5] Russia and the European Court of Human Rights: What's Next? // Bulletin of the European Court of Human Rights. Russian edition, 2015. P. 137.

[6] Case "Burdov v. Russian Federation" (No. 2) (complaint No. 33509/04) // Russian reports of the European Court, 2009, No. 4.

[7] On Compensation for Violation of the Right to Legal Proceedings within a Reasonable Time or the Right to Execute a Judicial Act within a Reasonable Time: Federal Law No. 68-FZ dd. 30.04.2010 // SPS Consultant +.

[8] See: On Amendments to the Federal Law "On Compensation for Violation of the Right to Judicial Proceedings within a Reasonable Time with regard to Awarding Compensation for Violation of the Right to Enforce of a Judgment Providing for the Execution by the State of Property and (or) Non-Property Claims Within a Reasonable Time": Federal Law No. 450-FZ. 2016 // SPS Consultant +.

[9] Case "Kalashnikov v. Russian Federation", judgment of the ECHR dated 15.07.2002 (complain No. 47095/99) // Guide to Case Practice of the European Court of Human Rights for 2002. M., 2004. P. 315.

[10] Report on the results of monitoring of law enforcement in the Russian Federation for 2014 //SPS Consultant+.

[11] On Approval of the Set of Rules "Pretrial Detention Facilities of the Penal Enforcement System. Engineering Rules": order of the Ministry of Construction of Russia dated 15.04.2016 № 245/pr //SP Consultant+.

[12] See: Case "Barsukov v. RF". 2017. // Russian reports of the European Court, 2017, № 3; "Solonenko v. RF". 2018. // Russian reports of the European Court, 2018, № 2.

conditions and reasonableness of detention. For example, in 2016 the court adopted the Resolution in the case "Zherebin v. Russian Federation"[13] stating the systemic nature of the problem and proposing an effective approach to its solution. The court noted that at present the Russian courts state the reasons for the extension of the term of detention; however, there is no proportionality between the reasons and the restriction, the burden of proving the absence of reasons for the extension of the term of detention rests with the accused[14]. As stated by lawyer of the European Court of Human Rights M. Kh. Gilmitdinova, "the rationale of the court judgment should contain an analysis of the personal situation of a particular person and comply with the logic of Art. 5 of the Convention built on the principle of restraint in exceptional cases only"[15], with one cannot but agree with, of course. Such an approach, on the one hand, will strengthen the legal guarantees of the protection of citizens' rights, on the other hand, it will increase the authority of the national judicial system.

To create an effective compensatory remedy, the Ministry of Justice of Russia has developed a draft federal law "On Amendments to Certain Legislative Acts of the Russian Federation (in terms of improving the compensatory judicial remedy against violations related to the failure to ensure proper conditions of detention and in places of deprivation of liberty)". The bill stipulates amending the Federal Law dd. July 15, 1995 No. 103-FZ "On Detention of Suspects and Accused of Crimes" and the Criminal Penal Code of the RF, namely, the consolidation of the right to compensation through legal proceedings for the damage caused by inappropriate conditions of detention, regardless of the presence of the fault of government bodies and their officials from the public treasury of the Russian Federation[16].

It should also be noted that amendments have been made to the Criminal Procedure and Civil Procedure Codes of the Russian Federation, their norms now allowing resumption of proceedings in the case in view of new or newly discovered circumstances; for example, in accordance with paragraph 2 of Part 4 of Art. 413 of the Code of Criminal Procedure of the RF, new circumstances include "a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in the consideration of the criminal case by the court of the Russian Federation established by the European Court of Human Rights". Such innovations allow review of the case already at the national level and exclusion of the consequences of violation of the Convention. These changes are quite progressive and were made in pursuance of the ECHR judgment in "Posokhov v. the RF" of 2003.

Apart from pilot judgments, significant consequences were also entailed by resolutions such as: "Shtukaturov v. Russian Federation", in pursuance of which amendments were made to the Federal Law dd. April 6, 2011 No. 67-FZ "On Amendments to the Law of the Russian Federation "On Psychiatric Care and Guarantees of Citizens' Rights in its Provision" and the Civil Procedure Code of the RF"[17] and Art. 29, 30 and 33 of the Civil Code of the RF which introduced the institution of partial legal capacity. Placement of a person in a psychiatric hospital requires the person's consent, and in its absence — a motivated court decision with the obligatory presence of the person concerned[18].

Changes were also made in pursuance of judgments, such as: "Putintseva v. Russian Federation" 2012 — adoption of the Regulations of the Military Police of the Armed Forces of the Russian Federation; "Kormacheva v. RF" 2004 — reduction of the terms of civil and criminal proceedings, compensation for judicial red tape, "Kiyutin v. RF" 2011 — termination of the automatic removal of HIV-infected citizens, and many others.

Reforming of the legislation in pursuance of such decisions is certain to have a positive effect on law enforcement practice and strengthens the legal and constitutional guarantees for the protection of citizens' rights.

However, the state often faces difficulties in the implementation of ECHR judgments. These difficulties are primarily related with the fact that some decisions touch upon the problem of the relationship

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[13] Case "Zherebin v. Russian Federation" (complaint № 51445/09): ECHR judgment dd. 24.03.2016 // Bulletin of the European Court of Human Rights. 2016. № 12.

[14] *Gilmitdinova M. Kh.* From Kalashnikov to Zherebin: Development of the Problems of the Validity of Detention // Russian Chronicle of the European Court. 2019. No. 3. P. 151.

[15] Ibid.

[16] Report on the results of monitoring of law enforcement in the Russian Federation for 2017. // SPS Consultant +.

[17] On Amendments to the Law of the Russian Federation "On Psychiatric Care and Guarantees of Citizens' Rights in its Provision" and the Civil Procedure Code of the Russian Federation: Federal Law dd. 06.04.2011 № 67-FZ // Corpus of Legislation of the RF, 11.04.2011, № 15, art. 2040.

[18] *Gracheva S. S.* Respect for the Rights in the Provision of Psychiatric Care and the Rights of Disabled Persons // Russian Yearbook of the European Convention on Human Rights / T. K. Andreeva, E. E. Baglaeva, G. E. Besedin et al. M. : Development of legal systems, 2019. Issue 5: Russia and the European Convention on Human Rights: 20 years together. P. 145.

between the national and international legal order. With the introduction of amendments to the Constitution of the Russian Federation, it will become even more relevant. For example, the issue of the relationship between the international and national law was raised in the ECHR judgment in the case "Anchugov and Gladkov v. Russian Federation"[19]. The European Court found a violation of the requirements of Art. 3 of Protocol No. 1 to the Convention, taking the side of the applicants who complained that, as convicted prisoners held in custody they could not participate in the elections. Thus, the execution of the judgment came into collision with the Constitution of the Russian Federation, in accordance with Part 3 of Art. 32 of which "Citizens who have been declared legally incapable by a court, as well as those held in places of imprisonment under a court verdict, do not have the right to elect and be elected". Accordingly, in order to execute the decision, it is necessary to amend the Constitution, and this does not seem possible, since Art. 32 is included in Chapter II of the Constitution which is particularly difficult to amend. In a collision of the national constitutional and international law, and the constitutional law that is not subject to revision, there is an inevitable problem of comparability of the second with the first.[20].

As stated by P. A. Vinogradova[21], in the opinion of the Constitutional Court of the Russian Federation expressed in Resolution No. 21-P, by which after amendments are made to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, the Constitutional Court of the Russian Federation is empowered to recognize the decisions of the ECHR as unenforceable in the event of their inconsistency with the Constitution, the availability of the problems in the ECHR related to deviation from the principle of subsidiarity creates the risk of situations in which an orientation towards rather abstract norms of the ECHR may lead to ignoring the will of the constitutional legislator in an interstate legal structure that does not imply the transfer of such an element of state sovereignty to it[22].

The problem of the interpretation of the Convention by the European Court and the resulting impossibility to execute some judgments is debatable both in other countries and in the Russian Federation. However, in this case it is certainly necessary to search for a compromise in order to prevent, on the one hand, a violation of the principle of state sovereignty, and on the other hand, the deterioration of the position of citizens of the state as applicants under the complaints.

One cannot but agree with the opinion of Professor A. I. Kovler, who notes: "... due to the fact that the Constitution vests the principles and norms of international law with legal force that exceeds the force of the national law, one can speak of the supremacy of its norms. But any lawyer must take care of the observance of legal certainty; therefore every conflict between national constitutional norms and supranational norms must be resolved "peacefully"[23]. That is, a dialogue is necessary between the national and international legal systems which should pursue one goal — proper provision of human rights. As S. L. Budylin notes: "The real problem here is not whether the "national" or "supranational" will win, but rather, how the joint work of government bodies of each country and international institutions can be organized in the best way to enable them to achieve the common goal"[24].

Thus, it would be more effective if the Constitutional Court of the RF gave conclusions on the compliance of one or another method of executing the decision with the Constitution of the RF, without questioning its very "enforceability"[25].

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[19] Case "Anchugov and Gladkov v. Russian Federation" (complaint No. 11157/04, 15162/05): ECHR judgment dd. 04.07.2013 // Bulletin of the European Court of Human Rights, 2014, № 2.

[20] *Blankenagel Alexander.* "Good-Bye, Council of Europe!" or "Council of Europe, let's talk!"? Commentary on the judgment of the Constitutional Court of Russia of April 19, 2016 on the enforceability of the judgment of the ECHR in the case of Anchugov and Gladkov of July 4, // the Comparative Constitutional. 2016. No. 6. P. 146.

[21] *Vinogradova P. A.* The Procedure for Resolving Conflicts of Constitutional and Conventional Interpretation // Russian Justitia. 2015, No. 11. P. 32.

[22] In the case of constitutionality verification of article 1 of the Federal law provisions "On ratification of the Convention on Human Rights and Fundamental Freedoms and the Protocols thereto", paragraph 1 and paragraph 2 of article 32 of the Federal law "On international treaties of the Russian Federation", part 1 and part 4 of article 11, paragraph 4 of part 4 of article 392 of the Civil Practice Act of the Russian Federation, part 1 and part 4 of article 13, paragraph 4 of part 3 of article 311 of the Arbitration Procedure Code of the Russian Federation, part 1 and part 4 of article 15, clause 4 of part 1 of article 350 of Code of Administrative Judicial Procedure of the Russian Federation and paragraph 2 of part 4 of art. 413 of the Code of Criminal Procedure of the Russian Federation in connection with the request of a group of State Duma deputies: resolution of the Constitutional Court of the Russian Federation No. 21-P of 14.07.2015 // «Vestnik Konstitutsionnogo Suda RF» («Russian Constitutional Court Bulletin»), No. 6, 2015.

[23] *Kovler A. I.* European Convention in the International System of Human Rights: a monograph. M. : IZiSP, Norma, INFRA-M [IZiSP, Norma, INFRA-M], 2019. P. 300.

[24] *Budylin S. N.* Convention or Constitution? International Law and State Sovereignty Limits // Lex. 2013, No. 12. P. 78.

[25] *Kovler A. I.* European Convention in the International System of Human Rights: a monograph. M. : IZiSP, Norma, INFRA-M [IZiSP, Norma, INFRA-M], 2019. P. 303.

Nevertheless, despite all the difficulties of interaction between the Russian Federation and the European Court of Human Rights, this is the case when together it is difficult, and apart it is impossible. The reforms carried out in pursuance of the decisions of the European Court should be continued, because they are designed to strengthen the constitutional guarantees for ensuring human rights, which in the end should lead to minimizing the gap between the rights enshrined in the Constitution of the Russian Federation and their practical implementation. The European Court of Human Rights works on the basis of the principle of subsidiarity, it should complement the system of national justice, but not replace it, so the choice of the method of execution of the judgment of the European Court is with the state. The aim of the legislative changes made on the basis of ECHR judgments appears to be to achieve the effectiveness of national justice.

References

1. *Blankenagel, A.* "Good-Bye, Council of Europe!" or "Council of Europe, let's talk!"? Commentary on the judgment of the Constitutional Court of Russia of April 19, 2016 on the enforceability of the judgment of the ECHR in the case of Anchugov and Gladkov of July 4, 2013 [«Proshchay, Sovet Evropy!» ili «Sovet Evropy, davay pogovorim!»? Kommentariy k Postanovleniyu Konstitutsionnogo Suda Rossii ot 19 aprelya 2016 goda ob ispolnimosti Postanovleniya ESPCH po delu Anchugova i Gladkova ot 4 iyulya 2013 goda] // the Comparative Constitutional Review [Sravnitelnoe konstitutsionnoe obozrenie]. 2016. No. 6. P. 135–150. (In rus)
2. *Budylin, S. N.* Convention or Constitution? International Law and State Sovereignty Limits // Lex [Zakon Journal]. 2013, No. 12. Pp. 64–80. (In rus)
3. *Vinogradova, P. A.* The Procedure for Resolving Conflicts of Constitutional and Conventional Interpretation // Russian Justitia. 2015, No. 11. Pp. 30–33. (In rus)
4. *Gilmitdinova, M. Kh.* From Kalashnikov to Zherebin: Development of the Problems of the Validity of Detention [Ot Kalashnikova do Zherebina: razvitiye problematiki obosnovannosti soderzhaniya pod strazhey] // Russian Chronicle of the European Court [Rossiyskaya khronika Evropeyskogo Suda]. 2019. No. 3. Pp. 151–156. (In rus)
5. *Gracheva, S. S.* Respect for the Rights in the Provision of Psychiatric Care and the Rights of Disabled Persons [Soblyudeniye prav pri okazanii psikhiatricheskoy pomoshchi i prav nedeyesposobnykh lits] // Russian Yearbook of the European Convention on Human Rights [Rossiyskiy yezhegodnik Yevropeyskoy konventsii po pravam cheloveka] / T. K. Andreeva, E. E. Baglaeva, G. E. Besedin et al. M. : Development of legal systems [Razvitiye pravovykh sistem], 2019. Issue 5: Russia and the European Convention on Human Rights: 20 years together [Vyp. 5: Rossiya i Yevropeyskaya konventsiya po pravam cheloveka: 20 let vmeste]. 576 p. (In rus)
6. The Case "Barsukov v. Russia" 2017 [Delo «Barsukov protiv Rossii» 2017 g.] // Russian chronicle of the European Court [Rossiyskaya khronika Evropeyskogo Suda]. 2017, No. 3. (In rus)
7. The Case of "Burdov v. Russia" (No. 2) (application No. 33509/04) [Delo «Burdov protiv Rossiyskoy Federatsii» (№ 2) (zhaloba № 33509/04)] // Russian Chronicle of the European Court [Rossiyskaya khronika Evropeyskogo Suda], 2009, No. 4. (In rus)
8. The Case of "Solonenko v. Russia", 2018 [«Solonenko protiv Rossii» 2018 g.] // Russian Chronicle of the European Court of Justice [Rossiyskaya khronika Evropeyskogo Suda]. 2018, No. 2.
9. *Kovler, A. I.* European Convention in the International System of Human Rights: a monograph [Yevropeyskaya konventsiya v mezhdunarodnoy sisteme zashchity prav cheloveka: monografiya]. M. : IZiSP, Norma, INFRA-M [IZiSP, Norma, INFRA-M], 2019. 304 p. (In rus)
10. The Decision of the ECHR of July 4, 2013 The Case of Anchugov and Gladkov v. Russia (application No. 11157/04, 15162/05) [Postanovleniye YESPCH ot 04.07.2013 «Delo "Anchugov i Gladkov protiv Rossiyskoy Federatsii" (zhaloba № 11157/04, 15162/05)] // Bulletin of the European Court of Human Rights [Byulleten' Evropeyskogo suda po pravam cheloveka]. 2014, No. 2.
11. The Decision of the ECHR of July 15, 2002 Case "Kalashnikov v. Russian Federation" (complaint No. 47095/99) [Postanovleniye YESPCH ot 15.07.2002 Delo «Kalashnikov protiv Rossiyskoy Federatsii» (zhaloba № 47095/99)] // 2002 European Court of Human Rights case-law guide [Putevoditel' po pretsedentnoy praktike Evropeyskogo suda po pravam cheloveka za 2002 god]. M., 2004? 504 p. (In rus)
12. The Decision of the ECHR of March 24, 2016, the Case "Zherebin v. Russian Federation" (complaint No. 51445/09) [Postanovleniye YESPCH ot 24.03.2016 Delo «Zherebin protiv Rossiyskoy Federatsii» (zhaloba № 51445/09)] // Bulletin of the European Court of Human Rights [Byulleten' Evropeyskogo suda po pravam cheloveka]. 2016. No. 12. (In rus)
13. Russia and the European Court of Human Rights: What Next? [Rossiya i Evropeyskiy Sud po pravam cheloveka: chto dal'she?] // Bulletin of the European Court of Human Rights. Russian edition. [Byulleten' Yevropeyskogo Suda po pravam cheloveka. Rossiyskoye izdaniye]. 2015. No. 3. Pp. 136–146. (In rus)

