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ТЕОРЕТИЧЕСКАЯ И ПРИКЛАДНАЯ ЮРИСПРУДЕНЦИЯ

Theoretical and Applied Law

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

Thomas Jefferson

Vladimir F. Popondopulo
On the Regulatory Regime of Private Individuals

Michail V. Tregubov
Theoretical and Legal Aspects of the Reclamation of Property from Unlawful Possession

Andrei N. Medushevskiy
2020 Constitutional Reform as the Problem of Legitimacy Theory

Oleksiy V. Stovba, Yuriy V. Mytsa
Se me perdieron las llaves, or Back to the Phenomenon of Guilt in Philosophy of Law Again

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Opening Remarks by the Editor-In-Chief

The long-awaited conference "Second Baskin Readings. Changes in Law: Innovation and Continuity", which brought together a number of outstanding Russian and foreign legal experts, has become the event to which this issue of the journal "Theoretical and Applied Law" is dedicated The relevance and practical significance of the topic of the conference – changes in law – are beyond dispute. In fact, law is a dynamic phenomenon that continuously changes with the development of society, its culture, political and economic structures, and therefore legal transformations not only accompany the existence of law, but also act as one of the main subjects of its scientific knowledge. At the same time, taking into account the breadth of the concept under consideration, changes in law are studied at different levels, which are of interest both for the theory, history and philosophy of law, and for branch legal disciplines.

In practical terms, this problem is directly related to legislative activity, its purpose, main directions and conditions of effectiveness. The strategy of law-making is determined not only by current factors, which, of course, are also present, exerting their own positive or negative, but always irremediable, impact on the adopted normative legal acts. However, much more important are the global trends in the development of law, which determine its dynamics in the long term. These trends are of a general social nature, including, among others, cultural, economic, political and other prerequisites for legal changes.

Their effect can be clearly seen in the era of radical changes, such as the time of the Great Reforms of the 1860s or the market transformations of the end of the last century. It is during such periods that the issues of reforming legislation, including the adoption of new codified acts or amendments to existing ones, are particularly acute. For Russian lawyers, the reform of various branches of legislation, apparently, is already becoming a familiar and even common practice. In that way, since 1994, when Part one of the current Civil Code was adopted, Russian civilists have witnessed several stages of civil law reform.

The first stage covers the middle and second half of the 1990s, when the foundations of modern civil law regulation were laid, meeting the needs of a market economy and a law-based civil society. The second stage was initiated by the adoption of Presidential Decree No. 1108 of 18.07.2008 "On Improving the Civil Code of the Russian Federation»[1]. In this decree, as well as in the concept of civil law development approved by the decision of the presidential Council of the Russian Federation on codification and enhancement of civil legislation, dated 07.01.2009, new directions were outlined, including the reflection of the experience of judicial practice, the convergence with the legal practice of the European Union, the results of modernization of civil law in European countries, provision of stability of legislation and a number of other[2].

Finally, at the third stage of the reform, which has been ongoing since 2017, the creation of general regulatory prerequisites for the digital transformation of subjective civil rights becomes particularly relevant. Thus, changes in civil legislation in our country are rapidly reproducing the dynamics and trends that characterize foreign legal systems in the long-term retrospective, namely, the gradual development from the institutions of industrial society to post-industrial law and from it to modern digital law. In these circumstances, multi-stage reform of the system of justice, designed to bridge the gap between domestic and foreign legal systems, developed over decades of existence of "socialistic" civil law in our country, seems inevitable.

On the contrary, the constitutional legislation of the last decades was characterized by stability and the absence of large-scale transformations, which was designed to ensure the stability of the foundations of the constitutional system of the Russian Federation as a legal and democratic state.

It is no wonder that the constitutional reform of 2020 has caused active discussions among scholars who are trying to assess in the first approximation both its scope and the possible consequences of making changes to the Basic Law. The spread of doctrinal positions is noteworthy. For example, some experts object to the use of the term "constitutional reform" in relation to these amendments. Among other things, this position is reflected in official documents, namely in the Message of the President of the Russian Federation to the Federal Assembly dated 15.01.2020, which emphasizes that the potential

[1] Corpus of Legislation of the Russian Federation. 2008. No. 29. P. I. Article 3482

[2] See: Concept of Development of Civil legislation in the Russian Federation. Moscow: Statut, 2009.

of the current constitution "is far from exhausted, but the fundamental foundations of the constitutional system, human rights and freedoms... will for many more decades remain a solid value base for Russian society»[3].

At the same time, the problem of changes in law is not limited to the considered aspects related to the reform of legislation, but is of important theoretical and legal, and even philosophical and legal significance. The regularities of legal evolution in their global, world-historical manifestations are of particular interest. It is known that this issue does not have an unambiguous solution, the complexity of its study is aggravated by the diversity of legal systems, their cultural and historical specifics. Nevertheless, it seems a promising task to consider the mechanisms, driving forces and main stages of the evolution of system of justice on concrete factual material. In particular, we are talking about the relationship between traditions and innovations in law, whether evolutionary transformations entail a radical renewal of the legal system or, with all possible changes, its institutions maintain stability and continuity due to the peculiarities of the legal mentality of society or people.

The articles published on the pages of the journal "Theoretical and Applied Law" are characterized by increased attention to the designated range of problems. The topics of publications offered to the reader are multidimensional and diverse. Thus, O. V. Stovba and Y. V. Mytsa comprehensively consider the category of guilt, and the attempt to reveal the meaning of this phenomenon through the prism of the ideas of M. Heidegger, W. Maihofer and other european authors. The article reflects O. V. Stovba's long-term reflections and search for the creation of a phenomenological and existential law understanding unique for post-Soviet jurisprudence, which is a promising direction of a legal idea. The work of A. N. Medushevskiy, a long-time friend of the Faculty of Law of the NWIM, is devoted to the discussion of the legitimizing effect of the constitutional reform in Russia. We believe that the author's conclusions can serve as a conceptual basis for understanding not only of constitutional amendments, but also of the problem of legal changes as such.

The central place in this issue of the journal is occupied by the research of civilists. Professor V. F. Popondopulo proposed a deep and original interpretation of the regulatory treatment of citizens' activity, taking into account the specifics of the legal capacity of individuals as the main subjects of private law. M. V. Tregubov, in his article devoted to the reclamation of property from unlawful possession, focuses on such a new institution for Russian civil legislation as astreinte, the admissibility of which to vindication claims causes active discussions in science and judicial practice. In addition, the author considers the vindication of intangible assets, which is of indisputable importance in the light of the above-mentioned trend towards digitalization of property turnover and digital transformation of civil rights. In the articles by L. V. Shvarts and V. A. Mayboroda, practical problems of legal regulation and application of the current legislation are considered in the broad context of modernization of the legal system of the Russian Federation at the present stage of development.

A tribute to the memory of the outstanding scholar and philosopher Yuri Y. Baskin was published by R. T. Mardaliev, prepared based on the materials of the thesis that the author defended at the time under the scientific supervision of Yuri Baskin. In addition, a detailed review of the Second Baskin Readings, prepared by I. K. Shmarko, is also available in this issue of the journal. In conclusion, I would like to express confidence that the discussion of legal changes initiated within the event will continue in the future, since the scale, as well as the scientific and practical significance of this topic deserve the closest attention of researchers.

Editor-in-Chief
Nikolay V. Razuvaev

[3] See: [Electronic resource]. URL: http://kremlin.ru/events/president/news/62582 (date of reference: 14.12.2020).

Se me perdieron las llaves[1], or Back to the Phenomenon of Guilt in Philosophy of Law Again

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ABSTRACT
The article is dedicated to the consideration of the phenomenon of guilt in the sphere of legal philosophy. The reasoning of the similar issue is fulfilled both synchronically and diachronically. In the synchronic field of research authors consider the specificity of guilt in the sphere of private law (civil law, commercial law) as such as in the region of public law (criminal law, administrative law). In the context of the diachronic research of the phenomenon of guilt authors turn themselves to the origin of the legal thought — legislation and legal philosophy of Ancient Greece (first of all, pre-Socratic philosophy of law — Parmenides, Heraclitus etc.) and Ancient Rome. The result of the diachronic analyses is the following conclusion. The guilt in its legal-philosophical aspect presents itself originally as the transformed category of the causality. During the contemporary development of the legal thought the latter is substituted by the interpretation of the guilt as the psychological relation of the person, who has committed the legal deed towards its socially dangerous consequences. The similar conclusion is grounded partly on the comparative examination of the obligations, which derivate from contract and from the infliction of the harm (contractual obligation and delict obligation). In the similar case the guilt as the causal relation is existed between the deliberate or negligent action from one side and the harm, which is derivated from the similar action — from the other.In this situation the category of delict (the break of the norms and rules) is interpreted as the secondary in historical relation and taking place later than phenomenon of causing the harm. In its turn, the synchronic analyze of the phenomenon of guilt leads authors to the hypotheses, that the form of guilt (criminal intent or criminal negligence) is a criterion, which gives us possibility to distinguish the fields of private law and public law. It's worth to underline that sphere of gross negligence is the border line (so-called mixed zone) between the public and the private law. As the special case authors underline such institute of the civil law as the responsibility without guilt, when the fact of the committing deed (or even the possession of the certain estate) as such creates the ground of the legal responsibility of the person. Finally authors come to conclusion that the real foundation of the legal responsibility is guilt as the fact of involving in the occurrence, i. e. that concrete situation, "case" which is an ontological ground to turn to the law.
Keywords: guilt, intent, negligence, causality, private law, public law

1. Introduction

The question of guilt is fundamental to both legal theory and legal practice. At the same time, if in the practical aspect it is the establishment of the guilty person that is the core of the criminal, civil or other judicial process, then in the context of the philosophy of law, the focus of questioning shifts to the phenomenon of guilt itself. What gives grounds to establish a connection between the act of a person, on one level, its actual consequences — on the other, and legal consequences — on the third? Anyone who takes on the difficult task of understanding the problem of guilt in its philosophical and legal aspect inevitably falls to such a "Bermuda triangle".

At the same time, it is necessary to pay attention to the seemingly obvious fact that not only a jurist, but also a theologian, an ethicist, and in general anyone who dares to ask a question about guilt in its religious, ethical or other dimensions finds oneself a similar triangle. Accordingly, the task of the philosophy of law in this case will be a particular "specification" of this "triangle" in legal terms, since guilt as a fundamental condition of human responsibility before God, people, or, for example, the state or society will be significantly differentiated depending on the perspective of the question.

2. Historical exposition of the problem

It is known that in ancient time law did not stand out as such from the general scope of social norms, being inscribed in a syncretic array of religious, ethical and other rules governing the public life of people. In accordance with this, guilt itself was conceived in a similar way — syncretically simplified, representing not the "mental attitude of a person to the committed act", but his "being-the cause" of what happened, i. e. the actual ability of a person to conceive the cause-and-effect sequence that later leads

[1] My keys are lost (Spanish)

to a certain result.[2] In other words, more initially than the mental attitude of a person to the accomplished act, guilt means: source, beginning, cause, reason, preposition[3]. Similarly, in Latin (causa), and, for example, in German (die Schuld), *guilt* denotes the ability of a person *to conceive the causal sequence that leads (may lead) to the occurrence of damage*. As the German philosopher M. Heidegger points out when analyzing the phenomenon of guilt, "guilt" can be understood in two ways: as "being-guilty" in the sense of duty to someone and "being-the cause" of something. They coincide in what we call *"to-be-guilty"* (italics M. H.), that is, through the guilt of duty to violate the right and make yourself subject to punishment. ...The delinquency is not due to the offense as such, but because one's fault is that the Other in their existence is put under attack, led astray or even broken. This delinquency to Others is possible without violating the "public law"[4].

Explaining what has been said, it should be noted that in the history of law, guilt was initially understood as the ability of a person to be the cause of what happened (infliction of damage). A clear illustration of this situation was the law in the Early middle Ages (the "Salic Law", "Russkaia Pravda", "Gray Goose Laws", etc.), which not so much contained the offences, as were a kind of a "price list" of material equivalent to the damage, effectively replacing both guilt, and the offense as a whole.

However, what does "being-the-cause" mean? After all, in some way "cause" of a murder committed by a child, "are" the parents as the reason for his birth, cause of a theft is hunger, cause of an accident is an animal or an object that actually caused harm. In other words, the question of guilt as a cause gave rise to the question of at least the criteria for determining the cause as the "zero number" from which one should "count" both the event itself and its outcome — infliction of damage. Similarly, in the field of civil law, even in ancient Rome, the complexity of forms of economic turnover led to the fact that non-performance of obligations by the counterparty or actual harm was often caused by a complex set of intermediate causes and consequences, in which a simple "objective imputation" of guilt could not serve as an effective way to resolve the dispute.

It is known that even in the most ancient Roman law, it was established that an obligation can arise from two grounds: from a contract and from a delict[5]. In other words, initially, both in German law and in Roman law of the archaic period, the "guilt", i. e. the cause of the obligation (as a rule, of compensation for harm), was considered to be the act that caused the damage: either as a violation of the obligations assumed, or directly as a delict. Guilt was specified in three ways: as intent (dolus), gross negligence (culpa lata) and petty negligence (culpa levis)[6]. Somewhat deviating, it can be assumed that it is the above-mentioned allocation of three degrees of guilt that served in modern legal theory as the basis for the crystallization of both the "material" and "procedural" distinction between private and public law. So, if the delict was committed intentionally, then this act fell into the sphere of public law and was subject to prosecution by the state. If the damage was caused carelessly or was the result of non-performance of the contract, the committed offense belonged to the sphere of private law, and the process of bringing the culprit to justice was of the nature of private prosecution. It is no accident that even in Roman law, malice (dolus malus) was understood not so much as the degree of guilt, but as a delict as such ("causing harm from malice»)[7]. In turn, the Roman jurists understood negligence, first of all, as imprudence. There is guilt when there was no provision for what a caring person could have provided for[8].

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[2] *Karnaukh, B. P.* Vyna yak umova tsyvshno-pravovsy vidpovidalnosti. [Karnaukh B. P. Guilt as a condition of civil liability.] Kharkiv, 2014. p. 10. (in rus)

[3] *Dal V.* Tolkovyy slovar zhivogo velikorusskogo yazyka: v 4 t. [Dal V. Explanatory Dictionary of the Living Great Russian Language: in 4 v.] Moscow, 1955 v. 1. A – Z p. 204. (in rus)

[4] *Heidegger M.* Sein und Zeit. Tuebingen, 2001. S. 282. See also Russian translation: *Heidegger M.* Bytiye i vremya. [Heidegger M. Being and time.] Moscow, 1997. p. 282. The reference to the German text is given because of our disagreement with the translation of this fragment by V. V. Bibikhin (for example, the latter translates "ein Recht verletzen" as "to break the law" instead of "to violate the right", etc.)

[5] We focus on the ancient origin of this division for a reason, since only in the classical period does Roman jurisprudence begin to take into account its incompleteness. Thus, although Gaius says in the Institutions (III.88) that "omnis obligatio vel ex contractu nascitur vel ex delicto", he himself in another work (2nd book of "the Golden", Aureorum) adds a third group "aut propria quodam jure ex variis causarum figuris" (from various other grounds). In the Justinian period, however, we see a generally formed four-term division of such grounds (contracts, delicts, quasi-contracts, quasi-delicts) (see: *Pokrovsky I. A.* Istoriya rimskogo prava. [Pokrovsky I. A. History of Roman law.] Saint Petersburg, 1999. p. 372, 390, 391; Rimskoye chastnoye pravo : uchebnik [Roman Private Law: Textbook] / ed. I. B. Novitsky and I. S. Peretersky Moscow, 1997. p. 239, 240).

[6] *Karnaukh, B. P.* Vyna yak umova tsyvshno-pravovsy vidpovidalnosti. [Karnaukh B. P. Guilt as a condition of civil liability.] Kharkiv, 2014. p. 11. (in Ukranian)

[7] Ibid. p. 12.

[8] Ibid. p. 13.

At the same time, the form of guilt served as a "watershed" for determining the subject areas of not only material, but also procedural law. It is known that in the era of the primitive society, not only the legal prosecution of the guilty, but also the execution of the court decision was entirely entrusted to the interested person — the plaintiff. However, as the French philosopher M. Foucault points out, since the classical Middle Ages, the right to resolve their disputes is alienated from individuals; a prosecutor appears as representing the state that suffers damage from a misdemeanor, and the very concept of an offense appears[9]. Thus, with the development of the state, the latter begins to actively monopolize the coercive power, primarily in relation to intentional crimes. This tendency reaches its apogee in the absolutist states of the Modern age, when any public offense was thought of as an "attempt on the body of the monarch", which could only be balanced by a retaliatory material repression of the state against the body of the criminal[10].

3. The phenomenon of guilt in modern legal science

As we can see, with minor changes, such a basis for differentiating public and private law has been preserved to this day, being actualized both in the "substantive" difference between public and private law, and in the "procedural-legal" difference between criminal or administrative proceedings, on the one hand, and economic or civil proceedings, on the other. Responding to the possible objection that any process is inherently public (at least by virtue of its administration by a State body — a court), it should be clarified that, for example, intentional damage to property and intentional failure to fulfill civil obligations assumed are inherently public offenses and are subject to prosecution by the State, while similar acts committed by negligence belong to the sphere of private law, when bringing the perpetrators to justice is the prerogative of the victim themself. At the same time, there is a so-called "gray zone" between public and private law, when a number of negligent delicts (for example, negligent homicide, fatal accidents) are criminalized, entering the sphere of criminal law. A similar "gray zone" in procedural terms is the case of private prosecution in criminal proceedings or public lawsuits in civil or economic proceedings.

It should be assumed that the historical basis for distinguishing the "gray zone" of the spheres of public and private law in material terms can also serve as the previously mentioned degrees of guilt, which were distinguished in Roman law: gross negligence (culpa lata) and petty negligence (culpa levis). Thus, gross negligence took place where there was no measure of foresight (diligentia), which could be demanded from anybody, from "anyone"[11]. At the same time, petty negligence was understood as the absence of the foresight that is inherent not in everyone, but only in a good, prudent owner (bonus paterfamilias, diligens paterfamilias)[12]. In other words, if gross negligence in the most ancient Roman law was actually equated with intent and, accordingly, in its essence belongs to the sphere of public law, then light negligence immanently belongs to the sphere of private law[13].

Thus, it can be assumed that guilt as a person's attitude to the act committed by him and its consequences is the most important criterion for distinguishing whether this act inherently belongs to the sphere of public or private law, thereby predetermining the corresponding material or procedural consequences. Thus, if the guilt is expressed in the form of intent, the offense will obviously be mainly of a public-legal nature, while in the case of petty negligence, it will belong to the sphere of private law.

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[9] *Foucault M.* Intellektualy i vlast // Istina i pravovyye ustanovleniya. [Foucault M. Intellectuals and power // Truth and legal regulations.] Moscow, 2005. p. 88 (in rus)

[10] *Foucault M.* Nadzirat i nakazyvat. Rozhdeniye tyurmy. [Foucault M. Discipline and Punish: The Birth of the Prison.] Moscow, 1999. p.73 (in rus)

[11] *Karnaukh, B. P.* Vyna yak umova tsyvshno-pravovsy vidpovidalnosti. [Karnaukh B. P. Guilt as a condition of civil liability.] Kharkiv, 2014. p. 12. (in Ukranian)

[12] Ibid. p. 13.

[13] In this regard, the concept of L. I. Petrazhitsky, who, when considering the division of the right to public and private, shifted the emphasis to the area of individual mental experience of the authorized person, deserves special attention. This approach makes much more sense than it may seem at first glance, especially if we take into account, along with the personal opinion of the authorized person regarding the direction of his interest, also the much more objectifiable factor of the form and degree of guilt of the subject (what we, in fact, are discussing). Thus, the criterion of the basic division of law proposed by L. I. Petrazhitsky becomes much clearer, at the same time the injustice of the reproaches of the supporters of the theory of material interest, who attribute this approach to dependence on the changeable state of the mood of the authorized person, becomes more obvious (for more information see: *Cherepakhin B. B.* K voprosu o chastnom i publichnom prave [Cherepakhin B. B. On the issue of private and public law] // Cherepakhin B. B. Trudy po grazhdanskomu pravu. [Cherepakhin B. B. Works on civil law.] Moscow., 2001. p. 98-100). (in rus)

Guilt in the form of gross negligence introduces the committed act into the so-called "gray zone" between public and private law, when the identification of the relevant legal relations will fluctuate depending on specific historical, social, political and other standards. In that way, for example, according to the legislation of Ukraine, if the driver of the car, being drunk, lost control and carelessly crashed into someone else's car, this will constitute a civil tort. If it is proved that the mentioned actions were committed intentionally, then this act as the deliberate destruction of someone else's property automatically moves to the sphere of public law. At the same time, it is obvious that the legislation of other countries may regulate these situations differently.

Similarly, the nature and specificity of the legal consequences of the act depend on the form of guilt. Thus, in the case of guilt in the form of intent, the focus will be, first of all, on retaliation, on punishment for the committed act, and only then on compensation for the harm caused. At the same time, any carelessness brings to the first place precisely the issues of compensation for damage, while just retribution for the committed act plays a secondary role. This distinction covers even the previously mentioned "grey areas" between private and public law. As a matter of fact, we know from practice that in cases of reckless crimes, compensation for the damage caused and reconciliation with the victim most often lead to the release of the guilty person from punishment or even from criminal liability, while in cases of intentional crimes, the commission of these actions in most cases only mitigates the punishment.

Summing up the above, we can conclude that a single and seemingly self-sufficient phenomenon of guilt, when examined more closely, breaks down into a complex system of interaction of such fundamental legal categories as *guilt*, *liability* and *damage*. Thus, in the sphere of public law, mainly in the sphere of intent, *guilt* seems to "prevail" over *damage*, determining *responsibility* first of all by the act itself, and only then by its consequences and the possibility of compensation.[14] In other words, an act committed intentionally "forms" its own consequences, as if by itself, when responsibility as *legal* consequences of the committed act is primarily due to the premeditation of the act. In the sphere of private law, in relation to a careless tort, the emphasis is shifted from *guilt* to *actual* consequences — *damage*, the absence of which excludes the *responsibility* of the offender, and compensation for the result of a careless act "erases" the committed act, making legal liability inherently derivative, derived from actual compensation for harm. In other words, the *guilt* in the sphere of private law from the mental attitude of the offender to the committed act and its consequences actually tends to the *objective imputation of the subject of violation of those rules, the observance of which would allow them to avoid causing harm.* The peak of such a *transition* from the phenomenon of *guilt* as the basis of legal *responsibility* to the *act* is a *responsibility without guilt*, as is the case with compensation for damage caused by a source of increased danger. At the same time, it can be assumed that such widespread civil constructions as the presumption of guilt of the defendant or strict liability are rather fictions designed to cover up the actual objective imputation. In other words, in the mentioned examples, the "zero number of guilt" as the cause of the incident is shifted from the guilty (intentional or careless) in commissioning of a tort to the fact of possession of the relevant property (with strict liability) or to the commission of the act that purely deterministically led to damage. At the same time, the defendant's mental attitude to the committed act and its consequences is important only in so far as it is necessary to distinguish *intent* (which transfers the act into the sphere of public law) from *negligence* (which allows to remain within the private law). Thus, the actual objective imputation is covered by the constructions of strict liability or the presumption of guilt solely for the purpose of "ideological disguise" of the "medieval" legal policy of the state in the relevant sphere.

Thus, in the course of our consideration of the question of guilt, we come to the need to revise the coordinates of its understanding. However, in the search for a way out of the previously mentioned so-called "Bermuda triangle" (act-damage-sanction), we find ourselves in another "triangle" formed by the act, damage and responsibility, where, it seems, there is no place for guilt. What is the basis of legal liability in this case? It should be assumed that here is the limit of questioning within the branch legal science, which is only able to construct dogmatic constructions, without speculating about their nature and essence. For example, the expression of Article 179 of the Civil Code of Ukraine describes a thing as "an object of the material world, in relation to which civil rights and obligations may arise." However,

[14] It should be noted that the difference between the so-called "material" and "formal" elements of a crime does not refute our statement, since in crimes with formal or even truncated elements, the onset of socially dangerous consequences is presumed by definition (as, for example, in the case of the creation of a criminal organization [Article 255 of the Criminal Code of Ukraine], when the very fact of the creation of such is considered harmful to public relations, regardless of whether such an organization has committed any specific crimes or not).

civil law, within its subject area, is unable to define what "world", "matter", "object", etc. is, being forced to borrow these categories from philosophy as dogmatic ones. Thus, we are forced to move into the sphere of the philosophy of law, which by its very nature is designed to question the meaning and grounds of the corresponding phenomena.

4. The phenomenon of guilt in the philosophy of law

It is known that in the theory and philosophy of law, guilt has traditionally been interpreted in two ways: "subjectively" – as a person's mental attitude to the committed act (the so-called "psychological theory of guilt"), or "objectively" — as a way of behavior that objectively does not meet the standards adopted in a particular society, regardless of the direction of the perpetrator's intent (the so-called "behavioral theory of guilt»)[15]. At the same time, both theories are based on the philosophical postulate that there is a special kind of connection between a human act (action or inaction) and its consequences, which cannot be reduced to either a causal or logical connection, but has a very special nature. In other words, the seemingly contradictory "subjective" and "objective" interpretations of the phenomenon of guilt have common philosophical roots, going back to those concepts of truth that existed in the minds of people in the corresponding period of time, causing and inducing the corresponding understanding of guilt in the field of jurisprudence[16].

In modern non-classical philosophy of law, guilt is initially understood as the existential ability of a person to become a reason for causing damage to the being of another person (existence)[17]. This ability resides in the fact that the offender in his being with other people seems to "hides" himself, by means of such concealment, not allowing other people who meet him in being to realize their opportunities. The modes of such concealment are "refusal" (complete concealment), "appearance" (distorted visibility) and "order" (hyper-manifestation of oneself in being with other people, excluding and absorbing their self-perception)[18]. In turn, in Roman law, guilt as malicious intent was initially associated with non-appearance, distortion, concealment. Thus, malicious intent was interpreted as a kind of "trick to deceive another person, when the pretended appearance is one thing, and the actions are different" (Servius). "It is possible to act without pretense in such a way that someone will be bypassed (deceived), it is possible to do one thing without malice and create a false appearance of another: thus act those who, by such pretence, hold and guard either their own or others'; therefore (Labeon) himself defines evil intent in this way: it is cunning, deception, trickery, committed in order to circumvent, deceive, confuse another" (Ulpian)[19].

However, the distinction between guilt and innocence as between concealment and appearance has even deeper Greek roots than Latin: as the difference between the truth ('αλέθεια), understood as the maximum manifestation of being in the fullness of its being, and the lie, concealment, oblivion of the truth of being (λέθέ). In works of Parmenides the access to 'αλέθεια was kept by none other than the goddess Dike, who owns the changing (now locking, now unlocking) keys to the gates of Day and Night[20]. As has been repeatedly noted in the relevant literature, there is an inherent relationship between the truth ('αλέθεια) and the law ('Dike'). Thus, the German philosopher of law E. Wolf points out that the essence of Dike as a goddess who shines and translucents, illuminates, exposes and reveals the hidden

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[15] *Karnaukh, B. P.* Vyna yak umova tsyvshno-pravovsy vidpovidalnosti. [Karnaukh B. P. Guilt as a condition of civil liability.] Kharkiv, 2014. p. 44. (in Ukranian)

[16] The reference to the "relevant time period" is not accidental. Depending on the chosen historical epoch, the"binding" of guilt to a person will be based on a variety of prerequisites, starting from the "objective imputation" (guilt as a cause) and ending with the imputation of guilt as the "subjective direction of intent" of the actant. At the same time, at the "prehistoric" stage of human development, it is not necessary to talk about "specifically legal guilt" at all, since law itself was not isolated from the system of other social norms, which were a syncretic fusion of religion, morality, magic, etc. Similarly, in place of the deterministic connection of an act and its consequences in primitive society, "acausal rows" (K.-G. Jung) took place, when, for example, in contrast to "physical" harm, "hex", "evil eye" , etc. were not the result of a "direct action" of a person, but of one's appeal to supernatural forces ("allies", "spirits", "totems", etc.).

