Law Journal of North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration under the President of the Russian Federation

ТЕОРЕТИЧЕСКАЯ И ПРИКЛАДНАЯ ЮРИСПРУДЕНЦИЯ

Theoretical and Applied Law

> Laws must go hand and hand with the progress of the human mind.
>
> **Thomas Jefferson**

2020 № 3(5)

ISSN 2686-7834

Contents

Opening Remarks by the Editor-In-Chief

The reader is invited to the next issue of the journal "Theoretical and Applied Law". As ever, the articles contained in this issue, although being immensely diverse, are still focused on two general objectives which, if achieved, could give success to any scientific publication. These are, firstly, significant development trends that characterize the actual situation in the country and in the world, and, secondly, challenges of high scientific relevance. These objectives are largely interrelated, at least in the context of social and legal cognition, where the study of fundamental scientific issues yields quite tangible practical results, and the needs of lawmaking and law enforcement practice lead to generalizations of the highest theoretical level.

It seems that the most important feature inherent in the processes taking place in the modern world is acceleration of their dynamics, which is largely facilitated by the introduction of digital technologies into all spheres of public life. Constantly becoming more complex and improving, information technologies are actively used not only in science, production, education, management, but also in everyday mass use. And if back in the early 1970s, American sociologist D. Bell, stating the onset of the post-industrial era, where information becomes the main resource, considered it the monopoly ownership of scientists and other intellectuals (which is intended to provide the latter with dominant social positions, according to the researcher), today this resource has become a common property. The above tendency did not bypass the legal regulation, the legal science and the higher legal education contributing to their qualitative transformation, improvement, and simultaneously putting new challenges to be tackled.

As has often happened in the past, challenges that humanity faces in the form of hard-to-predict natural factors, namely the coronavirus pandemic, which have affected social dynamics both in the third world countries and in highly developed post-industrial societies, are catalysts for change. Legislative measures taken by governments of most states in the context of the continuing epidemic threat, such as restriction of freedom for communication, simultaneously stimulate the development of virtual communication means that connect an ever wider range of recipients of information. In turn, innovations in communication create a prerequisite for the emergence of new subjective rights and legal institutions that are of significant research interest.

The processes considered, in our opinion, are a clear illustration of the thesis that changes in the legal sphere (including in the long-term historical perspective) have human communication as their prerequisite. This circumstance gives particular urgency to the problems related to evolution of the rule of law shedding light on a number of general theoretical laws. The journal "Theoretical and Applied Law" has more than once discussed the constructivist properties of legal phenomena, which have become the subject of the postclassical theory of law. There is no doubt that legal reality in all its aspects and manifestations is constructed by members of society in the process of communication.

Meanwhile, activities aimed at constructing the rule of law have a historical dimension. One of the most urgent tasks of postclassical legal thinking is to study the natural relationship of constructivist, systemic-structural and historical-evolutionary dimensions of legal reality. A significant contribution to its settlement is made by the articles published in this issue, most of which are devoted to the problems of foreign and international law in a broad historical and theoretical context. It is with special pleasure that one can state the constant presence of leading foreign lawyers on the pages of our journal, whose studies shed light on the latest trends in the development of legislation in a number of countries, both the European continent and other regions of the world.

The article by Professor I. Hoffman examines the structural reform of the social care system in Hungary and formulates a number of general conclusions that are of significant interest to Russian specialists engaged in the relevant field. The typology of social care models proposed by the author in different countries of Central and Eastern Europe deserves close attention. As I. Hoffman shows, the particulars of these systems are determined by historical traditions and peculiarities of the rule of law, but at the same time decentralized models capable of flexibly responding to public requests have advantages over centralized hierarchical models, whose effectiveness in the dynamically changing legal order of post-industrial civilization demonstrates its limitations.

The topics covered in this publication are developed by the article by A.E. Arimoro, which contains a detailed analysis of the experience of the Nigerian healthcare system in combating the consequences of the COVID-19 coronavirus pandemic. The main conclusion of the Nigerian scientist is that the solution of global problems that require an integrated approach involves participation of not only management

structures, but also a broad private initiative, first of all, non-profit organizations that are the main producers and suppliers of services in the public sector of the economy, including medical services. In such a situation, it seems quite natural to actively develop the institution of public-private partnership, which, most likely, serves as an optimal response to many of the challenges faced by developing countries.

Topical theoretical issues that are acquiring a new sound in the postclassical paradigm are touched upon in the publication of I. I. Osvetimskaya discussing in detail the prerequisites for the crisis of legitimacy in the modern state and outlining the prospects for transformation of political power in the context of digitalization of the rule of law and emergence of the information society. One cannot but agree with the opinion of the researcher that overcoming crisis tendencies is possible only under the condition of a qualitative transformation of the state power structure jointly with the transformation of many vertical hierarchical ties into horizontal ties based on the equality of participants and mutual coordination of interests of various social factors. This conclusion finds its detailed justification in the comparative legal paper by V. N. Shalaevskaya dedicated to the history and prospects of antimonopoly legislation development in Japan.

The general conceptual provisions formulated by the authors are consistently developed in the research of specialists in the field of international and domestic Russian law. Thus, the article by V. S. Kichenina and A. R. Khuzin examines the widely discussed problem of the jurisdictional immunity of the Russian Federation in international law, and the articles by O. A. Nogina and A. A. Kashayeva consider the current novels of the Russian private and public law. We believe that such an interdisciplinary approach used in all areas of legal knowledge, in the future, can give a powerful impetus to theoretical developments, which, no doubt, will arouse the interest of the journal readers.

Editor-in-Chief
Razuvaev Nikolay Viktorovich

Structure of the Personal Social Services in Hungary[1]

Prof. Dr. István Hoffman
Eötvös Loránd University (Budapest, Hungary), Faculty of Law, Department of Administrative Law
Marie Curie-Skłodowska University (Lublin, Poland), Faculty of Law and Administration, Department of Public International Law
hoffman.istvan@ajk.elte.hu
i.hoffman@poczta.umcs.lublin.pl

ABSTRACT
The article reviews the changes of the service provision system, especially the structure of the Hungarian social care. Firstly, theoretical and international backgrounds of the topic are shown. Secondly, the article presents the transformation of the Hungarian social care in the last decades. Here, a tendency of concentration and centralisation can be observed. Thirdly, the mixed nature of the Hungarian municipal social care system is analysed, which system have been strongly centralised in the last five years. The effects of the centralisation are analysed as well, the article shows, that the changes of the funding have the most significant impact on the spatial structure of the service provision.
Key words: social care, municipal social care, funding, centralisation, concentration, spatial structure

1. Introduction: hypothesis and research method

In Hungary, the system of the social care has changed radically in the last decade. The system was originally based on a strong, but fragmented municipal system. The main goal of the transformation of the system in the last decade has been firstly to maintain the grassroots model of the Hungarian social care. Secondly the reforms have tried to solve the problem of economies of scale. This article will examine the regulatory methods and the related budgetary support system applied for this aim. Thus, the primary method of the research is jurisprudential, but the effects of the regulation and the practical outcome of the new support system will also be analysed.

Firstly, the article will review the main models of the social care. This comparative review is very useful, because different administrative systems and paradigms have different concepts on spatial structure of these services. After a short comparative review, the jurisprudential and budgetary analysis will then show the transformation of the social care system and the paradigm-shift of these services after 2011/12. Finally, the effects and impacts of the partly centralised model will be examined by this article.

2. Social care and local governments

The role of the municipalities is significant in the welfare states in the field of personal social services. However the social care is partly or fully based on these local entities several models have been evolved.[2]

The models can be characterised by different methods, because these systems are impacted by the welfare model of the given country, by the municipal model and by the spatial structure, as well.[3]

The characterisation of these models of my chapter is based mainly on *the role of the municipalities* and on the *spatial structure of the service provision.* Thus *decentralised and centralised models* can be distuingished.

2.1. Decentralised model

The decentralised model is based on the main service provision role of the *municipalities.* In this model the local governments are mainly responsible for the social care services, the agencies of the central government have just limited tasks.

Two main types of the decentralised model can be distinguished: the first one is the local community centred model which is based on the prominent role of the 1st tier municipalities and the regional centred model in which the most important services are organised and provided by the regional (2nd tier government). The inter-municipal cooperations are mainly correctional they are very important in the community centred model.

[1] This article is based on the investigations of the research project „Restricting the legal capacity of adults in Hungary" No. OTKA FK 132513 (leader of the project: Prof. Dr István Hoffman) supported by the research grant of the Hungarian National Research, Development and Innovation Office.

[2] Lőrincz, L. *A közigazgatás alapintézményei.* Budapest : HVG-Orac, 2005. Pp. 191–194.

[3] Hoffman, I. A személyes jellegű szociális szolgáltatások igazgatása // In: Horváth, T. M. and Bartha, I. (eds): *Közszolgáltatások megszervezése és politikái. Merre tartanak?* Budapest and Pécs : Dialóg Campus, 2016. Pp. 330–332.

2.1.1. Local community centred model

The social care is primarily organised by the local (1st tier) municipalities in the countries of the *local community centred.* These local social services are mainly basic social care services (e.g. home care, catering). In this model the role of the regional (2nd tier) municipalities are just additional, those services are organised by the regional (2nd tier) municipalities which cannot be provided by the local communities (especially several special, residential, in-patient social care services).

Although this type of the service provision is based on the dominant role of the local (1st tier) municipalities, two subtypes were resulted by the different spatial and municipal system of the given countries.

Large, concentrated municipalities with broad service provision responsibilities: the Nordic model * The *Nordic (Scandinavian) countries* can be classified as examples of the local community based model. In *Sweden* the Social Services Act (SFS 2001: 453) makes clear that *only* the 1st tier local governments are responsible for the provision of the social services.[4] *Finland* developed a model similar to the Swedish one.[5]

Denmark and Norway have a mixed model because the communities (1st tier municipalities) are responsible for the basic social care but and the majority of the residential (in-patient) social care services but the regional (2nd tier) municipalities have relevant competences because the residential services of children protection and the alcohol and drug addicts are provided by these municipalities.

Community centred model with the additional responsibilities of the regional municipalities and the inter-municipal cooperations * The majority of the European countries follow this model therefore countries with different municipal and welfare model belongs to this. In these states — having regard to their mainly Bismarckian (Continental) welfare model — the social services provided by the municipalities are typically means-tested and these services have a complementary role.

Some countries with *Latin (French) local government type* can be classified into this model as well, for example *Italy* and *Belgium.* In *Italy* the settlement-level municipalities *(comune)* are primarily responsible for the provision of the social services including elderly care, child and youth protection and helping people with disability. The regional municipalities *(regione)* have a regulatory and coordinating role in the field of these services. Because of the wide range of municipal tasks the Italian public law developed legal institutions for the general correction of the economy of scale problems. These legal institutions are the typically — exceptionally compulsory — inter-municipal associations. These tendencies were strengthened by the reform of the *legge Delrio* (2014)[6] by which the establishment of the different type service provision inter-municipal associations have been encouraged.[7]

In *Belgium* the community governments are primarily responsible for the provision of the social care. The municipal social services are organised by the public centres for social welfare *(openbare centra voor maatschapelijk welzijn / centres publics d'aide sociale)*, regardless of the region to which the municipalities belong.[8] The centres are professionally independent from the municipalities, but their budgets are approved by the local councils[9]. Although the number of the Belgian local municipalities *(gemeente / commune)* was significantly reduced during the 1970s, the inter-municipal associations have been institutionalised by the Belgian administrative law for the correction of disparity in size between the settlements. The Belgian regions, which can be considered as member states of a federation, are responsible for the higher-cost services.[10]

In *Slovakia* the local municipalities are responsible for the non-residential (basic) social care and the regional municipalities, the districts *(kraj)* are responsible for the residential social services and for the services of child protection.[11] The *Czech Republic* has chosen a similar model. *Poland* has a special

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[4] Strönholm, S. *An introduction to Swedish law.* Stockholm : Norstedts, 1981. P. 93; Thakur, S. et al. *Sweden's welfare state. Can the bumblebee keep flying?* Washington D. C. : International Monetary Found, 2003. P. 8.

[5] Niemelä, H., Salminen, K. *Social security in Finland.* Helsinki : Finnish Centre for Pensions, 2006. Pp. 17–18.

[6] Legge Delrio — Italian law dated April 7, 2014 No. 56 as amended by Laws dated June 23, 2014 No. 89 and August 11, 2014 No. 114, which reorganized the local government system and amended the powers of local administrations. — Approx ed.

[7] Vandelli, L. *Città metropolitane, province, unioni, e fusioni di communi. La legge Delrio, 7 aprile 2014, n. 56 commentata comma per comma.* Santarcangelo di Romagna : Maggioli, 2014. Pp. 125–145.

[8] Bocken, H., de Bondt, W *Introduction to Belgian law.* Kluwer Law International, 2001. P. 70.

[9] Aerts, Y., Siegmund, H. *Kommunalpolitik in Europa //* in Belgium, In Wehling, H. G. (ed.). Berlin, Stuttgart and Köln : Verlag V. Kohlhammer, 1994. P. 110.

[10] Supra note 7. Pp. 70–71.

[11] Nižňanský, V. *Verejná správá na Slovensku*. Bratislava : Government of Slovakia, 2005. P. 56; Malikova, L. Regionalization of Governance: Testing the Capacity Reform // In: Baldersheim, H. and Batora, J. (eds.): *The*

position among the Visegrád countries considering its larger area and arger population[12]. The Polish local government system is a three-tier system. The 1st tier municipalities (communities — *gminy*) are responsible for the non-residential social and child protection services. The provision of the expensive residential services belongs to the competences of the 2nd tier municipalities, to the districts *(powiaty)*. The Voivodships as 3rd tier municipalities do not have any competences in the field of social services. The inter-municipal associations do not have significant role in the Polish municipal system because of the concentration of the municipalities.[13]

2.1.2. Regional municipality centred model

The social care system of the *United Kingdom* can be characterised as a regional municipality centred one. The — professionally independent — local social authorities of the county councils and unitary councils are responsible for the provision of the social services.[14] The reforms encouraged by the New Public Management in the 1980s and 1990s altered the role of the local governments significantly: they became organizers instead of being providers.[15] The private sector has played an increasingly important role in the change. The *competitive compulsory tendering (CCT)* was introduced by the selection of social care provider. As the result of the reforms the local governments became the "managers" of the services instead of their former providers.[16] This model has not been transformed significantly by the reforms of the Labour Party Government of the Millennium.[17]

2.2. Centralised model

Primarily, *Germany* can considered as one of the example of the centralised model. Article 3 of 12th Book on personal social assistance of the Social Code *(Sozialgesetzbuch — SGB)* states that personal social assistance is provided by the designated municipal bodies and the designated administrative bodies above the local tier. As principle the local administrative bodies responsible for the social care are the German *Landkreise* (the county-like districts of Germany[18], and the unitary councils *(kreisfreie Städte)* — if the provincial social law *(Landessozialrecht)* does not make an exception[19]. The provinces *(Länder)* can designate the bodies responsible for regional *(überörtlich)* services. The provinces (*Bundesländer)* are empowered by the Article 99 of the 12th Book of SGB to design the local municipalities *(Gemeinde)* and the– typically obligatory — inter-municipal associations *(Gemeindeverbände)* to provide several, basic personal social services. The 12th Book of SGB determines that — if a provincial acts did not have other regulation — the administrative level above the German counties (*Kreise)* (the so called *überörtlich* level) is responsible for the care for disabled and blind people, for nursing and care services and for the statutory defined social services in the event of crises.[20] Thus the provinces, the Member States of the German federation have the most important role in the field of personal social services.[21]

Bavaria has chosen a specific solution, which — as the largest German province — has developed not a two, but a three-tier local government system: the seven districts *(Bezirke)* are self-government units.[22] Social care (assistance) tasks have been shared between the under intermediate level counties

Governance of Small States in Turbulent Times: The Exemplary Cases of Norway and Slovakia. Opladen : Barbara Budrich Publishers, 2012. P. 210.

[12] The Visegrad Four, or V4, is a cultural and political union of four Central European countries — the Czech Republic, Hungary, Poland and Slovakia. — Approx. ed.

[13] Wollmann, H., Lankina, T. Local Government in Poland and Hungary: from post-communist reforms towards EU-accession // In Baldersheim H. et al. (eds.), *Local Democracy in Post-Communist Europe*. Opladen : Leske + Budrich, 2003. P. 106.

[14] Arden, A., Manning, J., Collins, S. *Local Government Constitutional and Administrative Law.* London : Sweet & Maxwell, 1999. Pp. 103–104.

[15] Jones, B., Thompson, K. Administrative Law in the United Kingdom // In Seerden, R. and Stroink, F. (eds.), *Administrative Law of the European Union, Its Member States and the United States. A Comparative Analysis.* Antwerpen — Groningen : Intersentia, 2007. P. 232.

[16] Wilson, D., Game, C. *Local Government in the United Kingdom.* Basingstoke & New York : Palgrave Macmillan, 2011. Pp. 135–136.

[17] Healy, J. The Care of Elder People: Australia and the United Kingdom // *Social Policy and Administration. 2002. Vol.* 36. Issue 1, pp. 6–8. DOI: 10.1111/1467-9515.00266

[18] Steiner, U. *Besonderes Verwaltungsrecht.* Heidelberg : C. F. Müller, 2006. Pp. 147–148.

[19] Waltermann, R. *Sozialrecht.* Heidelberg : C. F. Müller, 2009. P. 129.

[20] Eichenhofer, E. *Sozialrecht*. Tübingen : Mohr Siebeck, 2007. P. 298.

[21] Baron v. Maydell, B., Ruland, F., Becker, F. *Sozialrechtshandbuch*. Baden-Baden : Nomos, 2008. P. 408

[22] Reiners, M. *Verwaltungsstrukturreformen in den deutschen Bundesländern. Radikale Reformen auf der Ebene der Staatlichen Mittelinstanz*. Wiesbaden : VS Verlag für Sozialwissenschaften, 2008. P. 154.

(Kreis) and unitary councils *(kreisfreie Städte)* and the upper intermediate level district *(Bezirke)* municipalities.

It is shown by the short international outlook, that the local level has very important role in the field of the provision of personal social services. Even the local municipalities of the countries of the centralised model could have responsibilities in this field. It is clear, that the spatial structure of these welfare services is deeply impacted by the spatial structure of the given country, especially the spatial structure of the municipalities.

After the review of the main models of the spatial structure of the personal social services, the Hungarian system will be review, but firstly the frameworks of the Hungarian system will be analysed.

3. Social care in Hungary

This part of my chapter is based on a jurisprudential analysis. Firstly, I would like to review the framework of the Hungarian social care system, especially the changes and the role of the municipalities in the Hungarian public service provision system. After that I would like to review shortly the changes of the social care services and Hungary and finally, I would like to show shortly the reform of the personal social service system. This analysis could show the main factors of the recent spatial structure system.

3.1. Hungary: a country with a fragmented municipal system

Hungary has a fragmented spatial structure. The majority of the Hungarian municipalities had less than 1,000 inhabitants in 2010 (see Table 1).

Table 1

Population of the Hungarian municipalities (1990-2010)

Year	0–499	500–999	1,000–1,999	2,000–4,999	5,000–9,999	10,000–19,999	20,000–49,999	50,000–99,999	100,000–	All
	Inhabitants									
1990	965	709	646	479	130	80	40	12	9	3,070
2000	1,033	688	657	483	138	76	39	12	9	3,135
2010	1,086	672	635	482	133	83	41	11	9	3,152

Source: Szigeti[23], 2013, p. 282

Therefore the provision of local public services — included the personal social services — in Hungary has been based on this condition, and the (inter-communal) cooperation has a significant role.

3.1.1. Personal social services before 1945

In the 19th century when the modern Hungarian public administration evolved the personal services have only limited significance. Only the framework of the services for poor and the children protection were established. This fragmented and residual system was based on the communities which have a limited self-governance under the supervision of the county municipalities[24].

3.1.2. Social services of the Soviet-type administration

After the World War II a Soviet administrative system evolved in Hungary. The administration radically changed after 1950. The self-governance of the communities, towns and counties was terminated and the former intercommunal associations were liquidated[25], as well. Social administration was a void territory of the Hungarian public administration. Firstly, the social benefits were "taboos" in the Soviet type system, because it was an axiom of the Communist regime that poverty was liquidated by the Socialism. The personal social services and the social insurance remained public administration tasks[26]. This model changed after the reforms of 1968, the significance of the personal social services increased.

[23] Szigeti, E. A közigazgatás területi változásai // In. Horváth, T. M. (ed.): *Kilengések. Közszolgáltatási változások.* Budapest and Pécs : Dialóg Campus, 2010. P. 282.

[24] Hoffman, I. *Önkormányzati közszolgáltatások szervezése és igazgatása.* Budapest : ELTE Eötvös Kiadó, 2009. Pp. 89–90.

[25] Ibid. Pp. 105–109.

[26] Krémer, B. *Bevezetés a szociálpolitikába.* Budapes : Napvilág, 2009. P. 126.

Although merging communities was an important element of the public service provision reforms, the intercommunal associations were reborn. A dual system evolved: the local councils (1st tier) were responsible for the basic social care and the county councils (2nd tier) were responsible for the residential (in-patient) social care. The main element of this system were the large institutions by which primarily residential social care was provided. During the 1980s the frameworks of the social administration were stabilised.

3.1.3. Democratic Transition and the reborn of the social administration system

In 1990 a new, local government system was established by the Amendment of the Constitution and by the Act LXV of 1990 on the Local Self-Governments (hereinafter: Ötv). This system was a two-tier, but local-level centred system. The first tier was the local (community) level. According to the Ötv villages, large villages, towns, county towns and Budapest as the capital city were considered as local-level governments (municipalities). The second tier was the county level. The county local governments had an intermediate service-provider role, but the county-level service delivery could largely be overtaken by the municipalities. The local-centred nature of the Hungarian local government system was strengthened by the system of voluntary inter-municipal associations.[27].

In 1993 the Act III of 1993 on the Social Administration and on the Social Benefit was passed. The municipal social benefits and the personal social services has been regulated by this act. A new, local level centred model have been evolved. The local municipalities — the communities and the towns — were responsible for the basic social services and the counties and the towns with the status of the counties were responsible for the residential social care. The local municipalities could take over the provision of the residential social care. The main provider was the local level and the counties — as regional municipalities — had practically supplementary tasks: the residential social care was provided by them if the local municipalities could not organise the provision of these services.[28]

3.1.4. Institutionalisation and dysfunctional phenomena

Although the act on social administration and benefits was passed in 1993 the institutionalisation of the new service system required years. As I have mentioned earlier, the personal social service provision was based on the great institutions before 1990.[29] Thus the system of the local basic services evolved in several steps.

Practically, the period of the institutionalisation of these services ended to the Millennium, therefore after 2000 the dysfunctional phenomena of the new system could be analysed. These dysfunctions were related to the general dysfunctions of the new municipal system. After 1990 a local tier centred, and fragmented local government system evolved in Hungary in which model the major responsibilities belonged to the communities and towns. This fragmented spatial structure was strengthened by democratic changes, as a counterpart to former Communist times: where compulsory inter-municipal associations (the above presented common village councils) treated size inefficiency problems. This compulsory form was unpopular among Hungarian municipalities; therefore, it disappeared with the democratic changes, giving opportunity to a disintegration tendency in the transition period.[30]

This fragmentation and the related size inefficiency problem was tried to be solved by inter-municipal cooperation which was based on voluntary cooperation. The new types of associations could not stop the disintegration because of their purely voluntary nature and the poor financial support provided by the central budget. Therefore, the number of service provider associations was only 120 in 1992. The joined municipal administrations decreased in these years: the number of common municipal clerks was 529 in 1991, 499 in 1994, and only 260 administrative inter-municipal associations were established until 1994[31]. The lack of intercommunal cooperation, the fragmented spatial structure, and the weak, subsidiary intermediate level public service provider role of the county local governments resulted in significant service delivery dysfunctions. The local self-governments — especially the small villages which were the majority of the Hungarian municipalities — were not able to perform a significant part of the municipal tasks. In 2005 the most basic social services — social catering and social home care — was

[27] Verebélyi, I. (ed.) *Az önkormányzati rendszer magyarázata*. Budapest : KJK-Kerszöv, 1999. Pp. 30-36

[28] Velkey, G. Központi állam és a helyi önkormányzatok, In: Ferge, Zs. (ed.): *Magyar társadalom- és szociálpolitika 1990–2015.* Budapest : Osiris, 2017. Pp. 128–133.

[29] Ibid. Pp. 126–128.

[30] Hoffman, I. *Önkormányzati közszolgáltatások szervezése és igazgatása.* Budapest : ELTE Eötvös Kiadó, 2009. Pp. 130-132.

[31] Hoffman, I. A helyi önkormányzatok társulási rendszerének főbb vonásai // *Új Magyar Közigazgatás. 2011. Vol.* 4 (1), Pp. 30-31.

not performed by 725 municipalities, by almost a quarter of the municipalities in Hungary.[32] The municipal social services were mandatory municipal tasks; therefore they should be performed and the performance has been supported by the central budget. The share of the central grants was just limited, in 2006 50,4% of the municipal social expenditures on basic social services were financed by the central grants[33]. The small communities which have only limited own revenues could just hardly perform their tasks.

Although there were service deficiencies in the field of basic social services, the residential social care was relatively well organised as a heritage of the former service provision system. The service deficiencies in basic care resulted a dysfunctional phenomenon: people who required basic care were provided by residential care because the basic social care was not available for them[34]. Another problematic element was the so called 'care need' test: this test was performed practically by the institutions, by the providers, therefore it was not an independent one and the remedies against the decisions were limited.[35]

Therefore a consensus evolved at the Millennium among the Hungarian experts: reforms are required.

3.2. The reforms of the social care

3.2.1. The first step: new forms of municipal cooperation (2005-2007)

The first step of the reforms was related to the municipal reforms. Firstly, at the end of the 1990s the institutions of the various inter-municipal associations were regulated, and new, additional state subsidies were introduced to accelerate the formation of voluntary inter-municipal associations after 1997.[36] As a result of these changes, the number of inter-municipal associations radically increased (see Table 2).

Table 2

Number of the inter-municipal associations responsible for public service provision between 1992 and 2005

Year	Number of the inter-municipal associations responsible for public service provision
1992	120
1994	116
1997	489
1998	748
1999	880
2003	1,274
2005	1,586

Source: Belügyminisztérium, 2005: 205[37]

In 2004, the legislator introduced a new type of inter-municipal association — the multi-purpose micro-regional association — based on the French inter-municipal association form 'SIVOM'. The central government significantly supported service delivery through associations: in 2004, the share of the special subsidies for them was 1.19% of the whole central government subsidies for local governments, and in 2011 it already reached 2.91%.[38]

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[32] Rácz, K. Szociális feladatellátás a kistelepüléseken és a többcélú kistérségi társulásokban // In: Kovács, K. & Somlyódyné Pfeil, E. (eds.): *Függőben. Közszolgáétatás-szervezés a kistelepülések világában.* Budapest : KSZK ROP 3.1.1. Programigazgatóság, 2008. P. 191.

[33] Ibid. P. 189.

[34] Krémer, B., Hoffman, I. Amit a SZOLID Projekt mutat. Dilemmák és nehézségek a szociális ellátások, szolgáltatások és az igazgatási reformelképzelések terén, 2005. *Esély* 16 (3), P. 35.

[35] Ibid. Pp. 50–51.; Rozsnyai, F. K. Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure // *Central European Public Administration Review. 2019. Vol.* 17 No. 1. Pp. 9–10.

[36] Balázs, I. 'L'intercommunalité en Hongrie' // in Steckel-Assouère, M. C. (ed.), *Regards croisés sur les mutations de l'intercommunalité*. Paris : L'Harmattan, 2014. P. 428.

[37] Belügyminisztérium: *A helyi önkormányzati rendszer tizenöt éve. 1990–2005. 15 év a magyar demokrácia szolgálatában*. Budapest : BM Duna Palota és Kiadó, 2005.

[38] Hoffman, I. A helyi önkormányzatok társulási rendszerének főbb vonásai // *Új Magyar Közigazgatás. 2011. Vol.* 4 (1). P. 31.

3.2.2. Partial reforms of the personal social services

In 2007 a partial social service reform was passed by the Hungarian Parliament. The reform act amended the act on social administration and benefits. The decentralised, local level centred model remained but the partial reform tried to solve several problematic elements of the service delivery system. The funding of the services has been partly transformed: the share of the central funding in the field of the basic social services was increased, which resulted the fast increase of the recipients of the basic social services. For example, in 2007 45 989 persons were performed by social home care but 48 120 persons were performed in 2008 and 63 392 persons were performed in 2009 (KSH, 2017[39]). The service delivery tasks of the inter-municipal associations were encouraged by the funding reform, as well. The share of the grant for the joint service provision was increased.

The care need test was amended as well. A new model was established: the care need test was performed by an independent commission which was organised by the chief public servants of the town municipalities (by the town clerks — *jegyző).* The detailed conditions of the test were regulated by a ministerial decree and this regulation tried to objectivise the test.[40]

3.2.3. The effects of the constitutional and municipal reforms. The age of centralisation after 2011

The former municipal regulation was changed radically, the former decentralized model has been transformed by the new Constitution — the Fundamental Law of Hungary — and by the new Municipal Code — the Act CLXXXIX of 2011 on the Local Self-Governments of Hungary (hereinafter Mötv). The local service performance role of the municipalities has been weakened, and the scope of the tasks has become narrower. The legislator is allowed to reduce the local government tasks by the new regulation. Due to this remodelling, the concentration of the municipal local services has partially lost its significance. The regulation on voluntary tasks has been changed, as well. A simple model has been chosen by the central government to reduce the fragmentation of the public service system: the most problematic service provisions were centralized and now they are performed by the local agencies of the central governments. The local government tasks have been significantly reduced, which is reflected by the size of the local government expenditure: before the reforms, in 2010 the total local government expenditure was 12.8% of the GDP, while in 2016 it was 8.1% only (see Table 3).

Table 3

Local government total expenditure in Hungary (in % of the GDP) 2002–2015

Year	2002	2006	2010	2011	2012	2013	2014	2015
Local government total expenditure (in % of the GDP)	12.9%	13.0%	12.8%	11.6%	9.4%	7.6%	7.9%	8.1%

Source: Eurostat, 2016[41]

The main tasks of the education, inpatient care, residential social care and residential child protection are performed by the agencies of the central government[42].[43] The county municipalities lost their tasks in the field of social services (included the services of children protection). Although the basic social services are provided by the local level municipalities and several residential care in the field of

[39] Központi Statisztikai Hivatal (2017): *Éves társadalomstatisztikai adatok 2000–2016* [Electronic resource]. URL: http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_fsi002b.html?down=644 (date of access: 17.06.2017) (KSH, 2017).

[40] Rácz, K. Szociális feladatellátás a kistelepüléseken és a többcélú kistérségi társulásokban // In: Kovács, K. & Somlyódyné Pfeil, E. (eds.): *Függőben. Közszolgáétatás-szervezés a kistelepülések világában.* Budapest : KSZK ROP 3.1.1. Programigazgatóság, 2008. Pp. 193-194.

[41] Eurostat (2016): *Total Government Expenditures* [Electronic resource]. URL: http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do;jsessionid=9ea7d07e30dcd247b519937c4d909261df02fe3369b7.e34MbxeSahmMa40LbNiMbxaMchmTe0?tab=table&plugin=1&pcode=tec00023&language=en (date of access: 17.06.2017).

[42] Fazekas, J Central administration // In Patyi, A. & Rixer, Á. (eds.): *Hungarian Public Administration and Administrative Law.* Passau : Schenk Verlag, 2014. Pp. 298–301.

[43] The main tasks of the education, inpatient care, residential social care and residential child protection are performed by these agencies. The maintenance of the state-run schools belongs to the responsibilities of the Klebelsberg Maintainer Center which is a central agency with district and county level bodies. The residential social care and children protection institutes are maintained by the county agencies of the Directorate General of the Social and Children Protection. The inpatient health care institutions are maintained by the National Healthcare Service Center. Thus the local governments are mainly responsible for the settlement operation, for the maintenance of the kindergartens, for basic social care, for basic services of child protection, and for cultural services (Balázs & Hoffman 2017: 12-13).

elderly care can be performed by these communities, the majority of the provision of residential care was nationalized. The majority of the providers of residential social care and the children protection institutes are maintained by the county agencies of the Directorate General of the Social and Children Protection which is an agency of the Ministry of Human Capacities.[44]

The transformation of the role of the central administration can be observed by the change of total expenditure of the budgetary chapter — practically the sectors — directed by the Ministry of Human (formerly National) Capacities (see Table 4).