Education as a Category of Private Law

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ABSTRACT
The present paper considers the category "education" as a category of private law. The authors established the relationship of private law with educational legal relations, revealed that the specific feature of educational legal relations is the combination of public and private principles in them, and it is also noted that education is an interdisciplinary field. Despite the predominantly public law (administrative) nature of educational legal relations, they also have a private law component which was the object of this study. The article analyses private legal relations in the field of education, explores the concept of educational services, describes the features of an educational agreement, shows the place of this agreement among other agreements on the provision of services. At the same time, the authors note that an educational agreement is one of the agreements for the provision of actual services, which determines its legal nature.
Keywords: Private law, public law, educational organization, student, educational contract

M. Yu. Chelyshev noted: "Practice presses for legal science to study the problems of consistency, including in the civil law sphere. Such a need is to no small degree conditioned by the substantial development of comprehensive, intersectoral legal regulation, including civil legal means"[1]. In view of the above, the cross-sectoral links in the field of education deserve in-depth study and analysis. The adoption of the Federal Law dd. December 29, 2012 No. 273-FZ "On Education in the Russian Federation" (hereinafter — the Law on Education) resulted in the actualization of the interest in the topic of legal regulation of educational activities.

Paragraph 4 of Art. 4 of the said law states: "The norms governing the relations in the field of education and contained in other federal laws and other regulatory legal acts of the Russian Federation, law and other regulatory legal acts of the constituent entities of the Russian Federation, legal acts of local self-government bodies must comply with this Federal Law and cannot restrict the rights or reduce the level of the provided guarantees in comparison with the guarantees established by this Federal Law."

The law on education tells us about the predominantly administrative-legal nature of relations in the field of education. Public (state and municipal) educational services previously excluded from the current legislation have received an effective mechanism for their provision[2].

Among the articles "revived" in the new Law on Education, it is primarily necessary to highlight the articles that institutionalize the legal status of the teacher (Articles 46-48), contractual regulation in the field of education (Article 54 of the Law), the economic foundations of education (Ch. 13 of the Law).

Back in 1985, G. A. Dorokhova noted that the norms of different legal branches being built into the system of legal regulation of education receive a new "citizenship", that is, they essentially become the norms of educational law[3].

Something similar actually happened with the new Civil Code of the RF which included articles of a public law nature, such as articles on licensing of certain types of activities, rules on bankruptcy, etc.[4]

It is interdisciplinary approaches that have determined the specifics of an educational agreement, allowing it to be considered as a civil law agreement with elements of public law[5].

The interdisciplinary nature of individual categories sometimes has negative consequences leading to an extensive interpretation of the law enforcement practice. In this regard, in this paper we study education to a greater extent as a category of private rather than public law.

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[1] *Chelyshev M. Yu.* The System of Interbranch Ties of Civil Law: Civil Law Research. Extended abstract of dissertation of Dr. of Sciences. P. 3.

[2] See: Public Services and Law: Scientific and Practical Guide // ed. Tikhomirov Yu. A. M., 2007. P. 160.

[3] *Dorokhova G. A.* Legislation on Public Education (Theoretical Problems of Improvement). M., 1985. Pp. 13–14.

[4] See: *Syubareva I. F.* The Legal Regime of Property of Educational Organizations in Modern Russia. M., 2016. P. 55.

[5] See: *Kazakov V. P., Revnova M. B.* Features of the Agreement on the Provision of Educational Services // Legal thought. 2001. No. 5. Pp. 46–51.

It should be noted that in our country, both economic and social policies depend on how the education system functions. Art. 43 of the Constitution of the Russian Federation institutionalizes the right to education. According to the Federal Law dd. December 29, 2012 No. 273-FZ "On Education in the Russian Federation", education is a single purposeful process of upbringing and teaching being a socially significant benefit.

Successful preparation and implementation of target programs in the field of education using budgetary funds, conducting an expert assessment of the achieved indicators are certain to increase the efficiency of educational organizations throughout Russia. Vocational education in the Russian Federation is characterized by the long and difficult adaptation of graduates of educational organizations to the labor market, as well as significant investments by employers in additional vocational education of the graduates. All this testifies to the fact that the vocational education system should have proper legal regulation, including by the norms of private law, since it is the citizen who is the customer of high-quality professional educational services.

According to Art. 101 of the Law on Education, educational organizations have the right to carry out educational activities using the funds of individuals and (or) legal entities under agreements on the provision of paid educational services. The new law on education pays much attention to the contractual provision of education. But nevertheless, the current problems in the field of education tell us that the legal regulation of educational relations is certain to have shortcomings that can negatively affect the development of a citizen and society as a whole.

The evolution of the educational system in Russia is always related with changes of the qualitative characteristics of the society. Information technologies, global digitalization is transforming the world around us. This conditions the urgent need to change educational approaches and technologies. However, rapid development of education is

unthinkable without proper legal regulation, including by the norms of private law. This is what ensures the interest in the legal problems of reforming education at all levels which, it should be noted, has been taking place throughout the recent years.

The combination of public and private principles in educational legal relations is their specific feature. In this regard, worthy of attention is the position of I. A. Pokrovsky who pointed out that there can be no strict delimitation between private and public law[6]. During the period of the Soviet Union, educational legal relations were almost completely public, but the collapse of the USSR led to cardinal transformations in all areas of public life and influenced the establishment of a new market type of economy. The transition from an administrative-planned to a market economy contributed to the emergence of a private component in the education system as well. In this system characterized by a subordinate (imperative) approach, coordination (dispositive) principles gradually started emerging, a typical example of which may be said to be the area of contractual regulation of educational legal relations[7].

In his days, well-known jurist O. S. Ioffe pointed out that the problem of legal relations is the most complex and at the same time the least developed in the legal science[8]. The reasons for disputes may be both objective and subjective, which is related to the historical aspects of changes in legal relations. One of the domestic experts in the field of educational law V. M. Syrykh is of the opinion that education is not an area falling under civil law regulation. According to him, an educational agreement should be regarded as a quasi-document. Therefore, in his opinion, educational relations are a special type of legal relationship different from any other legal relationship (civil, administrative and others)[9]. Scientist V. A. Belov tends to be of the same opinion[10].

Famous civil lawyer E. A. Sukhanov considers educational legal relations to be a kind of administrative and legal ones. But these legal relations lack any state coercion inherent in administrative law; therefore, it does not seem possible to agree with the position of E. A. Sukhanov[11].

A significant share of educational relations is now characterized by private legal features. However, the regime of their legal regulation should be certainly based on the public-law approach. In the field

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[6] See: *Pokrovsky I. A.* The Main Problems of Civil Law // I. A. Pokrovsky. 3d Ed. M., 2016. P. 102.

[7] See: *Belov V. A.* Civil Law: Actual Problems of Theory and Practice // Belov V. A., Babaev A. B.; under the general. ed. V. A. Belova. M., 2015. Pp. 438–440.

[8] See: *Ioffe O. S.* Legal Relationship in Soviet Civil Law. Leningrad : Publishing House of Leningrad State University, 1949. Pp. 32–35.

[9] See: *Sirikh V. M.* Educational Services and Educational Legal Relationships: Controversial Views and True Reflection // Journal of Russian Law. 2010. No. 4. Pp. 71–72.

[10] See: *Belov V. A.* Civil Law. Vol. II. Common part. Persons, Benefits, Facts: Textbook for Bachelors // Belov V. A. M., 2014. P. 135.

[11] See: Civil Law. In 4 volumes. Volume 2 // Ed. Sukhanov E. A. M., 2014. P. 62.

of education, the correlation between public-law and private-law elements is not static, it constantly changes depending on the role played by education in the state arena. Having extended private law elements to the field of education the market type of economy has now generated a market of educational services with all the regularities functioning within this market. Educational organizations today have and enjoy significant powers, including in the area of private law.

For further analysis of private law relations in the field of education, it is still necessary to understand what type of private legal relations they refer to. O. S. Ioffe noted that legal relations can be property and personal non-property ones[12]. However, the Soviet period is a thing of the past, and already E. A. Sukhanov points out that the foundations of civil law regulation are property rights and rights of obligation[13]. According to V. A. Belov and A. B. Babaev, the priority relations are a group of absolute and relative legal relations which are distinguished by the circle of obliged subjects: this circle is not defined in absolute legal relations, and clearly defined in the circle of relative relations[14]. Property relations and legal relations of obligation act as absolute and relative, respectively. The relations of obligation or relative relations are primarily distinguished by their content (the requirement of a certain action). Real or absolute right is distinguished by its object (individually defined thing)[15].

Thus, with regard to civil legal relations in the field of education, it can be concluded that there are relative legal relations in this area, since their subject composition is determined (authorized and obligating parties).

Exploring various scientific approaches, one should first of all pay attention to the dynamics of the transformation of the content of legal relation with account of the changes in the society and the state, the state of affairs in the scientific and technical field, topical social needs and other socially significant aspects of education as a service.

Private legal relations in the field of education are undoubtedly built on the principle of legal equality of the parties (Article 1 of the Civil Code of the RF (Part 1) dd. 30.11.1994 No. 51-FZ). Similar equality in relations such as, for example, the relations of "student — higher education institution" are present in the case of contractual education. The essence of contractual legal relations between a student and a university is the provision of paid educational services, obtaining high-quality education which will enable the graduate to take an appropriate position in the organization in his major (specialty) and effectively carry out professional activities. Under an educational agreement, the educational organization provides the customer with an educational service. It should be noted that this agreement is concluded by the customer not with direct contractors (university teachers), but with the university itself represented by the rector. The Civil Code of the RF and the Law of the RF dated 07.02.1992 No. 2300-1 "On Protection of Consumer Rights" apply to these relations. Based on the foregoing, a student or another learner can be considered to be the customer, and an educational institution is the contractor. Legal equality in these legal relations is manifested in the fact that the parties to the educational agreement have mutual rights and obligations, and bear mutual responsibility to each other.

Strictly speaking, the concept of "educational agreement" mentioned in the Law on Education (Art. 54) is somewhat broader than the concept of "agreement on the provision of paid educational services". The second concept is used when we are talking about the education received on a paid basis at the expense of the customer. The customer can be a citizen enrolled for training or his legal representative (parent, adoptive parent, etc.). In this case, the educational agreement is a consumer one, and the student can be considered to be the weak party, and therefore he needs increased legal protection. The customer may also be a legal entity or an individual entrepreneur undertaking to pay for the training of the person enrolled for training. In both cases, the agreements are characterized by the non-gratuitous nature and are subject to the Civil Code of the RF. It is just such contracts that we attempted to study in this paper.

It should be noted that the Civil Code of the RF (Art. 779) refers to training services, while the Law on Education (Art. 54) refers to educational services. In this regard, some scholars deny the civil law nature of contracts for obtaining education on a paid basis[16]. In this regard, we would like to disagree

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[12] See: *Ioffe O. S.* Selected Works: in 4 vol. Vol. 2 . SPb, 2014. Pp. 109–112.

[13] See: *Sukhanov E. A.* Property Rights and Rights to Intangible Objects // The Herald of Economic Justice. 2007. No. 7. P. 17.

[14] See: *Belov V. A.* Civil Law: Actual Problems of Theory and Practice // Belov V. A., Babaev A. B.; under the general. ed. V. A. Belova. M., 2015. P. 354.

[15] See: Civil Law: Textbook. In 2 Vol. [Grazhdanskoye parvo: uchebnik. V 2 tomakh] // Ed. Gongalo B. M. Vol. 2. 2nd ed., M., 2017. Pp. 255–258.

[16] See: *Sirikh V. M.* On the Legal Nature of an Educational Contract with a Condition for Paying Students the Cost of Training // Law and Education. 2002. No. 4. Pp. 68–83.

with this position. It follows from the Law on Education itself that education is a "process of upbringing and teaching" (Art. 2). The training service is, therefore, a kind of an educational service and, of course, is of the civil nature.

Like any other service, the educational service has no materialized result. This service involves formation of the competencies, knowledge, abilities and skills that must be formed in the consumer of such a service during its provision. Obtaining a diploma, certificate or another document on education cannot be considered to be a materialized result, since the document only testifies to the receipt of one or another level of education. Attention should also be paid to such a characteristic of the service in the field of education as the lack of the guarantee on the part of the obligated party concerning the achievement of the expected result.

The expected result is beyond the scope of the contractual relationship. The subject of the agreement on education is the process of providing educational services, but not its result, because the latter directly depends on the personal qualities of the consumer. As a result of receiving education of the same level, one consumer will acquire the necessary knowledge, skills and abilities in full, while another consumer will obtain them only partially. In this regard, the issue arises about the lack of educational services, which is extremely hard to prove. In their scientific papers P. M. Khodyrev and E. A. Khodyreva give examples of court cases in which plaintiffs (customers) tried to bring defendants (contractors) to civil liability due to detection of shortcomings in the educational services provided to them.

Example 1. M. and GOU VPO South Ural State University SEI of HPE entered into an agreement on the provision of educational services. This agreement did not specify the consequences of violation of its terms (Resolution of the Presidium of Chelyabinsk Regional Court dated 12.24.2008). M. (the plaintiff) filed a lawsuit against the South Ural State University (the defendant) on enforcement of the implications of the defendant's improper performance of the agreement, namely, poor-quality provision of the educational services. "The plaintiff linked the quality of the educational services with such criteria as the non-compliance of the taught educational material with the requirements of the educational standard, the introduction of the subjects not established by the standard without the student's consent. However, the defendant referred to the fact that the educational program, according to which the plaintiff was trained, met the requirements of GOST. Student M. was given the necessary minimum of knowledge, and the rest of the knowledge was to be acquired through the student's independent work. In its turn, the court pointed out that the educational material read to the plaintiff by the university teachers, as well as the number of the subjects studied and their sections, could not attest to the quality of the service provided by the defendant. The subject of the agreement concluded by the parties for the provision of educational services was the implementation of the plaintiff's training in the agreed specialty, and not the number of the lectures delivered on academic subjects. Upon completion of training and successful attestation of the mastered educational material, the student was issued a diploma of higher education that meets the state standard. The diploma was assessed as evidence confirming the proper fulfillment of the terms of the agreement by the defendant"[17].

