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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.

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Opening Remarks by the Editor-in-Chief

The current issue of The Theoretical and Applied Law Journal was formed in the complicated conditions of the COVID-19 coronavirus infection pandemic which had a complex adverse effect on various spheres of private and public life of citizens, significantly bringing down the level of the publication activity that was most directly stimulated by our journal. To prevent the threat to life and health of people created by the pandemic, a number of previously announced events were canceled. For example, originally scheduled for April 2020, the Second Interuniversity Scientific and Practical Baskin's Readings Conference "Changes in Law: Innovation and Continuity", to the organization of which our friends and colleagues, including members of the editorial board of the journal, made a truly invaluable contribution, was postponed to October. Let us hope, however, that this circumstance will not in the least affect the relevance and substantive value of the issues planned for discussion at the conference.

In the pandemic situation we had to face another serious problem that affected the productivity of creative work, namely, the delayed publication of new issues of traditional "paper journals", resulting from the remote work of scientific institutions and higher educational institutions, under the auspices of which these journals are published. The need to provide the need for prompt and high-quality publications once again confirms the advantages of online journals coming out in an online format, makes them an indispensable tool for research communication at the present stage. In general, the events taking place in the world and in our country have become a chance to draw the attention of the international community of scientists to the importance of modern technologies in sharing the experience and the results achieved.

This refers, in particular, to holding conferences, scientific seminars and other events in a remote format. It can be argued without exaggeration that the North-West Institute of Management is committed to the widest introduction of digital technologies in research work. We believe that readers will be interested in the review of the online conference "Legal Tech: Ensuring the Rights and Legitimate Interests of Citizens in the Digital Environment" prepared by Editor-in-Chief of the journal I. K. Shmarko which was organized on the Zoom platform by the North-West Institute of Management and the Statutory Court of St. Petersburg. This conference dedicated to the urgent problem of digitalization of legal systems and the use of electronic means in various spheres of legal regulation became a unique event in itself, since, as far as we know, no events of this kind with the participation of first-class specialists (theorists and practical experts) have been held so far.

There is no doubt that the experience of overcoming the consequences of the coronavirus infection pandemic will become a powerful impetus for a serious innovative movement in practice. The possibilities of digitizing the institutions of private and public law are already being discussed. The ideas of electronic democracy, digital government, cryptocurrencies and a universal database (Big data) that have become well-known to lawyers are being supplemented with new topics evidencing, according to the fair remark of Chairman of the Constitutional Court of the Russian Federation V. D. Zorkin, that the use of high technologies includes increasingly wide spheres of public life. Against this background, one should not, however, disregard the traditional priorities and highest values of law, namely of a person, his freedom being developed in constitutional rights and individual freedoms.

The publications of the authors of the journal are devoted to these well-established, but invariably important issues. In light of the above, of special interest is the article by K. Nuotio "Human Rights and Fundamental Freedoms as Exemplified by the Constitution of Finland". Considering the problem of constitutional rights and freedoms in a broad historical retrospective, the author sheds light on the formation and development of this institution: from the subjective rights developing within the framework of specific legal relations to their normative consolidation in the provisions of the Basic Law. On the basis of the findings, K. Nuotio draws a fundamental distinction between human rights and freedoms, on the one hand, and fundamental rights, on the other hand, which is of significant value for the domestic constitutional doctrine which does not clearly emphasize this distinction.

The postnonclassical legal consciousness which correlates with the contemporary epistemological trends is developed by the papers by V. A. Slyshchenkov "Concept of Freedom: History and Modern Times" and O. A. Halabudenko "Norms of Law in the Focus of the Theory of Constructivism". Methodological constructivism (or radical constructivism as its strong version) is known to be the dominant attitude both in social and humanitarian cognition and in mathematics and mathematical logic, where it was established owing to the now classical works of L. Brouwer and P. Martin-Löf. In recent years, the

constructivist turn has also impacted the legal sciences, opening both new horizons for their development and creating serious challenges to the principle of objectivity of scientific truth. The conviction in the total constructedness of legal phenomena, in our opinion, is fraught with the loss of the subject of legal science and blurring of the boundaries that separate jurisprudence from ideology, if not social myth-making. In such a situation the natural way out is to recognize the invariability of the ontological foundations of law, the major one among them being the category of freedom serving as the conceptual basis and essential characteristic of law. This conclusion receives its theoretical substantiation in the liberal-conservative views developed by the best representatives of Russian and European legal thought both in the past and today.

Various aspects of modern constitutionalism, as well as constitutional rights and freedoms of man and citizen, are considered in the articles by M. A. Kashina and A. A. Pyakhkel "Ensuring the Implementation of the Principle of Gender Equality de jure and de facto: Experience of the Countries of the European Union" and S. L. Sergevnin "Brief History of the Constitutional and Judicial Assessment of the Problems of Federalism in Russia". It should be noted that the last work of the journal continues the publication of the materials of the Third Conference "The Constitution of Russia Yesterday, Today, Tomorrow", the end of the review published in this issue, as promised. In general, given the variety of the topics, the content of the regular issue of The Theoretical and Applied Law Journal confirms the main idea that being a fundamental legal category, freedom remains invariably significant for serious researchers, and its study requires joint efforts of representatives of all legal disciplines.

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Nikolay Viktorovich Razuvaev

Human Rights and Fundamental Freedoms as the Basis of the Finnish Constitution

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ABSTRACT

In the article, the author describes the history of the formation of constitutional legislation in Finland and, in particular, notes the key events and participants in the process of constitutionalism in the country. The author describes the Finnish arrangement for monitoring that the adopted laws comply with the Finnish constitution and its provisions of fundamental rights as well as the human rights obligations of Finland. Of particular importance in the article is the description of the development of the institution of fundamental human rights and freedoms, their form of consolidation in the legislation, as well as the shrinking role of customary law. The author emphasizes the important role of the provisions of the Constitution not only in guaranteeing the realization of rights and freedoms, but also in providing guidance for the subsequent development of legislative regulation on various fields of law, including the rights and duties relating to providing of a healthy environment.

Keywords: Constitution of Finland, fundamental human rights and freedoms, constitutionalism, neo-constitutionalism

1. From old Swedish constitution through the times of the Russian rule to the Constitution of the independent republic of Finland

Compared to Russia, the Finnish history of constitution and constitutional law is less dramatic, even though the political history could indicate the opposite. Namely, the old Swedish constitutional laws continued to provide the basis for the Finnish legal order even during the time following the Napoleon wars when Finland was annexed to Russia in 1809. In fact the much criticized Swedish constitutional law of the time gave the ruler almost absolutist powers, but on this occasion it was good news for Finland, since otherwise the new ruler, Russia, might not have granted Finland the autonomy in legal terms. The Swedish constitution was reformed in 1809 whereas in Finland the former Swedish constitution remained valid still more than 100 years.[1] The old Swedish constitutional acts were not yet "enlightened"; they were not built on the ideas of separation of powers or of the sovereignty of the people. During the times of the Swedish rule, the entire concept of law was still mainly premodern, and also the legal system was still non-professional as the legal education was underdeveloped and most of the judges lacked legal education.

The Enlightenment period had raised the issue of freedom rights, but it took a long time before a modern view on the constitution was developed. One line of the development was a constitutionalist reading of the old Swedish constitution, especially towards the end of the 19th century. There was, however, some artificiality involved since the old Swedish constitution played out between the king and the estates, and the point of view of an individual was mainly absent.[2] Anyway, the modern view already entailed the idea that part of the constitution were the rights of the individual which were rights also and especially vis-á-vis the state authorities.[3]

In terms of the constitutional development, first the Constitution of the independent Republic of Finland (Form of Government, 1919, together with the other laws of constitutional rank) formed the permanent basis of a liberal legal order in Finland. As mentioned, the roots of constitutionalism can be traced back to the old Swedish law, but a long formative period was required before the solid basis could be achieved.

At times also the already granted rights were weakened which can be seen for instance from the fact that the 1774 (Swedish) regulation on the freedom of press continued being formally valid, but the

[1] Paavo Kastari, Suomen valtiosääntö, SLY, 1977, p. 41–42. The legal and political history of the period 1809–1917 has been researched extensively, and we only can refer to a few sources. As regards the political history, see Osmo Jussila, Suomen suuriruhtinaskunta. WSOY 2004. As regards the constitutional law history, see, e. g., Antero Jyränki, Lakien laki, Lakimiesliiton kustannus 1989. As regards the history of fundamental rights during that period, see, Veli-Pekka Viljanen, Kansalaisten yleiset oikeudet. Tutkimus suomalaisen perusoikeuskäsityksen muotoutumisesta autonomiakaudella ja itsenäisyyden ensi vuosina. 2. uudistettu painos. Lakimiesliiton kustannus 1988. A text-book on the constitutional law of Finland, see, Jaakko Husa, The Constitution of Finland. A contextual analysis. Hart 2011.

[2] Viljanen 1988, p. 42–43.

[3] Kastari, ibid,. p. 335.

new authority, the Russian tsar gave instructions which narrowed it down. Later a national system of censorship was introduced, and even one that was regulated by a decree in 1829.[4] During the 19th century in Finland the criticism was mainly directed against the political censorship, whereas it was still regarded rather natural that the freedoms themselves could be limited for instance by rendering it punishable to use the right of free speech a certain way.

After five decades of *Stillstand*, in 1863 the tsar Alexander II finally invited the House of Estates again to convene, and a new decree on the freedom of the press for Finland was enacted in 1866. This ended the practice of censorship, but left still room for *ex post* control of the press. The criminalisations limited effectively the exercise of the rights. The ups and downs of the freedom of press in Finland continued until the end of the Russian empire and the October Revolution, and to some extent even the days after the independence.

The legal situation could also be illuminated by looking at the development of the liberty of occupation, that is, the freedom of trade. Finland was not an exception in that traditionally the labor force was organized in guilds which governed the work of the craftmanship. During the 19th century, especially in the 1840's, this system was increasingly being criticised in favor of the freedom of trade. J. V. Snellman was one of the critics who claimed that the guild system was harmful as it protected the minority of the craftsmen, while leaving the majority of them in poverty. The system led to a shortage in production and products had to be imported to cover for the inefficiency. Snellman also demanded that the prohibition to trade land property be repealed since it slowed down industrialisation.[5]

Only when Alexander II started in Russia his liberal reforms which aimed at turning Russia into a rule of law state, progress towards freedom of trade became possible in Finland. Besides that, changes in the demand of the international market created opportunities to export more wood products, but the mercantilist regulations hindered the ability to make full use of those opportunities. Alexander II was aware of these problems and introduced his reform policy, which had a liberal spirit.[6] Many of the reforms introduced created at least some of the basis of a market economy. For the Finnish economy, the liberalization of the sawing industry was especially relevant. The liberty of occupation was realized, albeit not entirely.

It is worth noting that in the "old world" in which the society was organized in guilds and in estates, the breakthrough of new liberal bourgeois rights required that the former privileges be limited or abolished. The conservatives often rather defended the legally granted privileges than fought for reforms. The liberal reforms meant significant progress since the labor force was freed from the mercantilist controls and the poor for instance got the right to move to another municipality. Also the control of the vagabonds became more loose.[7]

Only in the 1870's and 1880's was the term 'fundamental right' introduced in the vocabulary of constitutional law theorizing by two scholars, Leo Mechelin and Robert Hermanson. It had also established itself in the work of the House of Estates. The core basic rights included protection against unlawful detention, right of access to a competent court which was determined by law, and freedom to buy land.[8]

The old laws of Sweden-Finland did not entail developed lists of the rights of the individual. However, in the legal tradition some of such rights had been present for centuries, as could be proven by the fact that the legislature more or less expressly recognized such rights. It took a long time, during the period of Russian rule, to fully implement a system of rights. In this regard the constitution-like Act on freedom of speech, freedom of assembly and freedom of association from 1906 was a landmark.[9] The years 1899–1905 and 1908–1917 are known for the efforts of the Russian rulers to 'russify' Finland and to do away with the separate constitutional identity of Finland.

The Russian revolution led to the foundation of the Soviet Russia whereas Finland gained independence in 1917, and in 1919 the new Finnish Constitution entered into force. It did not really break up with the tradition, but rather built on the long-term historical tradition. No rights were abolished, but new were added and some previous ones were reformulated and broadened to correspond to the societal development. Many of the rights had earlier been granted as customary law. Also some influence of foreign law was visible.

The Constitution of 1919 stated that Finland was a Republic and that supreme public power belonged to the people who are represented by the democratically elected Parliament. The legislative power was

[4] Cf. Riku Neuvonen, Sananvapauden historia Suomessa. Gaudeamus 2018, p. 98–112.
[5] Jukka Kekkonen, Merkantilismista liberalismiin. Suomalainen lakimiesyhdistys 1987, p. 31–37.
[6] Kekkonen, ibid., p. 44–46.
[7] Kekkonen, ibid., p. 152–154.
[8] Hallberg, Pekka et al, Perusoikeudet, Oikeuden perusteokset, WSOYpro, Helsinki 2011, p. 32.
[9] Esko Hakkila, Suomen tasavallan perustuslait, WSOY 1939, p. 33–34.

exercised jointly by the Parliament and the President of the Republic. The highest executive power belonged to the President as well, and besides the President there was a Government which consisted of ministers. The adjudicate authority, in turn, was given to the court system, headed by the Supreme Court and the Supreme Administrative court. The presidential powers were rather central which at least partly reflects the fact that the heavy civil war in 1918 had cast some shadows as regards the idea of giving the Parliament a leading role in the governance of the society.

Anyway, the Constitution of 1919 was one that was committed to the basic values of republican government, and a list of fundamental rights of the citizens was a central part of the Constitution.[10] The provisions concerning the rights and liberties of the individuals did not maybe contain many surprises, but considering the time of the enactment, they were progressive and they even had some steering effect as regards the following legal development. The provisions concerning the freedom of religion, for instance, were significant, and they paved the way for the legislation on the matter. The Act on that entered into force in 1922.

Freedom of association was granted, as well as freedom of speech, which included the prohibition of any censorship concerning the printed media. People were also granted the right of organizing public meetings without prior permission. The private property was protected which meant that expropriation only was lawful in case of a full compensation. The language rights were granted to both Finnish and the Swedish speakers. The Constitutions included a provision stating that no noble ranks would be awarded in the republic.

We could summarize the development of the understanding of the rights of the individual that a certain way of seeing the role these rights have was partly linked to the historical roots of those rights and to the societal and political debates, circumstances and developments. Besides that, the Hegel-inspired political theorizing of the statesman Johan Vilhelm Snellman presented a system of rights a mature state would be built on. German idealism influenced the Finnish legal scholarship of the time. But still more important was the constitutional law theorizing which included detailed comparative studies. This meant that an understanding of a modern constitution and its central elements for Finland was formed. Amongst the scholars Leo Mechelin is most often mentioned. He was both a scholar and an activist who was the first to raise the issue that the citizen's rights should be guaranteed also vis-á-vis the legislature.[11]

The debates and deliberations first in the House of Estate and later, since 1906, in the one chamber Parliament, paved the way for a national Finnish approach of the system of rights. The liberal reforms which narrowed down the mercantilist forms of governance and which instituted a liberal market were important in introducing a new type of social order which paved the way for a democratic form of governance based on a system of equal rights. Since the Reds were defeated in the civil war, it was clear that the Constitution of the new Republic was to be based on non-socialist premises.

The content of the Constitution was a compromise, and after some hurdles were passed, it could be enacted. The main author of the Constitution was professor Kaarlo Juho Ståhlberg, who also later became a president of Finland. The Constitution itself had a long life since its central contents stayed valid for almost a century. An amendment concerning the new bill of rights was introduced in 1995, and the new Constitution entered into force in 2000.

If we again refer to the freedom of press and freedom of speech, we may note that the freedoms continued to be somewhat limited. During the Russian times the rulers were worried about Swedish influence, and later the Russian rulers were worried about granting any privileged positions to Finns compared to other parts of the empire.

In the 1920's, the supervisors of the press went against social democratic and socialist materials, and the forbidden Communist Party went underground. In the 1920's, the Agrarian Fascist movement of Lapua started its activities, following the model of Mussolini in Italy, and in 1930 the activists of that movement destroyed unlawfully a communist press in Vaasa. The men of the Lapua movement went, however, later too far, but the authorities managed to cut its influence and restore a government through law.

Even this brief summary of some elements of the legal reality tells that the rights of the individual, if we take the example of freedom of speech and freedom of expression, did not become easily, without struggles and without limitations. During the early years the fundamental rights granted in the constitution were not really regarded directly applicable, but they were merely setting limitations and requirements to the legislative procedure. This changed in fact first in the 1990's.

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[10] See, generally, Hallberg, Pekka et al, Perusoikeudet, Oikeuden perusteokset, WSLT 2005.

[11] Viljanen, p. 64.

Democracy and freedom of speech are mutually dependent and the limitations to the freedom of speech were marking also problems of democracy. We speak today of hate speech as if it were a new phenomenon, but in the circumstances of the 1920s and 1930's, incitement to hatred was common, and even legislation contributed to the hatred.

The Constitution of 1919 allowed for laws of exception to be made, and this opportunity was also widely used. It introduced an element of flexibility into the legal system, but it as well relativized the idea of a constitution which would define the core of the state structure and the legal system. Some of the old privileges continued to be valid, so that the Constitution did not completely clear the tables.

Above we have reported on the protection of the rights of the individual, and the ways a system of rights was developed. This development was boosted after WW II also by the international development especially within the frames of the United Nations. The Declaration of Human Rights (1948) was followed by binding international legal instruments such as the International Covenant on Civil and Political Rights (1966) as well as the International Covenant of Economic, Social and Cultural Rights (1966).

Finland signed and ratified the central UN human rights conventions rather fast, and this required a substantial domestic work with legal reforms. Finland was also actively participating in the Nordic legal and legislative cooperation which had long roots but which became politically highly ambitious in the 1960's and 1970's. Finland also participated in the international activities of the Council of Europe, without formally being a member. Only when the iron curtain fell, Finland joined the Council of Europe and its Human Rights Convention, and started the preparations for joining the European Union. Finland joined the European Union in 1995, together with Sweden and Austria.

These developments were significant in the sense that both of these systems include a court which has a particular 'constitutional' role as they both interpret the law in a transnational context but in a way which has a legal effect also internally as regards the Finnish legal system. The ECtHR system was revised in 1998 when the new Court started its activities.

This constitutional development has paved the way for strengthening the role of the courts not only in the protection of the rights of the individual, but more generally in increasing opportunities for non-application of ordinary laws.[12] In Finland this shift of balance has still been rather moderate. The full story began already earlier.

Towards the 1970's it had become clear that the Bill of Rights in Chapter II of the constitution was outdated and no longer reflected the needs of the society and the existing legislation. The social critical movements which became active in all of the Western world were demanding better protection of rights and more efficient limitation of the exercise of public power. There were plenty of issues to be raised in Finland, which maybe lagged behind the other Nordic countries in the welfare developments.

The social, economic and cultural rights became important together with the steps toward a welfare society and welfare state. The balance between the state and individual had gone wrong, and reforms were started to grant rights to new groups, such as men in the military service, prisoners, patients in mental hospitals. All this could no longer be left to the benevolence of the administrators. The social and legal critique contested the idea of "administrative power" as justifying rights-affecting decision in closed institutions.

As 1970's was the period when the rights of the individual were in many ways strengthened on the level of legislation, including also new types of laws, such as consumer protection, the changes on the level of constitutional law took more time. The preparations for to reform the Constitution took still a couple of more decades.

This may, however, not have been so detrimental. It may namely have been easier to reform the constitution and formulate the provisions on fundamental rights anew, when at least some of the new contents already had some backup on the level of the ordinary laws. Otherwise that progressive and future-oriented function of the bill of rights might be overburdened and leave people disappointed if the promises of the constitution cannot be lived up to. In some sense, thus, the constitutional reforms may be easier after the fact. At least in the case of Finland, the processes of law reform were parallel rather than top-down. Reforming ordinary laws pawed the way for a constitutional reform, which again strengthened the law reforms. During the last decades we have experienced a kind of dialectics in this respect.

As an example we could mention the constitutional law provision on the environmental protection in 20 § of the Constitution (2000). The paragraph entails two parts, and the first of them deals with the duty protect the environment. Thus, instead of using the language of right, the provision states a common responsibility on the environment. The second part of the provision states that the public power needs to secure for everyone the right to a healthy environment as well as the opportunity to influence

[12] Jääskinen, Niilo, Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia. Yliopistopaino, Helsinki 2008.

in the decision-making on the own environment. As a result we can see that the provision sort of programs the legislature to take action aiming at securing the preservation of the environment. Thus, the building up of the institutions and regulation needed for environmental protection are an elementary part of living up to such tasks. From 1980's onwards the substantive law on environmental protection has been rapidly developed. Thus, the new constitutional law provision was not the start of it all, but it reinforced and gave an extra boost for working on these issues. The provision was and is symbolical, but is also has guiding power.

2. The Finnish Constitution and the Protection of the Human Rights in 2020

We could now, after these very brief remarks and observations concerning the historical background of protection of basic rights in Finland, look at where we stand now. The preceding years have witnessed a long series celebrations of 100 years anniversaries. The Republic itself celebrated its first centenary in 1917, the Bill of Government was introduced in 1919. The Supreme Court and the Supreme Administrative Court were established in 1919. Even if the anniversaries themselves are not important, they often encourage a look back in the history.

As for Finland, the 100 years has meant a very big leap in societal development. A poor country has developed into one of the most progressed industrialized countries of the world. The legal development has been one aspect of it all. The legal culture has preserved some of its long-term characteristics, such as the legal cultural ties with the other Nordic countries. Especially after world war II the significance of the Nordic legal context has grown.

The Nordic countries are known for the fact that they have not introduced constitutional courts, but rather opted for other ways of checking of the constitutionality of the laws to be enacted. Differences between the Nordic legal systems are significant. What is common is the high respect of the parliamentary decision-making and respectively a lesser role of the courts. In Norway, the Supreme Court has a bigger role than in the other Nordic countries.[13]

In Finland this way of controlling the constitutional law quality of ordinary legislation by a particular committee, the Constitutional Law Committee, has over the years won a very central role. This committee which is part of the bodies of the Parliament consists of politicians as do also all the other committees. The main choice is thus that the control of the constitutionality of ordinary legislation will be carried out by a political body which is part of the national Parliament. But still, the particular role of that committee has over time developed so that in fact the Committee has a quasi-judicial role. It not only reviews the compatibility of a law proposal with the Constitution, but also interprets the human rights and fundamental rights obligations of Finland and assesses the merits and demerits of the law proposal in that regard.

The Constitutional Law Committee has over time won a particular role, and the history of this dates back to the early days of the Parliament a century ago. In the early times this role was not visible in the letter of the constitution, but in the most recent reform of the Constitution (2000) it was expressly regulated. As a result, the Constitutional Law Committee has a unique position as a (quasi-)judicial body which is still part of the parliament. The *ex ante* control of the constitutionality of law proposals as carried out by the Committee has the benefit that it does not weaken the role of the Parliament in this regard and that, due to the high status of the opinions of the committee, it in a way strengthens the role of both the Parliament and the Constitution in the legal system.[14] Even the doctrine of legal sources which recognizes the significance of the preparatory works in interpreting statutes is a sign of the central role of legislature in the legal culture as is the fact that the precedents of the Supreme Court are not legally binding.

The opinions of the Constitutional Law Committee are regarded as binding by the other bodies of the parliament, and its opinions enjoy a high respect throughout the legal system and its various institutions. The committee hears experts, typically constitutional law experts, and it has over the years established for itself a special authority in these issues. The opinions are published online in the data system of the Parliament and can easily be consulted.

This system of *ex ante* control has also actively been developed, since still in the 1980's it was a rare event that the constitutional law committee would issue an opinion concerning a law proposal in

[13] Cf. Jaakko Husa, Constitutional Mentality, in Pia Letto-Vanamo, Ditlev Tamm, Bent Ole Mortensen (Ed.s), Nordic Law in European Context. Springer 2019, 41–60, at p. 53.

[14] See, Antero Jyränki, Valtiosta valtaan. Valtiosääntöoikeuden yleisiä kysymyksiä. 3. painos, Talentum 2003, 393–414.

the field of criminal law. Since then, the role of the committee has grown a lot, these days it is rather usual that an opinion will be delivered. The committee has, for instance, given opinions on the principles of criminalisations stating certain requirements which need to be fulfilled in order to allow for criminal law to be used. Such a doctrine rather effectively frames and limits the use of criminal law measures and enables to secure a certain balance of criminal law and constitutional law. The starting point is that criminalisations are limitations of fundamental rights and need to be reasoned by giving ground which justify the use of criminal law. The relationship between criminal law and fundamental rights is, however, twofold since the state also has the duty to guarantee the basic rights, and thus there are duties to criminalise breaches of rights.[15]

This doctrine, which was formulated rather soon after the new bill of rights had entered into force, has been influential also when Finland has been under pressure to act fast as has been the case concerning the drafting of the law on terrorist offences. The active participation of the constitutional law committee has contributed to the fact that the principle of legality and its sub-rules have been respected and the new regulations have been adjusted to the needs of the protection of the fundamental rights and human rights.

When the new bill of rights was adopted in 1995, the Constitutional Law Committee itself emphasized that in most cases the courts should interpret various legal provisions in such a way that a contradiction between the letter of the law and the fundamental rights could be avoided. The provisions concerning the fundamental right are today directly applicable; once again a novel feature, since earlier it was very rare that arguments based of constitutional rights would have been openly taken up in judicial proceedings of judgments of the courts.

The novel idea was that even though at first sight a contradiction could appear, in most cases this contradiction could be done away by interpretative means. The new doctrine that would be helpful in this was the so-called *fundamental rights friendly interpretation*.[16] This doctrine, in turn, was borrowed from a previous doctrine, namely the doctrine of human rights friendly interpretation[17] which had been introduced when following of the case law of Strasbourg became an obligation. In this sense the point was not so much to emphasize the *primacy* of the norms on fundamental rights in relation to the ordinary laws, but rather to seek to adjust these two sources of law to each other. An existing *ex ante* check of the constitutionality of ordinary legislation was helpful since it as well was based on a approach of reading the legislation in the light of the constitution, and this this first reading created the basis for the courts to continue the same path.

The existence of an active Constitutional Law Committee thus takes away most of the air from the needs to strike down laws or not to apply laws due to problems of human rights and fundamental rights protection. The Constitution, however, in its 106 § provides that the non-application of a legal provision by a court only may result from a manifest contradiction between the constitution and the legal provision. A fundamental rights friendly interpretation of laws will in most cases solve the issue and show that the contradiction is not inevitable. There will, however, always remain cases in which such an approach will not be enough.

Cases have been rather rare, but not quite non-existent. The threshold of this ex post judicial control of the constitutionality of a legal norm has knowingly been set higher than it would be otherwise; thus, use of term 'manifest contradiction' is meant to indicate this.

A recent case in which Helsinki Court of Appeal, after a vote and in a strengthened composition, anyway applied the famous 106 § of the Constitution concerned was one in which a male person had refused both military and its alternative, civil service, since he claimed to have conscience grounds for this choice.[18] He was not a Jehova witness, for which an exceptional exclusion was expressly granted by law, and he claimed for an equal protection of his belief.

Helsinki Court of Appeal followed his reasoning in that a privileged treatment of the Jehova witnesses was against the equal treatment before the law as granted by the Constitution. The legal obligations for such a protection had increased more weight after the time when the Constitutional Law Committee had exercised its *ex ante* check of the constitutionality of that specific law.

The judgement of the Appeals Court was not unanimous, and the minority reasoned that since the Constitutional Law Committee has not voiced doubts when dealing with this issue, there was no ground for applying the 106 § of the Constitution. It has, namely, been a rather common practice that when the

[15] CLC, Report 25/1994, p. 4–6; CLC, Opinion 23/1997, p. 2–3.
[16] CLC, Report 25/1994.
[17] CLC, Opinion 2/1990.
[18] Helsinki Court of Appeal, 23.2.2018, 108226 (2018:4).

committee has expressed itself on a certain issue, the courts would not go against it. But in this case the legal and constitutional protection against discrimination had been strengthened after the committee had issued its opinion, which triggered that the court had to give legal protection to the applicant.

This is, of course, what the courts are expected to do. The decision was, however, rather revolutionary, and it led to a fast law reform which mainly consisted in the abolition of the privilege granted for the Jehova witnesses. In this case, thus, the final outcome was not that the right granted was universalized, but rather the opposite. In any case, there was also some ground for this abolition since such a privilege was less grounded than before, and also the ways to perform these citizenship duties had become more flexible and the Jehovas were no longer so clearly at risk of facing a sentence of imprisonment.

The European human rights law has also increasingly become visible in the case law of the Finnish courts. According to the data of the open database Finlex there are some 300 decisions of the Supreme Court of Finland in which the court refers to the European Convention of Human Rights. There are a variety of important topics which have been involved, and the Finnish courts have learned how to secure that in the national application of law the European minimum standard of human rights protection will be granted. Finland has had particular problems concerning issues such as the ne bis in idem -prohibition, too lengthy proceedings and some freedom of speech -situations.

In 2019 Finland faced a first really grave conviction at the Strasbourg Court; it concerned the expulsion of a person to Iraq in spite of the fact that he had already faced certain threats in Iraq as a former governmental official. He was killed soon after the expulsion had been completed. Finland was convicted on grounds of both article 2 and 3 of the Convention.[19]

Over the last 30 years the Finnish legal culture has matured in the way it handles fundamental rights and human rights. Finland has been part of a bigger process which has often been called the *new constitutionalism*. The courts have learned to live up to the expectation that they should give protection to the individual accordingly and even in a situation not clearly foreseen by the legislature. There have been cases, for instance, in which a legal remedy has not been available, but the 106 § of the Constitution has enabled opening one.

A human rights friendly and fundamental rights friendly interpretation of the laws has to my mind also been made possible by the general improvement of substantial reasoning of the courts since the 1970's, which again has resulted of the increased expectations that the judgements of the courts are well-founded and deserve social appreciation. It became increasingly important that the courts could give convincing reasons for their decisions since the society had changed and the exercise of public authority started meeting with open challenge and criticism. The only way to maintain the trust of the people was to raise the professionality of the court's work and to emphasize the need for good reasoning. The legal theoretical discussions and theories have contributed to the development. In Finland, the work of Aulis Aarnio has been groundbreaking.[20]

In 1980's the Supreme Court of Finland was made into a court which mainly delivers precedents, and this gave it the opportunity also to set an example of how good reasoning would look like. The decisions of the Supreme Court are not as precedents legally binding meaning that the case law of the Supreme Court has not been recognized a clear rule-making role. As a result, the authority of the Supreme Court's decisions stems more from the high appreciation of the quality of its work. A continuous improvement of the quality of its reasoning has contributed to that it has gained a kind of factual rule-making power.

Since 1990's the case law of the Supreme Court as well as plenty of other legal sources have been available online, which again has rendered this case law accessible to both lawyers and the general public. The FINLEX portal was the first of its kind in the world. Thus, we have seen several developments take place in a parallel fashion, and the rise of neo-constitutionalism and the status of rights has been part of this process of open argumentation and thus transparency. The new way of dealing with the tensions within the legal system has meant that the formal hierarchical structures of the legal order are not stressed too much, but rather the emphasis has been put on the quality of the substantial reasoning.

What has been helpful for the courts in this task is that actors of all the relevant normative fields speak more or less the same language. Since the freedom of speech, for instance, is protected on different levels, be they on the level of the Constitution or the level of ordinary legislation, or on the level

[19] Case N.A. v. Finland (Application no. 25244/18), November 14, 2019. Finnish National Bureau of Investigation has, however, surprisingly announced on April 22nd 2020 that the documents presented during the proceedings may have been falsified and that the expulsed person in fact may still be alive.

[20] Cf. Aarnio, Aulis, The Rational as Reasonable. A Treatise on Legal Justification. Kluwer, 1986.

of European or international human rights law, the different levels do not necessary conflict much with each other.

If we think of current issues of incitement to racial and other hatred, it is very clear that the case law of the Strasbourg Court provides for a central point of reference, but the Finnish courts and the Finnish scholars will of course also pay attention to the Finnish circumstances which deviate in some sense from the situation of other countries. Finland has, for instance, not introduced legislation on holocaust denial or specific legislation banning use of nazi symbols. It may, however, be punishable as incitement to hatred to use nazi flags in a rally, for instance. Finnish courts have also recently been faced with new types of cases, since the Police Government has demanded that an organization named Nordic Resistance Front be prohibited due to its openly racist goals. An appeal is pending in the Supreme Court, and a ban is currently temporarily being enforced.

It is not possible here to give any fuller account on the role of human rights and fundamental rights in the context of the European Union law. Anyway, one should bear in mind a clear strengthening of the role of these rights also within the EU legal order. This has not been a quite easy and linear process, but anyway we can see the rights of the individual have gained more significance as the EU law has marched to new areas. It has been very important for instance as regards the establishment of the EU as an Area of Freedom, Security and Justice that the EU simultaneously as it strengthens it's role in addressing security threats, also commits itself to the core European values. The drafting of the Charter of Fundamental Rights of the European Union was a landmark. The EUCJ has also in its case law established the human rights and fundamental rights as general legal principles of the EU law.[21] The Lisbon Treaty provides for that the European Union would become a party to the ECHR, but this has faced both technical and more principled obstacles.[22]

The clear trend is that the rights of the individual play today a bigger role than earlier in the Finnish legal culture. But the new emphasis has not changed the foundations of the legal culture. The strong role of the Parliament and of the legislation is still true. Developing a strong democratic culture where the political legislature and legislation as its product stands as the central and most legitimate source of legal governance of the society can be combined with a legal culture in which the rights of the individual are at the core.

The neo-constitutionalist tendencies have in the Finnish legal system introduced importantly new features to the ways the various legal actors see their role. But once again we see that the development has not been revolutionary but rather evolutionary; neo-constitutionalist development can be seen as an important part of maturing and deepening of the constitutional rule of law state. Contrary to many other countries, as regards Finland, the development itself has not been motivated by an effort to take a distance vis-á-vis the former history.[23]

In the Finnish model it has been possible to develop the entire system so that the various sources of legitimacy will all contribute to the over-all legitimacy of the legal system. The Finnish model of constitutional rule of law state involves in this regard and efficient *ex ante* control of the constitutionality of the ordinary legislation, but also active courts which will give effect to the human rights and fundamental rights, should the legal order not otherwise be able to give full legal protection. The aim to make rights real is shared by all relevant institutions. The Constitution itself, in the Article 22, sets out the objective that the public power has to secure the full implementations and enforcement of the human rights and fundamental rights.

Let me also mention in passing that the Finnish law still recognizes certain rights which, in fact, continue to be based on customary law, or, to put this another way, are only partly legally regulated. Here I refer to the so-called everyone's rights which are regarded as restrictions to the rights of the owner of land property. When the Bill of Rights of the Constitution was reformed, the matter was debated whether everyone's rights should be listed as constitutional rights, but the reformers ultimately let that field stay unregulated.[24]

Everyone is thus entitled to move freely on another person property, pick mushrooms and berries, etc. The exercise of such a right needs also caution since you are not allowed to leave rubbish behind or cause other nuisance. You are also not allowed to violate the domestic peace, which means that you should not enter the garden of a house. Everyone's rights are granted even to foreigners, as are other

[21] Cf. Rosas, Allan, Perus- ja ihmisoikeudet EU-oikeudessa, in Hallberg, Pekka et al, Perusoikeudet, Oikeuden perusteokset, WSOYpro, Helsinki 2011, 200–205.

[22] Opinion 2/13 (2014), EUCJ. Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[23] Lavapuro, Juha, Uusi perustuslakikontrolli. SLY, Helsinki 2010, p. 21.

[24] Hallberg, Pekka et al, Perusoikeudet, Oikeuden perusteokset, WSOYpro, Helsinki 2011, at p. 781.

fundamental rights, except for the political rights. Everyone's rights may even have prepared the Finns for an environmental friendly approach to law, since they communicate values which are once again topical: everyone's duties to care for the environment and to see the need for common action in this.

In this brief article I wanted to especially focus on the role of rights of the individual in the Finnish legal order, but I feel that it is necessary to still complement this with a remark on the control of the legality of acts taken by the authorities. I refer here not only to the supervision exercised by the chancellor of justice who works directly under the national government, but also to the supervisory activities of the Parliamentary Ombudsman who in turn is appointed by the Parliament and who reports to the Parliament.

Both of these institutions have already a long history and they enjoy a high respect amongst the people. Individuals may report cases in which they feel that the authorities have not performed lawfully, and this usually leads to some investigation of the case, which again may lead to a legal action. Usually, if there is something to be improved in the way people's matters are being handled, the supervisors indicate there view on a rather soft tone, but due to the status of these institutions, the authorities in most cases will study carefully the instructions given, and will do their best to improve their performance. Very rarely, and only in severe illegalities, will the supervisors initiate a criminal investigation against the civil servant.

It deserves also to be noticed that the neo-constitutionalist tendencies can be seen here as well. The Parliamentary Ombudsman, for example, sees his role these days increasingly as a guarantor of the rights of the individual. In order to do that, the supervisory bodies also do site visits to institutions such as the prisons and the military bases, and they will interview the detainees and others in a vulnerable situation for to make sure that no abuses of authority take place. Such interviews will take place so that the formal representatives of the institutions are not present. All these activities aim at securing a full accountability of the authorities for their actions, and also at ensuring that the trust in the authorities is not blind, but is based on a real trustworthiness.

Conclusion

I hope I have in this brief summary been able to shed some light on how the Finnish legal order and the legal actors working for it see the role of the rights of the individual in the constitution of this order. The point is that if the various actors see the key features of the system in a similar enough way, they will jointly be able to develop a new culture in which the constitution becomes more a living instrument and in which it plays a bigger role than in the earlier times, but in which also excesses of constitutionalism may be avoided.

The neo-constitutionalism has namely also triggered discussions of whether the constitutionalisation of law has already gone too far and whether this development threatens the role of law as we have been used to seeing it, as fragmented in the sub-branches of criminal law, procedural law, etc.[25] In today's mature constitutionalism the risks of excesses have been given due attention, and all the actors see that a certain threshold must be set before an ordinary case becomes a true test case concerning the human rights or fundamental right.

From the point of view of the protection of human rights, the current constitutional setting provides for an approach for not only the judges, but the law drafters as well, that the human rights and fundamental rights standards set up by transnational legal bodies should be taken seriously and seeing as feedback mechanisms which strengthen rather than threaten the efforts to build a strong culture in which the rights of the individual are respected.

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[25] See, e.g., Lavapuro, Juha, Uusi perustuslakikontrolli. SLY, Helsinki 2010, p. 14–15.