[17] *Stovba O. V.* Temporalnaya ontologiya prava. [Stovba O. V. Temporal ontology of law.] Saint Petersburg, 2017. p. 288 et seq. (in rus)

[18] Ibid. p. 290.

[19] D.4.3.1.2 (cit. from: Digesty Yustiniana [Digest of Justinian] / translated from Latin. v. I. ed. by L. L. Kofanov. Moscow: Statut, 2002. p. 433). (in rus)

[20] Dosokratiki: eleatovskiy i doeleatovskiy periody [Pre-Socratics: the Eleatic and Pre-Eleatic periods] / translated from the Ancient Greek by A. Makovelsky. Minsk, 1997. p. 452. (in rus)

(wrong), solves and exposes, is identical with the essence of 'αλέθεια[21]. Hence, guilt, taken from such a perspective, is a specific way of being of a person, ontologically-existentially associated with untruth, concealment, which at the ontic-psychological level are manifested as a lie, deception or pretense. Thus, it is unexpectedly revealed that before any "objective imputation" or "form of intent", guilt is inextricably linked with truth.

However, the truth for the ancient Greeks is by no means a frozen "correspondence of our ideas to the objective state of things." As has been repeatedly noted in the relevant literature, the ancient truth is inherently dynamic, it is constantly coming true, it is happening[22]. When the limit is set to this implementation, to this occurrence of truth, then guilt takes place. In other words, if the truth is the happening itself, then the distortion, the concealment of it, will be the guilt. In other words, earlier than the violation of any natural law or positive law, the offense of the offender was that he would not let come to pass what essentially is such, and through his action, or inaction as it were, concealed, obscured what was going on, so it was impossible to tell who acted in accordance with the truth and who did not. As a result of an act that is illegal in its nature, i. e. "guilty" in the very original sense of the act, the distinction between Dike (truth, norm) and Adiksia (enormity) is erased.

At the same time, it was obvious to the ancient Greeks that it was possible to act with the best intentions, hiding the truth of what was happening, without realizing the mentioned concealment at all. So, in the famous tragedy of Sophocles "Oedipus Rex", the ancient Greek hero Oedipus, hurrying along the night road, accidentally kills his father Laius, and after saving his native city of Thebes from the monster Sphinx, turns out to be the husband of his mother. At the same time, the fact that Oedipus acted out of ignorance, not only having no intention to commit such terrible things, but also acting with completely noble intentions, in no way saves him from guilt or responsibility for what he did. Oedipus is guilty to the extent that, having committed a certain act that distorts what is happening, he is involved in it, and this fact of "involvement" turns out to be the source of both guilt and responsibility[23]. In other words, we can assume that before any "objective" and "subjective" theories of guilt, *its ontological basis is an incident as such, in which a person is involved*, when everything happens as if by itself, but the person still turns out to be responsible for what *happens to them*.

Turning to the philosophical and methodological prerequisites of this hypothesis, it should be pointed out that, like the construction of a relative legal relationship in civil law, in modern philosophy of law, one can meet the so-called "discrete theory of law", according to which law does not exist constantly as a certain legal field, constantly permeating the existing reality, but discretely, arising as a result of the committed act and disappearing after the onset of proportionate and timely legal consequences[24]. Similarly, it can be assumed that guilt initially exists not in the form of an ideal timeless construction describing "the mental attitude of a person to an act and its consequences" or "an objectively illegal way of behavior", but as a concrete situational acquisition of a person's "place" in what is happening, when they, being involved in it *as* someone, "automatically" receive that corresponding set of "rights and obligations", which makes any factual discourse about the person's guilt possible. In other words, initially guilt is a kind of "indicator" of the person's involvement in the incident, while responsibility is a "feedback" of the person and of what is happening. In other words, a person, being "connected with what is happening in a certain way" (in a way of being present in it)[25], gives a "countdown" of this connection in the course of explicating their place as a share in the whole of the incident, thereby "taking responsibility" for what is happening to them.

A small insight into the field of linguistics will help to clarify what has been said[26]. For example, in Spanish, the passive voice is expressed by the particle "se", which is placed at the beginning of the sentence. As in Ukrainian and Russian (by means of the particle "ся" [sya], which, however, expresses

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[21] *Wolf E.* Greichisches Rechtsdenken. Frankfurt am Main, 1947. S. 36.

[22] *Heidegger M.* Parmenid. [Heidegger M. Parmenides.] Saint Petersburg, 2009. p. 202.

[23] The task of this article does not include a complete and comprehensive interpretation of this extremely deep and multifaceted myth (which would require an independent study that goes beyond the scope of legal science). Here, the authors use mythological material to provide a figurative illustration of some of the provisions of this article. A similar path is followed, for example, by the famous French philosopher M. Foucault, who believes that the play "Oedipus Rex" can be considered as a literary exposition of the problems of power (see *Foucault M.* Intellektualy i vlast // Istina i pravovyye ustanovleniya. [Foucault M. Intellectuals and power // Truth and legal regulations.] Moscow, 2005. p. 68).

[24] See, for example, *Stovba A. V.* Temporalnaya ontologiya prava. [Stovba O. V. Temporal ontology of law.] Saint Petersburg, 2017. p. 6, 209 et seq.

[25] Ibid. p. 317.

[26] It should be emphasized that this insight does not have an independent methodological significance, but is intended to illustrate some of the provisions of this article with the help of expressive means of the Spanish language.

the reflexiveness),such a construction indicates that everything happens as if “by itself”, while the being involved in such an event is passive. For example, the expression “se perdieron las llaves” means “the keys are lost”, i. e. they were lost “by themselves”, not “lost by someone”. If I want to say that “I lost the keys”, i. e. I am responsible for the loss, it will sound like “yo perdi las llaves”. But if the keys are “lost by themselves”, but I am the owner, this Hispanic construction expresses it as effectively as possible as opposed to the phrase “The keys were lost by me”. The expression “Se me perdieron las llaves” through the particle “se”, although it will indicate my passive role in what is happening, however, by means of the reflexive pronoun “me”, i. e.” I have”, irrevocably enters me into the fact of loss that has occurred, thereby imputing guilt and responsibility to me. Metaphorically speaking, although the “keys” to the gates of Parmenides’ truth are lost as if “by themselves”, a person still turns out to be guilty of what is happening and responsible for the consequences that have occurred due to the fact that he is irreversibly “tied” to what is actually happening. In this case, he falls into the so-called “Bermuda triangle” of damage and liability indicated in the article, not through the act, but due to the very involvement in the relevant incident. At the same time, it should be emphasized that in this case we are not trying to justify objective imputation as a general approach, but we are trying to radically revise the traditional grounds of legal liability, bringing them into line with both the actual legal process and the deep, philosophical and ontological foundations of this phenomenon.

5. Conclusion

Summing up, it should be noted that the philosophical and legal understanding of the phenomenon of guilt leads us to the conclusion that the basis of guilt is not “a subjective attitude to the act and its consequences, expressed in the form of intent or negligence”, but also not “an objective violation of the norms and rules established in society”. A person can be guilty only in so far as he, being involved in a certain kind of incident, occupies a certain place in it, by virtue of which he acquires certain “rights” and can bear “responsibilities”, through which all “legal” prerequisites of guilt and liability become meaningful. At the same time, as a hypothesis, it should be assumed that in the practical plane of guilt and its forms are a possible criterion for separating the public and private spheres of law, which allows us to move from dogmatic postulation to the development of adequate methodological tools for the specification of the subject of individual branches of law.

References

1. Cherepahin, B. B. The Question of Private and Public Law [K voprosu o chastnom i publichnom prave] // Cherepahin B. B. Works in Civil Law [Trudy po grazhdanskomu pravu]. Moscow : Statut, 2001. Pp. 93–120. (in rus)
2. Dal’, V. Explanatory Dictionary of the Live Great Russian Language [Tolkoviy slovar’ givogo velikorusskogo yazika]: In 4 vol. Moscow : State Publishing House of Foreign and National Dictionaries [Gosudarstvennoe izdatel’stvo inostrannikh i national’nikh slovarey], 1955. Vol. 1: A — Z. (in rus)
3. Digest of Justinian [Digesty Yustiniana] / Translation from Latin. Vol. 1. Ed. by L. L. Kofanov. Moscow : Statut, 2002.
4. Pre-Socratics: Eleatic and Pre-eleatic Periods [Dosokratiki: Eleatovskiy i doeleatovskiy periodi]. Minsk : Harvest [Harvest], 1997. (transl. from Ancient Greeks)
5. Foucault, M. Intellectuals and Power [Intellectuali i vlast’] / M. Foucault. Truth and Legal Establishment [Istina i pravovie ustanovleniya]. Moscow : Praxis [Praksis], 2005. (transl. from French)
6. Foucault, M. Discipline & Punish. The Birth of the Prison [Nadzirat’ i nakazivat’. Rogdenie tur’mi]. Moscow : Ad Marginem, 1999. (transl. from French)
7. Heidegger, M. Parmenid [Parmenid]. Sankt Peterburg : Vladimir Dal [Vladimir Dal’], 2009. (transl. from German)
8. Heidegger, M. Sein und Zeit. Tuebingen : Max Niemeyer Verlag, 2001.
9. Karnaukh, B. P. The Guilt as Condition of the Civil-law Responsibility [Vina yak umova tsivil’no-pravovoi vidpovidal’nosti]. Kharkiv : Law [Pravo], 2014. (in Ukrainian)
10. Pokrovskiy, I. A. History of Roman Law [Istoriya rimskogo prava]. Sankt Peterburg: Summer Garden, Neva [Letniy sad, Neva], 1999. (in rus)
11. Roman Civil Law [Rimskoe chastnoe pravo] : Guide / Red. Novitskiy I. B. and Preterskiy I. S. Moscow : New Jurist [Noviy yurist], 1997. (in rus)
12. Stovba, O. V. Temporal Ontology of Law [Temporal’naya ontologia prava]. Sankt Peterburg: Alef-press [Alef- press], 2017. (in rus)
13. Wolf, E. Greichisches Rechtsdenken. Frankfurt am Main : Vittorio Klostermann, 1947.

2020 Constitutional Reform as the Problem of Legitimacy Theory[1]

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ABSTRACT

The legitimacy is one of the key resources of stability for all political regimes but its importance growing still much in regimes under transformation. The general legitimacy theory exposes why and how the dominant political class disposes the trust of society to stay in power by using available symbolic, moral and legal resources of self-legitimization. In contemporary law-based state the ground of the legitimacy is normally associated with the national constitution — its fundamental values, principles and norms as well as with general public agreement on mode of their application by government institutions and officials. Thus, each important constitutional revision means both the challenge to the established legitimacy and an attempt to reconstruct it in new forms. The author analyses the impact of Russian 2020 constitutional reform in the transformation of the Russian political regime legitimacy. He exposes the reciprocal interconnections between legitimacy and constitutionalism, regarding such items as positive and negative law-making impulses; substantive and instrumental aspects of reform; national, regional and local dimensions; constitutional and meta-constitutional parameters of the legitimization process as well as declared and undeclared reasons, motives, arguments and political technologies of amending process. According his conclusion, the main result of the Russian constitutional reform consists in the reconstructed legitimacy formula as a legal ground for consolidation of power under transition process and a fresh start for the new form of constitutional authoritarianism.

Keywords: Legitimacy, Russian Constitution, 2020 Russian constitutional reform, constitutional amendments, positive and negative legitimacy, substantial and instrumental legitimacy, national, regional and local dimensions of legitimacy, constitutional and meta-constitutional legitimacy, amending process, legitimacy formula reconstructed, constitutional authoritarianism

Observations of changes in the forms of life reveal the relationship between permanent and temporary factors that determine the ways of society and state power. According to the Chinese "Book of Changes", the analysis of metamorphoses generally explains the "laws of constancy" — it shows how "the beginning necessarily comes to an end and then a structure is formed", allowing us to understand that the process of movement "resides in cycles", which represent the successive change of similar phases, and "the cycles of metamorphoses are what hurries time"[2]. From the standpoint of the cognitive gnoseology, these metamorphoses reflect the general property of human consciousness in adapting to changes, mastering the meaning and logic of changes by constructing social reality — by the formation and consolidation of new values, principles and norms, concepts that express them, psychological and behavioral attitudes of social and cognitive adaptation, as well as patterns of behavior in a changing social environment.

These new ideas and behavioral practices can have both a completely spontaneous and directed character, being established in legal documents as completed products of the human mind. The metamorphoses of the legal organization of society especially clearly reflect the dynamics of its development, allowing us to talk about constitutional cycles that include the phases of rejection of old forms (deconstitutionalization), adoption of new ones (constitutionalization) and their transformation under the influence of the social context (reconstitutionalization)[3]. The directed construction of social reality is expressed in constitutional values, principles and norms (or amendments to them), which receive legal consolidation, since they have the highest normative status, are binding, and their effect extends to the entire society and determines the prerogatives of power and obedience to it.

The implementation of the program of constitutional changes in Russia in 2020, which became the most radical revision of the Constitution of 1993 for the entire time of its existence, caused diametrically opposite assessments in the expert community — from its presentation as a modernization of the Basic Law to recognition of it as a "constitutional coup"[4]. It is obvious that the resolution of this dispute

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[2] Yi Ching. Book of Changes [Kniga peremen]. Saint Petersburg : Azbuka-klassika, 2008. Pp. 234–245. (in rus)

[3] *Medushevskiy A.* Theory of constitutional cycles [Teoriya konstitutsionnykh tsiklov]. 2-nd edition. Moscow — Berlin : Direkt-Media, 2015. (in rus)

[4] See a number of round tables on the discussion of amendments in 2020 in leading journals: articles of the section "Metamorphoses of the Russian Constitution" ["Metamorfozy Konstitutsii Rossii"] // Comparative Constitutional

is impossible within the formal legal approach only, since the parties are guided by a fundamentally different view of both the values in law and the understanding of the formal aspects of changes of constitutional norms. This makes it appropriate to evaluate the amendments from the standpoint of the theory of legitimacy, which allows us to correlate legal changes with their social effect. The issue of their adoption has three sides — the interests of the authorities, the consent of citizens and the adequacy of the procedures for adopting norms to the views of society.

In this article, we will consider, first of all, the general question of applying the theory of legitimacy to constitutional changes, identifying the most important mechanisms of their correlation; then we will reconstruct the content parameters of changes introduced by constitutional amendments; we will analyze the procedural aspects of legitimation of amendments. This will, in our opinion, allow us to assess the contribution of the constitutional reform to ensuring the legitimacy of the Russian political power.

1. Legitimacy theory and constitutionalism: correlation parameters

Legitimacy is a concept of political and moral philosophy that means the consent of the governed to accept the power that governs them, based on the belief that this power ultimately corresponds to their ideas of what is due and fair. This consent, expressed in the assessment of power, can be explicit or implicit, and its origin is determined by the general picture of the world and ideas about the nature of power. Being of western origin, the idea of legitimacy goes back to the natural law theories of Antiquity and the concepts of the social contract of Modern age, links the exercise of power with its observance of certain fundamental laws and rights of citizens, the violation of which leads to the declaration of this power as illegitimate — tyrannical, even allowing the right of civil disobedience to it. Thus, legitimacy is the expression of a consensus between society and power, the source of which, at different times and in different societies, was the dominant idea of a fundamental law rooted in the nature of things, the divine will or reason. At the same time, the legitimizing formula (expressed and supported by the dominant official doctrine) is the justification for the rule of the governing class, and radical changes in this formula are evidence of its transformation[5]. In modern political science, the concept of legitimacy is interpreted as the acceptance by society (citizens) of the ruling political regime, whose right to rule is based primarily on consent, rather than on violence and suppression — consent expressed in constitutional and legal principles, norms and procedures.

In the classical concept of the legitimacy of power, developed by M. Weber as part of his sociology of religion, it was associated not so much with law as with various motives of social behavior. The three ideal types of legitimacy of power included: traditional (relying on historical tradition, customs, and habits); rational (relying on intelligently constructed norms, institutions, and procedures); and charismatic (relying on the exceptional qualities of a person in charge — a prophet, leader, or statesman who introduces new institutions in the form of prophecy or example). The basis of the rational type of legitimation is that "submission is now based not on faith and devotion to the charismatic personality of the ruler", but on the definition of the right for power "through rationally established norms (laws, regulations, rules) in such a way that the legitimacy of supremacy is expressed in the legality of general, purposefully thought out, correctly formulated and promulgated rules"[6]. In this classification, the rational type of legitimation of power most closely corresponds to the model of a legal or constitutional state, being able to reproduce political stability within the legal forms (i. e., legality), due to their acceptance by society on the basis of reason, and not traditions or emotions.

The structure of legitimacy in a constitutional state (as opposed to an unconstitutional one) is more complex and includes at least three components: the consent of the sovereign (people) to delegate

Review [Sravnitel'noe konstitutsionnoe obozrenie], 2020. No. 3 (136). (in rus) p. 33–96; Round Table: "Changes in the Constitution of the Russian Federation and Public Policy", February 27, 2020 [Kruglyi stol: "Izmeneniya v Konstitutsii RF i publichnaya politika", 27 fevralya 2020] // Public Policy [Publichnaya politika], 2020. (in rus) v. 4. No. 1. p. 9–42; Transcript of the Joint Meeting of the Constitutional Club and the Commission of the Association of Lawyers of Russia for the Development of Constitutional Legal Awareness Dated January 21, 2020 [Stenogramma sovmestnogo zasedaniya Konstitutsionnogo kluba i Komissii Assotsiatsii yuristov Rossii po razvitiyu konstitutsionnogo pravosoznaniya ot 21 yanvarya 2020] // Constitutional Bulletin [Konstitutsionnyi vestnik], 2020. No. 5 (23). (in rus) p. 55–75; Resetting and the Spirit of the Constitution: discussion [Obnuleniye i dukh Konstitutsii: diskussiya] // Zakon, 2020. No. 3. p. 23–37. (in rus)

[5] *Mosca G.* Storia delle dottrine politiche. Bari : Laterza e Figli, 1945.

[6] *Weber, M.* An Attempt of Comparative Research in the Sociology of Religion [Popytka sravnitel'nogo issledovaniya v oblasti sotsiologii religii] // Weber, M. Favorites. The Image of Society [Izbrannoe. Obraz obshchestva] Moscow : Lawer [Yurist], 1994. p. 71. (in rus)

power to certain institutions and representatives; the government's understanding that it has a popular mandate to govern; and the agreement of both parties on the rules and procedures for maintaining this balance over time. Among these rules, constitutional norms on constitutional review and amendments play a decisive role, since they theoretically ensure the reproduction of the consensus of civil society and political power over time, as well as institutions and procedures for civil control over power (referendums, periodic elections, legal and political accountability of the government to parliament, transparency in the exercise of power, its turnover, etc.). However, in a weak or unstable constitutional system, there are many ways to circumvent these restrictions by presenting the will of the ruling regime as a constitutional solution. Problems with legitimacy begin when one of these three components, for one reason or another, begins to fail, but if they act synchronously, there is no obstacle to ensuring agreement on the reproduction of the legitimacy of power on a new legal basis.

The concept of legitimacy, therefore, is broader than the concept of legality, and the nature of their relationship in a modern state can receive a different configuration: legitimacy appears as an extra-legal concept (associated with justice) that underlies legality (the constitutional system), it can enter into a confrontation with it, demonstrating a conflict of justice and legality, or, finally, manifest itself in constitutional norms, amendments to them or their changing interpretation. The key problem was formulated by K. Schmitt during the collapse of the Weimar Republic in the form of a well-known dilemma — legitimacy or legality?[7] This dilemma later was repeatedly reproduced in crises of a legal systems, and it was resolved in two diametrically opposite ways — by a radical change in the legality (of the old constitutional order) in favor of a new legitimacy — a system of values, rejecting the old positive law, or, conversely, by the denial of a new political legitimacy from the standpoint of the inviolability of the existent legality — established constitutional and legal order. A compromise solution is a partial adjustment of legality (constitutional norms), taking into account the change in the legitimizing formula of power.

The main task of the developers of constitutions or amendments to them is to regulate the focus of power — its institutions, functions and prerogatives, on the one hand, and to determine their relationship with society and its expectations, on the other[8].

This leads to the question of constitutional amendments as a tool for reproducing the legitimacy of the political system, especially in a situation where the previous methods of ensuring it lose their effectiveness and the power (the ruling class) feels the growing erosion of its own legitimacy.

2. Legitimation as a process and strategy of law policy

Since legitimacy as an expression of the priorities of public consciousness is not an immutable constant, it can be interpreted as a dynamic process. The essence of this process is determined by the struggle of the forces of legitimization and delegitimization of this political regime, which make directed efforts to support faith in existing institutions in society or, conversely, to discredit them. This conflict is especially clearly presented in the context of social changes, when the fate of the political regime is determined — its collapse or, on the contrary, its preservation with the reproduction of the legitimizing formula in an updated form. The fate of legitimacy depends on a number of variables — social, institutional, and procedural. Almost all of these variables in the modern state are reflected in the constitutional principles and norms, and their directed adjustment expresses the strategy of legitimization of power.

In modern conditions, when the vast majority of states have adopted a rational legal type of legitimacy of power and constitutionalism as a form of its expression and provision, the classical theory of legitimacy requires revision or, at least, clarification — the introduction of a more detailed classification of types of legitimacy and conflicts related to its legal provision. If all political regimes, at least formally, are legal, and the constitution is the basis for the legitimacy of any government, then how to classify their options in terms of the specifics of the implementation of legal norms and their changes? What are the different types of constitutionalism — liberal-centric and state-centric; hybrid versions of political regimes that combine constitutional, historical and personalist legitimacy? In what classification series should we put the numerous variants of imitative democracy, limited or imaginary constitutionalism? How to determine the legitimacy of the political system of constitutional authoritarianism, based on the formal legal consolidation of the unlimited power of the leader?

In this context, it is important to distinguish between such forms of constitutional legitimacy as negative and positive (rejection of certain values or adoption of new ones); external and internal (from the standpoint of international and national law); substantive (based on values) and instrumental (based

[7] *Schmitt C.* Legalitat und Legitimitat. Berlin : Dunker und Humblot, 1968.
[8] *Finer S. E., Bogdanor V., Rudden B.* Comparing Constitutions. Oxford : Clarendon Press, 1995. P. 1.

on institutions); legal and extra-legal (constitutional and meta-constitutional) legitimacy of the regime. The parameters of extra-legal legitimacy should be recognized as the factors of historical, ideological, social, functional and personalized legitimacy of the regime. From the standpoint of the contribution of legitimacy to the stability of the state, it is divided into stable and unstable, democratic and authoritarian, national and regional (local); institutional and procedural (electoral, judicial, administrative, etc.)[9]. Ultimately, legitimacy acts as a dynamic process of reproduction of public confidence in the government, and, consequently, its viability is determined by the relationship of public expectations and results, law and politics, and the interaction of all actors in constitutional reform.

At the intersection of legal and political factors of ensuring the legitimacy of power, the importance of the strategy of law policy increases — the use of directed technologies that can transform an unstable balance in favor of one or the other option — ensuring the legitimacy of power or its destruction. One of the types of such technology can be considered the adoption of constitutional amendments aimed at resetting or reproducing the legitimacy of the political regime. The key value for the results of such actions of the law policy is the ratio of goals and means to achieve them, and the result depends on the reaction of society, the political intuition of the authorities and the art of developers.

In this logic, the block of constitutional amendments of 2020 appears as an attempt to systematically reconstruct the legitimacy of a political regime that is aware of the growing threat to its position from the standpoint of external and internal challenges. This allows us to explain the mechanism of constitutional revision in Russia, which combined the formal preservation of constitutional continuity with its actual revision at the level of values, principles, norms and institutions[10]. The contradiction between the two aspirations — to preserve the constitutional norms on amendments (which have a fundamental legitimizing value) and the need for their actual revision — was removed by balancing the developers on the verge of constitutionality, although without formally abandoning it. Technically, the problem was solved by the "amendment withdrawal" ("revision-abrogation", following the French formula) — simultaneous rupture of constitutional continuity with its immediate reproduction within the adoption of the draft Law on the amendment[11] with the simultaneous recognition of its constitutionality by the Constitutional court of the Russian Federation — the project empowers the CC the right to determine its constitutionality[12].

3. Constitutional values: positive and negative legitimacy

Legitimacy depends on the parameters set and accepted by society for the cognitive construction of social reality, expressed in normative attitudes of both positive and negative nature. Their balance expresses a conflict of values, but determines the degree of support, stability and effectiveness of a certain system of government, as well as the idea of the right of the elite to power.

The amendments demonstrate a revision of the ratio of positive and negative legitimacy in relation to globalization. During the adoption of the 1993 Constitution, the consensus on globalization as a process of promoting the transnational values of liberal democracy, which emerged with the end of the Cold War and the collapse of the USSR, dominated. This legitimizing principle has found consistent expression in the theory of universal humanitarian values — internationally recognized human rights, granting inter-

[9] *Hermet G., Badie B., Birnbaum P., Braud Ph.* Dictionnaire de la science politique et des Institutions politiques // Legitimite. Paris : Armand Colin, 1994. P. 141–142.

[10] *Medushevskiy A. N.* Constitutional reform in Russia: content, directions and methods of implementation [Konstitutsionnaya reforma v Rossii: soderzhaniye. napravleniya i sposoby osushchestvleniya] // Social sciences and today's world [Obshchestvennyye nauki i sovremennost], 2020. No. 1. p. 39–60 (in rus)

Idem: Constitutional Amendments in Russia in 2020 as a Political Project of State Reconstruction [Konstitutsionnye popravki 2020 kak politicheskii proekt pereustroistva gosudarstva] // Public Policy [Publichnaya politika], 2020. V. 4. No. 1. p. 43–66. (in rus)

Idem: Rebirth of the Empire? Russian Constitutional Reform 2020 Against the Background of Global Changes [Vozrozhdenie Imperii? Rossiiskaya konstitutsionnaya reforma 2020 na fone global'nykh izmenenii] [Electronic resource] // Bulletin of Europe [Vestnik Evropy], 2020 v. 4 URL: http://www.vestnik-evropy.ru/issues/the-revival- of-the-empire-russian-constitutional-reform-2020-against-the-background-of-global-change.html (date of reference: 05.10.2020). (in rus)

[11] On improving the regulation of certain issues of the organization and functioning of public power: the Law of the Russian Federation on the amendment of the Constitution of the Russian Federation.