Example 2. S. filed a claim against K. I. Skryabin Moscow State Academy of Veterinary Medicine and Biotechnology. Federal State Educational Institution of Higher Professional Education. (The ruling of Moscow City Court dd. July 1, 2010 in case No. 33-16602.) The plaintiff asked to oblige the defendant to carry out her training according to an individual plan at the intramural-extramural department to obtain a second higher education with the Veterinarian qualification because according to the training results she was awarded a narrower qualification of a "veterinarian — biochemist". The claim was rejected, since S. has no complaints about the quality of education, her training was provided in strict accordance with the specialty specified in the agreement, the "biochemist" qualification complies with the state educational standards and state accreditation. The discrepancy between the quality of education and the social and personal expectations of a person cannot become the basis for meeting the above requirement[18].

The considered examples of the court cases confirm the fact that the requirements set to the educational organization of higher education is related with the difficulties of the plaintiff's proving the defect of the educational services provided to the plaintiff. In the first example, the defect of the educational services, according to the plaintiff, was manifested in the form of inadequate quality of the service, that is, its non-compliance with the requirements of the educational standard. In the second example, the

[17] *Khodyrev P. M., Khodyreva E. A.* Compensation for the Damage Caused by Poor Quality of Higher Education: Prospects for the Legislative Control // Bulletin of Udmurt University. Series Economics and Law. 2011. Issue 4. P. 161.

[18] *Khodyrev P. M., Khodyreva E. A.* The Quality of Education and the Issues of Responsibility of the University to the Student // Vector of science TSU. Series: Jurisprudence. 2012. No. 3 (10). P. 67.

plaintiff expected to be awarded a broad qualification, while she was awarded a narrow qualification. In her opinion, that was the defect of the educational services. Neither in the first nor in the second example was it possible to prove the defect of the educational service, and, therefore, the educational institutions of higher education were not brought to civil liability.

It should be re-emphasized that civil relations in the field of education are relative. They are distinguished by the long-term interaction of the parties, the correlation of public and private interests, as well as the presence of a certain level of the subjects' intellectual development.

It has to be said that educational services refer to the group of actual services. The concept of educational services can be formulated in accordance with the economic and pedagogical content of the educational process. Services provided in the educational system may be subdivided into educational services in a broad and narrow sense, depending on the personality of the contractor, the volume and nature of the service, and the specific features of the procedure of their provision. The very process of obtaining education is covered by the concept of an educational service in the narrow sense.

The objects of civil law are the services that primarily satisfy the person's private interests. This makes it necessary to regulate the relations involving the provision of such services by the norms of educational and civil legislation. Other educational services are publicly funded and satisfy public interests apart from private ones. Legal regulation of the provision of such services is carried out exclusively by the norms of educational legislation. In this regard, it is to be re-emphasized that the Civil Code of the RF extends its effect to the paid educational service agreement. The concept of an "educational agreement", as we have already noted, has a broader scope.

Considering the place of an educational agreement among other service agreements, it should be noted that it refers to agreements for provision of actual services. This agreement differs from transactions of legal actions and from transactions of actual and legal actions. The specific features of the subject of the transaction make it possible to delimit it from other transactions of actual actions, in particular, from a consulting service agreement, an information service agreement and others.

Two options are possible in conclusion of an educational agreement. If the customer acts as an offeror, the agreement is concluded according to the general rules stipulated by the Civil Code of the Russian Federation. When an educational organization acts as an offeror, this means organization of paid courses, seminars, lectures, etc. The offer in this case is subject to the rules on a public offer. The educational agreement is concluded by joining the pre-formed conditions. Such an agreement has the nature of a joinder agreement.

Considering the content of the agreement under study, it should be noted that the main obligations of the customer are the obligations to pay for the service and personally participate in its consumption. At the same time, an important issue is that of the methods and terms of payment, as well as of changing the price of the agreement. In particular, the agreement specifies the need to warn about the increase in tuition fees not later than one semester in advance. The right to demand that the contractor should fulfill the relevant duties is an undoubted right of the customer.

In our opinion, analyzing the forms of liability it should be said that its main form is reimbursement of the damages. Along with reimbursement of the caused damages this educational agreement may apply payment of a penalty. In this case, the penalty must definitely be a fine. It is the penalty that provides additional protection for the rights of consumers of educational services.

Within the framework of ensuring the private law in the educational system, there is a problem of interaction between the state and the society during the education reforming period. The interaction of the society with the state is due to the actualization of public interest in innovative technologies in the educational system, as well as the desire of a significant share of our society to regulate and control the processes taking place in education. The modern education management system cannot fully ensure the influence of the public on the management decisions in the field of education. Consideration of the interests of the public should serve the basis for the development of private law regulation of relations in the field of education.

Education plays a special role in the context of the emergence of the knowledge economy. In the market economy conditions, the mechanism of the educational system is changing: new methods of financing appear, private education develops, tuition fees are charged, and the education management process is transformed. The responsibility for education must be certainly shared among many subjects. At the same time, the educational system should be flexible and adapted to the actual requirements of the society.

The regulation of the educational system is a special economic conduct of the state in relation to educational organizations. The purpose of such regulation is to create conditions for effective economic work of educational organizations.

The role of the state in the regulation of educational relations is the need to determine the results of education that the society and the state want to achieve. However, it must be borne in mind that individual economic entities also have the right to manage the educational process, so the state should act both as a guarantor of the citizens' rights to education and as a guarantor of the private law in the field of education.

References

1. *Belov, V. A.* Civil Law: Actual Problems of Theory and Practice [Grazhdanskoye pravo: aktual'nyye problemy teorii i praktiki] // Belov V. A., Babaev A. B.; under the general. ed. V. A. Belova. M., 2015. 993 p. (In rus)
2. *Belov, V. A.* Civil Law. Vol. II. Common part. Persons, Benefits, Facts: Textbook for Bachelors [Grazhdanskoye pravo. T. II. Obshchaya chast'. Litsa, blaga, fakty: uchebnik dlya bakalavrov] // Belov V. A. M., 2014. 360 p. (In rus)
3. Civil Law. In 4 volumes. Volume 2 [Grazhdanskoye pravo. V 4 tomakh. Tom 2] // Ed. Sukhanov E. A. M., 2014. 496 p. (In rus)
4. Civil Law: Textbook. In 2 Vol. [Grazhdanskoye parvo: uchebnik. V 2 tomakh] // Ed. Gongalo B. M. Vol. 2. 2nd ed., M., 2017. 654 p. (In rus)
5. *Dorokhova, G. A.* Legislation on Public Education (Theoretical Problems of Improvement) [Zakonodatel'stvo o narodnom obrazovanii (teoreticheskiye problemy sovershenstvovaniya)]. M., 1985. 157 p. (In rus)
6. *Ioffe, O. S.* Selected Works: in 4 vol. Vol. 2 [Izbrannyye trudy: v 4 t. T. 2]. SPb, 2014. 511 p. (In rus)
7. *Ioffe, O. S.* Legal Relationship in Soviet Civil Law [Pravootnosheniye po sovetskomu grazhdanskomu pravu]. Leningrad : Publishing House of Leningrad State University [Izd-vo LGU], 1949. 144 p. (In rus)
8. *Kazakov, V. P., Revnova M. B.* Features of the Agreement on the Provision of Educational Services [Osobennosti dogovora ob okazanii obrazovatel'nykh uslug] // Legal thought. 2001. No. 5. P. 46–51. (In rus)
9. *Pokrovsky, I. A.* The Main Problems of Civil Law [Osnovnyye problemy grazhdanskogo prava] // I. A. Pokrovsky. 3d Ed. M., 2016. 352 p. (In rus)
10. Public Services and Law: Scientific and Practical Guide [Publichnyye uslugi i pravo: nauchno-prakticheskoye posobiye] // ed. Tikhomirov Yu. A. M., 2007. 415 p. (In rus)
11. *Sukhanov, E. A.* Property Rights and Rights to Intangible Objects [Veshchnyye prava i prava na nematerial'nyye ob"yekty] // The Herald of Economic Justice. 2007. No. 7. P. 16–31. (In rus)
12. *Sirikh, V. M.* Educational Services and Educational Legal Relationships: Controversial Views and True Reflection // Journal of Russian Law. 2010. No. 4. P. 69–79. (In rus)
13. *Sirikh, V. M.* On the Legal Nature of an Educational Contract with a Condition for Paying Students the Cost of Training [O yuridicheskoy prirode obrazovatel'nogo dogovora s usloviyem oplaty obuchayushchimsya stoimosti obucheniya] // Law and Education [Pravo i obrazovaniye]. 2002. No. 4. P. 68–83. (In rus)
14. *Syubareva, I. F.* The Legal Regime of Property of Educational Organizations in Modern Russia [Pravovoy rezhim imushchestva obrazovatel'nykh organizatsiy v sovremennoy Rossii]. M., 2016. 146 p. (In rus)
15. *Khodyrev, P. M., Khodyreva, E. A.* Compensation for the Damage Caused by Poor Quality of Higher Education: Prospects for the Legislative Control // Bulletin of Udmurt University. Series Economics and Law. 2011. Issue 4. P. 160–165. (In rus)
16. *Khodyrev, P. M., Khodyreva, E. A.* The Quality of Education and the Issues of Responsibility of the University to the Student [Kachestvo obrazovaniya i voprosy otvetstvennosti vuza pered studentom] // Vector of science TSU. Series: Jurisprudence [Vektor nauki TGU. Seriya: Yuridicheskiye nauki]. 2012. No. 3 (10). P. 66–69. (In rus)
17. *Chelyshev, M. Yu.* The System of Interbranch Ties of Civil Law: Civil Law Research [Sistema mezhotraslevykh svyazey grazhdanskogo prava: tsivilisticheskoye issledovaniye]. Extended abstract of dissertation of Dr. of Sciences. Kazan, 2009. 40 p. (In rus)

Correlation of the Concepts of "Legal Culture" and "Legal Mentality"

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ABSTRACT

The article contains a theoretical and methodological analysis of the structure and typology of legal culture as a social phenomenon. The author compares the various positions of modern scholars on this issue, explores the varieties and social forms of legal culture. The article attempts to scientifically analyze the elemental composition of legal culture, with special attention paid to discussion issues, in particular, the concepts of legal mentality and legal awareness.

Keywords: legal culture, elemental composition of legal culture, typology of legal culture, legal awareness, legal mentality, legal psychology, legal affairs, legal practice

As world practice shows, much attention is currently paid to the legal culture which forms the basis of the rule of law and legality regime in the society. Being a complex multidimensional category culture is of great importance for the society, since it plays the role of a linking bridge between generations, contributes to the development of a person's capabilities and the formation of his personality. Culture is a social regulator, as it influences various spheres of practical activities.

Legal culture is a complex and global phenomenon within the legal sphere, therefore, analyzing this phenomenon, it is necessary to use a system approach. In our opinion, the study of the structure of legal culture is necessary in order to get an insight into the essence of this institution being a qualitative indicator of the state of the legal life of the society.

The structure of legal culture is actively discussed in legal literature. For example, V. P. Salnikov identifies the following structural elements of legal culture which are components of legal reality: "law, legal awareness, legal relations, legality and legal order, lawful activities of subjects"1.

According to the author, two types of activities can be distinguished in the active side of legal culture:

a) activities directly in the legal field;

b) activities related to the operation of law (literature, cinema, journalism, etc., which one way or another reflect legal feelings, assessments and ideas).

The content of legal culture also includes the level of development of legal awareness, legality, and legal order. Many authors, in particular M. N. Marchenko, also include[1] legal science, criteria of political assessment of legal behavior and law, as well as legal institutions ensuring legal control, law enforcement and regulation into the structural elements of legal culture[2]. In addition, one can also identify the level of development of the system of legal documents[3] in the structure of legal culture.

Let us list the elements of legal culture identified by A. P. Semitko[4]:

1) development of legal affairs;

2) level of development of the legal awareness of the population (the level of assimilation of legal values and awareness);

3) degree of perfection of legal acts of various types.

In our opinion, L. A. Morozova holds quite a controversial position, according to which legal mentality and legal culture can be equated[5]. In particular, L. A. Morozova's assertion that legal culture is a way of thinking, a norm and a standard of behavior, and the legal mentality of the society which is a broader concept is generally debatable for the following reasons.

For a more precise understanding of the above thesis, let us turn to reference literature. According to the interpretation proposed by the Explanatory Dictionary of the Russian language by S. I. Ozhegov and N. Yu. Shvedova, mentality is defined as the state of mind[6]. The word "mentality" comes from Lat. "mens" which is mental disposition, mind, thinking. The word "mentality" is usually understood as

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[1] *Salnikov V. P.* Legal Culture // Actual Problems of the Theory of Law / Ed. K. B. Tolkacheva and A. G. Khabibullina. Ufa, 1995. P. 152.

[2] *Marchenko M. N.* Theory of State and Law. M., 1996. P. 8.

[3] Sociology of Law / Ed. V. M. Syrykh. M., 2001. P. 225.

[4] *Semitko A. P.* The Concept and Structure of the Legal Framework, Its Role in Legal Behavior // Problems of the Implementation of Law: Interuniversity Collection of Scientific Papers. Sverdlovsk, 1990. Pp. 112–116.

[5] *Morozova L. A.* Theory of State and Law. M. 2002. P. 371.

[6] *Ozhegov S. I., Shvedova N. Yu.* Explanatory Dictionary of the Russian Language. M., 2003. P. 350.

a certain deep level of collective and individual consciousness which includes the unconscious. This concept reflects the attitudes and predispositions of a social group or individual to think, act, perceive the world in a certain way. Since a person lives in a specific social environment, assimilates the culture and traditions of the society, this affects the formation of the mentality of the individual. In its turn, mentality influences culture and social environment.

As noted by D. V. Menyaylo, there is an organic unity between legal mentality and legal thinking, legal awareness, legal worldview. This unity is manifested in the interaction of legal mentality and legal thinking, and legal worldview[7].

The unity of legal awareness and legal mentality is similarly considered by V. N. Sinyukov in whose opinion "the category of mentality reflects a deeper layer of social awareness". According to the author, mentality is a kind of "spiritual and mental system of the people"[8]. V. N. Sinyukov expresses a rather controversial position equating legal mentality with legal culture. He believes that legal mentality is a variety of legal phenomena forming legal culture (legislation, legal affairs, etc.), therefore, it is broader than legal awareness.

A similar position is taken by I. A. Ivannikov who also equates legal mentality with legal culture in terms of structure and content[9].

We believe that at present there is a need for a separate study devoted to the content and correlation of the categories of "legal culture" and "legal mentality", since legal mentality influences the behavior of certain social groups and individuals, plays the role of a regulator in the lawmaking process. To understand the regularities of the state-legal Russian reality, it is necessary to pass it through the "prism" of legal mentality.

Thus, based on the above, it may be concluded that mentality is a concept organically related with the category of awareness, and awareness is an element of the general culture of the society and the individual. Having projected this conclusion on the problems of the elemental composition of legal culture, one can come to the following conclusion: legal mentality is both an element of legal culture and a determinant factor of the dynamics of the level of legal culture.