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Concept of Freedom: History and Modern Times

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ABSTRACT
The historical discussion of formation of the concept of freedom briefly displays main definitions of freedom, shows interrelations and connections of the concept of freedom with other important notions of the human existence, such as subject, self-realization, law, good, labor, knowledge, otherness. Correct understanding of the phenomenon of freedom implies a principal distinction between law and morality. It is law as a social institution that introduces freedom as such into social life, whereas morality provides only liberation from evil. According to the initial definition, freedom is the labor of self-realization. As freedom obtains social reality only in a legal form, the more concrete definition of freedom is as follows: freedom is a balance of human rights and duties.
Keywords: freedom, self-realization, labor, subject, morality, law, libertarism, sobornost

This article does not claim to offer an exhaustive explanation of such a complex subject as the concept of human freedom. The task is much more modest: to outline the main facets of the philosophical interpretation of freedom and to show the practical significance of legal regulation for entrenchment of freedom in the social reality. Freedom is a value or a duty, that is, an ideally existing goal, while the ambiguity of the goal poses many dangers. One cannot but agree with C. Montesquieu regarding the initial vagueness and uncertainty: "Not a single word would receive so many different meanings and make such a different impression on the minds as the word "freedom""[1]. Individuals, sometimes even entire nations, repeatedly strive to move from lack of freedom to freedom. It is all the more important to learn the experience and knowledge accumulated on this path in order to find, in spite of the multitude of random opinions, a real and not an imaginary answer to the key question: what is freedom?

The subject is free will[2]. Therefore, striving for freedom turns out to be a search for oneself, and vice versa. In other words, to comprehend one's freedom means to become conscious of oneself as a subject. Eastern philosophy has not yet made a significant contribution to the comprehension of freedom, because it has traditionally avoided focusing on a person as a subject. Own discoveries and achievements of Eastern thinking on this subject are rather a matter of the future than of the past.

The history of the concept of freedom begins in ancient Greece. City-states (polises) and, in general, the forms of social relations, mainly based here on the developed monetary economy, for the first time create favorable conditions for the isolation of a person from the public whole, the assertion of the independence of members of the society. The individual person becomes the real source of social order. A similar vision is already found in the appeals of ancient poet Hesiod (VIII-VII centuries BC): "Keep within limits in everything and do your work in time"[3]. Several centuries later, Protagoras will express this worldview position with maximalist directness, albeit in a sophistic, relativistic manner: "The measure of all things is man, existing, that they exist, and non-existent, that they do not exist"[4]. There emerges a social perspective of mutual coordination of special measures, beliefs and aspirations of each person, thereby the practical implementation of freedom. However, ancient Greeks did not turn freedom into the principle of social order. The open phenomenon of human freedom remains rather a natural givenness for them and does not become a value.

Therefore, the ancient Greek consciousness often equates freedom with arbitrariness, self will[5]. It is not freedom as such that matters, but the dignity of the freeborn. It is to the free-born that Aristotle's ethical teaching is addressed, which glorifies human nature brought to perfection, ennobled by virtue. According to Aristotelian ethics, happiness is the highest goal. However, happiness is a natural state: "the sum of satisfaction" of all needs and inclinations[6]. The natural fullness of ethics is emphasized by

[1] *Montesquieu C. L.* On the spirit of laws [O dukhe zakonov]. M. : Thought [Mysl'], 1999. P. 136.
[2] *Hegel G.* Philosophy of Law [Filosofiya prava]. M. : Thought [Mysl'], 1990. P. 68.
[3] *Hesiod.* Writings and days [Gesiod. Trudy i dni] // Hesiod. Complete collection of texts [Gesiod. Polnoe sobranie tekstov]. M. : Labyrinth [Labirint], 2001. P. 72 (694).
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[5] *Plato.* State [Platon. Gosudarstvo] // Plato. Collected works in four volumes. T. 3 [Platon. Sobranie sochinenii v chetyrekh tomakh. T. 3.]. M. : Thought [Mysl'], 1994. Pp. 350– 351 (562b–563d).
[6] *Kant I.* Fundamentals of the metaphysics of morality [Osnovy metafiziki nravstvennosti] // Kant I. Writings in six volumes. T. 4. Part 1 [Kant I. Sochineniya v shesti tomakh. T. 4. Ch. 1]. M. : Thought [Mysl'], 1965. P. 235.

the fact that Aristotle links virtue and happiness together, defines true happiness as "the activities of the soul in the fullness of virtue"[7]. All people strive for happiness; therefore, happiness is the good, moreover, the human good, that is, expressing the fullness of human existence which is not reduced to scientific, philosophical cognition. The knowledge of the good as such does not make a person happy and virtuous. Happiness is actualized in virtuous actions that embody the decisions made by a person on the basis of a conscious choice or striving for the good as a goal. The expediency of the decision presupposes an indivisible unity of will and thinking, therefore a person is a "striving mind"[8]. Actions do not express any deliberate correctness, because in striving for the good, a person can act one way or another, thus the content of actions is not the subject of science. Virtue is the middle between excess and lack of manifestations of emotional feelings. In the circumstances of a particular situation, a person independently decides where exactly the middle is, and acts accordingly.

Aristotelian ethics overcomes the identification of freedom with arbitrariness, outlines the fundamental definitions of freedom, within which further philosophical comprehension of the phenomenon of freedom starts. From now on, freedom appears as its own way of achieving the good as the fullness of human existence, independence in an active striving for happiness, self-actualization of a person among people. However, the understanding of freedom as an inborn, natural property of a freeborn prevents the substantive consideration of freedom as a social institution, the development of a special social regulator for the protection and maintenance of freedom. Aristotle notes that "man is inherently a political being"[9] living in a state, and in a very ancient Greek manner he declares the state to be self-sufficient, possessing independent significance. Freedom, equality and justice among people are actualized only in state communication, but if the state turns out to be a natural formation, it inevitably subordinates a person. The subject is objectified in the ancient Greek state, thereby accepting freedom as a givenness, loses the living source of freedom which is inside the person, and not the state.

The fall of the ancient Greek civilization led by no means to oblivion of the concept of freedom, but to the movement of freedom into the depths of subjectivity. Stoics emphasize the unconditionality and inalienability of freedom, the absolute independence of a person from external circumstances. According to Epictetus, one can be free even in chains[10]. A new search for social forms of freedom begins.

Owing to the accumulated historical experience, freedom as such appears to the Romans as the essence of human subjectivity, therefore, for the first time, it becomes a value, a guiding principle of social life. The task arises to find the subjective dimension of social relations, to overcome social objectification or alienation of members of the society, to establish freedom as a social institution, and ensure the true actualization of freedom in social reality. The solution was the Roman private law. The Romans discover law as a special way of regulating the relations between people which is not reduced to morality or another social regulator; they create jurisprudence (legal science) as a science of law, with its own subject area and methodology, isolated from ethics and other sciences.

The Roman private law restructures property relations according to the principle of freedom. The archaic, pre-legal property exchange, including the exchange of a thing for cash (real sale), is two counter donations carried out as a moral duty, is rooted in the ancient practice of exchanging gifts for the sake of prestige and social peace[11]. Such an exchange puts the donee in a position of personal subordination or dependence on the donor; if the donee does not make a counter donation or does not return what he has received, strict retribution reaches his personality. Slavery for debt, widespread in ancient times, is as a well-known illustration. The transformation of property relations according to the principle of freedom presupposes a conceptual transition from exchange as the state of being bound by an impersonal debt, a social role, to exchange as cooperation for the good of everyone. The legal approach preserves the volitional content of the exchange from the beginning to the end, the alienation of a thing is no longer accompanied by the alienation of subjective will. The new exchange mechanism is based on the concept of (subjective) law which establishes the sphere of freedom for a party. From

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[7] *Aristotle.* Nikomakhova ethics [Aristotel'. Nikomakhova ehtika] // Aristotle [Aristotel'.]. Works in four volumes [Sochineniya v chetyrekh tomakh]. T. 4. M. : Thought [Mysl'], 1983. P. 74 (1102a5).

[8] Ibid, p. 174 (1139b5).

[9] *Aristotle.* Politics [Aristotel'. Politika] // Aristotle. Works in four volumes [Aristotel'. Sochineniya v chetyrekh tomakh]. T. 4. M. : Thought [Mysl'], 1983. P. 378 (1253a).

[10] Conversations of Epictetus [Besedy Ehpikteta]. M. : Ladomir [Ladomir], 1997. P. 41 (I, 1, 23).

[11] For more detail see: *Moss M.* Experience about the gift. Form and basis of exchange in archaic societies [Opyt o dare. Forma i osnovanie obmena v arkhaicheskikh obshchestvakh] // Moss M. Society. Exchange. Personality. Proceedings of social anthropology [Moss M. Obshchestva. Obmen. Lichnost'. Trudy po sotsial'noi antropologii]. M. : KDU, 2011. Pp. 134–285.

now on, exchange is not so much an objective process that has to be accepted as it is, but rather the exercise of contractual rights, directed towards the future by free cooperation.

The right of one party is reflected in the obligation of the other. Roman jurisprudence creates the fundamental concept of an obligation: a legal link between people, by virtue of which one person (the creditor) has the right to demand performance of specified actions from the other (the debtor), and the other is obliged to perform such actions[12]. With regard to the sale, exchange of goods for money, two obligations are initially formed: the obligation to buy, that is, the seller's right to demand payment of the price and the relevant obligation of the buyer, and the obligation to sell, that is, the seller's obligation to transfer the goods into ownership and the buyer's right to demand the transfer. These obligations are interrelated, each obligation, in the sense of emergence and performance, is based on a counter obligation. In general, such a legal relationship is called a bilateral, or synallagmatic, obligation. The entitled party in one obligation becomes obligated in the counter obligation, while the obligated party becomes the entitled party. No party is here only obligated or authorized, but has the right and obligation, for example, the seller has the right to demand payment of the price and is obliged to transfer the goods. The bilateral obligation, clearly illustrated by the obligation to buy and sell, is a model of the rule of law: the right of a party in one relation is balanced by the obligation of the same party in another relation.

In a bilateral obligation, the right of one party relies on the right of the other. Therefore, the relation does not degenerate into subordination or dependence, but develops as free cooperation. The inextricable connection of freedom, equality and justice is revealed. Since each party is empowered in relation to the other, the parties not only have the sphere of freedom enshrined in subjective law, but are also equal as having the same right, and they are equal in freedom precisely. Recognition of the commensurate right of the other party presupposes constant and invariable willingness to listen in good faith and respond to the appeal of the other; therefore, law embodies justice. Law actualizes freedom in social reality simultaneously as equality in freedom and justice in the sense of recognizing another subjectivity. Punishment for an offense is not retribution inspired by blind vengeance, but is a responsibility that has the sole purpose of making up for the damage caused to freedom, restoring freedom in relations between people. Jurisprudence proceeds from the practical understanding of freedom as a balance of human rights and obligations.

Morality and law diverge here[13]. Morality strives towards good as the opposite of evil, while law overcomes the dualism of good and evil through the understanding of the notion of good, shows good and evil as transient moments of human freedom. Morality frees from evil, therefore it provides only negative freedom which easily degenerates into lack of freedom, while the law realizes freedom as a person's self-actualization in the social reality, therefore, it embodies genuine, living or positive freedom. Morality subordinates a person to duty which expresses a lifeless abstraction of good, while the law demands fulfillment of the duties that reflect the rights of another person, thereby teaching pay heed to another subjectivity. Only the generally binding nature of laws, a truly legal law really comes from people, thereby achieving the situation that "everyone should act uniquely individually, that is, always having a living person in front of oneself, a concrete personality rather than abstract good"[14].

A legal law has internal expediency when the goal of lawmaking is the law itself being a common will and good — a legal law. The discovery of the internal expediency of legal legislation begins with a clear understanding that the successful or effective operation of the law depends on the genuine approval of the law by all citizens affected by it, so that everyone should consider the law truly his own. The legal law reflects the common will, that is, it brings a lot of individual wills to agreement without imposing a deliberately correct decision. Only jurisprudence has the means to express the consent of citizens without destroying the individual will as a living source of the common will and to save the individual will from being suppressed by the supreme (national, public) will. This means is a balance of the rights and duties of each person. On the contrary, the moral law is subject to external expediency, because it serves the supra-legal goal of good chosen quite arbitrarily. Moral instructions can be enshrined in a compulsory law and be protected by public authority. An illustration is the contemporary labor and social legislation, in general any laws or orders of the authorities, inspired by striving for some good, but at the same time avoiding the total imposition of good. Because nonobservance of the measure of good brings evil. Such a moderately moral legislation in practice reconciles good and evil, therefore it

[12] For more detail see: *Dozhdev D. V.* Roman private law [Rimskoe chastnoe pravo]. M. : Norma, 1996. Pp. 427–431.

[13] For more detail see: *Slyshchenkov V. A.* Law and Morality: differences in concepts [Pravo i nravstvennost': razlichiya ponyatii]. M. : [Yurlitinform], 2020.

[14] *Berdyaev N. A.* About the appointment of a person. Experience of paradoxical ethics [O naznachenii cheloveka. Opyt paradoksal'noi ehtiki]. Paris : Modern Notes [Parizh : Sovremennye zapiski], 1931. P. 114.

partly fulfills the purely legal task of maintaining public freedom, however, not so much for the sake of freedom as such, but for uninterrupted functioning of social systems. Therefore, moral legislation rather strengthens and prolongs, but never overcomes the alienation of a person in the society. Nevertheless, the achieved legal result allows considering moral legislation as a law, however, as a kind of social law which differs from law as such by the absence of legal expediency proper. Social law is not at all a model of law as such, but only a practical premonition of law as a special way of regulating social relations. The external expediency of the law means that lawmaking is not supposed to be independent activities, but an appendage of other areas of social life, from religion to economics. This approach is inconsistent with the practice of law-making and law enforcement, does not explain the emergence and development of a special legal science and education. Law acts as an independent sphere of human activities having internal expediency, while historically the first law in its own sense was Roman private law.

After the collapse of ancient Roman civilization, the western man is again left alone with his freedom. However, historical experience reminds of freedom as the guiding principle of social life. The search for new social forms of freedom is supported by the Christian religion, according to which free will is a divine gift. The actualization of the freedom of a man as a member of society, not an individual or private one, but a social person, becomes the main content of the subsequent centuries of complex Western European history up to the end of the modern age. Freedom unfolds as an objective necessity. Therefore, the man of the Western world traditionally comprehends freedom as knowledge. Hence the worship of the natural law as the truth of social relations. The human law established by the will must be consistent with the natural law, the freedom of a social person must reflect natural freedom, but such consistency is observed very rarely: "A person is born free, but he is in chains everywhere"[15]. Freedom of a person as a member of the society living by the law, a citizen is truly achieved only when the person obeys his own law. Such a person is not a slave or an object, but a person or a subject of law: "… a person is subject only to the laws set himself (independently or, at least, together with others) for himself"[16].

The formal or procedural principle of lawmaking contained in this opinion was elaborated only in the second half of the 20th century owing to the communicative legal theory of J. Habermas. On the contrary, the knowledge-oriented modern European thinking seeks to define self-established laws in terms of content rather than the legislative process. Various natural law theories demand that the existing laws should be consistent with an allegedly indisputable moral truth. Such true laws only are called the law or legal laws which differ in terms of the content from power arbitrariness just outwardly formalized by the laws. However, within the framework of natural-legal theorizing, freedom turns out to be absorbed by moral knowledge, and a person — by the state as the highest moral organization of the community: "…the state is the journey of God in the world …"[17]. Thereat it turns out to be impossible to logically deduce the content of the whole legislation from natural law. The real criterion of lawmaking is the practical effectiveness of the law, not at all the observance of the natural law. Ideas about the natural law are rather adjusted to a successful law than vice versa.

In contrast with the natural law school the legal positivism trend which took shape in the 19th century refuses to search for the true law. The law is considered to be any valid law; from this point of view, the most inhuman orders of the authorities are referred to law. Legal positivism sometimes focuses on purely logical processing of the positive law, sometimes it expands to a sociological perspective to clarify the economic, cultural and other social factors of lawmaking. These factors are interpreted as extra-legal due: if natural law prevails over the law allegedly directly, social factors prevail only through the legislator. Both versions of legal positivism, that is, logical and sociological, leave the content of legal regulation to the discretion of the legislator. The doctrine of natural law and legal positivism remain in the paradigm of the external expediency of social law. The difference lies only in how the goal of the current law is determined: by cognition of the supposedly preexistent natural law or by the arbitrariness of the legislator. Substantial legal consciousness proceeding from the internal expediency of legal regulation opposes both natural legal ideas and legal positivism. Proper understanding and preservation of law as a social institution protecting freedom requires a substantial legal approach.

The constitutional consolidation of human rights and freedoms inspired by the teachings of natural law, in practice overcomes the moral limitations of natural law, it places the legal principle of the balance of the rights and duties of a citizen, instead of ethical requirements, in the basis of a state community.

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[15] *Rousseau* J. J. On the social contract, or the principles of political law [Ob obshchestvennom dogovore, ili printsipy politicheskogo prava] // Rousseau J. J. On the social contract. Treatises [Ob obshchestvennom dogovore. Traktaty]. M. : Canon Press [Kanon-press], 1998. P. 198.

[16] *Kant I.* The metaphysics of morals in two parts [Metafizika nravov v dvukh chastyakh] // Kant I. Writings in six volumes. T. 4. Part 2 [Kant I. Sochineniya v shesti tomakh. T. 4. Ch. 2]. M. : Thought [Mysl'], 1965. P. 132.

[17] *Hegel G.* op.cit. P. 284.

Although the name of public law is already familiar to the Romans, public law as such arises only owing to the new European legal doctrine of human rights and freedoms. Private law based on the Roman concept of obligation, as well as modern European public law together form the law known at the current historical moment in the proper sense. The freedom of speech, assembly, other public rights and freedoms belonging to everyone (excluding socio-economic and other similar rights that relate to morally oriented social law) presuppose proportionate duties as conditions of rights and freedoms, primarily, the duty to respect the rights and freedoms of others people. Thus, the freedom of a person as a member of the society, a public person is consolidated in the social reality. Western European civilization finds its own practical formula of freedom: the rights and freedoms of man and citizen. The theoretical expression of this outstanding achievement is the political and legal doctrine of liberalism. Some dogmatism of the liberal views is related to the inappropriate absolutization of the historical experience of Western states in ensuring public freedom. The shortcomings of liberalism do not diminish the undoubted importance of public rights and freedoms as a social form of freedom.

Public rights and freedoms are laid into the foundation of social life not by knowledge but by mutual recognition of people. Understanding or explanation, acquisition of knowledge in general, is movement from an object to a thought about an object. Man as such, in his subjectivity, avoids being cognised precisely because the subject is not an object. In other words: "The subjective reality of the human I cannot be fully objectified in objective activities"[18]. Recognition proceeds from the limitation of understanding: understanding is always open to the new or the incomprehensible; however, it is this openness that implies that on the other side of the understood there is always another one as unconditional otherness. The principal "openness to another" presupposed by proper understanding[19] demands that the other's voice be heard. Thus, understanding, cognition passes into recognition. Understanding the other means that the other is seen through, but thereby not recognized as another. Understanding between people takes place only as an understanding of the matter itself, that is, some objectivity, but not as an understanding by one person of another in his subjectivity: "A conversation is a process of mutual understanding. Therefore, in any genuine conversation, we gain insight in the words of the other, really reckon with his point of view and put ourselves in his place: however, not in order to understand him as the personality, but in order to understand what he is saying. The point is that … we could come to an agreement with him on the matter under discussion"[20]. In other words, mutual understanding between people does not mean their identity: each still remains different for the other. A person acts as a subject in the true sense, that is, another without reservations, only where understanding ends.

The well-known definition of freedom as a cognized necessity misrepresents genuine or positive freedom as negative liberation from the burden of necessity. The freedom of the subject does not at all mean merging with objectivity in absolute knowledge. The first objection is that objectivity appears to the subject as initially given, thus the subject is determined by objectivity, even when he comprehends its necessity. In other words, the cognized necessity is not true freedom for the same reasons that freedom of choice cannot be called true freedom: "If, in considering arbitrariness, we dwell on the fact that a person may want this or that, then this is really his freedom; however, if you firmly remember that the content is given, then a person is determined by it and it is in this aspect that he is no longer free"[21].

The second objection is directed against objective idealism, according to which objectivity does not have the initial givenness, as it is generated by thinking or knowledge. However, freedom which supposedly comes from thinking only unfolds the necessity of thinking: as long as thinking remains a support, the subject does not exist as such. To think about oneself is to be divided into a subject and an object. Following J. P. Sartre, it is necessary to reject the primacy of cognition as a way of human existence[22]. A person does not become free at all because he thinks; on the contrary, he is able to think because he is free. Thinking is born as a person's comprehension of his freedom, in other words, as an abstraction of the I from self-consciousness. Owing to the consciousness of one's otherness, one's being-not-object, self-awareness awakens which thinking clarifies in the abstraction of the I and which then returns to the concreteness of existence as realized otherness, living (genuine or positive) freedom in the form of recognition of the inherent otherness of another.

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[18] *Kon I. S.* Friendship. 4th ed. [Druzhba. 4-e izd.]. St.-Petersburg, 2005. P. 174.

[19] *Gadamer H.-G.* Truth and Method: basics of philosophical hermeneutics [Gadamer H.-G. Istina i metod: osnovy filosofskoy germenevtiki] / Transl. from German of I. N. Burova, M. A. Zhurinskaya, S. N. Zemlyanaya, A. A. Rybakov. M., 1988. P. 425.

[20] Ibid. P. 448.

[21] *Hegel G.* op.cit. P. 81.

[22] See: *Sartre J. P.* Being and Nothing: The Experience of Phenomenological Ontology [Bytie i nichto: opyt fenomenologicheskoi ontologii] / Transl. from fr. of V. I. Kalyadko. M. : Republic [Respublika], 2000. P. 24–30.

It is the person, the person himself, who is the source of the cognized necessity. However, as such a source, the person does not fall inside the necessity created by him, that is, he is not objectified or alienated in the comprehended necessity, while remaining independent of the natural necessity, to which he is able to oppose his own necessity. Man is the border of two worlds, the end of the natural necessity of nature and the beginning of the artificial or ideal necessity of culture. Such a borderline existence means absolute otherness "out this world", that is, a person does not embody any necessity. The otherness of human existence is retained only in relation to other otherness, thereby the absoluteness of otherness turns into relativity which presupposes an indefinite set of othernesses.

The man's otherness is actualized only among people as casual others. The law of free will says: act according to your otherness. Following one's own otherness presupposes the preservation of the otherness of the other, because the denial of other otherness abolishes the otherness of the doer himself who remains different only in relation to the other. Likewise, showing off the singularity for the sake of difference as such is harmful to otherness, because the singularity is certainty: a reckless immersion in certainty kills otherness. At the same time, certainty cannot be avoided, because a person actualizes his otherness through self-determination. Thus, freedom is seen not in an escape from any definitions or restrictions, but in the retention of otherness in the determination of one's own will.

Recognition of the other is reconciliation with otherness. Such a vision remains mostly alien to the European public consciousness of the Modern Age focused on understanding, cognition. Even public rights and freedoms at first seem to protect the fundamental sameness of people rather than the otherness of an individual person. The new European rationality sought only identity in the subject, therefore it did not attach importance to otherness which was just overcome as something insignificant. Karl Marx's statement is telling: "A person at first looks into another person like in a mirror. Only by treating the man Paul as of his own kind does the man Peter begin treating himself as a man. At the same time, Paul as such, in all his Pavlovian corporeality, becomes a form of manifestation of the "man" genus for him"[23]. Another person of the epoch of modernity is an alter ego, a different I. Only the time of European postmodernity fully discerned a different, non-I-subject as a fundamental otherness from the very beginning. "Neither the category of quantity, nor even the category of quality, — emphasizes E. Levinas, — describe the otherness of another, whose quality is not just different from mine: the other may be said to have otherness as a quality"[24]. The other's otherness is its imperfection, that is, the other is not what it supposedly should be like. Awareness of otherness is a prerequisite for the decision in the true sense of the self-determination of the will, for only owing to a person's awareness of his otherness will the will be alone with itself.

The antithesis of the right and the duty underlying legal regulation proceeds from the otherness of the participants: one side of the legal relationship is entitled, the other is obligated. Therefore, the rule of law orients a person to making a decision in full awareness of otherness opposite to another and to defending his decision in interaction with another. The difference between the right and the duty expresses otherness, apart from which the subject does not exist at all: "In certainty, a person should not feel determined; considering the other as another, he only then acquires a sense of himself"[25]. Freedom is real only as a balance of human rights and duties achieved through struggle which therefore must be thought of separately in order to balance. The identity of the right and duty as a legal position, a kind of theoretical and legal model of legal duty[26] appears as a bizarre distortion of the nature of legal regulation evidencing a confusion of law and morality. From a legal point of view, it is moral duty that looks like a syncretic unity of the right and duty.

Recognition is achieved through the exercise of a right mediated by the performance the opposing duty by the other party. The authorized party does not exercise power or domination over the obligated party, for otherwise the otherness disappears. In other words, to be obliged does not at all mean to belong to the authorized person, that is, to be a slave, rather the opposite: "A slave cannot have duties, only a free person has them"[27]. Therefore, the dispute over rights and duties appears as a search for an agreed solution, that is, mutual recognition. In the absence of agreement between the parties, the

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[23] *Marx K.* Capital. Criticism of political economy. Volume One. Book I: The Process of Capital Production [Kapital. Kritika politicheskoi ehkonomii. Tom pervyi. Kniga I: Protsess proizvodstva kapitala] // Marx K., Engels F. Writings. T. 23. 2nd ed. [Marks K., Ehngel's F. Sochineniya. T. 23. 2-e izd.] M. : Gospolitizdat, 1960. P. 62, ref. 18.

[24] *Levinas E.* From Existence to Existing [Ot sushchestvovaniya k sushchestvuyushchemu] / Transl. from French of N. B. Mankovskoy //Levinas E. Favorites. Totality and Infinity [Levinas Eh. Izbrannoe. Total'nost' i beskonechnoe]. M. — St. Petersburg : University Book [Universitetskaya kniga], 2000. Pp. 59–60.

[25] *Hegel G.* op.cit. Pp. 74–75.

[26] See: *Alekseev N. N.* Religion, Law and Morality [Religiya, pravo i nravstvennost']. Paris : YMCA Press, 1930. Pp. 76–77.

[27] Ibid. P. 207.

dispute is resolved by an independent court precisely in order for each party to agree with the final decision as its own. Instead of the mass of bodies measured by ordinary scales, the scales of justice weigh the weight of the recognition of the other contained in the counter decisions of the subjects.

Preservation of otherness presupposes openness to the other, constant and unchanging willingness to respond to the call of the other. The voice of another should be heard not for the sake of usefulness, truth or other objective qualities. The other strives for justice, for the other does not obey the existing rules but demands different rules that overcome the usual boundaries of correctness. Justice is rightness that is open to the incorrectness of another. Therefore, justice "is impossible without uniqueness, without the singular character of subjectivity"[28], which means the genuine involvement of the other. The implementation of justice is the content of legal communication where each is different for the other. The presence of the other explains the uncertainty of justice that escapes the evidence of knowledge. Therefore, one reasonably speaks about a sense of justice.

The legal fixing of the right and duty on opposite sides of the relationship becomes a principle or form of the otherness of subjects: (subjective) right in unity with the duty of the opposing side formalizes the call of the other and a positive response to the call. The call of the other is the beginning, hence jurisprudence or legal science is a teaching about the right and not about the duty. Through vesting of rights and duties, a legal formalization of the relationship is achieved and a legal relationship arises which is abstracted from the peculiar circumstances, expresses only the mutual recognition formalized by the right and duty. As a legal abstraction, the form of the right and duty includes any member of the society who meets the conditions for participation in this legal relationship. Owing to the abstraction of rights and duties, and anyone can have this right or duty, the legal capacity makes everyone a person, the legal order ensures the equality of subjects which is called formal equality.

Equality of abstract legal entities as a conceivable, ideal equality, that is, equality on an abstract basis, in practice turns into inequality, because abstraction is not reality. Equal legal capacity as the ability of everyone to have the right presupposes the inequality of actual possession: the right is on one side of the legal relationship, while the other side gets only the duty. However, whoever has a duty in one respect knows that he may have a right in another respect. The recognition of the obligated by the authorized person only in words turns into recognition in practice, when the obliged wins the right in another respect which balances his duty in the first respect. Therefore, the rule of law includes a struggle for recognition, a struggle for the right, through which the obligated party acquires the right in another legal relationship becoming the entitled party there, thereby balancing the burden of its duty. A good example is the citizen's right to elect and be elected which accompanies the duty to obey the orders of the authorities. The combination of this right with this duty on the citizen's side, or the combination of the duty to respect elections with the right to govern on the opposite side, essentially evens the ruling and the dependents. By allowing the struggle for the right, the law order protects the freedom of people: "The subject is free only in the struggle"[29]. The reality of formal equality means freedom which is practically revealed as a balance of rights and duties, that is, the balance of the right in one legal relationship with the duty of a given person in another respect. In other words, the true equality of subjects as such is equality in freedom. Legal freedom turns out to be positive freedom, because, as distinguished from negative moral freedom, it serves not to free oneself from some evil, but to strive for the good, for self-actualization of a person among other people.

The rule of law forms a spiral: from justice to formal equality, then to freedom. The transition to freedom does not close the circle, but is the beginning of a new round of the spiral of legal history, because the justice contained in freedom reveals a new other each time. This means that the law has a basis in itself: there is no other goal than the embodiment of the essence of law in the social world, in other words, the simultaneous implementation of the three essential properties of law: justice, formal equality and freedom[30]. The rule of law is not a closed system: legal establishment opens up to external influences, that is, it takes into account the expectations of extra-legal reality through the fair involvement of another into legal communication.

With regard to legal dogma, the simultaneous disclosure of the objective requirements of justice, formal equality and freedom in the current legal order appears as a transition from positive legal principles to legislative provisions, then to legal norms.

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[28] *Levinas E.* Totality and the Infinite [Total'nost' i beskonechnoe] / Transl. from french of I. S. Vdovinoy // Levinas E. Favorites. Totality and Infinity [Levinas Eh. Izbrannoe. Total'nost' i beskonechnoe]. M. — St. Petersburg : University Book [Universitetskaya kniga], 2000. P. 244.

[29] *Hegel G.* op.cit. P. 422.

[30] For more detail see: *Nersesyants V. S.* The philosophy of law. 2nd ed. [Filosofiya prava. 2-e izd.] M. : Norma; INFRA-M, 2011. Pp. 30–48.

In a certain area of social relations positive legal principles express justice as proper recognition of otherness, for example, public rights and human freedoms are such principles. Legal principles are not always explicitly expressed in the texts of laws: the main content of the latter is in legislative provisions that enshrine rights and duties at the achieved level of formal equality. For example, the private law principles of good faith or freedom of a contract, or public law freedom of speech, or religion, or another human public right are furnished with conditions for the implementation and reinforced by the duty of the other party, are transformed from a positive legal principle into a model stipulated by legislative provisions of legal relationship.

An individual legal norm as a systemic unity of hypothesis, disposition and sanction is formulated in specific circumstances at the stage of law enforcement by means of comprehending and interpreting the existing legislative provisions in the light of legal principles. Therefore, the norm of law does not arise as an obligation, but rather a prediction of future behavior. Legal norms latently change principles and rules: legislation can be specified, supplemented or canceled according to the practical application in life situations. By creating a generally recognized legal norm here and now, everyone becomes a legislator, and thus free. Of the variety of doctrinal definitions of law that can be based on the above, the most explicit is the definition of law as normative justice, that is, justice as a norm.

In this regard, it is appropriate to draw a distinction between the legal and logical understanding of the norm. Jurisprudence creates a norm as a rule of behavior according to the formula "if ..., then ..., otherwise ..." reflecting the systemic unity of the hypothesis, disposition and sanction, by considering the regulated social relations in the light of their legal essence. In other words, jurisprudence is not abstracted from the volitional nature of the norm, that is, the legal norm is perceived not just as a givenness, but as a result of purposeful activities. Therefore, the legal understanding of the norm proceeds from the fact that the legal norm is an obligation only as a goal. The norm establishes the boundaries of behavior, thereby formalizes, determines the form of the will: the specificity of the legal approach lies in the fact that the legal norm expresses the will, its purpose being its own form, that is, the will itself. Therefore, only a legal norm makes the will free and at the same time reasonable: reasonableness in general is the expediency of self-actualization. On the contrary, the interpretation of a norm as a form or measure of free will is alien to deontic logic or the logic of norms; here the norm is considered in the empirical givenness of a normative statement. A purely logical approach to legal regulation does not correspond to the subject, because it does not take account of the essence of a legal norm, ignores the substantial basis of law.

Freedom of will is a side of human rationality or wisdom which must be distinguished from reason, rationality as a simple ability to think abstractly. The abstraction of the ethical duty contains any content, because anything can be declared duty. The man of duty is reasonable, but does not belong to himself or is alienated, because he is enslaved by abstract precepts. The abstraction of duty is manifested in the formal rationality of capitalist management noted by M. Weber, that is, the subordination of economic activities to a purely quantitative monetary measurement[31]. Western European capitalism made money a fundamental moral value by expressing and enshrining the leading social significance of monetary management in the ethical field. Money promises liberation. Therefore, the ethical value of money is tantamount to the moral approval of a person's independence. Alienation in monetary relations appears as a person's oblivion of his independent will which is objectified in money, but thus it is still assumed to exist.

Freedom understood in a purely economic sense is freedom of choice, the human ability to make a rational choice. D. Hume clearly showed the limitations of this rational freedom. Questions about the reasons for the choice ultimately run up against the impossibility of a rational explanation, because the beginning of any choice is the immediacy of the human desire[32]. Nevertheless, the contemporary capitalist society considers rational freedom of choice to be the major form of freedom, because it fits well with the ideal of consumption. Freedom of choice masks and hides the specific social alienation on which the consumer society is based, namely, alienation through labor. The specific feature of capitalism is seen in the fact that it is labor that alienates a person, taking alienated forms of socially useful labor. A social man turns into a working animal (animal laborans) captured by an almost physiological cycle

[31] See: *Weber M.* Economy and Society: Essays in Understanding Sociology: In 4 vol. T. 1 [Khozyaistvo i obshchestvo: ocherki ponimayushchei sotsiologii: V 4 t. T. 1] / Trans. From German V. A. Brun-Tsekhovoy, L. G. Ionina, I. A. Sudarikova, A. N. Belyaeva D. B. Tsygankova. M. : Publishing House of the Higher School of Economics [Izdatel'skii dom Vysshei shkoly ehkonomiki], 2016. Pp. 133–135.

[32] See: *Hume D.* Research on the principles of morality [Issledovanie o printsipakh morali] / Transl. from English of V. S. Shvyreva // Hume D. Works in two volumes. T. 2. 2nd ed. [Yum D. Sochineniya v dvukh tomakh. T. 2. 2-e izd] M. : Thought [Mysl], 1996. Pp. 288–289.

of production and consumption[33]. Under capitalism, such alienation is mediated by money, that is, it is human self-alienation. On the contrary, under socialism it acts as directly compulsory labor. The historical mission of socialism was precisely in demonstrating and objectifying capitalist alienation.

The Marxist critique of alienation under capitalism is justified, but contains the fatal error of ignoring the key aspect of the mediating meaning of money. In Marxist economic theory, monetary mediation of commodity circulation means only that money is the universal equivalent of the value of commodities[34]. However, philosophically comprehended mediation is negativity, negativity of subjectivity as a source of dialectical development of social processes. It is owing to the person, the subject only, that denial comes into the world[35]. In other words, contrary to Marxist political economy, the commodity contains an internal contradiction between the consumer and exchange values not at all as such, that is, in the immediacy of objectified, materialized labor[36], but being mediated by the subject as a party to exchange. Therefore, a proper understanding of the mediating role of money places the man in the center of a self-developing economic system. Arbitrariness in setting prices for goods appears to be more important for the course of economic processes than the alleged source of objective commodity values. On the contrary, Marxism declares abstract human labor (that is, labor in general) to be the substance of the (exchange) value of goods[37], thereby revealing an allegedly objective basis for equating the exchanged goods, and hence the parties to the transaction, which in no way reflects the subjectivity of economic preferences. As distinguished from the objective commodity value, the subjective price of a commodity is regarded as something insignificant[38].

The key point, however, is that it is not labor embodied in a commodity that equates commodities (and the parties to a transaction), but rather that people compare and equate the values of their commodities. Only labor in general, abstract labor equates people, hence only the banal judgment that everyone works; on the contrary, concrete labor is compared and equated by people. No one can state which value ratio is correct in a particular transaction: the ratio is established by agreement, not scientific substantiation.

Marxist economic theory does not attach due importance to this circumstance, therefore it creates the false impression that under socialism labor is capable of determining the values of commodity costs directly, that is, without human participation. K. Marx writes: “Each individual manufacturer receives back from society, after all deductions, exactly as much as he gives it. What he gave to society is his individual labor share. For example, a public working day is the sum of individual working hours; the individual working time of each individual manufacturer is the part of the social working day supplied to him, his share in it. He receives a receipt from the society that such and such quantity of labor has been delivered by him ... and according to this receipt, he receives such a quantity of commodities for which the same amount of labor has been expended from the public stocks. The same amount of labor that he gave to the society in one form is received back by him in another form. This is probably dominated by the same principle that regulates the goods exchange as the latter is an exchange of equal costs ... a known amount of labor in one form is exchanged for an equal amount of labor in another form”[39]. Contrary to the above reasoning, the “individual labor share” is not able to compare itself with the labor share of another manufacturer: “Labor itself is a kind of factuality, an actual process, an actual relation, and it cannot measure and regulate itself, cannot be its own form, principle and norm”[40]. In addition, the equalization of the values of goods that embody labor is far from obvious, because the ratio of different concrete labor expended by two manufacturers is by no means proportional to the ratio of the time they worked, since for such a proportion it is first necessary to reduce the manufacturers’ complex labor to simple or abstract[41]. Therefore, it is extremely important who compares real labor contributions

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[33] For more detail see: *Arendt H.* Vita activa, or About an active life [Vita activa, ili O deyatel’noi zhizni] / Transl. from German and English of V. V. Bibikhina. St. Petersburg : Aletheia [Aleteiya], 2000. Pp. 103–174.

[34] See: *Marx K.* Capital. Criticism of political economy. Volume One. Book I: The Process of Capital Production [Kapital. Kritika politicheskoi ehkonomii. Tom pervyi. Kniga I: Protsess proizvodstva kapitala] // Marx K., Engels F. Writings. T. 23. 2nd ed. [Marks K., Ehngel’s F. Sochineniya. T. 23. 2-e izd.] M. : Gospolitizdat, 1960. Pp. 77–80.

[35] See: *Sartre J. P.* op.cit. Pp. 59–81.

[36] See: *Marx K.* Capital. Criticism of political economy. Volume One. Book I: The Process of Capital Production [Kapital. Kritika politicheskoi ehkonomii. Tom pervyi. Kniga I: Protsess proizvodstva kapitala] // Marx K., Engels F. Writings. T. 23. 2nd ed. [Marks K., Ehngel’s F. Sochineniya. T. 23. 2-e izd.] M. : Gospolitizdat, 1960.Pp. 71, 84, 124.

[37] See: Ibid. Pp. 52–55, 67–68.

[38] See: Ibid, p 112.

[39] *Marx K.* Criticism of the Gotha program [Kritika Gotskoi programmy] // Marx K., Engels F. Writings. T. 19. 2nd ed. [Marks K., Ehngel’s F. Sochineniya. T. 19. 2-e izd.] M. : Gospolitizdat, 1961. P. 18–19.

[40] *Nersesyants V. S.* op.cit. P. 194.