[12] The conclusion of the constitutional court 16.03.2020 No. 1–3 "On the compliance of the provisions of chapters 1, 2 and 9 of the Constitution of the Russian Federation, the provisions of the law of the Russian Federation on the amendment of the Constitution of the Russian Federation "On improving the regulation of certain issues of the organization and functioning of public power" pending its entry into force, and also about compliance of the procedure for the entry into force of article 1 of this Law to the Constitution of the Russian Federation in connection with the request of the President of the Russian Federation".

national courts the status of supreme arbitrators in resolving disputes on human rights, the concept of the so-called "democratic transit", which has become both an explanation for the adoption of new constitutions and a justification for their value content. Subsequently, these values were seriously challenged from the standpoint of revising the processes of globalization (the ratio of integration and fragmentation of regions in favor of the latter), the right turn in public thought (which actualized the search for national identity) and changing the relations of society and the state in favor of the latter (shifting the center of gravity from liberal-oriented to state-centric models of ensuring social consensus). The 2020 amendments marked the end of the "transition period", establishing these trends in a new interpretation of legitimacy — in the parameters of space, time and the meaning of existence.

In the spatial dimension — it is a building of a new balance of international and constitutional law, as well as international and national courts. Without disputing the priority of international law (Article 15, Part 4), the developers included its "pragmatic" adjustment (controversial in view of Article 46) — the recognition of "non-interference in the internal affairs of states" and the separation of ratified international treaties and their interpretation in decisions of interstate bodies, rejecting the need for that part of them that contradicts the Constitution (Article 79). The central arbiter in resolving contradictions in that respect is the Constitutional Court, which now has the prerogative to resolve the issue of the possibility of executing decisions of interstate bodies if they contradict the "fundamentals of public law and order of the Russian Federation" (Article 125, Part 5.1).

In the *chronological dimension*, the legitimacy of Russian statehood is corrected by the addition of its rational and legal foundations by an appeal to tradition. The amendments emphasize the historical aspect of the justification of the state — it is not limited to the post-communist period, but includes its entire centuries-old history. The amendments reflected an emotional appeal to "the memory of ancestors who passed on ideals and faith in God", restoring the "continuity in the development of the Russian state" torn by the revolution, postulating the immutability of "historically formed unity" and introducing the safeguarding principle of "protection of historical memory". In their entirety, these norms establish a new understanding of the historical legitimacy of the state as the "legal successor of the USSR" and at the same time of the Russian Empire, the continuity of which is determined in the categories of culture, religion and history (Article 67). These guidelines are formulated in the spirit of restoration logic and are exclusively retrospective in nature, although they can effectively influence the current and future policy of law.

In the interpretation of the *meaning of the existence* of the state, the amendments focus on its identity, which is revealed in the concepts of community of destinies, nationalism and territorial integrity. These ideas are concentrated in the interpretation of the principle of sovereignty, which now acquires clear national characteristics. This attitude is expressed in the constructed concept of the historical right to the territory associated with the traditional type of legitimacy. The amendment reflects the existence of "all-Russian cultural identity", but the priority is given to national identity: the Russian people is defined as "constituent", it belongs "to a multinational Union of equal peoples of the Russian Federation" and the Russian language is defined as "state language" (articles 68 and 69).

The hierarchy of constitutional values emphasizes the priority of the *principle of sovereignty* in relation to international law, the norms of which are now valid only by virtue of their recognition by the state, and its interpretation is determined by the national judicial system. Russia — "the legal successor of the USSR on its territory, as well as in relation to international obligations" (previously only succession in international relations was emphasized), provides "protection of sovereignty and territorial integrity", and actions and appeals aimed at alienating part of the territory of the state are not allowed (Article 67), which rejects the claims of other states (or their supporters within the country) to the disputed territories, even if they are supported by international courts, assuming a harsh reaction to them.

Concentrated expression of these legitimizing parameters is represented in the constitutional provisions on the "nationalization of elites" by imposing restrictions on holding state and municipal offices in connection with the foreign citizenship, a residence permit, possession of accounts and holding funds in foreign banks, albeit with no mention of ownership of property in foreign states (article 71). The expected consequences of this measure are seen in the weakening of the cosmopolitan aspirations of the elite, increasing its dependence on the state and regulatory authorities, as well as cutting off opposition members abroad from power.

Thus, the amendments, even in their rhetorical part, establish an important turn in the ratio of positive and negative aspects of legitimacy, in fact changing their places: they oppose sovereignty to globalization, traditionalism to modernity; historical legitimacy to rational; strengthening national structures to transnational; national-oriented elite to cosmopolitan. This cognitive turn defines a new interpretation of the axiological parameters of Russian constitutionalism.

4. Social consensus: substantive and instrumental legitimacy

An important criterion for the classification of legitimacy is its division into substantive (based on values) and instrumental (based on institutions). The first of these parameters presupposes the existence of a certain social consensus — a "social contract" of society and government, the second considers institutions and measures to ensure it.

Constitutional amendments have proposed a new version of such a contract — an interpretation of the principle of the social state. If at the time of the adoption of the constitution, the social state (Article 7) was interpreted in the context of the dominant concept of a market economy based on the "free play of market forces" and the idea of a "minimal state", the amendments establish its new understanding from the standpoint of the ideology of solidarism, consciously using elements of Soviet rhetoric. This refers to the concept of "social responsibility of the state", which includes the constitutional consolidation of "economic, political and social solidarity". It is described as ensuring "a balance of rights and obligations", "respect for the working man", and the creation by the State of conditions for "social partnership" and "sustainable economic growth" (Article 75). This emphasizes the regulatory role of the state and does not exclude restrictions on business in socially significant issues.

But the substantive legitimacy of the ideology of solidarism is reduced to three instrumental parameters — guarantees of certain social obligations of the state, the revival of elements of social paternalism and the formation of institutions that can give a certain mobilization effect in relations between society and the state. The *first parameter* is reflected in the form of state guarantees of "minimum wage not less than the minimum of subsistence of the working-age population", "indexation of pensions at least once a year", as well as social insurance, targeted social support, indexation of social benefits and other social payments (Article 75) — norms that theoretically do not need constitutional regulation, the implementation of which depends rather on the level of economic development. The *second parameter* is expressed in a number of norms that resemble the stereotypes of Soviet state paternalism: the protection of traditional social institutions — solidarity of generations, the institution of marriage as a "union of a man and a woman", the family, motherhood, fatherhood and childhood with the definition of children as "the most important priority of state policy" (which reflects the trends of the demographic situation). The *third parameter* is the expansion of the social functions of the state responsible for maintaining "sustainable economic growth", the introduction of common standards of "youth policy", education and upbringing, including the formation of feelings of patriotism, citizenship and respect for elders (Articles 67, 72).

The ideology of solidarism as an alternative to liberalism becomes the basis of social consensus-relations between society and the state, but its interpretation tends to reproduce the traditional ideas of social responsibility, state paternalism and vertical communications, which are specific to the neoconservative (neocorporativist) type of legitimization of power.

5. Center and regions: National, territorial and local dimensions of legitimacy

In complex states that include territorial entities formed on a national basis, the independent dimensions of legitimacy are national, regional and local. The Constitution of the Russian Federation originally laid the model of cooperative federalism, the implementation of which faced competition of different-vector processes of decentralization and centralization, expressed in terms of contractual and constitutional models of federalism. However, the overall dynamics of its development was in the direction of absorption of the powers of the subjects of the Federation and local self-government by the Center. This allowed the experts to formulate a thesis about the predominance of the processes of unification, centralization and unitarianism, which have reached the level of "deconstitutionalization of the federalism principle"[13].

This result is enshrined in the amendments that introduce a new legitimizing principle of "a single system of public power" into the Constitution: the sovereign power of the political union extends to the entire territory of the country and functions as a single system whole in specific organizational forms defined by the constitution. This concept is implemented in three directions: expanding the powers of the federal center, limiting the powers of subjects and integrating local self-government into a single vertical of power.

The *first direction* is expressed by the provision that the organization of public authority is wholly within the jurisdiction of the Federation, expanding the extensive amendments of the powers of the Centre in a number of new areas — the establishment of foundations of Federal policy for scientific and technological development, health, education, security of individuals, society and the state, particularly in an important field of application "of information technology, the circulation of digital data" (article 71).

[13] Constitutional principles and ways to implement them: the Russian context. Analytical report [Konstitutsionnyye printsipy i puti ikh realizatsii: rossiyskiy kontekst. Analiticheskiy doklad]. Moscow : IPPP, 2014.

Further, the area of joint competence of the Russian Federation and the subjects is expanding (in fact, leading to the dominance of the central government), which now includes a wide area of social policy (including a whole block of amendments related to the social package of regulation of family protection, wages, pensions and social insurance), as well as various areas of regulation — from agriculture to youth policy (Article 72). Finally, it provides for the possibility of territorial exemptions in favor of the Center — "the creation of federal territories on the territory of the Russian Federation, the organization of public power in which is established by federal law" (Article 67).

The *second direction* is a set of innovations for the incorporation of subjects into a single system of public power with a simultaneous restriction of their powers. In this context, the change in the interpretation of bicameralism is significant — the positioning of the Federation Council as the Senate (and not the Chamber of Regions) — an institution of public power, which is endowed with a number of new important powers and consists of senators. They now include up to 30 senators (previously — 17) from the Russian Federation, appointed by the president, seven of whom, including former presidents, are for life (Article 95): together with representatives of the executive bodies of subjects subordinate to the president in the FC, this gives the president a numerical advantage (more than half of the votes) in the chamber, making it quite manageable. The constitutional and legislative legitimacy of the constituent entities of the Federation is severely restricted. Now the CC, at the request of the President, "shall examine the constitutionality of laws of subjects of the Russian Federation prior to their publication by the higher official of the subject of the Russian Federation", and "acts or their individual provisions recognized as constitutional in interpretation given by the CC shall not be applied in a different interpretation" (article 125). These provisions lead to a significant restriction of the prerogatives of the constitutional and statutory courts of the constituent entities of the Federation, significantly weakening their legitimacy.

The *third direction* is the integration of the institution of local self-government into the system of public power, which completes the trend towards the nationalization of local self-government. The amendments do not provide for a direct formal rejection of the fundamental constitutional norm that "local self-government bodies are not included in the system of state authorities" (Article 12). The problem is solved by combining two types of bodies (state and municipal) into a single system of public power, where they "interact for the most effective solution of tasks in the interests of the population living in the relevant territory" (Article 132). Within this "interaction", state authorities are given the legitimate opportunity to change the borders of the respective territories, participate in the "formation of local self-government bodies, the appointment and dismissal of local self-government persons" (Article 131).

The potential conflict of legitimacy of three levels — federal, regional and local, which really took place earlier in an acute form, is removed by amendments within the new constitutional principle of unity of public power. This formally completed the building of a single vertical of power. The Federal Center sets "restrictions for holding state and municipal offices, positions of state and municipal service" (Article 71), and the President appoints prosecutors of the subjects of the Russian Federation without subjects' consent. The most clear institutional expression of the principle of unity of public power is the new constitutional institution — the State Council, formed by the President "in order to ensure the coordinated functioning and interaction of public authorities" at all levels, the status of which has yet to be determined by federal law (Article 83).

As a result, the previously existing balance of three types of legitimacy — national, regional and local — is sharply shifted in favor of the first, not only in fact, but also formally[14]. Instead of a divided legitimacy (generally inherent in federalism), a single legitimacy of public power is formed. In this construction of neo-imperial statehood, the powers of the regions and the autonomy of local self-government institutions are dissolved. Conflicts of different types of legitimacy at three levels can now hardly receive an adequate constitutional or judicial resolution, but they presuppose mainly a political solution. The constitutional doctrine of the unity of public power absorbs federalism, consistently linking its legitimacy with the principle of "functional unity" of all levels of government and administration.

6. Public authority: the aims and means of institutional revision

The legitimacy of public power is determined by the goals for which it exists and the means to achieve them. The goals should be divided into declared and implied, and the means should be grouped according to the degree of legal acceptability and effectiveness. The constitutional reform initially de-

[14] *Rumyantsev, O. G.* Constitutional Reform 2020 in the Russian Federation: Biased Assessment [Konstitutsionnaya reforma 2020 v RF: pristrastnaya otsenka] // Constitutional Bulletin [Konstitutsionnyi vestnik], 2020. No. 5 (23). p. 6–32. (in rus)

clared the expansion of the parliamentary component as a socially significant goal to increase the flexibility of the political system, but in reality, it significantly adjusted the mechanism of separation of powers in the direction of centralization of power. This result was achieved due to the combination of individual corrective amendments in relation to each of the branches of government, the overall effect of which was to weaken their influence in relation to the institution of the head of state.

On the one hand, the amendments do establish a certain expansion of the powers of all three branches of government horizontally, their balancing in relation to each other to give the system more flexibility. The State Duma "approves" (previously used an indefinite formula about "giving consent»), on the proposal of the President, the candidacy of the Prime Minister, and on the proposal of the latter — his deputies and part of the federal ministers (Article 103). The Prime Minister is appointed by the President after "approval" of his candidacy by the Duma (Article 111 Part 1), and the President "does not have the right to refuse" the appointment of relevant officials (Deputy Prime Ministers), "whose candidacies are approved by the State Duma" (Article 112 Part 3). The Federation Council is also given (in the amended version of Article 102) a number of new important powers — it appoints the Chairman, deputies and judges of the Constitutional and Supreme Courts, as well as the chairmen and judges of the cassational and appeal courts and, in principle, carries out the termination of their powers; holds consultations on the candidates of federal ministers of the security wing proposed by the President, the candidates of the Prosecutor General, his deputies, regional prosecutors, military prosecutors and other specialized prosecutor's offices equated to the prosecutors of the constituent entities of the Russian Federation, but they are appointed by the president. The Constitutional Court is endowed with a number of new important powers related to granting it the competence of preliminary control over the constitutionality of legislation, including assessing the constitutionality of draft laws on amendments to the Constitution of the Russian Federation, federal constitutional laws and federal laws before they are signed by the President; resolving the issue of the possibility of implementing decisions of interstate bodies from the standpoint of their compliance with the constitution; checking the constitutionality of laws of subjects of the Russian Federation before they are published by the head of the supreme executive body of the subject (art. 125). In addition, if the chambers of the Federal Assembly reverse the president's veto, it is the verdict of the court that determines the fate of the bill — whether it shall be signed by the president or returned to the Duma without a signature (Articles 107, 108). These provisions allowed the developers to talk about the growth of the parliamentary component of the political system.

On the other hand, the amendments significantly weaken the powers of all branches of government in relation to the President. The parliamentary responsibility of the government remains impracticable: the candidacies of the Prime Minister and his members are not nominated by the parliamentary majority, but are proposed by the President; a parliamentary vote of no confidence in the government or a question of confidence on the part of the Prime Minister (including repeated) does not entail his automatic resignation, the President still has the right to choose — to dismiss the government or to call parliamentary elections (Article 117). Outside the control of the Duma and the government remains virtually the entire security wing, formed directly by the president within the "consultations" with the Federation Council (the new order of formation of which, as noted, makes it more dependent on the president). Finally, the amendments sharply limit the autonomy and independence of the Constitutional Court in the political system — the resolution of issues of preliminary control of the constitutionality of draft laws, as well as the suspension of their adoption (in case of reversal of the presidential veto) is considered by the court only on the proposal of the president, the number of judges has been reduced from 19 to 11 (Article 125), and the procedure for their appointment and removal (undermining the principle of irremovability of judges) is entrusted to the Federation Council on the proposal of the President, which creates prerequisites for a system of controlled justice.

In this context, the innovation on the transfer of the function of government management to the President with the expansion of the existing order of responsibility of the government to the president established by the amendments is essential. The President "exercises general management of the Government of the Russian Federation" (Article 82), the government exercises executive power "under the leadership of the President" (Article 110, part 1), and the Chairman of the Government organizes its work in accordance with the "orders" and "instructions" of the President and bears "personal responsibility to the President for the exercise of the powers entrusted to the Government" (Article 113). The Government directs the activities of only a part of the federal executive bodies, with the exception of those whose activities are managed by the President personally (Article 110 Part 3). The leadership of the security wing — issues of defense, security and foreign policy — is carried out directly by the head of state.

Thus, the amendments present a *contradiction between the publicly stated goals* (expansion of parliamentarism) *and the means used* — the delegation of a significant part of the powers of all three

authorities to the head of state, who performs not only the functions of an arbitrator, but also the legitimate center of coordination and direction of their activities. The general vector of changes consists in further revision of the model of the mixed form of government with the system of separation of powers inherent in it (originally laid down in the Russian constitution, although with significant deviations) in the direction of the presidential form of government. It should be noted that the key innovation in this way is the formal granting of the function of management of the government (which fate is decided in president's sole discretion) to the head of state, which is an element of the presidential government, but with the full elimination of the inherent checks and balances (classical presidential system does not provide for the dissolution of Parliament by the President). This allows us to draw a conclusion about the transition from one type of institutional legitimacy (dualistic presidential-parliamentary) to another — a monistic quasi-presidential regime, with virtually unlimited powers of the head of state.

7. Head of State: constitutional and meta-constitutional foundations of the legitimacy of power

The distinction between the constitutional and meta-constitutional foundations of the legitimacy of power is a traditional way of determining the degree of its legal and political (functional) autonomy. This criterion is especially important for regimes where the head of state is both the formal and informal embodiment of power. The constitutional parameters of legitimacy derive from the legally regulated powers of the head of state or their interpretation by the judiciary, which can have an expansive character (so-called explicit and hidden powers derived from the totality of constitutional norms). Meta-constitutional powers are those that rely on the role of the President as a symbolic figure in the public space, the highest representative of the state in international relations, and a mediator in resolving social, national, and political conflicts.

These two types of legitimacy often enter into complex relationships and contradictions with each other. There are situations when rational-legal (formal-constitutional) and meta — constitutional (informal-personal) forms of legitimacy complement each other, come into conflict, or one of them absorbs the other. The latter option is typical mainly for authoritarian systems, where constitutional and legal legitimacy is limited or even included in the dominant meta-constitutional legitimizing formula of the head of state, who personifies the will of the nation. The Constitution of 1993 created certain prerequisites for this trend in the form of securing the enormous powers of the presidential power, but did not predetermine its result. The 2020 constitutional amendments obviously establish it. The five main innovations introduced by the amendments serve to achieve this goal.

First, giving the head of state a new symbolic status. Previously, the constitution defined the president exclusively as "the guarantor of the Constitution of the Russian Federation, human rights and freedoms." The drafters of the amendments went further: the president is defined as the guarantor of "civil peace and harmony in the country", which ensures the coordinated functioning and interaction of all bodies that are part of the "unified system of public power" (Article 80 in the new version).

Secondly, the concept of a single system of public power implies a new level of their integration: all branches of government and institutions are incorporated into a single system of public power, the top and embodiment of which is the head of state. In this concept, the head of state performs not only symbolic, but also quite real functions of the center of public power, rising above the system of separation of powers, directing the executive power, forming the agenda and determining the structure of political institutions, coordinating and directing their activities, determining the meaning and dynamics of the political process. The President turns from an arbiter in relations between the authorities into their center, while receiving new powers of the head of the government and of the entire vertical of executive power.

Third, the mechanism of conflict resolution in the relations of the authorities is closed to the president. All levels and branches of government, represented by the Duma, the Federation Council, the Constitutional Court and the Government, receive, as noted, significant new powers that "balance" their positions in relation to each other. However, potential conflicts between them are removed not through the separation of powers mechanism, but by delegating the right to a final decision to the highest political level of government, from regions to the centre, from Parliament to the government or its security components, and through that — to the President.

Fourth, granting the President lifetime immunity from prosecution. The norms are presented that make it impossible for the President to be responsible after his resignation. Not coincidentally, on the model of many post-Soviet countries (which reacted in that way to the change of their government during

the "color revolutions"), the Russian amendments include detailed recording of guarantees to the Presidents, who cease to perform their powers, they receive the life status of senators (art 95) and the appropriate immunity (article 98), "have immunity" (article 92) and the procedure of deprivation of immunity by the chambers of the Federal Assembly is almost the same as the impracticable procedure of impeaching the current President (article 93, 102, 103).

Fifth, the introduction of a new interpretation of the principle of succession of power and giving the current leader exclusive rights to re-election. The amendment to Part 3 of Article 81 included in the Constitution expresses the continuity and rupture of the constitutional system, inconsistently combining different types of legitimation of power — legal (regular) and personalistic (exclusive). The first is reflected in the reproduction of the principle of the alternation of power, even to strengthen the sternness of the wording — "one and the same person cannot hold the office of President of the Russian Federation more than two terms" (in the new edition the word "consecutive", which has already played its role to grant Putin a third and fourth mandate, is removed). The second is presented in the "reservation" to the same rule, according to which this restriction does not apply to a person who holds (or previously held) this position at the time of entry into force of this amendment. Thus, a "transitional position" is constructed from the old constitutional norm to the new one, which opens up prospects for the incumbent leader to participate as a candidate in the presidential election and hold this position, regardless of the number of terms that he held office before the entry of this amendment into force. This is an assertion of personal legitimacy over constitutional legitimacy.

Thus, the constitutional amendments provide the basis for a reconstruction of legitimacy of the head of state to unify the legal and extra-legal components with strengthening their meta-constitutional understanding — in the form of a new symbolic status of the President. Introducing a formal establishment of the virtually unlimited power of the head of state, the amendments simultaneously include an expanded interpretation of presidential immunity from prosecution, change the balance between legal and personalistic legitimacy in favor of the latter, and open up the prospects of an unlimited staying in power of the current leader. In the aggregate of all these parameters, this system can be defined by the concept of a constitutional authoritarianism[15] or a constitutional dictatorship[16], which is used to describe situations of establishing unlimited power in a formally constitutional way (in contrast to the usual dictatorship, which is usually indifferent to the constitutional framework).

8. Managing Public Opinion: Constructing Legal Legitimacy in the Media Scene

The society's request for constitutional reform was stated by sociologists several years before its implementation. However, the structure of this request showed completely different motives for supporting the reform in different segments of society — from liberal to conservative and collectivist-equalizing. These motives, of course, were taken into account by the developers both when formulating amendments and presenting them to the public. The goals and results of the PR campaign to promote the amendments are presented in the VTsIOM (Russian Public Opinion Research Center) analytical review on the attitude of the population to the constitutional amendments of 2020.[17]

This survey was conducted on January 24, 2020, i. e. immediately after the publication of the concept of amendments in the President's Message to the Federal Assembly, but before their subsequent detailing and adjustment. It was attended by 1,600 citizens aged 18 and over, taking into account social and demographic parameters, and the method used was a telephone interview based on a stratified two-base random sample of landline and mobile numbers. The survey organizers note that for this sample, the maximum error size with a 95% probability does not exceed 2.5%. Nevertheless, distortions are possible given the very wording of the questions. They were put on the basis of known public expectations, did not include topics or formulations that could cause rejection of respondents, as well as, of course, the final amendment — about the resetting of presidential powers. This allows us to be critical of the results obtained, but does not make them less informative for clarifying public attitudes and the parameters of their directed construction.

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[15] *Partlett, W.* Russia's 2020 Constitutional Amendments [Popravki k Konstitutsii Rossii 2020 goda] // Comparative Constitutional Review [Sravnitel'noe konstitutsionnoe obozrenie]. 2020. No. 3 (136). p. 51–62. (in rus)

[16] *Medushevskiy A. N.* The Russia's Move to Constitutional Dictatorship: Reflections on 2020 Constitutional Amendments [Perekhod Rossii k konstitutsionnoi diktature: razmyshleniya o znachenii reformy 2020] // Comparative Constitutional Review [Sravnitel'noe konstitutsionnoe obozrenie]. 2020. no. 3 (136). p. 33–50. (in rus)

[17] Amendments to the Constitution: Meaning and Attitude. Analytical Review of VTsIOM [Popravki v Konstitutsiyu: znachenie i otnoshenie. Analiticheskii obzor VTSIOM] (date of circulation February 3, 2020) [Electronic resource]. URL: https://wciom.ru/index.php?id=236&uid=10146 (date of reference: 05.10.2020). (in rus)

A contradiction is the fact that the majority of the population, who previously showed a stable apathy to the constitution and did not agree to see it as a real tool for protecting rights (as evidenced by previous polls of the Levada Center and FOM), generally supported the reform and reacted positively to the potential of amendments to the constitution (79%). The highest percentage of support is found in million cities (86%), the lowest –among young people (from 18 to 24 years) and in both capitals (72%)[18]. The explanation of this fact most likely consists in the consolidation of public sentiment in support of constitutional reform, formed and supported by an intensive information campaign of the official media with an emphasis on those priorities that were most accessible and understandable to the mass consciousness (without becoming legally more meaningful)[19].

First of all, absolute support (90–91%) was given to the idea of constitutional consolidation of social guarantees (indexation of pensions, allowances and other social payments and establishing the minimum wage not lower than the subsistence minimum). Further, amendments that were positioned as strengthening the Russian national statehood received a high level of approval — changing the criteria for a candidate for the post of president: increasing the qualification for living in the country to 25 years (87%) and limiting presidential mandates to two terms (66%); introducing a ban on foreign citizenship or residence permits for State Duma deputies, senators and municipal employees (68% vs. 14%).

Finally, the amendments for the "restoration of sovereignty" and for changing the configuration of institutions, asserted as steps towards democratization, received solid support: presidential appointment of heads of ministries, departments and public prosecutors of regions with the participation of the Council of Federation (66% vs. 12%); the priority of the Russian Constitution over international treaties or decisions of international associations (63% vs 14%); a proposal to expand the powers of the Federation Council, and also the idea to give the Duma the right to approve the Prime Minister, Deputy Prime Ministers and Ministers (60–62%)[20]. A particularly high level of support for amendments about reforming the constitutional court, the functions and activities of which the Russians have a very vague idea, is surprising — there was almost unanimous (81%) approval of the proposal to give the CC a function of pre-checking bills at the request of President in conformity with the Constitution.

It is obvious that we are talking about a public request for constitutional reform formed by the government itself, by articulating the meaning of the most attractive amendments in clear terms and omitting the most controversial ones. The success of the constitutional PR campaign is indirectly evidenced by the surprisingly low percentage of respondents who answered "I find it difficult to answer" regarding all questions (at the level of 3–5%): this is surprising, given that transformations of such complexity were evaluated by citizens, most of whom previously admitted to ignorance or vague knowledge of the constitution. The determining factor in the success of legitimation of constitutional amendments, therefore, should be recognized as the *information monopoly of the authorities*, the organization of a detailed *PR campaign* and its well-thought-out *targeted orientation*.

9. Legitimation of the political regime as a basis for the consolidation of power

The concept of legitimacy, as shown earlier, expresses the degree of agreement between society and the authorities, based on faith (or disbelief) in the legitimacy of the latter's actions. It links together a number of elusive parameters of the organization of the political system — prevailing moods, public expectations, the normative status of institutions, formal procedures for legal changes and technologies of power. The process of legitimizing of a political regime through constitutional amendments therefore involves a combination of rules (constitutional amendments), institutionalized procedures, and political technologies. The constitutional reform in Russia demonstrates their clear interaction, indicating the planned nature of the preparation and the desire to achieve the goals set. The 2020 constitutional amendments pursued precisely this goal — to reproduce the legitimacy of the Russian political regime in the face of the erosion of public trust in it, combined with a combination of external and internal

[18] For more information, see the table on the question: For you personally, are these possible changes important or rather not important?] [Electronic resource [Dlya Vas lichno eti vozmozhnyye izmeneniya vazhny ili skoreye ne vazhny?]. URL: https://wciom.ru/index.php?id=236&uid=10146 (date of reference: 05.10.2020). (in rus)

[19] E. g. see: Opros VTsIOM pokazal mneniye rossiyan o popravkakh k Konstitutsii 3 fevralya 2020 g. [The VTsIOM poll showed the opinion of Russians about the amendments to the Constitution on February 3, 2020.] [Electronic resource]. URL: https://russian.rt.com/russia/news/714520-vciom-opros-popravki (date of reference: 05.10.2020). (in rus)

[20] See the table data for the question: How do you feel about the possibility of the following amendments to the Constitution [Kak Vy otnosites k vozmozhnosti sleduyushchikh izmeneniy k Konstitutsii?] [Electronic resource]. URL: / https://wciom.ru/index.php?id=236&uid=10146 (date of reference: 05.10.2020). (in rus)

challenges. The problem was solved in the form of reconstruction of the legitimizing formula of power on new value and institutional-organizational principles. This explains the correlation between the form, content and mechanisms of constitutional reform.