After analyzing all the components of legal culture that are highlighted in the scientific literature, we can present its elemental composition in the following enlarged form:

1) legal awareness and legal mentality;

2) legal affairs;

3) legal acts.

Thus, it is necessary to consider the principles and initial prerequisites for the formation of the concept of "mentality" in the theory of legal culture in detail.

The encyclopedia of political science defines "mentality" as a political and journalistic, generalized concept that has a figurative and metaphorical meaning. In a broad sense, this term denotes a specific make-up of mental qualities and properties, manifestations and specific features[10].

The concept of "mentality" initially meant the presence of a special "psychological tooling", certain general "mental instruments" of representatives of a particular society, which was interpreted as a sociocultural and national-ethnic community of people allowing to be specifically aware both of themselves and their social and natural environment[11]. Later the term "mentality" was used to describe the specific features and properties of political consciousness and self-consciousness, the organization of political and social psychology of people in a generalized form.

According to D. V. Menyaylo[12], all the existing definitions of "mentality" can be conditionally divided into three groups. The first group consists of paradigms characterizing this term as a complex of archetypal, unconscious, collectively unconscious elements. The definitions making up the second group are focused on the mental sphere which is determined by the totality of ideas, attitudes, images, values: conscious elements. The third group includes definitions with the emphasis on closely interacting, conscious and unconscious structural components.

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[7] *Menyaylo D. V.* Legal Mentality: Abstract of Dissertation for the Degree of Candidate of Legal Sciences. Volgograd, 2003. P. 7.

[8] *Sinyukov V. N.* Russian Legal System. Introduction to the General Theory. Saratov, 1994. P. 180.

[9] *Ivannikov I. A.* The Concept of Legal Culture // News of Higher Educational Institutions. Scientific and Theoretical Journal, 1998. No. 3. P. 41.

[10] Political science: Encyclopedic Dictionary. General editorship and compilation by Yu. I Averyanov. M., 1993. P. 175.

[11] *Salnikov V. P.* Op. cit. P. 181.

[12] *Granat N. L.* Legal Awareness and Legal Education // General Theory of State and Law. Academic Course. T. 3 / Ed. M. N. Marchenko. M., 2001. P. 303.

The phenomenon of "legal mentality" has been studied by a few authors, but in general, all definitions of this concept have much in common. The authors basically define legal mentality as a set of legal attitudes of the collective, group, community and individual that form a program of activities, an internal plan in legally significant situations[13].

According to V. N. Sinyukov's definition, "legal mentality" is a category reflecting the complex morphology of the individual and social consciousness which denotes all the phenomena of legal culture: sign, symbolic, figurative, positive and non-positive. As understood by V. N. Sinyukov, the category of "legal mentality" expresses a multi-layered, composite phenomenon[14].

As defined by A. I. Kovalenko, "legal mentality" is a stable worldview, the state of mind of a certain class, social group, people, nation and other community on the law and state, components of the legal system, a special vision of the role of political and legal reality in public life.

All of the above definitions of "legal mentality" are correct, but the most successful, in our opinion, is the definition of legal mentality proposed by D. V. Menyaylo[15]. The author defines legal mentality as a complex of specific historically established worldview responses, ideas, to objects of the state-legal reality. These ideas are typical, stable for a certain national-ethnic community. This definition contains the main, essential feature of the concept of "legal mentality" which includes various structural components: legal attitudes, stereotypes, ideas, value and legal orientations.

Let's consider the content and essence of the following element of legal culture: the category of legal awareness.

Legal awareness is a form of social consciousness that predetermines and motivates human behavior, reflecting the objective needs of social development. There are several forms of consciousness as a reflection of social relations: philosophical, religious, legal, political, aesthetic consciousness.

Legal awareness has specific features that make it possible to consider it a relatively independent phenomenon. L. A. Morozova highlighted the following specific features[16]:

1) legal awareness reflects the legislation, legal practice: state-legal phenomena constituting the legal sphere of public life;
2) the state-legal reality is reflected in the following ways: through legal traditions and customs, legal categories and concepts, legal constructions, etc.;
3) legal awareness reflects the trends in the development of social relations, which evidences the ability of legal awareness to anticipate reflection of the legal reality;
4) legal awareness is closely related with other forms of social consciousness, especially with moral consciousness. The content of legal ideas and views are moral and ethical foundations and guidelines: concepts of humanism and justice, equality of all people, etc.;
5) legal awareness influences the reforms, social processes and transformations: it can slow down or, on the contrary, boost these processes. This is manifested, in particular, in the fact that if the legal awareness of the population lags behind social needs, large social groups may fail to understand and support the progressive legal reforms.

According to P. P. Baranov, legal awareness is a system of legal ideas and attitudes, emotions and feelings, assessments and ideas which are an expression of the attitude of members of the society both to the current law and legal practice, and to the desired law, to legal practice[17].

A similar definition of the concept of "legal awareness" is proposed by N. L. Granat who writes that legal awareness is a special area or form of human consciousness, "an ideal phenomenon, not directly observable"[18]. According to the author, being an area or form of consciousness, legal awareness reflects the legal reality in various forms. N. L. Granat lists the following forms of reflection of legal reality: "legal knowledge, legal attitudes, assessment of law and legal practice, value orientations of people manifested in the activities and behavior of people in situations that are legally significant"[19].

T. V. Sinyukova also writes about legal awareness as a set of feelings and ideas that express people's attitude to law (effective or desired). The author writes that legal awareness is a very independent, integral phenomenon that needs to be studied as a special object of the theory of law, since through legal awareness the theory of law "comes out" to questions about the genesis and essence of law,

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[13] *Salnikov V. P.* Op. cit. P. 183.
[14] *Salnikov V. P.* Op. cit. P. 189.
[15] *Menyaylo D. V.* Op. cit. P. 7.
[16] *Morozova L. A.* Op. cit. P. 373.
[17] *Baranov P. P.* Legal Awareness and Legal Education // General Theory of Law / Ed. Babaeva V. K. N. Novgorod, 1993. P. 475.
[18] *Granat N. L.* Op. cit. P. 309.
[19] Ibid.

the cultural specifics of legal regulation which is inherent in one or another civilization, as well as to questions "about the causes of the emergence of social pathology, crime and other forms of deformation of legal behavior"[20].

All the approaches to the definition of the essence of legal awareness considered above evidence that this concept is very complex, specific and ambiguous.

According to A. P. Semitko, the legal culture of the society primarily depends on the level of development of the citizens' legal awareness, how well the population of the country is informed in matters of law, whether people have mastered the main phenomena of law, such as the value of human freedoms and rights, the value of legal procedures in resolving disputes, etc. The attitude of the population to the law, judicial institutions in emotional terms is very important. It should be noted that the population is diverse in terms of social, age, educational, professional and other criteria. According to A. P. Semitko, everything listed above is "the first element of legal culture" [21].

As S. S. Alekseev emphasizes, "legal culture is, first of all, "qualitatively intense "legal awareness"[22]. This refers to the level of development of the sense of law and legality, understanding of law, knowledge of laws, the degree of faith in law.

Being a complex socio-psychological phenomenon, legal awareness has its own internal structure. It is generally recognized that the structure of legal awareness consists of two main elements: legal psychology and legal ideology. Some authors highlight the behavioral element of legal awareness[23].

Legal psychology as a reflection of the routine, everyday life of people related with legal practice is a set of established and developing conscious and unconscious psychological states in the form of legal feelings, emotions, experiences, habits, desires, expectations, claims, expressing the specific attitude of individuals, groups, collectives, society as a whole to law, laws, legal norms, to all phenomena of legal reality and determining the formation of the necessary motives, models, stereotypes of the forthcoming legal behavior in real life situations for each individual as a subject of law.

As written by V. I. Shepelev, legal psychology is the most accurate criterion for assessing the attitude of a person to the components of legal practice and the legal system. It is within the framework of legal psychology that each individual reveals his true attitude to legal phenomena, shows the ability to critically perceive specific laws and legal norms, to square his behavior to them[24].

N. L. Granat calls legal awareness "a focal point accumulating in itself all mental states, properties and processes that manifest themselves in a specific legal behavior precisely as a result of value orientations and legal attitudes"[25]. The main role here is assigned to legal psychology.

An important property of legal psychology was noted by T. V. Sinyukova: "… Legal psychology is the most profound sphere of legal reflection "hidden" from direct perception and understanding"[26], being the source of the emergence of the response of the public and the individual to legislation, law. This is what often determines whether the implementation of certain legislative programs will be successful or unsuccessful. Problems may arise in the implementation of a new legislation if the population does not psychologically perceive certain permissions as socially justified, and certain prohibitions as really necessary. T. V. Sinyukova emphasizes that the legal psychology of the population must not be ignored, since this can lead to the failure of certain state measures that are socially useful "from the point of view of the social goal (combating moonshining, certain illegitimate traditions and customs, etc.)"[27].

In our opinion, all of the above leads to the following conclusion. There is a current need to conduct social and legal studies of the state of the legal culture and awareness of the population: to study the level of prestige of the law, legal knowledge of the population and other components of the complex of legal attitudes, beliefs and feelings characterizing the attitude of social groups, individual citizens to the existing laws and legal phenomena.

Many legal reforms currently being carried out in Russia, management decisions are ineffective precisely because they were adopted without correlation with the legal awareness of the people, social group, and individual. According to V. M. Syrykh, the importance of the scientific research is in the fact that the rich empirical material obtained allows carrying out a theoretical analysis of the most important

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[20] *Barulin V. S.* Social Philosophy. Part 1. M., 1993. Pp. 233–237.

[21] *Semitko A. P.* Op. cit. P. 117.

[22] *Alekseev S. S.* Law. Complex Research Experience. M., 1999. P. 270.

[23] Theory of State and Law / Ed. V. M. Korelsky and V. D. Perevalova, M., 2000. P. 341.

[24] *Shepelev V. I.* Legal Awareness and Legal Culture / Theory of State and Law. M., 2003. P. 495.

[25] *Granat N. L.* Op. cit. P. 304.

[26] *Sinyukova T. V.* Legal Awareness and Legal Education // Theory of State and Law / Ed. N. I. Matuzova, A. V. Malko. M., 2001. P. 613.

[27] Ibid.

problems related with the mechanism of legal regulation[28]. The author notes that only by understanding the legal feelings and emotions of the population, the legal psychology of the individual and social groups, one can take account of the role of legal psychology in the development of legal norms and increasing the efficiency of legal regulation of legal institutions, individual branches of law[29].

Let us list the factors that most accurately convey the content of legal psychology which need to be given special attention:

- the nature of the assessment (negative or positive) of the laws in force;
- the degree of solidarity with the principle based on the recognition of the high social value of laws and the law;
- orientation and degree of legal activity of the individual in the legal sphere;
- the presence of an attitude towards lawful behavior;
- motives of the desire to act in accordance with the law and the laws in force

Legal ideology is the cognitive side of legal awareness. Let us present the definition of legal ideology given by L. N. Granat: "Legal ideology is a systematized scientific expression of legal requirements, principles, views of the society, various strata and groups of the population"[30].

A similar position is held by V. I. Shepelev. In particular, he writes: "Legal ideology is a system of legal views, opinions, ideas, principles, judgments, concepts, teachings, theories that form and manifest themselves at the level of strata, groups of the population, society as a whole and characterize the legal system, legal reality and practice and their individual components"[31]. As a phenomenon of a higher cognitive and informational level, legal ideology fills legal psychology with the necessary content, gives it a more conscious and purposeful character, which enables an individual to more accurately orient oneself in real life circumstances mediated by legal regulations.

The intellect-based legal ideology introduces worldview-theorized principles into the sensory-emotional sphere of legal awareness giving the latter a state of an integral, socially significant legal phenomenon. At the same time, legal ideology can carry both positive and negative potential. This does not mean that under the active influence of legal ideology, legal emotions and feelings lose any meaning and are of a derivative nature. Being components of legal psychology, a relatively independent part of legal awareness, emotions, feelings, experiences are the factors, criteria that clearly confirm the actual attitude of the subjects of law to certain sides, elements of the legal system, and are a kind of guideline as to what adjustments should be made to the theory and practice of legal spheres of public life. The foregoing means that legal psychology also has a fairly noticeable effect on the content of legal ideology and on legal awareness in general.

Concerning the views on the behavioral element of legal awareness, O. F. Skakun writes: "Legal behavior is the volitional side of legal awareness which is a process of translating legal norms into real legal behavior"[32]. Legal behavior consists of the elements that determine its nature (direction): these are legal attitudes, motives of legal behavior.

In our opinion, however, V. I. Shepelev[33] is right writing that identification of the behavioral element of legal awareness is not entirely convincing, since legal psychology and legal ideology presuppose that through comprehension of attitudes and assessment of the legal reality the person will simulate the direction and nature of the forthcoming legal behavior to a certain extent. The entire content of legal awareness is practically permeated with the behavioral element. It follows from this that legal behavior is an independent activity element of legal culture.

Let's move on to considering the concept of legal practice. There are several views on this topic in Russian jurisprudence. Let us analyze three of the currently existing opinions on the essence of the concept of "legal practice". Some authors, including I. Ya. Dyuryagin, V. Knapp and A. Gerloch, believe that the concepts of "legal practice" and "legal activities" are identical. Other authors, in particular S. I. Vilnyansky and S. S. Alekseev, believe that legal practice should be limited from legal activities, since the latter is a relatively independent phenomenon to which the objectified experience of legal activities refers.

In our opinion, it is advisable to consider the types of legal practice in complete unity of legal activities and social and legal experience formed on their basis. This position makes it possible to correctly reflect the dialectics of legal activities, to accurately determine the elements of the structure of legal practice, to determine the significance of social- legal experience in the legal system of the society.

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[28] *Syrykh V. M.* Sociology of Law [Sotsiologiya prava]. M., 2011. Pp. 401–404.
[29] Ibid.
[30] *Granat N. L.* Op. cit. P. 307.
[31] *Shepelev V. I.* Op. cit. P. 497.
[32] Theory of State and Law / Ed. V. M. Korelsky and V. D. Perevalova, M., 2000. P. 348.
[33] *Shepelev V. I.* Op. cit. P. 497.

Thus, we can give the following definition of legal practice. Legal practice is usually applied to the activities of people, in the course of which they influence social relations, transform these relations, as well as the accumulated social and legal experience.

The legal culture of the society is significantly influenced by law enforcement. This concept is usually meant to denote the power activities of competent officers and special bodies for the implementation of the rule of law, regulated by regulatory acts, laws, and other regulatory legal documents[34]. Law enforcement activities of officers and state bodies should be carried out in strict compliance with the principles that are generally recognized in all countries of the world. The scientific literature on law lists the following principles:

- the principle of social justice;
- the principle of expediency and validity of decisions made[35].

V. M. Syrykh identified the following indicators of effective law enforcement:

1) social and legal goals are achieved simultaneously;

2) material costs are minimized;

3) achievements were made within a short time[36].

The same opinion is held by V. V. Lazarev who notes that law enforcement can be recognized as effective only if all goals are achieved "with the least damage to various social values, with the lowest economic costs, within the shortest possible time"[37].

Achievement of the goals of law enforcement is understood as the process of cognition and the formation of the will expressed as the state power decision in any particular case. V. V. Lazarev notes that "in itself, the linkage of general norms to a specific case is an organizing and creative matter, since it is related with an assessment of the law and the fact with account of the specific features of all elements of the factual composition (event, causation, guilt, etc.). with the need to determine specific persons responsible for the implementation of the law in this particular case, to determine the means of ensuring the right on the same basis, etc."[38].