[41] See: *Marx K.* Capital. Criticism of political economy. Volume One. Book I: The Process of Capital Production [Kapital. Kritika politicheskoi ehkonomii. Tom pervyi. Kniga I: Protsess proizvodstva kapitala] // Marx K., Engels F. Writings. T. 23. 2nd ed. [Marks K., Ehngel’s F. Sochineniya. T. 23. 2-e izd.] M. : Gospolitizdat, 1960. P. 53.

and how. In the practice of real (Soviet) socialism, the labor of workers and employees was equated by those in power in a compulsory manner and not without benefit (privileges) for themselves. The Marxist socialist utopia completely deprives human subjectivity of social significance, turning numerous private occupations and concerns into a directly public matter. Instead of genuine freedom, Marxism paved the way for unprecedented labor slavery.

In the 20th century the Russian state, then many Eastern European countries became the true center of the practical construction of a socialist social system inspired by Marxist ideas. The socialist glorification of labor turned out to be consonant with the essential features, revealed the hidden foundations of the Eastern European civilization. Here subjectivity, quite in the spirit of the Christian religion, finds the predominant form of self-expression in work: the worker imitates Christ, whoever does not want to work, let him not eat[42]. The assertion of labor activities as a form of social freedom, the transition from alienated labor as a moral duty to labor as self-actualization becomes the super-task of Eastern European history. In the context of the contemporary global capitalism which continuously aggravates labor alienation and widens the gap between the rich and the poor, the worldwide significance of this task is beyond doubt. The sad experience of real socialism helps to look for a genuine solution. The search has not yet been completed, the discovery of such a solution, convincing theoretical substantiation and successful implementation in social practice remain a matter of the future. In any case, it is necessary to find a way to legally transform the labor relations of social production still primarily regulated by morally oriented social law. The sought-after transfer of hired labor under the legal principle of the balance of rights and duties can violate the usual dualism of private and public law, lead to the emergence of a third system-forming part of law in the proper sense.

Labor is essential for ensuring human freedom, because freedom is not a givenness. The immortal is doomed to self-actualization, which is why he is not free. It is the awareness of finitude, mortality only that allows a person to comprehend his own self-actualization as a value, in other words, to consider self-actualization as a result of efforts or labor. Freedom is the labor of self-actualization. Free labor, not alienated labor, is labor as self-actualization.

In social life, a working person is guided not so much by the law as by the immediacy of the bonding social feeling, such as the feeling of friendship or love. The doctrine of togetherness developed by Russian religious philosophy is significant. The principle of togetherness is the person's self-actualization in the society as a living communication of free people[43]. The intuition of the joint social structure captures the sensual content of the rule of law which spreads friendly communication to all members of society. Thus, the concepts of community, public freedom and the rule of law coincide in all essential aspects. Therefore, consistent substantial legal thinking leads to a libertarian-joint theory of law.

One of the main lessons of history is that freedom is not identical to liberation. The principle of morality is liberation from all kinds of evil, its reverse side being objectification, the alienation of a person allegedly being unconditional good, an indisputable ethical truth. The negative freedom of moral duty turns into a new lack of freedom. On the contrary, genuine freedom is positive freedom which is not at all in flight from evil, but in the self-determination or self-actualization of a person, entering into reality through an independent decision, with which a person turns uncertainty into certainty. The source of positive freedom is a person's awareness of his own otherness, and the social mechanism is the legal balance of the rights and duties of everyone. As a special social regulator, law demands the recognition of the other as a subject, thereby realizing genuine freedom in public life.

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[42] See: Ano The Apostle Paul. The second letter to the Christians in Thessalonica. Book of the New Testament [Apostol Pavel. Vtoroe pis'mo khristianam v Fessalonike. Kniga Novogo Zaveta] // Books of the Holy Scriptures of the Old and New Testament. Canonical. Modern Russian translation [Knigi Svyashchennogo Pisaniya Vetkhogo i Novogo Zaveta. Kanonicheskie. Sovremennyi russkii perevod]. M. : Russian Bible Society [Rossiiskoe Bibleiskoe Ob shchestvo], 2011. P. 1325 (Гл. 3, 6–12).

[43] For more detail see: *Frank S. L.* The spiritual foundations of society [Dukhovnye osnovy obshchestva]. M. : Republic [Respublika], 1992. Pp. 54–63.

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Legal Norms in the Focus of the Constructivism Theory

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ABSTRACT
Based on the theory of constructivism, the author explores the central concept of law: the legal norm. A consistent deconstruction of the legal norms is carried out, which allows us to distinguish its three components: "Normative proposition" or "Normative utterance" about the rule of conduct, "Normative rule", which serves as a model for assessing the behavior of a participant in legal communication in law enforcement, and "Rule of conduct" as the basis for the obligation of subjects of the legal communication. In the author's opinion, the proposed deconstruction allows asserting that the legislator speaking out on the acceptable form of legally significant behavior is limited by legalization factors based (having the external border of the normative proposition) on moral imperatives. They define the boundaries of a person's freedom and define the contours of his acceptable legal behavior. For a subject of law, a normative statement becomes imperative as a result of inclusion in legal communication. Such communication is possible only if there is a single code of legal communication. The aforementioned indicates the presence of structures of public consciousness (legal construction) that predetermine both the choice of the form of behavior of the participant in legal communication and the characteristics of the normative statement itself. Law as an objective phenomenon defined through the categories of truth or falsity exists only at the level of a normative utterance. In their turn, normative rules and rules of conduct are evaluated through the criterion of effectiveness (achievement of a legal goal). The impossibility of deducing the true state of affairs from a rule that have a normative dimension allows asserting that the components of the legal material that make up the content of any legal system have a constructive "nature". According to the author, the methodology of legal constructivism removes the opposition between the norm and the legal relationship, making it meaningless to search for the actual content of acts of subjects of legal communication in a normative matter. The application of the approach under consideration allows us to state that the subject of legal communication is a way of representing the corresponding legal structure through his target behavior.
Keywords: legal norm, normative proposition, normative utterance, normative rule, rule of conduct, legal construction, deconstruction, moral imperatives, legal facts

1. Deconstruction of the legal norm: problem statement

In the science of law, as well as in the philosophical and methodological reflection on the phenomena of the legal life of the society which goes beyond the subject of law, there has formed a generally uniform approach to the idea of what is called objective law with a certain degree of conventionality: it is generally understood as a system of norms that "regulate life in the society, the observance of which, in its turn, is guaranteed by public authorities"[1]. However, there is already no visible unity in views among researchers regarding the "primary cell" of objective law: the legal norm. The special legal literature devoted to the study of individual spheres of legal reality is characterized by the ambiguity of the term of "legal norm" (a generally binding rule of conduct established by the state and ensured by its force; a formally defined precept of a normative act; logical judgment of an implicative type)[2] or the multidimensionality of the concept under consideration (norms-precepts and norms-judgments)[3].

In our opinion, the issues considered in this paper may be solved through consistent deconstruction of the general legal category of "the legal norm" into its components, namely: the "normative statement" being the central element of the system of law, the "normative rule" serving as a model for assessing the behavior of a participant of legal communication in law enforcement activities, and the "rule of conduct" as the basis for the obligation of subjects of legal communication[4]. In case of sufficient clarity a normative statement is presumably equally perceived by the participants of legal communication,

[1] *Bergel J.-L.* General Theory of Law [Obshchaya teoriya prava] / Under. total ed. V. I. Danilenko / Transl. from fr. M. : Publishing house NOTA BENE, 2000. P. 15.

[2] See: Civil law: Actual Problems of Theory and Practice [Grazhdanskoe pravo: aktual'nye problemy teorii i praktiki] / Under Ed. of V. A. Belova. M. : Yurait-Publishing House [Yurait-Izdat], 2007. Pp. 94–96.

[3] *Mankovskii I. A.* Norms and Sources of Civil Law. Theoretical Foundations of Formation and Application : monograph [Normy i istochniki grazhdanskogo prava. Teoreticheskie osnovy formirovaniya i primeneniya : monografiya]. Minsk : International University "MITSO" [Mezhd. un-t. "MITSO"], 2013. P. 5.

[4] The idea of the need for a clear distinction between the above sections of the legal norm was prompted to the author by the works of Evgeny Bulygin (see, in particular: *Bulygin E.* On the Problem of the Objectivity of Law [K probleme ob"ektivnosti prava] // Problems of Philosophy of Law [Problemi filosofii prava]. 2005. V. III. No. 1–2. Pp. 7–13).

however, since identity is possible only at the level of a sign expression of events or phenomena, social consensus in case of a dispute is achieved due to their interpretation of the relevant normative statement. Thus, the need for the proposed differentiation of concepts is predetermined by the specific features of the reference to the acting subject of the terms of legal reality determined by these concepts, and, accordingly, the function performed by these terms in the process of legal communication.

2. Experience of deconstruction of the legal norm: normative statements, normative rules and rules of conduct

2.1. Foundations of normative statements

The proposed deconstruction of the concept of the "legal norm" and its consideration in the focus of the theory of legal constructivism give rise to several key questions, namely:

1. Is the conventional figure of the legislator as the exponent of the legally significant will historically accidental[5]?
2. Can the foundation of power be narrowed down exclusively to the social practice established in a particular society, that is, to the so-called "right to nomination" enabling the sovereign to accumulate the "legal capital" in his hands? 3
3. Should the established linguistic legal practice be recognized as a source of law displacing moral imperatives beyond the legal dimension?

Any normative statement (normative proposal) is known to be based on authority (*auctoritas*) which ensures its social legitimation, and is provided with measures of compulsory implementation brought into action by the subject performing the function of *potestas*, its essence being the ability of the subject of the political power to act. Such a subject is the sovereign acting personally, or a hypostatized entity which is the state acting on behalf of the people, the bearer of sovereignty. It should be noted that in the mind of the subject of legal communication, political power is perceived as a form of his dependence on the object perceived by him as a source (beginning) of the object establishing normative precepts. It is in the consciousness of the perceiver only that such an object is personified, endowed with the qualities of a subject, nevertheless, without being it for so long as it is impossible to enter into communication with it. The inclusion of subjects of legal communication into legal communication reflects the dynamic aspect of the legal order. According to G. Kelsen, the named aspect fixes the process of "creation and application of law, law in its movement" and is also "regulated by law", since "one of the most important properties of law is that it regulates its own creation and application"[6].

Note that the history of European law knows different approaches to the legitimation of normative statements. For example, at the dawn of the establishment of the Roman legal order, normative statements were deemed by the authority of the priestly colleges, later — by the authority of the legal experts who formed the *ius*, and the Senate of Rome; with the recognition of the Christian teaching as "absolutely true", the authority of the normative statement is deemed by the power of the emperor given by God, "… for there is no power not from God; the existing authorities are established from God"[7].

In this vein, normative statements were also perceived by glossators who considered the legal material of Roman law as *ratio scripata*, since the rational in the era under consideration was considered synonymous with the divine. Normative statements were recognized as such until the moment when the Christian concept of law was replaced by natural law — the new *ius* of the originally deistic and later secularized era, which eventually degenerated in the "East" into the authority of the will of the ruling class.

In their turn, modern methodological studies of the justification of normative statements in the "West" build upon the search for grounds for their effectiveness. Accordingly, the hypothetical effectiveness of

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[5] In a broader sense, this is a fundamental question about the degree of influence of cultural factors on legal phenomena and, accordingly, the question of the degree of determinacy of law by cultural factors external to it in a broad sense.

[6] *Hans Kelsen.* Pure Theory of Law. 2nd editon [Chistoe uchenie o prave. 2-e izd]. Transl. from German by M. Antonov and S. Loesov. St. Petersburg : Alef Press Publishing House, 2014. P. 94.

[7] The Epistle of the Apostle Paul to the Romans. (Rom. 13.1.) / Bible (Books of the Holy Scriptures of the Old and New Testaments) [Poslanie k rimlyanam apostola Pavla. (Rim. 13.1.) / Bibliya (Knigi Svyashchennogo Pisaniya Vetkhogo i Novogo Zaveta)]. M. : Edition of the Moscow Patriarchate [Izdanie Moskovskoi Patriarkhii], 1992. P. 1240.

a legal norm here appeals to the political and legal approach which is reduced mainly to an economically effective assessment of the operation of law: from the point of view of utilitarianism, the moral and, consequently, the legal value of conduct is determined by its usefulness[8].

2.2. Normative statements and moral imperatives

In connection with the above, the problem of the relationship between normative statements and moral imperatives seems to be significant. In our opinion, the ratio of legal and moral is determined by the very content of subjective law. In legal culture, power as the freedom of a person regarding the legitimately appropriated objects is recognized as a social value (good). The assessment of the social benefit in question, on the one hand, depends on the recognition by the society and the protection by the legal order and, therefore, cannot be indifferent to the legal order; on the other hand, it depends on the person who dominates the object, which, therefore, allows imposing the responsibility on him if the recognized boundaries of lawful behavior are violated. In this sense, subjective right is a measure of freedom of a person recognized and protected by law regarding the benefit legitimately appropriated by it: freedom from the variability of actual conditions.

According to the just remark of J. Habermas, "under the revolutionary premise, according to which everything that is not explicitly prohibited is rightly allowed, no longer obligations, but subjective rights form the basis for the construction of the legal system"[9]. Thus, it is the concept of subjective law rather than an order that makes it possible to overcome the dependence of the behavior of the subjects of legal communication on the world of the *fusis* by subordinating their behavior to the *nomos* — a self-sufficient sphere of legal reality isolated from other phenomena. At the same time, note that the connection between legal and non-legal phenomena is not lost, but as distinguished from the world of physical phenomena, it has a correlation rather than a causal nature. However, in the cases where social experience makes it necessary to "elevate the fact into law," factual phenomena are evaluated only in the context of the phenomena making up the sphere of legal reality.

This thesis clearly demonstrates the definition of the boundaries of subjective law outwardly enshrined in normative statements which is quite universal for all types of societies. The boundaries of a person's freedom in committing behavioral acts related with a legitimately appropriated limited resource are determined by the imperatives of the "morality of duty" and "morality of striving"[10] enshrined as fundamental principles in the text of the law. The "moral of duty" being the lowest limit of a person's freedom is aimed at preventing a conflict within the society, since the law ordains not to want someone else's property, to give everyone his due[11]. The ultimate upper limit of a person's freedom is determined by the freedom of other persons to dispose of legitimately appropriated limited resources ("the morality of striving"), because no legal order can function in any stable way imposing rather than creating opportunities for subjects in the appropriation, exercise and protection of subjective rights.

Thus, in its moral dimension the law proceeds from a well-known controversy: without allowing the establishment of normative precepts on how a person should to behave to achieve the best result, it demands compliance with the aforementioned "morality of duty" which imposes the duty of all and everyone to refrain from encroachment on the limited resource legitimately appropriated by a person. The said lower and upper limits of a person's freedom define the contours of his acceptable legal behavior. The recognized person's freedom to behave within the aforementioned boundaries serves as the natural legal foundations of the right in general and its main systemic element: a normative statement.

On the other hand, the legal possibility of acquiring, exercising, changing, terminating and protecting the subjective right is determined by the legal norm, which allows concluding that the essence of the law, its *essentia* can be determined in the focus of the ratio of the normative statement legitimizing the legally significant behavior of a person and a normative rule determining the legal consequences of

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[8] See: *Khalabudenko O. A.* Law and Economics vs Law and Moral: Some Methodological Observations [Pravo i ekonomika vs pravo i moral': nekotorye metodologicheskie zamechaniya] // Law and Business: Convergence of Private and Public Law in the Regulation of Entrepreneurial Activity [Pravo i biznes: konvergentsiya chastnogo i publichnogo prava v regulirovanii predprinimatel'skoi deyatel'nosti]. M., 2015. Pp. 49–62.

[9] *Habermas J.* The Concept of Human Dignity and the Realistic Utopia of Human Rights [Kontsept chelovecheskogo dostoinstva i realisticheskaya utopiya prav cheloveka] // Questions of Philosophy [Voprosy filosofii], 2012, No. 2. P. 71.

[10] The concepts of "morality of duty" and "morality of striving" were introduced into scientific circulation by American legal scholar Lon L. Fuller who investigated the specific moral requirements to law. See: *Fuller Lon L.* Moral Law [Moral' prava] / Lon L. Fuller; trans. from English T. Danilova, ed. A. Kuryaeva. M. : IRISEN, 2007. Pp. 14–20.

[11] D.1.1.10pr: «Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere alterum non laedere, suum cuique tribuere».

such behavior. Indeed, normative statements establish values, whereas descriptive statements are aimed at describing facts. When, for example, we assert that it is forbidden to violate someone else's subjective right, in particular the right to performance, our goal is not to describe what the facts are, but to form a certain line of our behavior, according to which the obligated person, a debtor or third parties, must not violate the named right, and if they do, they will be held accountable. In other words, normative statements say how we should behave in a particular factual situation. Thus, it is not inferred from the presented normative rule that we *will* behave in exactly this way, but it is *a standard (model)* and, possibly, *our decision* on how we should act in a given situation[12]. Thus, both the regulatory and protective effect of the norm are of an evaluative nature: "no objective connections between facts and their legal consequences exist or can be established ..."[13].

A normative statement in itself does not answer the question why certain social relations are related with legal norms, suggesting, when resolving this issue, drawing on the belief in the rationality of the "legislator" who is able to determine which factual situation is worthy of recognition and protection, and which should be ignored. In this regard, let us take note of the fact that the fact and the right are not in a causal relationship analogous to the one inherent in natural phenomena and which can be described through its laws (fusis). The relationship between the cause and the effect is "factual and empirical", while the relationship between the foundation and the effect is "conceptual and logical"[14]. The foundation is not intended to influence the world of facts, but, on the contrary, the actual behavior, action or inaction, is assessed in terms of the legal effects provided for by the normative rule. For example, the performance under the obligation to transfer a thing (actual action) gives a legal effect: it terminates the obligation by proper performance because the disposition (sanction) of the norm shows the legal consequences of taking the relevant actions aimed at terminating the obligation.

Following the theory of L. I. Petrazhitsky, the rule itself affects human behavior and is experienced by him as a legal subject[15]. Based on the empirical argument of G. Hart, under the influence of legal norms certain types of human behavior are transformed from arbitrary into mandatory[16]. The duty expressed in the normative statement is related to the execution of the order of the sovereign, while the duty expressed in the normative rule, what the jurisdictional body is guided by, does not fully comply with the orders, "because it was introduced on the basis of well-known legal procedures that are generally obligatory and applying to many persons"[17]. (The noted, *a propos*, reconfirms the inconsistency of reducing the concept of law to the orders of the sovereign.) Hence, the algorithm of the interaction of a normative rule with legal effects is given by the sequence in which the legal norm determines (regulates) the behavior of a participant of legal communication implemented in certain legal forms, including in legal relations. In any case, there is no need for an intermediary in the form of a legal relationship between the legal norm and the legally significant behavior of participants of legal communication.

3. Issues of the logical relevance of normative statements and normative rules

In connection with the proposed deconstruction of the concept of "rule of law", a number of critical considerations also arise regarding the logical relevance of a normative statement and a normative rule. This refers to the well-known "Hume's paradox or guillotine" (*is — ought problem*) known to suggest two possible solutions: either complete rejection of the possibility of deducting what is ought to be from the things existent (the conclusion resulting from the concept of phenomenology of E. Husserl[18]), or the

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[12] *Ogleznev V. V.* G. L. A. Hart and the Formation of an Analytical Philosophy of Law [G. L. A. Khart i formirovanie analiticheskoi filosofii prava]. Tomsk : Publishing house of Tomsk University [Izdatel'stvo Tomskogo un-ta], 2012. P. 78.

[13] *Belov V. A.* Civil Law. A Common Part. T. I. Introduction to Civil Law : textbook [Grazhdanskoe pravo. Obshchaya chast'. T. I. Vvedenie v grazhdanskoe pravo : uchebnik] / V. A. Belov. Moscow : Yurayt Publishing House [Izdatel'stvo Yurait], 2011. P. 244.

[14] *G. H. von Wright.* Logico-Philosophical Research: Selected works [Logiko-filosofskie issledovaniya: Izbrannye trudy]: transl. from English / Total Ed. G. I. Ruzavina and V. A. Smirnova. M. : PROGRESS, 1986. P. 71.

[15] *Petrazhitsky L. I.* The Theory of Law and the State in Connection with the Theory of Morality [Teoriya prava i gosudarstva v svyazi s teoriei nravstvennosti]. St. Petersburg: Publishing House "Lan" [Izdatel'stvo "Lan'"], 2000. Pp. 270–274.

[16] *Hart H. L. A.* The Concept of Law [Ponyatie prava] / Transl. from English; under the general. ed. E. V. Afonasina and S. V. Moiseeva. SPb. : Publishing House of St. Petersburg University [Izdatel'stvo S.-Peterbugskogo universiteta], 2007. P. 14.

[17] *Johnson C. D.* Moral and Legal Obligation // The Journal of Philosophy. 1975. Vol. 72. No. 12.

[18] See: *Husserl E.* Logical research. T. 1: Prolegomens to Pure Logic [Logicheskie issledovaniya. T. 1: Prolegomeny k chistoi logike]. M. : Academic project [Akademicheskii proekt], 2011.

recognition that the obligation has an actual origin and goes back to social experience (the theory of action developed by J. Searle[19]).

Let us try to consider this problem through the prism of logical truth. Logical truth is known to be based on arguments applicable in deductive or inductive reasoning. In this case deductive reasoning presupposes the application of the criterion of validity (logical correctness). Valid reasoning is based on the fact that only correct conclusions follow from correct premises. It should be recognized that deductive reasoning is logically impossible for understanding the behavior of a participant of legal communication carried out by means of evaluation, when the behavior in question is brought to comply with the general rule that fixes the established ideas about what should be done. The point is that deductive reasoning is always strong: the cause is causally connected with the effect in them. The behavior of the subject of legal communication may be assessed by means of weak understanding taking account of the purpose of the performance of behavioral acts by the subject (teleological understanding and explanation as bringing to comply with the generally accepted truth). Weak understanding is problematic, inductive reasoning[20]. The scheme of weak understanding is: "A is the foundation of B. B is social benefit; therefore, A is probably also a benefit." For example, the actual possession of a thing (A) serves the foundation for protecting the relevant ownership situation of a bona fide owner (B), its stability being recognized as a social benefit; therefore, the actual possession of the thing is probably also a benefit. The probability here is that the normative rule presupposes the social value of ownership based on the probability of bona fide behavior of the person actually owning the thing. In any case, the question of what kind of actual possession is a social benefit is left to the discretion of the court which takes into account the accumulated social experience when making the decision.

Weak understanding of the assessment of the behavior of a participant of legal communication carried out by bringing it up to comply with the general rule, apart from the assessment of the behavior itself also includes the purpose to achieve which the subject behaves in the manner stipulated by the rule. According to G. H. Wright, the logical form of understanding the target behavior of a participant of legal communication is a practical syllogism serving as a supporting model for teleological explanation.

In practical syllogism, the initial premise speaks of some desired goal (goal of action); in a lesser premise the action as a means of achieving it is linked with the desired result; finally the conclusion is made about the use of the means to achieve the goal[21].

From the point of view of a teleological explanation, one can understand the behavior of the actor, or rather, the action of the very rule of behavior by which he is guided, at the same time it is impossible to reliably know whether the behavior of the actor has led to the desired result. Evaluation of the achievement of the intended result in case of a conflict situation is possible only in an inductive conclusion which assumes that particular prerequisites are related with the conclusion through certain factual grounds lacking a formal character[22].

4. Ontological and logical limits of measurement of the legal norm

Further logical analysis of the legal norm is determined by the correctness of the answer to the question: does law exist as an objective phenomenon? The result obtained determines the solution of two problems closely related with it: first, whether law (in the meaning of a normative statement) is the result of human experience, excluding rational or empirical apriorism; second, as a consequence of the first, is it permissible to recognize that there is no logical connection between law (in the meaning of a normative rule) and morality[23].

The question of whether a legal norm exists objectively can be answered positively if the legal norm is understood as a certain state of affairs as it really is, regardless of our opinions about it (metaphysical objectivity), in other words, when the concept under consideration is used in the meaning of a normative statement. On the other hand, it cannot be recognized that a legal norm in the meaning of a normative rule and a rule of conduct is a logical connection between a statement expressed in a descriptive sentence and a certain object existing in the world, and therefore that a legal norm estab-

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[19] See: *Searle J. R.* Rationality in Action [Ratsional'nost' v deistvii]. Transl. from English A. Kolody, E. Rumyantseva. M. : Progress-Tradition [Progress-Traditsiya], 2004.

[20] Philosophy : Encyclopedic Dictionary [Filosofiya : Entsiklopedicheskii slovar'] / Ed. A. A. Ivina. M. : Gardariki, 2004.

[21] *G. H. von Wright.* Op. cit. P. 64.

[22] *Ivin A. A.* Logics : Tutorial. 2nd Edition [Logika : Uchebnoe posobie. Izdanie 2-e]. M. : Knowledge, 1998. P. 112.

[23] *Bulygin E.* On the Problem of the Objectivity of Law [K probleme ob"ektivnosti prava] // Problems of Philosophy of Law [Problemi filosofii prava]. 2005. V. III. No. 1–2. P. 7.

lishes an objective connection between the behavior of a participant of legal communication and its effects.

The function of a legal norm is prescriptive ("the law ordains, allows, authorizes" but "does not speak out about the subject of cognition"[24]), therefore, normative rules, unlike statements about their existence (normative sentences), cannot be true either, nor false. Thus, normative statements about the rule of behavior (normative sentences) cannot be characterized as valid or effective, they can neither be observed nor violated, but they can be true or false. On the contrary, normative rules can be valid or invalid, effective or ineffective, they can be observed or violated, but they cannot be true or false[25]. Therefore, a normative statement is considered within the meaning of a social fact and established practice. For example, a normative statement about the assessment of the conscientiousness of a participant of legal communication can be true or false, while the effects of the relevant norm within the meaning of a normative rule determining the consequences of conscientiousness or unconscientiousness cannot be validated and, therefore, cannot be true or false.

Note that truth is always contextual; it is built in a dialogue with *another*. Indeed, it is "... only at the level of social interaction through linguistic communication that we create the foundations independent on the desire"[26] — the foundations of an obligation. An obligation exists in the normative form as a rule of behavior addressed to the subject that must be fulfilled; it is perceived as an appeal to another, and therefore an obligation has a communicative nature[27]. Nevertheless, it should be borne in mind that to start legal communication, it is necessary to develop a single code of communicative interaction. Effective communication is possible only when the participants of the process of legal communication preagree on a formalized method of communication clear for them. The development of such a method in the process of communication is basically impossible, since in this case the possibility of the beginning of *iuris communicatio* is excluded. In other words, a legally significant result of communication is possible only if "the method of transmitting messages has already been worked out and agreed upon"[28]. So, it is only the result of reception represented by the legal tradition (by what is transmitted) that provides a single code of legal communication ensuring effective communication between different legal cultures. Therefore, it is incorrect to say that in the actual acts of communication themselves (orders, promises, obligations) the grounds for normative judgments are created.

Hence, it is permissible to assume that the assessment of the person's behavior ordained by a legal norm (normative rule) may be correct or incorrect: the correct answer is not true, but it allows determining effectiveness through the prism of awareness of the rights and obligations, their compliance with or violation entailing certain legal consequences. However, the normative rule itself depends on the existing social experience, it is ambiguous. In any case, the certainty of the norm is achieved not in itself, but in the practice of its application: "only after the judge's decision can we find out which norm corresponds to the specified normative wording"[29]. In this sense, a judicial act performs the function of a determinative allowing determination of the final normative meaning of a rule. With regard to the question of the relationship between the legal norms and moral imperatives, this point of view allows asserting that the court will resort to the application of moral categories, the basis of judicial discretion, whenever a normative statement is incorrect from the point of view of social experience.

It should be noted that legal norms, like signs, are not entities, and therefore the "exist objectively" definition of their state is applicable to them, as noted above, only when they are defined as normative statements. The sign does not refer to the meaning of the thing outwardly, it refers to the meaning within its own boundaries. In this sense, the basic concept of law is identical to itself: law is law, its definition does not require a predicate. Nevertheless, legal norms are "directly or symbolically linked to specific acts that take place in real life"[30]: in the meaning of a normative statement — by the practice

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[24] *Hans Kelsen.* Op. cit. P. 95.

[25] *Bulygin E.* Op. cit. P. 8.

[26] *Ogleznev V. V.* Some Remarks on the Theory of the Grounds for Action [Nekotorye zamechaniya k teorii ob osnovaniyakh dlya deistviya] // Tomsk State University Bulletin: Philosophy, Sociology, Political Science [Vestnik Tomskogo gosudarstvennogo universiteta: Filosofiya, Sotsiologiya, Politologiya]. 2015, No. 2 (30). P. 215.

[27] *Polyakov A. V.* Rule of Law [Norma prava]. [Electronic resource] // URL: http://www.law.edu.ru/doc/document.asp?docID=1140109 (accessed: 05.20.2020).

[28] *Gasparyan D. E.* Introduction to Non-Classical Philosophy [Vvedenie v neklassicheskuyu filosofiyu] / D. E. Gasparyan. M.: Russian Political Encyclopedia (ROSSPEN) [Rossiiskaya politicheskaya ehntsiklopediya (ROSSPEHN)], 2011. P. 198.

[29] *Bulygin E.* Op. cit. P. 11.

[30] *Lloyd D.* The Idea of Law. The idea of law. Repressive Evil or Social Necessity [Ideya prava. Repressivnoe zlo ili sotsial'naya neobkhodimost'] Transl. from English: Yumashev Yu. M. (Scientific Ed.), Yumashev M. A. M. : Yugona, 2002. P. 295.

of legitimation and the procedure of adoption, in the meaning of a *normative rule* — by the practice of application, and in the meaning of *a rule of conduct* — by practical implementation. Therefore, law cannot be narrowed down (like chess) to a set of rules, according to which each element is determined by reference to another, but not to its substrate.

5. Constructive "nature" of legal norms

The fundamental impossibility of deriving the true state of affairs from a rule that has normative significance makes it possible to assert that the components of legal material, a special kind of structure making up the fabric of any legal system, have a constructive "nature". The links between the elements of legal reality reflect their constructive features set by political and legal imperatives or by "legal nature" in terms of natural law, but in reality by a special legal regime conventionally recognized and established by the legal order with regard to certain typified legal constructions corresponding to forms of social consciousness.

Accordingly, legal phenomena can be explained at the methodological level, and understood at a subsequent level only by fixing the constructive activities of human thinking carried out with specific goals and according to certain rules with rigidly established boundaries and precisely expressed in a specific language[31].

Being forms of social consciousness, legal constructions are desubstantiated: the meaning of a certain element here is determined by its location in it and the resulting function performed by it[32]. Recognition of the normative level of expression of legal constructions removes the problem of doubling the ontology of legal phenomena, eliminating the need to supplement the phenomenal dimension with the world of noumenal entities in the form of acts of will of the subjects of legal communication. "Understanding of legal constructions as the proper content of law, — according to the fair remark of N. N. Tarasov, — in addition to the designation of new heuristic horizons of legal research, seems extremely fruitful for overcoming the attitude to law as a form that does not have its own history, its own content that has developed within the framework of the paradigm of socio-economic determinism[33]. Thus, the methodology of legal constructivism removes the opposition between the search for the ratio of "factual" and "legal" in legal relations allowing consideration of the established forms of legal communication as a legally significant connection between subjects, without endowing such connections with the typification unusual for them.

On the other hand, the methodology of legal constructivism also removes the opposition between a legal norm and legal relationship, making it senseless to search for the actual content of acts of subjects of legal communication in a normative statement[34].

In this regard, it may be supposed that this or that legal structure precedes the normative statement, but at the same time, being enshrined in the normative material (normative statement), it retains its autonomy which allows resorting to its heuristic comprehension. The subject of legal communication in this sense is a way of representing the relevant structure.

Thus, the autonomous subject of legal communication ceases to exist, its place is taken by the named communicative community, the correspondence theory of truth is replaced by the concept of truth as a consensus, which eventually leads to the replacement of the epistemological subject with "intersubjectivity". According to J. Habermas, law is the result of communicative activities represented by "symbolically transmitted interaction" carried out in accordance with the obligatorily accepted norms

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[31] For comparison see the definition of constructivism in: *Antonovskii A. Yu., Kasavin I. T., Bernshtein V. S.* Constructivism / Humanitarian Encyclopedia: Concepts [Konstruktivizm / Gumanitarnaya ehntsiklopediya: Kontsepty] [Electronic resource] // Center for Humanitarian Technologies [Tsentr gumanitarnykh tekhnologii], 2002–2020 (last revised: 02/08/2020). URL: https://gtmarket. ru/concepts/7047 (accessed: 20.05.2020).

[32] In our opinion, constructions should be distinguished from constructs: both of them undoubtedly have rational grounds, their structure is logical (self-identical, consistent, substantiated, formally true). However, as distinguished from a construct, a construction is not only rational, but, if you will, socially useful, reasonable from the point of view of social experience. This explains the current practice of bypassing or even ignoring laws in which numerous constructs are enshrined in the textual form, the resort to them seeming unreasonable for the subject of legal communication.

[33] *Tarasov N. N.* Methodological Problems of Legal Science [Metodologicheskie problemy yuridicheskoi nauki] / Humanitarian University Press. Ekaterinburg [Izdatel'stvo Gumanitarnogo universiteta], 2001. P. 244.

[34] For more details on solving the issues related to the interpretation of the concept of "legal relationship" through the theory of legal constructions, see, in particular, *Khalabudenko O. A.* Some Questions of the Methodology of Law: Civil Law Prerogatives and Legal Constructions [Nekotorye voprosy metodologii prava: grazhdansko-pravovye prerogativy i yuridicheskie konstruktsii] // Bulletin of the Perm University: Series "Legal Sciences" [Vestnik Permskogo universiteta: Seriya "Yuridicheskie nauki"], No. 1 (2013). Pp. 174–187.

determining the mutual behavioral expectations, understood and recognized by at least two actors; moreover, as distinguished from technical rules and strategies that depend on the consistency of empirically true or analytically correct statements, the meaning of social norms is based only on an intersubjective agreement about the intentions and is guaranteed by a general recognition of obligations[35].

However, as noted above, with this understanding of legal communication, a logical circle is observed: communication is possible when a single communication code is developed which must necessarily precede its very beginning. In other words, the communicative theory of law does not provide an answer to the question of the a priori foundations of a particular legal discourse. The assumption that if "discursive formations are historically conditioned, they, therefore, are devoid of an a priori foundation, which means that each society has its own order of truth, its own policy of truth"[36], contradicts, by the way, the practice of an intercultural legal dialogue.

In his turn, in turn, to avoid self-referentialism, M. Foucault, one of the founders of radical constructivism, substantiates his views by the idea of searching for a quasi-transcendental basis of discursive practices which he identified with the discourse of total power: "panoptism"[37]. For legal discourse, the embodiment of total power is the legal norm.

In fact, legal constructions acquire the character of "substance" (in the meaning of *existentia*) when a participant of legal communication expresses will, thus setting their explicit dimension. From the moment of the expression of a legally significant will, the legal structure acquires a certain "center": the possibility laid down at the level of a normative statement becomes a legal reality. Thus, the "center" serves as a deep foundation not belonging to the structure itself, but holding the construction itself. Unlike the reasons that make us not free, the foundations depend on the free will of the subjects of legal communication. For a normative statement about the rule of conduct, such a center is *potestas*; for a legal norm in the meaning of the rule of behavior this is will, or rather the target behavior of the subject of legal communication. In case of a dispute, the gap between a normative statement as an abstract directive precept and a specific rule of conduct followed by the subject is filled with the meaning obtained in the practice of applying the normative rule.

An effective way to solve the problem of an endless search for the foundation of an episteme was proposed by G. Teubner who developed his views on constructivism in law on the basis of the *theory of autopoiesis* introduced into the sphere of cognition of social reality by N. Luhmann[38]. This concept borrowed from biology denotes a system that reproduces its elementary parts with the help of an operating network of the same elements and, owing to this, is delimited from the external environment. In the social and, as one might assume, the legal system, reproduction is carried out in the form of communication. Thus, *autopoiesis* is a way of reproducing a certain system identical to itself.

Autopoetic discourse allows asserting that the main element of the legal system is not a legal norm and not power as a form of perception of legitimate violence by the subject of legal communication, but a legal structure. G. Teubner states: "The law autonomously processes information, creates worlds of meanings, sets goals and tasks, creates constructions of reality and determines normative expectations, and everything is completely independent of the views of the world in the minds of lawyers"[39]. Being autopoietic, the legal system subordinates to itself the provisions established in other socially related systems, such as politics, economics, ecology, etc.

In other words, legal constructions absorb and recode any external meanings. In order to be recognized as legally significant, any empirical fact should be interpreted in the context of the constructions adopted by the legal community. It should be borne in mind that the normative component of the rule performs an ascriptive function[40] ordaining a legally significant status to a certain state of affairs. From

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[35] *Habermas J.* Technik und Wissenschaft als "Ideologie". Frankfurt a/M., 1968. S. 62. (Cit. ex: Communicative Rationality: an Epistemological Approach [Kommunikativnaya ratsional'nost': epistemologicheskii podkhod] / Ros. Acad. Sciences, Institute of Philosophy; Ed.: I. T. Kasavin, V. N. Porus. M. : IFRAN, 2009.)

[36] *Teubner G.* How the Law Thinks: Toward a Constructivist Epistemology of Law. In: Krohn W., Küppers G. & Nowotny H. (eds.) Selforganization. Portrait of a scientific revolution. Kluwer, Dordrecht: 87–113 [Electronic resource]. URL: http://www.univie.ac.at/constructivism/archive/fulltexts/2713.html (accessed: 20.05.2020).

[37] See: *Foucault M.* Psychiatric Power. Course of Lectures Delivered at the College de France in the 1973–1974 Academic Year [Psikhiatricheskaya vlast'. Kurs lektsii, prochitannykh v Kollezh de Frans v 1973–1974 uchebnom godu]. St. Petersburg : Science, 2007; *Foucault M.* Oversee and Punish. Birth of a Prison [Nadzirat' i nakazyvat'. Rozhdenie tyur'my] / transl. from French V. Naumov. M. : "Ad Marginem", 1999; also: *Teubner G.* Op. cit. note 40.

[38] See: *Luhmann N.* The Autopoiesis of Social Systems, in: F. Geyer and J. van der Zouwen (eds.), Sociocybernetic Paradoxes, Sage, London, 1986, 172 ff.

[39] *Teubner G.* Op. cit.

[40] *H. L. A. Hart.* The Ascription of Responsibility and Rights // Proceedings of the Aristotelian Society, New Series, Vol. 49 (1948–1949), P. 171–194.

the point of view of the theory of speech acts, this function is realized in a certain "constitutive rule"[41], which determines the possibilities of a new behavior from the legal point of view, thus creating a so-called "institutional" fact. An institutional fact arises at the moment when collective intentionality endows the empirically perceived objects with a certain status and a function corresponding to this status.

6. Facts and moral categories in the context of legal constructions

In their turn, the factual circumstances in resolving specific cases are assessed exclusively in the context of a certain legal construction. Without connection with a specific legal construction, the fact remains legally indifferent.