The legal form of reproduction of legitimacy was chosen to be not the adoption of a new constitution, but a systematic adjustment of its fundamental principles by the adoption of a block of partial amendments to less protected sections of the Basic Law. The amendments do not formally go beyond the limits of procedural restrictions (in accordance with Articles 136 and 108) and do not affect the most protected chapters of the Constitution, which made it possible to avoid launching the procedure for convening a Constitutional Assembly. They do not contradict Federal Law "On the procedure of adoption and entry into force of the amendments to the Constitution of the Russian Federation" (dated 04.03.1998), which does not allow to combine amendments of different content in one block, because, contrary to the critics, actually show a single logic and internal relationships — in the revision of legitimizing foundations of the political system. At the same time, however, the scale of the changes was so significant that it allows us to talk about the transformation of the meaning of the fundamental constitutional principles. The contradiction of the basic constitutional principles with their reduced interpretation by amendments is obvious (in violation of Article 16, paragraph 2), which does not exclude further conflicts of interpretation of legislative norms in judicial practice. This decision is legally ambiguous, but it allowed to tackle three political challenges at a time: to guarantee the stability of the situation, not allowing uncontrolled public debate on the legal contents and prospects of the political system; to preserve the constitutional legitimacy of the regime (concerned with the reaffirmation of the current changes in the political system in relation to the Constitution of 1993, on the basis of which it has been formed) and at the same time to fill this legitimacy with different (even contradictory) conservative restoration sense.

The *content* of the amendments expresses a single internal logic of the transformation of Russian constitutionalism in the direction of limiting its authentic liberal basis. The amendments provided an answer to a number of systemic challenges — globalization, threats of internal destabilization, split of the elite and transfer of power. Globalization (the priority of international law over national law) is opposed by state sovereignty; rationalism — by historical continuity; modernism — by protection of traditional values and national priorities; human rights ideology — by patriotism and their state-centered interpretation; destabilization (alienation of power and society) — by a new construction of the "social contract" from the positions of solidarism and paternalism; the threat of territorial disintegration — by a revision of federalism in the direction of centralization; loss of systemic flexibility — by adjustment of the entire balance of power in the direction of functional unity; cosmopolitanism of the elite — by its "nationalization"; the problem of continuity of the supreme power — by ensuring its preservation for the current leader for an indefinite period. The unifying concept for all these innovations was the new constitutional doctrine of "unity of the system of public power" headed by the president as its symbol, guarantor and guiding force.

The mechanism of the constitutional reform consisted in combining procedural, institutional and technological tools in the context of the information monopoly of power. The key element of the whole construction was the revision (extended interpretation or correction) of the method of revision of the current constitution itself at the time of its change by a special law and the set of principles of their interpretation from the perspective of the changed legal and political reality. Procedurally, the greatest doubt was the constitutionally controversial linking of the adoption of the law on the amendment and the complex of the whole amendment block (especially about resetting the previous presidential mandates) with the message of the President to the constitutional court, which is not provided by the Constitution and applicable law on the constitutional court directly (as well as his repeated statements about the illegality of doing it). The other controversial point was the actual (but not legal) revision of the procedures for the adoption of amendments associated with the introduction of the unprovided for by the constitution additional Institute — the "All-Russian vote", which corresponds neither to the referendum, nor even to the nation-wide vote in the sense of the 1993 Constitution (as the criterion of its success was not the support for the initiative by the majority of citizens, but by a simple majority of vote participants). The developers' dilemma, as shown, was the need to comply with the constitutional provisions on amendments with the need for their simultaneous revision. It was solved at the political level by the unanimous support of the Law on the Amendment and the methods of its adoption by all branches of government — the State Duma and all regional legislative assemblies, the Federation Council and the Constitutional Court (which is not surprising due to the dominance of one party in power).

Political technologies of constitutional reform — are an independent factor in promoting and legitimizing amendments in society. They included: the secret nature of their development; an information

campaign to prepare public opinion; the exact choice of the form and time of proposing amendments (in the President's Message to the Federal Assembly, postponed for this purpose to the beginning of the year); rapid progress of amendments and of passing the formal stages of their "discussion" and adoption (within three months); inclusion of elements of corrective or distracting PR (in the form of the idea of the State Council); metered supply to society in three separate blocks (social, institutional and related to the extension of the presidential mandate); timely involvement of the "public" to make ideological amendments; involvement of the Constitutional Court in the assessment of amendments and, above all, the most important of them — on resetting the terms of office of the current president; holding a quasi-constitutional all-Russian vote with subsequent approval of its results as an additional legitimizing action.

As a result, the *combined or cumulative legitimacy of the amendments* was formed as a synthesis of legal, institutional-political and factual arguments.

10. Results of the constitutional reform: the reconstructed legitimizing formula of power and its significance

In general, the amendments ensured the achievement of a number of vital political *objectives* of the ruling regime — a deep revision of the content of the constitutional principles with their external immutability; reproduction of legitimacy of the political regime on a new basis; demonstration of the unity of all branches of government to external and internal challenges; the prolongation of the mandate of the incumbent head of state for an indefinite period; support for these decisions by a plebiscite (whether real or simulated) and, crucially, the implementation of all these changes within the formal constitutional legality, which ensures the legal continuity of the current government.

This construction of the legitimacy of the government is quite consistent with the restoration historical periods, summing up the entire post-Soviet constitutional cycle and its final phase — the re-institutionalization (i. e., the revision of the meaning of the previously adopted constitution from the standpoint of restoration logic). It constitutionally records all the major changes of the previous decades in the direction of a conservative revision of the liberal potential of the 1993 Constitution, completing this process by recognizing the legal reality of a neo-imperial state with an authoritarian-plebiscite political regime.

The *formula of legitimacy* introduced by the 2020 amendments and established in the course of their promotion is internally contradictory: it combines legal and extra-legal forms of legitimation — combines the constitutional and democratic basis of the political system with non-legal (cultural) parameters, including history, nation, solidarity, the priority of public power over society, and the symbolic (meta-constitutional) status of the head of state. The system of constitutional values is revised by changing the balance of positive and negative legitimacy, and authentic goals are reduced to the means of achieving them. Within this formula, the sovereign (people) democratically delegates its power to the head of state, who thereby performs the function of its permanent and sole representative.

T*he balance of advantages and disadvantages of this solution* does not look clear: the advantages include the reproduction of legitimacy as a guarantee of relative stability of the regime in the short term; overcoming the growing contradiction between its constitutional form and real content by reflecting the latter in the norms of positive law; reproduction of the mandate of the current leader in the face of growing international rivalry and internal problems. The disadvantages include the internally contradictory nature of the legitimizing formula, composed of different legitimizing principles (constitutional and meta-constitutional); the threat of stagnation due to the hyper-centralization of state power, which remains the only arbiter in resolving social conflicts; the lack (outside of formal constitutional procedures) of clear (and legitimate) mechanisms for the transition of power, the problem of transfer of which has been postponed in time, but will inevitably arise in the future, provoking the threat of a split of the elites.

The most accurate definition of the current political regime is the concept of *constitutional authoritarianism (constitutional dictatorship)* — a system of government in which, on the basis of the constitution, with the consent of society (confirmed by a plebiscite) and with the unanimous approval of all branches of government, takes place the establishment of virtually unlimited power of the institution of the head of state, personified in the figure of the current leader. The stability of the legitimizing formula, the viability of the political regime and its effectiveness in overcoming external and internal challenges are now determined mainly by one factor — the success of the leader to whom the people have entrusted their fate.

References

1. Amendments to the Constitution: Meaning and Attitude. Analytical Review of VTsIOM [Popravki v Konstitutsiyu: znachenie i otnoshenie. Analiticheskii obzor VTSIOM] (date of circulation February 3, 2020) [Electronic resource] URL: https://wciom.ru/index.php?id=236&uid=10146 (date of reference: 05.10.2020). (in rus)
2. Constitutional Principles and Ways of Their Implementation: Russian Context. Analytical Report [Konstitutsionnye printsipy i puti ikh realizatsii: Rossiiskii kontekst. Analiticheskii doklad]. M .: Institute of Law and Public Policy [IPPP], 2014. 75 p. (in rus)
3. Finer, S. E., Bogdanor, V., Rudden, B. Comparing Constitutions. Oxford : Clarendon Press, 1995, 395 p.
4. Hermet, G., Badie, B., Birnbaum, P., Braud, Ph. Dictionnaire de la science politique et des Institutions politiques. Paris : Armand Colin, 1994. 280 p.
5. Medushevskiy, A. N. Constitutional Amendments in Russia in 2020 as a Political Project of State Reconstruction [Konstitutsionnye popravki 2020 kak politicheskii proekt pereustroistva gosudarstva] // Public Policy [Publichnaya politika], 2020. Vol. 4. No. 1. Pp. 43–66. (in rus)
6. Medushevskiy, A. N. Rebirth of the Empire? Russian Constitutional Reform 2020 Against the Background of Global Changes [Ozrozhdenie Imperii? Rossiiskaya konstitutsionnaya reforma 2020 na fone global'nykh izmenenii] // Bulletin of Europe [Vestnik Evropy], 2020. Vol. 54 [Electronic resource]. URL: http://www.vestnik-evropy.ru/ issues/the-revival-of-the-empire-russian-constitutional-reform-2020-against-the-background-of-global-change. html (date of reference: 05.10.2020). (in rus)
7. Medushevskiy, A. N. The Russia's Move to Constitutional Dictatorship: Reflections on 2020 Constitutional Amendments [Perekhod Rossii k konstitutsionnoi diktature: razmyshleniya o znachenii reformy 2020] // Comparative Constitutional Review [Sravnitel'noe konstitutsionnoe obozrenie], 2020. No. 3 (136). Pp. 33–50. (in rus)
8. Metamorphoses of the Russian Constitution [Metamorfozy Konstitutsii Rossii] // Comparative Constitutional Review [Sravnitel'noe konstitutsionnoe obozrenie], 2020. No. 3 (136). Pp. 33–96. (in rus)
9. Mosca, G. Storia delle dottrine politiche. Bari : Laterza e Figli, 1945, 350 p.
10. Partlett, W. Russia's 2020 Constitutional Amendments [Popravki k Konstitutsii Rossii 2020 goda] // Comparative Constitutional Review [Sravnitel'noe konstitutsionnoe obozrenie], 2020. No. 3 (136). Pp. 51–62. (in rus)
11. Resetting and the Spirit of the Constitution // Zakon, 2020. No. 3. Pp. 23–37. (in rus)
12. Round Table: "Changes in the Constitution of the Russian Federation and Public Policy", February 27, 2020 [Kruglyi stol: «Izmeneniya v Konstitutsii RF i publichnaya politika», 27 fevralya 2020] // Public Policy [Publichnaya politika], 2020. Vol. 4. No. 1. Pp. 9–42. (in rus)
13. Rumyantsev, O. G. Constitutional Reform 2020 in the Russian Federation: Biased Assessment [Konstitutsionnaya reforma 2020 v RF: pristrastnaya otsenka] // Constitutional Bulletin [Konstitutsionnyi vestnik], 2020. No. 5 (23). Pp. 6–32. (in rus)
14. Schmitt, C. Legalitat und Legitimitat. Berlin : Dunker und Humblot, 1968. 98 p.
15. Transcript of the Joint Meeting of the Constitutional Club and the Commission of the Association of Lawyers of Russia for the Development of Constitutional Legal Awareness Dated January 21, 2020 [Stenogramma sovmestnogo zasedaniya Konstitutsionnogo kluba i Komissii Assotsiatsii yuristov Rossii po razvitiyu konstitutsionnogo pravosoznaniya ot 21 yanvarya 2020] // Constitutional Bulletin [Konstitutsionnyi vestnik], 2020. No. 5 (23). Pp. 55–75. (in rus)
16. Weber, M. An Attempt of Comparative Research in the Sociology of Religion [Popytka sravnitel'nogo issledovaniya v oblasti sotsiologii religii] // Weber M. Favorites. The Image of Society [Izbrannoe. Obraz obshchestva]. M. : Jurist [Yurist], 1994. Pp. 43–77.
17. Yi Ching [Itszin] Book of Changes [Kniga peremen]. SPb. : Azbuka-klassika [Azbuka-klassika], 2008. Pp. 234–245. (in rus)

On the Regulatory Regime of Private Individuals

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ABSTRACT
The article assesses the quality of legislation regulating the participation of individuals, both from a formal legal point of view (form) and in terms of its social purpose (content). One of the criteria for assessing the quality of legislation is the regulatory regime of the subjects. The difference between the regulatory regime of private individuals and the regulatory regime of public authorities is shown. A list of tasks that can be understood and resolved to a large extent in the legal nature of legislation is provided. One such task is considered — the task of determining the purpose and subject of legislative regulation. The Russian Civil Code is assessed as a system-forming piece of legislation of all Russian legislation. On the basis of the assessment of the state of Russian legislation, it is concluded that the federal law on regulations, which will regulate all the main aspects of legislative and other normative activities: the concept of legislation; Regulatory boundaries Principles of regulatory activity (based on the objectives and subjects of regulation, taking into account the differences in the nature of human activities and the activities of political institutions); types of regulations and their relationship with each other (legislative and by-laws; federal, regional and local acts; centralized and local acts; general and special acts, etc.), including case law, customs, universally accepted principles and norms of international law, international treaties; other aspects corresponding to the content of such a law (in particular, the drafting of the bill, including its public discussion, adoption, publication, modification and repeal, etc.). The determining principle in all cases should be the recognition, observance and protection by the state of the rights and freedoms of a person and a citizen as the highest value (Article 2 of the Russian Constitution).
Keywords: regulatory regime, activities of individuals, activities of public authorities, self-regulation, goals and subject of legislation, law on regulations

The characterization of the regulatory treatment of private individuals' activities involves an assessment of the quality of legislation which regulates relations with private individuals, both from a legalistic perspective (letter) and from the perspective of its social purpose (spirit). It is usually considered that a law is a normative act adopted by the highest representative body of state power in compliance with the procedure established by the constitution or through a referendum[1]. This definition of the law is incomplete, since it defines it only with formal features.

The law, being a normative means of regulating public relations, must meet certain regulatory objectives and reflect the relevant public interests. This shows the spirit side of the law. Therefore, the law should be evaluated not only from the perspective of formal features in the system of normative acts, but also from the perspective of what it actually represents in its social purpose, whose interests it reflects[2]. The system of legislation should reflect the system of law and, therefore, if possible, be brought into line with it. Many authors have paid attention to this[3].

1. *From a legalistic point of view, legislative acts* as external forms of expression of law are characterized by such features as subjectivity and complexity.

The subjective nature of legislative acts is determined by the fact that they are constructed in accordance with the subjective views of the legislator (a group of persons authorized to adopt such acts), who proceeds from practical interests. Since the state of legislation (its system, structure) largely depends on the will of the legislator, contradictions between the law, law system (an objective phenomenon) and legislation and its system (subject to political influence) are not excluded. The choice of systematization of legislation depends on the will and interests of the legislator, who forms this system taking into account the economic and political situation in the country and its traditions, seeking to ensure the most effective regulation of relations in this area.

The subjective nature of legislative acts and their system is confirmed by their comparison in different countries, which sometimes shows significant differences in the set of such acts. For example, the business legislation of Russia and of a number of other countries with a monistic system of private law (in particular, Italy, the Netherlands) is represented by unified civil codes, which are accompanied by other legislative acts adopted in the development of the civil code and dedicated to individual institutions

[1] Legal Encyclopedia [Yuridicheskaya ehntsiklopediya] / edited by B. N. Topornina. Moscow., 2001. p. 317. (in rus)
[2] *Tikhomirov, Y. A.* Theory of Law [Teoriya zakona] / edited by V. P. Kazimirchuk. Moscow, 1982. p. 27–37. (in rus)
[3] See: *Genkin, D. M.* To the Question of the System of Soviet Socialist Law [K voprosu o sisteme sovetskogo sotsialisticheskogo prava] // Soviet State and Law [Sovetskoe gosudarstvo i pravo]. 1956. № 9. p. 91 (in rus); Theoretical Issues of Systematization of Soviet Legislation [Teoreticheskie voprosy sistematizatsii sovetskogo zakonodatel'stva] / edited by S. N. Bratush, I. S. Samoshchenko. Moscow, 1962. (in rus) p. 241.

of business law (laws on companies, bankruptcy, etc.). In countries with a dualistic system of private law (for example, Germany, France), business legislation is separated from civil legislation in the form of special trade codes adopted as the development of the Civil Code, which did not exclude the need to adopt other legislative acts as the development of trade codes (for example, the German Joint Stock Companies Act of 1965, the French Insurance Act of 1967, etc.).

There are also examples of the adoption of business codes nowadays, but in fact such codes are not legislative acts that would not allow the subsidiary application of the norms of civil codes to relations regulated by such business codes. Thus, in Ukraine, the Commercial Code has been adopted, but it cannot claim to be a truly codified act, since it does not contain primarily homogeneous norms that would be divided into norms that make up the General and Special parts of the Code. The CC of Ukraine is, in essence, a special legislative act regulating a complex of heterogeneous relations and allowing the application of the norms of the Civil Code of Ukraine and other general laws to these relations. For example, according to paragraph 6 of Article 265 of the Commercial Code of Ukraine ("Supply contract"),"the relevant provisions of the Civil Code of Ukraine on the contract of sale shall apply to supply relations not regulated by this Code".

Kazakhstan has adopted the Entrepreneurial Code of Kazakhstan, which, in essence, is a systematization of legislative acts on state regulation and control of entrepreneurial activity. This approach has nothing to do with the dualistic system of private law expressed in the European trade codes.

In the general law system, where the main source of law is a judicial precedent (Case Law), business relations are also regulated by the system of legislative acts (Statute Law). For example, in the UK there are laws on the sale of goods, on bills of exchange, on property, on companies, on currency control, on fair trade, on insolvency, etc. In the United States, the basis of business legislation is the Uniform Commercial Code of 1968. Some areas of trade are regulated by separate laws: the Tariff Act of 1930, the Trade Act of 1974, the Bankruptcy Act of 1978, and some others. At the state level, there are also laws regulating trade.

The complex nature of legislative acts is determined by their subjective nature and is expressed in the fact that legislative and other normative acts, as a rule, contain heterogeneous norms (norms of civil, administrative, criminal, procedural legislation) in one or another proportion. For example, the laws on the securities market, on banks, on bankruptcy, and many others present both rules governing relations based on equality (between professional participants in the securities market and clients, banks and clients, etc.) and rules governing relations based on power and subordination (between professional participants in the securities market and the Bank of Russia, credit institutions and the Bank of Russia, etc.).

The so-called branch codes, which contain mainly norms of one kind, are also complex, since in each of them norms of a different kind can also be found. Thus, the Civil Code of the Russian Federation, along with the norms regulating relations based on equality, contains norms that prescribe individuals to act in accordance with public interests, for example, the norms on state registration in the field of entrepreneurship (Articles 51, 164), on licensing of certain types of entrepreneurial activity (Article 49), and a number of others.

Since Soviet times, such phenomena as civil law, administrative law, criminal law, etc., are traditionally named as branches of law, although they are in fact are not branches of law, but bodies (branches) of legislation, represented, as a rule, by several legislative and other normative acts containing heterogeneous norms (standards of behavior) aimed at mutual regulation of heterogeneous social relations of the corresponding sphere of society: economic, social, managerial, etc.[4]

Taking into account the identified formal and legal features of legislative (regulatory) acts, they should be defined as *coming from different state authorities and containing heterogeneous norms* regulating human activity both in terms of its implementation and in terms of its public organization.

2. *From a substantive point of view, legislative acts* as external forms of expression of law, despite their subjectivity, should be legal, i. e., reflect the needs of public life as accurately as possible. An illegal official act is an explicit or hidden arbitrariness of the authorities.

The legal nature of legislative acts can be largely ensured by understanding and solving problems, in particular, such as: a) determining the purpose and subject of legislative regulation, its relationship with subordinate statutory regulation; b) the ratio of federal, regional and local regulation; c) the ratio of centralized and local regulation; c) the ratio of unified and specialized regulation. The solution of these tasks will allow us to understand the existing trends in the legislative regulation of public relations and determine its optimal limits, to ensure the necessary regulatory treatment of human activity.

[4] *Antonov M.* On the System and Branches of Legislation [O sisteme i otraslyakh zakonodatel'stva] // Law and Economics [Law and Economics]. 2011. No. 3. p. 53. (in rus)

Before describing the above tasks, let us briefly consider the concept of "*ensuring the necessary regulatory treatment of human activity*", which equally applies to all tasks to be solved and allows us to show which ratio of regulatory means of regulating public relations the necessary regulatory treatment foremost provides. This concept means that the legislation corresponds to the nature of the activity regulated by it and the relations that mediate this activity. Thus, the Constitution of the Russian Federation states that everyone has the right to freely use their abilities and property for entrepreneurial and other non-prohibited economic activities (Part 1 of Article 34). I believe that this constitutional guarantee applies equally to any human activity that is not prohibited by law, which by definition is based on the freedom of a person and a citizen. The legislation should define only the necessary restrictions for human activity, leaving a wide scope for the individual's own discretion.

It is necessary to distinguish between the concepts of the regulatory treatment of the activities of individuals and the regulatory treatment of the activities of institutions of society, especially public authorities.

Statutory regulation of the activities of private individuals should be based mainly on dispositive principles, where detailed regulation of relations is unacceptable. In contrast, *the statutory regulation of relations with the authorities* should be characterized by detailed regulation of the behavior of their participants (for example, the tax authority and the taxpayer), where legal procedures (administrative, procedural) become important. Accordingly, to the extent that legislation creates normative opportunities for human freedom and to the extent that it strictly defines the powers of public bodies, it contributes to the task of forming a civil society (including an effective economy) and building a State governed by the rule of law.

The practical importance of theoretical provisions on the regulatory treatment of human activity is that they can be used in the process of improving the legislation and practice of its application, in formation of modern legal thinking of those who make laws, in organization of execution of laws and in the resolution of social conflicts. The correct definition of the necessary regulatory treatment allows us to establish the general direction of the development of legislation and to reflect the objectively existing system of law most adequately, to develop the concept of a particular regulatory act being designed, to use the appropriate legal tools (legal means, structures, mechanisms).

Determining which regulatory treatment should be the basis for the regulatory act being developed is the first step in translating socio-economic requirements into legal language. This is what determines the strategy of statutory regulation in the society.

3. Let us briefly consider only one of the above-mentioned tasks to be solved in order to ensure the legal nature of legislative acts — the task of determining the purpose and subject of legislative regulation. The question of the limits of the activity of the legislator is considered in legal science from the position of *sufficient minimization of the legislative regulation of public relations*. It is known that the domain of law exists as an objective reality, regardless of whether we are aware of it or not. Along with the domain of law, there is also the domain of statutory regulation, i. e. legal by nature social relations that can be affected by an external regulator (law, custom, precedent). In particular, the legislator gives legal relations statutory force, brings them under the protection of the state, and confirms in the public consciousness the fact that the relations have a "normal", i. e., correct character. Thus, the initial limiter of the activity of the legislator (as well as other external regulator) is the domain of the law, of legal relations[5].

Legal relations are relations of individuals based on equality, autonomy of will and property independence of their participants. They arise from the division of labor and the exchange of its results on an equivalent basis. The external regulator cannot ignore this pattern, since it is an objective constraint on the will of the external regulator, primarily the legislator.

The redistribution of material and spiritual values with the help of the state (legislative, executive and judicial bodies) by means of restrictions and incentives can be permissible only if it is aimed at establishing or restoring the violated equivalent or is carried out in the interests of persons who, due to their psychophysical properties or due to extraordinary circumstances beyond their control, cannot act as an equal party in the exchange of equivalents. State intervention, including through legislative regulation, in the processes of free exchange and redistribution with other, even the best of intentions leads to a violation of the equivalent relations of exchange and cannot be justified, it is public arbitrariness[6].

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[5] *Silchenko N. V.* Boundaries of the Activities of the Legislator [Boundaries of the Activities of the Legislator] // Soviet State and law [Sovetskoe gosudarstvo i pravo] 1991. No. 8. p. 15. (in rus)

[6] Ibid. p. 18.

Thus, since legislative regulation is a subsidiary means of regulating public relations (complementing legal self-regulation), it is necessary, first of all, to determine the *objectives of legislative regulation*. From the Constitution it follows that rights and freedoms are the supreme value and the state (including the legislative branch) has the duty to recognize, respect and protect human and citizen rights and freedoms (article 2); human and citizen rights and freedoms shall have direct effect; they determine the meaning, content and application of laws, activity of legislative and executive authorities, local self-government and are provided with justice (article 18). The article 55 of the Constitution of the Russian Federation also states the purpose of legal regulation. According to the article the enumeration in the Constitution of the Russian Federation of fundamental rights and freedoms shall not be construed to deny or disparage other universally recognized human and citizen rights and freedoms; laws that abrogate or derogate the human and citizen rights and freedoms must not be issued; human and citizen rights and freedoms may be restricted by federal law only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of other persons, and to ensure the defense and security of the State. It seems that these provisions of the Constitution of the Russian Federation determine the *limits of legislative regulation*.

The issues that are the *subject of law regulation,* are solved in the Constitution fragmentarily, for example, in clause 4, article 81, paragraph 2, article 96, paragraph 2, article 114 of the Constitution it is stipulated that the election procedure of the President of the Russian Federation, the procedure of formation of the Federation Council and elections of deputies of the State Duma, the procedure of the Government activity are defined by Federal laws. Obviously, there is a need for a fundamental definition of the subject of legislative regulation, which can be done both in the Constitution of the Russian Federation and in a special law on normative acts. More important, however, is how the list of these issues should be defined: in an exclusive way, by reflecting the basic list or by establishing the principles by which the issue of attributing public relations to the subject of the exclusive regulatory impact of laws should be resolved[7].

It seems that it would be reasonable to resolve the issues that constitute the subject of regulation of laws based on the objectives of legislative regulation, in a special law on normative acts by defining a basic list of such issues and establishing the principles (criteria) for their determination, just as it is done in Article 34 of the French Constitution, which specifies *not only the institutions and relations* that are regulated by legislative acts, but also *the principles* on the basis of which the subject of legislative regulation is determined.

The subjective nature of the legislation allows us to agree with the established legal theory of its differentiation into constitutional, civil, administrative, criminal legislation, as well as legislation regulating the relevant procedural relations: constitutional-procedural, civil-procedural, administrative-procedural, criminal-procedural and constitutional-procedural legislation.