An important element of the legal culture of the society is the level of perfection of the entire complex of normative legal acts being the result of the law enforcement and lawmaking activities.

If the society has a high level of legal culture, this means that a perfect system of legislation has been created in the country free of any contradictions and gaps, vagueness and ambiguity of norms and legal regulations, which excludes the arbitrariness of officials, bodies and the state.

Thus, having considered the problems of the elemental composition of the category of legal culture, the following generalizing conclusion can be drawn.

Despite the abundance of approaches to the problem of determining the content of legal culture, this category, according to the author, should be considered in the dialectical unity of its constituent elements: legal mentality, legal awareness, legal activities, the entire system of legal acts. Each of the elements has its own essential and substantial characteristics and properties. In addition, the activity components should be implemented in accordance with the fundamental principles considered by the author in this paper. The level of legal culture of the society is naturally dependent on the implementation of these principles in the practical activities of legal entities.

References

1. *Alekseev, S. S.* Law. Complex Research Experience [Opyt kompleksnogo issledovaniya]. M., 1999. 712 p. (In rus)
2. *Baranov, P. P.* Legal Awareness and Legal Education // General Theory of Law [Pravosoznaniye i pravovoye vospitaniye // Obshchaya teoriya prava] / Ed. Babaeva V. K. N. Novgorod, 1993. P. 475–494. (In rus)
3. *Barulin, V. S.* Social Philosophy [Sotsial'naya filosofiya]. Part 1. M., 1993. 333 p. (In rus)
4. *Granat, N. L.* Legal Awareness and Legal Education // General Theory of State and Law. Academic Course [Pravosoznaniye i pravovoye vospitaniye // Obshchaya teoriya gosudarstva i prava. Akademicheskiy kurs]. T. 3 / Ed. M. N. Marchenko. M., 2001. (In rus)
5. *Ivannikov, I. A.* The Concept of Legal Culture // News of Higher Educational Institutions. Scientific and Theoretical Journal [Kontseptsiya pravovoy kul'tury // Izvestiya vysshikh uchebnykh zavedeniy. Nauchno-teoreticheskiy zhurnal], 1998. No. 3. P. 12–16. (In rus)
6. *Lazarev, V. V.* The Effectiveness of Enforcement [Effektivnost' pravoprimenitel'nykh aktov]. Kazan, 1975. 207 p. (In rus)

[34] *Granat N. L.* Op. cit. P. 308.

[35] Problems of the Theory of State and Law. Ed. M. N. Marchenko. M., 2017. P. 116.

[36] *Syrykh V. M.* Op. cit. P. 413.

[37] *Lazarev V. V.* The Effectiveness of Enforcement. Kazan, 1975. P. 61.

[38] Ibid.

7. *Marchenko, M. N.* Theory of State and Law [Teoriya gosudarstva i prava]. M., 1996. (In rus)
8. *Menyaylo, D. V.* Legal Mentality: Abstract of Dissertation for the Degree of Candidate of Legal Sciences [Pravovoy mentalitet: Avtoreferat dissertatsii na soiskaniye uchenoy stepeni kandidata yuridicheskikh nauk]. Volgograd, 2003. (In rus)
9. *Morozova, L. A.* Theory of State and Law [Teoriya gosudarstva i prava]. M. 2002. (In rus)
10. *Ozhegov, S. I., Shvedova N. Yu.* Explanatory Dictionary of the Russian Language [Tolkovyy slovar' russkogo yazyka]. M., 2003. (In rus)
11. Problems of the Theory of State and Law [Problemy teorii gosudarstva i prava]. Ed. M. N. Marchenko. M., 2017. (In rus)
12. *Salnikov, V. P.* Legal Culture // Actual Problems of the Theory of Law [Pravovaya kul'tura // Aktual'nyye problemy teorii prava] / Ed. K. B. Tolkacheva and A. G. Khabibullina. Ufa, 1995. P. 147–158. (In rus)
13. *Sinyukov, V. N.* Russian Legal System. Introduction to the General Theory [Rossiyskaya pravovaya sistema. Vvedeniye v obshchuyu teoriyu]. Saratov, 1994. 496 p. (In rus)
14. *Sinyukova, T. V.* Legal Awareness and Legal Education // Theory of State and Law [Pravosoznaniye i pravovoye vospitaniye // Teoriya gosudarstva i prava] / Ed. N. I. Matuzova, A. V. Malko. M., 2001. (In rus)
15. *Semitko, A. P.* The Concept and Structure of the Legal Framework, Its Role in Legal Behavior // Problems of the Implementation of Law: Interuniversity Collection of Scientific Papers [Ponyatiye i struktura pravovoy ustanovki, yeye rol' v pravovom povedenii // Problemy realizatsii prava: Mezhvuzovskiy sbornik nauchnykh trudov]. Sverdlovsk, 1990. P. 112–116. (In rus)
16. Sociology of Law [Sotsiologiya prava] / Ed. V. M. Syrykh. M., 2001. (In rus)
17. *Syrykh, V. M.* Sociology of Law [Sotsiologiya prava]. M., 2011. (In rus)
18. Theory of State and Law [Teoriya gosudarstva i prava] / Ed. V. M. Korelsky and V. D. Perevalova, M., 2000. (In rus)
19. *Shepelev, V. I.* Legal Awareness and Legal Culture / Theory of State and Law [Pravosoznaniye i pravovaya kul'tura / Teoriya gosudarstva i prava]. M., 2003. (In rus)

Materials of the Third Conference "The Constitution of Russia: Yesterday, Today, Tomorrow" (St. Petersburg, December 9–10, 2019)[1, 2]

ABSTRACT

This material is devoted to a review of expert reports at the Conference "The Constitution of Russia: Yesterday, Today, Tomorrow", held in St. Petersburg on December 9-10, 2019. The problems of modern federalism, human rights and freedoms, and their protection by the state and local self-government were discussed at the conference. The experts analyzed the origins and causes of the existing state structure in the Russian Federation, its features and possible development paths; problems of human rights and freedoms in Russia and in other states, as well as the current state of local self-government in Russia, trends in its preservation, expansion and bringing into line with modern requirements of social development in the context of globalization.

Keywords: Constitution of the Russian Federation, federalism, human rights and freedoms, local government

In the early December 2019 St. Petersburg hosted the 3rd Conference "The Constitution of Russia: Yesterday, Today, Tomorrow" dedicated to the problems of constitutional law in the Russian Federation. The conference was organized by the Law Faculty of the North-West Institute of Management of RANEPA, the Boris Yeltsin Presidential Center Foundation, the Commissioner for Human Rights in St. Petersburg and the Presidential Library named after B. N. Yeltsin.

The Conference discussed topical issues of Russian constitutionalism, including the problems of the federal structure, regulation and protection of human rights and freedoms as the basis of the constitutional system, issues of local self-government and many other things. The conference was held in the format of panel discussions and included three panels[3].

The participants of the **first panel "The Difficult Fate of Federalism in Russia"** were Sergey Mikhailovich Shakhrai[4] (panel moderator), Lyudmila Borisovna Eskina[5], Andrey Nikolaevich Medushevsky[6], Andrey Aleksandrovich Zakharov[7] and Sergey Lvovich Sergevnin[8].

Sergey Mikhailovich Shakhrai. The structure of state administration in Russia currently tends to change from federal to unitary built on the principle of a rigid vertical power structure. While federalism is not just a way of distributing powers between the centers of executive and judicial power, but is also a guarantee of the preservation of a democratic political regime. Federalism is a kind of philosophy, a worldview based on an understanding of the importance of diversity, respect for the opinion of others, and recognition of the value of an equitable dialogue. Unless there is such understanding of federalism, the most perfect federation turns into a formality.

Russia has made at least three attempts to move from formal federalism to genuine one: in the first quarter of the 19th century after the war with Napoleon, in the first quarter of the 20th century during the work of the Constitutional Commission of 1918. and in the 1990ies when, as a result, the current Constitution of the RF was adopted.

As a result of the adoption of the 1993 Constitution, its test implemented the idea of cooperative federalism which implies conducting a dialogue, reaching an agreement and joint solution of the tasks and problems by the federal center and regional authorities with the participation of local self-government. However, this model is not implemented in practice, since the authorities, federal and regional, have completely different and, most importantly, varied ideas about the nature of the organization of federal governance. The federal authorities communicate the ideas of a unitary state, while the regional au-

[1] Обзор подготовлен редакцией журнала «Теоретическая и прикладная юриспруденция» Северо-Западного института управления Российской академии народного хозяйства и государственной службы.

[2] The review was prepared by the editors of the journal "Theoretical and Applied Law" of the North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration.

[3] Complete publications of some of the conference participants are available in this issue of The Theoretical and Applied Law Journal.

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thorities live in a parallel reality, clearly dividing governance issues into federal and regional ones, and solve them primarily through the relevant distribution of the budgetary funds.

Thus, the formula of modern federalism can be assessed as follows: as soon as the treasury runs out of money, they remember federalism, that is, they give away powers along with responsibility and financial and economic problems to the regions.

The framework of federalism still includes the problem of delimiting the objects of supervision and powers between the levels of the government. On the one hand, Article 11 of the Constitution, included in the section "Fundamentals of the Constitutional System", states that the powers are distributed by the Constitution itself, federal and other agreements. Articles 71-73 of the Constitution establish that outside the jurisdiction of the Federation itself, all the fullness of the state power belongs to the subject of the RF, and paragraph 6 of Article 76 states that the laws of the subjects adopted on objects referred to their exclusive jurisdiction have priority over federal laws.

The cooperative model of federalism is important in that it presupposes a dialogue, delegation and search for coordinated solutions, with no desire to find them being clearly observed at the present time. As to cooperative federalism, this choice was made during the preparation of the text of the Constitution both consciously and forcedly. It was done forcedly because in 1992-93 it was not possible to perform a more rational scientific delimitation between the objects of supervision and powers, the clash of interests and opposition of some forces to others was so great that it was easier to declare the issue an object of joint supervision, including it in the list established by Article 72 of the Constitution than to try to determine it in a clear, detailed and legally correct manner. In this regard, we have forced cooperative federalism. But the Constitution provides for mechanisms of distribution of powers and objects of supervision, namely: by using the provisions of the Constitution itself, the Federal Treaty, Federal Constitutional and Federal Laws, as well as agreements on the delimitation of powers and objects of supervision between the Russian Federation and the subjects of the Russian Federation.

In this respect, Article 78 of the Constitution is applied in practice in relation to the temporary redistribution of powers. For example, more than 200 agreements have been concluded to date between the RF and the authorities of the constituent entities on the transfer of the relevant powers for a certain time and subject to specific conditions. In this context, the tension in the relations inside the federation could be relieved by transfer of cultural issues, the national issue and education issues to the regional level, rather to the level of local self-government. Because federalism is an institution of public administration, primarily budgetary, economic management, it is not possible to solve issues being largely subjective, private, and local by nature at the global level of the federation.

Fiscal federalism and fairness is another challenge faced by us. Is the established procedure for the distribution of budgetary funds, grants, subsidies fair enough? Unfortunately, no consensus has been reached between the federation and the regions, or between the regions themselves, on this issue.

Attempts are currently being made to reform the federal structure laid down in the Constitution, for example, by creating mega-regions or districts that include several subjects. The question is about the possible form of introducing such changes, and whether the Constitution provides for their possibility or whether it is necessary to amend it in this part. And given that there is no true federalism in Russia, whether something that does not exist can be reformed. This is an extremely important question. Within the framework of this issue, it should be noted that just in order to ensure the independence of judicial power, the criteria of the formation of the subjects of the RF and judicial districts should be divided. These steps have already been taken, in particular in the framework of the creation of appellate districts in the system of courts of general jurisdiction. However, one should not be satisfied with what has been achieved.

One of the achievements of the drafters of the text of the 1993 Constitution should be considered to be the absence of provisions on the right to secession (departure from the federation) in it. Right, the Constitution contains the right of peoples to self-determination, but only within the federation and within the framework of the effective Constitution. With regard to the equality of the constituent entities of the Russian Federation, the Constitution enshrines the provisions on their equality in relations with the federal authorities, but not among themselves, because the status of the constituent entities in our country is very different, starting from the type (republic, territory, region, etc.) and ending with the size of the population. In this regard, the problems of the status of subjects and their relationships can be resolved within the framework of constitutional laws.

With a view to objective representation of the interests of the regions, the Council of the Federation should be formed on the basis of representation of the heads of the executive and legislative branches of the respective constituent entity in it. This procedure of forming the Council of the Federation can be determined in the relevant constitutional law which does not exist today. In my opinion, only if the Council

of the Federation is formed in such a way that the executive and legislative bodies of the constituent entities themselves are directly involved in the development and adoption of federal laws affecting the life of the regions, it will be possible to fully implement the decisions of the federation at the regional level.

Lyudmila Borisovna Eskina. Russian federalism is the most complex federalism in the world, because it is a mixture of a lot of different criteria and, moreover, it took shape under the Russian Empire, and in this regard, this is the most complex system which would be called federalism known to history and the world. When the structure of regions was created as far back as in the pre-revolutionary period, no clear criteria were determined, and the Soviets exacerbated the complexity of the territorial structure, adding a national criterion of creating constituent entities of the federation within the framework of the idea that the Soviet state is to implement national sovereignty which also received territorial outlines. But it was just impossible to take account of the interests of all nationalities; thus, this criterion was not fully implemented, either. At the same time an additional gradation of constituent entities based on their type was created: autonomous republics, autonomous districts and regions, this gradation surviving to this day.

Therefore, when the 1993 Constitution was development, there was a difficult task of finding a compromise between the subjects of the federation, which was reflected in the position of equality of subjects in relations with the federal power (Article 5 of the Constitution). But it was not possible to smooth over all the contradictions in this way, and they are just now becoming obvious, because the power keeps reproducing the imperial models of governance, creating governance structures parallel to constituent entities: federal districts, judicial districts, economic territories and territories with a special status. Such trends clearly evidence the intention to reform the federal system, and attempts to find a way and a criterion for its reforming. There is obviously a need for such a reform in order for the governance to correspond to the contemporary realities. But it is necessary to find a thought-out adequate criterion of distribution of the power.

To find such a criterion, it is necessary to turn to the origins of the emergence of federalism, namely to recall that the purpose of the distribution of power within the federation was initially to combine the advantages of large and small, when it was easier to implement large projects at the federal level and to ensure a democratic regime, that is, to bring the population closer to power, at the level of regions, constituent entities of the federation. This last task is still extremely relevant today.

Regarding the fact that the Constitution does not provide for the right to secession of a constituent entity of the federation, I would like to note that this prohibition is not directly enshrined in the Constitution, despite the fact that secession from the federation can be considered one of the forms of self-determination of the people, the right to it being recorded in the Constitution, and despite the fact that there are no options of forms of self-determination in the Constitution. Unfortunately, the mechanisms for exercising the right to secession have not been developed either at the level of various states or at the international level, but at the same time, this right is implemented in practice (Transnistria, Abkhazia, Ossetia, Catalonia in Spain, for example). Sidestepping on this issue will maintain tension on this issue both at the domestic and international levels.

Andrey Aleksandrovich Zakharov. The paradox of the nature of Russian federalism which, on the one hand, is enshrined in the 1993 Constitution, and on the other hand, almost never finds its practical application. Of particular interest in this situation is the question of why this happens. And if the provisions of the Constitution concerning federalism are dormant, then what will happen when they find their application? What makes us maintain this situation of contradiction between the desired and the actual?