Facts and related legal consequences are known to have no causality relations between them. Thus, the logical connection of the implicative type established between the hypothesis and the disposition (sanction) of a legal norm should not be identified with the connection that participants of legal communication recognize between the occurred fact and the legal consequences recognized by legal order. The connection between actual circumstances and legal consequences is recognized by virtue of the essence of the construction itself and exclusively in the context of its components, regardless of the form of its expression. In the hypothesis of a legal norm (normative rule), the model (structure) of a legal fact is consolidated. In the presence of the relevant model features enshrined in the hypothesis, a specific fact is recognized as a condition for the occurrence of the relevant legal consequences.

However, the "fact-hypothesis" (logical antecedent) cannot be explained without referring to the basis of the explanation: the multitude of phenomena of reality that precede or accompany the "fact-foundation" of the emergence of certain legal consequences. A legal fact as the foundation of certain legal consequences from the point of view of logic is covered by a wider area of reality than "the sub-area to which causal explanations are given"[42]. While a causal explanation points to the past and it assumes a nomic connection between the causal factor and the effect factor (*because, quia*), its presence determining the validity of the causal explanation depends, the teleological explanation points to the future (*so that, ut*), in this case the nomic connection is not a decisive factor in determining the validity of the teleological explanation[43]. Consequently, a functional (invariant) approach to explaining legal phenomena cannot be recognized to be sufficient; the practical syllogism applicable for this presupposes the clarification of a specific goal of an accomplished fact (Latin *factum* — done): the object of teleological explanation (explanandum) describes a certain result of behavior that the subject has intentionally achieved.

As noted above, a fact can be explained as a phenomenon or process that entails certain consequences with the help of a "practical syllogism". The logical connection between the three proposed aspects of the regulative action of a legal norm looks, apparently, as follows: a large premise is a normative statement that consolidates social intentionality (available in a sign for perception), a smaller reference is represented by a normative rule linking a certain action (fact) with the aim of an action (achieving a legal result), considering such an action as a means of achieving the goal (the semantic content of a sign), a conclusion — the legal situation informs about the use of this means to achieve the goal corresponding, on the one hand, to social intentionality, and, on the other hand, to the legal result sought by the subject of communication.

Note that through the constructivist approach to law, the issue of the relationship between moral categories and normative rules is also resolved: moral and ethical imperatives can be assessed only in the context of the relevant legal constructions. The point of view expressed by G. Kelsen that "morality should be considered as part of law in the cases where law contains norms that make moral norms a condition for the use of coercion"[44], can be accepted if it involves not normative statements, but specific normative rules, their ensemble, with account of the practice of their application, forming a relevant normative construction. So, the idea of the inadmissibility of the commission of private legal acts that

[41] The concept of "constitutive rule" was introduced into scientific circulation by J. R. Searle, opposing it to the regulative rule "regulating the activities, the existence of which is logically independent of the existence of rules" (see: *John R. Searle.* What is a Speech Act? In: "Philosophy in America" ed. Max Black, London, Alien and Unwin, 1965, P. 221–239; *Searle J. R.* What is a Speech Act [Chto takoe rechevoi akt] // New in Foreign Linguistics [Novoe v zarubezhnoi lingvistike]. M., 1986, Vol. 17. Pp. 151–169). In our opinion, all legally significant rules, if we adhere to the classification proposed by J. R. Searle, refer to the class of constitutive rules, since legally possible behavior manifests itself only in the sphere of the obligation.

[42] *G. H. von Wright.* Op. cit. P. 53.

[43] Ibid. P. 116.

[44] *Kelsen H.* General Theory of Law and State. Harvard University Press, 1949. P. 374.

contradict the law or morality, the prohibition on the use of customs that violate morality, the inadmissibility of including conditions contrary to morality in the transaction — these and other prohibitions in practical application can be explained and cognized only in the context of the relevant legal constructions. The foregoing allows concluding that moral and ethical imperatives, being included in the legal context at the level of the relevant legal constructions, do not determine their essence, but are subordinate to them.

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On the Problems of Application of Institute of Cancellation of the Documentation on a Lay-out of Territory, Recognition of Separate Parts of Such Documentation not Subject to Application

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ABSTRACT
The article discusses the problems of applying a relatively new institution of urban planning legislation: cancellation of territory planning documentation, recognition of certain parts of such documentation inapplicable. The author tries to identify the differences between the cancellation of such documentation and the recognition of its individual parts as inapplicable, considers a number of issues related to the possibility of canceling the territory planning documentation that meets the legal requirements. Attention is also paid to the determination of the list of the persons authorized to cancel the territory planning documentation, the need for public hearings in the process of such cancellation. Finally, the author draws the main conclusions, once again drawing attention to the presence of systemic shortcomings of the existing public law regulation.
Keywords: territory planning documentation, cancellation, public hearings, trust in state actions, administrative law

1. Introduction, problem statement

In August 2019, the federal law "On Amendments to the Urban Planning Code of the RF (hereinafter the UPC of the RF) and Certain Legislative Acts of the Russian Federation"[1] entered into force introducing the institution of cancellation of territory planning documentation, recognition of certain parts of such documentation as inapplicable[2].

Art. 2 of the UPC of the RF places construction among the principles of urban planning legislation, including on the basis of the territory planning documentation (hereinafter the TPD)[3] necessary for formation of a comfortable urban environment.

For example, in the absence of such documentation, it is impossible to ensure step-by-step development of the territory in order to synchronize construction of housing and social infrastructure facilities, construction of large linear facilities providing the population with communal resources, transport accessibility of the territories.

According to O. A. Zharkova, there is a rather noticeable legal vacuum in the legislation regarding TPD[4]. For example, the sources of funding of the preparation (development) of such documentation are not clearly defined, which allows public authorities to "stimulate" individuals to develop a TPD at their own expense, according to the principle: if you do not develop a TPD, you will not receive a construction permit, you will not be able to implement the project on other grounds[5].

At the same time, having invested significant funds in the development of TPD, the investor does not receive any guarantees that the planning solutions being part of such documentation can really be implemented[6].

The dynamism of the urban planning legislation[7] entails constant adjustment of urban planning documentation which, in its turn, leads to situations where different types of such documentation start

[1] On Amendments to the UPC of the RF and Individual Legislative Acts of the RF: Federal Law dd. 02.08.2019 No.283-FZ (hereinafter FZ No.283-FZ). The statutory regulation and judicial practice are given according to Consultant Plus RLS.

[2] See: p. 18–20 Art. 45 of the UPC of the RF.

[3] Which currently includes territory planning and demarcation projects (hereinafter TPP, TDP) according to p. 4 Art. 41 of the UPC of the RF.

[4] *Zharkova O. A.* Provision of Land for Construction Purposes and Documentation on the Planning of the Territory [Predostavlenie zemel'nogo uchastka dlya celej stroitel'stva i dokumentaciya po planirovke territorii] // Statute [Zakon]. 2013. № 5. Pp. 65–72.

[5] For the existing practice of issuing urban planning plans of land plots without specifying the place of the permissible location of the capital construction facility in the absence of a developed TPD, see [Electronic source]: URL: https://zakon.ru/blog/2014/5/16/novaya_praktika_vas_rf_dlya_togo_chtoby_stroit_gradostroitelnogo_plana_nedostatochno_eshhe_obyazatel (accessed on: 08.03.2020).

[6] In other words, that it will be really able to build the capital construction facilities planned in such documentation.

[7] In 2019 alone the UPC of the RF was amended six times.

contradicting one another. For example, it is quite possible that after the approval of the territory planning project (hereinafter the TPP), the land use and development rules (hereinafter the LDP) will be changed, which will entail the impossibility of placing facilities in accordance with the parameters contained in the PPT. The possibility of implementing planning decisions as part of the TPD may be also influenced by the adjustment of the rules in the field of normative and technical regulation (sets of rules).

For example, the previously approved TPP provided for the creation of a school for 250 students, while the existing standard technical regulation allow for the height increase for educational organizations, which allows placement of the facility of a significantly greater capacity[8, 9]. In addition, the possibility of placing facilities in the TPD may be influenced by the plans of the public authorities to create infrastructure facilities (motor roads, for example)[10]. 10. In the situations considered above, it becomes necessary to adjust the TPD, which is often just as time-consuming and costly as approving new documentation. In view of the above, the analysis of the possibility of cancellation, recognition of the TPD (its individual parts) as inapplicable as an "alternative" to amendments to the TPD is of undoubted practical interest. This analysis will be the subject of this article.

2. Cancellation of territory planning documentation and its recognition as inapplicable. Differentiation of the notions

Paragraphs 18-20 of Art. 45 of the UPC of the RF use the following wording: the procedure of amending the TPD, the procedure of canceling such documentation or its individual parts, the procedure of recognizing certain parts of such documentation inapplicable.

Even the application of the grammatical interpretation of this norm allows making the unambiguous conclusion that the recognition of parts of the TPD as inapplicable is not the same as the cancellation of such documentation.

The correctness of this conclusion is also confirmed by the fact that even before the adoption of FL No. 283-FZ, the UPC of the RF contained a list of cases in which the TPD was declared ineffective (including in part)[11].

The adoption of AFL No. 283-FZ clearly highlighted the possibility of the existence of two independent Procedures (the cancellation of the TPD and the recognition of certain parts of the TPD as inapplicable were separated).

When analyzing these notions, it is necessary to take account of the practice existing at the level of the supreme judicial authority of including TPDs into regulatory legal acts[12].

As noted by M. B. Rumyantsev, the general principle of cancellation and suspension of the operation of regulatory legal acts is the provision that this function primarily belongs to the law-making bodies that adopted them[13].

Accordingly, cancellation of a regulatory legal act (TPD) is an integral part of the lawmaking process carried out by public authorities within their competence.

The need to cancel TPD may be due to a wide variety of circumstances[14] (for example, the obsolescence of the space-planning solutions contained in it), among which the recognition of such documentation as ineffective on the basis of a court decision is worth noting.

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[8] In certain situations, it may be necessary to change both the parameters and the functional purpose of the capital construction facility stipulated in the TPD. For example, the previously approved TPP provided for the placement of a retail facility, but now the shortage of places in preschool institutions has reached such a level that it requires placement of a kindergarten.

[9] Thus, the availability of a previously approved TPD may prevent effective satisfaction of the public interest in providing the population with infrastructure facilities.

[10] This situation may be viewed from another side: creation of the facilities stipulated by the TPD can "put an end" to creation of linear facilities servicing, among other things, public interests.

[11] Part 12.6 of Art. 45 of the UPC of the RF, part 21 of Art. 46.9 of the UPC of the RF.

[12] See: cassational ruling of the Judicial Chamber on Administrative Cases of the Supreme Court of the RF (hereinafter the SC of the RF) dd. 05.06.2019 No. 87-KA19-1, appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 30.01.2019 No. 45-АПГ18-2, ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the RF dd. 18.12.2014 No. 306-ЭС14-3391 in case No. A06-2224/2013.

[13] *Rumyantsev M. B.* Abolition of Legal Norms in Legislative Process of the Russian Federation as a Law-making Decision [Otmena pravovyh norm v zakonodatel'nom processe RF kak pravotvorcheskoe reshenie] // State Power and Local Self-government [Gosudarstvennaya vlast' i mestnoe samoupravlenie]. 2018. № 11. Pp. 37–41.

[14] More difficult to consider is the question of whether a public authority can cancel a TPD that has not been recognized ineffective by the court, which fully complies with the norms of the current legislation, but hinders the effective implementation of public interests? A possible answer to it will be given in Section 3 of this article.

It seems important to note that the court recognition of a regulatory legal act (including TPD) as ineffective does not mean that this act is canceled.

In the practice of the Constitutional Court of the RF (hereinafter the CC of the RF), a position was developed that the court recognition of a regulatory act contrary to the federal law is not its cancellation by the court itself, the more so its invalidation from the moment of publication, but means its recognition as ineffective[15] and, therefore, it shall not be applied from the moment the court decision comes into force.

Besides, it should be noted that an act recognized by a court as illegal cannot be considered effective, entailing legal consequences, regardless of whether it will be formally canceled by the body that issued it[16]. Moreover, the court may declare the relevant regulatory legal act ineffective both from the moment of the court decision and from the date of its adoption[17].

Thus, the public authority canceling the TPD declared ineffective by the court decision, only confirms its invalidity.

As distinguished from the cancellation of the TPD which may be due to various circumstances (including a court decision), the recognition of certain parts of the TPD inapplicable can only be the result of the adoption of a relevant regulatory legal act by public authorities. This predetermines that while the cancellation of a regulatory legal act can be carried out with a retroactive effect (i. e., the act is recognized canceled from the date of its entry into force), the suspension of a regulatory legal act is possible only from the moment when the act ordering its suspension was adopted.

Also note possibility of drawing certain "parallels" between the institutions of recognizing certain parts of the TPD inapplicable and suspending the validity of a regulatory legal act[18] which allows identifying a certain control function incorporated in the content of part 18-20 of Art. 45 of the UPC of the RF.

Let us imagine the following situation: a local self-government body developed a TPD for placing a facility of local significance (a library, for example)[19], but later this territory became necessary to a constituent entity of the RF for placement of a facility of regional significance[20] (a snow-melting station, for example).

In the situation under consideration, it seems logical to suspend the operation of the municipal regulatory legal act on the approval of the TPD in order to meet the public needs of a higher level rather than to cancel this act, given that the effect of the suspended act, unlike the canceled act, can be renewed[21].

Thus, the use of the institution of recognition of the TPD inapplicable instead of the cancellation of the TPD will avoid the need to re-develop such documentation, obtain all approvals, thereby contributing to saving municipal budgets.

Speaking about the cancellation of TPD, recognition of its individual parts inapplicable, I would like to draw your attention to two points.

Firstly, it seems necessary to amend parts 18–20 of Art. 45 of the UPC of the RF in order to be able to recognize the TPD inapplicable as a whole rather than its individual parts only.

Otherwise, the existence of this institution makes no sense at all due to the fact that the parts of the TPP that are not recognized as inapplicable (for example, in terms of determining the boundaries

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[15] See: Ruling of the CC of the RF dd. 27.01.2004 No. 1-П. In a dissenting opinion to this decision, Judge A. L. Kononov also concludes that differentiating between the recognition of the illegality of regulatory acts in terms of the consequences into ineffective (i. e., obviously having no real effect) and invalid (i. e. non-existent) is not convincing or even understandable.

[16] See: Ruling of the CC of the RF dd. 27.01.2004 No. 1-П.

[17] See: On the practice of court consideration of cases of challenging regulatory legal acts and acts containing clarifications of the legislation and possessing regulatory properties: Resolution of the Plenum of the SC of the RF dd. 25.12.2018 No. 50, par. 38.

[18] This institution is provided for by Art. 48 of Federal Law dd. 06.10.2003 No.131-FZ "On the General Principles of Organization of Local Self-Government in the RF".

[19] According to Part 19 of Art. 1 of the UPC of the RF, facilities of local significance are capital construction facilities, other facilities, territories necessary for local authorities to exercise powers in issues of local significance and within the transferred state powers and having a significant impact on the socio-economic development of municipal districts, settlements, urban districts.

[20] Part 20 of Art. 1 of the UPC of the RF defines facilities of regional significance as capital construction facilities, other facilities, territories necessary for exercising powers in issues referred to the jurisdiction of the constituent entity of the RF, state authorities of the constituent entity of the Russian Federation, and having a significant impact on the socio-economic development of the constituent entity of the RF.

[21] The independent regulatory legal act "On renewal of the effect of the TPD" will have to be adopted.

of the zones for placing facilities) do not allow achieving the goals of non-application of the TPD, preventing the implementation of public needs of a higher level[22].

Secondly, there is a need to specify the understanding of the term "part of the TPD" at the level of legislation or to have it clarified at the level of the Ministry of Construction of Russia. We believe that such parts should be imply not only TPD sections according to Art. 42, 43 of the UPC of the RF, but also the part of the territory for which such documentation was developed.

Such an understanding of the term "part of the TPD" is supposed to allow using the institution to meet public needs in the placement of facilities of particular significance without the need to carry out a "complete revision" of such documentation every time. Moreover, its correctness is evidenced by the fact that the amendments made by Federal Law No. 283-FZ to Art. 41.1 of the UPC of the RF provided for the possibility of preparing TPD both regarding the elements of the planning structure[23] and individual land plots.

Summing up, it seems possible to draw the following conclusion regarding the relationship between the TPD cancellation and the recognition of its separate parts inapplicable: procedurally these institutions are not identical, but in essence they entail the same legal consequences (the TPD recognized ineffective or inapplicable does not entail legal consequences)[24, 25].

3. On the possibility of cancelling the TPD complying with legislative requirements

Within the frames of this section, we will try to answer the question already raised earlier about the possibility of canceling the TPD complying with legislative requirements.

At first glance, it seems logical that the public authority that has adopted a regulatory legal act (hereinafter — the TPD) should be able to cancel it. First, it correlates with the recognition of the scope of discretion of public authorities in the field of urban planning policy at the level of judicial practice[26].

Secondly, it takes into account that the need for such cancellation may be mediated by the public interest in the formation of a comfortable urban environment[27, 28].

At the same time, the discretion of public authorities in the possibility of canceling the TPD cannot be unlimited in view of the fact that the cancellation of the TPD affects both public interests and the interest of private individuals in the possibility of real implementation and effective protection of their rights.

For example, the persons involved in urban planning activities within the boundaries of the TPD operation are interested in maintaining the TPD taking into account that if such documentation is canceled, they cannot start implementing their projects. Moreover, such cancellation will create significant risks for the implementation of the projects already being implemented with regard to the impossibility of obtaining permission to commission the facilities under construction (paragraph 5, part 6, article 55 of the UPC of the RF)[29]. The persons who do not plan to carry out construction (reconstruction) may also be interested in maintaining the TPD effect as a guarantee of the fulfillment of the obligations to create infrastructure facilities by the public authorities[30].

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[22] In other words, the constituent entity of the RF will be unable to place a snow-melting station in the parameters stipulated for the location of the library, or, for example, if the zone of the planned location of this school is not cancelled in the TPD, the purpose of its location will not be achieved, either.

[23] According to part 35 of Art. 1 of the UPC of the RF, an element of the planning structure is part of the territory of a settlement, urban district or inter-settlement territory of a municipal district (block, microdistrict, district and other similar elements).

[24] Further on, using the term "cancellation of the TPP" in this article, we will also mean its recognition as inapplicable.

[25] Accordingly, on the basis of such documentation, capital construction facilities cannot be built; it cannot serve the basis for making the decision on the possibility of withdrawing land plots for state (municipal) needs.

[26] See: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 22.01.2020 No. 53-АПА19-51.

[27] For example, within the framework of the examples already cited by us, when TPD is canceled in order to ensure the possibility of placing infrastructure facilities of a larger capacity without contradicting the requirements of the current regulation.

[28] Imagine a situation in which the previously approved TPD did not provide for the placement of sports facilities within the boundaries of the block, but with the growth of its population, sports facilities "in the neighborhood" no longer cope with the influx of those willing. At the same time, there are land plots in the block intended according to the TPD for placement of trade facilities, while the LDP provides for "sports" as a permitted kind of use for them, among other things. We believe that in this case, the public authorities should be able to cancel the TPD in the part that preventing placement of sports facilities.

[29] See: [Electronic source]. URL: https://zakon.ru/blog/2018/09/07/ob_ocherednom_gradostroitelnom_koshmare_dlya_biznesa_ili_obratnoj_sile_zakona_342-fz (accessed on: 12.03.2020).

[30] In other words, the citizens living within the boundaries of the block are interested in having the healthcare and social infrastructure facilities promised to them really built.

Thus, when TPD is canceled, it is necessary to ensure that an appropriate balance is found between private and public interests.

If we consider the possibility of canceling a TPD complying with legislative requirements from the point of view of the current regulation (de lege lata), one can come to disappointing conclusions: a catastrophic situation has developed in which public authorities, having adopted the relevant procedure, may be able to cancel the TPD subject to no restrictions.

Moreover, it should be taken into account that within the framework of the existing regulation, when judicial control over the appropriateness of the adopted regulatory legal acts is impossible[31], there may be situations when public authorities use the TPD cancellation institution just "hiding behind" the public interest, but in reality — in disregard of the legitimate purpose. For example, the TPD cancellation can be used as a means of encouraging developers to take on "social responsibility" for various infrastructure facilities[32].

The current situation seems to result not from the imperfection of the urban planning legislation but from the systemic problems of the Russian administrative law which is poorly developed, according to A. A. Ivanov[33].

Firstly, the administrative law is still perceived by many as a branch primarily regulating the issues of bringing to administrative responsibility, exercising control and supervisory activities, but not the general procedure of the relationship between individuals and public authorities.

No law on administrative procedures consolidating the general principles of administrative law has been adopted so far, although the need for its urgent adoption has been highlighted by many scientists[34].

This predetermines the existence of gaps in the implementation of the principle of maintaining the confidence of citizens and legal entities in the actions of public authorities. At present, this principle is only occasionally applied by the SC of the RF and the CC of the RF; however, it is not possible to say that any system of its application has been established[35].

However, in foreign legal order, this principle underlies the doctrine of the legal force of administrative acts, within the framework of which risks are distributed between the public administration and a private person when such an act is canceled[36].

Secondly, individual institutions of administrative law are not properly regulated, either. In particular, insufficient attention is paid to identifying the substance of the notion of "administrative management", the study of the category of administrative acts[37], their classification.

For example, the current legislation lacks classification of administrative acts into favorable (that is, creating a person's right or having any legally significant advantages [benefits]) and burdening (entailing adverse consequences for addressees)[38], known even to many post-Soviet states[39].

As noted by A. F. Vasilieva, such a classification is both of theoretical and practical significance. For example, the procedure for cancelling favorable administrative acts has a number of specific features conditioned upon the operation of the principle of protecting the confidence of citizens (legal entities) in the actions of the state[40].

According to Yautrite Briede, a lawful (favorable) administrative act can be canceled, firstly, in the case when the addressee could not have legal confidence in the invariability of the administrative act

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[31] For the existing models of regulatory compliance verification see: [Electronic source]. URL: https://zakon.ru/blog/2019/07/16/ teorii_normokontrolya_v_dele_o_zaprete_vyezda_policejskim_za_granicu__k_opredeleniyu_po_delu_luzhnyh (accessed on: 12.03.2020).

[32] In other words, unless you build a kindergarten and hand it over to the city free, we will cancel the TPD.

[33] *Ivanov A. A.* Problems of the Russian Public Law: View from the Outside [Problemy publichnogo prava Rossii: vzglyad so storony] // The Herald of Economic Justice [Vestnik ekonomicheskogo pravosudiya Rossijskoj Federacii]. 2017. № 2. Pp. 46–59.

[34] See: [Electronic source]. URL: http://www.vestnik.vsu.ru/pdf/pravo/2015/03/2015-03-04.pdf (accessed on: 12.03.2020).

[35] See: [Electronic source]. URL: https://zakon.ru/blog/2019/07/16/ustranenie_posledstvij_svoih_oshibok_-_otvetstvennost_publichnoj_vlastiesche_raz_napomnil_ks_rf (accessed on: 12.03.2020).

[36] See: [Electronic source]. URL: https://dpp.mpil.de/07_2018/07_2018_37_77.pdf (accessed on: 12.03.2020).

[37] Such notions as a regulatory legal act, a non-regulatory act, an administrative act are not enshrined in the current legislation.

[38] See: [Electronic source]. URL: http://elib.sfu-kras.ru/handle/2311/2211?show=full (accessed on: 12.03.2020).

[39] See: Art. 11 of the Administrative Code of the Republic of Moldova, parts 6, 7 of Art. 1 of the Law of Turkmenistan on administrative procedures [Electronic source]. URL: https://online.zakon.kz/Document/?doc_id=38575176, http://infoabad.com/zakonodatelstvo-turkmenistana/zakon-turkmenistana-ob-administrativnyh-procedurah.html (accessed on: 12.03.2020).

[40] See: [Electronic source]. URL: http://www.dslib.net/admin-pravo/administrativno-pravovoe-regulirovanie-publichnyh-uslug-v-germanii-i-rossii.html (accessed on: 12.03.2020).

and, secondly, in case of a substantial change of the facts and circumstances and the interests of the public regarding the cancellation of the act which exceed the rights and interests of the addressee[41].

Accordingly, when implementing such cancellation, public authorities should take account of the need to achieve a balance between private and public interests which can be ensured, inter alia, through the recognition of the need for justification of the decisions to cancel administrative acts (including TPD)[42] not fixed at the level of the existing regulation, which, in our opinion, is one of the negative consequences of the existence of the already mentioned "global gaps" in the Russian administrative law.

We would also like to point out that the current legislation has not regulated the problem of the possibility of issuing administrative acts (in particular, TPD) under certain conditions, which is often a practical necessity. Imagine a situation in which a developer is interested in the approval of the TPD which implies placement of schools, which is currently prevented by the normative sanitary protection zones[43] of the industrial enterprises located outside the block.

According to part 2 of Art. 41 of the UPC of the RF, in preparation of the TPD before establishing the boundaries of zones with special conditions of the use of the territory, account is taken of the size of these zones and restrictions on the use of the territory within the boundaries of such zones which are established in accordance with the legislation of the Russian Federation.

The action of the above norm significantly reduces the efficiency (variability) of the use of the territory actually ordaining to take account of the restrictions that have not yet been established[44].

In addition, this norm prevents the possibility of parallel implementation of TPD development and urban planning preparation of the land plot (i. e., to remove the restrictions preventing its development), which significantly increases the project implementation time[45]. Accordingly, the current legislation is subject to adjustment to recognize the possibility of TPD approval under certain conditions.

We believe that de lege ferenda, the list of cases in which it is possible to cancel the TPD which complies with the legal requirements should be as follows[46]. This documentation may be cancelled:

- if the implementation of measures, including the creation of capital construction projects stipulated by the TPD threatens public interests (poses a danger to human life or health, to the environment, cultural heritage sites), which must be confirmed by the availability of particular documents (materials);
- if the TPD was accepted subject to performance (non-performance) of certain actions (for example, under the condition that the person interested in preparing the TPD undertakes the obligations to reduce the boundaries of the sanitary protection zones), and this condition recorded in the regulatory legal act on approval of such documentation or another regulatory legal act has not been fulfilled (fulfilled with substantial violations[47]).

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[41] *Briede Ya.* Cancellation of the Administrative Act, Subject to Latvian Supreme Court Case Law [Otmena administrativnogo akta s uchetom sudebnoj praktiki Verhovnogo suda Latvii]. Yearbook of Public Law Administrative Law. Comparative Law Approaches: Collection of Essays [Ezhegodnik publichnogo prava Administrativnoe pravo: sravnitel'no-pravovye podhody]. Moscow, Infotropic Media, 2014. Pp. 419–427.

[42] At least at the level of issue of explanatory notes to relevant decisions.

[43] According to part 4 of Art. 1 of the UPC of the RF, sanitary protection zones are a kind of zones with special conditions of the use of the territory.

For more detail about the classification of sanitary protection zones see: *Kirsanov A. R.* "Undetermined" Sanitary Protection Zones, or On Legal Grounds and Consequences of Inclusion of Indicative and Estimated Sanitary Protection Zones in Land Use and Construction Rules ["Nedoustanovlennye" sanitarno-zashchitnye zony, ili O pravovyh osnovaniyah i posledstviyah vklyucheniya v pravila zemlepol'zovaniya i zastrojki orientirovochnyh i raschetnyh sanitarno-zashchitnyh zon] // Property Relations in the Russian Federation [Imushchestvennye otnosheniya v Rossijskoj Federacii]. 2019. № 7. Pp. 83–89.

[44] See: appellate ruling of Sverdlovsk regional court dd. 14.02.2018 No. 33a-3140/2018, Appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd.12.09.2018 No. 4-АПГ18-13.

[45] For example, clause 4.3.1 of Appendix No. 1 to the Resolution of the Government of St. Petersburg dated 21.06.2016 No. 524 "On the Rules of Land Use and Development of St. Petersburg", duplicating Part 2 of Art. 41.1 of the UPC of the RF, states that, as part of the developed TPD, the zone for the location of capital construction facilities, the placement of which is limited in accordance with the legislation of the RF within the boundaries of zones with special conditions of use, may be determined in the absence of the restrictions prohibiting placement of such facilities.

[46] Analysis of the regulation of municipal entities shows that they are often very "negligent" in adopting the procedure stipulated by part 20 of Art. 45 of the UPC of the RF, using the following wording: "Cancellation of the territory planning documentation (its individual parts) is possible according to the procedure ordained by the current legislation in case of revealed grounds for its cancellation (cancellation of its parts)." See, for example: Resolution of the Administration of Samara City District dated 05.09.2019 No. 654 "On Approval of the Procedure for Preparing TPD for Samara City District and the Procedure for Making the Decision on Approving the TPD for Samara City District".

[47] Accordingly, there is a need for a separate procedure regulating the procedure for recording the relevant violations.

This ground for canceling the TPD will become relevant only if, at the level of the current regulation, the already mentioned problem of the admissibility of adopting administrative acts (including TPD) subject to performance (non-performance) of certain actions is resolved, and the procedure for assuming certain obligations by individuals that mediate the possibility of approving an administrative act is regulated.

In view of the above:

- in case of the emerging circumstances that did not exist at the time of the adoption of the TPD, in the presence of which at the time of adoption of such documentation the public authority could not adopt it, and the maintenance of this documentation in force does not correspond to the objectives of the integrated and sustainable development of the territory[48];
- in a situation when the availability of an approved TPD prevents placement of a facility of federal, regional (local) significance or does not allow placement of such a facility with the technical and economic indicators that would be achievable if it were located in the absence of such documentation[49]. At the same time, the need to locate the relevant facilities must also be justified, for example, in the documents of territorial planning adopted by the public authorities.

We believe that an independent analysis is also required for the case when the possibility of canceling the TPD is due to the fact that its maintenance in force prevents the implementation of activities for integrated and sustainable development of the territory with account of the criticism faced by institutions of implementation of such activities as allowing total seizure of land plots from rightsholders in favor of other individuals[50].

Accordingly, it seems important to note the fact that in all cases of TPD cancellation, the need for such cancellation must be duly justified by its initiator. For example, as already mentioned, if the implementation of measures, including the creation of capital construction projects stipulated by the TPD, threatens public interests, documents (materials) must be presented confirming the existence of the relevant "threat".

In this case, according to our position, it is impossible to establish an exhaustive content of the justification for canceling the TPD (i.e., a specific list of documents [materials]) at the level of the adopted regulation.

The "sufficiency" of the presented justification will be ultimately still determined by the public authority making the decision to cancel the TPD. The assessment of this "sufficiency" will be within the discretion (administrative discretion) of the relevant body and will be carried out with account of the availability of a number of legal positions of the SC of the RF, according to which the policy of urban planning, development of the territory provides the state with a wider scope of discretion than is the case of regulation of exclusively civil rights[51].

The Draft Regulation of the Government of the RF "On approval of the rules of amending TPD approved on the grounds of the decisions of authorized federal executive bodies, cancellation of such documentation or its individual parts, recognition of certain parts of such documentation inapplicable and on amendments to the Regulation of the Government of the RF dated 26.07.2017 No. 884" states in paragraph b of Clause 26 that the application for cancellation of TPD prepared by the initiator of such cancellation must contain a reasoned justification of the need to cancel the TPD. Moreover, if the justification of the need to cancel the TPD requires presentation of additional documents or materials, such documents or materials shall be attached to the application of the initiator[52]. In other words, the procedure is based on the "open composition" of the provided justification.

At the same time, according to clause 30 of the Draft, the public authority refuses to make a decision to cancel the TPD only if there is no justification for canceling the TPD, without evaluating it substantively, which cannot be agreed with in view of our position given above.

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[48] An example of such a circumstance may be considered to be a change in the norms of the federal legislation, its adoption resulting in prohibition of construction on a certain territory.

[49] This case should provide for mechanisms confirming the presence of a public interest in the cancellation of such documentation to avoid potential abuse. For example, the justification prepared by a public authority that it actually cancels the TPD (part of it), for example, to ensure creation of a hospital rather than to complicate the implementation of stakeholders' construction projects.

[50] For more detail see: [Electronic source]. URL: https://urban.hse.ru/data/2016/12/29/1114674201/%D0%B2%D0%BE%D0%BF%D1%80%D0%BE%D1%81%D1%8B%201,%202,%203.pdf (accessed on: 12.03.2020).

[51] See: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dated 25.12.2019 No.51-АПА19-19: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dated 19.09.2018 No. 7-АПГ18-5.

[52] See: Draft Regulation of the Government of the RF "On approval of the rules of amending TPD approved on the grounds of the decisions of authorized federal executive bodies, cancellation of such documentation or its individual parts, recognition of certain parts of such documentation inapplicable and on amendments to the regulation of the Government of the RF dd. 26.07 2017 No. 884" (hereinafter the Project).

Also note that the current regulation lacks the circumstances preventing the issue of guidelines or clarifying letters of the Ministry of Construction of the RF on how to motivate the need to cancel TPD, including statement of the examples of the documents and (or) materials that may be attached to the declaration of the need for such cancellation. We believe that the emergence of appropriate guidelines, letters is a matter of the "near future".

Let's move on to the analysis of the subject composition of the persons entitled to demand the TPD cancellation.

4. On identification of the range of the subjects entitled to demand TPD cancellation

The first approach presupposes that any person, natural or legal, should be able to apply for a TPD cancellation.

At the same time, the fact that such a person lives outside the boundaries of preparation of documentation should not restrict his right to apply for cancellation of such documentation.

At first glance, it seems proper that a person living in the vicinity of the proposed garbage plant (on the territory of an adjacent block) may be interested in applying for the cancellation of the TPD regarding the placement of such a plant, in view of its influence on the comfort of living in the populated locality as a whole, and not only on certain territories[53].

Another approach is based on the fact that the subject composition of the persons who can apply for the TPD cancellation should be reduced, for example, to the rightsholders of the real estate units located within the boundaries of the TPD development, or exclusively to the public authorities that took part in the preparation of such documentation[54].

Let us analyze the outlined approaches.

On the one hand, it is recognized at the level of judicial practice by virtue of the recognition of the TPD to be regulatory legal acts that its norms are designed for repeated application and are addressed to an indefinite range of persons[55].

Accordingly, since TPD can affect the rights and obligations of an indefinite number of persons, any person should be able to apply with a petition to cancel such documentation.

In addition, it is necessary to note the existence of the concept of the right to the city[56] which can be perceived in Russian realities with account of the rights recognized at the constitutional level to favorable living conditions (favorable environment)[57]. According to the supreme judicial authority, the existence of the right to a favorable environment which, as applied to cities, is understood as the integrated and sustainable development of the territory, mediates the possibility of challenging urban planning decisions taken by public authorities[58]. Hence, there are no grounds for limiting the subject composition of the persons entitled to apply for the TPD cancellation.

On the other hand, the very existence of the right of all and everyone to demand cancellation of a regulatory legal act (TPD) adopted by public authorities is hardly compatible with the principles of stability of regulation, legal certainty, including the possibility of foreseeing the consequences of their behavior for the participants of the relevant legal relations[59].

In our opinion, such a right is essentially similar to the institution of actio popularis which is aimed at providing individuals with the opportunity to protect public interests by their actions[60].

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[53] One can even imagine a situation when the facility located in one constituent entity of the RF (for example, a repository of radioactive waste) will affect the value of real estate units in the territories of adjacent municipalities within the boundaries of another constituent entity.

[54] For example, in accordance with clause 20 of the Resolution of Kaluga City Government dated 14.08.2019 No. 203-п "On approval of the procedure of preparation and approval of the TPD developed on the basis of the decisions of Kaluga City Government, the procedure of its amendment and cancellation", the decision on cancellation of such documentation can be made only on the initiative of the authorized body (Department of Architecture, Urban Development and Land Relations of the city of Kaluga).

[55] See: ruling of the SC of the RF dd. 06.09.2018 No. 303-КГ18-13853 in case No. A04-1875/2018; appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 30.01.2019 No. 45-АПГ18-22.

[56] *Medvedev I. R.* Public Discussions of Urban Development Projects in the Light of Law № 455-FZ [Obshchestvennye obsuzhdeniya gradostroitel'nyh proektov v svete Zakona № 455-FZ] // Statute [Zakon]. 2018. № 3. Pp. 181–195.

[57] See: Art. 39, 42 of the Constitution of the RF.

[58] See: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 10.01.2018 No. 78-АПГ17-20.

[59] See, for example: Ruling of the CC of the RF dd. 17.10.2017 No. 24-П.

[60] See, for example: [Electronic source]. URL: http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_II_documents/ECE.MP.PP.2014.5_rus.pdf (accessed on: 13.03.2020).

As Martin Kaiser notes, the existence of this institution can lead to situations when the parties to the administrative legal relationship cannot be completely sure that the administrative act will not be "appealed" by third parties unexpectedly for them[61].

According to A. Zhagaryan's position, the legality of a regulatory legal act must not be questioned by an unlimited range of persons, for any reason at that, including those related only to abstract assumptions of a subjective-evaluative nature about the possible violations that may result from the application of this act[62].

In view of the foregoing, we believe that for our country where urban planning activities were carried out for a long time not under the conditions of legal regulation, but within the framework of the action of the mechanisms of administrative-point adoption of town planning decisions[63], the best variant would be the compromise variant of determining the subject composition of the persons authorized to apply for cancellation of TPP.

In other words, any natural (legal) person should be able to apply for cancellation of TPD, but they must prove that they have a legitimate interest in the implementation of such cancellation[64].

Also note that in the list of the persons authorized to demand cancellation of TPD (initiators) the Project identifies, among other things, individuals or legal entities interested in the construction, reconstruction of a federal facility or an interregional capital construction facility. At the same time, the Project lacks mechanisms of determining the availability of a relevant interest.

We suppose that the presence of such an interest may be evidenced, for example, by the fact of the availability of the relevant facility stipulated by the TPD in the investment program of a natural monopoly entity planning to create such a facility.

According to our position, it is advisable to issue guidelines or letters of the Ministry of Construction of the RF explaining the list of the circumstances that may evidence that individuals or legal entities have a legitimate interest in canceling the TPD.

The application of this approach allows providing the necessary level of guarantees for the participation of interested persons in determining the prospects of the spatial development of the territory[65], which is especially important in the absence of a developed system of public law ensuring an adequate level of protection of the rights of individuals, and also presupposes the presence of a "barrier" against obvious abuse.

5. On the need for public hearings (public discussions) in TPD cancellation

In order to observe the human right to favorable living conditions, the rights and legitimate interests of the rightsholders of land plots and capital construction facilities, the UPC of the RF provides for public hearings (public discussions) in TPD preparation[66].

Without dwelling in detail on the delimitation of these institutions, let us pay attention to their common shortcomings.

For example, part 2 of Art. 5.1 of the UPC of the RF significantly limits the potential range of participants of public hearings[67] regarding the TPD to the citizens permanently residing in the territory for which such documentation has been prepared, to the rightsholders of the land plots located within this territory and (or) capital construction facilities located in them, as well as to the rightsholders of the premises being part of the specified capital construction facilities. As I. R. Medvedev notes, it is obvious that certain projects affect both the fragment of urban land limited by a design assignment, and the

[61] See: [Electronic source]. URL: https://dpp.mpil.de/05_2016/05_2016_105_210.pdf (accessed on: 14.03.2020).