In the system of legislation, the Constitution of the Russian Federation (Article 15) has the highest legal force. It contains the basic norms of society: on the basic rights and freedoms of the individual, on the relationship between the individual and the state; on the types and competence of state authorities.

The core legislative act is the Civil Code of the Russian Federation, which combines the norms governing private relations and guarantees individuals the most stable conditions of activity. Around the Civil Code of the Russian Federation are grouped special laws and bylaws that regulate both relations based on equality, autonomy of will and property independence, and relations based on power and subordination. Special normative acts take into account the dynamics of public life by defining public requirements (restrictions, prohibitions, etc.) that ensure public order for a given period of society's development.

In accordance with paragraph 2 of article 3 of the Russian Civil code the norms of civil law contained in other laws, should correspond to the Civil code of the Russian Federation. This statute is evaluated differently in the legal literature, mainly critical, since we are talking about the ratio of legal acts of equal legal force, a distinction which appears only in the fact that one is a codified legislative act, and the others are ordinary legislative acts[8].

I believe, however, that to solve the issue of the ratio of the norms of civil law contained in the civil code and other legislative acts, we should use not the traditional formal criteria (the form, validity, etc.), but objective criteria, determining the relationship strength of these external forms of law expression with the law as such, of how directly (or indirectly) law is reflected in the legislation standards. When

[7] *Marchenko, M. N.* Sources of Law [Sources of Law] Moscow, 2005. p. 128–129. (in rus)
[8] Ibid. p. 133–167.

determining the priorities of legislative acts, it is necessary to proceed from such a factor as the degree of compliance of the legislative norm with the fundamental rights and human and citizen rights and freedoms.

From this point of view, there should be no doubt that the codified norms of civil legislation have priority over the norms of the same legislation contained in other legislative acts. Moreover, I would venture to suggest that the norms of civil legislation (first of all, codified) should play a system-forming role in the system of all legislation. The Civil Code of the Russian Federation is often called the economic constitution. However, given that the norms of the Civil Code of the Russian Federation regulate not only property relations based on equality, autonomy of will and property independence of their participants, but also personal relations based on the same principles, its significance is much broader. On the basis of the value of the Civil Code of Russian Federation in the system of legislative acts, which directly provides along with the Constitution the freedom of the human activities, other legislative acts (not only the special norms of the civil law, but also norms of administrative, criminal, procedural law) should define only the *necessary restrictions* for human activity, leaving wide scope for private discretion of the individual. The only question that remains is how to legally consolidate the leading role of codified norms of civil legislation? It would be logical to do this in the law on regulations, which should be adopted.

4. So far, the system of current Russian legislation leaves much to be desired. To represent its state, it would be necessary to consider each of the structural parts of this system, but I will limit myself to civil legislation.

Civil legislation is represented not only by the norms of the Civil Code of the Russian Federation, but also by many norms of civil legislation contained in other legislative acts, including those called codes: family, labor, land, housing, etc. It is quite legitimate to ask the question: how many codes do we need?[9] It is not about the form of a regulation, although it is also important, as there is no need to call the code what actually is not a codified normative act, which by definition must contain mostly homogeneous legislation with allocation of the General and Special parts in it. Thus, the civil, criminal, and procedural codes, of course, are codified normative acts and contain a certain set of legislative norms of the corresponding kind. Family, labor, housing, forest, land, and many other codes are not actually codified regulations, as they contain heterogeneous legislative norms, so they should not be called codes, but ordinary laws, respectively: on the regulation of family relations, on the regulation of labor relations, on the regulation of land relations, etc.

In the legal literature, it is correctly noted that, for example, a tort has its own characteristics in contrast to a contract, law of property differs from the law of obligations, but this is not the basis for their regulation in separate codes (although this is possible — in the UK there are no codes, but there are laws). Why, then, should family law, housing law, or commercial law be separated into separate divisions of legislation, expressed externally in the form of codes? Such excessive differentiation of civil legislation destroys its unity, hinders its visibility and simplicity in interpretation and application, reduces the importance of general rules governing private relations, and affects the legal culture. This problematics is considered not only from academic interest. It is of great practical importance, in particular for the codification of certain matters within and outside the Civil Code, including the creation of special types of jurisdiction.[10].

Thus, the codification of Russian civil legislation is characterized by a mixed approach, and in essence – inconsistency, chaos. On the one hand, the legislator refused to adopt the Commercial Code, including the norms regulating business relations directly in the Civil Code of the Russian Federation, but, on the other hand, along with the Civil Code of the Russian Federation, the above-mentioned comprehensive legislative acts, unreasonably called codes, have been adopted and are in force. It would be logical to place the norms governing private relationships considered by these comprehensive codes (laws) directly to the civil code of Russian Federation as sections (e. g. section, "Family law") or chapters (e. g. the Chapter "of Property rights to land"), etc. Mainly the rules governing public relations in the relevant sphere of society should be contained in the laws on the regulation of family relations, on the regulation of labor relations, on the regulation of land relations, etc., establishing the guarantees of the rights of individuals, on the one hand, and the necessary restrictions on their freedom, on the other. Examples of this approach exist. For example, the rules governing insurance (private) relations are con-

[9] *Shelokaeva, T. A.* How Many Codes Does Russia Need? [Skol'ko kodeksov nuzhno Rossii?] // Law [Pravovedenie] 2009. No. 4. p. 102–108. (in rus)

[10] *Kniper R.* Problems of Internal Differentiation of Private Law [Problems of Internal Differentiation of Private Law] // Civil Law in the System of Law [Grazhdanskoe pravo v sisteme prava] / edited by M. K. Suleimenov. Almaty. 2007. p. 30. (in rus)

centrated in the Civil Code of the Russian Federation (Chapter 48), and the rules on the public organization of insurance business — in the Federal Law of December 31, 1997. "On the organization of Insurance business in the Russian Federation»[11].

Differentiation of the civil law should manifest itself primarily in the framework of a unified civil code and when required to develop in the ordinary law governing a particular sphere of private life, subject to the assumption of subsidiary application of norms of the civil code to relations regulated by these laws. The division of the norms governing relations based on equality between several codes (civil, commercial, labor, family, etc.) is an archaic approach typical of countries with a dualistic (pluralistic) system of private law, in particular Germany and France, and is criticized not only in the Russian legal science. For example, a German professor R. Kniper encourages the rejection of the dualism of private law. In particular, he writes that the legitimate legal structure of genuine commercial law is very small, there are great doubts about the need for its independent codification, but the costs of legislative activities related to the abolition of the German Commercial Code are too high. In order to present a proportionate, voluminous Commercial Code, there should be sections attached to it (currency law, banking law, stock exchange law, competition law, rules governing the circulation of securities, bankruptcy relations), which clearly do not represent only commercial law[12].

5. The Law "On Normative Acts". The above assessment of the Russian legislation testifies to the usefulness, if not to say urgent needs in the development of the law "On normative acts", which would resolve all the main aspects of legislative and other regulatory activities: the concept of a normative act; the boundaries of normative regulation; principles of regulatory activities (based on the goals and objects of regulation, distinguishing the nature of human activities and political institutions); types of normative acts and their relationship to each other (legislative and subordinate acts; federal, regional and local acts; centralized and local acts; general and special acts, etc.), including case law, customs, generally recognized principles and norms of international law, international treaties; other aspects corresponding to the content of such a law (in particular, the procedure for drafting a bill, including its public discussion, adoption, publication, amendment and repeal, etc.). The defining principle in all cases should be the recognition, observance and protection by the state of the human and citizen rights and freedoms as the highest value (Article 2 of the Constitution of the Russian Federation).

The question of the need to adopt such a law has long been discussed in the legal science[13]. Many states, including all CIS member states except Russia, have adopted such laws. A model law "On Normative legal Acts" for the CIS member states has also been developed and adopted. Theoretical developments concerning the concept, structure and content of the law on normative acts, including the recommendations contained in this work, the practice of issuing and applying such a law in the countries where it is adopted and in force, allow us to propose to the Russian legislator to develop and adopt a federal law "On Normative Acts".

References

1. Antonov, M. On the System and Branches of Legislation [O sisteme i otraslyakh zakonodatel'stva] // Law and Economics [Pravo i ehkonomika]. 2011. No. 3. (in rus)
2. Genkin, D. M. To the Question of the System of Soviet Socialist Law [K voprosu o sisteme sovetskogo sotsialisticheskogo prava] // Soviet State and Law [Sovetskoe gosudarstvo i pravo]. 1956. No. 9. (in rus)
3. Kazmin, I. F., Polenina, S. V. "Law of Laws": Problems of Publication and Content [«Zakon o zakonah»: problemy izdaniya i soderzhaniya] // Soviet State and Law [Sovetskoe gosudarstvo i pravo]. 1989. No. 12. (in rus)
4. Kniper, R. Problems of Internal Differentiation of Private Law [Problemy vnutrennei differentsiatsii chastnogo prava] // Civil Law in the System of Law [Grazhdanskoe pravo v sisteme prava] / edited by M. K. Suleimenov. Almaty. 2007. (in rus)
5. Lukyanova, E. G. Some Problems of Law-making in Modern Russia [Nekotorye problemy pravotvorchestva v sovremennoi Rossii] // Law [Pravovedenie]. 2007. No. 6. Pp. 159–165. (in rus)
6. Marchenko, M. N. Sources of Law [Istochniki prava]. M., 2005. (in rus)
7. Panova, I. V. On the Normative Legal Act [O normativnom pravovom akte] // Vestnik SAC of the Russian Federation [Vestnik VAS RF]. 2009. No. 6. Pp. 57–73 (in rus)

[11] Corpus of Legislation of the Russian Federation. 1998. No. 1. Article. 4.

[12] *Kniper, R.* op.cit. p. 31–32.

[13] See, for example: *Kazmin I. F., Polenina S. V.* "Law on Laws": Problems of Publication and Content ["Zakon o zakonah": problemy izdaniya i soderzhaniya] // Soviet State and Law [Soviet State and Law], 1989. No. 12. p. 3–9; *Lukyanova E. G.* Some Problems of Law-making in Modern Russia [Nekotorye problemy pravotvorchestva v sovremennoi Rossii] // Law [Pravovedenie]. 2007. No. 6. p. 159–165; *Panova I. V.* On the Normative Legal Act [O normativnom pravovom akte]/ Vestnik SAC of the Russian Federation [Vestnik VAS RF]. 2009 No. 6. p. 57–73.

8. Silchenko, N. V. Boundaries of the Activities of the Legislator [Granitsy deyatel'nosti zakonodatelya] // Soviet State and law [Sovetskoe gosudarstvo i pravo]. 1991. No. 8. (in rus)
9. Theoretical Issues of Systematization of Soviet Legislation [Teoreticheskie voprosy sistematizatsii sovetskogo zakonodatel'stva] / Under ed. S. N. Bratush, I. S. Samoshchenko. M., 1962. (in rus)
10. Tikhomirov, Yu. A. Theory of Law [Teoriya zakona] / edited by V. P. Kazimirchuk. M., 1982. (in rus)
11. Shelokaeva, T. A. How Many Codes Does Russia Need? [Skol'ko kodeksov nuzhno Rossii?] // Law [Pravovedenie.]. 2009. No. 4. Pp. 102–108. (in rus)
12. Legal Encyclopedia [Yuridicheskaya ehntsiklopediya] / edited by B. N. Topornina. M., 2001. (in rus)

Theoretical and Legal Aspects of the Reclamation of Property from Unlawful Possession

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ABSTRACT

The article is devoted to the consideration of such issues as the permissibility of applying astreinte to vindication claims, the possibility of vindication of property that is not expressed in material form. The focus is on studying the prospects of vindication claims in relation to such a new object of economic relations as cryptocurrency. Using formal-logical, retrospective methods, as well as the method of legal constructions, the author first studies the problem of applying a court penalty under the rules of art. 308.3 of the civil code of the Russian Federation (structurally located in the section on binding rights) to a real-law claim-vindication claim; secondly, it analyzes the evolution of scientific views on the permissibility of extrapolating real rights to intangible objects, including those that exist in a virtual environment. It is concluded that the question of the legality of awarding an astreinte by a decision to satisfy a vindication claim is not clear in doctrinal terms, but judicial practice, in General, considers this issue positively; currently, Russian science is actively trying to determine the place of digital objects in the field of legal regulation. there are no fundamental obstacles to extrapolating the existing practice of the vindication analogy to the sphere of turnover of digital assets and values.

Keywords: replevin, astreinte, private law, cryptocurrency

For those cases where the property is removed from the possession of the owner, the traditional method of defense is a claim for reclaiming property from unlawful possession (vindication claim). Strictly speaking, the Civil Code, as well as the Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Commercial Court of the Russian Federation of April 29, 2010 No. 10/22, does not operate with the concept of "vindication", but this term is widely used in decisions of courts of different instances. The vindication claim is a classical civilistic construction, the conditions for its presentation have been sufficiently studied by modern legal science, but the question of how applicable the classical Roman interpretation of vindication protection is in modern economic realities remains relevant. The article does not aim to formulate and resolve all the multifaceted problems associated with the institution of reclaiming property from unlawful possession, but there are several unresolved theoretical and practical problems that have arisen relatively recently, the study of which is of considerable interest.

The admissibility of the application of astreinte (monetary penalty, court penalty) to vindication claims

The astreinte institute, which was assimilated to Russian law from French judicial practice in 2015, aims to strengthen the judicial decision, since it is imposed not in case of violation of an obligation, but for non-compliance with a public legal act of the court. Thus, when collecting a court penalty, the court does not resolve the dispute about the right. Given the relative novelty of astreinte in the Russian legal field and some instability of judicial practice, a single clear opinion on its legal nature and scope of application has not yet developed. One of the issues facing the law enforcement officer is the possibility of applying the astreinte to real claims, in particular, to claims for reclaiming property from unlawful possession.

Legal regulation of the institute of astreinte is currently performed by the article 308.3 of the civil code of the Russian Federation and Plenum of the Supreme court of the Russian Federation of March 24, 2016 No. 7 "On application by courts of certain provisions of the Civil code of the Russian Federation on liability for breach of obligations" (*hereinafter — Plenum No. 7*). The legislation establishes a norm of judicial penalty in the material law in the section on contractual rights, linking astreinte with the court's decision on the enforcing of *obligations* specifically, thus contrasting the rights of obligations with the rights of property. However, Plenum No. 7, having clarified that the court penalty is applied as a measure of liability for breach of obligations, separately noted the possibility of applying the astreinte to a negatory claim (p. 28). Therefore, it somewhat leveled the decisive importance of the location of standards on the judicial penalty in the Chapter "the Definition of Obligation", which naturally gave rise to discussions in the legal community, which essentially centres on the following: a) extending the application of Institute of judicial penalties on negatory claims, the Supreme court in no way argued that

the electoral decision accordingly, and if the court applied astreinte to one proprietary claim, it seems, there is no insurmountable barrier to the use of this mechanism, not only in the law of obligations, but also in the proprietary legal relations; b) on the other hand, the judicial penalty as a means of encouraging the enforcement of the act, providing for the elimination of violations of property rights, not connected with deprivation of possession, is expressly stated by the Supreme court as an exception, replevin is not mentioned and, therefore, astreinte is not applicable to the vindication requirements.

Turning to judicial practice, it should be noted that the number of acts in which the reclamation of property from unlawful possession is accompanied by a claim of judicial penalties is small, however, if the claim on the enforcing of astreinte is received, in most cases, the courts of first instance satisfy it essentially at a resolution of vindication to the plaintiff, and any correlation between the object of vindication and the amount of astreinte are not noted — it is stated, in our view, arbitrary, the rationale for the penalty is carried out formally, it, as a rule, is not disputed by defendants, and the courts are not inclined to reduce the size of astreinte compared to the amount requested by the plaintiff. Here are some examples:

a) the object of vindication is an apartment, the court has enforced a court penalty in the amount of 1 thousand rubles for each day of delay in the execution of the court decision, starting from the date of the decision on the case[1];

b) claimed property — refrigerated display case, enforced astreinte of one thousand rubles per each day of delay of liabilities execution as of the date of the expiration of the specified judicial act of the term for its completion (10 working days from the date the court decision comes into force) until the date of actual execution[2]; c) the object of vindication — advertising structures with a size of 1000 × 800 mm, a court penalty — 20 thousand rubles. 00 kopecks. for each day in case of non-execution of the court act[3]; d) object of a vindication claim — construction tools (30 items), the decision of the court is to enforce a court a penalty in the amount of 100 RUB per every day of non-compliance with court decisions, commencing from the day next after the expiry of one month from the date of entry of decision into legal force[4]; e) claimed property — two buildings with a total area of 906,6 sq m and 55 sq. m, respectively; astreinte — 2 thousand rubles for each day of non-execution of a court decision that has entered into legal force on this case[5]; f) when deciding of a vindication claim for the reclamation of land with an area of 95 sq. m. from unlawful possession in favor of the plaintiff, the court considered that "the establishment of compensation for waiting for execution of the decision in the amount of 100 thousand rubles at a time, as well as 50 thousand rubles for each month of non-execution of the court decision until the full execution of the requirements, without violating the balance of interests of the parties, leads to the fact that the execution of the judicial act for the defendant is more profitable than its non-execution"[6]. In all cases, the amount of the astreinte requested by the plaintiff was not reduced by the court.

It should be noted that there are rare cases of the court using its discretionary powers in terms of correcting the size of the astreinte when considering a vindication claim. For example, in the case considered by the Commercial Court of Saint-Petersburg and Leningrad region, the plaintiff asked the court to recover the penalty on a progressive scale — 30 thousand rubles. for each day of default during the first calendar month starting from the decision date, and further increase the penalty to 10 thousand roubles every month. The defendant petitioned for the reduction of the judicial penalty on the basis of article 333 of the civil code and changing the order of payments from progressive for the amount of money charged periodically, up to 30 thousand rubles. per month; the court, given that the court penalty is an evaluation category, considered it possible to establish a progressive order of payment of

[1] Decision of April 28, 2017 on case No. 2-1702 / 2017 [Electronic resource]. Pushkinsky District Court (St. Petersburg). URL: https://sudact.ru/regular/doc/sKUzma7xvhJx/ (date of reference: 15.11.2020).

[2] Decision of July 29, 2019 on case no. A76-30787/2018 [Electronic resource]. The Commercial Court of the Chelyabinsk Region (CC of the Chelyabinsk Region). URL: https://kad.arbitr.ru/Card/8b77d956-c694-4821-ba7e-0828e410bfa8 (date of reference: 15.11.2020).

[3] Decision of December 12, 2018 on case no. A75-14692/2018 [Electronic resource]. The Commercial Court of Khanty-Mansi Autonomous Okrug (CC of the Khanty-Mansi Autonomous Okrug). URL: https://kad.arbitr.ru/Card/67ce31cf-65ce-48d3-b691- b637296758ec (date of reference: 15.11.2020).

[4] Decision of June 20, 2019 on case No. 2-1085/2019 [Electronic resource]. Verkhnepyshminsky City Court (Sverdlovsk region). URL: https://sudact.ru/regular/doc/PqmWLuCHZAbW/ (date of reference: 15.11.2020).

[5] Decision of September 24, 2020 on case no. A54-5246/2020 [Electronic resource]. The Commercial Court of the Ryazan Region. URL: https://kad.arbitr.ru/Card/69435164-525f-427e-9073-21fb7b6c9ff5 (date of reference: 15.11.2020).

[6] Decision of November 29, 2019 on case no. A75-14926/2019 [Electronic resource]. The Commercial Court of Khanty-Mansi Autonomous Okrug URL: https://kad.arbitr.ru/Card/f3629119-2059-45fa-8629-62ccdf11ad27 (date of reference: 15.11.2020).

astreinte, but significantly reduced its size to 5 thousand rubles for each day of default during the first calendar month, commencing on the eighth day from the date of entry into legal force of the judgment, with a consequent increase in the amount of the penalty to 10 thousand rubles on the day of the second calendar month of default, with a consequent increase in the amount of the penalty to 15 thousand rubles per day for the third calendar month, and a further similar increase in the size of the penalty in 5 thousand rubles every month of default until the date of actual execution of the judicial act[7]. Moreover, neither the court nor the parties to the civil dispute provided any factual circumstances of the case in support of the stated claims and the decision made that would allow us to judge the reasonableness, fairness and relevancy of establishing of the procedure for paying the court penalty and its amount.

When evaluating the possibility of using astreinte to claims for vindication, the courts — both Commercial and of General jurisdiction, — base their decisions on the provisions of clause 31 of the Plenum № 7, which states that "in case of satisfaction of the claim on ordering of specific performance, the court has no right to refuse in its awarding", however, formally citing the court decision clarification of the Plenum № 7, the court does not hold more in-depth analysis of regulatory statutes, not allowing, thus, to understand why they allowed the application of the provisions of the law of obligations to the law of property.

Familiarization with the scientific literature allowed us to identify a number of assumptions about the reasons for the current practice that allows the use of such a means of stimulating the execution of a court decision as astreinte in vindication disputes.

1. When applying an astreinte to a vindication claim, the court thus identifies a real-law claim for the reclamation of property with an obligation claim for forcing the debtor to specific performance, although this is contrary to the doctrinal provisions of civil law.

2. The existence of the following logical chain is assumed: due to direct instructions, the astreinte applies to the debtors on performance of specific obligations, but a clear prohibition on the use of the provisions of section 308.3 to the specific performance of vindication suit is not contained in the civil code of the Russian Federation and Plenum No. 7, moreover, there is a possibility of application of this article to property claims (item 28 of the Plenum No. 7, Article 304 of the Civil Code of the Russian Federation — negatory claim). Obligations in accordance with part 2 of article 307 of the civil code arise "from contracts and other transactions, ... and from other grounds specified in the civil code of the Russian Federation", the latter in accordance with subparagraph 3 paragraph 1 article 8 of the civil code can be attributed to a judicial decision establishing civil rights and obligations. Accordingly, if the court decides to withdraw and award the object of vindication, the defendant will have an obligation on the basis of the court decision. And the provisions of Article 308.3 of the Civil Code of the Russian Federation may be applied to such an obligation. In such reasoning, in our opinion, it is possible to see a particular logical flaw — vindicatory action, being a claim for a property reclamation, is enforceable in the manner prescribed by the legislation on enforcement of proceedings, and, as has been noted by higher instance courts, it is unacceptable to articulate the court's decision concerning reclamation of property from unlawful possession as an obligation of the defendant to perform certain actions[8], since the enforcement of the court judgment on the defendant is committed by another person — the court bailiff, which, however, does not deprive the defendant of the opportunity to voluntarily transfer the reclaimed property to the plaintiff. In addition, we should agree with the opinion of M. A. Rozhkova, according to which the obligation of a person to execute the judgment in its legal essence is not always a contractual relationship in the meaning of article 307 of the civil code[9].

3. The following theory is based on the assumption that replevin is actio in personem because from the moment of the violation of the absolute rights of a vindicant, of the property rights, the vindication obligation arises, for the specific performance of which (return of things) the claim of the owner is directed, and if there is an obligation, then an astreinte is applicable. Without going into more detail in challeng-

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[7] Decision of June 19, 2019 on case no. A56-120154/2018 [Electronic resource]. The Commercial Court of St. Petersburg and the Leningrad Region. URL: https://kad.arbitr.ru/Card/04a1013d-05c7-4eb5-b003-02ea9bcc120b (date of reference: 15.11.2020).

[8] On the Approval of the Program for Improving the Efficiency of Commercial Courts in the Russian Federation in 1997-2000 and the Action Plan for Implementing the Program for Improving the Efficiency of Commercial Courts in the Russian Federation in 1997-2000 [Electronic resource]: Order of the Supreme Commercial Court of the Russian Federation No. 14 of 18.09.1997. SPS Consultant Plus. URL: http://www.consultant.ru/cons/cgi/online.cgi?req=do c&base=ARB&n=41808#06491031580382487 (date of reference: 15.11.2020).

[9] *Rozhkova M. A.* On the Issue of Obligations and the Grounds for Their Occurrence [K voprosu ob obyazatel'stvakh i osnovaniyakh ikh vozniknoveniya] // Bulletin of the Supreme Commercial Court of the Russian Federation [Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii] Moscow : YURIT-Vestnik, 2001. No. 6. p. 69-85.

ing this thesis, which seems doubtful to us, we note that this approach is not widely used in civil law.

4. The analogy of law is called to be the basis for vindication claim astreinte — the effect of astreinte can be extended to proprietary claims, especially in cases where vindicant has no other effective means of stimulating the execution of a judicial act issued in his favor and it does not affect the rights, freedoms and legitimate interests of others.

It seems that the latter approach is more appropriate, because the legislator as a general rule has spread the effect of the rule on the judicial penalty only on obligation relations[10] by placing it in the section on contractual rights of the Civil code, which is the source of the substantive law, and the use of astreinte to the vindication action — property demand — is possible only as analogy of the law, if we consider the claims of reclamation of a thing (the vindication and specific enforcement of obligations) as having a similar civil-legal nature. Reference to the analogy of the law as to the method of legal regulation in civil law according to paragraph 1, article 6 of the civil code, is based on the flexibility of civil law relations and the effect of the super-mandatory principle of fairness.

Getting into the sphere of the appellate instance, the issue of astreinte is resolved positively. For example, the Fifteenth Commercial Court of Appeal (Rostov-on-Don) held that it was necessary to change the subject of the optional claim and its regulatory basis. Having claimed a vindication action, the plaintiff, in addition, demanded, in case of non-return of the tray (kiosk), the recovery of losses in the form of its value in the amount of 45 thousand rubles, and the court of first instance satisfied the claim. The appeal pointed to incorrect qualification of the court of first instance of this requirement because: a) in its legal entity the statement of claim meets the criteria set forth in article 308.3 of the civil code and not article 393 of the civil code; b) judicial penalty may be recovered in a lump sum; c) the amount of liquidated damages can be equal to the cost of vindicated property[11].

It should be noted that in a number of court decisions, when satisfying the plaintiff's claims on the vindication claim, the enforcement of the astreinte was refused. In all the decisions, the reasons for refusal were fundamentally different. Thus, the Sovetsky District Court of Novosibirsk denied the enforcement of astreinte because of its inapplicability to the vindicatory claims, stating that, first, the plaintiff in accordance with the General rules of action proceedings must justify their right to the claim for recovery of legal penalties, second, astreinte would be possible, if the claimant filed a claim: 1) on the compulsion of the debtor to refrain from performing certain actions; 2) on the compulsion to eliminate the violation of property rights not related to the deprivation of possession; 3) on the compulsion to perform the specific obligation; 4) on the obligation of the defendant to perform certain actions that are not related to the transfer of property or sums of money. Accordingly, the use of astreinte for the reclamation of property from unlawful possession is not provided for by the current legislation, and therefore the claim to recover the legal penalties should be denied[12].

The commercial court of Sverdlovsk region, while not denying the possibility of the enforcement of astreinte on vindication claims, found the consent of the plaintiff on the implementation of the dismantling and removal of the disputed equipment (installations for the processing of rubber, plastic [carbon-containing] waste "Reactor-1") on its own and for its own account to be justified and fair, considered it necessary to impose a duty to provide plaintiff with access to equipment with the aim of dismantling and removal on the defendant, but refused satisfaction of claims of the claimant on collecting of the judicial penalty from the defendant, since the imposition of a judicial penalty is the right of the court based on the principles of civil law, including the inadmissibility of benefit from unlawful or bad faith behavior, but in this situation, the decision of the court depends on the actions of the plaintiff in the case[13].