Considering that we inherited the current status of the federation from the Soviet past, and the Soviet state accepted this situation from the Russian Empire, respectively, an interesting question arises: why, when creating a new state on the ruins of the empire, the Soviet government chose and retained the federal system of the state structure strange at that time? There is the inevitable conclusion that the Soviet government just had no other way to secure support for itself and to win the Civil War, it had to use federalism to meet the demands of self-determination that were set by the ethnic groups inhabiting the empire. Right, these requirements were met partly but sufficiently to win the Civil War. Subsequently, it does not seem possible to take away even that, albeit incomplete, degree of sovereignty once granted to one or another ethnic group. Thus, at the stage of the reforms in the 1990ies Russia just had no other choice but to preserve its internal organization according to the territorial-national principle. Is it possible to change this way of organizing the territorial structure of the Russian Federation? It is, but the costs of this kind of transformation are likely to be too great.

Besides, it is important to take account of the fact that the Soviet Union practiced what is called affirmative action in relation to ethnic minorities inhabiting the country, and began doing this even earlier

than other federal states, and in this sense the federalism of the Soviet state showed itself as a means of harmonizing the relations between ethnic groups within the entire state. This experience is important for us even now within the framework of the Russian Federation, so it should not definitely be abandoned.

In this respect, the right to secession was declared in the USSR as a way to oppose the union state to other traditional empires that existed at that time which could be seceded only arms in hand. While the new state of workers and peasants provided freedom of such secession. However, no one believed that this right would have to be recognized or exercised one day. But the consolidation of such a right as it is was not accidental.

At present, the process of globalization increases the demand for federalism, for creation of quasi-federal and federal entities, but at the same time, globalization also exacerbates the ethnic sensitivity of the groups inhabiting the planet. And this means that it is necessary to look for new forms of federalism in the conditions of unresolved national and ethnic problems.

Andrey Nikolaevich Medushevsky. While discussing the problem of federalism, we cannot ignore the changes currently taking place in the world. It is important to try to look ahead immediately, analyzing the possible prospects of the world changes related with globalization. Many people write that globalization actually generates the phenomenon of global constitutionalism or global federalism. And from this point of view, it is important to keep in mind such a phenomenon as the convergence of international and constitutional law.

Sometimes the concept of constitutionalism of international law is used. This means that international norms strongly influence the constitutional ones, on the one hand, and, on the other hand, constitutional norms are integrated into international acts in such a way that the phenomenon of international constitutional law emerges. This is certainly of fundamental importance for federalism, since a completely new type of law emerges. Some people call it global law, others talk about transnational law.

A kind of such law may be said to be the modern European law. It cannot be defined either as international or as constitutional. That is, this is a completely new phenomenon. From this point of view, we can talk about a change of the global trend in the understanding of federalism and constitutionalism. In my opinion, the meaning of this global trend is that there is a process of rethinking the principle of separation of powers. As has already been stated, federalism is part of the separation of powers. This is vertical separation as opposed to horizontal, but new parameters of the separation of powers also arise, in particular, into institutions based on international law, international organizations, and institutions based on constitutional law.

Thus, there is pluralization of systems of separation of powers and pluralization of hierarchies. Where does federalism play in this process? Some believe that now is a transitional period which will result in formation of a new hierarchy of levels of global separation. We are talking about the separation of powers already at the level of international regimes, such as, for example, the European Union, the level of national states, the level of the subjects of the federation and the level of local self-government. Thus, the problem of federalism is extremely complex, including in relation to Russian federalism which combines problems of integration in the post-Soviet space and creation of new integrative associations.

The second important question to be discussed in the context of the problem of federalism is whether there are actually historical prerequisites for the emergence of federalism in the territory of Russia. The Russian empire did not know any federalism, of course. We can talk about the ideas of federalism which found some practical application, but as a whole it was an empire that viewed itself as a single state. It was only at the end of the imperial period that decentralization projects appeared, but they did not reach the level of federalism in substance, it was only about granting certain autonomy to potential subjects, such as Finland, Ukraine and Poland. This, in fact, is the state of implementation of the ideas of federalism in Russia which took shape by 1917.

Another important aspect to be paid attention to is whether a system of federalism was created in the Soviet Union. The simplest answer is yes, because it was recorded in the Constitution. But upon closer consideration, it turns out that Soviet federalism can hardly be defined as federalism. Why? Because it was not based on the scientific concept of federalism developed at that time by the academic science. The scientific concept proceeded from the fact that decentralization and the solution of the national question, including in the form of federalism, are completely different things. Linking federalism with ethnic nationality and national self-determination is the path to the disintegration of the state.

When discussing any concept of federalism, it is obviously necessary to decide whether an equal status should be given to all subjects or it is better to think of a gradual movement towards federalism in the form of autonomies, cultural, functional, etc. And as a consequence, within the framework of the federation it is necessary to have a judicial instance that would resolve conflicts arising between levels of power in the form of the Supreme or Constitutional Court.

The Bolsheviks completely disregarded this academic concept. As a result, a model of federalism appeared which in no way corresponds to scientific and academic ideas about it. Then the question arises, what the Soviet federalism was like. Formally, legally, when discussing the state structure of the Soviet Union, we cannot speak of federalism, because the Soviet model enshrined the right of secession of the subjects of the federation, and this is a sign of confederalism. Thus, we can say that Soviet federalism was a confederation and not federalism at all, although this entity was called a federation in the Constitution.

And finally, in reality it was a unitary state. Thus, we get a contradiction in the definition of the notion of federalism already at the level of resolving these issues by the Constitutional Commission of 1918, when very different models of federalism competed: both the comparative (presentation of federalism as an aggregate of regions), and the Leninist-Stalinist concept which eventually triumphed — the concept of national-territorial division of the country. My colleague says here that there was no alternative. But I believe that there was an alternative, and I wish it had been implemented. In my opinion, the alternative would be not to create a single scheme of federalism and impose it on the entire country, but to introduce differences of the subjects using a very differentiated scale, based on how much the potential subjects themselves are ready to become subjects of the federation.

In other words, the general model of federalism was imposed on the regions. If we consider this imposed construction of federalism implemented in 1918, the lawyers of that time compared this model to the colonial rule of the British Empire, that is, the federal subjects that were created resembled the dominions of the Westminster model. This model was extremely contradictory, it included a federation within a federation, a large number of subjects of various types: those were union, autonomous republics and all other entities. And the regulation of this asymmetric model, I would say, the regulation of this artificial asymmetric division was organized in such a way as to only maintain control over this system. That is, it was a model that was easy to manage, but not a federation by and large.

Since this model was actually reproduced in the 90ies, when the status of the union republics and autonomous republics was equalized, and since this model actually passed over into modern Russia, the question is whether we should hold on to it or raise the question about a radical revision of this model in accordance with the demands of the contemporary globalizing society, on the one hand, and from the standpoint of the concepts of federalism and, in general, decentralization that modern science offers, on the other hand. And is this model worth defending? Perhaps it is worth raising the question of the transition from a schematic interpretation of federalism to other forms of decentralization, for example, devolution, administrative self-determination, autonomy, regionalization, etc.

Regarding the recognition of the right to secession in the Constitution of the USSR, I would like to note the following: the Bolsheviks certainly wanted to create a world federation, and some believe that the introduction of the right of secession is related with this, but the right of secession and generally the construction of federalism on a national and ethnic basis, rather, contradicts Marxism, therefore it is rather difficult to explain it by ideological reasons. I would say that it was rather a tactical move to retain power in a disintegrating country. I would not think that this is some basic principle that can be useful, because recognition of such a right was certainly a time bomb under the entire building, which actually happened, since the collapse of the Soviet Union, in which Russia played the key role, was carried out precisely on the basis of the Soviet constitution and the right of secession.

Has the 1993 Constitution renounced the right to secession? It does enshrine the principle of the sovereignty of the multinational people of the RF and says nothing about the sovereignty of the subjects, and the more so about the right of secession. All this is true, but nevertheless, it cannot be said that the Constitution of the RF has finally resolved this issue, because there are still serious disputes over whether we have a constitutional or contractual federation. Please note paragraph 3 of Article 11 of the Constitution of the RF which says that the delimitation of the subjects of supervision and powers between the state authorities of the RF and the state authorities of the subjects is carried out by this Constitution, federal and other agreements on the delimitation of the subjects of supervision. Thus, the federal treaty has not been canceled by the current Constitution, but the federal treaty enshrines, firstly, the sovereignty of the republics, secondly, the right of the republics to control their resources, thirdly, the joint implementation of legal proceedings, and fourthly, coordination of the introduction of a state of emergency with the center. If we imagine the situation of a crisis in the central government, I assure you that the idea of contractual federalism will quickly reappear.

What can be the way out of this situation? In my opinion, the optimal model of state structure for Russia is a strong federal center and broad development of local self-government. The Soviet model of federalism inherited by Russia is ineffectual and needs to be revised.

Sergey Lvovich Sergevnin. Secession from the federation is impossible within the framework of the system of legal terminology as the right to secession is a sign of such a state association as a confed-

eration. There is certainly a different practice at the international level, but if we proceed from the Russian political and legal tradition, then we should look at this issue in this way. In its constitutional provisions the Soviet Federation did provide for the right of the Union republics to secession which was ignored until the relevant socio-economic and political factors arose, which led to the collapse of the Soviet Union. This sad experience was taken into account in the preparation of the 1993 Constitution, and the right to secession was not enshrined in it, and from the legal point of view the Russian Federation really became a federation, while the Soviet Union, rather, formally resembled a confederal union.

Resulting from the right to secession, or rather its denial in the constitutional practice of the federal state, is the principle of the unity of sovereignty which was also to be fought for very seriously. Mechanisms for attracting higher courts were to be used in order to state the impossibility of two-stage sovereignty in our political and legal realities, since the source of this sovereignty in a single state is the people and it cannot be distributed among different levels.

For a more accurate understanding of the differences between federalism and confederation, it is necessary to recall such an instrument that is characteristic of confederations as ratification, which is more inherent in international than domestic law. Nevertheless, the experience of using this tool in Russia took place, for example, in some constituent entities of the RF with attempts to introduce mechanisms for suspending the operation of federal laws issued on matters of exclusive federal jurisdiction.

In some cases, they were stipulated by an additional mechanism for suspending the effect of regional laws which redistributed the matters of federal jurisdiction, until the federation issues its laws on the matters of its exclusive jurisdiction. In fact, this is a variant of ratifying federal legislation at the level of a constituent entity of the federation: a direct path to the collapse of the state. Examples of the exercise of the right to secession, for instance, Catalonia in Spain, primarily concern the so-called regional states rather than federal. And this is a relatively new phenomenon on the political and legal map, practically not studied so far.

The second panel "Human Rights and Freedoms: the Foundation of the Constitution" was attended by Olga Leonidovna Pokrovskaya (panel moderator)[9]9, Mikhail Yurievich Biryukov[10] [11], Maria Georgievna Matskevich[11]11, Kimmo Nuotio[12]12, Viktoria Viktorovna Filatova[13], Ilya Georgievich Shablinsky[14], Aleksandr Vladimirovich Shishlov[15]. Friedrich Memmel[16]and Nikolai Viktorovich Razuvaev[17] also spoke during the discussion on the issues under consideration.

Aleksandr Vladimirovich Shishlov. The range of the rights protected by the state should be wider than provided for by the Constitution. It is necessary to strive to increase the range of recognized and protected rights and freedoms, but the fundamental rights and freedoms, the requirement for the protection of which by the state is directly enshrined in the Constitution, still create a system of feedback in the society. The degree of their regulation and protection determines the implementation of the rest of the range of the rights: social, cultural, environmental, labor, etc. And where the feedbacks are broken, the system becomes at best inadequate to the needs of the governance objects, and at worst it just goes downhill, it becomes unstable. Unfortunately, justice is often not found in the Russian legal system. In this regard, it is very important that Russia retains its membership in the Council of Europe and that the human rights court is available to Russian citizens.

Ilya Georgievich Shablinsky. In my opinion, the main problem in terms of exercising electoral rights in the current period is the created practically insurmountable barrier related with the registration of candidates. The signature verification instrument is ineffective and creates conditions for abuse.

Video recording during elections is not a bad idea, but no conditions for its full practical implementation have been created. Access to the archive of records is extremely difficult, and the practice of considering such records as evidence has not yet been established within the framework of legal proceedings.

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In these conditions, an effective and fair instrument seems to me to be the electoral deposit, its use canceled in 2005. The return of such an instrument as the electoral deposit would allow returning the conditions of competition to elections, its absence negatively affecting the development of the state, economy and society.

Mikhail Yurievich Biryukov. Indeed, the value of democracy is growing, but at the same time there are growing costs, expenses that we pay for exercising our rights, for democratic elections, democratic procedures. Especially alarming against this background is the strengthening of criminal responsibility and the unlawful prosecution of the persons who took part in peaceful actions. The absence of open platforms for discussing problems in the society, for example, the All-Russian Civil Forum, including for discussing the problems of relations between the population and the authorities, cannot lead to a positive scenario of the development of the state, since the effect of the accumulation of unresolved issues can create a threat of their explosive resolution.

Viktoria Viktorovna Filatova. I would like to note that such a concept as the illusiveness of justice which we are witnessing now in our society must certainly become a thing of the past. And in this sense, the positions and the legal approaches being developed by the European Court of Human Rights, including the focused attention on this problem, the problem of illusory justice, can certainly help the state in solving internal problems with a careful reading of the judgments decisions delivered by the European Court in the cases regarding the Russian Federation. Analyzing these decisions can help bridge the gap between what is written in the Constitution and the actual exercising of rights that we see.

Twenty-year-experience of Russia's participation in the Convention for the Protection of Human Rights and Fundamental Freedoms has been accumulated, and, despite all the complexities of the relations between Russia and the Council of Europe, despite the ambiguous assessment of some judgments of the European Court by the legal community, this experience is certain to be significant for the legislative system and legal practice of the Russian Federation.

First of all, it is necessary to note the pilot judgments of the European Court delivered regarding the RF: these are the rulings revealing some structural problem, in respect of which the court suggests that the state take general measures in order to prevent such violations in the future and reduce, accordingly, the flow of complaints on this issue.

We have identified several problems of the kind. For example, such a problem as the length of non-enforcement of court judgments. As many as two pilot rulings were delivered on this issue, and the response was changes in the legislation of the RF: the adoption of the law on compensation for violation of legal proceedings and the execution of a judicial act within a reasonable time, which created a domestic remedy, ambiguously assessed, but nevertheless recognized by the European Court as an effective remedy.

The European Court of Human Rights is a subsidiary mechanism in addition to domestic remedies of protection of human rights and freedoms which are of the highest value in Russia as well, which is enshrined in our Constitution. And the message given by the European Court of Justice to states is that rights and freedoms must be primarily implemented at the national level, a strong judicial system must be created allowing these rights to be exercised precisely at the domestic level, while the international way of protection is extraordinary.

Most states lose human rights cases in the European Court to their citizens, and Russia is no exception. But these defeats in court should not certainly be perceived as a loss, because the European Court in this case is a way to look at the domestic structure from the outside, and, ultimately, a careful study and attitude to such cases creates opportunities for reforming the legal and judicial system of the relevant state.