[62] *Zhagaryan A. A.* The Right to Challenge a Normative Act as an Integral Method of Judicial Protection: Problems of Regulation and Implementation in Administrative Proceedings [Pravo na osparivanie normativnogo akta kak neot"emlemyj sposob sudebnoj zashchity: problemy regulirovaniya i realizacii v administrativnom sudoproizvodstve] // The Herald of Civil Procedure [Vestnik grazhdanskogo processa]. 2019. № 3. Pp. 263–287.

[63] See: Town Regulation: Basics of Regulation of Urban Development in the Conditions of the Real Estate Market Formation [Gradoregulirovanie: osnovy regulirovaniya gradostroitel'noy deyatel'nosti vusloviyah stanovleniya rynka nedvizhi-mosti] / Trutnev E. K. (ed.). Moscow, 2008. P. 110.

[64] Foreign legal orders determine this variant as quasi actio popularis. See: [Electronic source]. URL: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2011)018-rus (accessed on: 17.03.2020).

[65] In accordance with such a principle of the implementation of urban planning activities as the participation of citizens and their associations in the implementation of urban planning activities, it requires ensuring the freedom of such participation (part 5 of article 2 of the UPC of the RF).

[66] Part 1 of Art. 5.1 of the UPC of the RF, part 13.1 1 of Art. 45 of the UPC of the RF, part 5 Art. 46 of the UPC of the RF.

[67] Using the term "public hearings" in what follows, we will mean both direct public hearings and public discussions.

formed environment of the district as a whole, which will affect a larger number of people than is provided for by the UPC of the RF[68, 69].

Thus, at the level of the current regulation, there is a trend to limit the subject composition of the participants in public hearings. The UPC of the RF does not contain provisions ordaining mandatory public hearings when TPP is canceled.

We believe that the issue of the need for their implementation can be resolved by the constituent entities of the RF (municipalities) within the framework of the adoption of the procedure of TPD cancellation approved in accordance with Part 18, 19 of Art. 45 of the UPC of the RF. In determining this need, the following circumstances should be taken into account.

In judicial practice, a position was formulated on the orientation of the procedure of public hearings to ensure comprehensive consideration of the interests of the population, respect for the human right to favorable living conditions, rights and legitimate interests of rightsholders of land plots and capital construction facilities[70].

Accordingly, the situation in which the persons making their proposals at public hearings in the framework of the TPD preparation are deprived of the opportunity to express their views on the cancellation of such documentation is contrary to the purpose of this institution.

It is also necessary to take into account that the canceled TPD may contain planning solutions, regarding the implementation of which the population has certain legitimate expectations[71].

We believe that in this case, the public authorities are obliged, within the framework of an open and transparent procedure of public hearings, to explain the motives that guided them in canceling the relevant documentation to the citizens[72], and the citizens should have the opportunity to ask public authorities questions about plans for the further use of the territory.

In view of the foregoing, we believe that appearance of methodological recommendations at the level of explanations of the Ministry of Construction of Russia instructing the constituent entities of the RF (municipalities) to hold public hearings when TPD is canceled.

6. Main conclusions

The following main conclusions may be drawn based on the results of the article.

1. The institution of TPD cancellation is undoubtedly necessary for the purposes of the implementation of urban construction activities, contributing to both improving the comfort of the urban environment and reducing the time required to implement large infrastructure projects.
2. Cancellation of TPD and recognition of its individual parts inapplicable entail the same legal consequences, differing only procedurally.
3. In view of the fundamental problems in the Russian administrative law, a catastrophic situation arises when public authorities can cancel the TPD without any restrictions. The need to comply with the principle of maintaining the confidence of citizens and legal entities in the actions of the state is completely ignored.
4. In terms of determining the subject composition of the persons entitled to demand cancellation of the TPD, the most optimal approach is the one assuming that all interested parties can apply for such cancellation if they prove that they have a legitimate interest in such cancellation.
5. The current legislation contains uncertainty about the need to hold public hearings when TPD is canceled. We believe that they should be carried out with account of their focus on ensuring the interests of the population in the process of implementing urban planning activities.

In conclusion, let us pay attention to the fact that the very introduction of the TPD cancellation institution into the legislation clearly demonstrates the need to improve the system of public law in the RF.

Until “general rules of the game” governing the relationship between public authorities and private individuals are established, there is a significant risk that the institutions of sectoral legislation (such as the TPP cancellation) will be applied contrary to the goals of their introduction into the legal regulation system.

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[68] *Medvedev I. R.* Public Discussions of Urban Development Projects in the Light of Law № 455-FZ [Obshchestvennye obsuzhdeniya gradostroitel’nyh proektov v svete Zakona № 455-FZ] // Statute [Zakon]. 2018. № 3. Pp. 126–137.

[69] For example, the case of construction of a garbage plant already given by us.

[70] See: review of the practice of consideration by courts of cases related to changing the type of permitted use of a land plot (approved by the Presidium of the SC of the RF on 14.11.2018).

[71] Let us imagine a situation where TPD involves placement of social infrastructure facilities.

[72] For example, that the cancellation of such documentation is not related with a refusal to fulfill obligations to create infrastructure facilities, but ensures formation of a comfortable urban environment by increasing the capacity of social infrastructure facilities.

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Ensuring the Implementation of the Principle of Gender Equality De Jure and De Facto: the Experience of the Countries of the European Union

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ABSTRACT
Achieving equal rights and opportunities for men and women is an integral part of ensuring human rights. The inter-national ranking of the gender gap calculated by the World Economic Forum shows that there is a very big difference in its reduction in different countries of the world. The European Union has achieved the best results. This indicates the effectiveness of its measures to overcome gender discrimination. The analysis has shown that the countries — leaders in the gender gap reduction both consider gender equality a constitutional principle and include it in the sector specific legislation. They demand development and implementation of plans to overcome the gender discrimination from all organizations with more than 25 (30) people. These countries have created an effective mechanism to control ensuring the principle of gender equality, including administrative measures and even criminal prosecution in some countries.
Keywords: Gender mainstreaming, gender gap, gender discrimination, European Institute for Gender Equality, Ombudsman, positive discrimination, human rights, Northern Europe

Introduction

Art. 2 of the Universal Declaration of Human Rights states that "everyone is entitled to all the rights and freedoms, without distinction of any kind, such as race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status"[1]. Human rights reflect the values and ethical criteria being the backbone of the system of justice and are the basis for protecting citizens against discrimination. There are three generations of human rights: the first is civil and political rights, the second is socio-economic, and the third is collective or solidarity right.

The principle of gender equality is part of the third generation of human rights which ensures equal rights for all social strata of the population, be it children, women, people with disabilities, elderly people or other categories of citizens. The principle of gender equality is that women and men are independent (free) and equal subjects of law, including the well-known and equal autonomy of will in case of their participation in social ties and relations, the enjoyment of their rights and legitimate interests. This principle is an integral part of the system of principles for the observance of human and civil rights and freedoms. This issue has been well studied in Russian literature[2]. One of the first works that laid the foundation for further research was the work of S. Polenina which substantiates the concept of human rights for women[3].

In the XXI century gender equality is becoming one of the key criteria by which one can judge the degree of development of democratic institutions and civil society in a particular country. At the national level, the contemporary democracies consider equality and freedom of women and men to be the basic social values and guarantee their observance by constitutions and other legal documents[4]. Integrating the gender perspective into policy (public and corporate) (gender mainstreaming) means that equality between women and men as an all-encompassing principle must be taken into account *in all*

[1] Universal Declaration of Human Rights [Electronic resource]. URL: https://www.un.org/ru/documents/decl_conv/declarations/declhr.shtml (accessed on: 28.03.2020).

[2] See, for example: *Alekseeva O. N.* The History of the Formation and Development of Fundamental Human Rights and Freedoms // Colloquium-journal. 2018. № 10 (21). Pp. 5–9; *Maksimov A. A.* Position of Gender Equality in the System of Princi Ples of the Legal Status of the Person in Russia // Problems of Law 2012. № 5. Pp. 29–32; *Oleinik N. N., Oleinik A. N.* Historical Developments of Generations of "Human rights" // Nauchnye vedomosti Belgorodskogo gosudarstvennogo universiteta. Seriya "Filosofiya. Sotsiologiya. Pravo". 2015. T. 33. № 14 (211). Pp. 120–128; *Shabailov D. V.* The Principle of Equality in the Context of the Principles of Equality and Justice [Printsip ravno-praviya v kontekste printsipov ravenstva i spravedlivosti] // Problemy upravleniya. 2013. № 2 (47). Pp. 147–152.

[3] See: *Polenina S. V.* Women's Rights in the Human Rights System: International and National Aspects [Prava zhenshchin v sisteme prav cheloveka: mezhdunarodnyi i natsional'nyi aspect]. M. : In-t gosudarstva i prava RAN, 2000. 255 p.

[4] *Voronina O. A.* Feminism and Gender Equality [Feminizm i gendernoe ravenstvo]. M. : Editorial URSS, 2004. P. 34.

decisions at *every* stage of the policy development process by *all* parties involved. In this case, the political process is understood as a multi-stage cycle that includes definition, planning, implementation and verification (monitoring and evaluation). In many cases, these stages are combined into a cycle that repeats as changes occur. Policy assessment can identify new problems that need to be addressed by adjusting the existing programs[5].

Thus, it can be stated that the principle of gender equality, being an integral part of the concept of human rights of the third generation, is reflected both in scientific literature and in the political agenda of democratic countries. However, de jure recognition does not automatically mean de facto implementation. An analysis of the actual practice of ensuring the implementation of the principle of gender equality in the national legislation is required, as well as an assessment of the effectiveness of this legal norm in the society. Of highest interest in this regard is the experience of European countries that have been pursuing the policy of ensuring gender equality since the last quarter of the 20th century and have achieved notable success in this. Our article is devoted to the study and assessment of this experience.

Research objective: to analyze the practice of ensuring the implementation of the principle of gender equality in the legislation of the countries of the European Union. Special attention will be paid to the study of the legislation of Iceland, Sweden, Norway and Finland, because these countries have achieved the best results in overcoming the gender gap[6] in the society.

Research methods: comparative legal method, content analysis of regulatory legal acts, analysis of secondary sources on the research topic.

Research hypothesis. International requirements for the implementation of the principle of gender equality are a necessary but insufficient condition for a significant reduction of the gender gap in the country.

Research results

As has been already noted, the principle of gender equality is one of the components of the concept of human rights of the third generation concept. In Europe, its guarantee is institutionalized at the supranational level. The standards and mechanisms for ensuring gender equality of the Council of Europe include the activities of a number of bodies and organizations, as well as a fairly large number of mandatory and recommendatory documents, their number growing constantly.

The European Institute for Gender Equality[7], hereinafter the EIGE, is an autonomous body of the European Union created specifically to pursue the policy of ensuring the implementation of the principle of gender equality. This implies integrating the gender perspective in all EU strategies and ensuing national policies, combating gender discrimination in all spheres of life, and raising the awareness of EU citizens about gender equality. The EIGE gathers, analyzes, processes and disseminates data and information on gender equality issues making them comparable, reliable and relevant to all stakeholders.

As an autonomous body, the EIGE operates within the framework of the European Union policies and initiatives. The European Parliament and the Council of the European Union have given it a central role in addressing gender issues and encouraging equality between women and men throughout the European Union. The EIGE provides expertise to the European Commission, European Parliament, EU member states. This contributes to a more justified policy of promoting gender equality in Europe.

One of the conditions for accession to the European Union is the recognition of the principle of gender equality and its enshrinement in the national legislation. In addition to the law itself, it is necessary to identify the body (official) responsible for its practical implementation. At the same time, the violators of the law may be subject to various kinds of sanctions, which turns this legal norm from a wish into a real instrument for monitoring of ensuring the equality of rights of women and men in the society. Each EU country solves this problem in its own way based on the specific features of its political system and legal framework. Depending on the level of recognition of the importance of striving for gender equality at the state level, various National Mechanisms for improving the female status and implementing the policy of achieving gender equality are being built[8].

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[8] For more detail about the National Mechanisms see: Gender Equality in the Modern World: the Role of National Mechanisms [Gendernoe ravenstvo v sovremennom mire: rol' natsional'nykh mekhanizmov / otv. red. i sost. O. A. Voronina]. M. : Maks Press, 2008. 772 p.

There is also specialized gender legislation. For example, *Denmark* has adopted the Gender Equality (Consolidated) Law 2007[9], the Law on Maternity in the Private Labor Market 2006[10], the Consolidated Law on Equal Treatment of Men and Women in Employment and Maternity Leave 2006[11], the consolidated Equal Pay for Men and Women Act 2008[12]. *Sweden* has adopted the Abortion Act (as amended in 2005)[13], the Equality Ombudsman Act 2008[14], and the Discrimination Act (as amended in 2012)[15]. Since 1999, the purchase of sexual services has been considered a crime. "Over the time of the operation of the law, street prostitution in Sweden has halved, and the share of the men buying sexual services has dropped by almost a third to 8%. Since 2009, a similar legislation has been in effect in Iceland and Norway, and in 2016 the French Parliament voted for the transition to the Swedish model"[16].

Austria has the Federal Law on the Equal Treatment Commission and Equal Treatment Attorneys (revised in 2013), the Paternity Leave Act (revised in 2015)[17], and the Maternity Protection Act (revised in 2015)[18]. Other countries also enact special laws to ensure gender equality[19].

Table 1[20] shows the national wording of the principle of gender equality in the constitutions of the countries of the European Union, and states the bodies (officials) responsible for its implementation.

As the analysis of the data in Table 1 shows, there are many variants of the wording of the principle of gender equality and organizing the control over its observance. A common feature is the constitutional level of enshrinement of this principle as well as the existence of supervisory bodies at the national level. It can be a ministry (Iceland, Norway), a special institution (Belgium, Spain, the Netherlands), a federal agency (Germany), a commission (Bulgaria, Ireland, Malta, Portugal), a directorate (Hungary), a center (Luxembourg, Slovakia), a department (Latvia) or a council (Denmark, Romania, the Czech Republic). The commonest variant is the existence of a national ombudsman / controller / defender of equal rights for women and men, a minister or counselor on equality issues (Austria, Hungary, Greece, Denmark, Italy, Cyprus, Lithuania, Poland, Slovenia, France, Croatia, Estonia). In some cases, there is a collegial supervisory body and an official at the same time.

It should be noted that some problems of European integration are simultaneously the problems of ensuring gender equality. For example, the low employment among certain groups of immigrant women. Many women come from countries where men and women have clear and distinct roles and responsibilities in the family and in the labor market. In some countries of immigration, women are less educated than men. The experience and attitude of some immigrants towards gender equality are under a challenge in the European society which cannot put up with the fact that some people do not enjoy the same rights and opportunities as others. Problems are encountered in the areas of upbringing and education, work and business, health and protection from violence and abuse. These are areas that are of great importance for the development of the society and for human well-being, therefore they are in the area of special attention of European states.

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[9] Lov om ligestilling af kvinder og mænd LBK nr 1095 af 19/09/2007 / Gender Equality Law [Electronic resource]. URL: https://www.retsinformation.dk/eli/lta/2007/1095 (accessed on: 25.04.2020).

[10] Lov om barseludligning på det private arbejdsmarked (barseludligningsloven) LOV nr 417 af 08/05/2006 / Law on Maternity in the Private Labor Market (Maternity Law) [Electronic resource]. URL: https://www.retsinformation.dk/eli/lta/2006/417 (accessed on: 25.04.2020).

[11] Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m. v. LOV nr 240 af 27/03/2006 / Law on Amending the Law on Prohibiting Discrimination in the Labor Market, etc. [Electronic resource]. URL: https://www.retsinformation.dk/eli/lta/2006/240 (accessed on: 25.04.2020).

[12] Lov om lige løn til mænd og kvinder LBK nr 899 af 05/09/2008 / Law on Equal Labor Remuneration for Men and Women [Electronic resource]. URL: https://www.retsinformation.dk/eli/lta/2008/899 (accessed on: 25.04.2020).

[13] Abortlag (1974:595) / Abortion Act (1974:595) [Electronic resource]. URL: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/abortlag-1974595_sfs-1974-595 (accessed on 25.04.2020)

[14] Lagen om DO / Swedish DO Act [Electronic resource]. URL: https://www.do.se/lag-och-ratt/lagen-om-do/ (accessed on: 25.04.2020).

[15] Swedish Discrimination Act (Diskrimineringslagen 2008:567) [Electronic resource]. URL: https://www.do.se/lag-och-ratt/diskrimineringslagen/ (accessed on: 25.04.2020).

[16] See: *Dobrovidova O. M* = F, or Equality in Swedish / M=Zh, ili Ravnopravie po-shvedsky/ [Electronic resource]. URL: https://ru.sweden.se/ljudi/m-zh-ili-ravnopravie-po-shvedski / (accessed on: 01.04.2020).

[17] Federal Act establishing parental leave for fathers (Paternity Leave Act — VKG) № 162/2015 [Electronic resource]. URL: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1989_651/ERV_1989_651.html (accessed on: 25.04.2020).

[18] Maternity Protection Act 1979 — MSchG [Electronic resource]. URL: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1979_221/ERV_1979_221.html (accessed on: 25.04.2020).

[19] For more detail see: A comparative analysis of gender equality law in Europe. Brussels: European Commission, 2016 [Electronic resource]. URL: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=52837 (accessed on: 29.03.2020).

[20] The table was compiled based on the materials of sources Nos. 2, 6, 7, 11, 12 and the data of the official websites of the EU member states in Internet.

Table 1

National specific features of implementation of the gender equality principle in EU member states

Country	Wording of the guarantees of human rights, including ensuring the gender equality principle, in the constitution of the country	Commitments (actions) of the country to prevent discrimination, including gender-based	Body (official) responsible for implementation of gender equality in the country
1	*2*	*3*	*4*
Austria*[1]	All citizens of the Federation are equal before the law. Privileges depending on origin, gender, position, class and religion are excluded.	Measures to promote de facto equality of women with men are acceptable, in particular by eliminating de facto inequalities	Ombudsman for equal treatment
Belgium*[2]	There are no class distinctions in the state; Belgians are equal before the law; enjoyment of the rights and freedoms recognized for Belgians must be ensured without discrimination	The law ordains measures to prevent discrimination on ideological and philosophical grounds	Institute for Equality of Women and Men
Bulgaria*[3]	All citizens are equal before the law. No restrictions in the rights or privileges based on race, nationality, ethnicity, gender, origin, religion, education, belief, political affiliation, personal status or property status are allowed	The main objectives of the foreign policy of the Republic of Bulgaria are national security and independence of the country, prosperity and fundamental rights and freedoms of Bulgarian citizens, as well as assistance in the establishment of a fair international order	Commission for Protection Against Discrimination
Hungary*[4]	The Republic of Hungary ensures equal rights for men and women with regard to all civil and political, as well as economic, social and cultural rights	The Republic of Hungary promotes the implementation of equality by measures aimed at eliminating the inequality of chances that citizens have in exercising their rights	Directorate on Equal Treatment; Ombudsman for Basic Rights
Germany*[5]	All people are equal before the law. Men and women have equal rights.	The state promotes de facto implementation of equality between men and women and helps to eliminate the harmful consequences of its violation	Federal Anti-Discrimination Agency
Greece*[6]	Greeks are equal before the law. Greek men and women have equal rights and obligations	Taking affirmative action to promote equality between men and women does not constitute discrimination based on gender. The state takes measures to eliminate the existing inequality, in particular, to the detriment of women	Greek Ommbudsman
Denmark*[7]	Personal freedom is inviolable. No Danish citizen can be deprived of his/her liberty in any way on the basis of his/her political or religious beliefs or origin.	Government bodies must pursue gender equality within their portfolio and integrate gender equality in all planning and management (mainstreaming)	Ombudsman for equal treatment

Table 1 continued

1	*2*	*3*	*4*
Ireland*[8]	All citizens, as human beings, must be equal before the law. This should not mean that the state is not obliged to take proper account of the differences in physical or moral ability and in social function differences in its legal instructions.	The state must, in particular, by its laws, as far as possible, protect against unfair attacks, and if such an injustice is committed, protect the life, personality, good name and property rights of every citizen.	Institute for Equality of Women and Men
Iceland*[9]	All are equal before the law and have human rights regardless of gender, religion, belief, nationality, race, skin color, financial status, origin and other factors. Men and women enjoy equal rights in all spheres.	After municipal elections, municipal councils appoint equality committees to discuss the equal status and equal rights of women and men in the respective municipality. The committees should advise local authorities on issues related to gender equality, and monitor and initiate measures, including specific measures, to ensure equal status and equal rights for women and men in the respective municipality.	Commission for Protection Against Discrimination
Spain*[10]	All Spaniards are equal before the law and no discrimination of any kind based on birth, race, gender, religion, opinion, or any other personal or social grounds is allowed	Public authorities ensure the conditions under which freedom and equality of individuals and their groups become real and effective, as well as eliminate all obstacles to their full development and promote the participation of all citizens in political, economic, cultural and social life	Directorate on Equal Treatment; Ombudsman for Basic Rights
Italy*[11]	All citizens have equal public dignity and are equal before the law without distinction of gender, race, language, religion, political beliefs, personal and social status	The task of the Republic is to remove obstacles of the economic and social nature which, actually restricting the freedom and equality of citizens, hinder the full development of the human personality and the effective participation of all workers in the political, economic and social organization of the country.	Federal Anti-Discrimination Agency
Cyprus*[12]	All people without exception are equal before the law, administrative authorities and justice, having the right to enjoy equal protection and equal treatment	Everyone enjoys all the rights and freedoms provided for by the Constitution, without any infringement of rights, indirect or direct, in connection with his/her communal affiliation, nationality, skin color, religion, language, gender, political and other convictions, national and social origin, place of birth, status, social affiliation or any other reason, unless the provision of the Constitution categorically determines otherwise	Ombudsman for administrative issues and human rights

Table 1 continued

1	*2*	*3*	*4*
Latvia*[13]	All people in Latvia are equal before the law and the courts. Human rights are exercised without any discrimination	The State recognizes and protects fundamental human rights in accordance with this Constitution, laws and international treaties binding on Latvia	Department of public integration and gender equality
Lithuania*[14]	Ensure the implementation of the equal rights of women and men enshrined in the Constitution of the Republic of Lithuania, as well as prohibit any discrimination of a person on the basis of gender, especially when it is related to family or marital status	State bodies provide for measures designed to ensure equal opportunities for women and men in strategic planning documents. Self-government bodies shall provide for measures designed to ensure equal opportunities for women and men in the strategic plan for the development of self-government and (or) in the strategic plan for self-government activities	Controller on equal opportunities
Luxembourg*[15]	Women and men are equal before the law	The state takes care of active assistance in removing obstacles that may exist in matters of equality between women and men	Equal Treatment Center
Malta*[16]	No person should be subjected to discriminatory treatment by any person acting on the basis of any written law or in the performance of the functions of any public institution or any public authority	The state must promote equality of men and women in the enjoyment of all economic, social, cultural, civil and political rights and, for this purpose, must take appropriate measures to eliminate all forms of discrimination between the sexes on the part of any person, organization or enterprise; the state must particularly strive to ensure that working women enjoy equal rights and receive equal pay for equal labor with men	National Commission on Equality Promotion
Netherlands*[17]	All people in the Netherlands should be treated equally under equal circumstances. Discrimination on the basis of beliefs, religion, political opinion, race or gender or for any other reason is not allowed	The king takes the following oath or makes the following promise on the Constitution: “I swear (promise) that I will defend and protect the independence and territorial integrity of the state to the best of my ability, that I will defend the rights and freedoms of each and every one of my subjects, that I will use the powers that I am vested with by the law to maintain and develop the well-being of each and every one, as befits a righteous and good king”	Dutch Institute for Human Rights
Norway*[18]	The duties of the state bodies include respect for and protection of human rights	Differentiated treatment promoting gender equality in accordance with the purpose of this law does not contradict its essence. This also applies to the special rights granted to women on the basis of biological differences between the sexes	Ministry for Children’s Affairs and Equality

Table 1 continued

1	*2*	*3*	*4*
Poland*[19]	Women and men in the Republic of Poland have equal rights in family, political, social and economic life	The Republic of Poland provides Polish citizens belonging to national and ethnic minorities with the freedom to preserve and develop their own language, preserve customs and traditions, and develop their own culture	Ombudsman for human rights
Portugal*[20]	All citizens have equal public dignity and are equal before the law	The primary tasks of the state are: to contribute to the improvement of the well-being and quality of life of the people and real equality between the Portuguese, as well as the enjoyment of economic, social and cultural rights through the transformation and modernization of economic and social structures; promoting equality between men and women	Commission on equality in labor and employment; Commission on citizenship and gender equality
Romania*[21]	Citizens are equal before the law and public authorities without privileges and without discrimination	The state must ensure creation of the conditions necessary to improve the quality of life	National Council on combating discrimination
Slovakia*[22]	People are free and equal in dignity and rights. Fundamental rights and freedoms are integral, inalienable, non-limited and irrevocable	Fundamental rights and freedoms are guaranteed on the territory of the Slovak Republic to everyone regardless of gender, race, skin color, language, belief and religion, political or other beliefs, national or social origin, nationality or ethnic group, property status, gender and other circumstances. No one can be harmed, granted or denied benefits on the said grounds	National Center on Human Rights
Slovenia*[23]	In Slovenia, everyone is guaranteed equal rights and fundamental freedoms regardless of nationality, race, gender, language, religion, political or other beliefs, property status, origin, education, social status or any other personal circumstances. Everyone is equal before the law	The law must provide for measures to promote equal opportunities for men and women with regard to elections to state and local self-government bodies	Defender of the equality principle
France*[24]	People are born and remain free and equal in rights. Social differences can only be based on considerations of common benefit	State power is needed to guarantee human and civil rights; this power is established in the interests of all rather than in the private interests of those to whom it is entrusted	Defender of rights

Table 1 continued

1	*2*	*3*	*4*
Croatia*[25]	Freedom, equality, national equality and equality of the sexes, peacekeeping, social justice, respect for human rights, inviolability of property, nature and environmental protection, rule of law and a democratic multi-party system are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution	Respecting the will of the Croatian people and all citizens, decisively expressed in free elections, the Republic of Croatia is formed and develops as a sovereign and democratic state in which equality, freedom, human and civil rights are guaranteed and ensured, as well as their economic and cultural progress and social welfare are implemented	Ombudsman for gender equality
Czechia*[26]	Fundamental rights and freedoms are guaranteed to everyone regardless of gender, race, skin color, language, belief and religion, political or other convictions, national or social origin, national or ethnic minority, property status, gender or other circumstances	Ratified and published international treaties on human rights and fundamental freedoms, their obligations assumed by the Czech Republic, are directly operating and take precedence over domestic law. The legislative regulation of all political rights and freedoms and their interpretation and use must create opportunities for free competition of political forces in a democratic society and ensure its protection	Government Council on equal opportunities for women and men
Estonia*[27]	All people are equal before the law. No one can be discriminated against because of his/her nationality, race, skin color, gender, language, origin, religion, political or other opinions, as well as property and social status or other circumstances	Ensuring rights and freedoms is an obligation of the legislative, executive and judicial authorities, as well as local self-governments	Ombudsman for gender equality and equal treatment

*[1] Constitution of Austria [Electronic resource]. URL: https://worldconstitutions.ru/?p=160 (accessed on: 25.04.2020).

*[2] Constitution of Belgium [Electronic resource]. URL: https://legalns.com/download/books/cons/belgium.pdf (accessed on: 25.04.2020).

*[3] Constitution of the Republic of Bulgaria [Electronic resource]. URL: https://legalns.com/download/books/cons/bulgaria.pdf (accessed on: 25.04.2020).

*[4] Constitution of the Republic of Hungary [Electronic resource]. URL: https://legalns.com/download/books/cons/hungary.pdf (accessed on: 25.04.2020).

*[5] Constitution of the Federal Republic of Germany [Electronic resource]. URL: http://vivovoco.astronet.ru/VV/LAW/BRD.HTM (accessed on: 25.04.2020).

*[6] Constitution of Greece [Electronic resource]. URL: https://legalns.com/download/books/cons/greece.pdf (accessed on: 25.04.2020).

*[7] Constitution of the Kingdom of Denmark [Electronic resource]. URL: https://worldconstitutions.ru/?p=152 (accessed on: 25.04.2020).

*[8] Constitution of Ireland [Electronic resource]. URL: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/ireland/irelnd-r.htm (accessed on: 25.04.2020).

*[9] Constitution of the Republic of Iceland [Electronic resource]. URL: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/iceland/icelnd-r.htm (accessed on: 25.04.2020).

*[10] Constitution of Spain [Electronic resource]. URL: http://vivovoco.astronet.ru/VV/LAW/SPAIN.HTM (accessed on: 25.04.2020).

*[11] Constitution of the Republic of Italy [Electronic resource]. URL: https://legalns.com/download/books/cons/italy.pdf (accessed on: 25.04.2020).

*[12] Constitution of the Republic of Cyprus [Electronic resource]. URL: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/cypros/cyprus-r.htm (accessed on: 25.04.2020).

*[13] Constitution of the Republic of Latvia [Electronic resource]. URL: https://legalns.com/download/books/cons/latvia.pdf (accessed on: 25.04.2020).

*[14] Constitution of the Republic of Lithuania [Electronic resource]. URL: https://worldconstitutions.ru/?p=115 (accessed on: 25.04.2020).

*[15] Constitution of the Grand Duchy of Luxembourg [Electronic resource]. URL: https://legalns.com/download/books/cons/luxembourg.pdf (accessed on: 25.04.2020).

*[16] Constitution of Malta [Electronic resource]. URL: https://worldconstitutions.ru/?p=145 (accessed on: 25.04.2020).

*[17] Constitution of the Kingdom of Netherlands [Electronic resource]. URL: https://legalns.com/download/books/cons/netherlands.pdf (accessed on: 25.04.2020).

*[18] Constitution of the Kingdom of Norway [Electronic resource]. URL: https://legalns.com/download/books/cons/norway.pdf (accessed on: 25.04.2020).

*[19] Constitution of the Republic of Poland [Electronic resource]. URL: https://legalns.com/download/books/cons/poland.pdf (accessed on: 25.04.2020).

*[20] Constitution of the Republic of Portugal [Electronic resource]. URL: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/portugal/portug-r.htm (accessed on: 25.04.2020).

*[21] Constitution of Romania [Electronic resource]. URL: https://legalns.com/download/books/cons/romania.pdf (accessed on: 25.04.2020).

*[22] Constitution of the Republic of Slovakia [Electronic resource]. URL: https://legalns.com/download/books/cons/slovakia.pdf (accessed on: 25.04.2020).

*[23] Constitution of Slovenia [Electronic resource]. URL: https://worldconstitutions.ru/?p=109 (accessed on: 25.04.2020).

*[24] Constitution of France [Electronic resource]. URL: https://legalns.com/download/books/cons/france.pdf (accessed on: 25.04.2020).

*[25] Constitution of the Republic of Croatia [Electronic resource]. URL: https://legalns.com/download/books/cons/croatia.pdf (accessed on: 25.04.2020).

*[26] Constitution of the Republic of Czechia [Electronic resource]. URL: https://legalns.com/download/books/cons/czech_republic.pdf (accessed on: 25.04.2020).

*[27] Constitution of the Republic of Estonia [Electronic resource]. URL: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-r.htm (accessed on: 25.04.2020).

Given the diversity of the ways to ensure the implementation of the principle of gender equality in the European Union, the question arises about the effectiveness of the work of national bodies of protection against discrimination in terms of gender, about assessing the success of individual countries in ensuring equality of rights and opportunities for its citizens: women and men.

It should be remembered that reducing gender inequality is important not only from the standpoint of democracy and the protection of human rights; it is also a condition for the prosperity of economy and society. Ensuring the full development and proper deployment of half of the world's workforce, which is women, has a profound impact on the growth, competitiveness and development of future economies and businesses around the world. In view of this, international organizations have developed a number of indicators for assessing the level of gender inequality in the society, the best known of them being the Global Gender Gap Index. It was introduced for the first time by the World Economic Forum in 2006 as a framework for determining the scope of gender differences and tracking the progress of overcoming them over time.

The index compares the national gender differences according to economic, educational, medical and political criteria and builds a ranking of countries that allows effective comparisons in terms of regions and income groups. The rankings are designed to provide global awareness of the challenges

arising from gender differences and the opportunities created by reducing them. The methodology and quantitative analysis of the ranking are intended to serve as a basis for developing effective measures to reduce the gender gap. The latest report is dated 2020 and provides information on 153 countries[21].

Today, the global gender gap in the world averages 68.6%. This means that there is still 31.4% left before gender parity. The positive trend is that over the past year 101 out of 149 countries have improved their position at least slightly. At the same time, no country in the world has yet reached full parity, and only the first five countries in the ranking have closed at least 80% of the gap. Among them are four Northern European countries (Iceland, Norway, Finland and Sweden), one Latin American country (Nicaragua, 5th position). Table 2 presents regional differences in terms of economic, educational, medical and political criteria. The leader is Western Europe, with the region of Central Asia and North Africa being the last.

Table 2

Regional differences in terms of economic, educational, medical and political indices of the gender gap[22]

Figure 8 Regional performance 2020, by subindex

	Overall Index	Subindexes			
		Economic Participation and Opportunity	Educational Attainment	Health and Survival	Political Empowerment
Western Europe	0.767	0.693	0.993	0.972	0.409
North America	0.729	0.756	1.000	0.975	0.184
Latin American and the Caribbean	0.721	0.642	0.996	0.979	0.269
Eastern Europe and Central Asia	0.715	0.732	0.998	0.979	0.150
East Asia and the Pacific	0.685	0.663	0.976	0.943	0.159
Sub-Saharan Africa	0.680	0.666	0.872	0.972	0.211
South Asia	0.661	0.365	0.943	0.947	0.387
Middle East and North Africa	0.611	0.425	0.950	0.969	0.102
Global average	0.685	0.582	0.957	0.958	0.241

0 — 1

Table 3 presents the values of the gender gap index for the best countries and those being at the bottom of this ranking in 2020. At the end of the list, as expected, were the Arab countries. The 20 best countries include 10 countries — members of the European Union. This allows stating that the efforts of supranational institutions to promote gender equality were not in vain. The USA took the 53rd position in the ranking of 2020, Russia — 81st, China — 106th.

The presence of African, Asian and Latin American countries among the leaders of the ranking evidences that there is no direct connection between the level of economic development and the gender gap in the society. The position of women in Nicaragua appears to be better than in Germany, Great Britain or the United States. From the point of view of the dynamics of this index, a significant variation is also noticeable. It is the developing countries that have made a significant leap forward in bridging the gender gap. For example, Nicaragua has reduced it by 0.147 over 12 years of observations, while Sweden by 0.007 only. The study of the reasons for this is beyond the scope of this article, therefore, we will limit ourselves only to the statement of the fact that the countries of Northern Europe have always been among the leading countries with the best indicators.

Analysis of the dynamics of the gender gap in general shows that the countries of the world are overcoming it in very different ways but generally quite slowly. One of the reasons for this is the different legal basis for these activities. Obviously, this is due to the degree of attention paid by the state pays to the solution of this problem.

[21] For more detail see: Report of the International Economic Forum: Global Gender Gap Report 2020 [Electronic resource]. URL: https://www.weforum.org/reports/global-gender-gap-report-2020 (accessed on: 28.03.2020).

[22] Global Gender Gap Report 2020. P. 22 [Electronic resource]. URL: https://www.weforum.org/reports/global-gender-gap-report-2020 (accessed on: 28.03.2020).

Table 3

The Global Gender Gap Index 2020 rankings[23]

Rank	Country	Score (0–1)	Score change (2018–2006)
1	Iceland	0.877	+0.095
2	Norway	0.842	+0.043
3	Finland	0.832	+0.036
4	Sweden	0.820	+0.007
5	Nicaragua	0.804	+0.147
6	New Zealand	0.799	+0.048
7	Ireland	0.798	+0.065
8	Spain	0.795	+0.063
9	Rwanda	0.791	n/a
10	Germany	0.787	+0.034
11	Latvia	0.785	+0.076
12	Namibia	0.784	+0.098
13	Costa Rica	0.782	+0.089
14	Denmark	0.782	+0.036
15	France	0.781	+0.129
16	Philippines	0.781	+0.029
17	South Africa	0.780	+0.068
18	Switzerland	0.779	+0.079
19	Canada	0.772	+0.055
20	Albania	0.769	+0.108
21	United Kingdom	0.767	+0.031
22	United States	0.724	+0.020
23	Ukraine	0.721	+0.042
24	Russian Federation	0.706	+0.029
25	China	0.676	+0.020
26	Syria	0.567	n/a
27	Pakistan	0.564	+0.020
28	Iraq	0.530	n/a
29	Yemen	0.494	+0.034

Taking into account that the principle of gender equality is a component of the general concept of human rights, it is necessary to analyze the best practices of its implementation in order to give recommendations for improving the legislation of those countries where this principle is enshrined but is yet insufficiently implemented.

The leaders of the world gender equality ranking are four countries of the European Union: Iceland, Norway, Sweden and Finland. Let us consider their practice of ensuring the implementation of the principle of equal rights and freedoms of women and men in more detail.

In each of these countries: 1) there is a law on equality between men and women or a law on discrimination; 2) there are bodies monitoring the observance of the principle of gender equality; 3) each organization with more than 25 (30) employees develops and implements a plan to ensure gender equality; 4) non-observance of the law is subject to sanctions: administrative fines or even criminal prosecution (for more details, see table 4).

[23] Global Gender Gap Report 2020. P. 9 [Electronic resource]. URL: https://www.weforum.org/reports/global-gender-gap-report-2020 (accessed on: 28.03.2020).

Table 4

Comparative analysis of national mechanisms of ensuring gender equality in the countries — leaders of the global gender equality ranking

Country	Name of the gender equality law	Name of responsible bodies / officers	Gender equality plan	Sanctions for non-performance of the law / plan
Iceland*[1]	Law on equal status and equal rights of women and men	Equal Rights Complaints Committee, Gender Equality Bureau, Gender Equality Council, Gender Equality Directorate	Companies and organizations with 25 or more employees must adopt a gender equality plan or integrate aspects of gender equality in the policy regarding their employees on an annual basis	Daily fines may amount up to 50,000 ISK per day
Norway*[2]	Equality and Anti-Discrimination Act	Ombudsman for Equality and Anti-Discrimination, Department for Equality, Non-Discrimination and International Relations, Committee for Gender Equality, Council for Equality and Discrimination	Employers 'and workers' organizations must make vigorous, targeted and systematic efforts to promote equality and prevent gender discrimination in their respective fields of activities	Punishment in the form of a fine or imprisonment for a term not exceeding three years
Sweden*[3]	Anti-Discrimination Law (Act)	Commission to Suppress Violations of Democracy, Ombudsman for discrimination issues	An employer who employed 25 or more employees at the beginning of the calendar year must draw up a plan for achieving gender equality at the enterprise every three years. During the year, the employer must document the work on the application of active anti-discrimination measures *[4]	Administrative fine or imprisonment for up to three years
Finland*[5]	Men and Women Equality Law	Ombudsman for equal opportunities under the Ministry of Justice; Ombudsman for gender equality; Commission on equality and gender equality	If an employer employs at least 30 employees on a regular basis, the employer must draw up a plan of ensuring equality at least every two years, in particular, regarding labor remuneration and other labor conditions which is to include measures to encourage equality	Anybody violating the discrimination ban is to pay compensation to the affected person. The refund is to be at least 3,240 EUR

*[1] Lög um jafna stöðu og jafnan rétt kvenna og karla / Law on Equal Status and Equal Rights of Women and Men of Iceland. No. 10. March 6, 2008. [Electronic resource]. URL: https://www.althingi.is/lagas/nuna/2008010. html (accessed on 25.04.2020).