Table 4

Total expenditures (in million HUF) of the budgetary chapter directed by the Ministry of Human Capacities

Year	Total expenditures (in million HUF) of the budgetary chapter directed by the Ministry of Human (formerly National) Resources
2011	1,535,370.6
2012	1,949,650.5
2013	2,700,363.9
2014	2,895,624.8
2015	3,049,902.2
2016	3,011,947.7

Source: Act CLXIX of 2010 on the budget of the Republic of Hungary, Act CLXXXVIII of 2011, Act CCIV of 2012, Act CCXXX of 2013, Act C of 2014 and Act C of 2016 on the central budget of Hungary

Inflation rate was 3.9% in 2011, 5.7% in 2012, 1.7% in 2013, and -0.9% in 2014 based on the data of the Hungarian Central Statistical Office.

Although the central budget support of the municipalities has been reduced the in 2012 the funding of the basic social care was increased, especially the funding of the social home care. The funding of the municipal social services was strengthened by the new municipal finance model which was based on the actual expenses.

3.2.3. Reform of the last years

The last reform of the Hungarian municipal social system was in 2015. The reform was focused primarily on the social benefits. In the new model the central budget support of the municipal social cash benefits was strongly reduced, several municipal cash benefits were nationalised. The most important transformation of the reforms was the amendment of the financing of the social benefits and services. In the new model primarily these benefits and services are financed mainly by the local business tax. The state aid is only a supplementary source for funding these services. The basic services are practically real municipal services, and the central government has only a compensative role.

The regulation on the social services in Hungary changed significantly in the last decade. The changes were connected to the municipal and public service reforms. Although the majority of the residential social care was nationalised the social services have remained the most important municipal services.

These changes impacted the spatial structure of the Hungarian social service system, as well. In the next point I would like to review this impact.

4. Spatial structure of the personal social services in Hungary

4.1. Hypothesis

As I have earlier mentioned, the reforms in the last decade tried to solve the economy of scale problem of the Hungarian personal social services, which were based on the fragmentation of the Hungarian municipal system. The provision of the high cost services, the personal services was nationalised.

Secondly, the new provision of the basic services was encouraged by the new financing methods, especially in the rural areas. The service provision of the smaller municipalities has been supported

[44] Fazekas, J., Fazekas, M., Hoffman, I., Rozsnyai, K., Szalai, É. *Közigazgatási jog. Álatalános rész I.* Budapest : ELTE Eötvös Kiadó, 2015. Pp. 269–270.

by the increased finance, by the support of the inter-municipal cooperation and by the new block grant.

Thus two hypotheses could be formulated. *First hypothesis* is that the accessibility to the social service has been improved by the new financial mechanism. The *second hypothesis* is based on the strong nationalisation of the residential care. The spatial structure of the residential social services has been primarily impacted by the nationalisation.

4.2. Analysis and findings

To examine these hypotheses, I analysed the number of the recipients and the share of recipients of two basic social services (social meal and social home care). As I have mentioned earlier, they were not provided by almost the quarter of the Hungarian communities in 2005. If we look at the number of the recipients of social catering it could be observed that the share of the recipients has been increased significantly between 2008 and 2011 when the funding reforms occurred. The share of the recipients decreased modestly after 2012 when the central budget support decreased, and the municipal own revenues were preferred. Similar changes occurred in the number and share of the recipients of the social home care (see Table 5, 6 and Figure 1).

If we look at the regional data, it could be observed that the number and the share of the recipients increased more in all regions but the most significant growth can be observed in those regions where the spatial structure is not very fragmented and the medium-sized villages (with 2 000 to 4 000 inhabitants) are dominant.[45] Thus primarily the access to these services has been strengthened. The modest decrease of the recipients shows that the service provision is sensible to the decrease of the central budget support.

Table 5

Recipients of social catering in Hungary (in share of the population, in %)

Recipients of social catering in Hungary (in share of the population, in %)								
NUTS 2 region / Year	Central Hungary	Central Transdanubia	Western Transdanubia	Southern Transdanubia	Northern Hungary	Northern Great Plain	Southern Great Plain	Hungary
2008	0,59	0,9	1,20	1,43	1,66	1,38	1,13	1,08
2011	0,72	1,35	1,57	1,98	2,15	2,18	2,03	1,55
2012	0,79	1,34	1,51	1,93	2,28	2,53	2,28	1,67
2015	0,63	1,31	1,49	1,89	2,41	2,89	2,76	1,73

Source: KSH, 2017

Table 6

Number of recipients of social home care in NUTS-2 regions of Hungary

Number of recipients of social home care in NUTS-2 regions of Hungary				
Regions / Year	2008	2011	2012	2015
Central Hungary	6683	7548	9914	7753
Central Transdanubia	4144	6426	9260	10397
Western Transdanubia	4897	7598	8525	8485
Southern Transdanubia	6779	9508	10753	10600
Northern Hungary	7490	12252	19312	16568
Northern Great Plain	8746	23716	45537	38657
Southern Great Plain	9181	17893	21980	25921

Source: KSH, 2017

[45] Szabó, P., Farkas, M. Different types of regions in Central and Eastern Europe based on spatial structure analysis // In: Černěnko, T., Sekelský, L. & Szitásiová, V. (eds.): *5th Winter Seminar of Regional Science.* Bratislava : Society for Regional Science and Policy, 2015. Pp. 8–10.

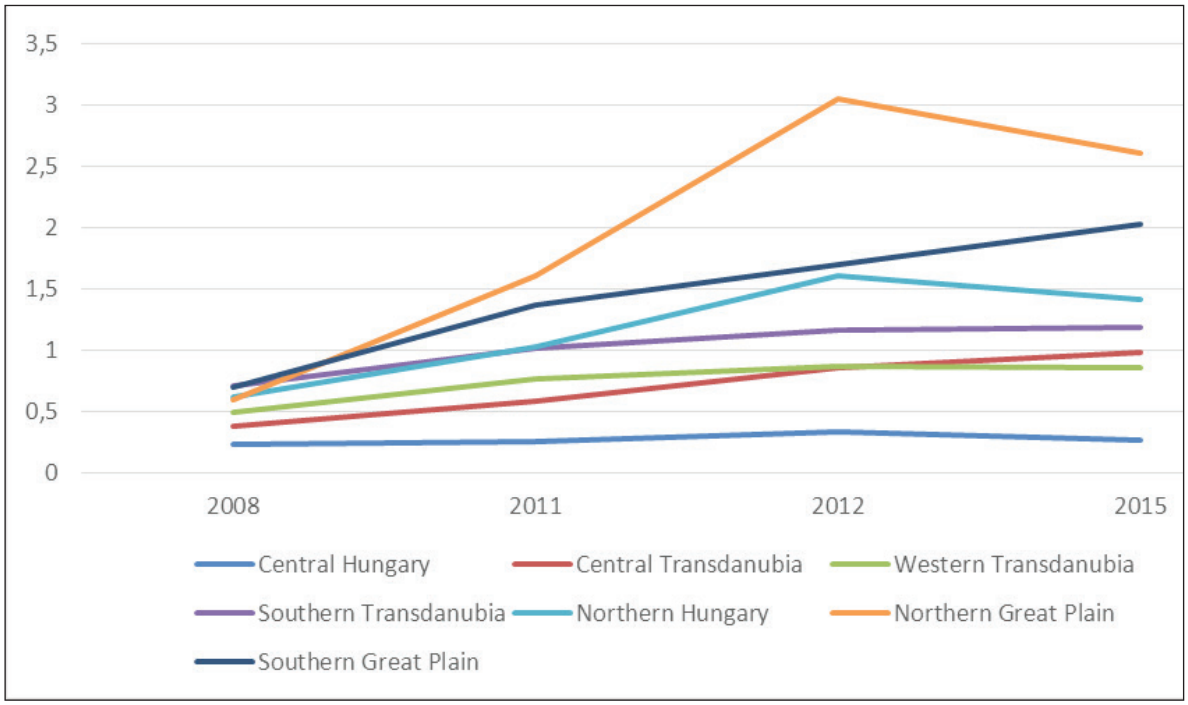

Figure 1. Social home care — share of recipients (in %)

Source: KSH, 2017

The *hypothesis 2* has been certified by the statistical data: the service provision is services is very sensitive to the financing, especially to the central budget supports. Thus, the spatial structure of the services became more balanced after the reforms in 2008. The system was impacted by the municipal reform limitedly, especially the preference of the own revenues has had modest effect on the structure of the basic services.

If we look at *the residential social care* only a modest change can be observed. Although the service system became moderately balanced, the regional differences partially decreased, but practically the whole system has not been transformed (see Table 7 and Figure 2).

Table 7

Number of recipients of residential social care

Number of recipients of the residential social care				
NUTS — 2 regions / Year	**2008**	**2011**	**2012**	**2015**
Central Hungary	20640	21417	21847	22630
Central Transdanubia	8833	9607	9770	9836
Western Transdanubia	9304	9477	9721	9630
Southern Transdanubia	9201	9818	9853	9858
Northern Hungary	10239	10904	11111	10797
Northern Great Plain	14786	13542	13692	14077
Southern Great Plain	13441	14121	14106	14152

Source: KSH, 2017

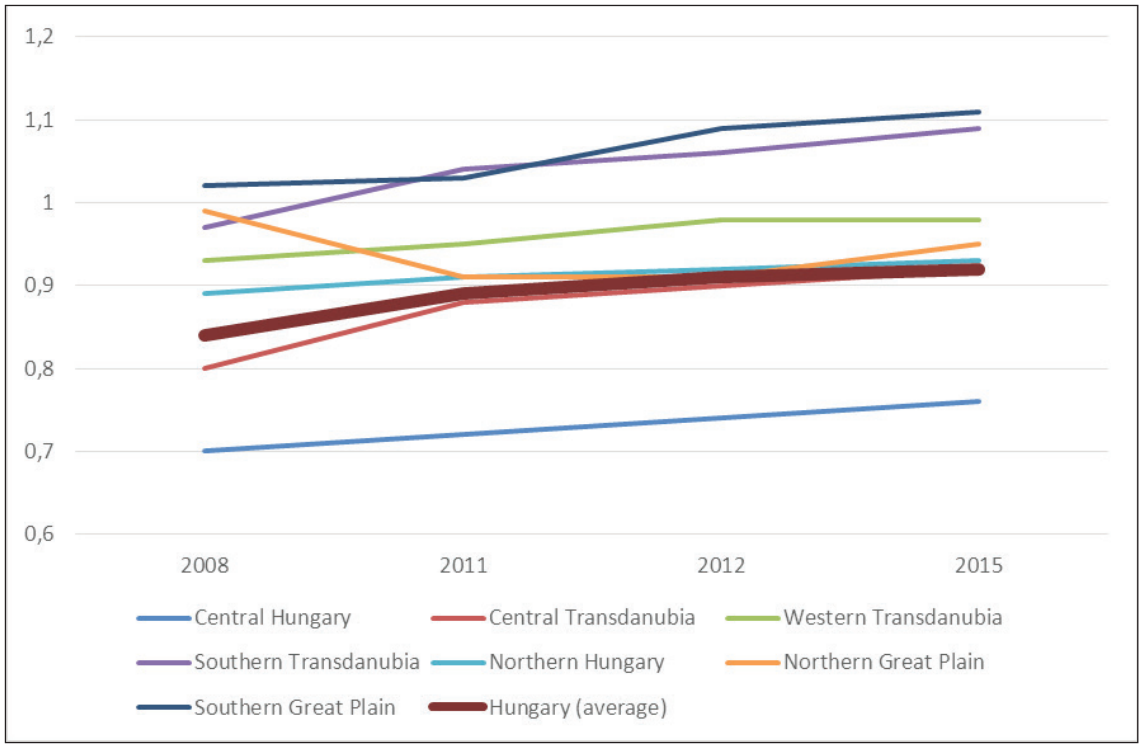

Figure 2. Share of the recipients of residential social care (in % of the population)

Source: KSH, 2017

The *hypothesis 1* has been just partially certified: the nationalisation had just a modest impact on the residential social care system. It can be observed that the service provision is strongly impacted by the transformation of the financing then the transformation of the organisation and management of these services.

5. Conclusions

If we look at the structure of the Hungarian personal social services, it could be stated that the community (1st tier municipality) centred system has remained however the majority of residential care service providers were nationalised after 2012. The main actors in the system are the local municipalities. The role of the municipal own revenues increased in the funding of the social care because of the reforms after 2015.

Although the reason of the nationalisation of the residential care was to balance the unequal and fragmented service provision system, this transformation impacted only moderately the system of social services. This effect was far more limited that it was expected by the experts. Although the system became a bit more balanced the former inequalities and the fragmentation have remained.

If we look at the Hungarian reforms it could be observed that the most effective reforms are the reforms on the funding the organisational reforms have just limited effect and impact.

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The Corona Virus (Covid-19) Pandemic and the Challenge of Healthcare Infrastructure in Nigeria: what Role for Public-Private Partnerships?

Augustine Edobor Arimoro, PhD
St Mary's Law School
St Mary's University Twickenham London
augustine.arimoro@stmarys.ac.uk

ABSTRACT
While it is not new that Nigeria is challenged by a huge infrastructure deficit, the COVID-19 pandemic has exposed the country's comatose healthcare system. Given the country's dwindling revenue, massive debt profile and the inability of the public-sector to efficiently manage public facilities in the country, this paper examines how the public-private partnership model of infrastructure procurement can be deployed as a solution for Nigeria's healthcare crisis. In addition to the above, this paper takes a look at how a partnership with the private sector can aid Nigeria's quest towards achieving healthcare-related Sustainable Development Goals. The paper also considers two healthcare-based projects as case studies to serve as lessons for future projects in the country. Among others, the paper recommends a holistic long-term solution for the country's healthcare needs.
Keywords: COVID-19, public-private partnership, healthcare, Nigeria

Introduction

Since the outbreak of the Corona Virus (COVID-19) pandemic and the record of the index case in Nigeria, the ugly shape of the healthcare sector in the country has raised a cause for concern.[1] Interestingly, Nigeria's Secretary to Government of the Federation (SGF), Mr Boss Mustapha, who is also the chair of the country's Presidential Task Force on COVID-19, was quoted by the media to have said that he never knew that the "entire healthcare infrastructure was in the state at which it is until I was appointed to do this work."[2] The healthcare system in Nigeria is poorly developed[3] due to several years of wanton neglect by the political class. Again, even where budgetary allocations are made for the healthcare sector, the reality on ground does not show that the funds have been appropriated for the purpose. For example, Nigeria's First Lady, Mrs Aisha Buhari was quoted in the media to have said that the Aso Rock Clinic could not treat her for a minor illness as there were no working X-Ray machines or even syringes at the clinic despite the annual budgetary allocations made for the clinic.[4] Sadly, the death of the former Chief of Staff to the President, Mallam Abba Kyari, who was a high profile casualty of the COVID-19 pandemic, re-echoed the need for Nigeria to pay attention to the country's healthcare infrastructure.[5] Regrettably Nigeria's healthcare system is reported to rank only better than those of the Democratic Republic of Congo, Central African Republic and Myanmar.[6]

It is certain that upgrading the healthcare sector in Nigeria requires a huge capital outlay given the current state of healthcare infrastructure in the country. Furthermore, given dwindling foreign revenues, competing demands for lean resources and a high debt profile, it is almost an impossibility for the government alone to revamp the state of healthcare in Nigeria. Another challenge with government entirely funding the sector is the problem of massive corruption in that sector. How else can one explain

[1] Paul Adepoju, 'Nigeria Responds to COVID-19; First Case Detected in Sub-Saharan Africa' (2020) 26 *Nature Medicine* 444-448

[2] Nike Adebowale, 'My Statement on Nigeria's Poor Health Infrastructure Misinterpreted – SGF' *Premium Times* 10 April 2020 available at < https://www.premiumtimesng.com/news/top-news/387249-my-statement-on-nigerias-poor-health-infrastructure-misinterpreted-sgf-mustapha.html> accessed 26 June 2020.

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that despite the allocations to a clinic meant to serve the President and Commander-in-Chief, the clinic is a mere consultation facility without the needed equipment budgeted and paid for? The need therefore, to have government partner with the private sector to fund, design, build/rehabilitate, manage and operate healthcare facilities cannot be overemphasised. As a result of the COVID-19 pandemic,[7] it is now clear to the political class and the citizens that a policy re-direction towards improving the healthcare sector in Nigeria is long overdue.

The aim of this paper is to highlight how the government in Nigeria can revive the healthcare sector through partnership with the private sector. The advantages of doing so include the fact that the government can leverage on private finance and expertise. Again, the government can concentrate on policy-making and allow private entities to run the healthcare sector efficiently and at the same time deal with the corruption bedevilling the sector. In this regard, the words of Laurence Carter, a former director of PPP Transaction Advisory at the International Finance Corporation (IFC) remains apt:

It is impossible to overstate the importance of healthcare – after all, worldwide economic growth and development depend on it – but governments' ability to provide affordable, quality healthcare dwindles every year. The challenge is now to engage private partners to deliver public benefits. Innovative, forward-looking public-private partnerships in healthcare do this, giving businesses an unparalleled opportunity to do well while doing good.[8]

What Are Public-Private Partnerships?

The huge costs associated with infrastructure funding, budget deficits, competing demands for state resources and the need for efficient management of public facilities mean that the public authority alone cannot cope with modern-day challenges.[9] Whilst there is no universal definition for the term 'public-private partnership (PPP),' writers on the subject agree that it is a collaboration between the public-sector and the private-sector for the provision of infrastructure facilities.[10] It is worthy of note also that authors and institutions often define PPP from their various viewpoints.[11] Following from the above, it is pertinent to differentiate between a PPP and other forms of procurement which sometimes appears blurred in many definitions. In the context of the discussion in this paper, a PPP may be defined as 'any contractual or legal relationship between public and private entities aimed at improving and/or expanding infrastructure services, but excluding public works contracts.'[12] For the sake of clarity, all PPP transactions, in the sense that it is used in this paper, must show at least four important characteristics in order to be so recognised. These elements include — that it is a long-term contract, the existence of a project company responsible for the design of the facility, the private sector financial investment is repaid from revenues generated from the asset and a transfer of the facility back to the government at the end of the PPP contract.[13]

Can PPPs Solve Nigeria's Healthcare Infrastructure Problem?

The first available option for the public-sector to partner with the private-sector in revamping the healthcare stock in Nigeria is via privatisation, i.e. the transfer of ownership rights in a state-owned enterprise to the private sector.[14] Unfortunately for Nigeria, privatisation has not provided the needed solution to the country's infrastructure problem. For example, the privatisation of the former Nigeria Telecommunications (NITEL) and what has happened to the power sector in Nigeria are clear cases of the country's misadventure with the privatisation option.[15]

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[7] David Baxter and Carter B Casady, 'Proactive Strategic Healthcare Public-Private Partnerships (PPPs) in the Coronavirus (Covid-19) Epoch' (2020) 12 *Sustainability* 5097 DOI: 10.339Q/su12125097.

[8] International Finance Corporation (IFC), 'Health PPPs' (2011) *Handshake IFC's Q.J. Public-Private Partnership* at 3.

[9] Augustine Arimoro, 'Public Private Partnership and the Right to Property in Nigeria' (2019) 19(2) *African Human Rights Law Journal* 763-778.

[10] Ibid.

[11] George Nwangwu, *Public-Private Partnerships in Nigeria* (Springer nature 2016) 3.

[12] Jeffrey Delmon, *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (Cambridge University Press 2011) at 3.

[13] ER Yescombe, *Public-Private Partnerships in Sub-Saharan Africa* (UONGOZI Institute 2017) 7.

[14] Augustine Arimoro, 'An Appraisal of the Framework for Public Private Partnership in South Africa' (2018) 13(3) *European Procurement and Public Private Partnership Law Review* 214.

[15] Alimi M Abiola and RO Abiola, 'Impact of Privatisation on the Growth of Nigerian Public Enterprises: A Case Study of Selected Enterprises in Nigeria' (2015) available at <dspace.futa.edu.ng/jspul/handle> accessed 10 April

In the modern era across the globe, PPPs are now widely deployed to deliver infrastructure projects.[16] There is no doubt that Nigeria is going through a serious challenge in terms of dwindling financial revenues and a massive debt burden. As of March 2020, the Senate put Nigeria's total debt profile at N33 trillion after its approval of $22.7 billion foreign load for the federal government.[17] With this growing debt profile and the burden of servicing the loans, there is not enough for the federal Government of Nigeria to positively change the fortunes of the country's dilapidated healthcare sector. In addition, Nigeria's growing population[18] which is estimated to grow potentially by 80 million by the year 2050 requires immediate action by the country's policymakers.[19] It is important to begin planning for the long-term. As it is, the available healthcare facilities in the country, even though moribund, are also overstretched.

PPPs can provide succour to the public authority in Nigeria providing the much-needed funds, expertise and efficient management of the hospitals/health facilities in the country.[20] A holistic PPP strategy for the country, can attract foreign and domestic funding for Nigeria's long-term goals as far as the healthcare sector is concerned. Through the PPP model, the Nigerian government can achieve the following:[21]

- Financing of projects for healthcare facilities;
- The designing of modern healthcare facilities and care delivery models;
- Building of greenfield[22] facilities or the rehabilitation of brownfield[23] facilities;
- Maintenance of the facilities and equipment. This is one area where the public-sector has failed in Nigeria;
- The operation, supply of applicable equipment, information technology, management/delivery of nonclinical services.

How Do PPPs Work?

The public authority (acting via a ministry, department or agency (MDA)) identifies the need for a project and then advertises that need to the public. A competitive process will then follow under which private-sector entities will bid to win the right to deliver the project. The winning private-sector bidder is then awarded the concession to implement the solution.[24] The private-sector party will then contract with the public entity and raise funds from willing investors and lenders to deliver the project. In practice, a special purpose vehicle (SPV) will be set up by the project company to shield the private sector sponsors of the project from the risk of insolvency peradventure the project fails.

The sponsor will manage the activities of the SPV. Typically, the SPV is set up as a subsidiary of the sponsor. The sponsors in practice are the equity investment arms of large construction firms or asset management companies. The agreement is usually documented in the shareholders' agreement. Thus, the project company enters a contract with the public-sector detailing the terms and conditions of the project. This document is referred to as the concession agreement. The SPV will obtain private funding from lenders and this is done via financing agreement. There will also be direct agreements. Lenders may include commercial banks, export credit agencies (ECAs), multi-lateral agencies (MLAs) and development financial institutions (DFIs). ECAs are government or quasi-government institutions. They provide finance to promote national exports. An ECA can act as a guarantor, an insurer or a lender.[25] MLAs are government institutions owned by several governments. Whereas an ECA's chief aim is to support national economic

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2015.

[16] Caiyun Cui, Yong Liu, Alex Hope and Jianping Wang, 'Review of Studies on the Public-Private Partnerships for Infrastructure Projects' (2018) 36 *International Journal of Project Management* 773.

[17] Deji Elumoye, 'Nigeria's Debt Profile Now N33tn- Senate' *This Day* 17 March 2020 available at <https://allafrica.com/stories/202003170021.html> accessed 26 June 2020.

[18] Currently estimated to be about 200 million people.

[19] IARAN, 'Nigeria: Now and in 2030' (2016) available at< https://www.accioncontraelhambre.org/en/nigeria-now-and-2030> accessed 24 June 2020.

[20] Robert Osei-Kyei and Albert PC Chan, 'Comparative Study of Government's Reasons/Motivations for Adopting Public-Private Partnership Policy in Developing and Developed Economies/Countries' (2018) 22(5) *International Journal of Strategic Property Management* 403-414.

[21] PWC, 'PPPs in Healthcare: Models, Lessons and Trends for the Future' (2017) available at <https://www.pwc.com/gx/en/industries/healthcare/publications/trends-for-the-future.html> accessed 26 June 2020.

[22] Greenfield projects refer to new projects that were never in existence before the PPP arrangement.

[23] Brownfield refer to the rehabilitation of existing projects via the PPP arrangement.

[24] Allen Overy and Virginia Tan, 'Public-Private Partnership' (2015) available at <w.a4id.org/sites/default/files/files/[A4ID] Public-Private Partnership.pdf> accessed

[25] ibid.

interests, an MLA's mandate is to further economic development in developing countries. Major MLAs include the Asian Development Bank (ADB) and the African Development Bank (AfDB).[26] DFIs provide long-term development finance for private-sector concerns in developing countries for example, USAid.

In a PPP, the public authority wins as it performs its role of providing infrastructure through private partners. On its part, the private-sector partner wins as, PPPs provide an opportunity for investors/promoters to get returns on investment (RoI). The general public also benefits as they get to use improved and modern facilities which are usually managed and maintained by experts. When the facility gets ready for use, depending on the type of PPP genre adopted, the government pays the operator for the use of the facility by members of the public or the members of the public pay tolls or charges to the operator for the use of the facility. In the former case, the PPP is regarded as a private finance initiative (PFI), while in the latter case the PPP is known as a concession. It is worthy of note that the Nigeria's main PPP law i.e. the Infrastructure Concession and Regulatory Commission (Establishment Etc) Act 2005 makes provision for concession styled PPPs. However, the wordings of the Rivers State PPP law for example, suggests that the Rivers State Government can arrange PFI-styled PPP projects.

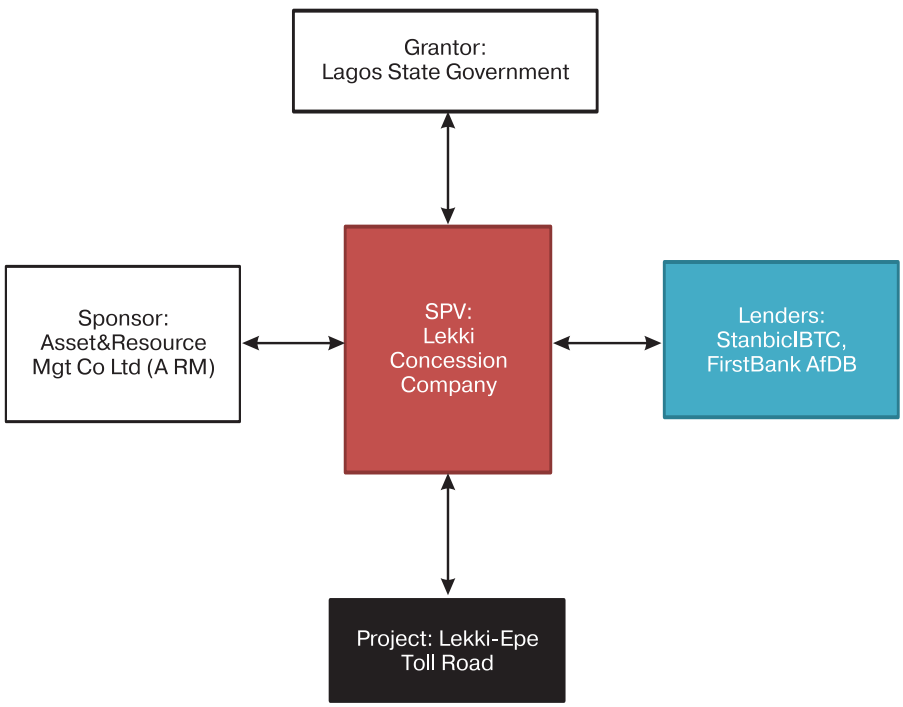

Figure 1. The Lekki-Epe Toll Road Concession Project: Source — Author

Nigeria's Adoption for the PPP Model of Infrastructure Procurement

The growth of any economy will be truncated without the availability of adequate public infrastructure and services. PPPs offer a good opportunity for the governments around the world to embark on other core social and economic programmes while relying on a structured partnership with the private sector to provide for the infrastructure needs of the populace. With regards to emerging economies, the impact and potential of PPPs in their development cannot be over stressed. For example, the resulting effect of the global financial crisis between 2007 and 2010 was a shortfall of capital inflows into emerging economies.[27] Notwithstanding the global recovery experienced in the last few years before the current global COVID-19 pandemic, the cost of foreign loans and the effect of the loans on the economy make PPP a better option.

To reduce Nigeria's infrastructure deficit, the PDP-led administration of President Olusegun Aremu Obasanjo[28] had attempted oil for infrastructure swap deals with Asian Oil Companies. That oil for infra-

[26] ibid.

[27] Tony Dolphin and Laura Chappell 'The Effect of the Global Financial Crisis on Emerging and Developing Economies' (2010) *Report of the Institute for Public Policy and Research* at 8.

[28] Mr Olusegun Obasanjo was Nigeria's civilian president between May 29, 1999 and May 29, 2007

structure swap deal turned out to be a total failure as was revealed by an audit carried out when the late Alhaji Musa Yar'Adua, also of the PDP, served as president and commander-in-chief of the armed forces of the federal republic of Nigeria.[29]

It is noteworthy that a high incidence of cases of corruption within the public sector in the country made the choice of PPPs an inevitable one. Before Nigeria embarked on a Privatisation and Commercialisation regime during the PDP led-administration of President Olusegun Obasanjo, nearly all the public utility companies were operating at a loss even though taxpayers paid for the use of such facilities. Bad management and outright thievery continued to drain the Nigerian economy and thereby causing monumental losses to the country. For example, the inherent corrupt practices of public sector officials negatively affected the fortunes of the National Electric Power Authority (NEPA),[30] the Nigerian Telecommunications (NITEL)[31] and many other public-sector corporations causing a situation of chaos and despair[32]. There is no doubt that when it comes to management of business concerns, especially in the developing world, the private sector is better placed to succeed. The private sector among other qualities, can offer better management of resources, ensure productivity as well as put a check to the loopholes that encourage corrupt practices on the part of public servants.

Utilities under the management of the public sector in Nigeria have failed over the years and have been a subject of research.[33] The provision of uninterrupted supply of power, efficient telephony services, portable water supply and good quality water, air, rail as well as road transport services have been elusive in the Nigerian economy despite the country's oil wealth.[34] The obvious reason is that the public-sector in Nigeria is ineffectual in the management of resources on the one hand as well as being corrupt on the other hand.[35]

A study of 179 Nigerian manufacturing companies revealed that 92 per cent of the firms surveyed owned power generating plants.[36]This is the same with many small businesses and private homes in the country. Poor management on the part of successive administrators of the country's former sole power company was the chief reason for the several years of decay in the sector. The pitiable state of power supply in the country has been a major source of worry to successive administrations. To provide a solution to the country's constant power outage troubles, the FGN unbundled the Power Holding Company of Nigeria (PHCN) and eventually sold what was left as power generating companies (GENCos) and power distributing companies (DISCos) to investors.

In the face of unstable oil prices[37] and resultant shortfall in revenue, it is not realistic to expect the federal government of Nigeria or government at any tier in the country to entirely meet up with the traditional obligation of providing for the infrastructure needs of the country (or states) as other demanding obligations such as providing social services and the payment of salaries and allowances are also challenges that government must cope with.

Sustainable Development Goals and Healthcare

The implementation as well as the achievement of the 2030 Agenda for Sustainable Development and Sustainable Development Goals (SDGs) presents a significant challenge to the government.[38] The SDGs are a blueprint to achieve a better future for all. They were designed to address the global chal-

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[29] Copyright Oxford Analytics Ltd, 'Nigeria: PPPs May Drive Infrastructure Rehabilitation' (2010) *Oxford Analytics Daily Brief* Service at18.

[30] NEPA used to be the Nigeria's sole power generating and distribution corporation. It was renamed Power Holding Corporation of Nigeria (PHCN) before it was unbundled to give rise to an era of multiple power generating and distribution companies with private sector participation.

[31] NITEL used to be Nigeria's sole telecomm firm with a monopoly on fixed telecom services.

[32] Asaju Kayode, Sunday O Adagba and Felix Anyio, 'Corruption and Service Delivery: The Case of Nigerian Public Service' (2013) 1(1) *Wudpecker Journal of Public Administration* at 3.

[33] Ademola Ariyo and Afeikhena Jerome, 'Utility Privatisation and the Poor: Nigeria in Focus' (2004) *Global Issue Papers* No.12. at 15

[34] ibid.

[35] ibid.

[36] ibid.