Friedrich Joachim Memmel. One of the tools of exercising human rights and freedoms is undoubtedly the availability of an independent judicial system which can ensure an impartial and independent instance for the protection of rights and freedoms from violation. In fact, the issues of the independence of the judicial system in Europe, for example France, Germany, Poland, Bulgaria, are no less relevant than in Russia. And in many ways the solution of this problem certainly depends on the intentions of the authorities.

Globalization in this sense creates both opportunities and difficulties, in particular, the boundaries of a person's self-identification are blurred, which complicates the search for solutions, since the request for a particular solution is not always obvious and understandable. An individual often no longer understands which group he belongs to. And such a situation creates conditions not for real democracy and politics, but for populism and manipulation, which, naturally, negatively affects the general condition of the society and the state.

Therefore, in order to preserve statehood and sovereignty, it is important to start small, from the local level, involving people in solving local problems and creating conditions for people to identify themselves with the local community.

Nikolay Viktorovich Razuvaev. Basic human needs include the needs for public goods, their satisfaction being stipulated by the Constitution of the Russian Federation. The state cannot be the only producer of such goods, since the state monopoly in the public sector negatively affects the quality of public goods.

Their production should be based of the competitive activities of non-profit organizations. The participation of the state and local self-government bodies in the public sector should be primarily reduced to financing of citizens' expenditures for the consumption of public goods, as well as to the regulation and control of the activities of non-profit organizations.

The constitutional basis for the creation of non-profit organizations based on membership is the right to association guaranteed by Art. 30 of the Constitution of the Russian Federation. The creation of conditions for the citizens to exercise their right to association requires a system of guarantees, including socio-economic, political, legislative and other guarantees. A special role among the guarantees of the citizens' right to association is played by its judicial protection against unlawful actions of the state and local self-government. Such protection should be aimed at applying measures of responsibility to public entities, their bodies and officials in case of violation of the rights and legitimate interests of non-profit organizations or their members.

Maria Georgievna Matskevich. A significant influence on the exercise of human rights in the state is exerted by the circumstance what ideas regarding human rights and freedoms the citizens themselves have. Few people in Russia are informed about what rights and freedoms are enshrined in the Constitution of the RF, and think about it. The results of opinion polls show that about 2/3 of the respondents do not know when the Constitution of the RF was adopted, and only about 10% of the respondents know the date of the adoption of the Constitution. At the same time, the majority does not have information about the circumstances under which the 1993 Constitution was adopted, that is, they do not take into account and do not understand the historical processes that led to its adoption.

The results of the polls also demonstrate the priority of social and economic rights over political rights among our citizens. These results are often used to confirm the lack of the citizens' demand for democratic institutions in the society. However, this is not quite true. On the one hand, we really see that people do not often value, for example, freedom of speech, assembly, association, as the right to social protection, free medical care. On the other hand, when we begin questioning the respondents thoroughly, without being limited to general formulations, we often hear that political rights are something taken for granted.

Another question is whether such citizens' ideas correspond to the reality, but in the minds of the citizens their social and economic rights are infringed more often than the political ones. For example, some opinion polls show that young people in European countries are critical of democracy. Does this mean that they want to abandon democratic institutions? Not at all. On the contrary, the value of democracy in the eyes of the population is growing, but a critical attitude to the work of democratic institutions is also growing, and there is a demand for their change.

At the same time, it is necessary to identify another dangerous social trend: this is the emerging discrepancy between the concepts of "legality" and "legitimacy", since the ideas of what justice is are increasingly contravening the formal legal decisions taken. This situation leads to the undermining of public confidence in the entire institutional system of power, creating a threat to stability. In this situation, every step, every decision determines the further vector of the country's development.

Kimmo Nuotio. In Finland, the institution of human rights and freedoms did not develop immediately and uniformly, either, and even at the current moment it cannot be said to be perfect and to be in no need of further development. The Finnish constitution underwent changes during the 20th century. Initially, the Finnish Constitution of 1919 was largely conservative, focusing on the importance of political rights, protection of property rights. While social, cultural, economic rights were not adequately covered by it. Accordingly, during the reform period of the 1970ies, these rights, the significance of which was already recognized by the international community, were implemented and recognized in practice. Finland became a member of the Council of Europe, joined the European Convention on Human Rights taking it as a model for changing the Constitution of Finland, in particular, changing the section on fundamental human rights and freedoms. The constitutional reform which started in the 1970ies eventually led to the adoption of a new, future- and development-oriented Finnish Constitution in 1999. In particular, the right to a favorable environment was enshrined as fundamental human rights and freedoms, and the fundamental legal provisions received the status of a motivator for the development

of the legislation, in particular the legislation on environmental protection, administrative legislation, and authorization regulation.

It should be also noted that the majority of human rights and freedoms have received and are receiving recognition, regardless of whether they are written directly in the Constitution. After joining the Council of Europe and under the influence of the European Court of Human Rights, Finland came to realize that further development of the institution of human rights was necessary. Under the influence of the Strasbourg case law Finland introduced reforms in relation to the criminal procedure, the executive power, the police, and shortening of the length of court proceedings, which especially affects the trust in the judicial system. But even now there are problems in the field of human rights and freedoms in Finland.

For example, the issues of protecting women's rights, the problem of domestic violence, the search for a new definition of the concept of violence, and others are among the most important and topical in the contemporary world. The need to improve the Finnish legislation regarding the protection of human rights and freedoms is evidenced by one of the latest decisions of the Strasbourg court in relation to Finland, by which the country was found guilty of non-compliance with Articles 2 and 3 of the Convention on Human Rights. The reason was the deportation of a refugee seeking asylum in Finland. The Finnish migration services considered that the produced evidence of the threat to the applicant's life did not prove the existence of a real threat to him, as they are usual for the territory from which he fled. The Strasbourg court pointed out that such a generalized approach did not correspond to the appropriate level of protection of human rights and freedoms, and Finland needed to apply an individual approach.

The third panel discussion "Local Self-Government on the Political Horizon of Russia" was dedicated to the problems of local government in Russia. The participants of this panel were: Emil Markvart[18] (panel moderator), Sergey Alekseevich Tsyplyaev[19], Dmitry Petrovich Sosnin[20], Revekka Mikhailovna Vulfovich[21], Elena Vladimirovna Gritsenko[22], Yuri Albertovich Gurman[23], Patrick Terry[24].

Sergey Alekseevich Tsyplyaev. Local self-government requires people who want to solve their problems independently, firmly standing on the ground, who understand how to do this, and are able to organize themselves. This is the key problem for creation of local self-government, our culture has a low degree of self-organization. The second condition for the implementation of the local self-government system is a sufficient number of legislative grounds, because it is also a system of power, but it differs from the state one in that it does not have an immanent right to coercion, it acts only on the basis of and in compliance with laws.

Laws are adopted by the state authorities, and local self-government bodies act on their basis. Therefore, there is a need for a good legal framework giving a wide space for work. And one more necessary condition for the existence of a local self-government system is the availability of a financial base. In our country, money is traditionally concentrated at the level of the federal government and then returns back in the form of subsidies, subventions and grants, which leads to a situation of control over the actions of local governments in order to control the funds provided by the federation or the region. Thus, strong self-government requires people, powers, and finance.

In the existing vertical system of state authorities, public officials often fail to understand the fact that according to the Constitution local self-government bodies are excluded from this vertical and, therefore, cannot be directly influenced by the power. Although the Constitution provides for all the necessary tools to control the actions of local self-government bodies: laws, funding, and, eventually, party discipline.

But, unfortunately, we do not have the habit and tradition of using these tools, we are accustomed to the way of interaction within the framework of a hierarchically built system from bottom to top. Many people believe that this is the eternal heritage of our country, but this is not so. During the time of the zemstvo power created by Alexander II, the state power did not deal with the issue of economy at all, it was not interested in how zemstvos built the socio-economic relations, solved the problems of

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hunger, education, treatment. Zemstvos created zemstvo schools, hospitals from scratch, and they did everything independently.

As estimated by researchers, the bulk of the budget remained at the local level. The paternalistic idea that everything is born in the center emerged a little later, but it perfectly fell on our psychology. If something is not approved from above, it creates fear. We are brought up in this way, we are used to it. Because of this, the local self-government system is often perceived as a kind of challenge, as a kind of danger, although it is not, in my opinion. The bulk of the issues that citizens should decide for themselves, and this is about 60% of issues, are resolved at the level of local government in developed countries rather than at the level of the state power.

It should be borne in mind that the local self-government system is to some extent an instrument of checks and balances in the relations between the federation and the constituent entities of the RF, in particular, it reduces the risk of strengthening of the power of the regions with a trend to disunite the country in case of weakening of the central power. In this situation, it is more logical for the federal government to rely on local government bodies than to seek to place them under the authority of the regions. As an example of such possible consequences, one can cite Moscow and St. Petersburg which were granted a special status as subjects of the federation, in particular, the opportunity was given to determine the issues of local self-government, which, as a result, led to the fact that local self-government bodies in these subjects were left exclusively symbolically, without real powers and opportunities, that is, these regions completely centralized the power authorities.

At present, the society is getting more complex both economically and politically. During the transition to the post-industrial economy, it becomes extremely diverse in terms of conditions and requires the participation of a free person. As the society becomes more complex, the management system must become more complex as well. It cannot be simple when all commands come from one center. That is why the mankind develops an actually three-level system of public power management: there are two state levels — federation, subject, and one is the local government. Such a three-level system allows taking account of the social diversity and responding flexibly to changes. Therefore, if a country wants to move on, wants to develop a complex society, then it will be necessary to build such a very complex and necessary management system, lower the maximum number of issues to the lowest possible level and refer them to the upper levels of power only if they cannot be effectively solved below or cannot be solved at all.

Another important element necessary for the development of the system of self-government in our country is the ability of municipalities to cooperate to resolve important or complex issues. Because in the absence of such a skill, all these issues will go to a higher level of power for solution, which will not contribute to the development of the institution of self-government.

Dmitry Petrovich Sosnin. Active population is one of the main conditions for ensuring the possibility of strong local self-government in our country. But the municipal authorities themselves should also be an important actor. At present, however, the conditions of their work (in particular, the appointment, rather than the election, of mayors) do not contribute to their activity and taking the responsibility for the development of the territories at the local level. Another problem is that the very decision to create a territorial municipal entity is made at the level of state authorities rather than the local population, for example, in the form of a referendum, which to a certain extent limits the right of citizens to self-organize at the local level to solve local issues.

Revekka Mikhailovna Vulfovich. Municipal entities in Russia are very different; they have different status and different resources. The municipalities of the second level, urban districts, include Russian million-plus cities, and the local self-government in these cities hardly has any power at all, given all our problems and existing shortcomings. However, there are only a few large cities that have used the right to create local self-government bodies and endow them with powers of authority, and this means that they are not ready and do not want to share the power. They themselves perceive themselves as a real powerful subject. And this is also basically a problem, when a city has a population of more than one million people, the decentralization of power is necessary.

In accordance with the European Charter of Local Self-Government, everyone should rely on the principle of subsidiarity of powers of authority which actually starts not from the local self-government, but from the individual level, at which citizens should be independent and self-sufficient, and this requires development of economy which should not again become 80% state. If we go in this direction, we will have still more problems than we have today, since the local self-government is physically objectively unable to provide the basic services absolutely necessary for a normal quality of life.

Within the framework of the problem of control over local self-government bodies by state authorities, the situations when the concepts of control and supervision are mixed with each other or combined

into a chimera called “control and supervision activities” are completely unacceptable. It is one thing when it comes to overseeing the compliance with the laws, that is, the implementation of legal supervision, and quite another thing is control over the rationality of the decisions made at the local government level. The latter is completely unacceptable.

Elena Vladimirovna Gritsenko. Active self-organization being the main feature of local self-government requires certain conditions which have not yet been created so far. This situation is facilitated, among other things, by the truncation of issues of local importance, centralized distribution of finances and the influence of state authorities on local self-government bodies. In general, the possibility of state power interference in the activities of local self-government should be allowed in exceptional cases, when it comes to the emergence of a crisis situation of the inability of local self-government bodies to provide the services required by the population and to resolve vital local issues. The problem is that legal forms of control are often transformed into measures of unlawful interference, in particular, organizational interference in the independence of local self-government, for example, by agreeing on the appointment of the head of a local self-government body which, along with issues of local importance, is engaged in the implementation of certain state powers, or a competitive procedure of the appointment of governors. Thus, conditions are created for the substitution of organizational measures for control measures.

Another important problem within the framework of local self-government and its possible reform is the lack of a clear understanding and idea of who the subject of municipal government is and what it should be like. The concept of a settlement as the main unit of local self-government is gradually being eroded in the course of the latest amendments to the legislation. This is manifested, in particular, by such measures as, on the one hand, the downsizing of urban districts to urban areas in order to bring the authorities closer to the population (changes in the legislation of 2014), and on the other hand, the enlargement of a municipal entity to a municipal district, refusal from the settlement as the main unit of local self-government (changes in 2017, 2019).

What type of organization of local power is the most effective, interesting, and meets the contemporary challenges? It turns out that there is no alternative that is more interesting and suitable for today, because local self-government allows taking account of the existing diversity, allows a flexible approach to solution of many problems and does not cancel the principles of the Charter (European Charter of Local Self-Government of 1985 — ed.) that can be adapted to the new challenges. In this sense, digitalization also provides very interesting opportunities, including from the point of view of awakening this very civic activity through the portals of an active citizen and various forms of local communities. To date, there is no more effective system for solving local issues than local self-government bodies.

Yuri Albertovich Gurman. When we talk about strong local self-government or that it must be strong, it should be remembered that local self-government is one of the foundations of the constitutional system of the Russian Federation, and a whole separate chapter devoted to local self-government is enshrined in the Constitution. That is, on the one hand, the main law formally contains provisions creating all the conditions for local self-government to be strong, and, on the other hand, these provisions are not implemented in practice. In particular, the reason for the weakness of local self-government is the lack of funding, while the lack of the citizens’ initiative is supported by the paternalistic model of public administration.

Unfortunately, the minds of representatives of state power still keep the former Soviet models of relations and governance which in no way contribute to the growth of citizens’ independence, including economic one, and therefore do not stimulate the development of the state’s economy.

As an example, I would like to cite a small populated locality in the USA, a local government representative of which came to the settlement of Chelyabinsk region as part of sharing of experience. A small American village with the population of about 7.5 thousand people has ten hotels, six representative offices of federal universities, its own court, its own hospital, its own theater. And the inhabitants of this village are exclusively independent in the distribution of their budgets and in making decisions. Local municipals do not consult with state officials, much less with federal authorities. This is the effect of empowering people at the local level.

Patrick Terry. Germany currently has certain problems at the local self-government level related with the fact that people have a certain mistrust regarding their ability to influence the decisions made in any way, in particular, there is an opinion that everything is solved at the federal power level. This entails a lot of problems with the active nomination of candidates to local self-government bodies, especially in rural local settlements. We have to conduct explanatory work, talk about how important it is to take part in solving local issues, talk about our own experience. Thus, now we are faced with an important task to reverse this trend of disbelief, to convince people that a large number of important decisions can and should be made at the local level.

However, the opposite problem is a certain overload of local self-government with the number of issues and problems to be solved by them, including with their own budgets, caused by the transfer of a significant number of issues to the local level. In this situation, the local self-government bodies would obviously benefit from the help of the federal authorities, in particular financial one.