*[2] Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act) of Norway [Electronic resource]. URL: https://lovdata.no/dokument/NLE/lov/2017-06-16-51 (accessed on 25.04.2020).

*[3] Diskrimineringslagen / Anti-Discrimination Act of Sweden [Electronic resource]. URL: https://www.do.se/lag-och-ratt/diskrimineringslagen/ (accessed on: 25.04.2020).

*[4] Active measures are prevention and advocacy work to combat discrimination in the organization and other ways to encourage equal rights and opportunities regardless of gender, gender identity or expression, ethnicity, religion or other beliefs, disability, sexual orientation or age).

*[5] Laki naisten ja miesten valisesta tasa-arvosta / Zakon o ravenstve muzhchin I zhenshhin 8.8.1986 / 609 Finland [Electronic resource]. URL: https://www.finlex.fi/fi/laki/ajantasa/1986/19860609 (accessed on: 25.04.2020).).

Note that in half of the cases, the combat against gender discrimination is an integral part of the overall fight against discrimination, including based on religion or ethnicity. Therefore, the laws are called "On equality and the prohibition of discrimination" (Norway)[24] or "On Discrimination" (Sweden)[25].

Sweden, for example, used to have "five basic regulations prohibiting discrimination in labor relations: the Law on Equal Opportunities for Men and Women in the Work Sphere (1991)[26]; the Law on the Prohibition of Ethnic Discrimination (1999)[27]; the Law Prohibiting Discrimination of People with Disabilities (1999); the Law Prohibiting Discrimination Based on Sexual Orientation (1999)[28]; Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act (2002)[29]. On January 1, 2009, a new Anti-Discrimination Act entered into force[30]. It replaced the anti-discrimination laws in Sweden by uniting them into a single regulatory act that additionally prohibited discrimination based on age and sexual identity. As a result, the prohibition of discrimination extended to the following grounds: gender, self-identification or self-expression atypical for a particular gender, nationality, religion or belief, disabilities, sexual orientation, age"[31].

In reality, this approach is more modern. Scientific studies show that gender inequality is in practice included in different types of other inequalities, therefore, to overcome it, it is necessary to use an intersectional tool that "addresses different types of discrimination simultaneously and helps to understand how different combinations of identities affect access to rights and opportunities"[32]. In other words, the movement towards gender equality should be carried out by combating discrimination on various grounds: race, religion, language, country of origin, etc.

The Russian Federation does not yet have special laws on ensuring the principle of gender equality. This leads to the fact that there are still unresolved issues of improving some norms of the family, criminal, criminal and penal, pension legislation, as well as the legislation in the field of education and ensuring the health of citizens, from the point of view of the implementation of the principle of equality of men and women. Moreover, as the recent discussion of the draft federal law on combating domestic violence has shown, some legal norms may conflict with others. This relates to the decriminalization of beatings, which in fact makes the very idea of a law to combat domestic and domestic violence meaningless. All this explains the extremely modest position of our country in the international ranking to reduce the gender gap in the society.

Conclusion

The above analysis allows confirming the research hypothesis that the demand to follow the principle of gender equality enshrined in the international law is a necessary but insufficient condition for a significant reduction in the gender gap in the country. In practice, the countries of the world have very different results in bridging the gender gap in the rights and opportunities of their citizens. While Iceland,

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[24] Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act) of Norway [Electronic resource]. URL: https://lovdata.no/dokument/NLE/lov/2017-06-16-51 (accessed on: 25.04.2020).

[25] Diskrimineringslagen / Discrimination Act of Sweden [Electronic resource]. URL: https://www.do.se/lag-och-ratt/diskrimineringslagen/ (accessed on: 25.04.2020).

[26] Lag (1979: 1118) om jämställdhet mellan kvinnor och män i arbetslivet / Law (1979: 1118) on Equality of Women and Men in Labor Life [Electronic resource]. URL: https://www.riksdagen.se/sv/dokument-lagar/ dokument/svensk-forfattningssamling/lag-19791118om-jamstalldhet-mellan-kvinnor_sfs-1979-1118 (accessed on: 25.04.2020).

[27] Lag (1994: 134) mot etnisk diskriminering / Law (1994: 134) against Ethnic Discrimination [Electronic resource]. URL: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994134-mot-etnisk-diskriminering_sfs-1994-134 (accessed on: 25.04.2020).

[28] Lag (1999: 133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning / Law (1999: 133) on Prohibition of Discrimination in Labor Life based on Sexual Orientation [Electronic resource]. URL: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1999133-om-forbud-mot-diskriminering-i_sfs-1999-133 (accessed on: 25.04.2020).

[29] Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act (2002: 293) [Electronic resource]. URL: https://www.government.se/4ac82e/ contentassets/bf6cc61affe746dc9fff402361e4cfe5/sfs-2002293-prohibition-of-discrimination-of-employees-working-part-time-and-employees-with-fixed-term-employment-act.pdf (accessed on: 25.04.2020).

[30] Discrimination Act [Electronic resource] URL: Discrimination Act 2008 http://www.do.se/Documents/ pdf/new_discrimination_law.pdf. (accessed on: 29.03.2020).

[31] See: *Isaeva E. A., Stefanova K. I.* The Battle for Gender Equality in Sweden: Steps to Success /Borba za gendernoe ravenstvo v shvetsii shagi k uspekhu/ [Electronic resource]. URL: http://jurnal.org/articles/2012/uri1.html (accessed on: 01.04.2020).

[32] Theory of intersectionality: an instrument of gender and economic justice [Electronic resource]. URL: http://ravnopravka.ru/2011/03/теория-пересечений-intersectionality-инструмент-ге/ (accessed on: 29.03.2020).

the leader of the world ranking, has a gender gap of only 12.3%, in Yemen, which is in the last position of the ranking, this gap is 50.6%. To effectively reduce the gap in the rights and opportunities of women and men, it is necessary to supplement the effect of the international law with the development and implementation of a regional and national legislation.

In the countries of the European Union, the principle of gender equality is institutionalized at the supranational level. The European Institute for Gender Equality has been established and is successfully operating. Its main task is to integrate the gender perspective into all EU strategies and national policies of the EU member states, to combat gender discrimination in all spheres of life, and to raise awareness of EU citizens about gender equality. As a result, 10 countries out of the 20 leading countries in bridging the gender gap are European Union states.

At the same time, each of the 27 EU countries implements the principle of gender equality in its own way. It is a constitutional principle, but it is often included in the broader context of respect for human rights and the fight against discrimination. There are various bodies controlling the observance of the principle of gender equality: ministries, institutes, agencies, commissions, directorates, centers, councils, departments. The commonest variant is the existence of a national ombudsman / controller / defender for the equal rights of women and men, a minister without portfolio or an equality adviser. In some cases, countries simultaneously have a collegial supervisory body and an officer.

The leaders of the world ranking of gender equality are four countries of the European Union: Iceland, Norway, Sweden and Finland. A specific feature of their national mechanisms for ensuring gender equality is that, apart from laws on gender equality and the bodies controlling their implementation, all organizations with more than 25 (30) employees are obliged to develop plans to combat discrimination, including on the basis of gender, and to report on their implementation. Violators are subject to administrative punishment, and even criminal prosecution in a number of countries. This turns the principle of gender equality into a real legal norm. At the same time, the implementation of this principle in these countries is ensured at all levels of lawmaking: general, private, and industry-related.

Not everything in the European practice of combating discrimination on the basis of gender is positive and indisputable, of course. There are cases when citizens abuse their rights making unfounded claims against employers, hoping to receive material compensation. There is a certain asymmetry in favor of protecting the rights of women; men often become objects of discrimination, especially in the family law. In addition, the fight against new forms of discrimination deserves attention, for example, electronic (digital) inequality related with the fact that women have fewer opportunities to get education in the field of IT technologies and modern jobs. All this is only just beginning to be reflected in the European legislation and may become the subject of our further research of the chosen topic.

The material has been verified, the figures, facts, quotations have been verified against the original source, the material does not contain information of limited distribution.

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A Brief Historical Summary of the Constitutional and Judicial Assessment of the Problems of Federalism in Russia

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ABSTRACT

The article is devoted to the consideration of the positions of the Constitutional Court of the Russian Federation on issues of the state structure, in particular the principles of the federal structure, the status and powers of the constituent entities of the Russian Federation, the delimitation of subjects of jurisdiction, and the organization of public authority. The author considers the main differences between a federal and confederal structure, type and other features of the federal structure enshrined in the 1993 Constitution of the Russian Federation.

Keywords: federal structure, status of the subjects of the Russian Federation, constitutional court, constitution

The issues of the state structure of the Russian Federation have often become the subject of analysis by the Constitutional Court of the Russian Federation. Given the approach to the main institutions of the state structure established in the theory of constitutional law, the greatest attention in this context is attracted by such problems as the principles of the federal structure and the status of the constituent entities of the federation, the delimitation of the subjects of the jurisdiction and powers between the federation and its constituent entities, primarily in the field of electoral law and organization of the public authority.

1. The Constitution of the Russian Federation of 1993 establishes the federal nature of the territorial (state) structure of Russia. This provision fully correlates with the previous constitutional regulation which established federalism as one of the secure foundations of the constitutional system of Russia. Meanwhile, this fundamental principle of the new Russian statehood was put to serious tests already at the earliest stages of its emergence and development. It is possible to speak specifically about the early initial stages of development and the novelty of Russian statehood in the chronological cut of the early 1990ies because of a radical breakdown of this statehood at its fundamental level, that is, at the level of principles, which, in its turn, allows speaking about the revolutionary nature of the specified time period.

One of the first strength tests was the attempts to deal a blow to the integrity of the federal state, including through the use of such a legal mechanism as secession. However, if we adhere to strict special legal assessments, the institution of secession, i. e. secession from the federation (union state), is not possible, since the right to secede (secession) is a sign of such a state alliance as a confederation (union of states). International practice certainly knows other, mainly terminological, approaches, but the strict legally significant delimitation between a federation and a confederation as independent forms of the territorial state structure presupposes the statement of the presence or absence of the right to secession in the subjects (members) of the federation / confederation as one of their key system-forming qualities. A different approach would actually make their legal delimitation meaningless, translating the problem into a terminological linguistic dispute.

At the same time, we must not forget that in its constitutional provisions the Soviet Federation (Union of SSR) did stipulate the right of the Union republics to secession which, however, was disregarded until the emergence of the relevant socio-economic and political factors that led to the disintegration of the Soviet Union. The very name of the state was to be connoted with the confederation (Union of SSR). The fact that with the weakening, and subsequently with the complete disappearance of the system-forming political core, the structure that held the Soviet statehood, namely the CPSU, the subjects of the de facto confederation (legal federation) took advantage of their constitutionally fixed “dormant”, de facto confederal, right to secession, together with other reasons and circumstances led to the disappearance of the largest state from the political map of the world. It should be admitted that among these reasons, it is the explosion of the “legal bomb” (the implementation of a formally legal, but inherently inadmissible power for the federation from the point of view of basic legal principles, the right to secession) that is far from being the least significant.

This negative experience was taken into account in the preparation of the 1993 Constitution, the right to secession of the subjects of the federation was not enshrined in it, and the Russian Federation became a real federation from the legal point of view.

The principle of federalism fixed in the Constitution of the Russian Federation does not provide for the right of the subjects to independently make decisions on secession from the federation (the right of secession). At the same time, the unilateral establishment of the right to secede from the Russian Federation by its constituent entity would mean recognition of the legitimacy of the complete or partial violation of the territorial unity of the sovereign federal state and the national unity of the peoples inhabiting it[1].

Neither should we forget about the constitutional and contractual nature of the federal relations in the Russian Federation. The relations between Russia and the republics within it are primarily built on a constitutional basis. This, however, does not exclude the possibility of concluding agreements between them within the framework of the Russian Federation on the basis of the Constitution. The development of this approach subsequently led to the statement and substantiation of the principles of the state integrity[2], as well as the unity and indivisibility of the sovereignty of the Russian Federation[3].

In this regard, particular attention is drawn to the principle of the unity and indivisibility of sovereignty which directly follows from the denial of the right to secession in the constitutional practice of the federal state and which one also had to fight for very seriously in Russia. At the same time, it was necessary to use mechanisms of attracting higher courts in order to ascertain 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, therefore, sovereignty cannot be distributed at different levels.

The Constitution of the Russian Federation does not allow any other holder of sovereignty and source of power, apart from the multinational people, therefore, it does not presuppose any other state sovereignty except the sovereignty of the Russian Federation. At the same time, the sovereignty of the federal state precludes the existence of two levels of sovereign authorities in a single system of state power which would have supremacy and independence, that is, it does not allow regional sovereignty.

The major component of the principle of unity and indivisibility of sovereignty is the principle of the supremacy of the Constitution and federal laws. It would seem that such a legal truism does not need any special explanation in theory and protection in practice. Meanwhile, the young Russian federalism has actually faced the problem of attempts to introduce such a specific legal mechanism as ratification by individual subjects of the federation.

Whereas the contemporary legal science generally accepts referring this mechanism to the sphere of international legal regulation, the real domestic practice has demonstrated examples of attempts to introduce such procedures into the fabric of the domestic constitutional structure. However, the introduction of the institution of approval of federal regulation as a legally binding conditions for the beginning of the operation of federal norms in the space of the relevant individual constituent entities of the Federation at the regional level may, from a formal legal standpoint, evidence the application of inappropriate legal procedures to legal relations of a different — confederal or international legal — nature, and may evidence the extreme weakness and even degeneration of the federal relations from the standpoint of social-political analysis.

In this regard it had to be recalled through an act of the Supreme Court that the principle of the supremacy of the Constitution of the Russian Federation and federal laws means, among other things, that the extension of the operation of federal laws on the territory of the constituent entities of the Russian Federation by special legislative acts of the constituent entities of the Russian Federation contradicts the concept of exclusive federal jurisdiction and, besides, it is unnecessary from the point of view of economy of legislative efforts and legislative technique[4].

At the same time, a constituent entity of the Russian Federation cannot change the priorities of laws and other federal legal acts established by the Constitution of the Russian Federation, limit their application, procedures and mechanisms for resolving conflicts, legal disputes not stipulated by the Constitution of the Russian Federation and federal laws[5].

Another important principle of federalism developed in the decisions of the Constitutional Court is the principle of equality of the constituent entities of the Russian Federation. The constitutional provision that in relations with federal bodies of the state power all constituent entities of the Russian Federation are equal to each other, is expressed, in particular, in the uniformity of the constitutional approach to the distribution of the subjects of jurisdiction and powers between the Russian Federation and its con-

[1] Ruling of the Constitutional Court of the RF dated March 13, 1992 No.3-П [3-P].

[2] Ruling of the Constitutional Court of the RF dated July 31, 1995 No.10-П [10-P].

[3] Rulings of the Constitutional Court of the RF dated June 7, 2000 No.10-П [10-P] and December 21, 2005 No.13-П [13-P].

[4] Ruling of the Constitutional Court of the RF dated September 30, 1993 No.18-П [18-P].

[5] Determination of the Constitutional Court of the RF dated June 27, 2000 No. 92-O.

stituent entities and dictates the establishment of uniform rules of the relationship of federal government bodies with all constituent entities of the federation by the federal legislator.

Meanwhile, even in the sphere of its competence the federal legislator is not entitled to resolve issues affecting the constitutional and legal status of the constituent entities of the Russian Federation without taking into account the constitutional foundations of the federal structure. The more so arbitrary narrowing of the legal possibilities of the constituent entities of the Russian Federation is unacceptable.

The legal equality of the subjects of the federation certainly does not and cannot mean the equality of their potentials and the level of socio-economic development[6]. However, the regard for the regional characteristics is a prerequisite for maintaining a balance of interests and introducing national standards in all spheres of life of the constituent entities of the Russian Federation[7].

2. The next large group of issues touches upon the problem of delimiting the subjects of jurisdiction and powers between the Russian Federation and its constituent entities.

Considering this problem, it should be borne in mind that the priority of the provisions of the Constitution of the Russian Federation takes place in determining both the status of the constituent entities of the Russian Federation, and the subjects of jurisdiction and powers of the bodies of state power of the Russian Federation and the bodies of state power of its constituent entities.

The attempts to implement their own legal regulation on the items referred by Art. 71 of the Constitution of the Russian Federation to federal jurisdiction by the constituent entities of the federation that have taken place in the real practice of domestic constitutionalism have made the Constitutional Court state the absence of such regional authority. This also concerned, for example, the cases when the legislator of a constituent entity of the Russian Federation postponed the enactment of an act adopted by it on an issue referred to the exclusive competence of the Russian Federation until the publication of the relevant federal law[8].

Since the real practice of early federalism faced attempts of certain constituent entities of the federation through regional legislation to transfer, exclude or otherwise redistribute the subjects of federal jurisdiction and powers of federal executive bodies established by the Constitution of the Russian Federation, a special response of the supreme constitutional and judicial body was required which pointed out that the bodies of state power of the constituent entities of the Russian Federation participate in the relevant relations of general federal significance to the extent and insofar as such participation is provided for and permitted by federal laws and other regulatory legal acts of federal bodies of the state power[9].

This actually authorized the possibility for constituent entities of the Russian Federation to participate in the decision-making process at the federal level, so that more account should be taken of their needs and interests, provided that such participation is of a subsidiary nature, takes place in the form of a preliminary agreement that does not determine the final solution of the issue, that is, it does not imply the transfer of the relevant federal powers to the constituent entity of the Russian Federation[10].

The extraordinary active rule-making, so typical and quite natural for the time of cardinal social reforms, in our conditions sometimes acquired the character of a kind of a competition based on the principle of "who is bigger and faster", "racing lawmaking". This was especially true of the regulation of joint jurisdiction. At the same time, however, one should not forget that the delimitation of the rule-making powers of the federal legislator and the legislators of the constituent entities of the Russian Federation on items of joint jurisdiction is carried out at the constitutional level. In those conditions of the rule-making confusion, the mechanism for specific bridging the gaps in the relevant level of normative regulation was derived from the textual meaning of the Constitution and formulated: prior to the issuance of a federal law on a particular item of joint jurisdiction, a constituent entity of the Russian Federation has the right to adopt its own law and other regulatory legal acts. However, after the publication of the federal law, such acts must be brought into line with the federal law[11].

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[6] Ruling of the Constitutional Court of the RF dated July 15, 1996 No.16-П [16-P].

[7] Ruling of the Constitutional Court of the RF dated April 22, 2014 No.13-П [13-P].

[8] Determination of the Constitutional Court of the RF dated November 5, 1998 No.147-0.

[9] Ruling of the Constitutional Court of the RF dated May 13, 2004 No. 10-П [10-P].

[10] Ruling of the Constitutional Court of the RF dated November 12, 2003 No. 17-П [17-P].

[11] Rulings of the Constitutional Court of the RF dated November 30, 1995 No. 16-П [16-P]; February 1, 1996 No. 3-П [3-P]; October 16, 1997 No. 14-П [14-P]; November 3, 1997 No. 5-П [5-P]; January 9, 1998 No. 1-П [1-P]; December 15, 2003, No.19-П [19-P]; Determinations of the Constitutional Court of the RF dated March 1, 2007 No. 129-О-П [129-O-P]; June 5, 2014 No. 212-0, etc.

And on the contrary, in the absence of proper regional regulation on an issue referred to the competence of a constituent entity of the federation by the federal legislator, the latter has the right to independently implement legal regulation in this sphere[12].

Attention should be paid to the fact that the Constitution in Art. 11 (part 3) does not directly affect the legal form of the normative act, through which the subjects of jurisdiction and powers are delimited. In any case, it does not envisage the adoption of federal laws as such a legal instrument. Meanwhile, it follows from the literal meaning of Art. 72 of the Constitution that the principles of delimiting the subjects of jurisdiction and powers are established by federal laws adopted in the sphere of joint jurisdiction[13].

A special case of regulation in the sphere of joint jurisdiction is the establishment of specific powers of federal bodies of the state power and the bodies of the state power of the constituent entities of the Russian Federation in the relevant area, including the transfer of the implementation of some of those powers that used to be exercised by federal bodies of the state power to the regional level. This is certain to be the unconditional right of the federal legislator[14].

It is also interesting to note here the, generally, at first glance, legal-technical phenomenon of textual duplication of federal normative material at the regional level which was very widespread in the first years of the formation of real federalism in Russia. This phenomenon which is quite explainable by the relative underdevelopment of the regional system of lawmaking and sometimes its very limited staffing capabilities, caused a symptomatic response of the Supreme Court which noted that the legislative body of a constituent entity of the Russian Federation within the limits of their powers is not obliged to pass laws that completely coincide textually with the federal legislation[15].

3. It follows from the federal nature of the statehood of Russia that the Russian Federation has charge of its federal structure and the republics making up the Russian Federation have charge of their territorial structure. Therefore, the republic is entitled to independently resolve the issue of its territorial structure which is of constitutional significance in terms of its nature[16] .

Of particular interest in this context are also issues of the organization of public power in the constituent entities of the Russian Federation. Regions have the right to establish their own system of public authorities by adopting their own regulatory acts (regional legislation). However, such acts must comply with the foundations of the constitutional system and the general principles of organization of representative and executive bodies of the state power, other provisions of the Constitution of the Russian Federation and federal legal acts specifying them. The state power in the constituent entities of the Russian Federation must be based on the principles of a democratic federal legal state with a republican form of governance, the unity of the system of state power, as well as the exercise of the state power on the basis of the separation of legislative, executive and judicial powers and the resulting independence of their bodies (the principle of “separation of powers”).

An important aspect of the characteristics of the federal form of the state structure is the factor of the unity of the organization of public power due to its very systemic nature. The general principles of organization of representative and executive bodies of the state power are established by the federal law, in accordance with which laws and other regulatory legal acts of the constituent entities of the Russian Federation are adopted. Due to this circumstance, the organization of public power at the level of a constituent entity of the Russian Federation must basically conform to the organization of public power at the level of the Russian Federation, therefore, the establishment of the powers of legislative (representative) and executive bodies of the state power of constituent entities of the Russian Federation cannot be the prerogative (exclusive right) of the constituent entities of the Russian Federation[17].

At the same time, the competence of the bodies of state power of the constituent entities of the Russian Federation is established on the basis of a constitutional rule, according to the bodies of state power of the constituent entities of the Russian Federation independently determine the powers which do not affect the constitutional foundations and the prerogatives of the federal legislator[18].

The initial stage of the development of domestic federalism in post-Soviet Russia was characterized, in particular, by the absence of a federal law on the general principles of organizing the system of government authorities. The issue of appointment (election) to the post of the principal officer of a con-

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[12] Ruling of the Constitutional Court of the RF dated November 3, 1997 No. 15-П [15-P].

[13] Determination of the Constitutional Court of the RF dated February 4, 1997 No. 13-O.

[14] Ruling of the Constitutional Court of the RF dated January 9, 1998 No. 1-П [1-P]; Determinations of the Constitutional Court of the RF dated March 1, 2007 No. 129-0; January 24, 2008 No. 3-O-O.

[15] Ruling of the Constitutional Court of the RF dated March 13, 1992 No. 3-П [3-P].

[16] Ruling of the Constitutional Court of the RF dated January 24, 1997 No. 1-П [1-P].

[17] Determination of the Constitutional Court of the RF dated July 8, 2000 No. 91-O.

[18] Ruling of the Constitutional Court of the RF dated January 18, 1996 No. 2-П [2-P].

stituent entity of the Russian Federation acquired critical importance in the context of the specific historical constitutional realities. This circumstance (the absence of a corresponding federal law) itself could not be recognized as preventing the constituent entities of the Russian Federation from adopting regional laws regulating the procedure of electing heads of executive power, which directly follows from the nature of joint competence. If there is an appropriate regulatory framework (charter, electoral laws), a constituent entity of the Russian Federation is entitled to independently set elections and determine their date. At the same time, in the cases when they were supposed to be held simultaneously with federal elections, they are to be appropriately coordinated with the federal authorities, which follows from the requirement for coordinated functioning and interaction of government authorities[19].

At the same time, the Constitution of the Russian Federation is known not to directly regulate the procedure of formation of government authorities of the constituent entities of the Russian Federation. The federal Constitution does not consider elections to be the only admissible mechanism of formation of all public authorities at each level of its organization. This, however, does not preclude the possibility of various options for empowering public authorities and officers not directly named in the Constitution of the Russian Federation as elected, including the possibility of changing the previously established procedure of empowering the relevant bodies and persons.

Exercising its right to establish the general principles of the organization of representative and executive bodies of the state power of the constituent entities of the Russian Federation, the federal legislator may provide for a regulatory and legal basis for the relationship between legislative and executive authorities within the framework of the separation of powers at the level of a constituent entity of the Russian Federation, the procedure of forming these bodies, in particular the procedure of vesting with the powers of the principal officer of the constituent entity of the Russian Federation[20].

Of particular interest is the existence of specific balancing mechanisms (stabilizers) in the system of organization of public power under federalism. These mechanisms allowing certain balancing of possible power-competence imbalances which are especially clearly manifested sometimes not so much in normative regulation as in the specific practice of enforcement of the right. One of these stabilizers is the institution of the removal of an official from office which may be related with various reasons.

For example, establishing the general principles of organizing the system of government authorities, the federal legislator is entitled to establish a recall institution as one of the forms of immediate (direct) democracy in relation to the principal officer elected by popular vote being the head of the supreme executive body of the constituent entity of the Russian Federation.

The possibility of recall does not affect the provision on a unified system of executive power in the Russian Federation established by the Constitution of the Russian Federation, since the decisions and instructions of federal executive authorities within the framework of its competence remain binding both on the new principal officer of the constituent entity of the Russian Federation to be elected to replace the recalled one and on the person temporarily acting on behalf of the principal officer of the constituent entity of the Russian Federation during the election campaign [21].

The organization of federal relations sometimes requires conferring the federal powers on issues of joint jurisdiction on the relevant territorial bodies of the federal executive power. In such cases, the federal legislator is entitled to provide for the possibility of coordinating the appointment to the positions of heads of territorial bodies of the federal executive power with the legislative (representative) body of the constituent entity, since such officers are called upon to ensure the delimitation of powers of executive authorities on matters of joint jurisdiction at all levels. This, certainly, does not affect the prerogatives of the Russian Federation to ultimately independently resolve this issue, provided that the necessary conciliation and jurisdictional procedures established by the Constitution of the Russian Federation and federal law are used[22].

4. Special attention should be paid to the analysis of the norms of electoral legislation as applied to various levels of public authority. In the conditions of the stage of the sometimes painful formation of the electoral system, it was fundamentally important that the very existence of a legal basis as a prerequisite for holding elections should have the value of the general principle of organizing the state power derived from a number of constitutional norms, in particular, Art. 5, p. 2; Art. 11, p. 2; Art. 66, p. 2; Art. 77, p. 1.

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[19] Ruling of the Constitutional Court of the RF dated April 30, 1996 No. 11-П [11-P].

[20] Rulings of the Constitutional Court of the RF dated April 30, 1996 No.11-П [11-P]; December 27, 2005 No. 13-П [13-P]; Determination of the Constitutional Court of the RF dated June 8, 2000 No.91-O.

[21] Ruling of the Constitutional Court of the RF dated June 7, 2000 No. 10-П [10-P].

[22] Rulings of the Constitutional Court of the RF dated June 7, 2000 No. 10-П [10-P]; May 13, 2004 No. 10-П [10-P]; Determination of the Constitutional Court of the RF dated November 28, 2000 No. 225-O.

Proclaiming the principle of democracy among the foundations of the constitutional system, the Constitution of the Russian Federation is known not to fix either a certain electoral system or specific electoral procedures in relation to elections in the constituent entities of the Russian Federation. This is the subject of regulation of their charters or electoral laws (electoral codes in some regions) which resolve issues of the terms of office of elected bodies, the procedure of appointing and postponing the elections. Such regulation in the constituent entities of the Russian Federation must comply with the principles of organization of representative bodies of the state power arising from the Constitution of the Russian Federation, as well as take account of the guarantees of the citizens' electoral rights stipulated at the federal level.

It is in the sphere of the electoral law that the previously mentioned phenomenon of a kind of legislative rivalry between the levels of public authority was most clearly manifested. Moreover, in the absence of a federal law on the general principles of organization of representative and executive bodies of the state power, the legislator of the constituent entity of the Russian Federation was entitled to establish its own legal regulation determining the procedure of electing deputies of the legislative (representative) body of the state power. This prerogative of the legislator of a constituent entity of the Russian Federation could be certainly limited only by provisions directly enshrined in the federal Constitution.

In its turn, the solution of these issues by the constituent entities of the Russian Federation was to comply with the requirement arising from the constitutional provisions to form a representative body on the basis of their own charter and laws, without deviating from the procedure for elections and terms of office of this body established in them and subject to the general framework instructions on the maximum duration of the legislature[23]. The early stage of the formation of federalism in the sphere of electoral relations gave examples of attempts to establish the requirements related to reaching a certain age and duration of residence in the territory of a constituent entity of the Russian Federation as conditions for citizens to acquire passive suffrage in addition to the Constitution of the Russian Federation. The introduction of such age and residency qualifications, undoubtedly, limited the rights and freedoms of the man and citizen.

Such restrictions could in no way follow from the powers of the constituent entities of the Russian Federation enshrined in Art. 77 (part 1) and Art. 11 (part 2) of the federal Constitution. By independently establishing the system of their government bodies and forming them, the constituent entities of the Russian Federation are obliged to act in accordance with the foundations of the constitutional system of the Russian Federation, including the principle of free elections, guaranteeing the freedom of expression of the will of the citizens and without violating the democratic principles and norms of the election law.

Rather sensitive in the considered early period of constitutional and legal development was "the language issue". The Federal Constitution is known to enshrine the right of the republics to establish their state languages (Art.68, part 2) which are used in the bodies of the state power and local self-government, state institutions of the republics along with the state language of the Russian Federation, which is ensured by the state integrity of the Russian Federation, the unity of the state power system, the specific features of the federal structure of the Russian Federation and serves the interests of preserving the bilingualism (multilingualism) of their multinational peoples. However, this does not imply the duty of the republics to establish state languages.

This issue became still more painful due to the attempts to legislatively introduce special requirements to the knowledge of these languages as a condition for acquiring a passive electoral right, including during elections of the head of state, in the practice of certain regions. Meanwhile, the need to introduce such requirements does not follow from the federal Constitution, either[24].

The introduction of additional electoral procedures at the regional level should be also balanced by the relevant additional guarantees of the citizens' electoral rights, and this balancing is essentially a condition for the constitutionality of expanding the legislative regulation of the electoral process at the regional level. This requirement follows from the constitutional provision according to which the protection of human and civil rights and freedoms, including electoral rights, is under the joint jurisdiction of the Russian Federation and the constituent entities of the Russian Federation. Introducing specific electoral procedures the constituent entities of the Russian Federation should provide for the necessary additional guarantees of electoral rights based on the specific features of these procedures[25].

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[23] Ruling of the Constitutional Court of the RF dated April 30, 1997 No.7-П [7-P].

[24] Ruling of the Constitutional Court of the RF dated April 27, 1998 No. 12-П [12-P].

[25] Ruling of the Constitutional Court of the RF dated March 23, 2000 No.4-П [4-P].

5. Finally, let us touch upon one more aspect of federalism which sometimes acquired the character of a constitutional and legal dispute at the initial stages of its formation in Russia. This is the issue of renaming of constituent entities. By virtue of Art. 73 of the Constitution of the Russian Federation, the solution of the issue of changing its name is within the exclusive jurisdiction of the constituent entities of the Russian Federation. Such a decision made according to the procedure established by the legislation of the constituent entity of the Russian Federation is the legal basis for introducing a new name in Art. 65 of the Constitution of the Russian Federation.

This procedure is carried out in a simplified manner, which has been repeatedly implemented in the constitutional practice. Changes in the name of the constituent entity of the federation are included in the text of Art. 65 of the Constitution of the Russian Federation by decree of the President of the Russian Federation on the basis of the decision of the constituent entity of the Russian Federation adopted according to the procedure established by it. In disputable cases, the President of the Russian Federation uses his mediation powers provided for in Art. 85 (part 1) of the Constitution of the Russian Federation. In this case this regional power is certainly limited by the basic framework of constitutional principles, cannot affect the foundations of the constitutional system, human and civil rights and freedoms, the interests of other constituent entities of the Russian Federation, the Russian Federation as a whole and the interests of other states, or presuppose a change in the composition of the Russian Federation or the constitutional and legal status of its constituent entity. In particular, it should not contain statements of a form of governance other than that provided for by the Constitution of the Russian Federation, affect its state integrity, imply or initiate any territorial claims, contradict the secular nature of the state and the principle of separation of the church from the state, infringe upon freedom of conscience, include ideological and other socio-political assessments contrary to the Constitution of the Russian Federation, ignore historical or ethnic traditions[26].

[26] Ruling of the Constitutional Court of the RF dated November 28, 1995 No.15-П [15-P].

Analysis of Evidence in the Case CAS 2019/A/6636 BC Arsenal v. Russian Basketball Federation and Forecasting of the Position of the CAS in the Case

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ABSTRACT
The subject of the article is the issue of the responsibility of persons for match-fixing activities. It considers the issue of the probable assessment of evidence in CAS 2019/A/6636. The forecast of the CAS position is based on the established Arbitration practice. The parties' positions are modeled based on the information available in open sources.
Keywords: disciplinary responsibility of individuals, match fixing, responsibility of individuals for match fixing

Manipulation with the results of matches is one of the major threats to professional sports. As noted in one of the decisions of the Court of Arbitration for Sport (hereinafter — the CAS) CAS 2014/A/3628, the protection of the integrity of the competition is absolutely necessary, since "match fixing is the major challenge, as it affects the basic principles of loyalty to the game, the integrity of sport and sponsorship"[1]. The CAS practice in this category of cases is of particular interest, as it demonstrates the specifics of the use of Lex sportiva to combat threats to professional sports.

This article analyzes the likely arguments of the parties and their assessment by the arbitration in the dispute between Arsenal BC and the Russian Basketball Federation (hereinafter — the RBF) which is considered in the Court of Arbitration for Sport[2].

Let us consider the facts of the case.

On December 7, 2019, the match of the 9th round of the Second Division of the men's Super League between the clubs of Arsenal (Tula) and Dynamo (Stavropol) took place. The first quarters of the match were not marked by anything remarkable, but in the last quarter with the score of 82:65 in favor of the Tula, the hosts started playing "strangely". During the last minutes Arsenal basketball players of Arsenal confidently ignored the "one hundred percent" chances to score the ball and, as a result, did not score a single point in this segment. Though Dynamo scored one three-pointer, the "style" of their game was very similar to the opponent[3].

The RBF investigated this "strange" game. Based on the video recording of the match, as well as the conclusion of the Review Commission and the recommendation of the Directorate, the RBF Executive Committee considered the teams' actions at the end of the game unsportsmanlike. As a result, two decisions were made.

Firstly, to annul the result of the Arsenal — Dynamo match and to declare a forfeit defeat to both teams with "disqualification".

Secondly, in accordance with the Regulations of the Championship and the Cup of Russia among men's and women's clubs/teams in the 2019/20 season, taking into account the presence of a warning for violating the spirit of competitive rivalry and fair play in the 2017/18 season, to delete Arsenal BC (Tula) from the list of the participants of the XXIX Russian basketball championship among men's clubs/teams of the Super League Second Division[4].

Arsenal BC contested this decision by applying to the CAS, and on December 20, 2019, the arbitration issued interim measures: it suspended the execution of the RBF decision and ordered the club to continue participating in the competition [5].

[1] Arbitration CAS 2014/A/3628 Eskişehirspor Kulübü v. Union of European Football Association (UEFA), award of 2 September 2014 (operative part of 7 July 2014) [Electronic resource] // Court of Arbitration for Sport. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3628.pdf#search=3628 (accessed on: 10.02.2020).

[2] Arsenal BC contests the decision of the RBF in the Court of Arbitration for Sport (CAS) [Electronic resource] // Arsenal Basketball Club. URL: http://bcarsenaltula.ru/news/439/ (accessed on: 10.02.2020).

[3] The RBF expelled Arsenal from Super League-2 for the "strange basketball" but the Tula club is fighting, in courts now [Electronic resource] // Internet portal Sports.ru. URL: https://www.sports.ru/tribuna/blogs/sportslaw/ 2700306.html (accessed on: 10.02.2020).

[4] The Tula Arsenal has been expelled from the body of the participants of the Russian Championship [Electronic resource] // Russian Basketball Federation. URL: https://russiabasket.ru/news/36438/tulskij-arsenal-isklyuchen-iz-chisla-uchastnikov-chempionata-rossii (accessed on: 10.02.2020).

[5] Arsenal BC contests the decision of the RBF in the Court of Arbitration for Sport (CAS) [Electronic resource] // Arsenal Basketball Club. URL: http://bcarsenaltula.ru/news/439/ (accessed on: 10.02.2020).

Thus, there are two possible grounds for canceling the RBF decision or reducing the sanction:
1. Failure to prove the fact of match fixing.
2. Unlawful imposition of the sanctions in the form of expulsion from the League.

I. Evidence of the fact of manipulating the results of the match

In accordance with the CAS practice, the principle of strict responsibility of clubs for the actions of its officials has been established. Based on this principle, it does not matter whether the actions of the person are approved by the management of the club or whether it is exclusively his initiative[6].

Hence, the RBF is to prove that at least one player, coach, or another person who can influence the game has manipulated the results of the match[7].

In accordance with the established CAS practice the use of evidence is regulated by Lex sportiva (CAS Code and CAS judicial practice).

Besides, the CAS subsidiarily[8] applies the Swiss law. The arbitration has explicitly stated that Lex sportiva has priority over the Swiss law in dispute resolution[9].

However, the fundamental principles have priority over Lex sportiva, this refers to the application of the principles enshrined in the Swiss law, if these principles are applied in the arbitration[10]. In accordance with the practice of the Sports Arbitration, the principles established for criminal proceedings are not applied[11].

Based on the above, the CAS admits a wide range of evidence[12, 13].

The main evidence in match manipulation cases is often the evidence obtained from criminal trials conducted by national law enforcement agencies[14].

In this case, however, no investigation was carried out into the fact of manipulating the results of the match, although the responsibility for unlawful influence on the result of an official sports competition is stipulated by the Criminal Code of the Russian Federation[15, 16].

Due to the refusal to initiate criminal proceedings, the amount of the possible evidence is reduced, since the RBF does not have the same powers as law enforcement agencies.

The main evidence providing the grounds for the RBF decision is the video recording of the match which shows the "strange" play of the athletes[17].

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[6] Arbitration CAS 2014/A/3625 Sivasspor Kulübü v. Union of European Football Association (UEFA), award of 3 November 2014 (operative part of 7 July 2014) [Electronic resource] // Court of Arbitration for Sport. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3625.pdf#search=3625 (accessed on: 10.02.2020).

[7] Id..