[37] Crude oil is the mainstay of the Nigerian economy. It is estimated to account for over 75 percent of revenue accruing to the country. See Gbadebo O Odularu 'Crude Oil and the Nigerian Economic Performance' *Oil and Gas Business* (2008) available at <http://www.ogbus.ru/eng/authors/odularo/odularo_1.pdf> accessed 23 November 2015

[38] Krishnan Sharma, 'Public-Private Partnerships and the 2030 Agenda for Sustainable Development' (2016) available at < https://blogs.worldbank.org/ppps/public-private-partnerships-and-2030-agenda-sustainable-development> accessed 25 June 2020.

lenges mankind faces including poverty, inequality, climate change, environmental degradation, peace and justice.[39] The 17 goals are all related and it is important ensure their achievement by the year 20130.[40] The goals include:

- Goal 1: No poverty;
- Goal 2: Zero hunger;
- Goal 3: Good health and wellbeing;
- Goal 4: Quality education;
- Goal 5: Gender equality;
- Goal 6: Clean water and sanitation;
- Goal 7: Affordable and clean energy;
- Goal 8; Decent work and economic growth;
- Goal 9: Industry, innovation and infrastructure;
- Goal 10: Reduced inequalities;
- Goal 11: Sustainable cities and communities;
- Goal 12: Responsible consumption and production;
- Goal 13: Climate action;
- Goal 14: Life below water;
- Goal 15: Life on land;
- Goal 16: Peace, justice and strong institutions; and
- Goal 17: Partnerships.

This paper addresses Goals 3 and 9 with particular emphasis on the healthcare sector. The SDGs are targets sect out by member states of the United nations to be achieved by the year 2030 in order to ensure sustainable development. There is therefore need for the government of Nigeria to pursue a strategy to use PPP to drive development in the healthcare delivery system in the country and to ensure the realisation of the SDGs.

Important Points to Note for Healthcare-based PPPs

There are several fundamentals that need to be put in place in order to structure efficient health sector-based PPPs. These fundamentals or drivers are referred to also as critical success factors (CSFs) by PPP experts. These fundamentals include the need to ensure a healthy investment environment for PPPs, the provision of a favourable legal framework, transparency and anti-corruption, ensuring that projects provide the right value for money. According to Babatunde *et al* the CSFs for successful PPP projects are a competitive procurement process, a thorough and realistic assessment of the cost and benefits, a favourable framework, an appropriate risk allocation and risk sharing, government involvement by providing a guarantee, political support, stable macroeconomic policy and the availability of financial market.[41]

Need for a Healthy Investment Environment

In so far as a healthy investment climate is delivered and the proper practice is put in place to ease doing business in any given economy, investments in infrastructure can become an alternative asset class for private investors provided an acceptable risk/return profile is offered.[42] It is essential that there is political will on the part of the public authority to pursue PPP and the legal and regulatory regime must be appropriate to ensure PPP success. The three elements mentioned above are vital and the lack of any of them will certainly discourage potential investors.

A Favourable Framework for PPPs

There must be an enabling structure in place prior to initiating PPPs in the first instance. An enabling framework must include a legal framework. There must be legislation or a body of legislation that backs PPP. It has been noted that certain other legislation must be amended and repealed to make PPPs practicable. It may even require constitutional amendments in some cases. For example, in Nigeria, there are some items in the Exclusive Legislative List in the Second Schedule to the 1999 Constitution of the

[39] United Nations, 'About the Sustainable Development Goals' (2020) available at < https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 25 June 2020.

[40] Ibid.

[41] ibid 223.

[42] OECD, *Private Financing and Government Support to Promote Long-Term Investments in Infrastructure* (OECD 2014) 5.

Federal Republic of Nigeria (as amended), that fall within the purview of the federal government and no matter how needful a project is, a state government may not initiate a PPP project as touching any of the items on that list.

In a similar vein, there must be a regulatory framework to monitor PPP projects. For example, the Infrastructure Concession Regulatory Commission (Establishment Etc) Act 2005 (ICRCA 2005), apart from serving as the primary law for PPP projects involving the federal government of Nigeria and any of its MDAs, also established a regulatory commission to superintend over PPP projects as well as take into its custody all signed PPP agreements. Following from the above, it is fundamental that the framework must be clear and devoid of ambiguities. It is essential for the success of PPPs that the parties i.e. the public-sector and the private party understand what their role is and what part the other party should play.

Transparency and Anti-corruption

One of the challenges of development in emerging economies is the vexed issue of corruption. It is fundamental that if government must adopt PPP that the transactions must be free of corrupt practices. Good governance advocates transparency, equal treatment and open competition. The lack of these is a source of worry to potential investors whether foreign or local. It is not in doubt, that corruption increases the cost of doing business as well as poor output. To curb corrupt practices in PPP procurement, Delmon recommends the following:

- The use of financial and fiduciary management, ring fencing revenue and subsidy flows from government, to demonstrate project viability and attract investment;[43]
- Improved access to information about the project and the procurement process – for example, through a dedicated project website with all the relevant information for contract bidding and award. This will attract bidders and improve competition;[44] and
- The project procurement must be seen to be transparent and competitive.[45]

It is imperative therefore that for PPPs to succeed in emerging economies, the government must commit to the fight against corruption. In this regard, the efforts by the Nigerian government to fight corruption is well noted especially with the passing into law of the Corrupt Practices and Other Related Offences Act No. 6 of 2003 to underscore this commitment. Specifically, the Act in Section 14 provides as follows:

Any person who —

(a) ask for, receive or obtains property or benefits of any kind for himself or any other person; or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, on account of —

(i) anything already done or omitted to be done, or any favour or disfavour already shown to any person by a public officer in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a government department, public body or other organisation or institution in which the public officer is serving as such or

(ii) anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by a public officer in the discharge of his official duties or in relation to any such matter as aforesaid,

is guilty of an offence of official corruption and on conviction be liable to imprisonment for seven (7) years.

Value for Money

Value for Money (VfM) is a very important concept in PPPs. It is about maximising the impact of each naira spent to improve the lives of the ordinary citizen. The achievement of VfM outcome in the use of public funds is considered vital in the procurement and delivery of each public investment project. VfM is a consideration for the sponsoring agency throughout the process of procurement. The UK Treasury defines VfM as '... the optimum combination of whole-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirement.'[46]

Governments across the globe are gradually shifting towards PPPs to deliver infrastructure to pursue VfM. VfM is not necessarily the choice of goods or services which is based on the lowest bid price, but

[43] Jeffrey Delmon, op cit (note 12) 16.
[44] Ibid.
[45] Ibid.
[46] The World Bank, *Value-For-Money Analysis – Practices and Challenges* (The World Bank 2013) 10.

a choice based on the whole life costs of the project or service.[47] The VfM test is necessary to determine the suitability of a project to be executed as a PPP. Basically, a PPP may provide VfM compared to traditional procurement if the advantages of risk transfer combined with private sector incentives, experience and innovation – in improved service delivery or efficiencies over the project lifetime outweigh the increased costs of contract and financing.[48] It follows that the granting authority (public sector) must determine the VfM for both traditional procurement vis-à-vis PPP before a choice is made whether the project is PPP viable. Simply put, the purpose for VfM analysis is to indicate whether to implement proposed projects as PPPs or to use other forms of traditional public procurement to execute a given project.

Risk Allocation and Mitigation

Due to the complex nature of PPP arrangements, it is incumbent that mechanisms are put in place to address the risks involved. To make a project bankable, the SPV would need to enter subcontracts with specialist counterparties better placed to manage and bear those risks. It is also important for insurance to be obtained for the key insurable risks.[49] Risk management and mitigation must be a priority at every phase of the project. The public sector may provide certain guarantees or subsidies for specific risks. Again MLAs, BLAs and ECAs will provide debt, equity, insurance and may guarantee certain risks as well.[50] Some of the risks that need to be addressed in all PPP arrangements include, political risk, performance risk, currency exchange risk, environmental risk, demand risk, financing risk and legal and regulatory risk – for example, land acquisition for hospital construction may raise challenges. In Nigeria, the Land Use Act No. 6 of 1978 transfers ownership of land to the Governor of the state who may claim it for public purposes provided compensation is paid to the owner(s) of the land. The case of communal land has been one that has generated a lot of debate as to whether the Act is draconian in the sense that government can acquire land for the sake of the general interest of the public. It is however settled in the case of *Adole v Gwar51* that land can only be compulsorily acquired by the government save in accordance with Section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The combined effect of the Constitution and the Land Use Act 1978 is that land may not be compulsorily acquired in Nigeria by the authorities except the proper procedure is religiously complied with. Thus, in *Olatunji v Military Governor of Oyo State52* the court stated as follows:

...If a property is ostensibly acquired for public purposes and it is subsequently discovered that it has directly or indirectly been diverted to serve private need, the acquisition can be vitiated. The acquiring authority cannot rob Peter to pay Paul by diverting one citizen of his interest in property by vesting same in another.

Again, in *Ibafon Co. Ltd v Nigeria Ports Plc,53* the court reiterated the following position:

Without the acquisition of the land by the government, there would be nothing to assign to the first defendant for its use by the government. And if the acquisition of the land suffers some illegality, any subsequent act predicated on an illegally acquired land is null and void. This is so because no one gives what he does not possess, the maxim '*nemo dat quod non habet.'* He gives not who has nothing.

Other legal and regulatory issues that need to be considered include labour relations, tax and accounting, costs, depreciation; VAT offsetting as well as regulatory mechanisms[54]. Changes in the legislative and/or regulatory framework affect the facility during its operations could impact on operational costs and profits. The risk should thus, lie with the public sector since the private sector cannot control this type of risk.[55]

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[47] D. Morrallos and A. Amekudzi, 'The State of the Practice of Value for Money Analysis in Comparing Public Private Partnerships to Traditional Procurements,' (2008) 13(2) *Public Works Management and Policy* at 114.

[48] The World Bank, op cit (note 46) 10.

[49] Jeffrey Delmon, op cit (note 12) 114.

[50] ibid 115.

[51] (2008) 4 SCNJ 1 at 6.

[52] (1995) 5 NWLR (Pt. 397) 586

[53] (2000) 8 NWLR (pt. 667) 86 at 100

[54] Jeffery Delmon, op cit (note 12) 101

[55] Elisabetta Iossa, Gianarlo Spagnolo and Mercedes Vellez, 'The Risk and Tricks in Public-Private Partnerships' (2013) *IEFE The Centre for Research on Energy and Environmental Economics and Policy* Working Paper 64 at 18.

Funding of PPPs in Nigeria

One of the first steps a bidder in a PPP contract must take is to secure funding for the project. Usually a financial adviser, with experience in project finance and PPP is appointed.[56] The role of the financial adviser includes assisting in preparing a financial model for the project; advising on sources of finance; assisting in bid preparations; assisting in negotiation with the grantor; advising on selection of commercial bank lenders or placement of bonds and assisting in negotiation of financing documentations.

The main sources of PPP financing are term loans, bonds and infrastructure funds and equity contribution. Commercial banks are currently the largest providers of debt capital for infrastructure in Nigeria[57]. The challenge with this is that loans from Nigerian commercial banks are unsuitable for infrastructure needs due to their short tenure of between 3 to 7 years), high interest rates (up to 25 percent per annum) and their preference for tangible collateral[58]. Bonds are an option that can be used to source for funding for PPP in Nigeria. A bond issued by a project company is like a load from the project company's point of view. Buyers of project-finance bonds are investors who require RoI without taking equity risks, for example pension funds.[59] Some infrastructure funds are now available for investments in PPP projects in the country for example the ARM Infrastructure Fund, a US$250 million closed end fund.[60] There have also been grants from foreign governments or development financial institutions like the African Development Bank (AfDB) and the World Bank. Private equity has been used to fund a significant percentage of the PPP projects executed so far in the country. This is especially so as project companies bidding for projects must show that they have a solid financial base before their engagement. It is submitted however, that there should be a structured model for financing PPP projects in the country. Such a structure will give assurance to the Pension Commission, pension fund administrators as well as contributors to the pension funds that the assets would be efficiently managed.

Attracting Finance for Healthcare-based PPP in Nigeria

While it is acknowledged that the future of public healthcare in Nigeria can be improved through the PPP model, there is need to consider the question of viability as well as bankability of projects to be arranged. PPP projects are well known for their high leverage and issues dealing with debt and funding.[61] There is need therefore for the federal and state governments to provide guarantees for healthcare-based PPP projects to enable project companies secure finance for future projects. For example, in Turkey legislation stipulates that "the ministry of health guarantees the lease payments during the term of the agreement."[62] Furthermore, the pension assets in the country being managed by several pension fund administrators could provide a source for domestic finance for PPP. As of October 2019, Nigeria's pension asset grew by N228 billion to end the month with an asset value of N9.81 trillion.[63]

The Legal Framework for PPP in Nigeria

One of the critical success factors for a successful regime of private sector participation in the provision of public infrastructure in any given jurisdiction is the provision of a legal, regulatory and administrative structure for PPP governance. First, no matter how well couched a PPP agreement is, it maybe void or voidable if it is inconsistent with the country's laws. Secondly, the law may prohibit certain genres of projects within a locality and thirdly, in a constitutional federation like Nigeria, an Act of

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[56] ER Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* (Elsevier 2007) 124.

[57] Detail Solicitors, 'Infrastructure Financing: Options for Nigeria' (2013) *Nigeria Public Private Partnership Review* Vol 2 Issue 1, 1.

[58] Usually the security for loans obtained for PPP projects is the project itself and not the other assets of the sponsors of the project.

[59] ER Yescombe, op cit (note 56) 136.

[60] Detail Solicitors, op cit (note 57) 2.

[61] Lei Zhu and David Kim Huat Chua, 'Identifying Critical Bankability Criteria for PPP Projects: The Case of China' (2018) *Hindawi Advances in Civil Engineering* 1.

[62] Magnus Rodrigues *et al,* 'Healthcare PPPs in Turkey' (2013) *Infrastructure Journal* 3 available at <https://www.inalkama.com/wp-content/uploads/Healthcare_PPPs_in_Turkey.pdf#:~:text=The%20project%20company%20has%20to%20procure%20the%20financing,of%20the%20agreement.%20In%20addition%2C%20it%20has%20been> accessed 10 August 2020.

[63] Uche Ndimele, 'Nigeria's Pension Asset Increased by N228 Billion in October' *Nairametrics* 18 December 2019 available at < https://nairametrics.com/2019/12/18/nigerias-pension-asset-increased-by-n228-billion-in-october/#:~:text=Nigeria%E2%80%99s%20pension%20asset%20grew%20by%20N228%20billion%20in,latest%20data%20from%20the%20Pension%20Commission%20of%20Nigeria.> accessed 10 August 2020.

the National Assembly[64] or a Law of a State Assembly[65] is required to set up any regulatory body as well as provide legitimacy for any transaction involving the private and public sectors. To give legal backing to the PPP policy in the country, the federal government of Nigeria as well as a few states in the federation have passed laws entrenching their respective PPP frameworks. The laws also establish administrative units for the regulation of PPPs in both the national and sub-national levels.

For a potential investor in infrastructure in Nigeria, it is expedient to understand the federal structure in operation in the country. The current structure specifically delineates between what projects the federal and state governments may within their powers execute whether exclusively or concurrently. It is therefore imperative to analyse the laws in order not to enter into an agreement that is *ipso facto* void.

Alkali *et al* note that Nigeria became a federation in 1954 vide the introduction of a federal constitution by the Nigerian (Constitution) Order in Council 1954.[66] The federation at present is made up of 36 states and a federal capital territory (Abuja).[67] Although Nigeria is considered a federation, the governance structure of the country is excessively centralised.[68] Due to prolonged periods of military incursion into politics in the country the Nigerian state operates more like a unitary state than a federal one. There is so much power concentrated in the federal government. The federating states rely so much on the federal government for monthly fiscal allocations and as a result, the states remain subservient to the federal authority. Although the governor of a state is the chief security officer of that state, the governor has no control of the police. There have been cases where the security details of a state governor are withdrawn based on orders 'from above' (a term used in Nigeria to describe directives issued by the federal authority). For example, due to a conflict between the administration of Dr Goodluck Jonathan and Governor Rotimi Amaechi of Rivers State, the Inspector General of Police withdrew the security details of the Rivers State governor.[69]Unlike the position in the United States federation, states in Nigeria do not have their own appeal courts or supreme courts. Appeals from State High Courts go to a centralised Court of Appeal[70] and further appeals go to a single Supreme Court domiciled at the federal capital territory.[71] The current federal framework in Nigeria has been described as a bad marriage that all dislike but dare not leave.[72]

The states that so desire, like Lagos, Rivers, Cross Rivers and Ekiti have created their own PPP frameworks in line with the country's federal system.

The Essence of a PPP Framework

The need for 'a clear and stable legal environment for PPP projects, to reduce the perception of risk, attract more competition for projects, attract more lending and therefore reduce project costs[73]' cannot be overstressed. An agency of government must have the necessary powers laid down by statute to enter into an agreement with a private consortium to undertake the obligations of that agreement. It is important that the framework should be clear, predictable and stable as well as commercially oriented. However, it must be noted that in the UK and some other common law countries, 'PFI-Model PPPs are treated as a variety of government procurement, for which no special legal arrangements are needed.'[74] This approach is considered as mainly contractual. Yescombe asserts that the advantage of the contractual approach is that there is greater flexibility to make changes in the PPP programme.[75] It is important however, that there is a legal framework as it is an opportunity for the government to[76]:

- Confirm its political commitment through explicit legislation;
- Set out the roles of the different arms of the government, including control and approval of individual PPP projects;

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[64] Where it concerns the federation itself.

[65] If it relates to one of the states of the federation.

[66] Alhaji Umar Alkali, US Abbo Jimeta, Awwal Ilyas Magashi and Tijanni, 'Nature and Sources of Nigerian Legal System: An Exorcism of a Wrong Notion' (2014) 5(4) *International Journal of Business, Economics and Law* at 3.

[67] 1999 Constitution of the Federal Republic of Nigeria (as amended), section 3.

[68] Aderonke Majekodunmi, 'Federalism in Nigeria: The Past, Current Peril and Future Hopes' (2015)9(2) *Journal of Policy and Development Studies* at 112

[69] Stanley Azuakola, 'Just in: Police IG Withdraws Security Details of Gov. Amaechi, Sen. Saraki and Alhaji Baraje' *The Scoop* 7 September 2013 available at <http://www.thescoopng.com/2013/09/07/just-in-police-ig-withdraws-security-details-of-gov-amaechi-sen-saraki-and-alhaji-baraje/> accessed 8 May 2018.

[70] The Court of Appeal is divided into different judicial divisions and sits in certain states in the country. See section 237 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[71] Section 230 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[72] Aderonke Majekodunmi, op cit (note 68) 114.

[73] Jeffrey Delmon, op cit (note 12) at 5

[74] ER Yescombe, op cit (note 56) 31.

[75] ibid 32.

[76] ibid.

- Set out the basis on which a Public Authority may provide support for various risk, e.g. revenue guarantees;
- Provide a procedure for the Public Authority to make changes in the project's specifications, and a method of compensating the Project Company for resulting extra costs;
- Provide clarity on investors' rights if the PPP Contract is terminated early, whether because of default by the Project Company or because the Public Authority want to take the Facility back under public sector control;
- Give lenders the ability to take security over the PPP Contract;
- If appropriate, allow for provision of investment incentives such as special tax treatment etc.

No doubt the passing into law of the Nigerian ICRC Act 2005, the setting up of the ICRC to administer federal PPP transactions across the country as well as similar laws enacted by some of the states in the federation are intended to serve as a palpable political will to entrench a successful PPP regime in the country with the main aims *inter alia being* to:

- Bridge the infrastructure gap;
- Create job opportunities;
- Stimulate FDI into the economy;
- Facilitate economic growth and development;
- Enable government at all tiers to concentrate on policy making and social development programmes; and
- To save scarce government resources.

Simply put, within the context of this research, the legal framework refers to 'how laws and regulatory structures can be used to encourage PPP, support the institutions implementing PPP and regulate them[77]'. On the other hand, the institutional framework deals with the persons involved, the powers they possess to make decisions and the functions they are permitted by law to perform. It remains to be stated that the absence of a legal framework would lead to uncertainty and chaos. Investors usually consider the legal framework as well as the process for relief in the event of a dispute or a cancellation as very important. Where these are not clearly defined, it is always regarded as a sign not to do business no matter the prospect of the investment and the expected RoI. As such, the law ought to be used as a tool to drive infrastructural development in the country in the light of the above. It follows that the legal framework must be clearly defined, holistic as well as demystified. A situation where there are various laws regulating the same process and with many of the laws overlapping each other breeds confusion and could give rise to disputes which could work against a successful PPP regime.

How PPPS are Administered in Nigeria

The principal Act that governs PPP in Nigeria is the Infrastructure Concession Regulatory Commission (Establishment Etc.) Act 2005 (ICRCA 2005). This law provides the primary framework for private sector participation in infrastructure development in Nigeria[78] It also established the Infrastructure Concession Regulatory Commission (ICRC) to:[79]

- Take custody of every concession agreement made under the Act and monitor compliance with the terms and conditions of such agreement;
- Ensure efficient execution of any concession agreement or contract entered by the Government;
- Ensure compliance with the provisions of the Act; and
- Perform such other duties as may be directed by the President, from time to time, and as are necessary or expedient to ensure the efficient performance of the functions of the Commission under the Act.

Regulations under the ICRCA 2005

The Act stipulates that for a private sector consortium to undertake a PPP concession with the FGN or any of its MDAs, it must possess the financial capacity, relevant expertise and experience in undertaking such infrastructure development or maintenance.[80] Given that PPP is recent phenomenon in Nigeria, it raises the question whether local consortiums may be disadvantaged when bidding for PPP projects with the more experienced foreign consortiums? Again, the Act requires that the consortium to win the bid for a project must be 'the one that submits the most technically and economically responsive bid'[81]

[77] Jeffery Delmon, op cit (note 12) 3.
[78] The Act was signed into law and came into force on November 10, 2005.
[79] Section 14 and Section 20 of the ICRCA 2005.
[80] S. 2(3) of the ICRCA 2005.
[81] S. 2(2) of the ICRCA 2005.

To offer some assurances of stability to private investors, the Act provides that no agreement reached in respect of the Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provisions of the Act.[82]

Sections 14 and 15 of the Act establish the ICRC and provides for a Governing Board for the Commission respectively. However, the Act is silent with regards to the funding process for PPP projects[83]. Nwangwu also notes, and rightly so, that 'the Act does not provide for detailed rules on how the procurement of PPP contracts should be carried out.'[84] The lacuna leaves the ICRC with wide powers to make regulations through policy statements.

In his analysis on the ICRC Act 2005, Soyeju points out that the Act is cloudy with regards to the following areas:[85]

- The approval process for PPP projects, the granting of a concession;
- The scale of projects to be considered for private sector participation and mechanism for dealing with unsolicited proposals;
- Dispute resolution process in the event of a dispute arising from a PPP arrangement; and
- The legality or otherwise of a PPP project not in consonance with the provisions of the Act.

Furthermore, the neglect to make a provision within the Act that deals with the funding of PPP projects is less than desired. This lacuna perhaps gave rise to the failure of the Lagos-Ibadan Expressway Concession awarded to Bi-Courtney Ltd.[86]

Case Studies of Health Sector-based PPPs

In this section, the paper examines two health sector-based PPP projects to serve as a template for future health facility PPP projects across the Nigerian federation. The first case study is the Cross River State Hospital while the second project discussed is the South African Pelonomi and Universitas Hospital Co-Location projects.

Cross River State Hospital

Given the deteriorating state of hospital infrastructure in Cross River State in addition to shortage of personnel, the people in the state started losing confidence in the facilities available which in turn led to high incidences of self-medication and medical evacuation. The situation caused concern as there were only 36 hospitals and 938 doctors covering all the state's secondary health facilities representing a doctor-population ratio of 0.21 doctors per 10,000 patients – One fifth of the sub-Saharan Africa (SSA) average.[87] The state, with just over 0.5 hospital beds per thousand people, had the lowest hospital density in the entire south-south Nigeria.[88]

As a part of the Cross River State Government strategy aimed at reforming the health sector to enable the delivery of effective, efficient, qualitative and affordable healthcare services, it retained the International Finance Corporation (IFC) to provide advisory support towards the setting up of a hospital in Calabar using the PPP model.

Fifteen international firms responded to an invitation for expression of interest issued by the Government of Cross River State in April 2012. Four of the bidders were prequalified. A 10-year concession was awarded to UCL Healthcare Services Ltd,[89] an international consortium comprising Utopian Healthcare Consulting (U.S.), Cure Hospital Management Services (U.S.), Cuningham Group (U.S.), Consultants Collaborative Partnership (Nigera), ITB Nigeria Limited (Nigeria), Healthfore Technologies (India), Simed International (The Netherlands) and Cure Hospital Management Services, a U.S. based firm that was to

[82] S.11 of the ICRCA 2005.

[83] Augustine Edobor Arimoro, 'Funding of Public-Private Partnership Projects under the Nigerian ICRC Act of 2005: Why is the Act Silent? (2015) 40 *Journal of Law, Policy and Globalization* 69-72

[84] George Nwangwu, 'Does Nigeria Really Need a Regulator for Public-Private Partnerships' (2016) 11 European Procurement and Public Private Partnership Law Review 320.

[85] Olufemi Soyeju, 'Legal Framework for Public Private Partnership in Nigeria' (2013) *De Jure* 826.

[86] The Concession did not consider funding as well. Whilst the Federal Government expected the Concessionaire to fund the project, the latter felt that its position was that of a middleman who is mandated to search for an investor.

[87] International Finance Corporation, 'Cross River State Hospital PPP Project,' Presentation delivered by Bayo Oyewole at the Corporate Council for Africa Health and Infrastructure Working Group Breakfast Meeting, April 2014.

[88] International Finance Corporation, 'Nigeria: Cross River State Hospital,' (2013) available at <http://www.ifc.org/wps/wcm/connect/5668b20040c913338d3b9d5d948a4a50/PPPStories_Nigeria_CrossRiverHospital.pdf?MOD=AJPERES> accessed 1 September 2016.

[89] Incidentally UCL Healthcare Services Ltd had the lowest financial bid.

provide clinical services. The Consortium was to bear some project development costs, deliver a turnkey hospital, and will operate the hospital under the terms defined in the PPP agreement.[90]

The transaction structure was for a Design-Build-Operate-Transfer PPP model to last for ten years. The construction cost totalling about $37 million was to be financed by the Cross River State Government, the consortium was to bear some project costs, deliver a turn-key hospital and will then be responsible for the day-to-day management of the hospital. The project is a 105-bed referral hospital to serve the (80 beds reserved for public patients; 20 beds for private VIP treatment at commercial tariffs and 5 beds for ICU) capital city Calabar, and its environs. The hospital is expected to have 6,000 admissions and 60,000 out-patient visits per year.[91]The transaction structure is designed as 10-year project term expected to be operational in 2015. The private operator is responsible for operations. The financial structure is CAPEX: approximately $37m; OPEX: approximately $2.4m. Executional timeframe was put at build (two years), operate (eight years, option to exercise additional two years.) Out of the CAPEX the Cross River State Government is to fund 49 per cent while the private consortium is to fund 51 per cent.

Some of the lessons learnt from the project are as follows: Political factors like election time table, high level government commitment and a strong champion with Governor's ear are important; dearth of experience in healthcare PPPs can be a setback in such transactions. Another challenge was that there were only a few experienced bidders.

The Pelonomi and Universitas Hospital Co-Location, Bloemfontein

This project is structured as a co-location PPP. This type of PPP occurs when the public and private sectors operate a similar service and collaborate rather than compete, which results in the public sector receiving revenue while the private sector generates profits.[92]

The project was arranged in the year 2000 at the provincial level, with the aim of providing a better level of healthcare for South Africans, especially those living in the Free State. An agreement was eventually signed as a 16-and-a-half-year contract on 25 November 2002. The PPP for the hospital co-location project is made up of three partners. The public agency in the partnership is the Free State Health Department (FSHD).[93] The FSHD selected its partner after conducting a competitive tendering process: having obtained the requisite permission from the Treasury to proceed, it invited interested parties to submit Registrations of Capability (ROC) and held informational meetings with 30 private parties indicating interest. After studying a blueprint from Australia, the FSHD accepted three of the ROC bids but only two responded to the Request for Proposals (RFP). A consortium of two healthcare companies was selected, the first a South African black empowerment company[94] and the other a healthcare company[95] with branches in South Africa and the United Kingdom. The consortium held a 65 percent stake in the concession and the remaining 35 percent was offered to investors, doctors and, later, the State.

Under the arrangement, the FSHD receives monthly concession fees from the private partner for the bed and operating theatre space that it uses in both hospitals. In addition, the private partner pays variable fees representing 2 percent of patient turn-over.[96] The inclusion of variable payments in the arrangement means that some operational risk is transferred to the FSHD because a portion of the revenue received is dependent on the success of the private partner. However, the private partner retains the risk associated with construction as it is responsible for all construction, renovations and upgrades.[97]

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[90] World Finance, 'Bridging the Healthcare Gap: The Calabar Specialist Hospital Aims to Improve national Access to Quality Healthcare in Nigeria,' (2014) available at <http://www.worldfinance.com/infrastructure-investment/project-finance/the-calabar-specialist-hospital> accessed 1 September 2016.

[91] Utopian, 'Calabar Specialist Hospital' (2014) available at <https://www.estateintel.com/wp-content/uploads/2014/10/Calabar-Specialist-Hospital-Intro.pdf> accessed 2 September 2016.

[92] Shadrack Shuping and Sipho Kabane, 'Public-Private Partnerships: A case study of the Pelonomi and Universitas Hospital Co-location Project' available at < http://www.hst.org.za/uploads/files/chap10_07.pdf > accessed 24 May 2017.

[93] The FSHD is the branch of the provincial government of the Free State in South Africa that oversees health-related issues and all the public health facilities, which include hospitals.

[94] With a 40% stake in the consortium.

[95] With a 25% stake.

[96] According to the contract the private partners are expected to pay a fixed monthly rental fee of R40,000 per month for the use of the co-located facilities within the first five years and R60,000 per month subsequently. In addition, 1.32% of the annual turnover before profit is to be paid back to the public sector.

[97] Ibid.

While the FSHD's role is to provide patient care in both hospitals, the private partner is responsible for all renovations and upgrades.[98] The upgrades at Pelonomi and Universitas Hospitals were completed on shared facilities and facilities for the use of the public hospital.[99] Apart from this, the private partner upgraded the facilities that were for its own private patients and in doing so, the private partner hired local construction companies. At one point, 26 Bloemfontein companies were subcontracted for a period of eight months. The result was an injection of over R10 million into the local economy.[100]

The PPP for Pelonomi and Universitas Hospitals is 'considered extremely successful.'[101] Both hospitals have facilities that are presently functional, with the healthcare needs of the population (whether insured or uninsured) being met daily. Running costs have been reduced and the quality of care has been increased because of the PPP arrangement. Furthermore, the PPP has ensured reduced costs for both the FSHD and the private partner, especially as there was no need to build a new hospital.[102] Again, commitment on the part of the stakeholders contributed immensely to the success of this PPP arrangement.[103]

Conclusion

This paper discusses the need to develop a strategy to co-opt the private-sector in providing solutions to the poor state of health infrastructure in Nigeria. The underlying causes for concern include the fact that despite dwindling revenues, funds appropriated for the health sector seem not to be appropriated for the purpose at the end of the day, again another fact is that the public-sector in Nigeria is a poor manager of public facilities. Furthermore, Nigeria can rely on the expertise of the private-sector to develop the delivery of healthcare in the country as well as on private-sector funding. Interestingly, Nigeria's health budget for example, in the year 2018 stood at N340.56 billon i.e. 10 per cent of the national budget and the equivalent of N1,832.62 for each citizen.[104] This even makes a stronger case for public-sector participation. Again, if Nigeria is to meet the 2030 SDG goals as far as the health sector is concerned, now is the time the country took a serious look at revamping the health sector.

The COVID-19 pandemic has exposed the fact that Nigeria's healthcare stock is in comatose and unless urgent steps are taken to reverse this ugly trend, the country will be worse off in the next few years given estimated potential population growth. It appears that the political class had not been concerned as they could easily travel to Europe, India, the United States as well as the United Arab Emirates on medical tourism. The COVID-19 pandemic and the lockdown meant that both the low and mighty had to seek for healthcare domestically.

Nigeria established a PPP framework vide the passing into law of the ICRCA 2005. While it is noteworthy that several projects have been arranged and executed under the current PPP regime, the PPP makes a call for deploying PPP as a strategic long-term tool for solving the Nigeria's healthcare infrastructure deficit. It is recommended that the right incentives be put in place to encourage private-sector participation in the delivery of healthcare in the country.

The federal and other state governments may do well to structure healthcare PPPs similar to the Cross River State model. There is need for amendment of the PPP laws in the country to include the provision of guarantees to support project companies to secure needed finance for critical infrastructure projects such as healthcare-based PPPs. The pension assets managed by the several pension fund administrators in country could be a source for domestic finance for PPP projects. The public authority at the federal level should also encourage investments in infrastructure funds. This is so because foreign loans for PPP projects in Nigeria has been hard to come by given the country's dwindling revenues and foreign exchange risks challenges. Finally, the ICRA Act 2005 should be amended to allow for project finance initiative type of PPPs wherein the government pays for the use of the facility by the citizens in order to make investments in PPP projects in certain areas of the country attractive.