The Commercial Court of the Ivanovo Region when considering a claim for the recovery of property from the OAO (open joint Stock company) Ivanovskiy Broiler and the recovery of 5.5 thousand rubles as judicial penalties for each day of default of the judicial act has established that the defendant

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[10] It is interesting that the legislator implemented the provisions on astreinte in procedural law only three years after its introduction into substantive law (Article 174 of the APC and 206 of the CPC are a reflection of the substantive rule of Article 308.3 of the Civil Code). These articles should be applied in a normative unity — the court may exercise the right to impose an astreinte in the case provided for in Article 308.3 of the Civil Code.

[11] Resolution of October 14, 2019 on case no. A32-20685/2019 [Electronic resource]. The Fifteenth Commercial Court of Appeal. URL: https://sudact.ru/arbitral/doc/bkJYtivMuNUp/ (date of reference: 15.11.2020).

[12] Decision of February 4, 2020 on case No. 2-2466/2019 [Electronic resource]. Sovetsky District Court of Novosibirsk (Novosibirsk region). URL: https://sudact.ru/regular/doc/BMQ90DBITNUC/ (date of reference: 15.11.2020).

[13] Decision of December 31, 2019 on case no. A60-48073/2019 [Electronic resource]. The Commercial Court of the Sverdlovsk Region. URL: https://kad.arbitr.ru/Card/ae190ad1-f6f2-4a1d-967c-476c4fc86ef0 (date of reference: 15.11.2020).

was declared insolvent, and with reference to the legal position of the Supreme court of the Russian Federation stated in definition from 26.11.2019 No. 308-ЭС19-21590, denied recovery of astreinte because the penalty "will not perform the catalytic function tool of legal action after the recognition of the defendant as bankrupt and introduction of procedure of receivership concerning the defendant because of the inability of the defendant to dispose of its property and material adverse consequences to its creditors»[14]. The Sixth Commercial Court of Appeal (Khabarovsk) approached the issue differently: the plaintiff asked for a penalty in the amount of 20 thousand rubles per day from the date of entry into force of the court's decision, the first instance reduced the amount of the astreinte to 1 thousand rubles per day.[15]. The vindicant, appealing against the decision, pointed out that reduction of penalty will not encourage the debtor to the execution of the judgment, since the defendant did not fulfill an enforceable court decision for recovery of property, it is possible to execute the judgment regarding to the spouse of the defendant, who conduct commercial activity, is the founder of commercial companies with a turnover more than 250 million rubles and on the basis of the marriage contract is obliged to take action to preserve the property of the spouse. The financial manager of the debtor requested to cancel the decision on the imposition of the astreinte in full, since the defendant in connection with the bankruptcy procedure had no financial resources and was unable to dispose of its property, which is the bankruptcy estate, and the execution of the court decision was possible through the use of enforcement mechanisms without the use of the astreinte. The courts of appeal and cassation rejected the plaintiff's arguments and financial management as untenable, stating that, first, the need to make it more unprofitable to not execute a court decision than to preserve property is not an evidence in itself about the need to increase the amount of the penalty, which is defined by the first instance, and secondly, the court's decision on the vindication of the disputed land is not executed by the defendant, there are no objective reasons or reasons beyond control that prevent the transfer of the disputed property, in connection with which, the defendant's evasion from the execution of a judicial act is illegal, and the insolvency law does not release the debtor from the obligation to execute a court decision that restored the plaintiff's property rights, therefore, the recovery of a court penalty from the defendant in these circumstances, in order to encourage him to timely perform the enforced specific obligation, is justified[16].

Summing up the preliminary results, it can be noted that the decisions of the courts that deny the possibility of collecting astreinte due to its inapplicability to vindication claims are rather an exception to the rule. In some cases, allowing for the possibility of a court penalty in principle, the courts still refuse to satisfy the claim, deducting situational restrictions depending on the circumstances of the case.

Admissibility of vindication of property not expressed in material form

The term "property" is actively used by the Russian legislator, but it is not set definitively, which creates the need for interpretation. The constitutional court of the Russian Federation, relying on the jurisprudence of the European court on the implementation of international instruments on human rights, attaches to the concept of "property" a rather broad content, including, besides the things, the entire array of enshrined rights that the applicant can prove having; shares or monetary claims based on contract or tort; economic claims in the form of benefits in accordance with the law on social security based on the public law; the right of claim belonging to the creditors; the right to perpetual use or lifelong inherited ownership of a land parcel, etc.

Thus, based on the fact that the right to freely use property guarantees, in essence, the right of ownership, the European Court of Human Rights postulates that a person can own any property, both expressed in material form (things), and representing rights to things and rights of claim, if it is sufficiently established that this right can be legally implemented, which, as L. Lapach and A. O. Rybalov rightly note, leads to a different understanding of property rights in constitutional legal sense (the object of any property based on the aforementioned approach) and in civil-law branch sense (an object is

[14] Decision of March 20, 2020 on case no. A17-7445/2019 [Electronic resource]. The Commercial Court of the Ivanovo Region. URL: https://kad.arbitr.ru/Card/04e58719-e21f-4993-91ea-2ec125b47c49 (date of reference: 15.11.2020).

[15] This application was received after the court satisfied the vindication claim at the stage of enforcement proceedings.

[16] Resolution No. 06AP-627/2020 of March 16, 2020 on case No. A73-2848/2019 [Electronic resource]. The Sixth Commercial Court of Appeal (Khabarovsk). URL: https://kad.arbitr.ru/Card/b5dbc615-a896-4f06- 8f84-8ddd4317c38b (date of reference: 15.11.2020).

traditionally recognized as thing, the main symptom of which is materiality, part of the collective category of "property")[17].

The identification in legislation of the generic term "property" as an object of civil rights (article 128 of the civil code) and as an object of the vindication claims (article 301 of the civil code) has a negative impact on law enforcement practice, as in the classic sense, although not enshrined in law, the object of vindication is an individually-defined, specifically existing thing belonging to a particular person, that does not fully correspond to the interpretation of the concept of "property" in contemporary law doctrine.

Thus, the legislator allowed the possibility of the existence of a real right in relation to specific objects — property that is not actually things, without providing for a special method of protection, and the practice, in turn, considered real-law claims, in particular, the claim of property, a valid option for the protection of civil rights, which gives rise to various forms of quasi-indicative claims.

The problem of vindication of property that does not have a distinctive feature of the thing — materiality, has been discussed in the scientific literature for a long time and regularly. For example, for a long time there have been fierce discussions about the admissibility of vindication claims against undocumented shares. Agreeing that the classical application of "proprietary" provisions to non-tangible, non-documentary securities (which by their legal nature are settled property rights) is legally incorrect, some researchers insisted on the impossibility of presenting vindication claims in general and on the need to use other methods of protecting the violated right; the others considered the possibility of declaring them analogs of things (in fact, legal fiction) and, accordingly, "proprietary" legal regulation as a general rule; the third, excluding the recognition of property rights as objects of property rights, considered it expedient to recognize for such special rights claims "the absolute effect" similar to real law by virtue of a direct indication of the law", i. e. to extend to them the condition of real law, without recognizing them as things[18].

Resolving disputes about the reclamation of the securities, the courts proceed from the fact that special rules for vindication in respect of securities are established by law: for documentary in article 147.1 of the civil code, for non-documentary in article 149.3 of the civil code[19], as well as relying on the decision of the Supreme Commercial Court of the Russian Federation from 29.08.2006 № 1877/06, which recognizes that the requirement to restore registry records about ownership of not available in the form of tangible material objects book-entry shares to a specific person is vindicatory in nature, and the ruling of the SCC dated 14.07.2009 No. 5194/09, where it is explained that a vindication claim is an acceptable method of protection of the rights of the persons who lost their book-entry shares in addition to the will, and a number of other similar decisions of the higher courts.

Features of vindication protection, as pointed out by the Commercial court of the far Eastern Federal district, based on regulatory provisions of article 149.3 of the civil code, are as follows: "the Vindication claim is formulated as the claim to return the relevant securities, and not their reclamation (as book-entry shares do not exist in paper form and are stored in the form of account, that is, they are not a thing); the owner is entitled to require those securities into that the owned book-entry shares are converted»[20].

The position of the Commercial court of the Chelyabinsk region seems more logical. In the case № A76-122/2019, the Court, referring to paragraph 7 of the Information letter of the Presidium of the SCC dated 21.04.1998 № 33, pointed out that "in order to protect the rights of shareholders who have lost book-entry shares belonging to them, a submission of claims for the restoration of rights to lost securities by shareholders is possible, which by analogy of law subject to review by the rules in article 301,

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[17] *Lapach L.* The Concept of "Property" in Russian Law and in the Convention for the Protection of Human Rights and Fundamental Freedoms [Ponyatie «imushchestvo» v rossiiskom prave i v Konventsii o zashchite prav cheloveka i osnovnykh svobod] // Russian Justice [Rossiiskaya yustitsiya]. 2003. No. 1. p. 19 (in rus); *Rybalov A. O.* Ownership (Commentary to Art. 209 of the Civil Code of the Russian Federation) [Pravo sobstvennosti (kommentarii k st. 209 GK RF)] [Electronic edition]. Moscow : M-Logos. 2017. p. 17-19. (in rus) URL: https://m-lawbooks.ru/wp-content/uploads/2017/06/027-kniga-Pravo-sobsvennosti.pdf (date of reference: 15.11.2020).

[18] See for example: *Rybalov A. O.* Ownership (Commentary to Art. 209 of the Civil Code of the Russian Federation) [Pravo sobstvennosti (kommentarii k st. 209 GK RF)] [Electronic edition]. Moscow : M-Logos. 2017. 96 p. URL: https://m-lawbooks.ru/wp-content/uploads/2017/06/027-kniga-Pravo- sobsvennosti.pdf (date of reference: 15.11.2020); *Sukhanov E. A.* Property Law: a Scientific and Educational Essay [Veshchnoe pravo: nauchno-poznavatel'nyi ocherk]. Moscow : Statut. 2017. 559 p. (in rus); *Selivanovsky, A. S.* Legal Regulation of the Securities Market: Textbook [Pravovoe regulirovanie rynka tsennykh bumag: uchebnik]. Moscow : Publishing House of the Higher School of Economics. 2014. 580 p. (in rus)

[19] Resolution of March 20, 2020 on case no. A59-7663/2018 [Electronic resource]. The Commercial Court of the Far Eastern District. URL: https://sudact.ru/arbitral/doc/h5vBge1Ap8m5/ (date of reference: 15.11.2020).

[20] See Ibid.

302 of the civil code»[21]. That is, the court clearly distinguished that an undocumented security is not a thing, therefore, a vindication claim is impossible. However, the violated right must be protected, so a claim for recovery of rights is possible, to which, by analogy with the law, the articles 301, 302 of the civil code are to be applied. Thus, despite the fact that the courts generally have a positive attitude to the possibility of protecting undocumented securities under the rules of Articles 301, 302 of the Civil Code of the Russian Federation, cases of decisions that do not allow such quasi-identification are not rare, which allows us to characterize the current judicial practice in disputes of this kind as somewhat unstable.

The situation is similar with the claim of a share (in the authorized capital or an ownership interest). In the ruling of the SCC dated 17.11.2009 № 11458/09 it is noted that the recovery of a share in the authorized capital of a company from unlawful possession by a company, taking into account substantive qualifications, can be rightly regarded as vindicatory requirement in relation to article 301, 302 of the civil code. It is impossible to vindicate an ownership interest according to the classical regulations, as the interest is rather a legal phenomenon, not physical, it is not a thing. However, the legislator recognizes this kind of property, thus, in case of violation of the ownership interest the owner should be protected, for example, in the form of a claim for restoration of the right to a share with the application by analogy of the rules of articles 301, 302 of the civil code, which, in fact, was indicated by the Presidium of the Russian Federation in the Resolution from February, 9th, 2010 № 13944/09. A similar position is established in paragraph 42 of the Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the SCC from 29.04.2010 № 10/22 "On certain questions arising in judicial practice when resolving disputes relating to the protection of the right of ownership and other real rights".

Some changes in the issue of protection of interests were made by the institute for the restoration of corporate control, introduced in 2014. The rules for the plaintiff's claim for the return of the interest in share capital stipulated in clause 3 of article 65.2 of the civil code were repeatedly and rightly criticized by civil law scholars, starting with the fact that it is unclear what meaning of the concept of "interest" does the legislator use (the interest of a participant of the Corporation, regardless of the method of consolidation — stock or the share, or OOO only), and ending with the use of cumbersome, unclear legal structures in the text, such as: "if it leads to unjust deprivation" or "extremely negative social and other publicly significant consequences."

In the classical model of limited vindication, implemented in Article 302 of the Civil Code, individually determined property, improperly and illegally in the possession of an unauthorized person, is subject to return, subject to certain rules aimed at protecting a bona fide acquirer. The rate of recovery of securities (article 147.1 of the civil code), being a special rule is in disjunctive connection with article 301-303 of the civil code, and contains: a) an indication that the rightful owner can act as a plaintiff; b) a ban on vindication of bearer securities, as well as order and registered ones certifying a monetary claim; c) a provision that the acquisition of a security by a bona fide person does not cure the vice of its disposal for an unscrupulous acquirer. In respect of book-entry securities (article 149.3 of the civil code) a quasivindication applies: "broadening" and the transformation of the object of vindication is allowed — the return of the same amount of relevant securities i. e. not those lost, but the same (paragraph 1); a vindication of those securities it that securities debited from the account have been converted (paragraph 2); the acquisition by the defendant of such securities on organised markets or compensation of all necessary expenditure for their purchase (p. 3). And finally, the restoration of corporate control (clause 3 of Article 65.2 of the Civil Code of the Russian Federation) is viewed as a method of protection other than vindication, not limited to the remuneration and good faith of the acquisition of shares (interest), provided that the final buyer is paid fair compensation. However, this rule is essentially a variation of Losungsrecht — an institution used in countries, the civilistic doctrine of which is based on unlimited vindication and causality, which is an original compromise between the conflicting interests of the owner and the bona fide buyer. Losungsrecht provides the owner (holder) with an unlimited opportunity to claim the property from the acquirer, provided that the latter is reimbursed for the purchase price paid by him, in the Russian version — limited by the condition of disposal against one's will. The logic and motives of the legislator, who differentiated them when claiming participation shares, where "fair compensation" should be paid, and non-documentary and documentary securities, where this compensation is not expected, are not entirely clear. Given the above, we should agree with the position of A. V. Yegorov, who noted that in comparison with vindication, the restoration of corporate control is a less convenient and

[21] Decision of June 11, 2019 on case no. A76-122/2019 [Electronic resource]. The Commercial Court of the Chelyabinsk Region. URL: https://sudact.ru/arbitral/doc/udEhP7bect5o/ (date of reference: 15.11.2020).

less fair method of protection for the plaintiff, therefore, only those plaintiffs who for some reason lost vindication claims will resort to restoring corporate control[22].

Thus, it can be stated that at present the civil law provides for several mechanisms of vindication and quasi-vindication, differentiated depending on the object of civil rights being claimed, which in practice leads to the establishment of the right to restore property interests according to the vindication model, even in cases where the classical theory objects to this.

The discussion about the possibilities of a vindication claim as an effective way to protect property rights has intensified with the emergence of such new objects of economic relations as "digital assets and values". Created just over a decade ago, the "blockchain" technology led to the introduction of cryptocurrency (a type of digital money) and tokens (the equivalent of shares) into trade, requiring the state to find ways to regulate them in public and private law. Now there is a process of searching and establishing those objective characteristics and elements that would allow laying the foundation for legislative regulation of legal relations regarding the digital environment. Undoubtedly, there is a certain specificity due to the digital form, but essentially civil rights do not change. Since the Roman law did not know anything about these digital elements of civil turnover, it is not necessary to speak about any system and continuity of legal and doctrinal regulation, there is a need to develop a legal regulation system that is optimal for regulating cryptocurrencies and other digital assets in the Russian legal field, without relying on the Roman heritage and looking at foreign constructions.

Currently, there are attempts to integrate "digital assets" into existing legal mechanisms, which raises many questions: is cryptocurrency a type of property, given that the term "property" is collective and ambiguous, the list of objects of civil rights enshrined in Article 128 of the Civil Code of the Russian Federation is not exhaustive; are the concepts of "cryptocurrency" and "digital currency" synonymous; what are the features of the legal regulation system of such property, the existence of which is inextricably linked with the use of "blockchain" technology, which is an information system based on a distributed registry; should a new legal regulation system be created for digital assets and in this case it is necessary to determine which one, or should we extend the system of real rights to them?

The case of the TOO (limited liability partnership) "CROWDVIZ" is of considerable interest to understand the possibility of protecting cryptocurrencies within the existing regulatory framework. The essence of the claim: the plaintiff ("TOO CROWDIS") initiated the ICO (Initial Coin Offering — digital process of public financing in a business project in exchange for providing a private tokens) and carried out the sale of tokens on the virtual platform of the defendant — ICO Adm.in (OOO "KRIPTON"); the defendant received the cryptocurrency due to the tokens issued by the plaintiff between October 2017 and February 2018, having a key that allowed to dispose of cryptocurrency, and blocked the platform of ICO "TOO CROWDIS", unlawfully possessing cryptocurrency owned by the plaintiff. The claims were formulated as follows: "To oblige the transfer of ETH1922, 903438 to the plaintiff's digital wallet for ETH…» That is, the plaintiff actually chose a vindication claim as a method of defense, justifying it by the fact that the cryptocurrency is a digital asset that has individualizing characteristics, and acting similarly to how securities market participants protect their rights. The Commercial Court of Moscow denied the claim, making the following conclusions: a) cryptocurrency is other property, namely property rights; b) the plaintiff has not presented evidence that the cryptocurrency of specific types in a certain number belongs or belonged to the plaintiff, and that the subject of the dispute became the property of defendants; C) the pending complaint is a dispute about the presence of digital rights, in connection with which the protection of the right by returning the specific property may not be carried out due to the nature of the disputed property. The appeal left the decision unchanged, stating that: a) transactions with cryptocurrency are not protected by the laws of Russia; b) the concept and legal status of cryptocurrency are not defined by the current legislation, so it is not possible to apply the rules governing similar relations to cryptocurrencies by analogy; c) it is impossible to clearly determine to which category does the cryptocurrency belong ("property", "asset", "surrogate", "information"), but the court of first instance correctly defined cryptocurrency as other property; g) the law does not known any means for protection of rights, as the obligation to provide a refund of cryptocurrency in digital wallets of the contributors in proportion to the size of the contribution of each contributor, and the claim for the reclamation of unlawful possession of flash drives with access to the crypto wallet (to transmit password) was not stated by the plaintiff[23].

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[22] *Egorov A. V.* Restoring Corporate Control. Pros and Cons of the New Design of the Civil Code of the Russian Federation [Vosstanovlenie korporativnogo kontrolya. Plyusy i minusy novoi konstruktsii GK RF] // Arbitration practice [Arbitrazhnaya praktika]. 2015. No. 7. p. 84-91. (in rus)

[23] See documents on the court case no. A40-164942/2019 [Electronic resource]. URL: https://kad.arbitr.ru/ Card/db741b81-cf91-4880-99b3-140e4b4e15c1 (date of reference: 15.11.2020).

The specifics of this dispute is that the subject of the claim is located inside the information system and has left the possession of the original owner of the password (holder) without his knowledge or against his will in a virtual environment specifically. Is it possible to vindicate (directly or by analogy) property that is in virtual form? The problem is that the legal nature of the subject of the dispute is not defined by law, and therefore a paradoxical situation arises — the court refers the cryptocurrency to other property (property law), recognizing its material value, but refuses to protect it, because it does not find a basis for this in material law, not seeing the possibility of applying even an analogy. The nature of the access right (password) to the "property right" — cryptocurrency and possible ways to protect it are also the subject of discussion. Science has yet to work out a decision on the relationship and correlation of the definitions of "cryptocurrency", "digital currency", "digital asset", "digital rights", since the legislator does not use the concept of "cryptocurrency" at all. Under the Digital Financial Assets Act (CFA) which comes into force on January 1, 2021, it is proposed to understand several types of digital rights as Digital Financial Assets: a) monetary claims; b) rights under equity securities; c) rights to participate in the capital of a non-public joint stock company (AO); d) the right to demand the transfer of equity securities, while the digital currency is not directly referred to as a digital financial asset, digital right or property by the law in the adopted version (although the original version proposed the term "cryptocurrency", which was classified as a type of property in electronic form) and is considered as "a set of electronic data contained in an information system". Digital rights, as correctly noted by M. A. Rozhkova, "in fact, have turned into a designation of property rights recorded in electronic (digital) form, which meet two criteria: first, they must be explicitly named as digital in the law; second, they must be acquired, implemented and alienated on an information platform that meets the criteria established by law"[24].

In sum up the study of the question, we believe it is possible to draw the following conclusions.

First, we should recognize the established practice of the use of astreinte to the vindication requirements, although in doctrinal terms the question of the legality of the enforcement of astreinte by a decision to satisfy the vindicatory claim is not clear.

Secondly, the introduction of new forms of intangible property into civil circulation is constantly taking place, and this process is unlikely to ever be completed. The active development of the digital (virtual) sector of the economy along with the real one leads to the fact that the classical understanding of vindication as a real-legal method of protecting an individual-defined thing existing in specific form does not fully meet the needs of economic entities, leads to contradictions between the needs of the economy and the conservative legislative system. Currently, Russian science is actively trying to determine the place of digital objects in the field of legal regulation. The use of proprietary methods of protection regarding property rights as a general rule is not allowed, but civil-law regulation should ensure the stability of relations in statics and predictability in the dynamics, therefore by filling the legal gaps, law-enforcers rightly and successfully used the provisions for reclaiming of property from unlawful possession in respect of book entry securities and ownership interests by the analogy with the law, due to the lack of other more effective remedy. In this regard, we do not see any fundamental obstacles in extrapolating the current practice of the analogy of vindication to the sphere of turnover of digital assets and values.

Specific legal nature of objects of civil rights (no-things), such as securities (certificated and uncertificated, which is, in fact, recorded property right of claim), shares in the "digital assets and values" necessitates the development of certain rules and recommendations to adapt vindication mechanisms to cases of reclamation from unlawful possession or to create new legal structures that will require in-depth civil law developments.

References

1. Egorov, A. V. Restoring Corporate Control. Pros and Cons of the New Design of the Civil Code of the Russian Federation [Vosstanovlenie korporativnogo kontrolya. Plyusy i minusy novoi konstruktsii GK RF] // Arbitration practice [Arbitrazhnaya praktika]. 2015. No. 7. Pp. 84–91.
2. Lapach, L. The Concept of "Property" in Russian Law and in the Convention for the Protection of Human Rights and Fundamental Freedoms [Ponyatie «imushchestvo» v rossiiskom prave i v Konventsii o zashchite prav cheloveka i osnovnykh svobod] // Russian Justice [Rossiiskaya yustitsiya]. 2003. No. 1. Pp. 18–20.

[24] *Rozhkova M. A.* Digital Rights: Public Law Concept and Definition in Russian Civil Law [Tsifrovye prava: publichno-pravovaya kontseptsiya i ponyatie v rossiiskom grazhdanskom prave] // Economy and Law [Khozyaistvo i pravo].2020 No. 10 p. 6 (in rus)

3. Rozhkova, M. A. On the Issue of Obligations and the Grounds for Their Occurrence [K voprosu ob obyazatel'stvakh i osnovaniyakh ikh vozniknoveniya] // Bulletin of the Supreme Arbitration Court of the Russian Federation [Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii]. M. : YURIT-Bulletin [YURIT-Vestnik], 2001. No. 6. Pp. 69–85.
4. Rozhkova, M. A. Digital Rights: Public Law Concept and Concept in Russian Civil Law [Tsifrovye prava: publichno-pravovaya kontseptsiya i ponyatie v rossiiskom grazhdanskom prave] // Economy and Law [Khozyaistvo i pravo]. 2020. No. 10. Pp. 3–12.
5. Rybalov, A. O. Ownership (Commentary to Art. 209 of the Civil Code of the Russian Federation) [Pravo sobstvennosti (kommentarii k st. 209 GK RF)] [Electronic edition]. M. : M-Logos. 2017. 96 p. URL: https://m-lawbooks.ru/wp- content/uploads/2017/06/027-kniga-Pravo-sobsvennosti.pdf (date of reference: 15.11.2020).
6. Selivanovsky, A. S. Legal Regulation of the Securities Market: Textbook [Pravovoe regulirovanie rynka tsennykh bumag: uchebnik]. Moscow : Ed. House of the Higher School of Economics. 2014. 580 p.
7. Sukhanov, E. A. Property Law: a Scientific and Educational Essay [Veshchnoe pravo: nauchno-poznavatel'nyi ocherk]. M. : Statute [Statut]. 2017. 559 p.

On the Issue of Pre-Contractual Liability Qualification

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ABSTRACT

The article is devoted to the study of the existing positions in the Russian doctrine regarding the institution of pre-contractual liability. The ambiguous position of the legislator, the controversial explanations of the judges of the Supreme Court of the Russian Federation do not reduce the relevance of the problem of the unified nature of pre-contractual liability. In this article, the author points out the shortcomings of the legal regulation of determining the time and grounds for applying pre-contractual liability measures, as well as issues of determining a specific mechanism for protecting bona fide negotiators, in particular in the field of identifying the rules for calculating losses incurred.

Keywords: pre-contractual liability, contractual liability, tort liability, legal nature, conclusion of a contract, pre-contractual contacts (negotiations), assurances

The inclusion of the rules on pre-contractual liability in the domestic legal order is a completely justified and well-timed step. Ensuring the restoration of violated rights, as well as their judicial protection, is proclaimed by the Civil Code of the Russian Federation as one of the main principles of domestic civil legislation. At the same time, the violation of rights is not associated with the mandatory existence of contractual relations between the subjects of law.

This amendment introduces the general principle of imposing liability, elements of which in Russian law were previously contained in the form of provisions for certain types of contracts and were derived from the general principle of good faith and from the composition of the general tort. With the complication of civil turnover, the increase in business needs, including the development of cross-border relations, such fragmentary regulation of pre-contractual relations became insufficient, which led to the adoption of Federal Law No. 42-FZ of March 8, 2015 “On Amendments to Part One of the Civil Code of the Russian Federation”, which actually adopted the approach to pre-contractual liability common in developed legal systems.

Pre-contractual liability is extended on such components of dishonest behavior, as entering into negotiations with a deliberate absence of intention to reach agreement with the other party; providing of incomplete or inaccurate information to the other party; sudden and unjustified termination of negotiations about the conclusion of the contract (article 434.1 of the Civil Code). False representations about the circumstances can be linked to pre-contractual liability in the event of the probability of occurrence in conditions when there are no contractual obligations yet (Article 431.2 of the Civil Code of the Russian Federation).

However, as we can see, the list of grounds for applying pre-contractual liability measures is very broad and vague, and therefore the question of determining the legal nature of pre-contractual liability has become even more acute.

Thus, when determining the station of pre-contractual liability, we should consider its special nature, which consists in the impossibility of attributing it to either tort or contractual liability. According to V. S. Komaritsky, “the main difference between pre-contractual liability and contractual liability is due to the absence of a contract concluded between the subjects. In turn, pre-contractual liability differs from tort liability in its subject composition, since it always arises only between persons who are already in a pre-contractual relationship”[1].