[8] Arbitration CAS 2013/A/3256 Fenerbahзe Spor Kulübü v. Union of European Football Association (UEFA), award of 11 April 2014 (operative part of 28 August 2013) [Electronic resource] // Court of Arbitration for Sport (accessed on: 10.02.2020).

[9] Arbitration CAS 2017/A/5003 Jérome Valcke v. FIFA, award of 27 July 2018 [Electronic resource] // Court of Arbitration for Sport. URL: https://www.tas-cas.org/fileadmin/user_upload/Award_5003_Final.pdf (accessed on: 10.02.2020).

[10] Id..

[11] Id..

[12] *Krus A. S.* Manipulation or illegal influence on the result of the match [Manipuliacia ili nezakonnoe vliianie na rezultati futbolnogo matha] // in SB.: Legal policy of Russia in the sphere of judicial power: Collection of scientific articles [Pravovaya politika Rossii v sfere osushestvlenia sudebnoy vlasti]. SPb. : Asterion. 2019. Pp. 215–220.

[13] *Afanasiev D. A., Vasiliev I. A.* Review of the practice of the court of arbitration for Sport in 2009–2014 on attracting clubs to sports (disciplinary) responsibility for manipulating match results [Obzor praktiki Sportivnogo arbitrashnogo suda za 2009–2014 gg po privlicheniu klubov k sportivnoy (disciplinarnoi) otvetstvennosti za manipulirovanie rezultatami matchei] // St. Petersburg lawyer [Peterburgskii urist]. 2018. № 1. Pp. 72–94.

[14] *Jun C., Vasilyev I. A., Izmalkova M. P., Dongmei P., Khalatova R. I.* Problems of proof in football clubs' disciplinary liability for match-fixing : Practice of the court of arbitration for sport (CAS) (2009–2014) // Journal of Siberian Federal University — Humanities and Social Sciences. 2019. № 3, 05.2019. Pp. 343–362.

[15] Art. 184 of the Criminal Code of the Russian Federation. Law dated June 13, 1996 No. 63-ФЗ // Ros. gas. 1996. Access from SPS "ConsultantPlus".

[16] *Krus A. S.* Manipulation or illegal influence on the result of the match [Manipuliacia ili nezakonnoe vliianie na rezultati futbolnogo matha] // in SB.: Legal policy of Russia in the sphere of judicial power: Collection of scientific articles [Pravovaya politika Rossii v sfere osushestvlenia sudebnoy vlasti]. SPb. : Asterion. 2019. Pp. 215–220.

[17] The Tula Arsenal has been expelled from the body of the participants of the Russian Championship [Electronic resource] // Russian Basketball Federation. URL: https://russiabasket.ru/news/36438/tulskij-arsenal-isklyuchen-iz-chisla-uchastnikov-chempionata-rossii (accessed on: 10.02.2020).

In accordance with the CAS practice, the mere fact of poor performance by players does not constitute evidence of match result manipulation[18]. Hence, this is not the main evidence of the club's fault. Based on this, according to the standard of sufficient (comprehensive) conviction (comfortable satisfaction), the fact of manipulation of the match results cannot be established.

However, this CAS practice was developed in the course of consideration of the cases related to the manipulation of the results of football games[19, 20]. The disputes under consideration involved the balls dropped by the goalkeeper in situations where in most cases a professional goalkeeper did not allow a goal.

In the case of the Arsenal — Dynamo game, there was a massive strange behavior of the players. Arsenal scored its last points 6 minutes 57 seconds before the final siren, after which the team's players started losing the ball and making inaccurate shots. On the part of the guests, similar actions were observed in the final 5 minutes: Dynamo's only hit during this time came from behind a three-point arc at the end of the time of handling the ball[21]. Thus, the players of the teams performed "strange" actions for a long time.

Therefore, this "abnormal" behavior cannot be just a coincidence and therefore must be accepted as evidence.

In addition, a proof of the fact of manipulation of the match results is an interview with Viktor Uskov, President of Arsenal BC, in which he pointed out that the actions of his team players were a reaction to the behavior of the opposing team which demonstratively stopped scoring points 5 minutes before the end of the match[22].

Thus, the president of the club admitted that the players' actions were unsportsmanlike. Based on the above, the CAS is likely to establish that the match results were manipulated with.

However, the club may point to the social usefulness of its actions: refusing to play is a way to demonstrate the unsportsmanlike behavior of Dynamo players and draw attention to the problem of manipulating match results.

In addition, there is no manipulation of the results of matches due to the fact that Arsenal was winning the game at the time of the "refusal" to play. Consequently, the lack of scored points at the end of the game is an unusual tactic that allows drawing attention to the unsportsmanlike behavior of Dynamo players.

However, these arguments are unlikely to be taken into account by the CAS, since Arsenal scored its last points within 6 minutes 57 seconds and its players "abandoned" the game almost 2 minutes earlier[23].

Consequently, the Arsenal players could not pay attention to the unsportsmanlike behavior of the rival, as they were the first to act in an unsportsmanlike manner.

Therefore, the CAS will probably agree with the decision of the RBF regarding the manipulation of the match result by Arsenal.

In addition, the results of the bookmaker's expertise can be used as evidence[24]. An expert's assessment of the betting market for "abnormal" betting on the match results will be important evidence.

Based on the above, an expert examination is necessary, and its results can be decisive.

If the presence of "abnormal" bets is established, the CAS will probably admit the fact of manipulation of the match results.

However, in the absence of "strange" bets, the club may point out that there is insufficient evidence of match manipulation to establish the club's guilt in accordance with the comprehensive conviction standard.

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[18] Arbitration CAS 2013/A/3256 Fenerbahзe Spor Kulübü v. Union of European Football Association (UEFA), award of 11 April 2014 (operative part of 28 August 2013) [Electronic resource] // Court of Arbitration for Sport. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3256.pdf#search=3256 (accessed on: 10.02.2020).

[19] Id..

[20] Arbitration CAS 2014/A/3625 Sivasspor Kulübü v. Union of European Football Association (UEFA), award of 3 November 2014 (operative part of 7 July 2014) [Electronic resource] // Court of Arbitration for Sport. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3625.pdf#search=3625 (accessed on: 10.02.2020)

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[23] The Tula Arsenal has been expelled from the body of the participants of the Russian Championship [Electronic resource] // Russian basketball Federation. URL: https://russiabasket.ru/news/36438/tulskij-arsenal-isklyuchen-iz-chisla-uchastnikov-chempionata-rossii (accessed on: 10.02.2020).

[24] Arbitration CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. Union of European Football Association (UEFA), award of 15 April 2010 [Electronic resource] // Court of Arbitration for Sport. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/1920.pdf#search=1920 (accessed on: 10.02.2020).

II. Lawfulness of imposition of sanctions in the form of expulsion of the club from the League

In accordance with Art. 4.1 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season, competitions are held in accordance with the current FIBA Official Basketball Rules, as well as in accordance with these Regulations and Appendices to them[25].

In accordance with Art. 92.1.2 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season, if a team makes actions preventing the game after the referee has decided that game should start / be continued, certain sanctions are applied. In case of a repeated violation committed within the framework of one tournament, the team is exempted from the competition[26].

Thus, the sanction is lawful if:

1. There were actions preventing the game.

2. The club committed a repeated offence.

Since the manipulation of the match results is a threat to professional sports preventing fair play[27], Arsenal is liable in accordance with Art. 92 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season.

More complicated is the issue of committing a repeated violation within the same tournament among men's and women's clubs / teams of the 2019/20 season states the basic terms and definitions but no definition of a "tournament"[28].

Several approaches to the interpretation of this term are possible.

1. Systemic interpretation of the term "tournament"

In accordance with Art. 74.8 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season, one of the duties of the chief secretary is to place the calendar of games (if possible with the training schedule of the teams), including the planned events: the opening and closing of the tournament, contests[29].

If it is possible to open and close a tournament, the tournament should be understood as a Super League championship in the 2019/2020 season. Therefore, the first violation by Arsenal is to be in the current season. A similar violation was committed by the club in the 2017/18 season in the game against the Magnitogorsk Dynamo. Therefore, the violation by Arsenal is not a repeated one.

In accordance with Art. 91.1.1 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season, at the first violation committed within the same tournament, the victory is awarded to the opposing team with a score of "20:0". The team loses the game by "forfeiture of the right", gets zero points in the classification, and is fined 75,000 rbl.[30]

Based on the above position, the RBF sanction is to be canceled.

2. Systemic interpretation of the term "competition"

In accordance with Art. 1 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season, competitions are the Russian Championship among women's clubs / Premier League teams, men's and women's clubs / teams of the Super League (First and Second Divisions), Russian Championships among male juniors and female juniors up to 19 years old (Children's and Juvenile Basketball League Championships), Russian Cups among men's

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[25] Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season. [Electronic resource] // Russian Basketball Federation. URL: https://russiabasket.ru/Files/Documents/1 Регламент 2019-20_ЧР_29.11.2019.pdf (accessed on: 10.02.2020).

[26] Id..

[27] Arbitration CAS 2014/A/3628 Eskişehirspor Kulübü v. Union of European Football Association (UEFA), award of 2 September 2014 (operative part of 7 July 2014) [Electronic resource] // Court of Arbitration for Sport. URL: http://jurisprudence.tas-cas.org/Shared%20Documents/3628.pdf#search=3628 (accessed on: 10.02.2020).

[28] Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season. [Electronic resource] // Russian Basketball Federation. URL: https://russiabasket.ru/Files/Documents/1 Регламент 2019-20_ЧР_29.11.2019.pdf (accessed on: 10.02.2020).

[29] Id..

[30] Id..

and women's clubs / teams — a set of matches of the Russian Championships among women's clubs / Premier League teams, men's and women's clubs / Super League teams (First and Second Divisions), Russian Cups among men's and women's clubs / teams[31].

Therefore, a tournament cannot be just the 2019/20 Super League, since in this case it is a competition. In addition, in accordance with Art. 1 of the Regulations of the Russian Basketball Championship and Cup among men's and women's clubs / teams of the 2019/20 season, a sports season is the aggregate of all matches of the Competitions[32]. Hence, the competition can be held within the same season.

Thus, the only way to interpret the term "tournament" is the aggregate of all competitions, in this case, the Super Leagues.

Based on this position, Arsenal committed a second violation, and there is no reason to change the sanction.

According to the standard of comprehensive conviction, the CAS will probably agree with the first position as it is based on the interpretation of the term "tournament", while the second position is based on the interpretation of "competitions".

3. Grammar interpretation of the term "tournament'

In its practice the CAS uses this way of interpretation[33].

According to Ozhegov's dictionary, a tournament is a sports competition in a circular system, when all participants have one (sometimes more) game with each other[34].

Let's turn to the Oxford Dictionary, as sports arbitration used it to determine the meanings of words in its practice[35].

According to the Oxford Dictionary, a tournament is a sports competition involving several teams or players who take part in various games and must leave the competition if they lose. The competition continues until only the winner remains[36].

Therefore, a tournament must have a start, an end and results.

Thus, a tournament cannot be understood as the aggregate of all the Super Leagues held (2019/2020 Super Leagues, 2018/2019 Super Leagues, etc.).

Therefore, the committed violation is not a repeated one.

Based on the foregoing, the CAS is likely to recognize the RBF sanction as unlawful.

Summing up, it may be concluded that in this case, the CAS is most likely to agree with the fact that there was a manipulation with the result of the match.

The main and most complicated issue is the problem of defining a repeated offence. Based on the available information, the CAS may recognize the sanction as unlawful and cancel the RBF decision in this part.

This case may be of great importance for the formation of the CAS and RBF practice in this category of disputes, but now this is only an assumption.

Today, we may just hope that the RBF will make the necessary changes to the legal acts regulating the holding of the competition and eliminate the contradictions.

The material has been verified, the figures, facts, quotes have been verified with the original source, the material does not contain information of limited distribution.

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[31] Id..

[32] Id..

[33] Arbitration CAS 2017/A/5003 Jérome Valcke v. FIFA, award of 27 July 2018 [Electronic resource] // Court of Arbitration for Sport. URL: https://www.tas-cas.org/fileadmin/user_upload/Award_5003_Final.pdf (accessed on: 10.02.2020).

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

ABSTRACT

This material is devoted to a review of experts' 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 were dis-cussed 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; possible ways of developing the state system of the Russian Federation in the direction of federalism, confederation and unitary state; discussed the current issues and features of federalism.

Keywords: Constitution of the Russian Federation, federalism, federalism, confederation, unitary state, Federal Republic of Germany

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

The conference discussed the topical issues of the Russian constitutionalism, including the problems of the federal structure of the state, the role, problems and prospects for the development of federalism both in Russia and at the international level. The Theoretical and Applied Law Journal continues publishing the materials of the conference which it began in the previous issue[2].

The framework of the second day of the conference traditionally included the Yeltsin memorial lectures dedicated to the events of the early 1990ies and the participation of the first President of Russia B. N. Yeltsin in these events. Last year, the conference was attended by the Dean of the Higher School of State Audit of Moscow State University, Head of the Center for Legal Support of Socio-Political Processes of the Institute of Socio-Political Research of the RAS Sergey Mikhailovich Shakhray with a memorial lecture on the topic **"Boris Yeltsin. Conflicts, Compromises, Legitimation of Power, Constitution"** and the former Prime Minister of the Republic of Estonia, ex-Mayor of Tallinn Edgar Savisaar, the topic of the lecture: **"Memories of Yeltsin"**.

Sergey Mikhailovich Shakhray. It seems important to me to tell about the events that preceded the adoption of the Constitution of the Russian Federation, for two reasons: firstly, I was directly involved in all these events, and secondly, my colleagues and I thoroughly checked and rechecked the history of the Yeltsin time through the archives many times, studied and analyzed it both from the inside and on a scientific, archival, factual basis; published a large series of books, collections, documents under the auspices of the Contemporary History Foundation. Some of them are kept here, in the Presidential Library. I have selected several striking episodes that will reflect that era to the greatest extent.

Episode one. On December 8, 1991, the Belovezha Accords were signed. A widespread myth says that on this day over a merry feast in the Belarusian forest three men wrecked the USSR: a powerful nuclear power with an army of almost two million people and a super-KGB. The rule of propaganda says: for a lie to be believed, it must be monstrous, but it must contain a drop of truth. The only drop of truth in the story about Belovezha is that there was a table there, but there was no fun at all, it was more like a commemoration. And the monstrous lie is that on December 8, 1991 it was supposedly still possible to wreck something. But by that time the USSR was gone. As of December 8, 1991, only two republics remained in the USSR: Russia and Kazakhstan. The other 13 had already become independent states. Ukraine was the last to leave the USSR on December 1, 1991; at an all-Ukrainian referendum 92% of the population voted for seceding from the USSR.

By the way, it is these dates from August to December 1991, that is, until the date of signing of the CIS Treaty, that are officially considered the days of the formation of independent states from the former Soviet republics, which are recognized by the UN, and therefore it is on these dates that our President and other world leaders send official congratulations on the Independence Day to our former USSR

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

[2] See: Materials of the Third Conference "The Constitution of Russia: Yesterday, Today, Tomorrow" (St. Petersburg, December 9-10, 2019) // The Theoretical and Applied Law. 2020. № 1. Pp. 66–78.

neighbors. In addition, back in August 1991, the single government of the USSR, the single army, security forces and law enforcement came to an end. Instead of them, the Supreme Soviet of the USSR, mind you, not the Russian parliament, but the union one, created some kind of vague inter-republican coordination structures. Therefore, on December 8, 1991, three presidents of the republics, two of them already being independent states, Ukraine and Belarus, signed the "USSR death certificate", legally formalized the accomplished fact and created a platform for the integration of the commonwealth of independent states.

A frequently asked question is whether it was possible to preserve the USSR. I usually answered that by that time it was already impossible, because the factors of disintegration were too strong: a severe economic crisis, irreconcilable contradictions between the republics, and most importantly, the struggle within the CPSU: the only organization of the country that was not essentially a party, but it was precisely the power that held the entire structure of the USSR. The internal struggle for power led to drastic steps such as an attempt to remove Mikhail Gorbachev from the post of the president and party leader. In response, Mikhail Gorbachev removed the party from power, stepped down as the General Secretary of the CPSU Central Committee and called on all honest communists to withdraw from the CPSU. Within a month, from late August to early September 1991, all republican organizations withdrew from the CPSU. The party was gone, and the state was gone.

But now, after years and a ton of studied documents, I think that the USSR could have been preserved but not in December or August 1991, but around 1989–1990, if the President of the USSR had not turned towards a union treaty, the idea which was offered to him by the Estonian delegation.

The point is that at first there was an idea, and an absolutely correct one, to adopt a new Constitution of the USSR which would take into account all changes: a single constitution for a single state. And there was such a project: Academician Kudryavtsev reported on it at a meeting of the Central Committee of the CPSU. But since 1989, the President of the USSR was inclined towards the idea of a union treaty.

The idea of a union treaty was based on the following historical premises: in 1940, Estonia, as well as Lithuania and Latvia, was annexed to the USSR by force on the basis of the Molotov-Ribbentrop Pact, and, according to some opinions, all this legally, aesthetically, politically looked ugly, illegitimate, undemocratic. The delegation from Estonia approached Mikhail Sergeevich Gorbachev with a proposal to sign a union treaty so that the relations between the countries would become politically and legally formalized. At the same time, Estonia emphasized that it did not offer secession from the USSR, but, on the contrary, sought to formalize the accession of Estonia into the USSR formally and legally beautifully. Subsequently, the topic of the union treaty, but already for reformatting the entire state, was raised by the deputies of the USSR at their first congress. There were also subjective reasons for the idea of a union treaty to be accepted positively and by the majority: the internal party struggle for the course, for the methods of the country development. M. S. Gorbachev saw that the attempts to overrun the political movements in the union republics by force led exactly to the opposite result. And at a meeting of the USSR Security Council in early April 1991 he announced that he was abandoning tough measures and was taking a course towards developing a new program of action together with the popular leaders of the union republics who were in favor of preserving the renewed union. At that time, the USSR had three independent states, 7 sovereign republics and 8 presidents. One of them, Boris Nikolaevich Yeltsin, was the brightest, most influential and decisive. In order to weaken the leadership positions of B. N. Yeltsin the union central officials decided to make an agreement with his subordinates. Accordingly, the union center promised the Russian autonomies that, in exchange for refusing to support B. N. Yeltsin and democratic Russia, they would receive the status of union republics and would establish a new union on par with them, union republics. This did not certainly sound so dramatic and was very democratically called the autonomization plan, but it was a collapse for Russia, because as a result of the implementation of the plan, 16 autonomies, that is, 51% of the territory with all strategic resources, seceded from the RSFSR. That was the beginning of the "parade of sovereignties" within Russia which echoes to this day.

In those conditions, the declaration of sovereignty on June 12, 1990[3] was intended to weaken this very process: the process of the collapse of the RSFSR. 86% of the delegates to the Congress of People's Deputies of the RSFSR were members of the CPSU, heads of large enterprises. The declaration does not contain a single word about independence; it refers to a renewed union, union citizenship, union legislation.

[3] See: Declaration of the Congress of People's Deputies of the RSFSR dated 12.06.1990 № 22- 1 "On the State Sovereignty of the Russian Soviet Federal Socialist Republic" // Vedomosti SND I VS RSFSR. 1990. № 2. Art. 22. — Editor's note.

When the coup happened in Moscow in August 1991, M. S. Gorbachev was isolated in Foros in the Crimea, and Boris N. Yeltsin had not yet "climbed on the tank" to declare the coupists outlawed, the leaders of the Russian autonomies, every single one, were already sitting in the reception office of Vice-President G. I. Yanaev who declared himself President of the USSR. They all came to receive the status of the union republics; they wanted to make sure that State Committee on the State of Emergency would not take away the previously promised status from them. If the coup had not failed, on August 21, 1991 the RSFSR could have already become a confederation, and this is the best case, or even could have ceased to exist as a state. Indeed, in addition to the autonomization plan, the union center had other ideas in the fight against the new Russian leadership. For example, on July 14, 1989, a document was published in The Izvestia newspaper as part of preparations for the September meeting of the Political Bureau and the Plenum of the CPSU Central Committee. In this document, it was proposed to create 7 union republics on the territory of the RSFSR. Seven new republics instead of one Russia. Almost like the current federal districts.

In general, during 1990–1993 Russia could have collapsed more than once both due to external intrigues and from the internal ones, because people often unite in the face of an external enemy, and when it disappears, internal squabbles and civil strife among the elites begin. This happened in Russia after the disintegration of the Soviet Union. A power struggle began between the old party members and the new Russian leaders.

Episode two: the referendum. Over the years, it becomes clear that any serious reforms, any big matters and even big business need political and legal protection, but when in the late 1980ies everyone was talking about the need for reforms in the USSR and Russia, no one seriously thought about their legal and political protection. Therefore, the first law of the RSFSR, on which I worked, was precisely the law on the referendum. It was adopted on October 16, 1990. The idea of the law was that in the most critical situations people should go to ballot boxes rather than to barricades; it was a kind of valve to let off steam from an overheated social political pot.

It may be a little immodest, but I found my old address in the Supreme Soviet of the RSFSR, when my colleagues and I presented this law, and the Supreme Soviet of the RSFSR did not want to adopt it. I said that "I am worried about the conflict between the federal and republican parliaments, this can be called a paralysis of power, but there is a supreme judge over all parliaments: the people, and if we do not pass the law on the referendum, we will thereby deprive ourselves of one of the few opportunities for a normal civilized way out of the conflict, without confrontation, without a civil war, but by addressing the people, putting issues on a national vote." My position has not changed one iota since then. I believed and still believe that it is the nationwide vote — a direct appeal to the people — that is one of the possibilities for a normal civilized way out of the conflict, without confrontation, without civil war. And the experience has shown that it is the mechanisms of the referendum, the mechanisms of direct democracy that took the country away from the brink of the abyss. One may have different feelings about the past referendums: the referendum on the preservation of the USSR and the referendum that went down in history based on the formula "yes-yes-no-yes"[4]. But the fact is the fact: the country did without revolutions and civil war.

Today, when the time of crisis has become history, when stability has come, the referendum law seems to have fallen asleep, although it is this political, legal and absolutely constitutional mechanism that could solve many acute issues that have now appeared to be driven into the depths and are actually leading to increased tension again.

Be that as it may, but I am firmly convinced that referendums will be in demand both as a mechanism to release social tension and primarily as a mechanism for the direct participation of citizens in power, direct decision-making using modern information technologies, such as blockchain technologies, which guarantee confidence in the results of the referendum. Soon we will not need a parliament at all, we will make all decisions ourselves online, especially considering that 72% of the Russian population already has access to the Internet and Russia is ranked eighth in the world ranking by this indicator.

Episode three: the assault on the White House. The events of October 1993 resulted from the failure in the work of the referendum mechanisms, when the formalized instruments of seeking a consensus failed. It was an episode of a real civil war, albeit limited by the perimeter inside the Garden Ring in Moscow, but no less bloody. Precisely because it was a civil war, where a brother goes against a

[4] The All-Russian referendum on April 25, 1993 which included four questions: on the confidence in Russian President B. N. Yeltsin; on the approval of the socio-economic policy pursued by him; on the necessity of holding early elections of the President of the RF; on the need for early elections of deputies of the People's Assembly of the RF. — Editor's note.

brother and no one is right or wrong, being the leader of the then third largest party in the State Duma, the Party of Russian Unity and Accord, I proposed a draft resolution on the amnesty of all participants in the events of the autumn 1993. Civil war cannot end in courtrooms. Only amnesty, only consensus and only reconciliation. We passed this resolution by a majority of one vote, and I am proud of it. B. N. Yeltsin could not psychologically treat these events that way, and therefore did not forgive me for this decision.

As always, the question arises, was it possible to do without such a conflict? It was, probably, but history does not know the subjunctive mood. In any case, we definitely had a historical fork, after which the situation turned onto the road where there were no options. This fork is called "zero option".

To resolve the conflict, extraordinary simultaneous elections of both the president and the congress of Russian deputies were announced. Now it has already gone down in history, and before it was not even said that literally on the eve of the bloody climax in October 1993, negotiations took place at St. Daniil Monastery with the mediation of Patriarch Alexy II, when the delegation headed by B. N. Yeltsin signed a protocol on consent to the "zero option" and the beginning of the surrender of weapons by those who were in the White House, and, accordingly, on the withdrawal of troops. However, at first this protocol was not even shown to the deputies sitting in the White House, and then they perceived B. N. Yeltsin's consent to the "zero option" as weakness and began pressing, and with weapons in hand. The chance for reconciliation was lost.

I personally believe that the "zero option" should have been taken immediately after the April 1993 referendum. It was necessary to use the energy of the referendum and its unique results, and to announce simultaneous early elections of the president and deputies already in June. But that did not happen.

By the way, one of the reasons for such an aberration of consciousness, when the president's proposal to move to the "zero option", albeit in October, was perceived as weakness, was the current constitution. Reversed and amended many times within 18 months, it simultaneously gave arguments both in favor of a popularly elected president and in favor of a congress of people's deputies. Actually, overcoming this constitutional ambiguity resulted in the birth of the new Constitution of the RF.

Episode four: the Constitution. As you know, the farther from the moment of adoption of the current Constitution, the more authors it gets. Especially after the current President of the RF V. V. Putin firmly said that the Constitution must remain stable. For example, one of the versions is that the author of the current Constitution was A. A. Sobchak.

The point is that A. A. Sobchak and S. S. Alekseev, later the co-author of the current Constitution of the RF, had their own draft Constitution in 1992. They actively promoted it, but when the presidential draft appeared written by S. S. Alekseev and me, S. M. Shakhray, A. A. Sobchak did not support this project; moreover, he strongly opposed it. For example, in the early August 1993, a forum of the city and regional deputies was held here in St. Petersburg at which more than 400 people, 32 parties, non-governmental organizations discussed, or rather condemned the presidential draft Constitution and did not approve it, the same as A. A. Sobchak who criticized the draft at the presidential councils.

Whatever news we have learned in the recent years, the fact remains that the text of the Constitution of 1993 was written on the direct instructions of B. N. Yeltsin by two people: S. S. Alekseev and me, S. M. Shakhray. S. S. Alekseev wrote the second section, the strongest one, about human rights and freedoms. The rest of the sections were written to me, and we wrote the section on the President of the Russian Federation, like Ilf and Petrov: one guarded the manuscript, and the other ran and coordinated the text with the President.

As you know, there is a conspiracy theory that the Americans wrote the Constitution of Russia and handed it over to B. N. Yeltsin through the American embassy, and S. M. Shakhray and S. S. Alekseev only formalized this parcel from the Americans. But any lawyer will say that if you look for a constitution that would be farthest from ours, it's the American one: it does not coincide on any point. In the United States, the president is the head of the executive power. There is no government, such as a cabinet of ministers. This is a completely different system of power: there is an executive person and state secretaries around him.

The system of governance being the basis of the Constitution of Russia is almost older than the United States itself; it has its roots in the work of M. M. Speransky in 1809 "On the Code of Laws of the Russian State". He did not write the whole draft Constitution at that time, but he found some golden rule that allowed him to solve a non-trivial task: to write the sovereign into the constitution, to determine his place in the system of the constitutional order. And when B. N. Yeltsin or V. V. Putin is called the tsar today, this joke is only half the joke, because it is the sole ruler, the head of the state in our historical tradition that is a symbol of unity and the ultimate arbitrator for the citizens of the huge multinational country.

Of course, those who call B. N. Yeltsin or V. V. Putin so are most likely trying to hint at their authoritarian governing style. But, firstly, someone must take personal responsibility for the decisions made in difficult situations. The captain whose ship got in a storm without means of navigation is unlikely to choose a course through parliamentary debates. And secondly, the current Constitution contains all the necessary checks and balances for our leader to be precisely a symbol of unity and the ultimate arbitrator rather than a dictator. By the way, political analysts and historians know that the dictatorship of the parliament is worse than the dictatorship of the president.

I would also like to draw your attention to the fact that V. V. Putin is the first head of state in our constitutional history not to rewrite the Constitution as he sees fit after coming to power. Before that, we had Lenin's constitution, Stalin's constitution, Brezhnev's constitution.

N. S. Khrushchev wrote a very good Constitution in 1964. M. S. Gorbachev also had his own draft Constitution. The current head of state was the first to break this tradition. Our Constitution was created specifically for our country, and if now it is replaced with another constitution, more logical, as some critics believe, an American one, or a more democratic German model, then the political system and the whole country will simply collapse, fall apart.

I have already said repeatedly that when we were writing the current Constitution, we worked quite long on the section regulating the powers of the President, including because S. S. Alekseev and I knew the character of B. N. Yeltsin very well; therefore, contrary to what critics say, we had to think more about limiting the President's powers more reliably rather than about expanding them. As a result, using the ideas of M. M. Speransky, we decided to withdraw the head of the state from the system of executive power and transfer only five or six powers to him which are called dormant powers in any normal, non-revolutionary state: pardon, presentation of the candidacy of the prime minister, judges of the Constitutional Court and the Supreme Court, the Attorney General and other officials to the Parliament. As a joke, we called this construction "the Russian model of the British queen". This did not mean at all that we were going to make the presidential post decorative; on the contrary, in a situation of an acute conflict between the authorities, the country needed a strong authoritative figure standing above the battle, capable of being an arbitrator and possessing sufficient constitutional powers to force the conflicting parties to find a compromise.

Therefore, norms and procedures have appeared suggesting that the President does not show much activity when everything is in order in the country, but when disagreements arise between the branches of the government, between the center and the region, he immediately becomes active and starts acting. He has a whole arsenal of possibilities for this: for example, to resolve any contradiction he can use mediation procedures, if it does not help — an appeal to the Constitutional Court, removal of an official from office. If such methods turn out to be ineffective, he can use the institution of a state of emergency or even the institution of direct federal intervention. Even in the event of a serious conflict between the federal parliament and the government, the President has the right and duty to resolve this conflict in one of two ways: replace the government or appoint new elections of a new parliament.

The fact that the "model of the British queen" could not be fully implemented in practice is largely due to the need for active action in the difficult socio-economic situation of that period, as well as to the character traits of B. N. Yeltsin, and the current President.

By the way, in the initial draft of the Constitution which we wrote with S. S. Alekseev, the President was not empowered to adopt decrees having regulatory and legal force, the force of law, but the final text put to a popular vote had this right of the President: this is the result of the work of the Constitutional Conference and the categorical consent of President B. N. Yeltsin himself with this.

For example, immediately after the adoption of the new Constitution, the legislators sabotaged the adoption of a number of laws necessary for the implementation of the Constitution for quite a long time. The President had to fill these gaps with his decrees, and this was his right and duty, which was confirmed by the Constitutional Court on April 30, 1996[5]. There were situations when members of the government did not want to assume responsibility for some unpopular measures and hid behind the back of the President, even Viktor Stepanovich Chernomyrdin shifted the main decisions to the President, and only one prime minister, Yevgeny Maksimovich Primakov, managed to take full advantage of the model enshrined in the Constitution, because he came to the post of the Chairman of the Government of the

[5] Ruling of the Constitutional Court of the RF dated April 30, 1996 No. 11-П "On the case of verifying the constitutionality of paragraph 2 of the Decree of the President of the Russian Federation No. 1969 dated October 3, 1994 "On measures to strengthen the unified system of executive power in the Russian Federation" and paragraph 2.3 of the Regulation on the head of the administration of the krai, region, city of federal significance, autonomous oblast, autonomous district of the Russian Federation approved by the said Decree".

RF as a figure of consensus between the parliament and the President, and he was supported by almost all factions even within the parliament. The President did not interfere and could not interfere with his powers. This was exactly the model supposed to be implemented according to the current Constitution: the executive branch is headed by the government headed by the Chairman of the Government.

Episode five: the Constituent Assembly. The civil war in Russia and all the problems began not in February or even in October 1917, but after January 6, 1918, when the Constituent Assembly was dissolved. Few people know that the first decree signed by the Bolshevik government was a decree calling for elections to the Constituent Assembly. The society was waiting for the Constituent Assembly, and even the Bolsheviks could not ignore this expectation after the coup.

The resolution on elections to the Constituent Assembly[6] was the most democratic in the world at the time. The resulting composition of the Constituent Assembly was said to be representative of the Russian state, but the Bolsheviks received half as many seats as the SRs, and therefore the fate of the Constituent Assembly was a foregone conclusion. Close in nature to the Constituent Assembly was, in my opinion, the Constitutional Conference of 1993 which, although being a representative body, had exclusively consultative powers, and it was convened by the decision of the President, there were no elections, but nevertheless the Constitutional Conference of 1993 actually played the role of the Constituent Assembly for adoption of the Constitution. Since it was clear that the deputies would not adopt the Constitution by their own decision, two options for adopting the Constitution were considered: through the Constituent Assembly or at a national referendum. Fortunately, the latter option was chosen.

The problem of the powers and legal personality of the Constituent Assembly is the problem of the legitimacy of the power. Inattention to this issue leads to the fact that the building of the state governance is built on sand and then collapses in an instant, I mean the building of the CPSU and the USSR.

In the contemporary history, we have employed the tactics of dual legitimacy. The Constitution itself was adopted by popular vote, and that's half the battle. The second half was the fact that, according to the rules of this Constitution, the presidential and parliamentary elections were held several times.

Quite unexpectedly, history gave us confirmation of the correctness of this approach as applied to the Republic of Tatarstan. The 1993 Constitution was not recognized on the territory of the republic, elections to the Federation Council, the State Duma were not held, the delegation of Tatarstan was present in the Venice Commission[7] pending confirmation of the recognition of the republic's constitution and the republic itself as an independent state. It was only the federal agreement with the Republic of Tatarstan which had been painfully worked out for three years, that allowed preserving the republic within the Russian Federation, and the possibility of concluding such an agreement was stipulated by Article 11 of the 1993 Constitution. A month after the agreement with Tatarstan was signed, the elections of two members of the Federation Council and five deputies of the State Duma were held. Accordingly, the results of these elections were presented to the Venice Commission as confirmation that participation in the national parliamentary elections is the recognition of the national sovereignty and the fact of recognition of the accession of this constituent entity to the single state. The distribution of the powers within the state is another matter, but the participation in the national elections is the recognition of national sovereignty.

Episode six: Union Treaty with Belarus. I do not think that practically anyone remembers or knows about this, but when we were preparing the first treaty with Belarus on the Union State, Tatarstan insisted on becoming the third participant in this union giving as a reason that the republic was an independent state living according to the international law and, therefore, could join the union with Belarus as an equal member and founder.

The very idea of the union treaty appeared after the factions of communists and agrarians received more than 40% in the new State Duma and started trying to adopt some acts to turn back the course of history. For example, on March 15, 1996 the State Duma adopted a resolution on deepening the integration of the peoples united in the USSR, canceling the resolution of the RSFSR Supreme Council dd. December 12, 1991 on denunciation of the agreement on formation of the USSR, etc.

The preparation and signing of the union treaty with Belarus turned the course of history in a different, positive direction.

In those days A. G. Lukashenko was almost the main active participant of the creation of the Union State. He personally traveled around almost half of Russia, campaigning for the union. It was very similar

[6] Resolution of the Soviet of People's Commissars of the RSFSR dated 27.10.1917 "On the convocation of the constituent assembly at the appointed time". — Editor's note.

[7] European Commission for Democracy through Law — an advisory body on constitutional law, established under the Council of Europe in 1990. — Editor's note.

to the primaries of the future president of the new country. Now the situation looks diametrically opposite. A. G. Lukashenko clearly understands that if a more integrated union state is created, he will not be able to take the presidency in such a state, and therefore restrains the process of integration of states.

Episode seven: the Constitution and splitting of reality. Going back to B. N. Yeltsin and the Constitution, I would like to note that in the early 1990ies the Constitution was absolutely real, which means that what was written in it was implemented. However, as experience in our country shows, the historically prescribed, statutory institutions and mechanisms rather quickly are at variance with the actual ones. This is perhaps one of the stable features of our state and society. Therefore, sooner or later, in contrast to what is established by the Constitution, parallel, almost mirror-like, de facto institutions of power start being created.

This splitting can be traced throughout our history. For example, it is obvious that the splitting of power, legal and actual, existed in the Soviet period between the representative bodies, soviets and the CPSU. When in the early 1990ies the slogan "All power to the Soviets!" sounded at 100,000 rallies in Moscow, it was truly revolutionary because it called for the return of real power to those bodies to which it was assigned in the Constitution.

An attempt to set out the rights corresponding to the real state of affairs in the system of power in the USSR, to reduce the degree of fictitiousness of the Constitution and thereby increase the degree of social and political stability in the Basic Law is known to have been undertaken only in the Constitution of 1977, its Article 6 establishing that the leading guiding forces of the Soviet society, the core of the political system of state and public organizations is the Communist Party of the Soviet Union, which corresponded to the real state of affairs.

In 1992, when the Constitutional Court considered the case of the CPSU, the ban on the party was recognized as consistent with the Constitution, and the party was "condemned" not for the communist ideology or criminal atrocity, the decision and the legality of the party's dissolution were based on the circumstance that the CPSU substituted the bodies of state power, appropriated the state power.

Then, as I said, after the adoption of the 1993 Constitution, it began creating a new reality, at a certain period of time there was practically no discrepancy between the legal and actual Constitution, but the situation changed gradually.

The discrepancies between the formal and the actual Constitution can be illustrated by the following examples. We have the State Duma — a legislative and representative body that has all the authoritative powers, but the indicator of the authority of this body in the society is small. At the same time, the Civic Chamber was created uniting people of authority, leaders of public opinion, but lacking any real authoritative powers. We have the Federation Council — fully-fledged, but not authoritative due to the chosen order of its formation, when its members are not real representatives interested in the development of the region they represent. And there is the State Council, authoritative by its composition: comprising the top public officials of the regions, but lacking real powers. We have the Government — formally the supreme body of executive power, but not a politically independent and not authoritative institution, and the Presidential Administration in which all the most important decisions are made. The situation is similar in the judiciary power.

What I want to show on the basis of these examples is that authority and power are in different dimensions. And if this trend continues, the degree of fictitiousness of the Constitution, the degree of discrepancy between the actual social relations and the basic law will reach a critical point.

We still have the opportunity to return, to get away from this duality of the organization of the state governance. This requires adopting a constitutional law on the parliament, a constitutional law on the presidential administration. The tools for eliminating such inconsistencies are stipulated in the Constitution itself; what is needed is the political will to use them.

In my opinion, changing the existing situation should be started with the implementation of judicial reform which should bring us back to the ideals of the 1864 reform carried out by Alexander II. It is necessary at least to do what he did: he separated the boundaries of judicial districts from the borders of provinces, ensured the independence of the judiciary power, introduced the institution of a judicial investigator as an instrument of judicial control over the preliminary investigation; a judicial investigator was appointed by the emperor on the recommendation of the minister of justice, and had a huge salary. In my opinion, if such measures were implemented, it would prevent an unthinkable situation when, according to statistics, out of two hundred thousand criminal cases on economic crimes, only 15% reached court, but at the same time the business of the people who got into the preliminary investigation machine was destroyed, their property was taken away from them.

These particular questions would seem to have nothing to do with our life today and tomorrow. However, there are categories such as trust and fairness. It is no longer possible to restore the trust of

the society and business to power by slogans. Only real changes, reforms will help the state and society face each other. At the same time, it should be noted that the nature of our republic is not parliamentary; our transition from autocracy, monarchy to a republic is not based on the parliament. An independent judiciary was created forty years before the parliament, and thus in our country the judiciary power is the basis of the democratic structure of the state.