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[98] Shadrack Shuping and Sipho Kabane, op cit (note 92).

[99] The United Nations Office for South-South Cooperation.

[100] Ibid.

[101] Ibid.

[102] It is significant that both hospitals can attend to all citizens without any form of discrimination based on race.

[103] National Treasury PPP Unit 'Case studies on the public private partnerships at Humansdorp District Hospital, Universitas and Pelonomi Hospitals and Inkosi Albert Luthuli Central Hospital: Overall findings and recommendations' (2007) available at <http://www.ppp.gov.za/Legal%20Aspects/Case%20Studies/Humansdorp%20Overall%20findings.pdf>accessed 29 May 2017.

[104] Healthwise, 'COVID-19 Exposes Nigeria's Wobbling Healthcare System' *Healthwise* 10 May 2020 available at < https://healthwise.punchng.com/covid-19-exposes-nigerias-wobbling-healthcare-system/> accessed 25 June 2020.

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State Power Legitimacy Crisis in the Era of Globalization

Iya I. Osvetimskaya

Associate Professor of the Department of Theory and History of Law and State, School of Law, Higher School of Economics National Research University (Campus in St. Petersburg); Associate Professor, Department of Theory and History of State and Law, St. Petersburg State University, Saint Petersburg, Russian Federation, Candidate of Legal Sciences; osv. iya@gmail.com

ABSTRACT

One of the urgent problems requiring special research is the comprehensive crisis of legitimacy that accompanies globalization, and one of the manifestations of which is the fragmentation of the phenomenon of legitimacy due to the fragmentation of the mechanisms of legitimation associated with different aspects of legitimacy being: power legitimacy, religion legitimacy, moral legitimacy, etc. State power legitimacy crisis has political and communicative grounds, such as: problematization of state sovereignty existence and state power existence; expanding political and non-political actors will to power; partial or complete lack of political will among citizens, which in turn is caused by a low level of public involvement in politics, which in turn is due to the usual functioning of political communication. The rules of language games (political, legal, cultural) are not created by the participants themselves in the result of a consensus-communicative discourse, but are set from the outside and are no longer shared by all members of a particular communicative community. The shaking of habitual traditions and norms of behavior leads to the imposed rules rejection and disruption of the consensus-communicative public discourse mechanisms functioning. These circumstances require a rethinking of the very phenomenon of power and the development of strategies for overcoming the crisis. From the point of view of a deliberative strategy (J. Rawls, J. Cohen, J. Habermas, S. Benhabib), the organization of a communicative power could become a way out of the crisis. This process requires all interested in the decision parties consensus expression. According to the agonistic strategy (C. Mouff), power is not interpreted as a purely external relation that develops between two given identities, but as something that establishes these identities themselves. According to J. Rawls and J. Habermas, it is necessary to find a way to eliminate power, because the more democratic a society is, the less power is present in its social relations. But according to C. Mouff, power relations are the basis of social relations, and the main issue of democratic politics is not how to eliminate power, but how to create such forms of power that could be more compatible with democratic values. Both approaches have the ability to bring the legitimacy of power out of the crisis, as long as the authorities will demonstrate its creative potential , which consists in protecting the fundamental rights of citizens; harmonious combination of public and private spheres; freedom realization.

Keywords: Political Communication, Legitimacy Loss, Power, Deliberative Democracy, Communicative Consensus, Agonistic Pluralism, Power Creative Potential, J. Habermas, C. Mouffe

1. Introduction

Globalization affecting all spheres of social life without exception is accompanied by rapid transformations of generally accepted legal and value system ideals. It results in emergence of numerous previously unknown non-conventional views which lead to the situation where previously formed phenomena experienced as legitimate are perceived as unfamiliar and illegitimate (this can occur both at the national and international level). In particular, in the age of globalization, the state sovereignty concept undergoes transformations. Many scientists fear whether this concept is becoming obsolete at all[1]. The democracy concept is also problematized.[2] The emergence of new political and economic actors on the international scene challenges the traditional beliefs in what democracy is and what its opposite is. Globalization is characterized by such features as inter-subjectivity, ambivalence and asymmetry3. Globalization is inter-subjective since, on the one hand, it emerges due to the actors who use their own resources and communication tools to act, and on the other hand, globalization undergoes reification and starts being experienced by the actor as something objective. Globalization is ambivalent since it can bring both positive and negative consequences. By itself, it cannot be assessed positively or negatively. To a large extent, its result is individual for each specific state and depends on whether this state can benefit from globalization or collapse under its influence. Globalization is asymmetric since different countries are unequally integrated into its processes. Globalization is also accompanied by disintegration and fragmentation, regionalization and localization. These changes directly affect the concept of legitimacy, whose content is problematized in the context of globalization. In the modern conditions of political power, legitimacy is especially essential, but it is very easy to lose and quite difficult to return.

[1] See, for example.: Guehenno J. The End of the Nation State. University of Minnesota Press, 2000; Ohmae K. The End of the Nation State. New York, 1996; Held D., McGrew A., Goldblatt D., Perraton J. Global Transformations: Politics, Economics and Culture. New York, 1999.

[2] See, for example.: Zolo D. Democracy and Complexity: A Realist Approach, Moscow, 2010.

Globalization contributes to a high level of liberalized thinking that begins to sharply perceive any bureaucratic obstacles that state power erects in the economic sphere. This is supplemented by a significantly complicated system of value preferences, as well as value relativism. The legitimacy concept disintegrates in all spheres of legitimacy existence: power legitimacy, law legitimacy, religion legitimacy, morality legitimacy, ethics legitimacy, etc. This means that the key problem is no longer the loss of trust in various social institutions, including the state power institution. The chief bugbear is the fact that the necessity of these institutions as such is disputed and the very idea of a state-organized society is rejected. The problems associated with power legitimacy can be tackled through different strategies (aggregative, deliberative, agonistic) which are described below in relation to settlement of the state power legitimacy crisis.

2. Political and Communicative Grounds for State Power Legitimacy Crisis in the Era of Globalization

The notions of state power and state sovereignty are contested in the era of globalization. The loyalty of residents to transnational corporations, international companies and "communities of identities"[3] outweighs the satisfaction from the state politics. The concept of sovereignty has been criticized by scholars of various fields. For example, J. Habermas in his speculations about how the concept of sovereignty emerged, emphasizes the fact that it was fixed in the actor's mind through "usurping the coercive power as a concentration of power that can overcome any other power".[4] The thinker believes that this monopoly will persist regardless of whether the sovereignty is identified with the particular people or correlated with the competence of the institutions formed by the people in accordance with the constitution. J. Habermas believes that it is essential to raise the capacity for political action to a higher level extending beyond the borders of nation-states. "A world dominated by nation-states is indeed in transition toward the post-national constellation of a global society. States are losing their autonomy in part as they become increasingly enmeshed in the horizontal networks of a global society".[5] The scientific community largely holds the view that globalization exposes the state sovereignty to significant "erosion"[6], and that the universalization of all spheres of social life prevents any nation-state from exercising its sovereignty, it is "eroded"[7], and this process is inevitable and objective. Such fears of scientists originate from the idea that globalization pushes the world to transfer from the Westphalian system of nation-states interaction, through the stage of "united nations", to a global order which can transform both to completely perished state, and to a new microsystem, cosmopolitan democracy or transnational states. The territorial boundaries of the state that are one of its key features become more transparent as a result of strengthened possibilities of inter-subjective extraterritorial communication, and are losing their traditional meaning. The loyalty of individual actors is transferred from the state arranged on a territorial basis to all kinds of inter-territorial organizations. In addition, libertization (from the English –liberty) of the individual (gravitation towards the idea of freedom) in all directions, whether it is political freedom, cultural or economic freedom of expression, also contributes to the erosion of state power legitimacy. Indeed, one of the consequences of global changes is the acquisition of unprecedented flexibility and dynamism by a society. According to D. Zolo's righteous assertion, "the increase in differentiation and the colossal spread of mobility, knowledge and opportunities for new experience, which occurs thanks to technological innovations, sharply exacerbates the need for functional freedom and personal independence"[8]9. This, in turn, entails the delegitimation of any institutions that impede realization of this freedom. Globalization is characterized by accelerated dissemination of information, knowledge, opportunities for acquiring new experience,

[3] Malakhov V.S. State Under Conditions of Globalization. Moscow, 2007. P. 187.

[4] Habermas J. Faktizität und Geltung. Frankfurt a. M., 1998. Pp. 364–365.

[5] Habermas J. The Divided West. Moscow, 2008. P. 119.

[6] The western researchers call this process erosion of sovereignty. See, for example: Goodwin G. L. The Erosion of External Sovereignty? // Government and Opposition. Vol. 9. No. 1 (WINTER 1974). Pp. 61–78; Loughlin M. The Erosion of Sovereignty // Netherlands Journal of Legal Philosophy. 2016 (2). Pp. 57–81; Raz J. The Future of State Sovereignty // Oxford Legal Studies Research Paper No. 61/2017 [Electronic resource]. URL: https://scholarship.law.columbia.edu/faculty_scholarship/2069 (date of application: 01.07.2020).

[7] Or "softened". These terms are commonly used by indigenous researchers of the state sovereignity. See, for example: Bogaturov A. D. The concept of world politics in the theoretical discourse // International processes. 2004. No. 1. p. 19; Lebedeva M. M. World Politics. Moscow. : Aspect Press, 2006. P. 66; Tsygankov P. A. World Politics and Its Contents // International processes. 2005. No. 1. Pp. 58–59.

[8] Zolo D. Democracy and Complexity: A Realist Approach, Moscow, 2010. Pp. 311–312.

increased mobility, which results in increasing need for freedom and independence. And this desire for freedom (namely, negative freedom, that is, "freedom from" excessive state intervention) leads to destruction of political consensus that existed earlier, which served the basis for functioning of all social institutions.

Globalization has a decisive effect on the territorial organization of social and political institutions, creating ever new forms and methods for exercising power at the supranational level. The constant increase in the flows of social activity on all continents leads to the inability of these interactions to be arranged only within the sovereign states. As a result, institutions of global supranational governance are formed (the system of UN specialized agencies, European Union bodies, etc.).[9]

Globalization is accompanied by such a tendency as "strengthening the will to power" of political and non-political actors. The emergence of such strong actors as supranational institutions of power, international organizations, transnational corporations, which pursue their economic and political goals in the international arena, compel states to act not always at their discretion, which lead to formation of special configurations of power relations accompanied by the value disintegration of the society. "The power falls into a certain circle of social legitimacy crisis. It spreads out and takes new more complex forms"[10]. For this reason, the very phenomenon of power requires a thorough rethinking.

The state power legitimacy crisis is associated with a partial or complete lack of political will among residents (with an increase in the will to power of political and economic actors), which, in turn, is caused by a low level of involvement of the population in politics, which is due to the usual functioning of political communication. Political elites form the necessary political views through the media, while applying technology of manipulating the population's consciousness by imposing the pleasing pictures of the world and, the idea of "symbolic" meaning of the reality. The population is consequently unable to assess the real political picture, to understand the political game rules, to make fateful political decisions and to take responsible political actions. In order to "get" legitimacy, the authorities resort to manipulation and shaping of public opinion. The audience persuasion is not based on argumentation, but on emotional suggestion. The dialogue communication that mediates the relationship between the state and the society is replaced by monologue communication. Such communication, in terms of its content, leads to the opposite process, i.e. to the loss of legitimacy in general. However, globalization, while libertizing thinking, brings the consciousness of the individual to a new level requiring the expansion of the political action boundaries.

3. Manifestations of State Power Legitimacy Crisis

Legitimacy is a phenomenon of social actors' perceptions that is formed in the process of their communication with each other, and presupposes trust, approval and recognition of social institutions, including institutions of power. At the same time, the criteria for the legitimacy of this or that social institution are not legal meanings or not so much legal, but value-oriented attitudes. The complexity of the legitimacy phenomenon lies in the consensus on the relevancy of social institutions as regards their value and target meanings. Globalization leads to instability, uncertainty of society development directions, deformation of the value content of both private and public life, and, finally, imbalance and global revaluation of values. In other words, the main criteria of legitimizing social institutions in the process of globalization are discredited and transformed, which results in disintegration of the legitimacy phenomenon and its transfer to the phase of a crisis.

In democracies, the state power legitimacy is based on the majority principle, which is implemented within a particular political community. At the same time, for its existence, the legitimacy requires the existence of "we-identity" condition that unites independent decisions of the political union members. Globalization, while leading to legal standardization, discredits the national and cultural identity of national societies, and reduces the level of legitimacy within these societies. In such a situation, two levels of legitimacy come into conflict with each other: the legitimacy of the democratic principle of majority and the legitimacy of the international principle of fulfilling obligations. This conflict consists in the fact that the authors of international treaties are not the people of the nation-state, but professional experts, whose opinion may run counter to the opinion of the majority of the population of a particular state. These decisions are not made by people's representatives, since they are only ratified in the parliament.

[9] For more details of globalization and its influence on the state sovereignty, as well as of supranational power institutions, see: Osvetimskaya I.I. State Sovereignty: contents and transformation under conditions of globalization // News from Higher Educational Institutions. Legal Studies. 2017. No. 2. Pp. 150–168.

[10] Ibid.

These decisions often do not correspond to the level of development of a particular society, but, being implemented in the national legal system, help to establish a gap between the law and democratic procedures of legal legitimation. Democratic procedures are based on a consensus between those participating in the processes of democratic legitimation and those who are thus affected by the legitimized decisions. Due to the fact that the phenomenon of "we-identity" does not allow expanding the range of democratic procedures to infinity, the principle of consensus is violated.

On the one hand, decisions from the outside are imposed on a democratic society, and on the other hand, decisions are legitimized by this society itself. Coming into conflict, these two levels of legitimacy existence increase the alienation of a given society from the authorities and from other societies. The power, if considered in the context of the supremacy of the law[11], is a kind of "instrument" that carries law through legislation as a positive form of law, not reducible to law in general. Trust in positive law thus determines trust in the actions of all branches of government. If positive law ceases to reflect general principles and ideas of law, and begins to be perceived as an instrument that restricts freedom, a new phase of human alienation from both law and state power arises.

Thus, the enhanced interaction of national states with other international actors contributes to blocking the principles which serve the basis for arrangement of all life within a democratic society. As a result, the normative basis for language games in a national society, whose institutionalization is only possible if there is a national (political, economic, legal, cultural, social) "we-identity", is discredited. The statement above is based on the L. Wittgenstein's concept of "language games", since language games reflect a certain form of language communication which functions in accordance with certain rules. But if these rules are disobeyed, the entire discursive practice and the entire language game are destroyed. Since a language game is carried out only in the process of communication, it is a specific way of the subject's communicative interaction with the environment. To understand the essence of a language game and its meaning, it is essential to be in this game space, to be a "player". L. Wittgenstein emphasizes the connection between the text and the way of its interpretation.[12] Due to the fact that in the era of globalization, the creation of the language game rules is not done by the members of a particular political community during the implementation of communicative conciliation procedures, but by external actors, these rules are not legitimized by a part of the members of this political community. Common traditions and standards of behavior are disobeyed, which finds its expression (consciously or unconsciously, in one way or another) in rejection of the rules imposed by others and malfunctioning of consensus-communicative public discourse mechanisms. Rapid changes in the social life order which accompany globalization and are clearly observed in the formation of global network relations, cause the emergence of heteronomous (alien) rules of conduct in the legal sphere. The main criterion for the law legitimacy seems to be its compatibility with substantial values. There is no doubt that unfreedom and injustice are not fundamental values that underlie social order. Freedom, equality and justice are a kind of reference point both for the individual and for the society, despite the fact that they need harmonization due to discrepancies in their interpretation. One way or another, these values are embodied in law to one degree or another. This a priori foundation, which is the quintessence of natural law, creates a pattern to be followed by positive law. If any pauses occur in such a follow-up, a crisis of the law legitimacy arises, which leads to the crisis of the legal legitimacy of other social institutions and phenomena.

Globalization is accompanied by the standardization of national legal systems. National law is incorporated into the international legal system, i.e. global law. As a result, different ideas emerge about what is right and what is legitimacy. National law is recognized as legitimate if it meets the standards recognized by international law. Thus, the justification of legitimacy, to which we are accustomed within the framework of national law, is rapidly moving into a new environment. There is a need to substantiate the legitimacy of international law as a measure of the legitimacy of national law. In addition, global tendencies problematizing state sovereignty discredit the faith in the sovereignty of national law, whose legitimacy continues to be understood as the legitimacy of national law.

The indicated effect of "loosening" the normative foundation of a society is easy to detect in developing countries, which are overly influenced by stronger states, including through legal intervention. Due

[11] The supremacy of law is here understood similarly to Professor A. V. Polyakov, i.e. as "establishment of such an order which acts on the basis of common standards, ensures human's rights and their guaranteed legal protection, and which is aimed at exercising the idea of justice in the context of law" (Polyakov A.V. Rule of Law, Globalization and Issues Related to Modernization of Phylosophy and Legal Theory // News from Higher Educational Institutions. Legal Studies. No. 4. 2013. P. 20).

[12] Wittgenstein L. Philosophical Investigations // Wittgenstein L. Philosophische Untersuchungen. Moscow, 1994. Pp. 90–91.

to the fact that alien standards cannot be harmoniously introduced into autochthonous normative worlds, they cannot gain legitimacy, but only lead to relativism in relation to existing standards.

If criticism of fundamental foundations in scientific thinking can lead through scientific revolutions to a change in the entire scientific picture of the world, then any manipulations with the "life world" can lead to unforeseen results. The collision of the basis for the "life world" of a particular society with normative worlds alien to it causes aggression, fear and alienation. There is probably some chance that this scenario will end positively if the criticized "life-world" undergoes its own internal changes. Conflicting ideas will be "filtered", some of them will be accepted in the course of public reflection and, as a result, the legal pluralism will emerge. But if the scenario turns out differently, namely, if the invasion of alien normative worlds is too intense, they will not be able to complement the existing picture of the world of a particular society, but will be perceived as something conducive to the death of the entire established normative basis.

4. Rethinking the Phenomenon of Power

Today there are many approaches to understanding the essence of the phenomenon of power. Let us dwell on the most relevant for post-classical science, such as communicative concept presented by H. Arendt and J. Habermas, and post-structuralism concept presented by M. Foucault and P. Bourdieu. According to these concepts, power is a repeatedly mediated instrument of inter-subjective interaction located in the social field and the sphere of communication. H. Arendt characterizes power as "multi-level institutional communication".[13] The emergence of the phenomenon of power is caused by the need to coordinate inter-subjective interaction in the process where members of society realize their private interests in order to correlate them with a common interest. According to J. Habermas, power is a kind of macro-instrument that allows settling problems arising from the correlation of private and public spheres of public life, which is aimed to preserve and multiply the communicative discourse between political actors.[14] M. Foucault and P. Bourdieu also treat the power as a kind of relationship and communication. M. Foucault, in his concept of power, emphasizes that power should not be identified with state power, because the latter is based on a whole system of micropower ("grid of power relations"), which includes a number of fostering, educational, medical and psychiatric institutions, as well as prisons. This forms the "whole bundle of power relations"[15] which entangles the individual and which helps the power to become omnipresent, reproducing itself at any point. In addition, "power relations are the relations of force, the relations between adversaries"[16]. This is the relationship that develops between two poles: one is the pole of force application, and the other is the pole of opposition to the force.

We can say that P. Bourdieu expands this approach and proposes his concept of "symbolic power as a kind of aggregate of various capitals distributed among the actors according to their positions in the political field".[17] There are many various forms of capital: economic, cultural, etc. The "political field" in his opinion is a social sphere constructed directly by the mutual subordination of power relations. P. Bourdieu's concept of symbolic capital is of interest for solving the problem of legitimizing power due to the fact that, according to the scientist, during the establishment of power, there is a transition of certain types of power capital into symbolic capital. Symbolic capital includes reputation, good name, and authority. It is thanks to the symbolic capital that the authorities begin to believe in it, they begin to follow it, that is, the legitimation of power is by its nature symbolic. Confirmation to this thinking can be found in T. Luckmann and P. Berger, who believe legitimation to be a prerequisite for constructing society as an objective reality. In their opinion, legitimation is a semantic objectification of the "second order". Objectification (or signification) means giving meaning to any phenomena, events, processes. Legitimation in this case forms its own worlds by creating new symbols and signs. Such worlds are called "symbolic universes" by T. Luckmann and P. Berger[18]. As a result, it turns out that in the process of symbolizing capital, that is, "moving" it into symbolic worlds, its owner is endowed with "perfect" mean-

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[13] See: Arendt H. Origins of Totalitarianism. Moscow, 1996.

[14] See: Habermas J. The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society. Massachusets. 1991.

[15] See: Foucault M. Power/Knowledge// Foucault M. Intellectuals and Power. Moscow, 2002.

[16] Ibid. P. 290.

[17] See: Bourdieu P. Social Space and Symbolic Power / Bourdieu P. The Origins / translation from French by M. A. Shmatko. Moscow, 1994.

[18] See: Berger P., Luckmann T. The Social Construction of Reality: A Treatise in the Sociology of Knowledge. Moscow, 1995.

ing in the perception of others, and this allows his power not to depend on anyone or anything. Thus, symbolic capital for P. Bourdieu and charisma for M. Weber are practically the same.[19]

According to P. Bourdieu, individual capital, which is a kind of political capital, is based on celebrity and recognition, and on the possession of such qualities that form a certain reputation and cause support from other actors. For M. Weber, charisma also represents such a quality of personality, thanks to which he is recognized by everyone as a gifted person. The seizure of symbolic capital or the symbolization of existing capital provides the authorities with its legitimacy. And what is very important, on the part of the subjects of legitimation, this process of legitimation will not always be conscious.

5. Possible Methods to Recover from State Power Legitimacy Crisis

In order to find a method to recover from the legitimacy crisis, it may be useful to rethink the basic models for settling conflicts that arise in the process of legitimizing power, such as aggregative, deliberative and agonistic models.

J. Schumpeter can be considered the founder of the aggregate strategy[20]. He believed that the essence of democracy lies in the aggregation of citizens' preferences and decision-making in the course of an open competitive electoral struggle by a majority of voters. On the whole, the aggregate model is overly procedural, reducing the phenomenon of democracy to mere procedures for achieving a balance of disparate interests through the interaction of various groups. Thus, E. Downs is convinced that the pluralism of interests and values is much more important than the common interest and the common good, therefore, the latter concepts should be completely abandoned.[21] It seems that the disadvantage of the strategy lies in the formation with its help of a one-way model of political communication. Communication in this channel is understood "as a formal, technical process of transferring precise, abstract information from a source-subject to an addressee-object. Such a one-sided, linear, subject-object political communication serves to achieve the power of a political leader or state apparatus that creates, regulates information and is its main source".[22] Such a model is not able to help find a way out of the current crisis, since it denies a person's ability to perceive and interpret political information coming from outside, in accordance with their value orientations.

Deliberative strategy or democracy of discussion is represented by two approaches. J. Rawls[23] and J. Cohen[24] are representatives of the first approach, while J. Habermas[25] and S. Benhabib[26] support the second approach. These scholars are convinced that deliberative procedures contribute to the achievement of an agreement that is consistent with the principles of normative rationality and the principles of democratic legitimacy. The former are expressed in the protection of fundamental rights and freedoms, the latter — in the people's sovereignty. According to this approach, legitimacy is based on universal rational agreement (consensus). If deliberative procedures create an opportunity for the implementation of principles such as equality, impartiality, absence of violence, honesty, then their result will be the finding of common interests that suit all participants in the discussion, and the decision thus made will be legitimate.

And finally, the **agonistic strategy** presented by C. Mouffe calls to understand power not as communication imposed by one subject on another from the outside, but as communication that forms these subjects.[27] Let's consider the last two strategies in more detail.

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[19] This is emphasized by Bourdieu P.: "Symbolic capital would be nothing more than another way of designating what Max Weber called charisma if he, who no doubt had best understood that the sociology of religion is a chapter of the sociology of power (and not a minor one at that), hamstrung by the logic of realist typologies, had not made charisma into a particular form of power instead of seeing in it a dimension of any power, that is, another name for legitimacy as the product of recognition or misrecognition, or of the belief (these are so many quasi-synonyms) 'by virtue of which persons wielding authority are endowed with prestige." (Bourdieu P. The Logic of Practice. St-Petersburg: Aleteya, 2001. P. 280).

[20] See: Schumpeter J.A. Capitalism, Socialism and Democracy. Moscow, 1995.

[21] See: Downs A. An Economic Theory of Democracy. New York, 1957.

[22] Linde A. N. The conception of deliberative democracy by J. Habermas in the context of the present theory of political communication // Russian Political Science. No. 2, 2017. PC. 75.

[23] See: Rawls J. A Theory of Justice. Novosibirsk, 1995.

[24] See: Cohen J. Democracy and Liberty / J. Elster (ed.), Deliberation Democracy, Cambridge, 1988.

[25] Habermas J. The Inclusion of the Other. Studies in Political Theory. St-Petersburg., 2001. P. 385.

[26] See: Benhabib S. Toward a Deliberative Model of Democratic Legitimacy / S. Benhabib (ed.), Democracy and Difference, Princeton, N. J., 1996.

[27] Mouffe C. Toward an agonistic model of democracy // Logos. 2004. No. 2 (12). P. 188.

Trying to find a way out of the situation related to the crisis of democratic legitimacy, denial of sovereignty, and the crisis of trust in democratic and power institutions that were characteristic features of the age of globalization, J. Habermas offers a new interpretation of the essence of democratic legitimacy, namely through the definition of sovereignty inter-subjectively as "power generated by communicative means"[28]. Both J. Rawls and J. Habermas seek to combine democracy and liberal values. According to scholars, power must be subject to universal justification in certain forms. The foundation of the legitimacy of democratic mechanisms is based on the fact that institutions, which strive for power, explain their desire by the fact that the result of their activities will be decisions that express the interests of all members of society.

However, if we think in this vein, it is not sufficient to take into account the interests of all participants together, as well as each separately to ensure the democratic decision-making procedure.

It is necessary to ensure the consensus of all parties concerned in the decision to be made. In this case, a "communicative power" will be formed, which "presupposes the absence of a permanent hierarchy, bringing both justification and application of prescriptions into the discussion area, widespread use of negotiation and conciliation procedures, corrective feedback, etc."[29]. If we turn to S. Benhabib, she writes the following about this: "In accordance with the deliberative model, in order to achieve rationality and legitimacy of joint decision-making processes in the state, it is necessary that the institutions of power provide an opportunity for the formation of a common interest in the course of deliberative procedures, openly and honestly organized between equal and free citizens".[30] J. Rawls and J. Habermas are characterized by the desire to achieve not a simple agreement, but a rational consensus, since it is the only which serves as the basis of liberal democracy, guarantees the compliance of power mechanisms with democratic values. For J. Rawls, the basic democratic value is justice. According to J. Rawls, it is possible to consider a democratic society only that one which is based on the principles corresponding to such an understanding of justice which is characteristic of the largest number of citizens. Only in this case the effective and legitimate functioning of state institutions is possible. J. Habermas considers legitimacy to be the main democratic value. According to J. Habermas and S. Benhabib, for the effective and legitimate functioning of state institutions, it is necessary to create a political community that adheres to rational views of legitimacy. For this reason, the main problem is the search for such a tool which, when used, will help to make guaranteed unbiased decisions that reflect the position of all citizens equally. Such a tool is advisory procedures, the result of which is the achievement of a rational consensus. "Legitimacy that meets democratic principles emerges as a result of open joint discussion of issues related to common interest,"[31] writes S. Benhabib.

However, with this formulation of the question, it is important to recall the words of L. Wittgenstein, who believed that it was not enough to reach a consensus in the definition of a concept. There is a need to reach a consensus on using this concept. Reflecting these words on the above reasoning of representatives of deliberative democracy, we can say that the gravitation towards the values of democracy and liberalism, rather, is based not on rational argumentation, but on "a passionate commitment to a system of reference"[32]. Following the chosen system of values becomes the faith and modus vivendi of every member of the political community.

C. Mouffe, criticizing the deliberative strategy, stresses that politics is not free from values, especially when it comes to the most important issues related to justice. In this regard, it is impossible to come to a universal solution that suits everyone. She puts forward the main argument that the actions and decisions of the authorities constitute social reality. In other words, any social reality is a political and constructed reality. In this perspective, power is interpreted not as an externally imposed relationship that develops between the subjects, but as **something that forms these subjects themselves**[33].

As a result, if we follow the strategy of deliberative democracy, then it is necessary to find a way to eliminate "passions from the public sphere"[34] in order to achieve a rational consensus. If we follow the agonistic model of democracy, then we are looking not for a way to eliminate passions due to the disappearance of pluralism of interests, but a way for the existence of pluralism of interests as a unity in a conflict context.

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[28] Habermas J. The Inclusion of the Other. Studies in Political Theory. P. 385.

[29] Belyaev M. A. Deliberative Model of Democracy: Basic Principles and Practical Difficulties // Proceedings of the Institute of State and Law of the RAS. 2019. Volume 14. No. 3. P. 86.

[30] Benhabib S. Supra note 27. P. 69.

[31] Ibid. P. 68.

[32] Wittgenstein, L. Philosophical Works. Part I. Moscow, 1994. P. 470.

[33] Mouffe C. Toward an agonistic model of democracy. P. 188.

[34] Ibid. P. 195.

According to the agonistic model, democracy requires the addition of the constructed phenomenon of the social sphere with the utilitarian basis of the authorities' aspiration for legitimacy. Power and legitimacy are not in a state of irresistible division, on the one hand. But no power is a priori legitimate — on the other hand. If any authority is established, it means that someone recognizes it as legitimate. But it remains so only if it fulfills its purpose effectively. This interdependence of two phenomena, according to C. Mouffe, is not taken into account by a deliberative democracy, which adheres to the idea of the reality of building rational argumentation to eliminate power and form legitimacy on the basis of pure rationality.

Developing this thesis, C. Mouffe proposes her own approach, which she calls "agonistic pluralism". In doing so, she shows the difference between two manifestations of pluralism, such as antagonism and agonism. If antagonism can be described as a confrontation between enemies, then agonism is a confrontation between rivals.

In modern democratic politics the crucial problem is how to transform antagonism into agonism. The difference between an adversary and an enemy lies in its legitimacy. We enter the struggle with the rival, sharing with him common political and ethical principles of freedom and justice. Our opposition consists in the existence of some differences in the interpretation of the meaning of these principles and the ways of their implementation. Such differences cannot be eliminated through rational discussion, for the reason that consensus cannot be reached in the area of public interest. "A well functioning democracy calls for a vibrant clash of democratic political positions. In this regard, the ideal of pluralistic democracy cannot be achieved through public consensus. Consensus in the public sphere is impossible"[35].

It seems that the model of agonistic pluralism, despite the fact that it is more sensitive to the various impulses sent from society, nevertheless implies a certain danger. This danger lies in the identification of social relations with relations of power. If we accept their identity, then there is a danger of a theoretical justification for removal of responsibility from public authorities.

6. Conclusion

Both approaches, deliberative democracy and agonistic pluralism, have the potential to overcome the legitimacy crisis. However, it should not be forgotten that the constitutive feature of the individual is rather a difference than a consensus. Therefore, in the eyes of an individualistic society, the power that supports individuality, the diversity of life forms, dialogues, etc. will be considered legitimate. The agonistic model of democracy is more suitable for such a society as a strategy. A society that is characterized by a greater bias towards common interests than private ones should adopt a deliberative model that seeks homogeneity through communicative consensus.

At the same time, it is important to understand that the level of modern society development requires the government to comply with high standards: the right to elect power, to freely influence the government and to participate in its decision-making processes. Compliance with democratic principles presupposes well-functioning mechanisms of two-way communication, effective dialogue, public control, and feedback. We should also remember the warning of H. Arendt that consensus can serve the basis for creation of political homogeneity which might be then followed by totalitarianism. In order to avoid this, the authorities should not forget about their **"creative potential"**, which, according to H. Arendt, is as follows[36]:

1. Governmental protection of undeniable, inalienable rights and freedoms of citizens.
2. Harmonious interaction of public and private interests ensured by the authorities. The priority of the public sphere over the private, the disproportionately large role of government institutions and the bureaucratic apparatus in the life of society entails a distortion of the life of society due to excessive infringement of personal space.
3. Realization of the phenomenon of freedom. In the field of politics, freedom can be realized as "protest" in the meaning of influencing the government and as "own position" in the meaning of disagreement with the government's decisions. As an internal quality, freedom means the ability to create and implement something new, just as freedom in the context of political reality means the presence of some space between individuals for their independent activity.