At the same time, we should note the fact that it cannot be denied that liability under agreements (for example, a negotiation agreement) is both contractual and pre-contractual, since, on the one hand, the provisions of the law on contractual liability are applicable to them due to their full compliance with the characteristics of a civil contract, but, on the other hand, they do not relate to the basic rights and obligations that will be established by a future contract, and therefore are pre-contractual[2].

However, there is a more radical view that pre-contractual liability is a special type of civil liability that cannot be defined through the nature of contractual or non-contractual liability[3].

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[1] *Komaritsky V. S.* Legal Regulation of Pre-Contractual Liability under the Legislation of the Russian Federation : dissertation of the candidate of legal sciences [Pravovoe regulirovanie preddogovornoi otvetstvennosti po zakonodatel’stvu Rossiiskoi Federatsii : diss. kand. yurid. nauk]. Moscow, 2016. (in rus) p. 8.

[2] See: *Komaritsky V. S.* Op. cit. p. 9, 24.

[3] See: *Idrissov Kh. V.* Problematic Issues of Pre-Contractual Liability: Doctrinal Approaches and Positions of Judicial Practice [Problemnye voprosy preddogovornoi otvetstvennosti: doktrinal’nye podkhody i pozitsii sudebnoi praktiki] // Lex russica. 2018. No. 10. p. 98-99. (In rus)

As noted earlier, the analysis of the current legislation also does not clarify the question of the qualification of these relations. The rules on pre-contractual liability are located in subsection 2 "General provisions on the contract" of Section 3 of the Civil Code of the Russian Federation, but they also establish the possibility of applying the rules on obligations resulting from harm. It seems that the location of the article 434.1 among contract law itself does not mean automatic classification of it as contractual liability as a whole and, therefore, the use of norms of Chapter 59 of the civil code is not a clear evidence of its non-contractual character. In general, this is correct, especially since contractual liability does not necessarily have to be a liability for breach of obligations[4].

Thus, taking an intermediate position between contractual and tort liability[5], it should be noted that pre-contractual liability in the general sense can be considered both as a means of protection and as a measure of liability. The measures of liability are the recovery of losses, penalties and moral damage, and the means of protection can include all other coercive measures (for example, compulsion to conclude a contract). In the context of this study, such an opinion is justified, since "the basis for applying such liability is the commission by a person of actions interpreted as pre-contractual violations. Thus, in the context of Article 8 of the Civil Code of the Russian Federation, the grounds for liability are actions that entail harm to another person"[6].

At the same time, it is necessary to clearly determine the moment of occurrence of pre-contractual liability in order to calculate potential pre-contractual violations, since the beginning of a pre-contractual relationship does not yet indicate the possibility of pre-contractual liability. When considering the procedure for agreeing on the terms of an international commercial contract, O. V. Muratova says that in modern conditions, pre-contractual relations arise most often not as a result of an offer to conclude a contract on certain conditions, but from the moment of manifestation of the intention to conclude a contract, from the offer to enter into negotiations[7].

According to I. Z. Ayusheva, in the classical sense, pre-contractual liability can be discussed only in cases where the intention of the subjects to conclude a contract is clear, but this intention was not followed by any specific actions[8].

V. V. Bogdanov also recognizes the intention of one party to conclude an agreement for the beginning of pre-contractual relations (for example, the intention may be expressed in the discussion of the terms of the upcoming transaction), where the unlawful refusal of the other party to conclude the contract will be the basis for the occurrence of pre-contractual liability[9]. The presented opinion is logical, because the main goal of liability at the pre-contractual stage is to protect the party interested in concluding the contract from the unfair behavior of the other party.

To expand the understanding of the legal nature of pre-contractual liability, special attention should be paid to the traditional scheme of concluding an "offer — acceptance" contract. An offer, which means a proposition to conclude a contract under certain conditions, must reflect the clear intention of the offeror to sign the contract in the future. In turn, the acceptance must contain an explicit assurance of the acceptor to conclude the contract on the proposed terms.

However, some scholars believe that the offer and acceptance is a one-way deal, criticizing the requirement for the essential terms in the text of the offer and supporting the suggestion to empower the court to determine the essential terms of the agreement in resolving the dispute about recognition of it as unconcluded[10].

This perspective is based on a misinterpretation of existing rules, because article 443 of the Civil Code states that "the response of consent to conclude a contract on terms other than proposed in the

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[4] See: *Khokhlov V. A.* General Provisions on Obligations : Textbook [Obshchie polozheniya ob obyazatel'stvakh : uchebnoe posobie]. Moscow : Statut, 2015. p. 235-238. (in rus)

[5] *Bogdanov D. E.* Evolution of Civil Liability from the Position of Justice: Comparative Legal Aspect : monograph [Ehvolyutsiya grazhdansko-pravovoi otvetstvennosti s pozitsii spravedlivosti: sravnitel'no-pravovoi aspect : monografiya]. Moscow : Prospect, 2016 p. 209. (in rus)

[6] *Komaritsky V. S.* Op. cit. p. 56-57.

[7] See: *Muratova O. V.* On the Issue of Qualification of Pre-Contractual Relations in International Commercial Turnover [K voprosu o kvalifikatsii preddogovornykh otnoshenii v mezhdunarodnom kommercheskom oborote] // Zhurnal rossiyskogo prava. [Journal of Russian law] 2018. No. 6. p. 117. (in rus)

[8] See: *Ayusheeva I. Z.* Pre-Contractual Liability: Novelties of Civil Legislation and Judicial Practice [Preddogovornaya otvetstvennost': novelly grazhdanskogo zakonodatel'stva i sudebnoi praktiki] // Lex russica. 2017. No. 5. p. 138. (in rus)

[9] *Bogdanov V. V.* Pre-Contractual Relations in Russian Civil Law: dissertation of the candidate of legal sciences [Preddogovornye otnosheniya v rossiiskom grazhdanskom prave: diss. ...kand. yurid. nauk]. Moscow, 2011. p. 135. (in rus)

[10] See: *Aleksandrov N. G.* Law and Legality in the Period of Developed Construction of Communism [Pravo i zakonnost' v period razvitogo stroitel'stva kommunizma]. Moscow : Gosyurizdat, 1961. p. 157-158 (In rus); Civil Law : Textbook [Grazhdanskoe pravo : Uchebnik] / edited by E. A. Sukhanov. V. 1. Moscow : Volters Kluver, 2008. p. 448. (In rus)

offer, is not an acceptance"; "the answer is recognized as the refusal of the acceptance and at the same time as a new offer".

Therefore, a holistic understanding of Articles 435 and 443 of the Civil Code of the Russian Federation makes it obvious that the proposition will be considered an offer provided that the following criteria are met simultaneously: it shall be addressed to one or more specific persons (with the exception of public offers); it shall be specific and express the intention of the offeror to conclude a contract. The last two features of the offer are key in all legal systems. Acceptance of the "offer", which does not contain specific terms of the contract, leads to the fact that the parties agree on the establishment of relations, without determining their specific subject.

After the introduction of the Institute of assurances and legal construction of pre-contractual liability in domestic law, some scholars began to distinguish pre-contractual contacts of the parties (negotiations) as a separate stage of the contract. For example, S. Yu. Kazachenok, reasoning about the legal nature of assurances laid down by the legislator, comes to the conclusion that "when the provision of information does not become part of the contract and the other party bears certain losses, based on the fact that it relied on it and it was unreliable, then, in fact, we are talking about tort liability. And only if the assurances (guarantees) were part of the contract, we can talk about contractual liability"[11]. On the basis of the above statement we can conclude that the author's position on the question of the formulation of pre-contractual liability tends to the faction of followers of the dual nature of the responsibility under study.

It should be noted that the opposite point of view, which criticizes the approach according to which pre-contractual contacts of the parties belong to one of the stages of concluding a contract, is also reasonably expressed in science. O. V. Muratova concludes that pre-contractual relations should be considered not as a stage of concluding a contract, but as an independent legal relationship in the civil law system that arises between potential transaction participants[12].

Another important point to consider in this context is the fundamental principles of Russian civil law and their relationship to pre-contractual liability.

According to Article 1 of the Civil Code of the Russian Federation, these are the principle of freedom of contract and the principle of good faith of participants in civil legal relations. At the same time, the norm on negotiations at the conclusion of a contract is based on both principles. In our point of view, pre-contractual liability is a necessary restriction of the principle of freedom of contract in the context of the prohibition on the entry into negotiations of unscrupulous entrepreneurs who initially do not plan to conclude a contract, but pursue other goals (for example, causing harm to a potential counterparty). At the same time, the legislator establishes a requirement for the bona fide conduct of legal entities as a whole, accordingly, good faith is an essential condition in the negotiation process.

It is also impossible to ignore such a problem as the lack of a specific mechanism for applying pre-contractual liability. In the general provisions (Articles 431.2 and 434.1 of the Civil Code of the Russian Federation) the legislator, in fact, established a certain possibility of protecting bona fide participants in negotiations, but did not specify the structure of this protection, in particular, in the field of identifying the rules for determining and calculating losses suffered by a bona fide participant in negotiations.

It is obvious that in practice there are inevitable difficulties with a new mechanism for the application of protective rules of the civil code, therefore, the Plenum of the Supreme Court delineated the task to set some guidelines for judicial practice concerning pre-contractual liability.

In this sense, a significant event was the adoption of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 24.03.2016 No. 7 "On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations". First, in paragraph 1 of clause 19 the Plenum of the Supreme Court resolved the question of the application of Chapter 59 of the civil code, specifying that the provisions of this Chapter shall apply to the relations on compensation for losses caused by dishonest conduct of negotiations in all matters not regulated by article 434.1 of the civil code.

Secondly, paragraph 20 clearly shows the position of the Supreme Court of the Russian Federation on issues of good faith in negotiations: "... a party that conducts or interrupts negotiations on the conclusion of a contract in bad faith, is obliged to compensate the other party for the losses caused by this;.the victim shall be put in the position in which it would have been if it had not entered into negotiations with an unscrupulous counterparty."

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[11] *Kazachenok S. Yu.* Procedure of Pre-Contractual Relations between the Parties to an Entrepreneurial Agreement as a Stage of Concluding a Contract [Protsedura preddogovornykh vzaimootnoshenii mezhdu storonami predprinimatel'skogo dogovora kak stadiya zaklyucheniya dogovora] // Entrepreneurial Law [Predprinimatelskoye pravo]. 2019. No. 1. p. 40-41. (in rus)

[12] See: *Muratova O. V.* Op. cit. p. 115-123.

It is important to note that these provisions currently apply to real contracts as well. Contradictory assessments were caused by the Resolution of the Plenum of the Supreme Court of the Russian Federation of December 25, 2018 No. 49 "On certain issues of Application of the General Provisions of the Civil Code of the Russian Federation on the conclusion and interpretation of a contract", which contains clarifications on the cases when the contract is considered concluded and how the formal non-compliance affects the validity of such a transaction. According to paragraph 4, "in case when in accordance with paragraph 2 of article 433 of the Civil Code of the Russian Federation the contract is considered concluded from the moment of the transfer of property (real contract), it should be noted that this circumstance does not relieve the parties from the duty to act in good faith in negotiations on the conclusion of such contract. The rules of Article 434.1 of the Civil Code of the Russian Federation are also applicable to negotiations on the conclusion of a real contract. In particular, if after the negotiations the real contract was not concluded, the party that conducted or interrupted these negotiations in bad faith is obliged to compensate the other party for the losses caused by this (paragraph 3 of Article 434.1 of the Civil Code of the Russian Federation)."

Third, the Plenum of the Supreme Court of the Russian Federation made an important note: the employer reimburses the harm caused by unscrupulous behavior of his employee on pre-contractual stage, according to the rules of article 1068 of the civil code.

Nevertheless, there are still a lot of unresolved issues. For example, it is not clear what will be reimbursed to the negotiating party if the other party acts in bad faith. For example, will the first party be able to receive compensation for income from the failed sale of goods or compensation for other loss of benefit?

It is unclear what is meant by expenses in connection with loss of ability to conclude a contract with a third party: whether it includes the loss incurred by the person in connection with the failure to conclude a contract with another person (for example, loss of income from the failed sale of goods); whether an abstract opportunity to enter into a contract with any third party shall be the subject of compensation, or it shall still be required to prove the existence of a real possibility of concluding an agreement with a particular subject of civil turnover? Moreover, it seems even more difficult to determine the amount of such expenses.

The compensation for the disclosure of confidential information obtained during negotiations, or the use of it for one's own purposes provided for by law also requires clarification.

References

1. Aleksandrov, N. G. Law and Legality in the Period of Developed Construction of Communism [Pravo i zakonnost' v period razvitogo stroitel'stva kommunizma]. M. : Gosyurizdat. 1961. 271 p. (In rus)
2. Ayusheeva, I. Z. Pre-Contractual Liability: Novelties of Civil Legislation and Judicial Practice [Preddogovornaya otvetstvennost': novelly grazhdanskogo zakonodatel'stva i sudebnoi praktiki] // Lex russica. 2017. No. 5. Pp. 136147. (In rus)
3. Bogdanov, V. V. Pre-Contractual Relations in Russian Civil Law: Diss. ...Cand. of Law Sciences [Preddogovornye otnosheniya v rossiiskom grazhdanskom prave: diss. .kand. yurid. nauk]. M., 2011. 155 p. (In rus)
4. Bogdanov, D. E. Evolution of Civil Liability from the Position of Justice: Comparative Legal Aspect : monograph [Ehvolyutsiya grazhdansko-pravovoi otvetstvennosti s pozitsii spravedlivosti: sravnitel'no-pravovoi aspect : monografiya]. M. : Prospect. 2016. 304 p. (In rus)
5. Civil Law : Tutorial. T. 1 [Grazhdanskoe pravo : Uchebnik. T. 1] / Under the editorship of E. A. Sukhanov. M. : Volters Kluver. 2008. 720 p. (In rus)
6. Idrissov, Kh. V. Problematic Issues of Pre-Contractual Liability: Doctrinal Approaches and Positions of Judicial Practice [Problemnye voprosy preddogovornoi otvetstvennosti: doktrinal'nye podkhody i pozitsii sudebnoi praktiki] // Lex russica. 2018. No. 10. Pp. 98–105. (In rus)
7. Kazachenok, S. Yu. Procedure of Pre-Contractual Relations between the Parties to an Entrepreneurial Agreement as a Stage of Concluding a Contract [Protsedura preddogovornykh vzaimootnoshenii mezhdu storonami predprinimatel'skogo dogovora kak stadiya zaklyucheniya dogovora] // Entrepreneurial Law. 2019. No. 1. Pp. 3945. (In rus)
8. Komaritsky, V. S. Legal Regulation of Pre-Contractual Liability under the Legislation of the Russian Federation : Diss. ...Cand. of Law Sciences [Pravovoe regulirovanie preddogovornoi otvetstvennosti po zakonodatel'stvu Rossiiskoi Federatsii : diss. .kand. yurid. nauk]. M., 2016. 205 p. (In rus)
9. Muratova, O. V. On the Issue of Qualification of Pre-Contractual Relations in International Commercial Turnover [K voprosu o kvalifikatsii preddogovornykh otnoshenii v mezhdunarodnom kommercheskom oborote] // Journal of Russian law. 2018. No. 6. Pp. 115–123. (In rus)
10. Khokhlov, V. A. General Provisions on Obligations : Textbook [Obshchie polozheniya ob obyazatel'stvakh : uchebnoe posobie.]. M. : Statute. 2015. 286 p. (In rus)

Urban Regulation of the Development of the Federal Territory

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ABSTRACT

The article formulated an idea of the possibilities of urban planning regulation in order to develop a new territorial and legal education in the Russian Federation — the federal territory. The concentration of all public powers at the federal level implies the need to strike a different balance of regulation in the exercise of local government powers in relation to urban planning regulation.

Keywords: federal territory, powers of public administration, urban planning

Chapter 3 of the Constitution of the Russian Federation is supplemented in Part 1 of Article 67 with provisions on the possibility of creating federal territories on the territory of the Russian Federation in accordance with federal law and on establishing by federal law of the organization of public power in such territories. In paragraph 3.1. of the Conclusion No. 1-3 of 16.03.2020, the Constitutional Court of the Russian Federation expressed the opinion about this norm in the part that the provision on the possibility of creating federal territories in its literal meaning does not imply the possibility of forming federal territories with giving them a status equal to that of the subjects of the Russian Federation[1]. It is obvious that the public legal uncertainty of the status of the federal territory will continue until the adoption of the federal law on the relevant federal territory. It seems that the status of each federal territory as it is created will be determined by an independent federal law on it, due to the lack of a stable definition of the concept of "territory" in the public law of Russia. This concept is used as a characteristic of the object of regulation in environmental legal relations (Federal Law of March 14, 1995 No. 33-FZ "On specially protected natural territories") as inherent properties of one of the special legal regimes of entrepreneurial and other economic activities (for example: the Federal law dated 03.12.2011 No. 392-FZ "About zones of territorial development in the Russian Federation and on amendments to certain legislative acts of the Russian Federation", Federal law of 29.12.2014 No. 473-FZ "About territories of advancing socio-economic development in the Russian Federation", Federal law of 28.09.2010 № 244-FZ "About the innovative centre "SKOLKOVO", Federal Law No. 193-FZ of 13.07.2020 "On State Support for Entrepreneurial Activities in the Arctic Zone of the Russian Federation" , etc.), as an element of the legal regime in land relations (Article 3 of the Civil Code of the Russian Federation) and in the legal relations of urban development. The term does not have a single normative meaning, and in relation to the public-legal organization of management, its understanding in the legislation is extremely diverse: federal districts, military districts, judicial districts, electoral districts (referendum districts), border territories, etc.[2] We can't disagree with the opinion of N. N. Popova that, being a multi-faceted concept, the territory is differentiated according to the existing legal regime on it[3].

That is, it is expected that the legal category "federal territory" will be another opportunity to create a special, different from the ordinary, legal regime, which will apply not only to special subjects (for example, often referred to as "residents"), but also to all people living in this territory.

In this connection, the doctrinal understanding of the implementation by the population of the rights to local self-government in the federal territory, as part of this article — in the part concerning the regulation of urban development activities, is noteworthy.

In general, the statement that the federal territory is a part of the territory of a subject of the Russian Federation, in which the powers of a subject of the Russian Federation and a municipal entity are

[1] The conclusion of the constitutional Court of the Russian Federation of 16.03.2020 No. 1-3 "On compliance with the provisions of chapters 1, 2 and 9 of the Constitution of the Russian Federation of provisions of the Law of the Russian Federation pending its entry into force on the amendment to the Constitution of the Russian Federation "On improving of the regulation of certain issues of organization and functioning of public authorities", and also about compliance of the procedure for the entry into force of article 1 of this Law to the Constitution of the Russian Federation in connection with the request of the President of the Russian Federation" // Bulletin of the Constitutional Court of the Russian Federation. 2020. № 2.

[2] Territory in Public Law [Territoriya v publichnom prave] / I. A. Alabastrov, I. A. Isaev, S. V. Naruto et al. Moscow : Norma, Infra-M, 2013. p. 158–160. (in rus)

[3] *Popova N. N.* Territory as the Object of Administrative-Legal Regulation [Territoriya kak ob"ekt administrativno-pravovogo regulirovaniya] // Administrative Law and Procedure [Administrativnoe pravo i protsess]. 2014. No. 1. p. 9. (in rus)

excluded or so significantly limited that they are insignificant, due to the provision of the Constitution of Russia that its territory consists of the territories of its subjects, is relatively clear. That is, the entire set of state and municipal management should belong to the federal government body, which, according to this combination, should not be called a state or municipal government body, but a public authority body. In essence, the federal territories of today, although without direct naming in this capacity, are the territories of internal waters, the territorial sea of Russia[4]. In these territories, there is no jurisdiction of the subjects of Russia and municipalities, and management decisions in relation to these territories are made exclusively by the federal authorities. But these territories lack the property of sustainable development, since their participation in the political, business and economic turnover is limited for an obvious reason — the lack of population.

Urban planning documents that ensure the sustainable development of the territory are the documents of territorial planning differentiated in Article 9 of the Urban Planning Code of Russia as the documents of territorial planning of the Russian Federation, documents of territorial planning of subjects and documents of territorial planning of municipalities. The latter are the general layout, which determines the functional zoning and planning of the placement of objects of federal, regional and local importance, and the consolidation of territorial zones with types of use (main, auxiliary and conditionally permitted) in the rules of land use and development in urban planning regulations. Thus, the exclusion of the level of territorial planning documents from the functions of the federal territory management body actually means that it is impossible to develop it, since the authority to approve this documentation is the authority of local self-government bodies.

Comparative analysis allows us to conclude that the foreign experience of the creation of federal territories, if it is even possible to adopt it, can only be of assistance in part of the general idea, which can be considered as a kind of allegory. In modern legal systems, federal territories exist in a number of states with a federal structure (the United States, Brazil, Venezuela, Australia, Canada, etc.) as a special administrative-territorial unit that is part of the federation without the right of (legislative) autonomy and, as a rule, without the right of representation in federal bodies. There are currently nine federal territories in Australia, six in India, three in Brazil, and two in Venezuela[5]. In the latter case, the federal territories include islands formed or created in the territorial sea or in the sea above the continental shelf[6].

However, these examples do not have the European tradition of local self-government, the quintessence of which is the European Charter of Local Self-Government (Strasbourg, 15.10.1985), ratified by Russia by Federal Law No. 55-FZ of 11.04.1998.

Guarantees of the exercise of the rights to local self-government by the population are enshrined in Chapter 8 of the Constitution of the Russian Federation, which is in semantic unity with the provisions of the above charter. According to one of the norms of this regulation, it is possible to change the borders of the territories within which local self-government is carried out. In the event of such change, acceptable in the perspective of the peoples concerned, the loss of the need for the implementation of territorial planning documents at the level of local government is possible, and the determination of the development strategy of the Federal territory will be made directly by one of the documents of territorial planning of the Russian Federation. Today such documents are the roadmaps of territorial planning of the Russian Federation in the spheres of federal transport, national defense and state security, energy, higher education and health. Territorial planning roadmaps of the Russian Federation contain provisions on territorial planning, maps of the planned location of objects of federal importance.

We see no legally significant barriers to integration of another roadmap of territorial planning of the Russian Federation into urban development regulation — roadmap of development of the federal territory, which is similarly to those in effect will contain provisions on territorial planning and maps of planned placing of objects of federal importance. Directly in the regulations on territorial planning it will be necessary to provide information about the kinds, designations and names of objects of federal importance planned for placing, their basic characteristics, their location, as well as characteristics of zones with special conditions of use in the manner regulated by Chapter XIX of the Land code of the Russian Federation.

We emphasize that the possibility of change of borders of self-governed territories is permitted by article 5 of the European Charter of local self-government and part 2 of article 131 of the Constitution

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[4] *Mayboroda V. A.* Formation of Legal Regulation Objects in the Water Area Planning [Formirovanie ob"ektov pravovogo regulirovaniya v sfere akvatorial'nogo planirovaniya] // Lawyer [Yurist]. 2016. No. 8. p. 39. (in rus)

[5] *Kurakov L. P., Kurakov V. L., Kurakov A. L.* Economics and Law: Dictionary-Reference [Ehkonomika i pravo: slovar'-spravochnik]. Moscow : [Vuz i shkola]. 2004. p. 348. (in rus)

[6] *Avakyan S. A.*Constitutional Law. Encyclopedic Dictionary [Konstitutsionnoe pravo. Ehntsiklopedicheskii slovar'] Moscow : Norma. 2001. p. 320. (in rus)

of the Russian Federation, and in this sense, the establishment of borders of the non-self-governed federal territory is legitimate.

This idea of the federal territory management concept means that full powers shall be entrusted to the appropriate body (bodies) of the public authorities at the federal level, consolidating the realization of authority of the Russian Federation subject and municipal formation in the territory in this body. Thus, the function of ensuring the sustainable development of the territory will be consolidated, and the balance of interests provided by it will be lost, shifted to the sphere of exclusively public regulation. Meanwhile, according to the definition given in section 3 of article 1 of the town planning code of the Russian Federation, sustainable development of territories is the provision of such development with the implementation of urban planning, which ensures the safety and favorable conditions of human life in the interests of present and future generations.

In our opinion, at the stage of forming of ideas about the regulation of the creation and development of the federal territory, it is necessary to highlight the principles on which normative regulation of the complex of sustainable development of the Federal territory (hereinafter — documentation) should be based.

First, the implementation of the set of documentation should proceed from the unification of the powers of the Russian Federation, the subject of Russia and the municipality in a public authority with competence to manage the federal territory.

Secondly, the implementation of the set of documentation should take into account the lack of differentiation of sectoral management (i. e. division into departmental issues) of managerial competencies. The unity of the tasks of the federal territory determines the consolidation of competencies in the territorial management body.

Third, in relation to the specifics of urban planning and the tasks of the federal territory itself, the set of documentation should have a cross-cutting penetration of the functionality of strategic planning for the development of the federal territory and tactical management of already built-up areas.

Fourth, the land ownership relations are to be unified, and the property can be settled only in one form — federal, since the roadmap can only plan the placement of federal objects. Other objects will fall out of circulation with the natural course of time, but the land-legal presumption of federal property is necessary at the initial stage of development of the federal territory.

In this connection, taking into account the possibility of changing the boundaries of the territories in which local self-government is carried out, it is possible to propose a set of documentation of the federal territory that ensures its sustainable development from the following documents.

1. **The federal territory planning roadmap** is a document of strategic planning for the development of the federal territory. This document is intended to establish the boundaries of the Federal territory, to settle planning of Federal facilities placement, development of the territory in the future, it needs to define a strategy for the long-term development of the territory.

In addition to the ordinary parts of the general layout (Part 3 of Article 23 of the Civil Code of the Russian Federation: regulations on territorial planning; map of the planned location of objects; map of borders; map of functional zones), it is necessary to supplement the roadmap with a spatial model of the territory development.

At the same time, the federal territory planning roadmap must be approved by the federal public authority (the President of Russia, or the government of Russia) for at least 20 years, with no possibility of changing it if the tasks set in it are not achieved for less than 40%[7].

2. **Rules for the development and improvement of a federal territory** — a document of a tactical development and territory use parameters study, based on the fundamental priority of the unity of architectural appearance of the federal territory and identifying the possible limits of economic activity and legal guarantees of the right holders of real estate. In this connection, it seems necessary to have an actual institution for achieving a public consensus on preserving the unity of the architectural and urban appearance. The institution of public hearings and public discussions in such circumstances will not make up for the attribution of the aggregate public opinion, since it is not legally binding by law, and in terms of the possibilities provided, it is extended to officials of local self-government bodies[8].