Finishing the story about the period when the current Constitution of Russia was created, I would like to note the most important thing about B. N. Yeltsin. In all the events of that era, the first President of Russia did not allow a civil conflict and civil war, did not allow the persecution of the old elite, did not follow the lead of the new elite entirely, maybe intuitively, but he maneuvered, and we have emerged from that stormy sea today. Let's remember this.

Edgar Savisaar. I believe that Boris Nikolaevich Yeltsin was a person who is of great importance to me and to all history. Without him, Estonia's fate could have had a completely different color and a completely different development in the early 1990ies.

I met B. N. Yeltsin for the first time in the spring of 1990, when he was yet a deputy chairman of the Construction Committee. At that time, he was not widely known or popular, and it was quite easy for my friends to organize our meeting.

In that period he did not enjoy the support of the party leaders, it is not a secret, and few believed that he would still be able to show himself.

This meeting began in a rather peculiar way: B. N. Yeltsin told me that the room was bugged and offered to go to another room. Which we did. This was the first time one of the Soviet leaders told me directly that the conversation was bugged. We talked about the future for both Russia and Estonia. He did not rule out the possibility of restoring Estonia's non-dependence, as it had been before World War II. In general, he was optimistic and promised me to visit Estonia in the same year.

Unfortunately, this did not happen, because both B. N. Yeltsin and I had difficult times. He visited Estonia only the next year and for completely different reasons, during the January crisis.

With the active participation of Boris Nikolaevich, an agreement on joint work between Estonia and Russia was signed in 1991[8].

Unfortunately, the tragic events known as "the January crisis" took place in Lithuania at the same time[9].

At this stage, we in Estonia also felt in a dangerous situation. We did not know what would happen next, since the Soviet authorities began using military force, but we did not expect this and, probably, were not psychologically ready for this.

I thought about what to do next, and, remembering my meeting with B. N. Yeltsin, I decided to call him and ask his opinion about the new situation, because it was clear that if Vilnius began active resistance, this will affect both the republics and the entire Soviet Union.

Boris Nikolaevich honestly warned that even he would not be able to contact M. S. Gorbachev, but we nevertheless tried to find a way out of this situation, and agreed that we would organize an official meeting. Our plan was that if we officially meet openly, it will influence M. S. Gorbachev and his entourage, everyone will understand that Russia is supporting Estonia, and then this may influence the decision of the leaders of the Soviet Union not to allow the use of force on Estonia.

At the beginning, B. N. Yeltsin suggested organizing this meeting in Russia, in Novgorod, then it was planned to move the meeting to Vilnius, but in the end we agreed to meet in Tallinn.

I would not say that we immediately managed to come to an agreement on the development of relations between Russia and Estonia. We had several negotiations by phone. Finally, the meeting took place in Tallinn.

We met in the evening in Tallinn, talked about the general situation, wrote several statements, including to the UN. By the way, M. S. Gorbachev did not at all like what Boris Nikolaevich was doing. It was important that B. N. Yeltsin addressed the Soviet soldiers deployed on the territory of Estonia. I think that this might have influenced the soldiers and officers, and when we had the most difficult times and tense relations between the countries, perhaps the speech delivered by B. N. Yeltsin played an important role in preventing the conflict escalation.

There are many legends about Yeltsin's return journey. In Estonia, the tense situation was aggravating, there were plans to prevent B. N. Yeltsin from leaving Estonia, to barricade the airport. As a result, it was decided that Boris Nikolaevich would return to Russia by car across the eastern border and via Leningrad.

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[8] This refers to the Russian-Estonian treaty signed in January 1991 in Tallinn by Chairman of the Supreme Soviet of the RSFSR B. N. Yeltsin and Chairman of the Supreme Soviet of Estonia A. Ruutel. — Editor's note

[9] Clashes between the population and units of the Soviet Army in Vilnius from 11 to 13 January 1991. — Editor's note.

Later I had several more important meetings and negotiations with B. N. Yeltsin.

For example, during the August coup, I was in constant contact with his assistants, with whom we exchanged information about where the coupists were getting help from in Moscow, and I think that this was beneficial for both Moscow and Estonia, of course.

We had another important meeting before the November 6 [1993] event. — Editor's note], when the State Council of the Soviet Union was meeting, when I asked Boris Nikolayevich about his opinion on whether M. S. Gorbachev would give Estonia freedom or not. He replied that he did not know, but believed that if M. S. Gorbachev did not do this, then the whole world would consider itself deceived. Everyone knew about the Molotov-Ribbentrop Pact and knew on what conditions Estonia was taken into the Soviet Union. But I am very glad that this meeting ended positively for us and that M. S. Gorbachev did not argue. To be honest, he did not have any special opportunity for this, given that N. A. Nazarbaev, V. V. Bakatin, B. N. Yeltsin, and a number of other leaders of the Union spoke in our favor.

So that you understand correctly, we were clearly on the same side of the barricade with Russia, and not only with Russia, but with many republics of the Soviet Union, in Tallinn and Moscow many meetings were organized with the leaders of other union republics, and this influenced everyone positively. Russia was certainly the most powerful among them.

We met with Boris Nikolaevich later when I was no longer the prime minister. He invited me to the Kremlin, discussed not only memories, but also prospects for the future. He regretted that Estonia's policy was not entirely friendly towards Russia. And I don't like Estonia's approaches to relations with Russia, either. I have always maintained good and friendly relations with Russia — we are neighbors. And I still think that a friendly policy would be positive for both Estonia and Russia.

In fact, in Estonia there are different people who think like me and remember the role of B. N. Yeltsin in gaining independence for Estonia, but there are other people, like everywhere else, the only difference is who speaks with a loud voice and who is silent.

At the end I want to say that some time ago I was in Moscow, visited the Novodevichie cemetery and laid flowers on the grave of B. N. Yeltsin, and I think that we should all do this and remember this person.

The content of the second day of the conference was also the panel discussion **"Federalism in the Contemporary World"** (moderated by Sergey Alekseevich Tsyplyaev[10]) which was attended by Andrey Aleksandrovich Zakharov[11], Andrey Nikolaevich Medushevsky[12], Friedrich Memel[13] and Sergey Mikhailovich Shakhray whose reports developed the topics of the previous day.

Andrey Nikolaevich Medushevsky. Federalism is a compromise between two extreme positions: confederalism, which means an international union of modern states, and unitarianism, which does not imply any decentralization, and in any case does not imply decentralization in the form of preserving statehood within the state. Accordingly, federalism may be said to perform a diametrically opposite function in history: a federal state can emerge from the disintegration of a unitary state or, more precisely, from its decentralization, or, vice versa, federalism can be a certain transition to the creation of such a unitary state.

Federalism itself is not a value, but rather an instrument, because the tasks of decentralization and preservation of freedom within the framework of decentralization can be also achieved without federalism. We know other ways of decentralization, for example, a state of autonomies, like in Spain, it can be devolution, like in the United Kingdom, it can be a state built on a regional basis, what is called regionalization. So, federalism is one of the instruments of state organization, and it is important to understand when it is really needed and when it is not. Suffice it to say that after the collapse of the USSR, federalism is represented only in Russia, and there is no federalism in any of the former Soviet republics that have become states, and this, of course, requires apprehension.

I would say that if we approach federalism reasonably and perceive it not as a value, but rather as a tool, then we need to ask ourselves, what it is needed for. If federalism is needed in order to better represent the civil society, ensure decentralization and make the system more flexible, then I would support such an interpretation of federalism, but if this instrument is needed in order to build a state based on the national and ethnic principle, then such federalism is asymmetric, destructive and can ultimately lead to the disintegration of the country.

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[11] Associate Professor of the Russian State University for the Humanities, Doctor of Philosophy, Editor-in-Chief of The Neprikosnovenny Zapas Journal.

[12] Doctor of Philosophy, Full Professor of the Higher School of Economics National Research University (Department of Social Sciences).

[13] President of the Constitutional Court of the Free City of Hamburg (FRG).

You needn't look hard to find an example: this is the fate of the Soviet Union, all its constitutions included federalism built on a national-territorial principle and also allowing the right of secession, which is a sign of confederalism. Therefore, in my opinion, in different situations there may be different interpretations and models of federalism, and the model that we inherited from the Soviet Union is not optimal, therefore, in my opinion, it is legitimate to pose the question of how to make this federalism less asymmetric, more flexible and fill it with a different content, not Soviet, but civil law, that is, to introduce the concept of federalism that would contribute to the development of civil constitutional rights. From this point of view, federalism is certainly important and useful.

In addition, I believe that many fundamental reforms in this direction, I mean the reforms for the development of civil society and the rule of law, do not necessarily have to be related to the protection of the structure of federalism that exists now. Everyone recognizes that this construction is not effective, that we actually have a trend towards unitarianism, a trend towards deconstitutionalization of the principle of federalism. Therefore, I would suggest considering alternative interpretations of the content of the concept of federalism and even quasi-federal forms, other forms of decentralization, as well as a set of measures that would create a single civil nation in Russia. This, of course, requires a set of economic, budgetary, political, administrative, and judicial reforms that would make it possible to combine the integration of the state with its decentralization and flexibility of governance.

If we understand the task of Russian federalism in this way, and not just literally interpret and protect federalism in itself in isolation from the goals and objectives of its use, then I think that we can get a completely different content of federalism, including a different constitutional interpretation, and move away from the ineffective Soviet model of quasi-federalism, which was not federalism at all, to the creation of other alternative instruments that combine the principles of federalism with other ways of implementing representation and decentralization.

The fate of Russian federalism cannot be torn away from constitutionalism and the political system. The Russian Constitution does not exclude the authoritarian vector, but it does not make it mandatory. The provisions of the Constitution can be filled with different meaning depending on the logic of the political process. The fact observed by us today, when one party dominates both in the central and in all regional parliaments, does not at all follow from the Constitution. We actually have a situation of the absence of real political competition, and this situation leads to stagnation both in the issues of federalism and in many others. From this point of view, the constitutional provisions on federalism can have a diametrically opposite interpretation, depending on what will be the dominant vector of development of the political system.

As for the constitutional provisions themselves, the Constitution even purely legally includes the possibility of different vectors of development.

On the one hand, this is Article 11 of the Constitution of the RF which assumes that the 1992 federal treaty has not lost its force, but it contains a provision on the sovereignty of the republics, and in this sense it is the path to confederalism. If we imagine the situation of the weakening of the federal center, we can again see the "parade of sovereignties" and the restoration of the contractual concept of federalism.

On the other hand, we have a rather vague interpretation of federalism itself from the point of view of the separation of competences. For example, Article 71 of the Constitution of the RF defines the competence of the federal center, Article 72 speaks of joint powers defining them very broadly and vaguely, and Article 73 says that, beyond joint powers, constituent entities have their own competence. In reality, it turns out that through the use of the provisions of Article 72 of the Constitution, the federal center completely dominates in the constituent entities of the RF, it overtakes all the competences of the union republics, and as a result we get the formation of that very vertical of power instead of federalism and the deconstitutionalization of the principles of federalism. Such conditions give rise to a third variant of the development of the vector of the state structure in the direction of unitarianism.

These three vectors — confederative, federal and unitarian — can be derived from the present Russian Constitution, although it speaks of the sovereignty of a multinational people and cancels the right of secession. This means that Russia is faced with a choice between decentralization, centralization and atomization of constituent entities, and the disintegration of the country twice within one century is certainly a phenomenal fact.

How can we get out of this vicious circle between disintegration and dictatorship? The way out, of course, is to fill federalism with new content. We are talking about the need to implement a cooperative model of federalism which presupposes a very clear delineation of the subjects of jurisdiction between the federal center and the constituent entities, presupposes division of ownership at different levels, reforming the budget legislation, administrative reforms and many other factors.

If only we touch upon this problem, we see a huge set of unresolved issues that are just postponed for the future.

Therefore, the contemporary Russian federalism may be defined as deferred federalism.

Federalism is enshrined in the Constitution as a kind of strategy of movement, and I agree that this is an element of the separation of powers and democracy, but there is still a long way to go in the implementation of these constitutional provisions, and here one can use both the logic of federalism, when it is useful, and the logic of quasi-federalism, extraconstitutional impact on the situation, for example, through the creation of economic regions, judicial regions, which presupposes filling the concept of federalism with its authentic content.

From this point of view, the Russian legislation is very inconsistent. We see that the law on the general principles of organizing the legislative and executive authorities have been amended more than a hundred times, major changes have been made to the legislation on party building, on the procedure of forming the Federation Council. We see contradictory decisions of the Constitutional Court of the RF, unsettled issues of bicameralism, which is related with the uncertainty of the procedure of formation of the upper house of the parliament which has changed four times. All this taken together turns us to face the federal reform, but not the reform of the Constitution, not its revision, but basically to reforming the institution of federalism understood as an instrument of the state structure.

As for the citizens' habit of turning to the central government as a manifestation of the absence of working mechanisms of federalism, this tradition stems from history, since Russia is a monarchical country. On the other hand, this follows from the fact that, in fact, many fundamental issues of modernization have not been resolved, for example, the problem of the civil nation as the basis of the entire state process. It is also a manifestation of the incapacity of Russian federalism largely based on the German model but not presupposing the system of subsidiarity and clarity of the legal and economic support underlying the German federalism. The responsibility is delegated bottom-upwards due to the inadequacy of local institutions. And the population imagines that there should be a certain authority at the top to act as a mediator between various institutions, interest groups, and it is this authority that can express the people's ideas about the good.

In this situation, it is necessary to consider the rule-of-law state building not as a one-time decision, but as a process (for example, German federalism took shape gradually in the conditions of severe conflicts). We witness a certain process in Russia as well, and I see the way out of this contradictory situation in the development of full-fledged political competition, the development of a multi-party system, the transition from a simulated multi-party system to a real one. But since it was impossible to do this right away and, apparently, there is still a long period of limited pluralism ahead, I see a way out in the creation of a treaty of elites on the transition to full-fledged political competition, at least at the level of elite groups.

Andrey Aleksandrovich Zakharov. Federalism is a political and legal mechanism of disaggregation of authority, its deliberate and purposeful distribution over several power platforms, which is designed to prevent its concentration in the hands of a single person and, accordingly, its abuse. Federalism, in and of itself, protects minorities by preventing abuse of power, and this is its major function.

It seems to me that we should not counterpose the federalism understood as the purpose, and the federalism understood as a means, that is, in this case the instrument and value must be fused together, because there are instruments, the rejection of which leads to the death of the whole society. Federalism in the case of the Russian Federation and other multiethnic societies where the federal scheme is used is precisely the tool that turns into value. If it is abandoned, there is a significant risk of reducing the territory of the state within its borders.

If we turn to the experience of some of our neighbors in the post-Soviet space, for example Georgia, we can see that the refusal to turn to federal recipes in this country entailed a 20% decrease of its territory. What should be done in this situation? It would seem possible to return to the federal scheme again, but it is much more difficult now. I will not list all the examples, but there are at least a couple of countries to which federal recipes were recommended but were ignored, they did not see any value in them, and as a result, these states are experiencing troubles and stress.

The second thing I would like to say is that the national-territorial federation is sometimes presented as some kind of an eyesore a deviation from the norm, but such a federation is a way of self-determination of ethnic minorities inhabiting a large political space. From this point of view, the national-territorial federation is a very useful tool with a powerful value load. It allows creating spaces within a huge state where the minority feels like the majority. And this stabilizes this minority, allows them to feel comfortable and cozy within the framework of this state entity, and this is a powerful argument in favor of an apology for federalism. The asymmetry of national federalism is the price that has to be paid

to ensure that the minority does not destabilize the entire socio-political mechanism.

And we all know from our history that one percent of the Russian population is enough for the country to feel very bad if this 1% is not satisfied with the place assigned to it within the framework of the state mechanism.

The Constitution of the Russian Federation is rather supine in some of its provisions concerning federalism.

On the one hand, it says that our constituent entities of the federation are equal in their relations with the federal center, and in the next paragraph it says that in certain situations the relations between the center and the region can be regulated by special agreements.

There is a clause in the Russian Constitution that does not exist in the constitutions of other federal states. I mean the provision on how the decisions made by the upper and lower houses of the Russian parliament are related to each other. In our country, any decision made by the Chamber of Regions, the Federation Council can be blocked by 2/3 of the votes of the State Duma deputies. This means that if you have a controlling stake in the lower house of the parliament, the opinion of the regions which are supposed to be represented in the Federation Council, can be fully ignored. This is a rather strange norm for a federal state. And basically, the constitutional text could be edited in these aspects.

I would start restoration of federalism in Russia with restoring the elections of heads of regions. What is the point of going to a leader whom you did not elect or elected in a strange way? When normal free elections are restored, some issues will be automatically resolved. There will be no need to run up, because the elected people who will depend on local voters will settle things with the center more effectively as well. Where will they get funding for local issues? They will force the center to reconsider the current financial relationship, and the process will start moving.

It is necessary to bring together the right to make a decision and the possibility of its implementation at the relevant levels, only then will it make sense to apply to the appropriate level for a solution to a specific problem.

Friedrich Joachim Memmel. Germany is a federal state, and a federation implies alignment, a certain combination of the levels of the government which are represented by the federation, the federal states of Germany, in other words, the regions, and local self-government in Germany.

But the fact is that all countries are different, and the governance system will look different in each country. Here one cannot reason in terms of the black-and-white world, each country has to look for its own combination, a balance between these three levels, that is, the level of the federation, the medium level of government bodies and the local level.

In my opinion, in the contemporary world characterized by globalization, in which all connections and interactions become more complex, and individualization intensifies, we need to have a space that would provide for the possibility of diversity, including the creation, recognition of such diversity and its maintenance. This requires different levels of governance, federation, regions and local, and there is to be a possibility of combining them on a certain developed basis.

Naturally, all countries are different, everything depends on the immediate conditions. These are regional conditions, ethnic conditions, people's living conditions, living standards, and the more homogeneous the state is, the more different the role of federalism is: the more diversity, the more contradictions, the greater the desire for the central core. If we consider the Federal Republic of Germany, we can say that we have chosen the path of federation and are following it out of the desire to attract all citizens to us, to involve them in the path we are going.

The discussion being held in Germany on the issue of improving the state structure often suffers from the disadvantage that it views the path exclusively as the path of developing democracy. But the state is the entity that provides services to its citizens, that is, the task of the state is to improve and create living conditions for citizens. If the state does not do this, it loses its citizens.

Which state has the best abilities of creating the necessary living conditions for its citizens? I believe that it is federalism from this point of view that is the best solution for creating the best living conditions for citizens, since it provides an opportunity to find out which conditions and needs are necessary for the citizens at various levels. If we take one top level of power only, it will be unable to know and take all this into account.

In the present conditions of loss of identity, change of ties, loss of ourselves in the format of the ongoing globalization, we need to create spaces for better self-identification. This is the biggest problem today, the challenge faced by the European Union, because it is the certain space that wants to be united and self-identified, but the laws, the resolutions adopted at the general level of the united Europe are not understood and are not implemented at the levels below, which we now see in the case of the UK.

Federalism implies better opportunities for the development of competition, including at different levels between areas, regions, between various forms of self-government. On the one hand, in the context of federalism, we create better conditions for competition, great opportunities for it, and on the other hand, we maintain the possibility of taking account of the needs of the population which are best known at the local power level in order to better plan and implement these needs. ...

Considering that there are states with a large number of ethnic groups, having groups of peoples, the state may have different languages, different size and different history which it has lived, and all this impacts the possible variant of the state structure.

Naturally, when choosing a variant of the state governance structure, the question should be posed about the goal to strive for. If the goal is power, including economic or political power, then one form of federation is chosen, and if the goal is democracy, democratization, then this will be another form.

On the one hand, people always express everything in the desire for power, which has its own expression in the policy. On the other hand, we want to improve the people's living conditions. For me, the question has an unambiguous answer: we need more democracy, care about improving people's lives, and this approach is supported by the aspirations of most states and peoples.

But in this case as well, there are differences in approaches at the state level. If we look at China, the situation in this state differs in that the greater independence of individual regions can lead to the disintegration of the state. European states are much more homogeneous from this point of view. If we look at the FRG, it is a federal state, consisting of 16 federal lands, regions. And each of the regions has its own communities, each having its own charters. Germany also has federal central governance bodies: the government, the chairman of the parliament and the constitutional court which exists separately from the rest of the court instances of the judicial system. The parliament creates an opportunity to work out questions, the government approves the decisions. At the same time, each of the regions has its own government, parliament and constitutional court. I see this as a certain peculiarity of our country which is important for us, this is the way in which the possibility of getting the citizens involved in governance and of taking account of their interests is ensured at every level. Thus, consideration for the conditions, consideration for the local interests enhances the competitiveness of each of the regions and thus contributes to the fastest development of the region.

In accordance with the Basic Law, great independence is also given to the level of local self-government: communities, communes which can have their own freely elected independent bodies, which no one can give instructions to, they can make their own laws in the areas important for them, naturally, within the powers given to them by the Basic Law.

The main requirement in such a state structure is to correctly and accurately define the competences: the competencies assigned to the federal level, so that the state should develop in a single direction; and the competences of the regional level. For this purpose, a special catalog has been developed in Germany containing the competencies assigned to the federal and regional levels. For example, financing issues, which primarily concerns subventions provided to the regional and local levels, and without solving the financing issues, neither competition nor independent solution of local issues is possible.

To ensure the conditions for observance of all these elements of the organization of the state, an effective judicial system is needed which would monitor all adopted laws and decisions and ensure their observance, since this is the only way to ensure trust in the state, and without trust, no system, existence within the state is possible. Only an effective judicial system which makes decisions quickly and transparently is able to increase public confidence in the power system, and when decisions are made long and in an incomprehensible way, then it becomes necessary to appeal to the supreme authorities, up to the president.

Sergey Mikhailovich Shakhray. Federalism is a compromise, it is a guarantee of a democratic political regime, the same as the division of powers into legislative, judicial and executive horizontally, vertical division within a single but complex federal state, it is a guarantee of a political democratic regime. Federalism in Russia is the most complex in the world, the most interesting. The Constitution lays down a cooperative model of federalism, and it makes it possible to adapt federal rules and structures to the modern life.

Federalism is freedom and unity, the unity of the territory and the state, freedom of man and regions. Federalism is the art of governing a complex state, it is a way to get all of our so different constituent entities involved in the common cause of state development.

We are extremely limited in the freedom to choose the development of our model of federalism. We are not in a laboratory, federalism is not in a test tube, we cannot separate the current state of Russia from its history. Twice in the history of our country, federalism was a forced measure of uniting a col-

lapsed state, that is, it was not an abstract model of the delineation of powers, but was a form of returning to the unity of the state: a federal, complex unity. This was the case in 1922, when the country was withdrawing from the Civil War, and it was the same in the 1990ies. And it is good that federalism was not understood as the need to establish a new Russia. We have maintained continuity, tried to get rid of some rudiments and birthmarks of federalism, which we inherited from the Soviet Union, in particular, for the first time in the history of our federalism, the right to secession was restricted. We declared, at least verbally, our federation to be territorial, not national. A certain asymmetry has been preserved, as a kind of tribute to history, but it was impossible to do without it, either. A new model of federalism in Russia should be grown gradually, without hurry, we should start from life, from the interests of those people in whose territory they live, so that they want to join a neighbor or, on the contrary, develop within the economic opportunities of their region only, using the possibility of enlarging the constituent entities of the federation stipulated in the Constitution. The principle of "do no harm" should be applied here. For example, the treaty with Tatarstan was canceled last year, almost no one noticed this event, but I assure you that in a couple of years this pot will boil and explode and problems with language, history, etc. will arise again. Federalism is the art of running a complex state, but not a science

The Constitution of the RF is ingenious in its contradictions, because it provides a whole set of tools for solving federal problems. But the main thing in a federal structure is, of course, finance, taxes, property, and the economy. And for the development of federalism in our country, it is necessary to clearly resolve the financing issues, to determine what share of the collected funds remains at the local and regional level, and what is transferred to the federal center. Unfortunately, this proportion of income distribution is not fixed in the Constitution, but this could not be done in 1993.

And of course, when up to 80% of taxes go to the federal budget, it is difficult to talk about federalism, since this way of distributing funding clearly evidences a unitary system of governance organization. Therefore, the paradox of federalism in Russia is that the less money in the treasury, the more federalism in the country, because it is necessary to transfer the freedom of decision-making to the regions and, together with the freedom to make decisions, to shift responsibility to the regional level, realizing that the region is to survive on its own, to look for its resources in this issue and in this problem. Thus, freedom is converted into economy, into development.

Legal Tech Development Online Conference (St. Petersburg, April 20, 2020)

ABSTRACT

The review highlights the main issues raised by the participants of the conference held on April 20, 2020 in the online conference mode due to the self-isolation conditions applied in the framework of the COVID-19 pandemic. The conference discussed the impact of digital technologies on public relations, prospects and the need to change the legal regulation of such relations, the experience of developing digitalization of public administration in China, as well as the contents of the term Legal Tech and Law Tech and the problems related with artificial intelligence.

Keywords: Legal Tech, Law Tech, artificial intelligence, digital rights, legal regulation, legal personality of the robot

The Development of Legal Tech conference was held online on April 20, 2020, with the participation of the Statutory Court of St. Petersburg. The conference was dedicated to the development of regulation of digital technologies which are becoming increasingly widespread and necessary in certain conditions, as the situation with the COVID-19 virus pandemic has shown. The Conference was attended by Dmitry Aleksadrovich Lisovitsky[1], Nikolay Viktorovich Razuvaev[2], Aleksandr Evgenievich Molotnikov[3] and Marina Aleksandrovna Rozhkiva[4].

Dmitry Alexandrovich Lisovitsky made a report on Digital Information: Challenges and Opportunities. He noted that since law is a regulator of social, primarily economic, relations, in particular, property relations and relations arising in the labor sphere, it is necessary to highlight such present features of these relations as the deepening division of labor, as well as their development in the context of scientific and technological progress, which includes digital information. According to D. A. Lisovitsky, people are trying to predict how the development of technology will affect the processes taking place in the society.

There are various futurological forecasts: from a catastrophic decline in employment and complete subordination of humans to artificial intelligence to more positive assumptions about the rationalization of labor relations, man's transition mainly to intellectual, creative work. However, these studies do not provide grounds for reliable conclusions about changes in basic social relations, including the social nature of labor as a commodity. Thus, it is too early to talk about the qualitative impact of digital information on law as a regulator of public relations.

For example, if we consider the question of whether the essence of constitutional rights and freedoms will change, then today it may be concluded that such changes should not be expected, but subjective rights may be technically adapted to socio-economic and political conditions of their exercise. This means, for example, the remote exercise of rights, which can already be seen in the example of the right to access to health care which is now actively developing within the framework of telemedicine; or electoral rights, the possibility of their exercise with the help of electronic and remote technologies being actively discussed now and being already being implemented to some extent. That is, the essential content of the right does not change, but new tools appear for its implementation.

Thus, Dmitry Aleksandrovich concludes that one can agree with Chairman of the Constitutional Court of the RF V. D. Zorkin that "digital rights are, in fact, the concretization (through law and law enforcement, including judicial acts) of universal human rights guaranteed by the international law and constitutions of states"[5]. Law is certainly facing new issues, for example, the issue of the legal personality of robots, electronic persons, but at the moment this is still theoretical reasoning that has no real support in practice.

In the sphere of law enforcement, the digitalization of the society has not yet led to a wide update of theoretical and legal tools, to a change in the structure of law, although there are also debatable issues, for example, smart contracts, their legal nature being discussed by experts.

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[5] *Zorkin V. D.* Law in the digital world [Pravo v tsifrovom mire. Razmyshleniya na polyakh Peterburgskogo mezhdunarodnogo yuridicheskogo foruma]. Rossiyskaya gazeta, 2018. May 29. (In rus)

The report of *Nikolay Viktorovich Razuvaev* "The law of the digital age: new paradigms of regulation and cognition" touches upon such issues as the need to study the digital society as a whole within the framework of an complex area that integrates the achievements of all social and human sciences.

In a digital society, the most important resource is intellectual capital defined as a set of intangible goods produced by a person (knowledge, professional and other skills, as well as the results of intellectual activity, rights to them and means of individualization). The source of intellectual capital is the human personality in all the fullness of its manifestations and aspirations whose creative abilities become the most important value, including the economic one, and the main subject of legal regulation.

According to N. V. Razuvaev, the relations that prevailed only in the sphere of property turnover for a long time, including the equality of all participants, become the basis of political power, leading to the transformation of the state and law, to a change in their social essence, structure and form. The state previously characterized by relative isolation from the civil society (and in some cases opposed to it) is now turning into one of the institutions of the latter built on the principles of self-organization inherent in the civil society as a whole. It is the predominance of horizontal relations over vertical hierarchical ones that should be considered the major feature of the emerging postmodern state which is a form of organization of power in an information society.

This circumstance was deeply and comprehensively covered in the works of J. Habermas and his followers who developed the concept of deliberative democracy being the main tool for making political decisions in a digital society. It should be noted that the formation of institutions of deliberative democracy which is a set of mechanisms of decision-making on fundamentally important issues based on a dialogue and coordination of the communicative actions of the participants is the result of the investment of intellectual capital in the political sphere leading to its accumulation and growth.

The guarantee of the effectiveness of the implementation of democratic procedures in the modern conditions is the use of digital technologies. It is no coincidence that in developed democracies the leading trend now is the digitalization of the political and administrative spheres, the use of technological opportunities to increase the citizens' participation in decision-making based on a broad dialogue and consensus building. The actively developing technologies include the so-called "electronic government" and other institutions of digital democracy characterized by a high degree of interactivity and openness to the demands of citizens shaping the agenda.

Despite all technical innovations, the basis of the rule of law in a digital society is still the sovereign human personality whose legally significant actions proceed from the awareness of their own freedom and at the same time the recognition of the freedom and inalienable rights of other people. The recognition of this fact involves reasonable conservatism that characterizes the "legal way of thinking". In a digital society, ensuring personal freedom, creating the most favorable conditions for its self-actualization should be the main goal of legal regulation, and the nature of communications determined by the personal qualities of the participants preconditions any areas of legal regulation. The recognition of the uniqueness of a person as a basic subject of law is seen as an effective means of countering the dehumanization of the society being one of the most important challenges of the digital age.

The conditions of the digital society require a radical turn of legal science making it capable of responding to the demands of the rapidly changing legal reality. The major prerequisite for such a turn is the convergence of the general theory of law and sectoral legal disciplines ensuring the similarity of their positions on topical problems of science and practice.

Thus, the digitalization of the society as a megatrend of the modern world needs to be comprehended, and this task has a high degree of relevance both for social theory and jurisprudence. According to N. V. Razuvaev, the main principles on which the study of the processes of digitalization of law should be based include:

- synthesis of the general legal theory and industry doctrines;
- development of cooperation between scientists and practicing lawyers whose developments are of significant value in solving specific issues;
- expansion of international cooperation in order to search for universal legal instruments in the context of globalization of communications.

Aleksandr Evgenievich Molotnikov shared information about China's experience in regulating the digitalization tools used. A. E. Molotnikov drew attention to the fact that, in general, the following pattern of technology development is observed: first, a technical solution appears, technology develops, and then it starts influencing human relations, which leads to the need to change legal regulation. An interesting feature of the current stage of development of the society (including in China) is that when we talk about technology, we forget that technologies are now directly related to law, but if technologies are

global, then the law is local. It has not yet been possible to create a universal legal model that could be applied to various legal orders.

Thus, the technologies are the same, but the consequences of their application and regulation are completely different in different countries. For example, the regulatory system in China is directly related to ethical aspects. One of the key problems is what ethical principles will form the basis for the application of technological inventions, artificial intelligence, big data arrays, and scientific experiments with the human genome. And this is the key aspect related to legal regulation.

There are two main positions regarding China's digital development: first, that China is turning into a digital concentration camp, and second, that this is a kind of digital future in store of all of us, and it will not affect the fundamental human rights and freedoms. But there are several aspects to consider. As for the position of creating a digital concentration camp in China, for example, the credit rating system in China is generally negatively perceived by the Western public, while the Chinese themselves are indifferent to it, they do not see anything wrong with it, given that that this is a technology that allows analyzing the person's behavior and assign a certain category to the person in order to receive certain services, but a negative public opinion has been formed in the Western society around this mechanism over the recent years.

At this stage, we are at the level where we often talk about technological phenomena that are to appear, but have not yet appeared. For example, artificial intelligence today is just a development related with neural networks, which allows a program to learn by analyzing a huge array of information, to make some decisions based on the data obtained. However, this is not an intellect that can make independent decisions and control certain processes independently of the human. Even in China, a lot of developments are still at the basic level. We can gather large amounts of data, but we cannot analyze it at a level sufficient to achieve the desired goals. We have not yet reached the stage in the development of technologies when they lead to the emergence of new systems of relationships that require the creation of special or new methods of legal regulation.

China is currently undergoing a large-scale reform of civil legislation and other branches of law. They have a very sound approach to it, and regulations are already emerging that will have an impact on the use of the gathered databases. And in some time, it will be already possible to analyze which way of regulating technological solutions China will take. We will be also able to see which model of legal regulation will prevail in the international space, whether it will be the West European approach or the Chinese or some other model.

During the discussion of the content of the concepts of Legal Tech and Law Tech, *Marina Aleksandrovna Rozhkova* noted that at the moment the technical solutions included in the concept of Legal Tech are, for example, the legal framework that we have been using for a long time, these are programs, technologies which allow lawyers to perform professional acts. When referring to legal bases using certain algorithms, we can provide ourselves with the necessary professional information. Thus, Legal Tech is not some complicated concept, but ordinary programs, electronic services that allow us to carry out professional legal activities. For example, legal databases offer both selection of judicial practice, publications on a specific topic and the possibility to draw up an agreement, etc. Law Tech is the other side of the coin. If we say that Legal Tech helps lawyers, then Law Tech is the programs, solutions that allow the end users, that is, consumers of legal services, to receive certain legal advice or access to legal information, these are reference legal systems, tools to calculate the stamp duty, etc.

When we enter a request in legal bases, we understand that the search for an answer to our request is not carried out manually, but by means of a program. This is where the field for the use of artificial intelligence comes in to simplify the task of lawyers and users of legal services.

What is artificial intelligence? If we look at the existing regulatory acts, the Concept of artificial intelligence[6], we will find a rather complex definition in them which is hard to correlate with our idea of a legal framework, for example. Another difficulty in defining the concept of artificial intelligence lies in the fact that owing to the literature in large segments, the prevailing idea of artificial intelligence is that of a kind of robot provided with certain knowledge that will come, connect the neural network and solve

[6] This refers to the draft Concept of development of regulation in the field of artificial intelligence and robotics technologies until 2024, developed by the Ministry of Economic Development of Russia jointly with the Skolkovo Foundation, Sberbank PJSC, MTS PJSC, the Analytical Center under the Government of the Russian Federation, the National Association of participants of the robotics market, the Center for Strategic Research Foundation, Yandex LLC, Mail.ru Group and representatives of other organizations and submitted for consideration by the Normative Regulation working group of Digital Economy ANCO on April 17, 2020 [Electronic resource]. URL: https://www.economy.gov.ru/material/news/rabochaya_gruppa_ano_cifrovaya_ekonomika_odobrila_razrabotannyy_minekonomrazvitiya_proekt_koncepcii_razvitiya_regulirovaniya_v_sfere_iskusstvennogo_intellekta.html (accessed on: 07.05.2020). — Editor's note.

any problem. Even the European Parliament in 2017 proposed to introduce a new entity into the legislation: an electronic personality which implied artificial intelligence and the most advanced robots.

It should be said that this initiative was largely based on the idea that in practice robots replace people in some kinds of work, which entails job cuts and a decrease in the tax base. That is, there is a fiscal interest of the state in regulating the use of robots, as well as the fact that to some extent robots pose a threat to the life of people, and the harm they can cause needs to be understood and legally regulated. Accordingly, this threat should have been assessed by experts in order to work out the decisions in which the robot itself would be responsible for its actions. The reality of such a threat was exemplified by robot Sophia which received the citizenship of Saudi Arabia in 2017 and thereby received legal personality.

In reality artificial intelligence in a simplified description is a computer program, its main elements being: a database; the "solver", actually — a program that allows solving the questions posed to it without human intervention; and an intelligent interface that allows the person to communicate with artificial intelligence.

An example is the situation with Amazon: the Amazon HR department conducted a recruitment campaign for the development of the technical sphere, IT specialists, using artificial intelligence according to a certain algorithm. It appeared during the CV selection process that the program rejects all women's applications. According to the results of the audit, it was established that the database provided for the artificial intelligence was the database of summaries of programmers over the recent ten years, when this work was mostly done by men. Artificial intelligence based on the algorithm embedded in it and the database provided for training selected questionnaires. The program was suspended, and Amazon had to make a public apology for the mistake. As you can see, it is practically impossible to create an ideal algorithm initially, since it is extremely difficult to take account of all the nuances. This is one of the main problems of using artificial intelligence.

Since this is a program, it can be embedded by the robot itself. At the same time, we often imagine robots as humanoids, but in fact robots and intelligent robots (robots of the last generation) can have absolutely any appearance, and the task for which they were created is determined by the goals set for them by the man. Today, a robot is a physical shell for artificial intelligence controlled by it, there is no reason to say that a robot is a subject of law. Information is initially put into it by the man, the algorithm of work is created by the man, the goal is set by the man. It is so early to say that this robot-object is provided with authorities, functions and powers similar to human ones that it is even strange that this issue was brought up for such a wide discussion in Europe.

Today there is no reason to say that a robot can have legal personality.

But many questions arise in connection with the use and development of artificial intelligence. In particular, these are issues of the subject of responsibility for causing harm: who should be responsible for the negative consequences arising from the use of artificial intelligence — the person who pressed the button, the developer, the owner of this object? Many issues are related to the emergence of intellectual property rights as a result of the use of artificial intelligence. There is definitely no reason to say that robots have these rights, but there is still a question whether they it is the owner or the developer of the robot that has them.

Today artificial intelligence is an auxiliary tool. For example, an experiment was conducted in South America of making judgments using artificial intelligence in the framework of the consideration of cases of administrative offenses. In 90% of cases, lawyers agreed with the decisions made by artificial intelligence. But these were really elementary cases that require the application of laws without evaluating the facts. As soon as we move into the plane of civil law cases where there are a lot of evaluation categories, subjective moments, where we are forced to apply an analogy of right, an analogy of law, then in such cases the use of artificial intelligence is impossible. At the same time, in this case artificial intelligence can be a good assistant to lawyers in the selection of judicial practice, literature.

As Marina Aleksandrovna summed up, it appears that at the moment the legal regulation of intelligence is not yet very developed, but it is too early to say that relations with the use of artificial intelligence urgently need legal regulation. At the same time, since many questions arise in connection with the use of artificial intelligence technologies, these issues should be already discussed by the professional community, so that when we reach the appropriate level of technologies requiring special regulation, we will not be at a loss and will resolve issues in accordance with ready-made legislative decisions.

In conclusion, the conference participants thanked the organizers for the opportunity to exchange views and expressed their hope for continuing the discussion of the topical problem of using digital technologies in law.

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