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The History of the Roman Civil Process as a Universal Model of the Evolution of the Rules of the Ancient World

Nicolay V. Razuvaev

Head of the Chair of Civil and Labor Law of the North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration, St. Petersburg, Russian Federation, Doctor of Jurisprudence; nrasuvaev@yandex.ru

ABSTRACT

The article examines the main stages of the evolution of the civil process in Ancient Rome. On the basis of extensive legal, historical and cultural material, it has been proved that the evolution of Roman procedural law reflects the general laws of the development of the legal order of the Ancient world. The author highlights three major trends in the historical dynamics of civil proceedings in Rome: first, the strengthening of the role of the state; secondly, the unequal ratio of the formal and semantic aspects of the civil process at various stages of its evolution; third, the modification of the form of claims.

As shown in the work, the form of claims provided for by Roman private law has evolved from the commission of non-verbal actions to oral statements and written documents. The trends considered are due to the general cultural patterns of the evolution of Roman private law and typologically identical legal orders of antiquity. The work highlights two such patterns: firstly, the transition from non-verbal gesture communication, first to oral speech, and then to written communication in the legal sphere. Secondly, a phased transition from regulation, carried out mainly based on the subjective rights and obligations of the participants, to normative regulation.

According to the author, the visual manifestation of these patterns in the Roman civil procedure makes it a universal model for studying the evolution of the legal order of the Ancient world.

Keywords: Roman private law, civil process, juridical communication, court proceedings, lawsuits

1. Introduction

This essay examines the stages of the Roman civil practice history in order to identify the universal principles that determine the evolution of law. The relevance of this research has two aspects: historical and general theoretical. The Roman private law, being the most famous and well-covered system that clearly reflects the specifics of the legal order of the Ancient world, has been well-documented and comprehensively analyzed in the publications of scholars who believe it to be the key to understanding the processes that influenced the formation of modern legal systems.

It is known that legal proceedings were central to the Roman private law. This circumstance, due to the particulars of the ancient legal mentality, for which the very existence of subjective rights was traditionally inseparable from their legal remedies, made the dichotomy of substantive and procedural law (inherent in the modern legal order) irrelevant.[1] It seems that this is the reason for the special attention to the procedural forms of both Roman lawyers and later authors who scrutinized the system of Roman private law through the prism of legal proceedings. Moreover, the doctrinal design of the system was based on the peculiarities of the judicial protection of subjective civil rights. Thus, one of the criteria of the dualism between *ius civile* and *ius honorarium* in the substantive aspect was the subject gradation of civil and praetorian claims, which allowed Giuseppe Grosso to assert that in Ancient Rome "material law arose as a manifestation of procedural means directly promised and provided by the praetor"[2]. In our opinion, the procedural orientation of Roman private law was not its unique feature, but it characterized, to a certain extent, all the rules of law of the Ancient world.

The stages of the Roman civil practice development is well-covered and well-documented in different sources, which from the moment of its inception to the later forms, makes it a convenient model for identifying the common features inherent in judicial systems at the same stage of evolution, and not only in static manifestations, but also — which is especially important — in dynamics. The study of the genesis and principal trends in the development of procedural law in Rome can contribute to the reconstruction of judicial procedures in those ancient societies, which lack sufficient material evidence for detailed and empirically substantiated conclusions.

First of all, it is the legal order, which, like ancient Greek law, effected the formation of Roman private law, including procedural law, and at the same time were influenced by it. This, of course, in no way implies the leveling of differences noted in the literature between ancient Greek and Roman law[3],

[1] For more details see: Santucci G. Die rei vindicatio im klassischen Römischen Recht: ein Überblick // Fundamina. 2014. Vol. 20. No. 2. P. 834; Dozhdev D.V. Roman Private Law. Issue 3, as amended. M. : Norma, INFRA-M, 2013. P. 197.

[2] Grosso G. Lezioni di storia di diritto romano. 3 ed. Torino : Giappichelli, 1955. P. 286.

[3] See: Surikov I. E. Problems of Early Athenian Legislation. Moscow: Languages of Slavic Culture , 2004. P. 16.

whose qualitative originality makes direct analogies and parallels impossible. It is more appropriate to try, with a great deal of care, of course, to single out the universal features inherent in the corresponding legal order, which, with all the dissimilarity in specific details, belonged to the same cultural and historical type.

In turn, the typological analysis carried out on the factual material provided by Roman law and other legal orders of the Ancient world, is intended to serve the solution of a more general problem, namely, the knowledge of the trends in the development of law in a broad diachronous retrospective, where the efforts of jurisprudence, cultural anthropology, historical science and other humanitarian disciplines that do not limit their subject field to factual descriptions, but try to come to generally valid conclusions, are ultimately aimed at. No wonder, that sophisticated expert in Roman law S.A. Muromtsev saw the main objective of the legal science[4] in the knowledge of universal laws, which was supported by a number of modern authors, at least those who do not confine themselves to pure dogma[5].

The cognitive relevance and heuristic value of the generalizing approach using universals, more or less inherent in different cultures and their corresponding legal order, raises doubts only at the most superficial glance, which cannot see the forest for the trees.

Meanwhile, its significance was not denied even by authors who are extremely cautious about generalizations, such as, for example, American anthropologist F. Boas, according to whom, "a critical assessment of what is generally significant for all mankind, and the demarcation from what is specific to individual cultural types, becomes the subject of the greatest importance in the study of society"[6]. Among other things, the study of the evolutionary dynamics of law makes it possible to formulate a number of conceptual provisions concerning the concept and essence of the latter, making the evolutionary approach a productive methodological basis not only in the historical, but also in the theoretical and legal terms.

Being a component of the culture, the law, similarly to other cultural phenomena, performs a communicative function, consisting in the exchange of information which contributes to creation of social institutions. The most important feature of legal communication is its inherent regulatory impact on the behavior of individuals[7]. The information media in the law are rules featuring the semiotic nature. However, it would be wrong to reduce the whole variety of semiotic means of legal communication, as is sometimes done, exclusively to the normative component.[8] In the diachronic retrospective, no less, if not more important, role was played by the subjective rights and obligations of participants in legal communication. Under the conditions of the underdeveloped normative dimension of Roman law, the unhindered exercise of subjective rights and their judicial protection became the priority tasks of the rule of law, on the solution of which its stability and viability depended. It seems that Roman private law, with its syncretism of substantive, procedural and legal elements, serves as a good example of the rule of law in which the behavior of individuals was effectively regulated with the help of their subjective rights and obligations, even in the absence of general rules.

2. Arbitrariness in the Law of the Ancient World

One of the most notable features of Roman private law was the presence of highly developed forms of procedural protection of rights, which in many respects laid the foundation for modern civil practice. Moreover, in a situation where the main, if not the only, means of constructing the rule of law were subjective rights and obligations, a special problem was giving them relevance for the participants who did not initially participate in the legal relationship where these rights and obligations arose.

Inevitably, the conflicts in interpretations of the semantic context of mutual legal claims, which are fraught with denial of law as such, created the need for the protection of subjective rights that are ef-

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[4] See: Muromtsev, S. A. On the Conservatism of Roman Jurisprudence // Muromtsev S. A. Selected Works on Roman and Civil Law. M. : Statut, 2002. P. 211.

[5] See: Belov, V. A. Subject-Methodological Problems of Civil Science // Civil law: Actual Problems of Theory and Practice / under total. ed. V. A. Belova. M. : Yurayt-Izdat , 2007. Pp. 158–159.

[6] Boas F. Some Problems of Methodology in the Social Sciences // Boas F. Race, Language and Culture. New York : The MacMillan Company, 1940. P. 261.

[7] See: Krawietz W. Juridische Kommunikation im modernen Rechtssystem in rechtstheoretischer Perspektive // Rechtsphilosophie im 21. Jahrhundert / hrsg W. Brugger, U. Neumann, S. Kirste. Fr. a. / M. : Suhrkamp, 1998. P. 197–200; Van Hook, M. Law as Communication. SPb. : ID SPBGU, OOO «Universitetskii izdatel'skii konsortsium», 2012. Pp. 29–31.

[8] Polyakov, A. V. Normativeness of Legal Communication // Polyakov A. V. Communicative Legal Understanding: Selected Works. SPb. : Publishing House "Alef-Press", 2014. Pp. 158.

fective for all cases of its potential violation. In the modern legal order, the main form of protection of rights is judicial protection (Article 11 of the Civil Code of the Russian Federation), along with which administrative protection and self-defense are applied (Article 14 of the Civil Code).[9] In the legal literature, there is a widespread opinion that judicial activity, not only today, but also at the early stages of legal evolution, is the exclusive prerogative of the state, and therefore it became necessary to consider the ways for protecting rights that preceded their judicial protection. Even the pandectists put forward the hypothesis of "arbitrariness" as a historically primary situation for the protection of law[10], which was subsequently consistently developed by R. Jhering[11]11. Such a naive evolutionist attitude, obviously, did not take into account the complex nature of human behavior as a self-organizing system containing a semantic basis correlated with subjective meanings expressed by the behavior of other individuals.

At the heart of the coordination of the meanings that motivate the behavioral acts of subjects, including specifically legal meanings (freedom, justice, formal equality, etc.), is, in the words of A.V. Polyakov, the mutual recognition of individuals as equal participants in legal communication, whose legally relevant claims become binding on other individuals[12]. A necessary prerequisite for such mutual recognition is the presumption of the rationality in the behavior of other persons shared by all participants in legal communication, from which the axiological characteristics of the latter follow.

Given such an assumption, any conflict generated by a collision of opposing interests must be eliminated using legal procedures, which include judicial (claim) protection of rights. Legal regulation of human behavior with its inherent tools for reconciling interests and resolving behavioral conflicts can be considered as a kind of continuation — at a higher evolutionary level — of the mechanisms of self-organization and achievement of dynamic homeostasis, acting in natural, including biological, systems.[13]

Unfortunately, some modern scholars who, to one extent or another, have perceived the doctrine of arbitrariness as the primary way of implementing and protecting the right, sometimes tend to draw conclusions on this basis that are not supported by historical evidences.[14]

This is the case, in particular, with the underdevelopment of the legal regulation tools in early state communities, similar to the ancient Greek policies in the Dark Ages (11th — 8th centuries BC) or Rome during the first kings' reign. Meanwhile, the apparent primitiveness did not at all testify to the inefficiency of these tools, which fully corresponded to the historical tradition, social organization and level of cultural development of the community. Moreover, the monuments preserved indications that already archaic legal orders, including the legal order of Early Rome, had well-formed judicial procedures for the protection of subjective rights and resolution of emerging contradictions.[15] This suggests that the origins of judicial procedures should be sought in a pre-state organization that possessed mechanisms for resolving conflicts and achieving social balance, which were developed in the early state communities of the Ancient world.[16]

A textbook example of this is the scene of the court described by Homer, depicted on the shield of Achilles, where in the assembly of the people (ecclesia) the assessors decide a civil litigation, making a decision on the basis of the arguments of the parties (Il.XVIII, 497-508).[17] There are hardly sufficient grounds to see a later insertion in this eloquent episode, guided by a priori ideas about the absence of a developed system of legal proceedings in the Homeric era. It is much more appropriate to assume

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[9] Civil Code of the Russian Federation. Part 1 // Collection of Legislative Acts of the Russian Federation. 1994. No. 32. Art. 3301; 2019. No. 1. Part 1. Art. 7482.

[10] See, in particular: Baron, Y. The System of Roman Civil Law: In 6 vols. SPb. : Ed.R. Aslanov "Legal Center-Press", 2005. Pp. 233– 234.

[11] See: Jhering, R. Spirit of Roman Law at Various Stages of Its Development. Part 1 SPb. : Pub. V. Bezobrazova and Co., 1876. P. 95.

[12] See: Kovkel, N. F. Review of the First International Legal Philosophy School in the Republicof Belarus // Proceedings of the Institute of State and Law of the RAS. 2019. Vol. 14. No. 6. P. 198.

[13] Fore more details, see: Knorozov, Yu. V. On the Classification of Signaling // Basic Problems of African Studies. M. : Nauka, 1973. Pp. 324–334; Ershova, G. G. Anthroposystem: Communicative Models and Regulated Integration // Historical Journal: Scientific Research. 2012. No. 4. Pp. 11–25.

[14] See: Sinyukov, V. N. Digital Law and Problems of Gradual Transformation of the Russian Legal System // Lex Russica. 2019. No. 9 (154). P. 10.

[15] See: Loginov, A. V. Judicial Scene on the "Shield of Achilles" in the Iliad and the legislative actio sacramento process // Judicial reform in Russia: past, present, future: Collection of reports of the VII International Scientific and Practical Conference. M. : Publishing house of Moscow State Law Academy named after O. A. Kutafi, 2015. Pp. 144–147.

[16] See: Maltsev, G. V. Revenge and Retribution in the Ancient World [Mest' i vozmezdie v Drevnem mire]. Moscow : Norma — INFRA-M, 2012, P. 101.

[17] Fore more details, see: Bonner R. J., Smith G. The Administration of Justice from Homer to Aristotle. Vol. 2. Chicago : University of Chicago Press, 1938. P. 117 f.

that such procedures were spontaneously formed in early state or even in pre-state communities, being elements of the system of public self-government, which only later received state power.

Moreover, the mechanisms for the judicial settlement of private disputes that had developed in the late clan community were borrowed by the early state legal order in a practically unchanged form, as evidenced by the ancient *legis actio sacramentum in rem* procedure.[18] It is no coincidence that even those researchers who treat the institutions of blood feud as a universal alternative to legal proceedings that took place at the initial stage of the evolution of the rule of law do not deny that at this hypothetically reconstructed stage, blood feud and unauthorized reprisal against the offender were not practiced in all cases, but only where conciliation and litigation were either not applied[19] or did not achieve the desired result[20]20.

According to sources, this was the case in the early Roman community, where the custom of blood feud retained its importance until the beginning of the Republic. The most famous examples of its manifestation described by ancient authors were the murder of the Curiatii brothers in a duel with Publius Horace, later rethought as a military feat (Liv. I. 24–26; Dionys. III. 2–31; Flor. Epit. I. 1; Lyd. de mens. 4. 1), the murder of Romulus (Plut. Rom. 27. 5), the death of Tullus Hostilius under mysterious circumstances (Liv. I. 31), the death of the kings Tarquinius Priscus and Servius Tullius (Liv. I. 42; Dionys. IV. 40) and, finally, the expulsion of representatives of the gens Tarquinia from Rome. It is noteworthy, however, that all of the above cases, to one extent or another, had their reasons for struggling for power in the community or military and social conflicts, without affecting the private sphere, where disputes began to be examined in court early enough.

Archaeological evidence of the above is the legal proceedings in Ancient Egypt, which were transformed simultaneously with the processes of the historical development of the most ancient Egyptian civilization.[21]

As noted by I.M. Lurie: "The Egyptian trial, its rite, dates back to the initial periods of Egyptian history. Having arisen as a court-competition, traces of which are clearly preserved, for example, in the "The Contendings of Horus and Seth", in which the gods act rather not as judges, but as arbiters, seeking to reconcile the irreconcilable claims of opponents"[22]. Thus, with all the paucity and limited information available, there is some reason to believe that the ancient Egyptian procedural law, having arisen on the basis of sacramental and mythological rituals, initially had a precedent character, and the judgments made, becoming part of the unwritten (and then written) legal tradition, served as standards for all specific life situations, typologically similar to the one about which the corresponding decision was made.

A typical example of this method of lawmaking is modern Anglo-Saxon common law corresponding to a later stage of evolutionary development. At the same time, it can be stated that the common law in its reliance on precedent is not an exception, since any lawmaking, as well as protection of rights, at a stage when legal facts and the subjective rights and obligations generated by them were the basis of the rule of law, could only have a precedent nature.[23] Even in modern conditions, the construction of new areas of legal reality can be carried out using precedents, which, in our opinion, takes place, for example, in private international law[24]. All the more significant is the role of the judicial precedent in the coordinate system set by the associative (pre-predicative) legal thinking, given the high degree of ritualism of judicial procedures, which determines their suggestive impact on participants in legal communication.

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[18] See: Bonner R. J. Administration of Justice in the Age of Homer // Classical Philology.1911. Vol. 6. P. 28; Cantarella E. Violence privee et le process // La violence dans les mondes grec et romain / Ed. J.-M. Bertrand. Paris : Annee d'edition, 2005. P. 345–346.

[19] See: Barton R. E. The Kalingas: Their Institution and Custom Law. Chicago : University of Chicago Press, 1949. P. 221.

[20] See in particular: Edwards M. W. The Iliad: a commentary / Ed. G. S. Kirk. Vol. V. Cambridge : Cambridge University Press, 1991. P. 214–216; Nagy G. Homeric Responses. Austin : University of Texas Press, 2003. P. 77; Benveniste, E. Dictionary of Indo-European social terms. M. : Progress-Univers, 1995. P. 379.

[21] See: Chehata Ch. Le testament dans l'Egypte pharaonique // Revue historique de droit française et etranger. 1954. Vol. 31. P. 3 ff.

[22] Lurie, I. M. Essays on Ancient Egyptian Law of the 16th–10th Centuries B. C. L. : Ed. State Hermitage Museum , 1960. P. 112.

[23] See: Arkhipov, V. V., Polyakov A. V., Timoshina E. V. Adaptation of Precedent Legal Systems Experience to The Russian Legal System: a Problem Statement // News of Higher Educational Institutions. Jurisprudence. 2012. No. 3 (302). Pp. 113–134.

[24] See in particular: Golub, K. Y. Judicial Precedent in the Systems of International and European Law // Izvestiya of Saratov University. Series: Economics. Management. Law. 2007. Vol. 7. No. 1. Pp. 92–96.

3. Cultural and Anthropological Prerequisites for the Emergence of Judicial Procedures in Roman Law

It will not be an exaggeration to assert that the anthropological prerequisites for judicial procedures in all cultures, including ancient Roman, are inherent in the nature of human himself as a biosocial being. Genetically, judgment, as well as other rituals practiced at an early stage of social evolution, goes back to games that are widespread not only in human but also in animal communities[25]. The playful nature of legal, including judicial, rituals, first disclosed by J. Huizinga[26], should be taken into account when considering both the origin of judicial procedures used in the Roman civil procedure and the evolution of legal communication in this area. In the pre-state and early state legal order, judicial rituals, closely approaching magical practices, were aimed at establishing the will of the gods and other supernatural forces. It can be argued that in the coordinate system set by the associative-shaped legal thinking, judicial procedures were a kind of divination rituals, which was already important in primitive cultures.

The Gods' will was determined by taking an oath and, in the future, through judicial fights, the simplest type of which was casting lots designed to determine the winner in a dispute. It is no coincidence that in many ancient languages, including ancient Greek and Latin, the words 'right' and 'justice', among other things, had the meaning of fate and lot. These are, in particular, the ancient Greek *τύχη* — 'chance', 'fate', 'coincidence', *μοῖρα* — 'fortune', 'fate', 'destiny', etc., and semantically interconnected *τό μέρος* — 'part', 'fate', as well as *ὁ κλῆρος* — 'fortune', 'fate', 'inheritance', *κληρόω* — 'determine by throwing lots'[27]27. This is also the origin of the noun *ὁ καιρός* which means 'proper measure', 'norm', and the adjective *τό καίριον* which means 'proper', 'correct', 'exact', directly pointing to the legal aspects of judicial rituals. The legal vocabulary of the ancient Greek language is closely related to the considered meanings, first of all, the noun *δικάζειν* which means 'weighing on the scales', and the verb *δικεῖν* which means 'to throw', 'to throw lots', from which the noun *δίκη*, which became the theonym of justice, is etymologically derived.

The Latin word *iustitia* has the same semantics and meant not only 'justice', but also 'throwing lots', 'taking an oath', etc. In Roman legal texts, the nouns *iuramentum* (oath), *iusiurandum* (oath), the verbs *iurare* (to swear), *iurgare* (to quarrel, to sue), the adjective *iuratorius* (oath), and the adverb *iurato* (by oath) are often found in appropriate meanings. Thus, the rites of justice were originally magical rituals, which consisted in taking an oath and subsequent judicial fights.

Naturally, under these conditions, a procedure was needed to equalize the strengths of physically unequal opponents and required the presence of a 'third party' in the competition, monitoring the fairness, that is, procedural correctness, of the duel. This arbiter initially might not have power over the litigants, since his task was not to pass or execute a sentence, but only to prevent abuses that ultimately turned the legal proceedings into promulgation of the 'fist law'. Obviously, in the presence of procedural (initially ritual and magical) requirements and in the presence of an arbitrator, there could be no question of arbitrariness of the disputing parties.

Oath-taking and ritual duels as primary forms of judicial procedure were practiced in many legal orders of the Ancient world. They were used in ancient Egyptian civil and criminal proceedings, along with other means of proof, up to the New Kingdom (16th — 11th centuries BC)[28]. Similar oaths were provided for by Old Babylonian and Old Testament law[29]. It is noteworthy that in ancient languages, taking a judicial oath was indicated by the sign of a palm or a raised hand, the semantics of which, among other things, included the meanings of performing religious rituals, casting incantations, as well as exercising personal and economic domination[30], such as Sumerian *zi* (oath), Old Babylon. *niš* (oath, raising hands), Old Egyptian *ᶜr.ḳ* (to swear).

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[25] See: Osvetimskaya, I. I. Game as a Method for Increasing the Efficiency of Legal Thinking // Russian Journal of Legal Studies. 2019. Vol. 6. No. 3. Pp. 89.

[26] See: Huizinga, J. Homo Ludens. Articles on the History of Culture. M. : Progress-Tradition, 1997. Pp. 85–94.

[27] In the law of Athenes in 5th — 4th BC, this was the term for land plots received at allocation of common lands or as award for military service. Fore more details, see: Cargill J. Athenian Settlements of the Fourth Century B. C. Leiden : Brill, 1995. P. 194; Moreno A. The Attic Neighbour. The Cleruchy in the Athenian Empire // Interpreting the Athenian Empire / Ed. by J. Ma. London : Duckworth, 2009. Pp. 211– 221.

[28] See for example: Spiegelberg W. Studien und Materialen zum Rechtswesen des Pharaonenreiches der Dynastien XVIII–XXI (c. 1500–1000 v. Chr). Hannover : Comissions — Werlag der Hahnischen Bucchandlung, 1892. P. 76 f; Seidl E. Einführung in die ägyptische Rechtsgeschichte bis zum Ende des neuen Reiches. Glückstadt : J. J. Augustin, 1951. S. 38; Lurie, I. M. Essays. P. 112.

[29] See: Price J. M. The Oath in Court Procedure in Early Babylonia and the Old Testament // Journal of American Oriental Society. 1929. Vol. 49. P. 23.

[30] See: Marr, N. Ya. Ishtar (From the Goddess of Matriarchal Afro-Eurasia to the Heroine of Love in Feudal Europe) // Japhetic Collection. Issue 5. L. : Publishing House of the Academy of Sciences of the USSR, 1927. P. 110.

The Old Greek *χειρός* (hand), in the set expression *ἐμβάλλειν χειρός πίστιν* (give a hand as a sign of fidelity [oath]) (Soph. Philoct. 813), and Latin *manus* (hand), which was polysemic and was used in various phrases to denote 'taking an oath', 'an oath of office', 'taking possession of an object', 'domination' (including economic), 'belonging', 'possession', etc. had the same use. In the Baltic and Slavic languages, this word is an element of the etymological group formed, apparently, back in the period of Indo-Germanic linguistic unity, where, along with Lithuanian *rankà* (hand) and Latvian *rùoka* includes Swedish *vrà* (angle), Norse *vrangr* — 'curve', 'oblique', Middle Low German *vrange* — 'arc'[31], which had common semantics from Slovenian *kolnem*, *kleti* — 'curse', Polish *klne*, *klač* — 'curse', Old Latvian *klentet* — 'curse', and Old Prussian *klantemmai* — 'we curse', whose meaning, according to M. Vasmer, was associated with the fact that "when pronouncing oaths, the hand touched the ground"[32].

The general significance of the considered linguistic material is illustrated by the example of the hieroglyphic writing of the ancient Maya, where many hieroglyphs, including those that conveyed social-political vocabulary, were outlined with an oval outline. There, researchers trace a reduced image of a palm[33], referring to the so-called 'hand speech', which arose at the initial stage of human communication[34], dating back to the Paleolithic, but was, as the studies of the spouses A. and B. Gardner proved, already characteristic of the higher primates, namely chimpanzee[35]. These are, for example, the signs *la* — 'face', 'lord', *chac* — 'big', *chac'* — 'sky', 'high', *naab* — 'palm', 'space'[36]. Especially noteworthy in this sense is the hieroglyph *ez* — 'witchcraft', which is a realistic depiction of an open palm. Thus, the gestures of linear manual speech and the words of the spoken language that developed on their basis, which had the meanings discussed above, were speech acts, whose illocutionary force consisted in influencing the behavior of communicants[37], which made them suitable for performing rituals of judgment.

Swearing of oaths and the subsequent duel of the parties were important components of the Hittite legal proceedings, and, as the latest research shows, Hittite judicial procedures were largely borrowed from the ancient Greek law of the Mycenaean era[38].

Perhaps such fights included a ritual pursuit, such as that described in the Iliad (Il. XXII. 136 sgg.)[39], which resulted in the sacrifice of the losing side, eventually replaced by the payment of property compensation to the winner[40]. Echoes of such ideas can be traced not only in legal, but also in paleographic evidences, in particular, in a number of Egyptian inscriptions of the Old Kingdom era, where the noun *ma'at* — 'justice' included the grapheme *mȝ*[41], used in the passive voice verb *mȝ'* — 'to sacrifice'[42].

In the Roman civil practice, the life and personal freedom of the defendant are likely to cease to be the subject of litigation quite early, giving way to the property over which the dispute is conducted. The

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[31] See: Streitberg W. Gotisch fraujinond, frauja // Indogermanische Forschungen. Zeitschrift für Indogermanische Sprachund Altertumskunde / hrsg. Von K. Brugmann, W. Streitberg. Strassburg : Karl J. Trübner Verlag, 1892. Bd. 23. Pp. 119–121.

[32] Fasmer, M. Etymological Dictionary of the Russian Language. In 4 Volumes. Vol. II. M. : Progress, 1986. P. 259.

[33] See: Ershova, G. G. Maya: Secrets of Ancient Writing. M. : Aleteya, 2004. P. 121.

[34] See: Marr, N. Ya. Language // Marr N. Ya. Selected works. T. II. Basic questions of linguistics. M. ; L. : Sotsehkgiz, 1936. P. 128.

[35] See: Gardner R. A., Gardner B. T. Teaching Sign Language to a Chimpanzee // Science. New Series. 1969. Vol. 165. No. 3894. P. 670.

[36] See: Knorozov, Yu. V. Writing of the Maya Indians. M. ; L. : Publishing house of the Academy of Sciences of the USSR, 1963. P. 158 and below.

[37] See: Searle, J. R. Classification of Illocutionary Acts // New in Foreign Linguistics. Issue 17. The Theory of Speech acts. Moscow : Nauka, 1986. P. 171 and below.

[38] See: Loginov, A. V., Trofimov A. A., Linko A. V. Retribution from the Proto-Indo-Europeans, Mycenaean and Homeric Greeks. M. : Academia, 2017; Loginov, A. V., Shelestin V. Yu. Court and Punishment in Mycenaean Greece and the Hittite Kingdom. M. : Academia, 2019.

[39] The presence of one more legal symbol in this fragment, i.e. the scales which were used by Zeus for weighing the lots of Achilles and Hector seems far from accidental (Il. XXII. 209–213, translated by Gnedich N.I.): "...Zeus, the providential, stretched out the golden scales, where he threw two lots of Death, immersing in a long sleep: one lot for Achilles, the other for Priam's son. He took it in the middle and lifted: the lot dropped to Hector and heavy lot fell to Hades (καὶ τότε δὴ χρύσεια πατὴρ ἐτίταινε τάλαντα, ἐν δ ἐτίθει δύο κῆρε τανηλεγέος θανάτοιο, τὴν μὲν Ἀχιλλῆος, τὴν δ Ἕκτορος ἱπποδάμοιο, ἕλκε δὲ μέσσα λαβών: ῥέπε δ Ἕκτορος αἴσιμον ἦμαρ, ᾤχετο δ εἰς Ἀΐδαο)", which resulted in Hector's death in the subsequent fight.

[40] See: Hoffner H. A. The Laws of the Hittites. Waltham : Brandeis University Press, 1963. P. 339–340.

[41] See: Gardiner A. H. Egyptian Grammar. 3rd ed. Oxford : Oxford University Press, 1957. P. 516.

[42] See: Zhdanov, V. V. Evolution of the Maat Category in Ancient Egyptian Thought. M. : Modern notebooks, 2006. P. 38.

only exceptions are *legis actiones per manus iniectionem*, that retained a connection with the most ancient forms of legal proceedings, which authorized the claimant to personally kill the defendant. Initially, such property was movable things and real estate, and later a sum of money as a universal property equivalent. With the evolution of the rule of law stimulated by the transition from figurative-associative thinking to conceptual thinking, ritual contests and oaths lose their probative power. It is not the manifestation of the will of divine forces that comes to the fore, but the effective and comprehensive protection of the interests of the subjects of legal communication, which is directly dependent on the development of the judicial procedure.[43]

Legal science and the activities of lawyers in general played a significant role in this transition (Pomp. 1 enchr., D. 1.2.2.5). In the writings of Roman lawyers, the legal order was constructed by understanding and systematizing the rights and duties of its subjects in the context of specific life situations, including situations associated with various kinds of legal collisions. Summarizing the number of typologically similar cases, the prudentes formulated recommendations which served the basis for court decisions.[44] This circumstance was reflected in the ancient political and legal thought which recognized doctrinal positions as obligatory for judges. So, according to Cicero: "If they [i.e. judges] recognize the lawyer's answer as correct and declare that it should be awarded differently, then they say that it should be awarded badly. After all, it cannot be so that one decision on the law should be made in court, another in response to consultations, and so that the one who claims that the right is something that should not be a court decision is considered an expert in law"[45]. The authority of the flow of law, thus, not only acted as a formal basis for making a decision, but also made the subjective rights and the claims enshrined by them binding on subjects who were not participants in a particular legal relationship[46].

4. Stages of Roman Civil Practice Development: General Characteristics

The need to create effective enforcement mechanisms required the participation of state magistrates in the court's activities. The evolution of the civil practice in Rome makes it possible to doubt the correctness of the traditional point of view, in accordance with which legal proceedings initially arise as one of the directions of the public-power activity of the state. On the contrary, the facts indicate that the state did not immediately begin to exercise judicial power, especially in the civil practice sphere, where consideration of judicial disputes and resolution of conflicts for a long time were carried out on a private initiative with minimal interference from the state.

So, if in the early stages of the Roman procedural law development, the participation of an official (in particular, a praetor who was responsible for organizing judicial procedures) was limited only to monitoring compliance with the formal requirements for filing a claim, then with the development of law and order, it became necessary for an official to intervene more actively in filing a claim, and in considering a case.

Although the division of the civil proceedings into two stages (praetor (*in iure*) and judicial (*in iudicio*)) was already typical to the legal process, which developed on the basis of the Laws of the Twelve Tables and was the most ancient type of civil proceedings, the role of the praetor was mainly reduced to solving three problems.

First, on behalf of the Roman people, the praetor assessed the public significance of the legal claims of individuals, deciding whether to give these claims legal (including judicial) protection and what specific remedies should be used. Apparently, this function of praetorian jurisdiction was fundamental, especially at the initial stage of the development of justice in the conditions of the procedural underdevelopment of the latter. The civilian group interested in maintaining the stability of the rule of law, which was threatened not only by private arbitrariness, but also by uncontrolled litigation on insignificant

[43] Fore more details, see: Ando C. Substantive Justice in Provincial and Roman Legal Argument // The Impact of Justice on the Roman Empire. Proceedings of the Thirteenth Workshop of the International Network Impact of Empire (Gent, June 21–24, 2017). Leiden : Brill, 2017. P. 147–148.

[44] See: Kofanov, L. L. The Role of the Responsa of the Roman Jurists in Disputatio Forensis in the Roman Civil Community of the 5th–1st Centuries B. C. // Journal of Ancient History. 2014. No. 4 (291). Pp. 89–90. The obligation of arbitrators in classic and postclassic age to be guided by opinions of the most competent lawers is evidenced, in particular, by the Law of Valentines III dated 07 November 426 (CTh. 1.4.3).

[45] Cic. pro Caec. 24.68: Sin illos recte respondere concedunt et aliter iudicari dicunt oportere, male iudicare oportere dicunt. Neque enim fieri potest, ut aliud iudicari de iure, aliud responderi oporteat, ne cut quisquam iuris numeretur peritus qui id statuat esse ius quod non oporteat iudicari.