It should be also noted that strong local self-government can only exist under the conditions when the community does not close itself, builds open relationships with the neighboring communities and when municipalities know how to unite to solve common issues or to share experience with each other regarding the solution of particular problems.

Emil Markvart. Experts have generally agreed that the main condition for effective local self-government is active self-organized population, financial resources and organizational independence of local authorities. However, there are problems in all these areas today, one of them being the disbelief of the population concerning the ability to influence anything. With regard to the powers of local self-government, the problem is manifested in the fact that a large number of issues that are traditionally solved at the local level, for example, health care, education, have been removed from the list of local functions; a large number of issues have been delegated or withdrawn for resolution at the level of the subjects of the RF. Thus, the principle of local self-government autonomy has been destroyed.

Regarding the financial independence of municipalities, it should be noted that even in an economically favorable period, 96% of municipalities were subsidized, not because of insufficient funds, but in connection with the applied mechanism of their withdrawal and centralized distribution by state authorities. It is difficult to talk about the organizational independence of local self-government, since it is deprived of the right to make decisions on determining its own structure, the procedure for forming local self-government bodies, due to the participation of state authorities in determining the candidacy of the head of a municipal entity. The consequence of such excessive state interference in local issues is stagnation and degradation of territories: the more the state interferes, the less is local initiative, the population does not believe that it can change anything, and just leaves these territories if possible.

The conference participants continued the discussion on **December 10, 2019**, when the panel discussion **“Federalism in the Contemporary World”** (moderator — S. A. Tsyplyaev) was held for a wide student audience. It was attended by A. A. Zakharov, A. N. Medushevsky, F. Memel, S. M. Shakhrai, in whose speeches the theme of the previous day was developed.

City Methodical Association as an Institution of Professional Development of Employees of State-Financed Social Welfare Facilities of St. Petersburg

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ABSTRACT

The article discusses a special form of professional development of employees of state-financed social welfare facilities: a methodological association which is a public methodological collegial body consisting of representatives of the professional community. The experience of organizing and working methodological associations is presented on the materials of city methodological associations of leaders and specialists of social welfare facilities of St. Petersburg. A special place in the article is highlighted by the work of the city methodological association of managers and specialists of personnel departments, specialists in standardization and labor norming as a unique form of work in the field of professional development of specialists of personnel departments, specialists in regulation and labor norming.

Keywords: social protection, methodological association, labor norming, personnel department

The sphere of social protection of the population is currently witnessing active processes of institutionalization and professionalization[1]. The institutionalization of professional activities is the formation and consolidation of norms and organizational structures.

Professionalization is raising the status of a professional group by limiting the possibilities of entering the relevant field of professional activities through the requirements to the qualification[2]. The enactment of Federal Law No. 442-FZ dd. 28.12.2013 "On the Fundamentals of Social Servicing of Citizens in the Russian Federation" and the relevant bylaws, the development and implementation of professional standards in the field of social protection of the population, many of them providing for new positions and areas of professional activities (for example, professional standards of "Specialist in work with the family", "Specialist in rehabilitation work in the social sphere" and others), have become important stages of these processes.

The formation and consolidation of the requirements to employees of social protection organizations in regulatory legal acts incentivized many employees to training and self-improvement, actualized the need to organize work with the staff, to provide effective information, methodological support of social protection. Informational and methodological support allows accumulating, generalizing, disseminating the best practices, ensures the continuous development of professional skills of specialists, and contributes to their innovative activities.

To improve the quality, efficiency and effectiveness of social services through the use of advanced technologies and innovations, to assist the organizations of social protection of St. Petersburg population in the exchange of experience in accordance with the regulation of the Committee on Social Policy of St. Petersburg dated 12.11.2019 No. 798-r "On the Activities of City Methodological Associations of Managers and Specialists of Organizations Providing Social Services to the Population of St. Petersburg", the Regulation on the activities of city methodological associations (hereinafter — CMA) of managers and specialists of organizations providing social services to the population of St. Petersburg was approved.

The regulation on the activities of city methodological associations of managers and specialists of organizations providing social services to the population of St. Petersburg stipulates that CMAs are public methodological collegial bodies, consisting of representatives of the professional community of managers and specialists of organizations providing social services to the population of St. Petersburg. CMAs coordinate the methodological work of organizations providing social services to the population

[1] See: *Grigoryeva I.* Transformation of Social Work in Russian Consumer Society // The Journal of Sociology and Social Anthropology (JSSA). 2011. No 5. Vol. 14. Pp. 287–297; *Parfenova O. A., Malyshev A. G., Popova V. V.* What Does It Mean to Be a Qualified Employee? : Reconstruction of the Ideas of Social Service Workers // Social Policy and Sociology. 2019. No 1 (130). Vol. 18. Pp. 124–131.

[2] See: *Selchonok A. K.* The Professional Standard of a Specialist in Social Work as a Resource for the Cultural Legitimation of the Profession // Journal of Social Policy Studies. No 1. Vol. 13. Pp. 164–173.

(analytical, expert, informational and advisory and methodological support) and are formed from the most experienced and proactive managers and specialists of organizations providing social services to the population and other organizations, including scientific research organizations, higher educational institutions of St. Petersburg. The activities of each CMA are coordinated by a supervisor from among the specialists of the Committee on Social Policy of St. Petersburg.

Such a form of methodological support for professional development as CMA appeared in organizations of social protection of the population more than ten years ago, but at the time these were CMAs of certain groups of specialists, sociologists, for example[3]. Today we can talk about the systemically organized work of CMAs which cover both professional groups of workers directly involved in providing social services to citizens (for example, psychologists, managers and specialists of organizations providing social services to families and children), and workers making the infrastructure of the institution of social protection of the population: specialists in the regulation and remuneration of labor, employees of personnel services, sociologists, specialists responsible for professional development and the organization of coaching. Today there are total fourteen CMAs, among them: CMAs of sociologists, CMAs of managers and specialists of personnel services, specialists in labor norming and remuneration, CMAs of managers and specialists providing social services to graduates of institutions for orphans and children deprived of parental care, CMAs of managers and specialists of organizations providing social services to elderly and disabled people, and others.

CMAs analyze the relevant professional needs of specialists of the social sphere. Specialists being CMA members study scientific literature, regulatory legal and methodological documentation, advanced practical foreign and domestic experience in identifying the best methods and technologies in the field of social services for the population.

As part of the work of CMAs, working groups are created consisting of the most experienced specialists with the participation of representatives of the scientific community, unified methodological approaches to solving topical problems arising in the system of social services for the population are developed, technologies and methods effective for use in the social sphere are developed and tested, methodological seminars, meetings and conferences on topical issues of professional activities are held, and methodological materials are also developed and updated.

There are certainly special CMAs focused on workers of the "infrastructure" of organizations of social protection of the population. While methodological associations, for example, for teachers or even specialists in social work are traditional, methodological associations of specialists in personnel, specialists in labor remuneration and norming are an institution that has practically never existed before. In this regard, it is advisable to consider the work of these "non-traditional" CMAs.

To provide effective assistance to employees of personnel services, as well as specialists in labor remuneration and norming of state institutions of social protection of St. Petersburg, the Committee on Social Policy of St. Petersburg gave these employees of state institutions of social protection of the population of St. Petersburg the opportunity to create CMAs, their major purpose being ensuring their needs in mutual professional communication and enrichment, exchange of experience, as well as the development of common approaches to solving urgent professional tasks.

The creation of CMAs was preceded by the organizational work of the organization, on the basis of which CMAs were created (St. Petersburg "Family" City Information and Methodological Center State Budgetary Institution), and the Committee on Social Policy of St. Petersburg. For example, in March 2019, an organizational meeting was held on the creation of a city methodological association of personnel service workers, specialists in labor norming and remuneration of social protection institutions. The meeting discussed the issues of organizing the work of CMAs. The decision was made to create two sections within the CMA: a section of personnel service employees and a section of specialists in labor norming and remuneration. CMA participants can be members both of one section or both sections at the same time. The sessions of the sections are conducted by different moderators, but they are coordinated in time so as not to allow simultaneous holding of meetings of two sections on the same day, thereby providing the opportunity for CMA members to participate in all meetings of the CMA sections.

Organization of the work of the section of personnel service employees

A human resources specialist is faced with a wide range of issues related to staffing, formalizing of employment relations with employees, training of the personnel, maintaining personnel records and other equally important and relevant areas of activities. In the recent years, there have been changes in

[3] See: *Malyshev A. G., Parfenova O. A.* Sociologist in the Space of Public Social Service: the Professional Distinctiveness, Challenges and Opportunities // Journal of Social Policy Studies. No 4. Vol. 13. Pp. 547–562.

the personnel work related with the adoption of a considerable number of regulatory legal acts in the field of employment relations which influenced the work of the personnel service of the institution of social protection of the population. The personnel employee was to adjust the local regulations and employment contracts with employees in the organization regarding every change. Every specialist is daily faced with the task of how to correctly and effectively organize his work in the large flow of regulatory acts, how to prevent violations in the maintenance of personnel documentation in the development and execution of mandatory documents, as well as in the application of regulatory legal acts on the legal regulation of employment relations with employees

Very important in the work of a human resources specialist, like most professionals, is the desire and opportunity to improve in his work, to develop, the opportunity to participate in seminars and webinars on relevant topics, to share experiences with colleagues. And even with a good organization of HR record management in an institution, the specialist needs to improve his professional level.

The section of personnel service workers included 43 people. The section was preceded by a study of the professional needs of its participants. With account of the results obtained, a work plan for the section was developed. The main purpose of the work of the section of personnel service employees is to contribute to the creation of conditions ensuring high-quality effective professional activities in the field of personnel records management.

To accomplish the purpose, it is necessary to solve the following tasks formulated at the organizational meeting:

- promotion of scientific and methodological support and practical assistance to expand knowledge in the field of HR record management and improve the level of professional competence of the personnel in the HR department;
- study and exchange of experience in issues of HR record management;
- development of methodological products regarding HR record management.
- In 2019 the meetings of the section of personnel service employees were held on the following topics:
- structure and content of an employment contract (effective contract) of employees of the state institution of social protection of the population of St. Petersburg;
- practice of concluding an employment contract (effective contract) with an employee of a state institution of social protection of the population;
- certain difficult issues in the application of professional standards in state institutions of social protection of the population of St. Petersburg;
- protection of personal data of employees of state institutions for social protection of the population.

The meetings devoted to the employment contract (effective contract) considered the normative legal acts and methodological documents regulating the formation of employment contracts. The participants of the section of personnel service employees presented their experience of concluding employment contracts in state institutions of social protection of the population.

A special place in the work of the section of personnel service employees was given to the application of professional standards, which was especially relevant in 2019 in connection with the completion of the implementation period for plans of organizing the application of professional standards on 01.01.2020. The expanded meeting of the section of personnel service employees dedicated to this issue considered the issues of determining the need for training of employees of state institutions of social protection of the population in connection with the application of professional standards and the possibility of training of the personnel for state institutions of social protection of the population, as well as procedural issues related with the introduction of changes in the personnel documentation of state institutions of social protection of the population in application of professional standards.

The meeting of the section of personnel service employees on the protection of personal data was attended by the deputy head of the department for the protection of the rights of subjects of personal data and supervision in the field of information technology of the Roskomnadzor Administration for the North-West Federal District. Such a meeting was necessary for employees of personnel services, since they had an opportunity to discuss complex issues of protecting the personal data of employees of state institutions of social protection of the population.

In 2019 the participants of the section developed the “Employment” Methodological Recommendations for employees of personnel services. The members of the section took part in the discussion of the draft Methodological Recommendations on the formation of personal files of employees of public institutions under the jurisdiction of the Committee on Social Policy of St. Petersburg.

At the expanded meeting of the section of personnel service employees at the end of the year a survey was conducted which demonstrated that 87.5% of the section members were satisfied with the topics of the seminars held within the section of personnel service employees.

In 2020, many changes are expected in the normative legal acts regulating the issues of personnel work, the period of introduction of electronic work books begins, which means that the personnel service employees have a lot of work to do in applying innovations in practice; accordingly, the section of personnel service employees will be in demand.

Organization of the work of the section of specialists in labor norming and remuneration

The activities of the section of specialists in labor norming and remuneration are structurally carried out under the direction of the head of the section and under the supervision of the supervisor from the Committee on Social Policy of St. Petersburg. The activities of the section are organized in such a way as to obtain the most useful result. It should be focused and stimulate participants to provide reliable information to form effective solutions.

The work of the section was initially based on informal interaction: when the discussion is not strictly regulated and the level of involvement of the participants does not affect the assessment of the effectiveness of their work in the institution. This reduces psychological inertia and creates favorable conditions for information sharing.

The topics of the work of the section of the specialists in labor norming and remuneration are selected so as to touch upon really significant, so far unresolved issues in the area of the section's activities. In 2019, for example, the following topics were selected:

- substantiation of inclusion of the work performed by the institution into the state assignment (to date, there is no procedure of substantiating the inclusion of the work, and most assistance provided to an indefinite circle of persons [work] is carried out by institutions without adequate funding);
- formation of guidelines for determining the number of staff members of institutions such as the Center for the Promotion of Family Education (hereinafter referred to as the CPFE).

In 2019, the formation of methodological recommendations for determining the number of employees in institutions such as CPFE was the topic that demanded the most active work of the section members. Work on this document began in June 2019. The Section met every month; thus seven meetings were held by the end of the year. Each meeting was attended by ten to twenty-five participants representing an average of nine institutions each time. This composition turned out to be necessary and sufficient for productive work on the chosen topic. The participants provided unique information about the specifics of the organization of work in institutions of the CPFE type. Valuable comments were also received from the invited representative of the Committee on Social Policy of St. Petersburg directly supervising the work of the CPFE. The result of the work of the section of specialists on labor norming and remuneration was the draft Methodological Recommendations for the staffing of institutions such as the Center for the Promotion of Family Education. Two institutions were selected to test this project.

The problem-oriented approach to organizing the work of the section of specialists in labor norming and remuneration proved to be successful due to the following elements: the choice of a specific goal significant for the functioning of institutions and the identification of a specific form of the work result (Methodological recommendations), informal, but at the same time regular nature of meetings of the section participants, attraction of experts capable of making a significant contribution to the final result of the section's work on the selected topic.

References

1. *Grigoryeva, I.* Transformation of Social Work in Russian Consumer Society // The Journal of Sociology and Social Anthropology (JSSA). 2011. No 5. Vol. 14. Pp. 287–297. (In rus)
2. *Malyshev, A. G., Parfenova, O. A.* Sociologist in the Space of Public Social Service: the Professional Distinctiveness, Challenges and Opportunities [Sotsiolog v prostranstve gosudarstvennoy sotsial'noy sluzhby: spetsifika professii, vyzovy i vozmozhnosti] // Journal of Social Policy Studies. No 4. Vol. 13. Pp. 547–562. (In rus)
3. *Parfenova, O. A., Malyshev, A. G., Popova V. V.* What Does It Mean to Be a Qualified Employee? : Reconstruction of the Ideas of Social Service Workers // Social Policy and Sociology. 2019. No 1 (130). Vol. 18. Pp. 124–131. (In rus)
4. *Selchonok, A. K.* The Professional Standard of a Specialist in Social Work as a Resource for the Cultural Legitimation of the Profession [Professional'nyi standart spetsialista po sotsial'noy rabote kak resurs kul'turnoy legitimatsii professii] // Journal of Social Policy Studies. No 1. Vol. 13. Pp. 164–173. (In rus)

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