[46] See: Kaser M. Das Urteil als Rechtsquelle im Römischen Recht // Festschrift für Fritz Schwing / hrsg. von R. Strasser. Wien : Metzger, 1978. P. 126.

reasons (like the proverbial 'fight over a donkey's shadow'), provided the official with powers that allowed the selection of legally significant requirements, as indicated by the standard wording of *iudicium dabo* — 'give protection' (D. 4.3.1.1; 39.4.1 pr.), or *actionem dabo* — 'give a suit' (D. 42.8.1 pr.), which is available in many provisions of the praetor edict[47].

Secondly, the praetor's duties included the prevention of possible arbitrariness, extrajudicial reprisals and direct violence, which created, especially against the background of still existing obsolete customs of blood feud and collective responsibility, the preconditions for insoluble social conflicts that entail destructive consequences for the rule of law. It is no coincidence that the provisions of the edict contain direct indications of the inadmissibility of such excesses expressed in the words *vim fi eri veto* — 'I prohibit the use of force'[48]. It should be noted that this formula was used as a legal basis for not only judicial, but also extrajudicial protection, in particular, interdict protection of ownership rights.[49]

Conflict situations became especially dangerous when the dispute was not about individually defined things, the possession of which excluded their physical belonging to others, but about generic things characterized by a quantitative trait[50], or about things in common use, like, for example, *ager publicus* (D . 1.8.2 pr.) or running water[51]. In this case, the prevention of potential violence became especially urgent, requiring appropriate action by the public authorities.

Finally, thirdly, organizing the most ancient type of civil proceedings, the essence of which consisted in performing ritual actions and pronouncing phrases provided for by the letter of the law (in this case, the Law of the Twelve tables), a judicial magistrate, first a consul, and then, after the reform of 367 BC, city praetor, ensured the legal correctness of the procedure. And since, unlike the pontiffs, the civil magistrate did not observe the exact reproduction of the religious and symbolic meaning of the judicial ritual by the parties, its role in the legal process was limited mainly to the performance of technical functions[52].

Namely, without going into consideration of the case on the merits, he accepted or rejected the claim guided solely by formal considerations[53]. Guy's words perfectly illustrate the above:

"...if someone looked for a reward for damaged vines, calling them vines, then they answered that he had lost the claim, since he had to call the vines trees, on the grounds that the Law of the Twelve Tables, according to which the claim was filed for cut vines, speaks in general about cut bushes"[54].

As the legal consciousness develops, the formalism of the most ancient civil law, which has found expression in legal proceedings, begins to come into conflict not only with the needs of economic turnover and the property interests of its participants, but also with a sense of justice that presented certain requirements to justice.[55]

The question is, in particular, the need to assist the parties in the legally competent formulation of the claim from its material and procedural points of view. The implementation of these requirements led

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[47] See: Jolowicz H. F., Nicholas B. A Historical Introduction to the Study of Roman Law. 3rd ed. Cambridge : Cambridge University Press, 1972. P. 99 ff., 202; Schiller A. A. Roman Law: Mechanisms of Development. The Hague ; Paris ; New York : Mouton Publisher, 1978. P. 412; Grevesmühl G. Die Gläubierangfechtung nach klassischen Römischen Recht. Göttingen : Wallstein Verlag, 2003. P. 59.

[48] See: Rudorff A. F. Edicti perpetui quae regula sunt. Lipsiae : Hirzelium, 1869. P. 212; Lenel O. Das Edictum perpetuum. Ein Versuch seiner Wiederherstellung. 3. Aufl. Leipzig : B. Tauschnitz Verlag, 1927. P. 461; Betancourt F. Derecho romano clásico. 3a ed., rev. y aument. Sevilla : Universidad de Sevilla, 2007. P. 287, 370.

[49] See: Dernburg, G. Pandekty. T. I. Part 2. Property Law. SPb. : University. pub. 1905. P. 43 and below.

[50] According to Salvius Iulianus (Iul. 22 dig., D. 45.1.54 pr.), "when we are promised generic things, they are divided according to the number (quotiens autem genera stipulamitur, numero fit inter eos divisio)". The later laws gave a similar definition to *res genera*, e.g., in Art. 66 of the Civil Law Code of the USSR, 1922. Fore more details, see: Khaskelberg B. L., Rovny V. V. Individual and generic in civil law. M. : Statut, 2004. P. 47.

[51] According to Marcian's statement (Marc. 3 inst., D. 1.8.2.1): "By virtue of natural law, the following are, surely, common to all: air, flowing water and sea, and therefore the seashore (Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris)". In this connection, Ulpian (Ulp. 70 ad ed., D. 43.20.1 pr.) quotes a fragment of the Praetorian interdict, which reads: "I forbid the use of force with the aim of preventing you in this way from diverting the water which is the subject of lawsuit, as you took it away last year not by force, not secretly and not precariously in relation to such (uti hoc anno aquam, qua de agitur, non vi non clam non precario ab illo dixisti, quo minus ita dicas, vim fieri veto)». See: Labruna L. Vim fieri veto. Alle radici di una ideologia. Napoli : Jovene, 1972. P. 247–284.

[52] See: Kocourec A. The Formula Procedure of Law // Virginia Law Review. 1922. Vol. 8. No. 6. P. 439.

[53] See: Khvostov, V. M. History of Roman Law. Ed. 3rd, rev. and add. M. : Type. t-va Sytina, 1907. Pp. 142, 146.

[54] Gai. 4.11: Unde eum, qui de uitibus succisis ita egisset, ut in actione uites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de uitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

[55] See: Schulz F. History of Roman Legal Science. Oxford : Clarendon Press, 1953. P. 24–29.

to the emergence of a new kind of proceedings at the end of the 2nd century BC, namely *per formulas*, first envisioned in 123 BC (*lex Aebutia*).

In the formulary procedure, while maintaining two stages *in iure* and *in iudicio*, the importance of the official who organizes the consideration of the case at the first stage noticeably increases. Now the magistrate not only accepts claims and appoints a judge, but also participates in the case, formulating the positions of the parties and setting them out in the form of a special order (praetor's formula), which was an order addressed to the judge to decide the case taking into account all the essential circumstances set out in the formula. The participation of the praetor in the formulary procedure made the latter more flexible in comparison with the archaic legislative process, which made it possible to create new legal remedies for the protection of subjective civil rights that would meet the evolving needs of economic life, as well as the notions of justice prevailing in legal consciousness and legal culture.

Thus, having originated as one of the tools for self-regulation used in the pre-state community, the judiciary became a 'branch' of state power, with all the conventionality of this term, in relation to the ancient policy state, which was the Roman Republic of the last centuries BC. The procedural advantages of the formulary procedure, as well as the public-power institutionalization of the judicial system, led to the abolition of the legislative process at the end of the 1st century BC, as a result of the adoption of *lex Iulia iudiciorum privatorum 17 BC*, which ensured a more active participation of the praetor and other magistrates in arrangement of judicial proceedings within the framework of the formal process.

At the same time, the praetor's procedural powers had their limits originating from the very essence of the praetorian empire, which was a 'lesser empire' (*imperium minus*)[56]. First of all, it is the independence of the judge from the praetor when considering the case on the merits at the *in iudicio* stage, which was the reason for the inability of the magistrate to influence the delivery of judgments other than by means of a formula describing the model features of a legally significant situation. In addition, the praetorian jurisdiction was limited by the term for which the magistrate was elected. As a result, a person whose claim was rejected on formal grounds could re-submit it only a year after the new praetor took office. Finally, already in the imperial era, the powers of the praetor come into conflict with the growing authoritarian tendencies, as a result of which this position itself, like other republican magistrates, loses its significance.

Changes in the political structure during the transition from the Republic to the Principate could not but affect the sphere of procedural law, where the extraordinary procedure (*extra ordinem cognitio*) which took shape in the practice of imperial courts[57] at the beginning of the 1st century AD, replaces the formulary procedure. The Princes sought to incorporate civil proceedings into the bureaucratic hierarchy, eliminating the separation between judicial and magistrate powers and eliminating the independence of the judge from the magistrate, which characterized the earlier stages of the evolution of procedural law. This trend became irreversible after the abolition of the *per formulas* procedure in 342, which made the extraordinary procedure the only kind of lawsuit (C. 2.57.1).

In the extraordinary procedure, judicial powers were exercised by imperial officials. As a result, the judicial procedure becomes more formalized, losing its link with the requests and needs of the parties, which cease to play a leading role in the process. Written documents are now the main evidences in the extraordinary procedure, while oral testimony of parties and witnesses is largely deprived of probative value. The priority of written documents and the freedom of the official exercising judicial powers to make decisions at his own discretion create conditions for various kinds of judicial errors discussed by Seneca the Elder, Quintilian, Apuleius and other authors of rhetorical essays who sharply criticized the flaws of the judicial procedure from the standpoint of ordinary legal consciousness (Apul. apol. 27). The mechanism for appealing decisions in higher courts, up to the imperial one, was called upon to compensate for the defects of cognitive legal proceedings. Nevertheless, even this mechanism was unable to resist judicial and bureaucratic arbitrariness.

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[56] Fore more details, see: Martino F. de. Storia della Costituzione Romana. Vol. I. Napoli : E. Jovene, 1958. P. 189, 230; Sanctis G. de. Storia dei Romani. Vol. II. La Conquista del primato in Italia. Firenze : Fb & c Ltd., 2017. P. 407; Stewart R. Public Office in Early Rome. Ritual Procedure and Political Practice. Ann Arbor : University of Michigan Press, 1998. P. 95–137; Bunse R. Die klassische Prätur und die Kollegialitat (par potestas) // Zeitschrift der Savigny — Stiftung für Rechtsgeschichte. R.A. 2002. Bd. 119. S. 29–43; Dement'eva, Vera V. Magisterial Power in the Roman Republic: the Meaning of imperium // Journal of Ancient History. 2005. No. 6. Pp. 46–75; Vlasova, O. A. The Imperium of the Roman Praetor: The Question of Interpretation // Bulletin of the Volga University. V. N. Tatishcheva. 2018. Vol. 1. No. 2. Pp. 5–12.

[57] See: Kaser M. Das Römische Zivilprozessrecht. München : C. H. Beckische Verlagbuchhandlung, 1966. P. 418 ff.; Lipshits, E. E. Law and Court in Byzantium IV–VIII centuries. L. : Science [Nauka], 1976. P. 173.

5. Evolution of Roman Civil Practice and General Historical Patterns of the Dynamics of Law and Order

An overview of the main stages in the evolution of the civil practice in ancient Rome allows us to outline three main trends in its development, which were interconnected and mutually conditioned. The first trend, described in detail above, consisted in the gradual strengthening of the role of the state, which turned the court from an informal procedure of voluntary mediation in the settlement of conflicts into a structural link of the bureaucratic apparatus, exercising its powers[58]. The second tendency consisted in the uneven ratio of the formal and substantive components in legal proceedings at different stages of its evolution. Thus, the legal process was characterized by the unconditional dominance of ritual forms over meaningful moments, which resulted in direct dependence of the outcome of the case on the compliance with ritual prescriptions.

The formulary procedure, in contrast to the legislative process, was aimed at developing the most flexible and effective tools for protecting subjective rights and legitimate interests of the parties, where an official took an active part, speaking on behalf of the civilian group and guided, first of all, by the idea of justice (*aequitas*)[59] opposed to external ritualism of strict law, which found its embodiment in the legal process. As is known, this contradiction of strict and 'fair' law clearly manifested in praetor lawmaking apparently has a universal character, being inherent in any legal order at a certain stage of its evolutionary development. To be convinced of the universality of the opposition between *ius strictu* and *bona fi des* in Roman law, it suffices to recall that a similar controversy took place in Anglo-Saxon law[60] that for a long time was characterized by the dualism of common law and the law of justice, which was formed in the 15th century through the activities of the Court of the Lord Chancellor. We believe that such a dualism was not just the result of the action of social and historical factors, but also constituted a necessary attribute of the logical structure of Anglo-Saxon law in the 15th — 19th centuries[61].

An important prerequisite for these procedural changes was the transition from associative thinking to conceptual thinking, which contributed to the explication of the basic axiological categories that underlie legal communication, including the category of good conscience (*bona fi des*)[62] that was the guiding principle of judicial and law enforcement activity. The importance of axiological foundations for a developed judicial discourse is evidenced, in particular, by the fact that both *aequitas* and *bona fi des* were constantly in the center of attention of Roman theorists of oratory, who, along with lawyers, put a lot of efforts into conceptualizing these concepts[63]. In turn, the extraordinary procedure was characterized by a well-known decline in legal consciousness and a decrease in the general level of legal culture of the participants, which led to the bureaucratization of legal proceedings. Since both the doctrine and the activities of the republican magistrates lose their law-making significance, the developed ways of practical application of the principles of justice and good conscience to specific factual situations go out of circulation, giving way to thoughtless, although in many cases highly technical, adherence to the letter of the law, namely the imperial constitutions, whose pathetic style and numerous appeals to justice often masked the loss of this concept of the actual legal content[64].

Finally, the third tendency manifested itself fully and clearly in terms of the external sign-symbolic form of procedural actions, whose evolution is characterized by the phenomenon of the so-called 'semiotic weakening of a sign'. In a general sense, the semiotic weakening of a sign inherent in legal communication is characterized as follows: "legal institutions have apparently evolved from the complete

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[58] See: Baty Th. The Difference between Arbiter in the Roman Sense and Modern Arbitrators // University of Pennsylvania Law Review and American Law Register. 1917. Vol. 65. No. 8. P. 734.

[59] See: Kipp, T. History of Sources of Roman Law. SPb. : Ed. N. K. Martynova, 1908. Pp. 6–11; Saveliev, V. A. Justice (Aequitas) and Good Faith (Bona Fides) in Roman Law of the Classical Period // State and Law. 2014. No. 3. P. 67; Dozhdev, D. V. Ars boni et aequi in the definition of Celsus: the Right between Art and Science // Proceedings of IGPRAN. 2016. No. 4. Pp. 70–71.

[60] Fore more details, see: Metzger F. Roman Judges, Case Law and Principles of Procedure // Law and History Review. 2004. Vol. 22. No. 2. P. 273–275.

[61] See: Hohfeld, W. N. An Additional Note on the Conflict between Common Law and the Law of Justice // Basic Legal Concepts of Wesley N. Hofeld. SPb. : Alef-Press, 2016. Pp. 160–165.

[62] See: Leesen T. M. Gaius Meets Cicero: Law and Rhetoric in the School Controversies. Leiden ; Boston : M. Nijoff Publishers, 2010. P. 8 ff.

[63] Fore more details, see: Pringheim F. Bonum et aequum // Zeitschift der Savigny — Stiftung für Rechtsgeshichte. Romanistische Abteilung. 1932. Bd. LII. S. 97; Riccobono S. Lineamenti della storia delle fonti del diritto romano. Milano : Giuffre, 1949. Pp. 108–122; Gallo F. Sulla definizione celsina del diritto // Gallo F. Opuscula selecta. Padova : CEDAM, 1999. P. 586.

[64] See: Koptev, A. V. Codification of Theodosius II and Its Preconditions // Ancient Law. 1996. No. 1. P. 253.

identity of the action and the information model towards similarity, when, instead of the identity of the sign and the action, a certain ritual procedure is chosen that imitates the overcome value — action by force ...This understanding of the development of law corresponds to the general tendency of semiotic development — the desire for semiotically weakened action"[65].

It is hardly possible to agree with the final conclusion that the semiotic weakening of a sign in the legal sphere consisted in the transition from physical violence to judicial coercion. Any legal order, even the most undeveloped, has the mechanisms of judicial settlement of disputes. It seems that the semiotic consequences of the weakening of a sign should be sought in the nature of the sign communication itself, which has its own characteristics at different stages of legal evolution. As applied to Roman private law, this meant a transition from the performance of ritual acts at the stage of the legislative procedure to oral judgment used in the formulary procedure, and then to written forms, which became the main means of the extraordinary procedure. Thus, in the Roman civil proceedings, in the course of its evolution, there is a semiotic weakening of the sign of the materiality of the performance of procedural actions, which were transformed from judicial fights into oral judicial pleadings of the parties, and then into written proceedings.

The noted changes have especially deeply influenced the form of claims in Roman law, which seems far from accidental, given that any subjective law in the representation of Roman lawyers had a procedural form of a claim. Thus, according to the well-known definition of Celsius: "A claim is nothing more than the right of a person to demand in court what he is owed"[66]. Accordingly, at the stage of the legal process, a claim as a procedural form of a person's subjective right was a unity of verbal and nonverbal actions provided for by the ritual and enshrined in the letter of the law (first of all, the Law of the Twelve Tables). The formulary legal proceedings differed by the fact that in such proceedings the statement of claim acquired a form free from ritualism. The obligation of the claimant was to inform the defendant orally or in writing of the claim (*editio actionis*)[67], which served the basis for the magistrate to draw up an order for the judge to consider the case, guided by the factual circumstances and the legal grounds set out in the formula.

Only in the extraordinary procedure does the statement of claim acquire the modern form of a written document containing the claim of the claimant or the applicant (cf. item 1, article 131 of the Civil Procedure Code of the Russian Federation, item 1 of article 125 of the Arbitration Procedure Code of the Russian Federation, item 1 of article 125 of the Code of Administrative Judicial Procedure of the Russian Federation)[68]. Note that in modern conditions of digitalization of law and order, and the transition to electronic technologies in law enforcement and judicial activities, a statement of claim is being transformed into an electronic document[69]. The virtualization of statements of claim is a further development of the tendency to weaken the semiotic sign of the materiality of procedural actions, which was already observed in Roman private law.

The evolution of claim forms in the Roman civil practice reflects general trends in the historical dynamics of cultural communication tools, confirming the correctness of N.Ya.Marr's findings stating that,

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[65] Proskurin, S. G. Evolution of Law in the Light of Semiotics // Questions of Philology. 2010. No. 3. P. 108.

[66] Cels. 3 dig., D. 44.7.51: Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.

[67] Ulpian (Ulp. 4 ad ed., D. 2.13.1 pr. — 1) defines the notion *editio actionis* as follows: "Whoever wants to raise a claim must first declare it to the defendant; since the fairest seems to be the order in which the one intending to raise a claim is obliged to declare it to the defendant ... To inform the defendant about the filing of a claim means also to give the opportunity to make a copy or set out the claim in writing and give it or read it. Labeo says that the one who writes the name of his opponent on the board [with the praetor's orders] and states what he intends to sue about, or informs about what he wants to use is also to inform about raising a claim (Qua quisque actione agere volet, eam edere debet: nam aequissimus videtur eum qui acturus est edere actionem... Edere est etiam copiam describendi facere: vel libello compecti et dare: vel dictare. Eum quoque edere Labeo ait, qui producat adversarium suum ad album et demonstrat quod dictaturus est vel id dicendo, quo uti velit)". Thus, in order to bring a claim to the plaintiff, it was enough to indicate its subject, including in an oral statement, as indicated by the lexical forms of the verb *dico* present in the quoted passage. For more details of the procedure for filing a claim in the formulary procedure, see: Kaufmann H. Zur Geschichte des Aktionenrechtlichen Denkens // Juristen Zeitung. 1964. No. 15/16. Pp. 484–485.

[68] Civil Procedure Code of the Russian Federation // Collection of Legislative Acts of the Russian Federation. 2002. No. 46. Art. 4532; 2019. No. 49. Part 5. Art. 6965; Arbitration Procedure Code of the Russian Federation // Collection of Legislative Acts of the Russian Federation. 2002. No. 30. Art. 3012; 2019. No. 49. Part 5. Art. 6965; Code of Administrative Court Procedure // Collection of Legislative Acts of the Russian Federation. 2015. No. 10. Art. 1391; 2019. No.52. Part 1. Art. 7812.

[69] See: Order of Judicial Department at the Supreme Court of the Russian Federation dated 28 December 2016 No. 252 on *Approval of Procedure for Filing Documents in Arbitration Courts of the Russian Federation in Electronic Form, Including in the Form of an Electronic Document*. As revised on 20 February 2018 // Bulletin of Acts on Legal System . 2018. No. 4.

in a diachronic perspective, communication in general (and legal communication, in particular) is a stagewise change of semiosis types leading to the weakening of links between sign designata and their subject referents. So, oral verbal speech emerges based on the non-verbal sign speech and in addition to it, and is further supplemented by written speech. The transitions to each subsequent stage of communication are revolutionary in nature and result in systemic restructuring of all spheres of human thought and culture, including the legal sphere. The history of procedural law of Ancient Rome serves as a particular case and model of evolution of the latter.

6. Conclusion

This essay does not seek to give a detailed historical overview, considering all the changes that the Roman civil practice underwent in chronological order. Its mission is to formulate and empirically substantiate a hypothesis, whose essence consists of two assumptions. Firstly, the civil practice is the most important component of the legal order of Ancient Rome, reflecting the features of not only Roman law, but also other stages of similar legal order of antiquity.

Secondly, the tendencies in the development of the Roman civil practice shed light on the basic general historical laws of legal communication evolution.

Legal communication can be defined as the transfer of information about possible, proper and prohibited behavior, which, in combination with other information processes in society, constructs a social reality. The means of coding information, specifically inherent in law, are speech acts of a semiotic nature, whose content is formed by the rules of law, as well as subjective rights and obligations. It is reasonable to presume that the evolutionary dynamics of legal communication, which in a diachronic retrospective determines the evolution of legal order, is manifested both at the level of external sign expression and in content.

The evolution of sign communication considered on the basis of the Roman civil practice includes three stages. The first, the most ancient, stage is characterized by the predominance of oral speech inseparable from non-verbal (gesture) means of communication implemented in the form provided for by the ritual, failure to comply with which makes the transmitted information irrelevant. This inseparable unity of word and action, which determined all aspects of the rule of law, clearly manifested itself in the legal procedure, whose ritual nature excluded the need for the state to participate in the judicial procedure. This trend is, among other things, due to the lack of well-established and officially recognized documentary evidences of legally significant information. Finally, at the third stage, corresponding to the extraordinary procedure, the relevance of legal communication began to be determined by its written form, which led to the displacement of oral speech to the periphery of the communicative space.

The considered changes in the field of legal communication serve as an important indicator of the formation of the normative component of the rule of law. In the early stages of legal evolution, the underdevelopment of legal rules was due to the syncretic unity of religious, moral and legal imperatives, which received external expression and consolidation in ritual. Since the ritual completely and fully determined the behavior of individuals in all significant spheres of their activity, minimizing the manifestation of the autonomy of the will of individuals in behavioral acts, there was no need for the actual normative regulation of behavior, setting the universally significant limits of individual freedom. In these conditions, the ritual becomes the main regulator, including legal behavior.

As freedom grows, associated with the development of personal self-awareness and the transition from associative-figurative to conceptual thinking, the ritual loses its ability to exert a regulatory influence on legal behavior, due to which the subjective rights and obligations of participants in specific life situations, most often non-documented in writing, become the main regulators. At the same time, on the basis of a set of subjective rights that form the basis for the rule of law, its normative dimension begins to take shape, establishing a generally valid measure of the possible and proper behavior of the holders of subjective rights and obligations.

As noted earlier, the main sources of rule-making in the legal order of antiquity (including the legal order of Ancient Rome) were the activities of lawyers and judicial practice inextricably linked with it, the development of which was significantly influenced by the development of forms of written recording of law. At the same time, as legal communication develops, the rules of law are also consolidated in official texts, primarily in laws and other normative legal acts, which, over time, occupy a dominant position in the system of sources of law. The tendencies considered on the material of Roman private law in one way or another manifest themselves in all legal orders of antiquity, which makes it possible to classify them among the general laws of legal evolution.

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History of Antitrust Law in Japan

Veronica N. Shalaevskaya
Student of Law Faculty, St. Petersburg State University, Saint Petersburg, Russian Federation; miss.veronika171717@yandex.ru

ABSTRACT
This article describes the process of development of Antitrust Law in Japan. The characteristic features of Japanese antitrust regulation in the historical perspective are presented. The effectiveness of the legislation and its problematic issues are analyzed. On the basis of the study, the author propose measures aimed at solving one of the problems of modern antitrust law in Japan, which is contrary to the administrative guidance.
Keywords: Japanese antitrust law, Japanese law, monopoly, history of law.

Introduction

In every modern democratic state, the operation of a market economy is proclaimed to be one of the key values. In the context of such an economic system, actors have the right to freely engage in a business activity, and various market mechanisms operate autonomously. However, practice shows that a market economy cannot function in such a way as not to infringe on the rights of one or another party. The exercise of the right to free competition being one of the key economic development factors is impeded by the process of monopolization. So, this phenomenon requires state intervention for its regulation.

Antitrust law in Japan is of particular interest when considering this issue. The Japanese society that has always considered state intervention in the economy and maintenance of monopoly forms of enterprises to be the most effective method for regulating economic relations, was forced, for historical reasons in the mid 20th century, to adopt democratic antitrust laws. Today Japan continues to amend and supplement its antitrust laws.

This essay is consequently aimed to provide a historical comparative overview of antitrust laws in Japan.

Monopoly and Competition

Prior to proceeding to the historical overview of the Japan's antitrust law formation, it is essential to define the concepts of 'monopoly' and 'competition'.

The concept of 'monopoly' has no unambiguous definition: experts interpret this notion differently. For example, K.A. Pisenko handles the concept of monopoly using two approaches: economic and legal[1]. The legal content of the concept of monopoly is defined through the list of main features in the law. In the economic sense, a monopoly is interpreted as a market condition where only one producer or vendor of a specific type of goods that have no equivalents operates, while buyers have no choice and are forced to purchase the monopolist's products only.

Other researchers of this phenomenon interpret the concept of monopoly using other approaches: microeconomic and macroeconomic[2]. In microeconomic interpretation, the key monopoly features are the ability to dictate their prices in the market and to restrict the entry to the market for other companies that produce the same or similar products.

It is noteworthy that monopoly in its microeconomic understanding is rather rare in real life and is an abstract concept[3]. The most relevant is the concept of monopoly in the macroeconomic sense. In this case, the monopoly is a market condition where the economic actor is able to influence and actually affects significant market parameters[4].

An ambiguous situation arises when trying to define the concept of 'competition'. By analogy with the concept of 'monopoly', the term 'competition' can be interpreted from the economic and legal points of view[5]. In economics, competition is understood as a market situation where an unlimited number of manufacturers or sellers carry out their economic activities without any restrictions.

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[1] See: *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* Legal Regulation of Competition and Monopoly in the Russian Federation : a Course of Lectures. Moscow : Statute, 2011. P. 43.

[2] See: *Shishkin, M. V., Smirnov, A. V.* Antimonopoly Regulation : Textbook and Practice for Bachelor's and Master's Degrees. Moscow : Yurayt, 2019. Pp. 5–7.

[3] See: Economy : the textbook / edited by A. S. Bulatov. 3rd ed. Moscow : Ekonomist, 2004. Pp. 240–241.

[4] See: *Shishkin, M. V., Smirnov, A. V.* (see above). Pp. 10–11.

[5] See: *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* (see above). Pp. 35–38.

The regulatory legal acts related to the regulation of competition applicable in most foreign countries do not give any specific definition of the concepts used, however, for example, the Japanese law contains an exact formulation of the concept 'competition'. Thus, Article 2 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade currently in force in Japan defines competition as a "state in which two or more enterprises, within the normal scope of their business activities and without making any material change to the facilities for, or kinds of, such business activities, engage in, or are able to engage in, supplying the same or similar goods or services to the same user; receiving supplies of the same or similar goods or services from the same supplier"[6].

Like monopoly, competition is rarely found in the market in its pure form (perfect competition). Oligopoly and monopolistic competition are much more often in the modern world. For example, an oligopoly is a market structure where a limited small number of suppliers and producers serve a large number of users.

In the ordinary mind, the monopoly always appears as a categorically negative phenomenon. In fact, monopolization can have both negative and positive aspects. One of the advantages of the monopoly is a significant reduction in costs while increasing production outputs, i.e. the so-called 'scale effect'. In addition, large monopolies make it possible to forecast the market, and are more stable in cases of bankruptcy. The stable position of a monopoly company inspires confidence among users, besides, it is easier for the state to control one enterprise than a large number of small ones. In addition, there are some industries that operate most effectively if they are managed within the framework of one large enterprise, or competition in these industries significantly infringes on public interests (state monopolies, for example, in the field of military security). In these areas, the state is forced to establish special rules that ensure the rights of stakeholders and compensate for the lack of competition.

Despite this, monopolies often tend to set excessively high prices and save their own funds to maximize profits. In the absence of competition, the monopolist does not seek to implement the achievements of scientific and technological progress, and reduces the quality of products. The assortment of the monopoly's products is prone to reduction, while consumers, in the absence of choice, demonstrate consumer rigidity[7].

The existence of perfect competition in the market also has positive and negative consequences. Competition promotes development of small and medium-sized businesses, and increases the quantity and quality of offered goods. The market has no shortage. In case of active non-price competition between companies, the consumer is provided with more complete information about the product and, consequently, has the opportunity to fully satisfy his needs and exercise his rights.[8] However, the forms of competition often become violent and even illegal. The stakeholders' position is unstable in perfect competition, and price changes become unpredictable.

Thus, to ensure market functioning without significant infringements of public interests and rights of individual economic actors, the market activity should be controlled by the state.

Antitrust Law

Antitrust (competition) law is one of the main methods for state regulation of monopolization and competition. This area of law regulates a specific complex branch of law.

In its most general form, antitrust law can be defined as a branch of law that regulates "economic relations in the sphere of monopoly and competition"[9], where state bodies, officials, individuals, legal entities, and their associations may participate.

It is noteworthy that many researchers equate the concepts of 'antitrust' and 'competition' law[10]. However, it is believed that these are two different areas of law[11]. This approach treats the antitrust law as a set of strictly restrictive measures, where the state has the right to demand that other economic actors conduct in a manner that does not allow restricting competition. The predominant method of antitrust legal regulation is the imperative method.

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[6] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Electronic source] // Japan Fair Trade Comission. URL: https://www.jftc. go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html (date of application: 10 February 2020).

[7] See: *Knyazeva, I. V.* Antimonopoly Policy of the State : textbook. Novosibirsk : SibAGS, 2010. Pp. 32–33.

[8] See: *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* (see above). Pp. 40–41.

[9] *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* (see above). P. 14.

[10] Ibid.

[11] See: *Totev, K. Yu.* Competitive Law (Legal Regulation of Competition) : textbook. Moscow : RDL, 2000. Pp. 73–74.

The competition law is considered to be aimed not only at controlling monopolies, but also at supporting and stimulating competition, and developing a competitive environment.

Thus, the content of antitrust law depends on various characteristics, but in general terms, including in Japan, it is the main regulator of market relations regarding two interrelated phenomena: monopoly and competition.

Stage 1 in Development of Antitrust Law in Japan (from mid 19th century to World War II)

Most social, economic and political problems aggravated in Japan by the mid 19th century, and the existing Shogunate system could not cope with those challenges. The last shogun of the Tokugawa dynasty was overthrown, and unlimited power was restored to the Emperor. In the new era of history, named after the slogan of the Emperor Meiji, important reforms were carried out in various spheres of public life, including economy.

It is important to note that at the beginning of this historical period, Japan was a backward and undeveloped country, but by the end of the period the country modernized and significantly improved its economic performance, which was due to the desire to achieve independence in the international arena and get rid of the influence of Western states.

The reforms of that time first touched the economic phenomenon of monopoly. Before the Meiji restoration, the law relating to the position of monopolies did not ever exist, moreover, the existing system of class division (shi, nō, kō, shō) perpetuated a disdainful attitude towards economic actors and determined the position of merchants and people engaged in commercial activities as the lowest stage in society[12].

The main element of Japanese modernization was the creation of a competitive industrialized economy, and in most cases it was indifferent by what means to achieve the goal. Thus, to develop the most important industries, the Japanese government considered direct government intervention to be the most effective method[13]. Throughout the entire period of the country's modernization, the Japanese government played an active role in strengthening important industries through the provision of incentives and subsidies to enterprises. Later, high customs tariffs and public procurements were added to the mercantilism policy.

Gradually, a small group of Zaibatsu conglomerates (in Japanese parlance means 'property') was formed in Japan that concentrated a large amount of economic resources in their hands. Most Zaibatsu, however, existed in the form of oligopolies, but not monopolies. One of the reasons for the predominance of such a structure was the interest of the military and government bureaucracy in maintaining some degree of competition in heavy industries. This was necessary to stimulate technological progress and restrict the influence of one enterprise on others. Later, a number of small enterprises emerged around Zaibatsu which completed orders from large businesses.

During the reign of Emperor Yoshihito (1912-1926), i.e. during the years of the so-called 'Taishō democracy', economic growth in Japan continued, but in the 1920s to 1930s, development after a rapid recovery slowed down sharply, primarily due to the global economic crisis. Over that period, about 25% of all industrial enterprises in Japan operated for export, and the decline in prices for Japanese goods in the world market led to an increase in industrial reserves and a large-scale reduction in production.[14]

Back in the 1920s, the Japanese government took a number of measures to overcome the recession. In this period, the Japanese parliament, in pursuit of limiting competition and stabilizing trade, passed a law aimed at stimulating exports for small and medium-sized enterprises. This law allowed small businesses to create cartels to control the prices of exported goods.

Some time later, in the Shōwa period (1926-1989), a certain list of legislative acts was adopted, which established a limited number of enterprises able to do business in a specific area. Among them are the Banking Act of 1927 and the Iron and Steel Industry Act of 1933.[15] The most important law regulating competition in Japan was the Principal Industries Control Act of 1931. Under its provisions, the creation of cartels was officially allowed in cases where their activities were reasonably necessary

[12] History of Law in Japan since 1868 / edited by W. Rohl. Leiden : Brill Academic Publishers, 2005. P. 483.

[13] *Seita A., Tamura J.* The Historical Background of Japan's Antimonopoly Law // University of Illinois Law Review, 1994. No. 1. P. 128.

[14] History of Japan / Ed. A. E. Zhukov. M. : Institute of Oriental studies of the Russian Academy of Sciences, 1998. Vol. 2. 1868–1998. P. 321.

[15] History of Law in Japan since 1868 / edited by W. Rohl. Leiden : Brill Academic Publishers, 2005. P. 527.

for development of the national economy. All agreements hereunder became binding for cartel members. In 1933, an important amendment was made to the Act, which prescribed that all cartels were required to obtain approval for their actions from the government and be accountable to the latter. The Act became the background for modern antitrust regulation, which features the approval of enterprises by state authorities.

Japan's competition law was notably influenced by its participation in international agreements after World War I. The Hague Conference of 1925 decided that all states-members of the Paris Convention, including Japan, should take measures to combat unfair competition before the next conference in London. In 1926, a draft law appeared, but it did not find approval and was not adopted. As the conference in London approached, the Japanese government had to fulfill its obligations. In 1934, shortly before the conference, the parliament passed the Unfair Competition Act. Its scope of application was overly limited; it was rarely applied and did not much affect the economic situation. For example, the Act provided for a purely formal provision prohibiting damaging the reputation of goods of another manufacturer.

Thus, before World War II, a system was formed in Japan, where all economic power was concentrated in the dominant industries Zaibatsu. Zaibatsu were somewhat hybrid in nature, as they incorporated both private and public resources. All the major Zaibatsu were a network that included a holding company with the majority of shares owned by members of the same family, and many subsidiaries. Employees of subordinate companies often associated themselves with the holding company, but not with a subsidiary, their real employer. They were ready to work for the good of the conglomerate, felt a sense of respect and obedience to their elders. This became a characteristic feature of Japanese business conduct and has survived to this day. The rest of the industries (production of cotton and silk fabrics, shoes, porcelain, etc.) in the Japanese economy of that period were represented by small and medium-sized enterprises, often transformed into cartels.

Stage 2 in Development (From the End of World War II to the Early 21st Century)

Antitrust law in its standard sense emerged in Japan only after World War II, in the course of the occupation forces' activities to democratize and demilitarize the Japanese state. Until that time, Japan, on the other hand, had some rules that encouraged monopolization and cartelization.

Paragraphs 10–11 of the Potsdam Declaration, which was signed by some countries of the antifascist bloc on the Japanese issue, contained provisions obliging the Japanese government to carry out democratic reforms, reorganize industry, and liquidate military oriented companies.[16] To implement these measures, an occupation government was created in Japan, which was supposed to consist of several countries, but in fact, only the United States was involved in the entire occupation policy.

The occupation government began to democratize industry through deconcentration of economic power and dissolution of Zaibatsu. Zaibatsu were perceived by the new authorities as one of the perpetrators of war crimes. The personal assets of family members of the largest Zaibatsu were frozen, and they were prohibited to hold managerial positions in other companies. Some Zaibatsu were split into several small companies, while others were replaced by new replacement enterprises.

The most important step in the development of a democratic Japanese economy was the adoption of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, the temporary transitional Deconcentration Law in 1947 and the revision of the Commercial Code. Thus, Japan became the first Asian country to borrow and adopt the law on monopoly and competition. The antitrust law contained many provisions from American antitrust laws, but was much more detailed and stringent, as the United States feared that against the background of traditional Japanese thinking, American antitrust laws would be misinterpreted.

The history of Japan's main antitrust law dates back to 1946, when the Japanese Ministry of Industry and Commerce issued a proposal to prohibit the excessive concentration of economic power, except when it is beneficial and necessary. The occupation government considered it unacceptable and began to independently develop a law that would completely ban monopolies, unfair trade practices and excessive economic concentration of power. These ideas were enshrined in Article 1 of the antitrust law.[17]

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[16] Declaration of Governments of USA, Great Britain and China [Electronic source] dated 26 July 1945 // Embassy of Japan in Russia. URL: https://www.ru.emb–japan.go.jp/itpr_ru/1941.html#7 (date of application: 12 February 2020).

[17] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Electronic source] // Japan Fair Trade Comission. URL: https://www.jftc. go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html (date of application: 10 February 2020).

The law additionally provided for creation of a special Japanese Fair Trade Commission, by analogy with the American Federal Trade Commission. Its main responsibility was to monitor compliance with the rules of the antitrust law.[18] Article 28 prescribed that the Commission should exercise its powers independently of the government.[19] Thus, the Commission actually monopolized the area of law enforcement in this industry. The occupation authorities believed that such a concentration of law enforcement in one independent body would be most effective in enforcing the law. It will later become clear that in Japan such a system makes the Commission more vulnerable to political pressure, and law enforcement may become ineffective.

Article 9 of the law prohibited creation of holding companies. No company, including a foreign one, could obtain an excessive concentration of economic power by acquiring or owning shares in other companies.[20] This provision on prohibition of holding companies was canceled only in 1997. A special aspect of the new law was Article 8, which did not have any equivalents in US antitrust laws. This article prohibited businesses from restricting competition and preventing other companies from doing business in a particular industry.[21]

Many businesses, mostly large companies and their backing conservative parties, found the law overly harsh and impeding Japan's economic growth. It was perceived not as a means to democratize the economy, but as punishment for a country that had lost the war. From the outset, the ideas of the antitrust law were foreign to the character and historical experience of the Japanese, which resulted in amendments to the antitrust law that first were made in 1949.

The most significant change was that amendments lifted a ban on the company's ownership of shares in another company, as long as the acquisition of shares did not harm the existence of free competition. The amendments canceled the restrictions on company directors to hold leadership positions in no more than four companies. This was now only prohibited if these companies were competing in the same industry.

In 1950, the Korean War broke out and Japan became an important supplier of military goods to the United States. This provided a precondition for revitalization of the Japanese economy and the subsequent "economic miracle" in the country. Despite this, many companies could not resist free competition and went bankrupt, enterprises began to demand additional amendments to the law. In connection with the situation, the Japanese parliament passed the so-called Stabilization Act, which allowed small and medium-sized enterprises to create cartels in case of a steady decline in demand for their products.

In 1953, new amendments were introduced into the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade. Those amendments mainly resulted in authorization of cartelization if approved by the ministry in charge of the relevant economy sector where the enterprise was created. Gradually, the number of cartels freed from the anti-monopoly law increased.

At all stages of development, the basic principles of the antitrust law were specified in the Fair Trade Commission's acts. In the 1950s, the Commission's enforcement activities focused on unfair trade practices and were often carried out informally. The focus on this problem and the evasion of official action was explained by the fact that the Commission tried not to interfere in the controversial issues of economic policy, which were decided by the Ministry of Trade and Industry.

In the 1970s, a major oil crisis began. In 1974, T. Takahashi, the Chairman of the Fair Trade Commission, proposed a program of reforms in the antitrust law to solve economic problems. Among the measures proposed were tougher penalties for violators of the antitrust law, partial alienation of assets from oligopolistic companies, and introduction of restrictions on the number of shares that financial companies may have. However, the Ministry of International Trade and Industry entered into confrontation with the Commission, and no significant changes were made to the law.[22] To rid the Japanese economy of severe price increases, the Ministry allowed oil importers to set up cartels to increase the cost of gasoline and fuel oil purchased by consumers. The Fair Trade Commission made the case public. In 1984, the Supreme Court ruled that the Ministry's actions were illegal, and fourteen top managers of oil companies were sentenced to prison. This situation allowed the Commission to influence parliament and tighten some provisions of the antitrust law.

The general trend of the 1980s in the area of antitrust regulation was an informal activity of the Fair Trade Commission through recommendations and warnings for companies. Antitrust laws increasingly

[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] *Suzuki K.* Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network. London, New York : Routledge, 2002. P. 23.

came into conflict with the interests of individual enterprises. In such areas, appropriate mitigating changes have been made to the legislation on monopolies. The relevant evidences can be found in the Fair Trade Commission report dated 1989 which demonstrated that nearly half of Japan's economic output continues to be in industries with a strong concentration of economic power.[23]

In the 1990s and 2000s, many provisions of antitrust laws have been rethought. Initially, the changes were caused by external pressure, mainly from the United States. They sought to amend the antitrust law in order to maximize the benefits for US companies in the Japanese market. Later, during a slowdown in economic growth, changes became part of domestic economic policy, which increasingly viewed the law as a way to create a sustainable and developing economy. For example, in 1992, an amendment was made to the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, which quadrupled the size of the fine for violating the antitrust law. Since the second half of the 1990s, the number of cartels excluded from the antitrust law was significantly reduced.

Modern Stage

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade as amended and numerous Fair Trade Commission's recommendations currently remain the main sources of antitrust law. However, economic conditions have changed significantly as compared to the end of the 20th century.

One of the phenomena characteristic of the Japanese economy today is keiretsu (in Japanese parlance means 'set', 'system'), which are often called the successors of Zaibatsu. Having united in keiretsu, the companies jointly create a diversified concern. Their position has some common features with the monopoly. Firms have a large percentage of each other's shares, and relations between firms are long-term. In addition, each of them has a close relationship with a common large bank.

Although many provisions of the main antitrust law have remained intact since 1947, Article 9 of the antitrust law was amended in 2002. The concept of 'holding company' was abolished, and the Article began to cover companies with an excessive concentration of economic power in general.

The next amendment to the antitrust law in 2005 established a stricter penalty for its violation. In 2009, the list of actions was expanded, including various types of unfair competition, for which companies are held liable. The last significant change to the antitrust law was made in 2013. Individuals acquired the ability to appeal any Commission's decision to the Tokyo District Court.

Today, Articles 1 and 2 of the modern antitrust law support free competition, promote democratic development of the national economy, and protect interests of the general population by prohibiting private monopolization, restricting trade and unfair trade policies.[24]

The Fair Trade Commission, which continues to have a long mandate, currently retains its active role in overseeing and modifying the law in line with economic realities. The clarifications issued by the Commission in the field of antitrust regulation adjust the provisions of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade in accordance with the requirements of the time. For example, in 2019, the guidance was issued regarding the abuse of best position in negotiations between digital platform operators and consumers who provide personal information.

One of the problems in implementation of antitrust law at this stage is its contradictions with the explanations within the administrative guidance given by the Ministry of International Trade and Industry. The administrative leadership consists in the fact that the Ministry, in the sphere of its permanent competences, gives recommendations to companies or makes proposals. It can be expressed in writing, but it usually exists orally. The law does not establish any penalties for non-compliance. The main problem with such clarifications is the Ministry's assistance to development of cartels or cartel agreements in order to overcome depression or rationalize industry. The Fair Trade Commission often opposes the Ministry, arguing that such anticompetitive governance is illegal, or at least undesirable, as it allows cartels to be created bypassing antitrust laws.

According to the author, this problem could be settled by introducing a system where any explanation of the Ministry would be published in writing and, before being sent directly to the company, would have to be checked by the Commission. If the Commission rejects the text of the clarification on the grounds of its contradiction with the antitrust law provisions, the Ministry could, for example, appeal it to another instance or revise the clarification. Such a scheme would avoid non-compliances and conflicts,

[23] History of Law in Japan since 1868 / edited by W. Rohl. Leiden : Brill Academic Publishers, 2005. P. 534.

[24] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Electronic source] // Japan Fair Trade Comission. URL: https://www.jftc. go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html (date of application: 10 February 2020).

and would not limit the Ministry's powers, since the Commission would have purely control functions. In any case, the administrative guidance is only a voluntary recommendation, and not an act binding the company.

Thus, modern Japanese antitrust law is an essential part of its legal system. It, like any other industry, is being constantly adjusted, and the bodies responsible for implementation of rules strive to ensure their most effective functioning and eliminate existing deficiencies.

Conclusion

To summarize, it is noteworthy to say that pre-war Japan was characterized by government support for monopoly and oligopoly forms of enterprises, meanwhile over the period after World War II, it faced the reverse process of borrowing strict US antitrust laws and attempting to modify the latter. Today, the Japanese antitrust law is a substantially amended and supplemented law that seeks to conform to the realities of a developed post-industrial society. The Fair Trade Commission remains the main body implementing these rules.

The main problem of the antitrust law that Japan has faced since the end of the 20th century up to now is the conflict between the antitrust law and unalterable Japanese opinion, according to which monopolistic forms of enterprises are the most effective. Evidence of such a problem is the confrontation between the Fair Trade Commission and the administrative leadership of the Ministry of International Trade and Industry. According to the author, this conflict can be resolved, for example, by introducing a system of checks by the Commission of the Ministry's proposals.

Thus, Japan's antitrust law is a unique element of Japanese law, whose essence, problems and contradictions can be understood only if considering it from a historical perspective.

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Jurisdictional Immunity of the Russian Federation as a Subject of International Private Law

Victoria S. Kichenina

Headofthe Departmentof Legal Supportof Foreign Economic Affairs ofthe St. Petersburg Branch of the Russian Customs Academy, St. Petersburg, Russian Federation, PhD; vskichenina@ yandex.ru

Artem R. Huzin

Law Student of the St. Petersburg Branch of the Russian Customs Academy, St. Petersburg, Russian Federation; tanker.gunner@gmail.com

ABSTRACT

This article discusses the concept of jurisdictional immunity. The problematic provisions related to the understanding of jurisdictional immunity in theory, legislation and judicial practice are presented. The international and national legislation related to the status of the state upon its entry into private law relations is analyzed. Based on the study, the authors propose measures aimed at creating a unique approach in understanding the jurisdictional immunity of the Russian Federation.

Keywords: immunity, state, private law relations, foreign trade transactions, jurisdiction

International cooperation is diverse in forms and areas of interaction. It is implemented by various types of entities, which include states. The latter are not only the parties to power relations, i.e. interstate relations of a public law nature governed by public international law, but also participants in private legal relations of a property or non-property nature, i.e. private cross-border relations governed by private international law. To describe the concept of jurisdictional immunity of the Russian Federation as a private international legal entity, this essay uses a comparative legal research method as well as a method for analyzing the existing rules of national and international law in this area of legal regulation.

State immunity is one of the basic fundamentals in private international law that determines the legal status of a State in international transactions and private cross-border relations in general.[1] Immunity, which exempts a State that exercises civil acts with national legal entities of foreign countries from being subject to the foreign courts' jurisdiction as well as from coming within the purview of foreign regulatory legal acts, pre-judgment or post-judgment measures of constraint such as attachment or execution of a decision, as well as arrest or seizure of property, was previously substantiated by the customary legal rules arising from the principles of sovereign equality and respect for sovereignty of States acting in private international law.[2] Proceeding from the modern legal reality, a number of acts of national and international legal nature were adopted, which fully cover these issues.

The first and main of these sources is the European Convention on State Immunity ('ECSI') of 1972. The Russian Federation did not sign or ratify this international treaty. However, on 2 December 2004 the United Nations General Assembly ('UNGA') adopted the United Nations Convention on Jurisdictional Immunities of States and their Property ('Convention') by its Resolution 59/38. The Convention amends and supplements the provisions of the European Convention on State Immunity and in many respects repeats the ECSI provisions.[3] Based on the provisions of Clause 1, Article 30 of the Convention, it enters into force after the delivery of the thirtieth instrument of ratification (as of 2020, only 22 instruments of ratification were delivered). However, despite the above, for the legal realities of the Russian Federation, at least from the point of view of theoretical approaches, this document is the main doctrinal source in the topic under consideration due to the following:

- Subject to amendments and additions, the more recent (in comparison with 1972) provisions of the Convention reflect more modern approaches to understanding the jurisdictional immunity of a State.
- The Convention was signed and ratified by the Russian Federation[4].

[1] *Barieva, A. A.* Problems of Development of the Legislation of the Russian Federation in the Field of International Civil Procedural Law // Innovative science. 2017. No. 2. P. 35.

[2] *Souresh A.* Jurisdictional Immunities of the State: Why the ICJ Got it Wrong // European Journal of Legal Studies. No. 9. 01.04.2017. P. 15.

[3] European Convention on State Immunity (ETS No. 74). Concluded in Basel on 16 May 1972 (as amended) // ATP "Consultant Plus".

[4] Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property" (hereinafter, the texts of regulatory acts are used and cited according to ATP "Consultant Plus". – Author's note).

- The provisions of the Convention have already been partially implemented into national legislation (Federal Law of the Russian Federation on Jurisdictional Immunities of a Foreign State and Property of a Foreign State ('RF Federal Law on Jurisdictional Immunities of a Foreign State').

The term 'immunity', based on the literal interpretation of all the provisions of the Convention, as well as the Annex to this Convention "Understandings with respect to certain provisions of the Convention", is not explicitly covered and is used in the general "context of draft articles as a whole".

The concept of 'jurisdictional immunity' was formulated in international law, first as a customary law, and then through judicial practice, legislation and international treaties, and means the right of a State not to obey the national procedural laws of other States.[5]

The jurisdictional immunity of a State, according to the Convention provisions, has three components:

– State immunity with respect to itself and its property from the courts' jurisdiction of another State (judicial immunity – Article 5 of the Convention)
– State immunity from pre-judgment measures of constraint, such as attachment or arrest against property of a State taken in connection with a proceeding before a court of another State (immunity from pre-judgment measures of constraint – Article 18 of the Convention)
– State immunity from post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State taken in connection with a proceeding before a court of another State (immunity from post-judgment measures of constraint – Article 19 of the Convention).[6]

In connection with the above, analyzing the meaning of the Convention, several reservations are essential.

1. Immunity of a State is based on the fact that it has sovereignty, and all States are equal. This basic fundamental of international law is expressed in the general principle of international law: "*Par in parem non nabet imperium*" ('Equals have no sovereignty over each other'). Consequently, the immunity of a State is always established exclusively in its own jurisdiction.
2. The recognition of jurisdictional immunity proceeds from the principle of its voluntary establishment by a State to which it belongs, and the same principle of voluntary refusal.
3. The recognition of immunity should in no way consist in release of a State from fulfilling its obligations or in release of a State from responsibility for failure to fulfill its obligations.[7]

All of the above, however, must be separable from the immunities granted to States under public international law[8]. Thus, in accordance with Article 3 of the Convention, the concept of jurisdictional immunity does not include:

– Immunities granted to a State in relation to its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to the bodies of international organizations or international conferences and related persons
– Immunities granted to heads of a State
– Immunities in relation to aircraft and spacecraft owned and operated by a State.[9]

In accordance with Clause 1, Article 7 of the Convention, a State cannot invoke immunity from jurisdiction in proceedings before a court of another State in relation to any matter or case, if it has explicitly expressed its consent to a foreign court's exercise of jurisdiction over such a matter or case, due to:

– International agreement (treaty)
– Contract in writing
– Statement in court or written communication in the framework of a specific proceeding.[10]

This essay clearly demonstrates the principle of voluntariness of waiver from jurisdictional immunity. In legal doctrine, two concepts of state immunity are usually considered:

– Absolute immunity
– Limited immunity.

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[5] *Borisov, V. N., Vlasova, N. V., Doronina, N. G.* / Private international law : a textbook / responsible ed. N. I. Mary`sheva. 4th ed., rev. and add. M. : IZiSP, Contract, 2018. P. 128.

[6] Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property"

[7] *Borisov, V. N., Vlasova, N. V., Doronina, N. G.* / Private international law : a textbook / responsible ed. N. I. Mary`sheva. 4th ed., rev. and add. M. : IZiSP, Contract, 2018. Pp. 130–131.

[8] *Enikeev, O. A.* Controversial Provisions of Chapter 45.1 of the Civil Procedure Code of the Russian Federation // The rule of law: theory and practice. No. 4 (46). 2016. P. 109.

[9] Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property".

[10] Ibid.

The concept of absolute immunity is based on its application in any legal situation, regardless of the nature of existing legal relationship between the parties.

According to the concept of functional (limited) immunity, a foreign State, its bodies, as well as their property, enjoy immunity only when a State exercises sovereign functions, i.e. *jureimperii* actions. If a State commits actions of a commercial nature (conclusion of foreign trade transactions, concession and other agreements), i.e. *juregestionis* actions, then it does not enjoy immunity. In other words, representatives of the concept of limited immunity believe that when a State puts itself in the position of a private person, it can be sued and its property is subject to measures of constraint.[11]

The United Nations Convention on Jurisdictional Immunities of States and their Property is based precisely on the concept of limited immunity. Thus, this Convention prescribes a number of restrictive cases when, should a dispute arise and be referred to the competence of foreign courts, a member State, i.e. party to the Convention, cannot invoke its jurisdictional immunity.

- If a State enters into a commercial transaction with a foreign natural or legal person (Article 10). In this case, a commercial transaction in accordance with Article 2 of the Convention means any contract or transaction of a commercial, industrial, commercial or professional nature, with the exception of an employment contract.
- If a State and a foreign individual enter into an employment contract and a dispute arises regarding the work that was or should be performed in whole or in part in the territory of that other State (Article 11).
- Cases arising from tort obligations (obligations due to injury to health or property), if actions or omissions took place in whole or in part in the territory of this other State (Article 12).
- Cases, where subject is protection of real rights to real estate or to any property, if real rights to it arise by virtue of inheritance (Article 13).
- Cases, where subject is establishment of the right to the results of intellectual activity (Article 14).[12]

The Convention provides for a reservation to the said rules: “Unless the States directly agree otherwise”.

If to talk about what concept the Russian Federation adheres to, then an unambiguous conclusion, at first glance, is difficult to make, since the national law does not contain the Federal Law on Jurisdictional Immunity of the Russian Federation or any other regulatory legal act that somehow reflects the position of the Russian Federation in this matter in relation to itself. Clause 1, Article 7 of the Law on Jurisdictional Immunities of a Foreign State sets forth that a foreign State does not enjoy judicial immunity in the Russian Federation in relation to disputes related to participation of a foreign State in civil transactions with individuals or legal entities or other entities that do not have the status of a legal entity, another State, if such disputes, in accordance with the applicable rules of law, are subject to the jurisdiction of the court of the Russian Federation and these transactions are not related to exercise of sovereign powers by a foreign State. Analyzing this provision, it can be concluded that functional immunity is enshrined in the legislation of the Russian Federation. The provisions of the Arbitration Procedure Code of the Russian Federation and the Civil Procedure Code of the Russian Federation should be also taken into account by virtue of direct indication in the law (Article 256.3 of the RF Arbitration Procedure Code[13] and Article 417.3 of the RF Civil Procedure Code[14]). Before adoption of the Law on Jurisdictional Immunities of a Foreign State in 2015, taking into account the provisions of the Russian law doctrine, it was possible to draw an almost unambiguous conclusion that the Russian Federation adheres to the concept of absolute immunity. However, since this Law entered into force, the advance of the Russian Federation towards the concept of limited immunity became obvious.

Article 7 of the Law on Jurisdictional Immunities of a Foreign State reflects the essence of Article 10 of the Convention, i.e. the main postulate of limited immunity that a State cannot invoke jurisdictional immunity if it enters into private legal relations with individuals or legal entities (in this case, commercial transactions form the basis of private cross-border relations). However, according to Clause 4, Article 7 of the Law on Jurisdictional Immunities of a Foreign State when deciding whether a transaction made by a foreign State is related to the exercise of its sovereign powers, the court of the Russian Federation takes into account the nature and purpose of such a transaction. Based on the literal interpretation of this provision, it can be concluded that it will be the court of the Russian Federation that

[11] *Borisov, V. N., Vlasova, N. V., Doronina, N. G.* / Private international law : a textbook / responsible ed. N. I. Mary`sheva. 4th ed., rev. and add. M. : IZiSP, Contract, 2018, 2018. P. 135.

[12] Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 “United Nations Convention on Jurisdictional Immunities of States and their Property”

[13] Civil Procedure Code of the Russian Federation dated 14 November 2002 No. 138-FZ (as amended).

[14] Arbitration Procedure Code of the Russian Federation dated 24 July 2002 No. 95-FZ (as amended).

will determine the nature of legal relations (private or public).[15] Thus, the key role in resolving this issue will be played by the evidence base provided by the parties and fully substantiating the nature of the transaction. However, taking into account the foreign policy attitudes prevailing in the modern world, it will be easy to assume that the court of the Russian Federation will interpret the evidence presented by the parties reflecting the essence of the transaction, not in favor of the interests of justice, but in favor of the interests of the Russian Federation, depending on the subject of the dispute and procedural legal status of the parties. It can concluded that provisions of Clause 4, Article 7 of the Law on Jurisdictional Immunities of a Foreign State, inter alia, act as a deterrent to the growth of the investment attractiveness of the Russian Federation.

In addition to the above differences, the Law also contains the so-called principle of reciprocity (Article 4 of the Law on Jurisdictional Immunities of a Foreign State), which enshrines the provision according to which the Russian Federation may apply restrictions on jurisdictional immunities of foreign States if similar restrictions exist in such States in relation to the Russian Federation. The presence of this provision also indicates the ambiguity of the concept of jurisdictional immunity of the Russian Federation, since the defining provisions of this law, for example, Clause 1, Article 5 or Clause 1, Article 7 of the Law on Jurisdictional Immunities of a Foreign State will not be applied in certain cases, which again raises the question of existence of a contradiction in their joint practical application.[16] Besides, based on the provisions of Clause 4, Article 7 of the Law on Jurisdictional Immunities of a Foreign State, it can be concluded that if, in practice, a court of a foreign State decides to recognize the nature of the transaction as a private law and, accordingly, to exempt the Russian Federation from the right to invoke jurisdictional immunity, then the Russian Federation will introduce similar measures in its territory in relation to this foreign State, which also complicates the practice of law enforcement and entails, first of all, the creation of conditions under which foreign States will be unwilling to conclude commercial transactions with Russian individuals and legal entities.[17]

Practical application of all the above can also give rise to problems in connection with adoption of amendments to the Constitution of the Russian Federation. According to the draft Law on Improving Regulation of Certain Issues Related to Arrangement of Public Authority, Article 79 of the Constitution of the Russian Federation has been amended as follows: decisions of intergovernmental bodies adopted on the basis of provisions of international treaties of the Russian Federation in their interpretation contrary to the Constitution of the Russian Federation, are not subject to execution in the Russian Federation.[18] Thus, decisions of intergovernmental bodies can be interpreted as contradicting the Constitution of the Russian Federation and not enforced in the territory of the Russian Federation, which will further complicate the position of the Russian Federation in the international arena. Moreover, similar consequences may be applicable to disputes arising from foreign economic transactions, which may entail irreversible consequences for foreign economic and investment activities of the Russian Federation.[19]

In addition, Clause 8 of Resolution No. 8 dated 11 June 1999 adopted by the RF Supreme Arbitration Court Plenum on Operation of International Treaties of the Russian Federation in Relation to Arbitration Proceedings contains a provision that the arbitration court accepts a claim in a commercial dispute, where defendant is a foreign State acting as a sovereign, or an intergovernmental organization having immunities under an international treaty, only with the explicit consent of the respondent to consider the dispute in the arbitration court of the Russian Federation. Such a consent should be considered as a waiver of the judicial immunity of a foreign State or international organization.

The consent to consider the dispute in the arbitration court of the Russian Federation must be signed by persons authorized by law of a foreign State or internal rules of an international organization to waive judicial immunity.[20]

Therefore, it can be concluded that the Russian Federation has not abandoned the concept of ab-

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[15] Federal Law of the Russian Federation dated 03 November 2015 No. 297-FZ on Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation (as amended).

[16] Ibid.

[17] Ibid.

[18] Draft Law of the Russian Federation on Amendment to the RF Constitution on Improving Regulation of Certain Issues Related to Arrangement of Public Authority (introduced by the President of the Russian Federation on 20 January 2020).

[19] *Khlestova, I. O.* New Law "On Jurisdictional Immunities of a Foreign State and Property of a Foreign State" // Journal of Foreign Law and Comparative Law. 2016. No. 2. P. 129.

[20] Resolution No. 8 dated 11 June 1999 adopted by the RF Supreme Arbitration Court Plenum on Operation of International Treaties of the Russian Federation in Relation to Arbitration Proceedings (as amended).

solute immunity, and all the above changes are very controversial. In addition, it should be noted that it is rather difficult to determine how a State entering into private legal relations can pursue non-public interests in the transaction and how this private interest will be proven in court.

So, the most optimal solution in the current situation may be adoption of a normative act, which would clearly indicate the approach to jurisdictional immunity of the Russian Federation. This would help to overcome the existing contradictions in law and judicial practice, and would lead to an unambiguous normative rather than judicial interpretation of provisions relating to the jurisdictional immunity of the Russian Federation.

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The Legal Nature of the Additional Payment of Excise Taxes Calculated Using an Increasing Coefficient, and the Problems of Applying the Calculation Method of Additional Excise Tax in the Conditions of Applying an Increased Coefficient M

Oksana A. Nogina

Professor of the Department of Administrative and Financial Law, Faculty of Law, St. PetersburgState University, Sankt Petersburg, Russian Federation, Doctor of Law; oksana_nogina1@mail.ru

ABSTRACT

This article is devoted to the actual problem of analyzing the signs of an additional payment for excise duties, the obligation to pay which arises in connection with exceeding the maximum volume of sales of excisable goods at the end of the calendar year. The article analyzes the problems of tax regulation calculation of an additional payment by the settlement method when determining the unfounded tax benefit received by the taxpayer.

Keywords: excise taxes on tobacco products, increasing coefficient, calculation of excise tax, calculation method, unjustified tax benefit

Pursuant Federal Law No. 401-FZ dated 30 November 2016, Article 194 of the Tax Code of the Russian Federation (RF Tax Code) was supplemented with Clause 9 which prescribes that taxpayers engaged in production of cigarettes and/or filterless cigarettes, and/or cigarillos, and/or bidi, and/or kretek cigarettes in the territory of the Russian Federation, should pay the amount of excise tax for the above excisable goods calculated for tax periods starting from 01 September (inclusive) of each calendar year through 31 December (inclusive) of the same year, using the coefficient T calculated as specified in Clause 9 of Article 194 of the RF Tax Code, if the total volume of excisable goods listed in para 1 of this Clause sold by a company over the tax period exceeds the average monthly total volume of the indicated excisable goods sold in the previous calendar year.

According to the explanatory note to the above Law, this measure was to bypass the existing long-term commodity producers' practice, when taxpayers knowing about the upcoming increase in excise rates starting from the new calendar year, sought to save on the payment of excise taxes payable to the budget through a significant increase in the volume of product sales at the end of each calendar year at lower excise rates applicable before the beginning of the next calendar year.

In other words, this situation resulted in formation of a significant volume of inventory immediately before the increase in the excise tax rate. The provision proposed under Clause 9 of Article 194 of the RF Tax Code was consequently aimed at limiting the volume of production and sales of tobacco products in the 4th quarter of each calendar year, but not at obtaining additional income to the budget through mandatory additional payment, which is nothing but additional property consequence for the taxpayer who exceeded the volume of production and sales of tobacco products in the 4th quarter as compared to the average monthly product sales volume in the previous calendar year.

In its opinion on the draft law (bill) that provided for introduction of Clause 9 into Article 194 of the RF Tax Code, the Legal Department of the Federation Council indicated shortcomings of the proposed bill provision related to the procedure for calculating the average monthly volume of product sales (total sales per year divided by 12) and comparing it with the base indicator of the previous calendar year. The shortcomings consist in the fact that the proposed legislative mechanism does not allow to distinguish between cases of increased production and sales of excisable tobacco products, both associated and not associated with tax evasion. Such regulation, as noted in the opinion, does not comply with Clause 4 of Article 3 of the Tax Code which prescribes that taxes and fees impeding non-prohibited legal economic activities of individuals and companies be inadmissible.[1]

This opinion justifies the situation where the volume of sales and production of tobacco products during one of the months of the calendar year may differ significantly from the same volumes in other months for objective reasons related to production processes. The method of calculating the coefficient applied to the amount of excise tax paid in September, October, November and December each calendar year, providing for the ratio of the total volume of excisable goods sold by a company over the tax

[1] Opinion of the Legal Department of the Federation Council Office [electronic resource]. URL: http://sozd.duma.gov.ru/bill/11078-7(дата обращения: 04.08.2020).

period/corresponding calendar month (VHn) to the average monthly total volume of specified excisable goods sold in the previous calendar year (Voß), reveals the desire of the legislator to overcome monthly fluctuations in production and sales volumes by calculating the average monthly total volume of excisable goods sold, determined by dividing the total sales of these goods for the year by 12.

In connection with the established procedure for calculating the coefficient, the question arises whether it is possible to recognize the tax benefit gained by the taxpayer as undue and understate the amount of excise taxes in the event of increased production and sales of tobacco products in July and August of each calendar year, i.e. in the months preceding the period when the coefficient is started to be applied.

First, it should be noted that, in contrast to the previously existing situation when the increase in volumes of production and sales depended directly on the increase in the tax rate, the tax benefit, after introduction of the coefficient, can no longer be associated with the increase in the rate, but correlates with the presence or absence of the taxpayer's liability to apply the coefficient to the amount of excise tax in the 4th quarter of the calendar year, depending on the quantitative indicators of production and sales of tobacco products.

Secondly, it is noteworthy that the taxpayer's liability to pay this additional payment arises only in certain cases (i.e. the payment is optional but not mandatory) and depends on the ratio of the total sales volume of excisable goods sold by a company over the tax period/the corresponding calendar month and the average monthly total volume of the indicated excisable goods sold in the previous calendar year. The focus of the provision on restricting the volume of goods sold in the last quarter of the calendar year is obvious, but at the same time the legislative prescription itself pushes the taxpayer, who is a business entity and whose purpose, in accordance with Article 2 of the Civil Code of the Russian Federation (RF Civil Code) is to derive and increase the profit gained, to distribute the expanding volumes of production and sales of tobacco products between other months of the calendar year.

It is quite logical that, due to objective reasons associated with production management and operation, the redistribution of expanded production volumes is generally possible in the 2d / 3rd quarter of the calendar year, which in no way can be considered as gaining an undue tax benefit, since the increased volume of production and sales of goods and, consequently, the need to redistribute these volumes over a calendar year, may depend on objectively changing market conditions.

As a result, due to the imposed additional payment calculated if the coefficient T is applied, the taxpayer's business activity faces the situation when inventory fails to be accumulated in the 4th quarter of the calendar year, but increased production volumes are distributed in other periods of the calendar year. Such a situation does not lead to gaining any undue tax benefit, since it actually contributes to the initial legislator's objective to restrict the volumes of production and sales in the 4th quarter of the calendar year. In addition, it should be noted that the increase in receipts of excise amounts to the budget before the 4th quarter begins due to redistribution of increased volumes during the 2d and 3rd quarters can be considered as a kind of "compensation" in the middle calendar year instead of paying an additional fee.

Thus, the additional excise tax collected in the 4th quarter is not a mandatory additional payment to the budget, but a legal and economic mechanism aimed to additionally restrict the volume of production and sales of tobacco products in the 4th quarter of each calendar year.

Note that, stating its legal views, the Constitutional Court of the Russian Federation emphasizes that the excise tax in terms of its economic and legal content (essence) is intended, through impacting the price of a particular category product, to reduce the returns from production and sales of this product, and thereby impede its entry into the market and hence its consumption.[2] Ultimately, in cases where the legislative goal to restrict the volume of production and sales of tobacco products in the 4th quarter for a specific taxpayer is achieved, the tax benefit gained by a company as a result of non-application of the coefficient in the 4th quarter due to redistribution of production volumes over the 2d and 3rd quarters of the calendar year, should be considered as due, since the 4th quarter demonstrates no non-compliances in exceeded production volumes and sales of products, and, respectively, no negative material consequences such as an additional payment which is actually a kind of "material liability" for tax law violation by the taxpayer.

The legal nature of any payment is, as a rule, identified through judicial practices, especially through the acts of the RF Constitutional Court, which, in particular, may consider any payment as indemnity,

[2] RF Constitutional Court's Decision No. 592-O dated 13 March 2018 on Refusal to Accept for Consideration the Deka Company's Claim on Infringement of Constitutional Rights and Freedoms, Clause 14, Article 187 and Clause 5, Article 200 of RF Tax Code.

compensation or sanction. For example, in its acts, the RF Constitutional Court considers a penalty as compensation for state treasury losses resulting from short-received tax amounts due to delay in tax payments. In this case, the liability to pay a penalty is derived from the main tax duty and is not an independent, but a supporting (accessory) liability.[3] In another example, the Supreme Arbitration Court of the Russian Federation recognized that the payment of penalties for using budgetary funds under a budgetary loan agreement established by provisions of Articles 290 and 291 of the Budget Code of the Russian Federation, is civil, i.e. it is a legal penalty (Article 332 of the RF Civil Code).

Thus, the judicial practice demonstrates a lot of examples when the court gives a special legal qualification to this or that additional payment based on its direction and purpose. Based on the foregoing, it seems quite legitimate to consider the difference between the amount of excise tax calculated using the increased coefficient and the amount of excise tax calculated without applying the coefficient as a sanction for exceeded volumes of tobacco production in the last quarter of the calendar year.

Thirdly, it should be noted that since the coefficient is calculated taking into account the average monthly total sales of goods in the previous year, the size of the tax benefit cannot be estimated within fluctuations in sales of one calendar year but must be estimated within two calendar years. Moreover, since in July or August the taxpayer will pay the amount of excise tax that is greater than that in the previous and subsequent months in case of increased production volume, then the specified excess may turn out to overlap the additional payment amount to be paid in the 4th quarter, i.e. there may be no tax benefit as such, or it may be insignificant for the taxpayer.

In general, in the context of the existing legislative regulation, it seems quite difficult to assess the tax benefit acquired by the taxpayer in the situation under consideration, since the tax benefit should ultimately be expressed as a quantitative amount of tax to be additionally paid to the budget.

In particular, in the event of tax authorities' claims regarding the overestimated volume of sales of goods in some months of the calendar year, the tax authority, in order to calculate the coefficient, will have to use a quantitative expression of the volume of sales of goods that differ from the actual volumes, i.e. whose calculation procedure is not established by tax legislation. The question is: how the tax authority should determine which volume of production is economically viable? It is not entitled to average the average annual volumes of the current year, since such a method for calculating production volumes in September, October, November and December of each calendar year has not been established by the Tax Code and is hardly justified, as the tax legislative regulation indicates that that the public entity has identified the need to adjust the sales volumes of the last quarter, but not those of the entire current calendar year.

According to the opinion emerging in judicial practice, the tax authority cannot independently establish methods for additional tax charges if such methods have not been set forth by tax legislation.[4] In connection with the above circumstances and the legislative uncertainty in calculating the coefficient in cases where the tax authority disputes, in quantitative terms, actual volumes of production, the question arises whether it is possible to apply the calculation method in accordance with Article 31 of the RF Tax Code, depending on the correlation of the same indicators for other similar taxpayers. At the same time, the RF Constitutional Court's legal view shall be taken into account which states that the admissibility of applying the calculation method for imputation of taxes provided for in paragraph 7, Clause 1, Article 31 of the RF Tax Code, is directly related to the liability of their correct, full and timely payment, and is caused by illegal actions (inaction) of the taxpayer. This statute not only contains a list of grounds for applying the calculation method for determining the tax liability, but also establishes a mandatory condition (method), where, if complied with, the amount of taxes can be recognized as reliable. So, the basis for the calculations is not the information on any other taxpayers, but only on those whose economic performances that affect the taxable base formation are the most similar/identical to those of the audited taxpayer. Thus, the determination of the tax liability by the calculation method does not imply its implementation on arbitrary grounds.[5] Meanwhile, the determination of taxpayer's financial indicators by calculation, using information available to the tax authorities as well as data on other similar taxpayers, is based on the hypothesis that another taxpayer who is conscien-

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[3] RF Constitutional Court's Resolution No. 20-P dated 17 December 1996 on *Constitutionality Test Case*, Clauses 2 and 3, Part 1, Article 11 of RF Law dated 24 June 1993 on *Federal Tax Police Bodies*».

[4] RF Constitutional Court's Decision No. 1822-O dated 18 September 2014, RF Supreme Arbitration Court's Decision No. VAS-8277/12 dated 05 September 2012 to Case No. A29-5132/2011; Resolution of RF Supreme Arbitration Court's Presidium No. 16282/11 dated 10 April 2012 to Case No. A55-5386/2011.

[5] RF Constitutional Court's Decision No. 1844-O dated 29 September 2015 on *Refusal to Accept for Consideration the Claim of Food Base No. 4 Ltd. on Infringement of Constitutional Rights and Freedoms*, paragraph 7, Clause 1, Article 31 of RF Tax Code.

tiously engaged in the same type of activity in a similar economic environment, has a tax base which is likely to be the same in sizes.[6] However, the use of such a method in the situation under consideration seems to be problematic, since other similar taxpayers may have the same situation associated with fluctuations in production and sales of goods, as in the case of the audited entity. In addition, other taxpayers may have special, inherent in their production only, economic and organizational features that significantly affect the production processes. This circumstance prevents from applying the method of determining the coefficient and additionally charged excise tax for other similar taxpayers.

If reliable accounting of taxable items is not available or if tax and accounting records are improperly maintained or if a documentary base is missing, which prevents the tax authority to establish the amount of a real tax liability, judicial practice generally prescribes using the calculation method for additional tax assessment. The courts declare that taxes can be correctly calculated only if incomes and expenses are properly registered, while the calculation method application involves the calculation of taxes with varying levels of probability.[7] The tax authority, in its turn, must first identify the grounds for applying the calculation method provided for in Article 31 of the RF Tax Code, and indicate them in its decision made following the tax audit results.[8] However, the additional excise tax assessment due to non-applied coefficient in most cases will not be supported by any grounds provided for in Article 31 of the RF Tax Code for the calculation method application. In the opinion that is emerging in judicial practice, the tax authority during the tax audit must identify the actual tax liabilities of the taxpayer[9], and only if such a determination is impossible, apply the calculation method.

The Constitutional Court of the Russian Federation also proceeds from the fact that the legal provisions of the Tax Code do not allow the taxpayer to be charged with additional taxes in the amount greater than that established by law, since the same provisions determine the amount of tax liability based on the actual indicators of the taxpayer's economic activity.

As for the possibility to use the coefficient applied by the taxpayer in the previous year, the tax law does not provide for such a method of additional excise tax assessment. Thus, the Tax Code currently does not establish any method for determining the estimated volumes of production and sales of excisable goods in order to calculate the coefficient upon presentation of claims by the tax authorities related to the undue tax benefit acquired by the taxpayer through the overestimation of production volumes in July-August or other months of the calendar year. The identified "estimated" volume of sales for the purpose of calculating the coefficient and arrears on excise taxes for the last quarter of the calendar year should be economically based on the relevant market research, taking into account the growth or decline of market indicators. In other words, the tax authority should specifically examine the market of relevant goods for the corresponding period of time, taking into account the fact that the total volume of tobacco products should be used to calculate the coefficient, and keeping in mind that the production and consumption market of specific types of tobacco products can behave differently.

The problem of recognizing the tax benefit as undue by virtue of Article 54.1 of the RF Tax Code, if grounds for applying the coefficient are not available, caused by fluctuations in the volume of tobacco products during the calendar year, is also associated with a special legal structure for calculating the coefficient which increases the amount of excise taxes in the last quarter of the calendar year. The fact is that Article 54.1 of the RF Tax Code is aimed at applying its provisions to civil law transactions (Clauses 2 and 3, Article 54.1, RF Tax Code), while the coefficient size is independent of the conditions of civil law transactions, but depends on the process of arranging the production and release of a certain volume of tobacco products.

Arbitrary and unjustified determination by the tax authority of the "estimated" volumes of production that differ from the actual ones, means that the tax authority, of its own free will, imputes to the taxpayer the amount of its tax liabilities calculating the coefficient and arrears at its own discretion, but fails to reconstruct its real tax liabilities, which is a significant infringement of the taxpayer's right for such tax exemption whose amount is determined solely on the basis of legislative regulations, but not at the authority's discretion.

Through setting itself the task to prevent the understated amount of excise taxes payable to the budget by virtue of a significant increase in the volume of sales in the 4th quarter of each year at lower excise rates due to the increase in rates from 01 January of the next calendar year, the legislator de-

[6] RF Supreme Court's Decision No. 302-KG15-17939 dated 25 January 2016 to Case No. A78-14492/2014.

[7] RF Supreme Arbitration Court's Presidium in Resolution No. 5/10 dated 22 June 2010 to Case No. A45-15318/2008-59/444.

[8] RF Supreme Court's Decision No. 57-KG15-8 dated 10 November 2015.

[9] Resolution of the Moscow District Arbitration Court's Resolution No. F05-17284/2018 dated 24 October 2018 to Case No. A40-105536/2017.

cided to charge an increased amount of excise tax for the above increase in production volumes resulting from the application of the coefficient in case of exceeding the amount of the usual excise payment established by Chapter 22 of the RF Tax Code for the first, second and third quarters. In other words, as mentioned above, the key objective of the legislator was to restrict the volume of production, but not to collect payments. As a result, if volumes of production and sales of tobacco products are redistributed by the taxpayer within a calendar year so that the 4th quarter demonstrates the restricted production volumes, then the tax benefit acquired by the taxpayer cannot be regarded as undue, since, through such an arrangement of production, the taxpayer fulfils the objective established by the legislator, and simultaneously gains a profit as a business entity.

“Professional Qualities” of Players, Coaches and Termination of the just cause Employment Contract

Anastasia A. Kashaeva

Candidate for a Master’s Degree, Law Faculty, St. Petersburg State University, St. Petersburg, Russian Federation; n.kashaeva2012@mail.ru

ABSTRACT

The issue of contractual stability between clubs and coaches has been raised more than once in the decisions of the Court of Arbitration for Sport. However, this issue is still relevant, since there are often disputes between clubs and players and coaches regarding the validity of termination of the employment contract with them. The article raises questions related to the interpretation of the concepts of efficiency and productivity of players, coaches in the practice of the FIFA Players’ Status Committee and the Court of Arbitration for Sport, and achievement of a certain result in work. The author considers the problem of termination of employment contracts with players and coaches due to non-compliance of their professional qualities with the standards declared by clubs, and the application of sanctions to players on the basis of this. In addition, the use of the generalized term “professional qualities” in relation to such disputes is proposed and justified, and the prospects for using the CAS practice in the future are noted.

Keywords: grounds for termination of the employment contracts, just cause, practice of the FIFA Players’ Status Committee and the Court of Arbitration for Sport

The regulation of the issues of the labor of football players and coaches in the FIFA perimeter offers a basic minimum of protection of the rights and legitimate interests of sports entities and does not pretend to be detailed regulations. For example, the FIFA Regulations on the Status and Transfer of Players[1] (hereinafter the Regulations) provides for several grounds for the termination of contracts concluded by clubs with professional football players[2].

The provisions of Art. 13 of the Regulations establish two basic grounds for the termination of a contract between a professional player and a club: upon expiration of the contract or by mutual agreement. Along with them, the Regulations provide for special grounds expressed in the declaration of will of one of the parties to the contract: 1) just cause; 2) sporting just cause; 3) without just cause.

The just cause criteria are not listed in the provisions of Art. 14 of the Regulations, as a result, the cause is established for each particular case with account of all the circumstances. In assessing the presence or absence of just cause the Court of Arbitration for Sport (hereinafter the CAS, arbitration) follows its practice[3] and demands that one of the parties should commit a major violation of the contract terms. The behavior violating the terms of the employment contract, by default, cannot be an excuse for terminating the agreement at the initiative of one of the parties. However, if there are several violations or one violation continues, the inadmissibility of the party’s behavior in terms of the contractual obligations reaches such a level of seriousness that the other party has the right to terminate the agreement. A similar explanation is contained in the official FIFA’s commentary to the Regulations[4].

The employment relations in professional sports are to be terminated when the “affected” party cannot in good faith expect the other party to continue the employment relations because the latter has committed a major breach of the contract[5]. As noted by the arbitration in Arbitration CAS 2016/A/4693 Al Masry Sporting Club vs. Jude Aneke Ilochukwu, award of 24 April 2017[6], before resorting to such an ultima measure the party is advised to notify the defaulting party of the need to cease the violation: despite the optionality of notification on such a matter in labor relations in professional sports, the ar-

[1] Regulations on the Status and Transfer of Players [Electronic resource]. URL: https://www.fifa.com/about-fifa/official-documents/law-regulations/index. html (accessed on: 25.04.2020).

[2] Considering the grounds for termination of contracts with coaches in this paper, we extend the relevant conclusions to assistant coaches as similar personnel.

[3] See: Arbitration CAS 2007/A/1352 MKEAnkaragücü Spor Kulübüvs. Charles Edouard Coridon, awardof 25 June 2008, para. 18; Arbitration CAS 2008/A/1447 E. v Diyarbakirspor, award of 29 August 2008, para. 12; Arbitration CAS 2009/A/1956 Club Tofta Itróttarfelag, B68 vs. R., award of 16 February 2010, para. 5.

[4] Commentary on the Regulations for the Status and Transfer of Players, article 14 [Electronic resourse]. URL: https://resources.fifa.com/image/upload/ fifa-rstp-commentary-2006.pdf?cloudid=eeorr2eogoidxzlbwhr8 (accessed on: 25.04.2020).

[5] See: Arbitration CAS 2008/A/1447 E. v Diyarbakirspor, award of 29 August 2008, para. 12.

[6] Arbitration CAS 2016/A/4693 Al Masry Sporting Club vs. Jude Aneke Ilochukwu, award of 24 April 2017.

bitration considers notices to be an important step that may influence the cessation of the violation especially if the violation has not reached a "completely unacceptable level"[7].

The employment contract between the club and the professional football player in Arbitration CAS 2015/A/4039 Nashat Akram vs. Dalian Aerbin Football Club, award of 3 February 2016[8] stipulated the player's right to unilaterally terminate the contract in the event of the club's salary arrears of more than three months. The player did not contest this clause of the contract and signed it, thereby agreeing with the unambiguous wording of the condition. It followed from the materials of the case that the salary arrears did not exceed 36 days, which meant, in accordance with the pacta sunt servanda doctrine, lack of violation on the part of the club, which would have been serious for the occurrence of just cause. Indeed, the club's debts violated the contractual obligations, but according to the position of the arbitration, it was not a major violation in order to be just cause for the player to terminate the employment contract.

Are the "professional qualities" of a football player, coach, a just cause for the club to terminate the contract, or is it an example of termination of an agreement without a just cause?

The term "professional qualities" of an athlete, a coach is not enshrined in the provisions of the Regulations, which preconditions the resort to the law enforcement practice of the sports jurisdictional bodies of the FIFA and the CAS presenting only a few relevant decisions.

In the practice of the FIFA Committee on the Status of Players (hereinafter the Committee) and the CAS, the issue of "professional qualities" was considered in the context of the "performance" of a football player, that is, his performance in competitions.

1. "Professional qualities": is it a just cause?

First of all, it should be noted that athletes' "professional qualities" can be the subject of consideration both of the disputes between a club and a player and the disputes arising between clubs, which will be demonstrated by us later in the judgments given. As evidenced by the practice of the FIFA jurisdictional bodies, such cases are primarily related to the requirements for the execution of a transfer contract.

For example, in dispute No.05171060-e[9] the football club terminated the employment contract with the player due to "poor performance" which could not be assessed when the employment contract was concluded with him, and refused to fulfill the terms of the transfer agreement. In considering the case, the Committee noted that the validity of the transfer agreement concluded by clubs is independent of the employment relations between the club and the player, reflecting the autonomy and independence of the two legal relationships arising between different subjects. As a result, the transfer agreement between clubs remains in effect despite the subsequent termination of the employment contract between the player and the new football club[10]. The same requirements were stated in dispute No.05172111-e[11]: when the employment contract between the player and the football club was terminated within six months for reasons of "unexpectedly poor results of the player", and the position of the Committee was predictably similar to dispute No. 05171060-e.

In either case the committee did not assess "poor performance" from the point of view of just cause, since the employment relationship between the club and the player is not the subject of this jurisdictional body (fall within the jurisdiction of the FIFA Dispute Resolution Chamber). Nevertheless, both decisions put an end to the question of the interrelation between the transfer agreement and the subsequent termination of the employment contract, even if there is a hypothetical just cause related to the "professional qualities" of the player. In our opinion, any doubts about "professional qualities" should be settled before the conclusion of the transfer contract, otherwise the legal force of such an agreement is not questioned. Is it possible to draw a parallel with "professional qualities" and the execution of labor contracts in connection with the conclusion made? The proposed analogy may seem to be appropriate for the following reason. An agreement with a football player is most often the result of a transfer contract, with exception of a "free agent" situation, and if the player's qualities are known at the time of making the transfer decision, the employment contract is concluded by the new club also based on this

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[7] Ibid, para. 105.

[8] Arbitration CAS 2015/A/4039 Nashat Akram vs. Dalian Aerbin Football Club, award of 3 February 2016.

[9] 05171060-e. Decisions of Players' Status Committee. Club vs. Club Disputes [Electronic resourse]. URL: https://resources.fifa.com/image/ upload/05171060-e-2908628.pdf?cloudid=avrogetf9fwbqnjhkq28 (accessed on: 25.04.2020).

[10] Ibid.

[11] 05172111-e. Decisions of Players' Status Committee. Club vs. Club Disputes, para. 8 [Electronic resourse]. URL: https://resources.fifa.com/image/ upload/05172111-e-2916776.pdf?cloudid=av3kczvz9wjgr2ywdcho (accessed on: 25.04.2020).

factual circumstance. But let us turn to the CAS practice where "professional qualities" were considered in connection with the discussion of a "just cause" for terminating an employment agreement.

In the disputes of Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp[12] and Arbitration CAS 2011/A/2597 Anorthosis Famagusta FC vs. Heinz Peter Vollmann[13] the arbitration considered the issue of the "professional qualities" of the coach and his assistant as a just cause: the employment contracts were terminated due to the "absence of sporting results". The football club considered the lost match and, as a consequence, exclusion from the tournament as the "absence of sporting results".

The contracts concluded with the coach and his assistant stated the grounds for the club to terminate the agreement unilaterally in the event of a "major" violation of the terms or for another "serious reason". It can be noted that this wording is an attempt by the club to formulate a "just cause" used for professional football players' contracts. In the opinion of the club, a "serious reason" must mean any major violation and/or major failure to comply with the terms of the contract, the disciplinary rules of the employer and/or the national football association and/or systematic wrongful behavior.

Terminating the contract the football club considered the failure to achieve certain sporting results to be both a "major" violation of the contract terms and another "serious reason": non-observance of the disciplinary rules[14]. The club decided that the coach had seriously violated the "explicit and implied terms" of the agreement (failure to achieve results) and internal rules (team performance). Referring to paragraph "C" of the club's internal regulations and, in particular, the chapter on the team's performance, it was pointed out that the team's performance did not meet the standards requested by the club and the discipline of the players was not properly built by the coach[15]. Thus, although the sporting result was not a condition of the agreement, the achievement of certain sports results, according to the club, was "an implied condition of the agreement".

The coach and the assistant coach, in their turn, stated that they were not aware of the internal rules referred to by the club and could not guarantee the team's sporting success[16]. In addition, it was noted that the club could not answer a number of questions throughout the proceedings, including: "What internal rules did the coach and his assistant violate?", "What particular behavior caused such a violation?", "How were these internal rules adopted by them, or at least brought to their attention?", "Why was the club not obliged to give a warning notice before terminating the contract, if these offenses on the part of the coach and his assistant are of such a serious nature?"

While considering both disputes, the CAS formulated an unambiguous legal position: the absence or non-achievement of sporting results cannot generally be the grounds in and of themselves for terminating the employment contract, and such a reason cannot be a just cause, since the coach and assistant coach cannot guarantee the sporting success of the team[17].

In the dispute of Arbitration CAS 2015/A/4161 Vladimir Sliskovic vs. Qingdao Zhongneng Football Club, award of 28 April 2016: 1) the employment relations with the assistant coach ended three days after the last of three training sessions was missed; 2) the club did not produce any evidence of his previous unacceptable behavior; 3) the club did not give the assistant any explanation about the reasons. In the process of resolving the dispute, the club specified that due to the systematic absence of the assistant coach from training, the "quality indicators" of the team and the players undoubtedly deteriorated. According to the club, the result was a violation of the club's disciplinary rules governing the activities of the coaching staff[18]. As you can see, this is an attempt to establish an interrelation between the deterioration of the "professional qualities" of the team, the players, manifested by the results of the performances, and the misconduct of the assistant coach, and thereby to find a just cause for his subsequent dismissal.

The arbitration tribunal noted that, following the requirement of good faith behavior of the participants of labor relations, the club was required, at least, to initiate disciplinary proceedings against the assistant: he could have been sent a warning in order to stop the violations, and then, if the unacceptable situation persisted, other disciplinary sanctions, such as reprimand or a fine, could have been applied.

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[12] Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp.

[13] Arbitration CAS 2011/A/2597 Anorthosis Famagusta FC vs. Heinz Peter Vollmann.

[14] Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp, paras. 2.8–2.10.

[15] Ibid, paras. 2.9, 2.10.

[16] Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp, para. 2.14; Arbitration CAS 2011/A/2597 Anorthosis Famagusta FC vs. Heinz Peter Vollmann, para. 2.13.

[17] Arbitration CAS 2011/A/2596 Anorthosis Famagusta FC vs. Ernst Middendorp, paras. 9, 10.

[18] Arbitration CAS 2015/A/4161 Vladimir Sliskovic vs. Qingdao Zhongneng Football Club, award of 28 April 2016, para. 8.

Dismissal should have been the last disciplinary measure (ultima) if the violation reached a serious level and "... not all the errors of the employee unambiguously entitle the club to unilaterally terminate the employment contract"[19].

Acting within the framework of the above reasoning and relying on the facts proved in the process, the CAS reasonably considered that the absence of the assistant from three workouts could not be considered to be major violations, justifying the unilateral just cause termination of the employment relations by the club. Thus, the CAS did not find any causal relationship between the deterioration of the sports performance of the team, players and the behavior of the assistant coach. Despite the fact that the "professional qualities" of the assistant coach himself were not considered as the grounds for terminating the employment contract, this decision seems interesting from a different point of view. The "professional qualities" of the players and the team as a whole only indirectly depend on the activities of the coaches and (or) assistant coaches and, accordingly, do not always influence the results. This approach of the arbitration tribunal seems to be more than logical. Otherwise, early termination of the employment contract by the club with the coach would have been carried out with enviable regularity and in most cases on a "just cause" without an adequate compensation to the latter, destroying the very existence of the stability of the contractual relations declared by the FIFA as the guiding principle in the provisions of Section IV of the Regulations.

2. "Professional qualities" as the grounds for applying sport sanctions

В споре Arbitration CAS 2012/A/2844 Gussev Vitali vs. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL) the football club applied a "disciplinary sanction" in the form of a 25% salary reduction.

The club referred to the fact that the sanction applied to the player was based on the internal acts of the club and was a disciplinary one. In this case, the sanction is not related to the absence of facts of participation in the matches, but to the player's attitude to the training process. The footballer was obliged to attend training, but as a result of the failure to appear, he showed sports inefficiency and low performance[20]. In this case it seems to be appropriate to consider the grounds declared by the club in the aspect of "professional qualities", since such qualities are also applied to the cases of the issue of the physical condition of an athlete. The CAS noted that it is unacceptable and unreasonable to impose sports sanctions on a player and terminate the contract due to his "performance" in the competition. There are no specific criteria to assess the quality of an athlete's play, as well as to compare with the player's performance in the previous season. Consequently, the "professional qualities" of a football player cannot provide the grounds for a sanction that negatively affects labor remuneration, unless the player's inappropriate behavior was proven[21].

It seems correct to apply the position of the arbitration tribunal by analogy to the cases of termination of the contract based on certain "professional qualities" ("efficiency" and "productivity") of a football player: these grounds cannot be a just cause. Firstly, as noted by the CAS, there are no efficiency and productivity criteria to apply such grounds. In this case, the issue of inappropriate performance of the duties assigned to the player was not considered. Secondly, the assessment of the professional qualities should be made by the football club at the stage of the conclusion of the contract, and not during its period of validity. Consequently, the level of performance or professional qualities should not act as a just cause for terminating an employment contract.

Conclusions

In the decisions considered by us the "professional qualities" were assessed by the clubs based on the lack of the coach's sporting results, efficiency ("performance"), as well as the physical abilities of the football player. It is quite obvious that the concept of "professional qualities" in practice is represented by collectively (efficiency, productivity, achievement of a certain result) substantiated grounds artificially created in the interests of motivation for terminating the employment contract in accordance with Art. 14 of the Regulations.

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[19] Ibid, para. 114.

[20] Arbitration CAS 2012/A/2844 Gussev Vitali vs. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL), para. 4.11.

[21] Arbitration CAS 2012/A/2844 Gussev Vitali vs. C.S. Fotbal Club Astra & Romanian Professional Football League (RPFL), para. 8.24.

Despite the absence of the concept of "professional qualities" in the provisions of the FIFA Regulations, it is also difficult to find any consistency of the positions of the Committee and the arbitration tribunal regarding the content of this term. Nevertheless, the arguments of the football club regarding the effectiveness or professional qualities of its staff (football player, coach) were not accepted as a just cause. This is, undoubtedly, important for the formation of the subsequent preclusive practice preventing interpretation of a just cause as universal grounds masking the real reason for unilateral termination with the absence of the obligation to pay compensation.

The legal consequences of the termination of employment by the club with the coach, assistant coach in the absence of a just cause should be considered with account of the provisions of Chapter IV of the Regulations. As noted in the dispute of Arbitration CAS 2015/A/4161 Vladimir Sliskovic vs. Qingdao Zhongneng Football Club, award of 28 April 2016, this chapter is aimed at maintaining contractual stability both between clubs and coaches, and with assistant coaches.

The only way to protect the interests of the club in the situation of assessing the effectiveness or professional qualities of a player seems to be for the Committee to set requirements to the club with which the player transfer agreement was concluded. It should be noted, however, that in such cases, a prerequisite will be the misbehavior of the defendant club which may be expressed, for example, in fraud or misrepresentation at the time of the conclusion of the agreement, which is quite hard to prove. The Regulations do not point out this basis for the nullity of the transfer agreement, and it will be necessary to refer to the law enforcement practice of the Committee and the arbitration tribunal describing specific precedents. Will your situation match them? The factual circumstances are most likely to prevent speaking about the identity of the two cases bringing the full burden of proving the wrongfulness of the actions of the counterparty club back to you. Therefore, it is necessary to identify the potential of a football player before concluding a transfer agreement, and even more so before concluding an employment contract with him.

In our opinion, the existing practice of the Committee and the CAS allows another important conclusion: "professional qualities", whatever content of this concept is meant by the clubs, do not have the status of "implied conditions" of a contract between a club and a professional football player or coach. This means that such qualities cannot be presented either as a major violation or failure to comply with the terms of the contract, or as a major violation of the employer's disciplinary rules, or as systematic misbehavior.

THEORETICAL AND APPLIED LAW

2020. No. 3(5)

Director of Publishing and Printing Center
E. Yu. KNYAZEV

Executive Editor I. K. SHMARKO

Corrector E. A. LYSUNETS

Layout Designer S. I. SHIROKAYA

FOUNDER
Russian Presidential Academy of National Economy and Public Administration (RANEPA)

PUBLISHER
The North-West Institute of Management, Branch of the Russian Presidential Academy of National Economy and Public Administration (RANEPA)

Certificate of registration of mass media
ЭЛ № ФС 77-77212 dated November 8, 2019.

ADDRESS OF EDITORIAL OFFICE:
199004, V. O., 8-ya liniya, d. 61, St. Petersburg.
Tel: (812) 335-94-72, 335-42-10. E-mail: shmarko-ik@ranepa.ru

Signed for publication on September 16, 2020.
Minimum system requirements — a CD-ROM device and software for reading pdf files.
Website of journal https://www.taljournal.ru
The data volume is 2.225 MB.
Mintage (number of media) 90 pcs.

The layout was prepared by the Publishing and Printing Center of the North-West Institute of Management of the Russian Presidential Academy of National Economy and Public Administration
199004, V. O., 8-ya liniya, d. 61, St. Petersburg.
Tel. (812) 335-94-97