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[7] *Mayboroda V. A.* Execution of Territorial Planning Documents as an Inherent Attribute of Certainty in Justification of Their Amendment [Ispolnenie dokumentov territorial'nogo planirovaniya kak immanentnoe svoistvo opredelennosti v obosnovanie ikh izmeneniya] // Town-planning law [Gradostroitel'noe pravo]. 2020. No. 1. p. 18. (in rus)

[8] *Khludnev E. I.* Public Debates and Public Hearings as Forms of Participation of the Population in Exercising of Local Self-Government and Public Control Forms [Obshchestvennye obsuzhdeniya i publichnye slushaniya kak formy uchastiya naseleniya v osushchestvlenii mestnogo samoupravleniya i formy obshchestvennogo kontrolya] // State Power and Local Self-government [Gosudarstvennaya vlast' i mestnoe samoupravlenie]. 2019. No. 3. p. 37. (in rus)

For example, it is possible to institutionalize an architectural advisory body that has the right to veto decisions that contradict, in the opinion of the body, the unity of the architectural and construction appearance of the federal territory. It seems that urban planning regulations in the federal territory should be of a nature that is combined with the requirements for the architectural and urban planning appearance of objects. In that way the formation of the appearance of buildings, the choice of a site for their placement, their purpose and spatial parameters are regulated. Since investment activity in the federal territory, in the sense of its creation, presumes the only financial source of development — the federal budget, then the function of justifying investment attractiveness for private capital may not be attached to such rules.

Landscaping as a function of municipal management is redistributed in the conditions of the federal territory to the authority of the federal territory management body. Therefore, the usual rules of improvement should be replaced by a document of a different regulation. The cities of federal significance — Moscow and St. Petersburg — have experience in implementing the improvement program in the state competence. The actual consequence of this redistribution is the formation of a separate type of permit document in the field of landscaping — a permit for earthworks (an order for earthworks). The rigidity of the administrative regulation of these legal relations, supported by high administrative sanctions, is due to the density of development. In the case of a federal territory, such experience should not be borrowed. On the contrary, the regulation of landscaping can be done through integration into a single document on construction, which, among other things, will have to regulate the definition of a work plan for complex engineering preparation of the territory before construction and the definition of a list of compensatory measures for the restoration of green spaces and landscape elements after construction.

Measures for the engineering preparation of the territory include a detailed comprehensive analysis of the territory based on engineering surveys, proposals for the organization of the terrain, shore protection, strengthening of slopes, organization of surface runoff, drainage of the territory, that is, the complex of works that are called “earthworks” in Moscow and St. Petersburg. A unified approach to the organization of works on the engineering preparation of the territory will provide an integrated approach to the organization of space with maximum consideration for the features of the terrain.

In conclusion, it should be pointed out that the proposed set of documents that are in the system unity of the statutory regulation of the subject — sustainable development of the federal territory, corresponds to modern requirements of town planning legislation designed to ensure the sustainable development of the territory, but at the same time forms a new direction in the legal relations considered, which ensures planning of the federal territory, and such development of this territory that will allow to achieve the objectives of sustainable development before gaining a new balance in the implementation of public law powers already in relation to the federal territory, which excludes the possibility of exercising local self-government.

References

1. Constitutional Law. Encyclopedic Dictionary [Konstitutsionnoe pravo. Ehntsiklopedicheskii slovar’] / executive ed. and head of the author’s board S. A. Avakyan. Moscow : Norma, 2001.675 p. (in rus)
2. Kurakov, L. P., Kurakov, V. L., Kurakov, A. L. Economics and Law: Dictionary-Reference [Ehkonomika i pravo: slovar’-spravochnik]. M. : University and School, 2004. 1288 p. (in rus)
3. Mayboroda, V. A. Execution of Territorial Planning Documents as an Inherent Attribute of Certainty in Justification of Their Amendment [Ispolnenie dokumentov territorial’nogo planirovaniya kak immanentnoe svoistvo opredelennosti v obosnovanie ikh izmeneniya] // Town-planning law [Gradostroitel’noe pravo]. 2020. No. 1. Pp. 16–20.
4. Mayboroda, V. A. Formation of Legal Regulation Objects in the Water Area Planning [Formirovanie ob”ektov pravovogo regulirovaniya v sfere akvatorial’nogo planirovaniya] // Lawer [Yurist]. 2016. No. 8. Pp. 37–41.
5. Popova, N. N. Territory as the Object of Administrative-Legal Regulation [Territoriya kak ob”ekt administrativno-pravovogo regulirovaniya] // Administrative Law and Procedure [Administrativnoe pravo i protsess]. 2014. No. 1. Pp. 9–11.
6. Territory in Public Law [Territoriya v publichnom prave] / I. A. Alabastrov, I. A. Isaev, S. V. Naruto et al. M. : Norma, Infra-M, 2013. 319 p.
7. Khludnev, E. I. Public Debates and Public Hearings as Forms of Participation of the Population in Exercising of Local Self-Government and Public Control Forms [Obshchestvennye obsuzhdeniya i publichnye slushaniya kak formy uchastiya naseleniya v osushchestvlenii mestnogo samoupravleniya i formy obshchestvennogo kontrolya] // State Power and Local Self-government [Gosudarstvennaya vlast’ i mestnoe samoupravlenie]. 2019. No. 3. Pp. 37–40.

Antitrest Legislation of the USA 1913-1915 [1]

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ABSTRACT
The article discusses the process of creating social legislation in the United States of America at the beginning of the 20th century. This legislation in the country was created later than in European countries. It was issued during the presidency of Woodrow Wilson. The process of reviewing these bills in the US Congress, as well as the political struggle associated with their development and adoption, the analysis of the documents themselves are the focus of this article.
Keywords: congress, president Wilson, administration, Sherman Act, Clayton Act, trade unions

At the beginning of the twentieth century, the United States entered a new stage of its development. This had manifested itself in the economic, political and, to an even greater extent, legal spheres.

Woodrow Wilson was elected president in 1912 in the face of the growing crisis of the two-party *Republican-Democrat* system established after the Civil War. The frantic pace of industrial growth, the emergence of large banks, trusts, on the one hand, and the sharp increase in the number of employees, the social stratification of society, on the other, made it obvious that the existing parties no longer reflected the interests of the main groups of the population. As a result, the stratification of these parties began.

This was especially true for the Republicans. The right wing of the party, led by the President in office of that time, Taft, became the representative of the interests of large monopolistic capital, the financial oligarchy. The other wing, which saw the danger of such a policy based on an overwhelming minority of the population, considered it necessary to express the interests not only of the monopolies, but also of the broad strata in order to avoid a social explosion and strengthening the position of the socialists. “Serious reforms are needed, but they should not be left to the left”, believed representatives of this wing, who called themselves progressivists. By the time of the election, their leader and presidential candidate was the popular at the time ex-President Theodore Roosevelt.

The Democratic Party was less affected by the stratification — there was no split. But even there, there was no complete unity. The left wing, led by a former trade union leader, Brian, took radical positions, sometimes little different from those of the Socialists. But the party also had its right wing that wanted to pursue the overdue reforms in close agreement with Wall Street. The unity of the party was significantly strengthen by the nomination of Wilson at the party convention, who, both at the convention and during the election campaign, managed to convince both wings of his commitment to reforms, on the one hand, and his intention to coordinate them with large capital, on the other. Not everyone agreed with this ambivalent position of Wilson, but the unity of the party was preserved.

The voters preferred Wilson to the progressivists, despite the fact that their programs had a lot in common. Although at its core Wilson’s program, despite the Democratic rhetoric, was more moderate than the views of the progressive leaders of Theodore Roosevelt and especially the more radical senator La Follette.

There are three reasons for this. First reason was the traditional fatigue of the voters from the lasting rule of one party – the Republicans. Second, the population believed more in the promises of the new man in politics, Princeton professor Wilson, than in the progressivists, who were still perceived as former Republicans, although it would be more accurate to call them Republican apostates. And finally, third, the position of the mass media, which created the image of Wilson as a statesman of a new breed, a fighter against monopolies and a supporter of the policy of “equal opportunities”, affected the result. The newspaper owners made a bet on him precisely because the ruling elite saw Wilson as the person who could prevent an explosion of discontent and at the same time carry out reforms without harming it. Wilson’s populist speeches caused mostly no fear among the oligarchs, unlike the speeches of the unpredictable and impulsive ex-president, whom the ruling class had always disliked. And they were not mistaken.

[1] The article is based on a previously published monograph: *Mardaliev R. T.* Woodrow Wilson: Political views, legal reforms, and the League of Nations project / R. Mardaliev; St. Petersburg Institute of Foreign Economic Relations, Economics and Law, “Znaniye” society of Saint Petersburg and Leningrad region. Saint Petersburg : St. Petersburg Institute of Foreign Economic Relations, Economics and Law, 2002. 182, [1] p.; ISBN 5-7320-0653-2. The article was written in order to cover the works of the outstanding Russian philosopher and jurist Baskin Yu.Ya., who acted as the Phd supervisor of the author of the monograph and article on the considered topic, within the academic conference “Second Baskin Readings”, held on October 14, 2020.

After the election, the progressivists made an absolutely conscious alliance with Wilson, supporting his program, the main points of which were tariffs, the reserve system, and antitrust legislation. There was a constant contact between their leader, La Follette, and the President. Roosevelt had already faded into the background after the election. It is known that there was a bad blood between him and Wilson. In general, the progressives were hopeful that their program would be successfully implemented by the new president.

March 5, 1913, was President Wilson's first working day since his inauguration the day before. In the Oval Office of the White House, all the members of the new government gathered. But this first meeting did not set out the grandiose plans for the reforms promised to voters during the election campaign. These plans had already been worked out by Wilson, and he did not need to agree with the members of his cabinet. It was not in his nature. In general, government meetings under Wilson were always a formality. He made all the drastic decisions himself or in the company of his closest advisers. He always treated the members of the government as technical workers who were called to carry out the will of the president. He believed that ministers should not even participate in global political decision-making and could have absolute power only within their ministries.

Wilson also believed that his task was to establish firm control over the activities of his party's representatives in Congress. In his opinion, the duty of the party leader was to keep democratic congressmen and senators under his command, imposing on them the duty to strictly follow him, strictly supporting his policies in the highest legislative body of the country. To this end, as a tool of pressure, he widely used the caucuses (general meetings of the party faction in the House of Representatives and the Senate). As a result, immediately after taking office Wilson put an iron hand on his party in Congress.

All this spoke of the authoritarian management methods that were inherent in Wilson at all stages of his life. As a young man, he came to the conclusion that the first place in the political life of the United States had to belong not to the Congress, but to the president. Only in this case, he believed, the state mechanism would function properly. Therefore, Wilson simply could not imagine the scenario where the Congress would not approve his proposals. But at the same time, he was more insightful than his predecessors and understood that such a result would not be achieved automatically. Therefore, Wilson did not distance himself from Congress, but, on the contrary, established the most intimate contact relations with its committees (and the power of committees in congress was indisputable — to this conclusion Wilson came a long time ago). Wilson's strategy combined flexibility and indomitability. These specific methods of Wilson played an important role in his work as the President of the United States, and especially in the implementation of social policy and the creation of antitrust legislation.

The first action in this direction can hardly be considered a credit to Wilson, since the law on the reorganization of the Department of Commerce and Labor into two independent ministries was put into effect on the last day of the Taft administration. Wilson simply supported the measure and implemented it. The result was the formation of an independent Social Ministry of Labor and the entry of the Minister of Labor into the Cabinet. The first social minister was the former trade unionist William Wilson, a namesake of the president, who had previously been secretary-treasurer of the United Union of Mineworkers, and from 1910 he was a member of the House of Representatives from the Democratic Party and headed the labor committee there.

The next step of the new administration was the Newlands Act, signed by Wilson in July 1913, at the height of the tariff struggle. According to this law, a mediation department was created to prevent conflicts between railway companies and hired workers (the official name was the Mediation and Reconciliation Department). According to the ideology of the law, this instance was supposed to protect employees from obvious harassment by companies. The first head of the department was the famous lawyer Frank Walsh. These were only the first steps, which arguably did not solve the whole complex of problems, but marked the beginning of a serious process of legislative registration of workers' rights, which stretched, however, for several decades.

The president behaved differently in the issue of control over the use of child labor in the workplace. By 1913, 35 states had passed laws setting an age minimum for children working in businesses. Most of these laws provided for restrictions on working hours for teenagers. Therefore, the progressivists raised the question of the need for a similar child labor law to be passed by the new administration, which would oblige all states to bring their legislation in this area into line with the federal one. But the administration took its time with this decision.

Then a member of the House of Representatives, Palmer, introduced a draft bill on child labor in Congress on January 26, 1914[2]. But this project ran into a misunderstanding on the part of the president.

[2] Congressional Record. 64th Congress. Vol. 51, p. 850

Wilson refused to listen to the committee's representatives and described the bill as unconstitutional. The President explained his position by the inadmissibility of federal interference in state legislation and the need to adopt such laws at the state level, the demographic and social situation in which is heterogeneous[3].

In such a step, Wilson's apparent reluctance to encourage the introduction of such innovations on a national scale was evident. It seems that during this period, the agreements reached between the President and representatives of the business community had an impact. It's no secret that they were frequent guests at the White House, where the political bargaining between them and the authorities took place. The government could not ignore the monopolists – otherwise, all the reforms would be threatened, and the President could lose the much-needed support from the press.

However, the Democrats had to fulfill their campaign promises in one way or another. During the presidential campaign of 1912, a magnificent declaration against monopolies was proclaimed in the party platform. It said: "Private monopoly is intolerable and in no way justified. We therefore advocate a vigorous strengthening of the criminal and civil laws against trusts and trust officials, and demand the introduction of such additional legislation as will be necessary to make it impossible for a private monopoly to exist in the United States"[4].

It is worth mentioning that Wilson himself immediately came out with a more moderate position, since in his heart he professed the idea of non-interference of the state in the affairs of private business. He had repeatedly stated that he was opposed to the regulation of trusts, but at the same time was not a supporter of monopolies. His position was repeatedly demonstrated during the election campaign and consisted in putting forward the thesis of absolutely free enterprise, which meant, on the one hand, the preservation of large corporations, and on the other — ensuring conditions for competition. Just a month before the election, Wilson said in a campaign speech in Indiana: "The Democratic Party is a friend of business, but only of free business. It is an absolute, open, implacable enemy of a monopoly of any kind."[5]

According to Wilson, the development of large corporations could not and should not have hindered competition and the activity of small enterprises. Thus, Wilson proposed to combine the incompatible. This position of the presidential candidate was not some kind of idealism, rather, it was explained by the pragmatism of the Democratic leader, who tried to please various party circles and thereby preserve the unity of the party, to oppose the split Republicans with a single democratic monolith. Wilson was never an opponent of big capital, and his denunciations were always forced, for tactical reasons, which he immediately declared in a narrow circle to the same monopolists and representatives of the right wing of the party.

But publicly, the president promised his constituents to destroy monopoly and restore free competition, which in itself was a utopia at the beginning of the twentieth century. Only for this reason, after coming to power, he had to take the initiative to revise the existing antitrust legislation. This was the last of the three main points of Wilson's program. In November 1913, when the tariff bill was already approved, and the climax of the struggle for the Federal Reserve Act was also over, the administration launched a teeming activity in Congress to develop new antitrust laws, trying first of all not to let the situation get out of control.

Formally, the bill was prepared by the House Judiciary Committee, which was headed by Congressman Clayton. However, the President intervened in the work of lawmakers as actively as in the development of the previous two laws. This was reflected in the President's lengthy meetings with Clayton, other lawmakers, and experts. Wilson was deeply convinced that legislation should not be left to congressional committees, which he had retained distrust of from a young age. He also had little confidence in the administration officials, who had always played only a supporting role in the administration's bargaining process with lawmakers. The President himself played a key role.

As a result of the joint work of the congressmen and the administration, general principles were developed that were to form the basis of the future bill. First of all, it was proposed to differentiate the various forms of monopolies, define them, and clearly explain which of them play a destructive role by restricting free trade, and which do not. It was proposed to introduce a rule that established the presumption of guilt when considering claims for violation of freedom of competition — proving of innocence in violation of the law would have to be assigned to the defendant in the claim.

It was also intended to prohibit the system of overlapping directorates, which led to the so-called hidden monopolism. In order to control the decisions of the courts to dissolve the trusts, it was proposed

[3] *Link A.* Woodrow Wilson and the Progressive Era (1910-1917). N. Y., 1963, p. 59.
[4] National Party Platforms. Urbana, 1956, p. 169.
[5] *Baker, R. S.* Woodrow Wilson. Life and Letters. Vol. 1-6. Garden City, 1927. Vol. 4, p. 356.

to establish an interstate industrial commission, accountable exclusively to the state. At first glance, these measures were impressive. In addition, the press constantly declared the President's support for these measures, that the bill being prepared was precisely his brainchild, capable of opening a new page in the history of the country[6].

On December 2, 1913, the President delivered his first annual message to the Congress, and political circles wondered what position he would take on the issue of drafting and passing antitrust legislation, whether the press was interpreting his position correctly, or whether it was one of the elements of the propaganda campaign of the democratic administration. Wilson, however, did not go into much detail on the subject. He once again assured the congressmen of his commitment to the program of "new democracy" and casually dropped the following phrase: "It is extremely important," he stressed, "that the business community of our country receive clear instructions in the legislation on their enterprises and investments, on which path they can follow without fear"[7]. In addition, Wilson stressed: "We must leave the Sherman Antitrust Law unchanged"[8]. This was an obvious nod in the direction of the business.

Here it is necessary to make a digression and explain what Sherman's law is. It was adopted as early as 1890, also in order to combat monopolies. But according to its norms, workers' organizations were also equated with monopolies. Its drafters believed that trade unions also discouraged competition in hiring labor. This enabled employers to pursue trade unions and their leaders with the help of courts that were obedient to them. Therefore, the Sherman act immediately caused discontent in the labor movement. Its partial revision was supported by the progressivists and the left wing of the Democratic Party, not to mention the trade unions themselves.

Therefore, the attitude to the worker's articles of the Sherman act meant to be a kind of test for the new administration and Wilson personally to find out their plans for reforming the antitrust legislation. The above-mentioned phrases of the President in his message to Congress were very revealing. The fears of the left came true — the government did not want fundamental reforms and a real change in the balance of power between employers and employees.

However, the authorities did not want to aggravate relations with those forces that still supported the administration. Therefore, they began to actively look for a way out of the situation. It was decided to pass amendments to the Sherman Act, which would recognize the legal status of workers' organizations and any other organizations that do not have capital. This would have somewhat complicated the then existing practice of banning workers' organizations through the courts. It was proposed to formalize all this in the upcoming Clayton bill, designed to accumulate all the proposals for changing the antitrust legislation that existed at that time.

So let's go back to the process of drafting and passing the Clayton bill. The President, who wanted to keep his finger on the pulse of the legislative process, decided to give a more detailed account of his vision of the relationship between power and capital in a speech to the second session of Congress on January 20, 1914. Wilson said: "There is no more antagonism between the business and the government. The government and the business community are ready to accommodate each other and regulate business practices with the help of both public opinion and the law. Just like us, the best representatives of the business world condemn the methods, actions and consequences of monopoly, and they are instinctively followed by a huge number of businessmen. We will now act as their representatives"[9].

Wilson stressed that "nothing hurts business more than uncertainty," and suggested that Congress develop and approve bills that could streamline existing antitrust legislation. For this purpose, he proposed to prohibit the system of overlapping directorates by law, to create a special industrial commission, and to expand the functions of the Interstate Trade Commission.[10]. All of these proposals were reflected in the upcoming Clayton bill.

The bill itself was being considered in Congress from May to October 1914. It was introduced there on May 23 and immediately caused a storm of discontent. But if conservative dissatisfaction with the norms that provided for sanctions for violating antitrust laws in the form of fines and even imprisonment was quite predictable, the accusations of progressivists turned out to be a rather unpleasant surprise for Wilson. Despite all sorts of references from the administration to the fact that the president was above the fray, and the main authors of the law was the Senate committee, few people were convinced.

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[6] The New York Times. December, 11. 1913. Vol. 1. Pp. 75–76.
[7] The Papers of Woodrow Wilson. Vol. 1–2. Princeton, 1966.
[8] Ibid. Vol. 1, p. 75.
[9] Ibid. Vol. 1. Pp. 82-83.
[10] Ibid. Vol. 1, p. 85.

In political circles, it was obvious to everyone that President Wilson was playing an active, if not leading, role in drafting key bills, which was fundamentally different from his predecessors.

But not only the paragraphs containing sanctions, but also the main "worker's" paragraphs caused a heated debate. The fact was that at that time, most congressmen and senators were convinced that concessions to workers were inevitable. However, they saw the limit of these concessions in differently. For example, Senator Ashurst of Arkansas came up with very left-wing ideas. "Labor," he said, "cannot be regarded as property; it is precisely labor that creates this property."[11] The senator stressed that the main task of the state at this stage was to ensure "social justice" and "industrial freedom", but only for those who "would leave their habits of laziness and wastefulness."[12] By the latter, he meant the strikers. The position of the senator from Arkansas was very characteristic of the supporters of the Clayton law.

On July 8, Wilson hosted a delegation from the Chicago Association of Entrepreneurs, who demanded that the president limited antitrust measures, softening the sanctions provided for by the draft for employers. At the same time, the entrepreneurs said that they generally approved of the "workers' paragraphs" in the form in which they are presented in the bill, and would not object to the legalization of trade unions[13].

Let's consider the main articles of the bill, which caused a mixed reaction. For example, Article 6 declared that "human labor is not a commodity or an object of trade". The article went on to state that it was unacceptable to "prohibit the existence and activities of workers', agricultural and horticultural organizations established for the purpose of mutual assistance, which do not own monetary shares and do not make a profit".[14]

Article 8 prohibited the practice of overlapping directorates, which had long been sought by trade unions, and not only by trade unions[15]. This article was not put into execution together with the law, but two years later. This is exactly what was provided for in the project.

Article 20 is interesting not only because of its content, but also because it perhaps demonstrates a cross-section of Wilson's policy in this area, conducted on the principle that "both the wolves have eaten much and the sheep have not been touched". On the one hand, there is a provision in this article that forbade the courts to decide on the use of force against workers during conflicts between entrepreneurs and hired workers. But at the same time, another rule imposed responsibility on trade unions in the event of damage to the property of entrepreneurs by workers. In this case, the latter were given the right to appeal to the court with claims, the defendants in which were trade unions[16]. The similar wording of this and other "worker's" articles quite satisfied employers and even trade unions, whose leader Gompers called these articles "the great charter of labor"[17].

It is noteworthy that these and other articles provided that the decision on the presence or absence of an offense, as well as the degree of punishment, could be made exclusively by the court. Given that relations between oligarchs and the judiciary were not always disinterested in practice, the law, of course, did not establish any guarantees against corporations circumventing many of its constructive norms.

By the time of final approval, the Clayton Bill had undergone significant editorial amendments. They were not of fundamental importance, but still contributed to a significant weakening of its assertive nature. All this caused discontent not only in the camp of the left, but even in the circles of the ruling party. There was a famous phrase of a democratic senator Reed of Missouri, which he said publicly: "Everything we do here is a hopeless farce"[18].

However, the significance of the law should not be underestimated. Its main merit was that it contributed to the preservation of political balance in the country, relative social peace. After all, those radical manifestations of discontent on the part of the working people were still not mass and did not find the support of the majority of wage workers, no matter how much the researchers of the Soviet period tried to prove it. Another merit of the law was the long-awaited prohibition of the overlapping directorate. And of course, the strongest component of the bill was the so-called "workers' articles", which not only declared that labor in principle could not be traded, but also for the first time created mechanisms, albeit insufficiently reliable, to comply with these norms.

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[11] Supra note 2. Vol. 51, p. 13667.
[12] Ibid. Vol. 51, p. 13668.
[13] The New York Times. July 9, 1914.
[14] Antitrust Laws with Amendments, 1890-1937. Wash., 1938, p. 25.
[15] Ibid. P. 26.
[16] Ibid. P. 31.
[17] *Gompers S.* Seventy Years of Life and Labor. N. Y., 1957. P. 299.
[18] Supra note 2. Vol. 1, p. 16161.

The second item in Wilson's antitrust program was the Federal Industrial Commission Bill. It was not Wilson's idea, or even his party's idea. This law was first intended by Louis Brandeis and George Rublee. The Federal Industrial Commission was conceived as a strong government body to regulate the economic processes in the country. It could issue orders to suspend or even ban the activities of individual corporations. Of course, such decisions could still be challenged in court, and this was the right thing to do. But still, the commission had too broad powers in the sphere of regulating economic life by the standards of that time.

When the bill was considered in the House of Representatives, it changed little, but when it was discussed in the Senate, it began to acquire a huge number of amendments. As a result, the commission's powers have significantly narrowed. Now it was only supposed to collect and publish information about the illegal activities of corporations. It could also provide this information to the Attorney General. On behalf of the President or Congress, the commission could investigate the activities of corporations that violated antitrust laws, and submit its results to these bodies. All these provisions were declared in Article 6 of the law, which, without exaggeration, can be considered the key article of the document.

The final decision in all cases was made by the judicial authorities, from the district Court to the US Supreme Court. Such an optimal solution from the today's perspective caused serious dissatisfaction in the left-wing political forces and among the trade unions. The reason for this discontent was not only the distrust of the judiciary, but also the unwillingness of trade unions to seek justice in an open competitive process — it was much preferable for them to exert pressure on members of the state commission who were close to them in their views and spirit.

No less dissatisfaction was caused by Article 5, to which the senators adopted an amendment on the need for broad and thorough judicial supervision of the activities of the Federal Industrial Commission. This amendment, of course, was the result of lobbying by the business community, which influence in the Senate was quite high.

Opponents of the final version of the law argued that in this way the judicial authorities were placed above the law, as they were able, using procedural tricks, to reduce the entire value of the law to zero[19]. It seems to be an exaggeration. Once again, from today's perspective, the priority of the decisions of the judicial authorities in relation to any other authorities is normal. Another thing is that the procedural aspects do often prevail, but not over the law as a whole, but over the substantive law. As for the political critics of the Federal Industrial Commission bill, most of them did not so much criticize the specific provisions of the law, as they could not forgive Wilson for the phrase in which he made it clear that he would like to see an "adviser and friend" of entrepreneurs in the established commission[20]. So it's hard to agree with mister Arthur Link on this.

The third item in Wilson's antitrust program was the Rayburn Bill. It was more narrowly focused than the previous two, and intended to give the Interstate Commerce Commission the right to control the financial operations of the railways. It was approved by the House of Representatives, but the senators, among whom there were many outspoken and hidden lobbyists, had a mixed reaction. Therefore, the Senate took advantage of the war in Europe that began in the summer of 1914 and did not consider this bill, postponing it until better days. The better days, as it happens, never came.

Thus, Wilson's antitrust program was implemented only basically. However, this was quite consistent with Wilson's ideas about the need for cooperation between power and capital, but it disappointed many of his now former supporters from the camp of the left. At the same time, the President has significantly strengthened his position in business circles. Big capital realized that it was wrong to fear Wilson's radical plans. The President was able to pursue a policy aimed at protecting their interests and at the same time easing the discontent of the general population.

The main task of the democratic administration was to make serious concessions to the left, but at the same time to try not to go beyond the Sherman Act adopted twenty-three years ago. It was impossible to achieve a perfect compromise, especially in such an area, so someone had to give in. In this case, the left had to give in, but not all of them immediately realized this. Therefore, the antitrust legislation can be considered the least successful of all the compromises reached by Wilson in those years.

Researchers name various reasons for the evolution of antitrust legislation in the process of its development and adoption. For example, Arthur Link believed that "the weakening of the antitrust government program was the first sign of an increased reaction that, since 1914, has increasingly influenced the President and the government."[21]

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[19] Supra note 3. P. 74.

[20] Ibid.

[21] Ibid. P. 75.

This seemed to be the case. Moreover, with each passing month, the monopolists had more and more levers of pressure on the government. In 1914, signs of an economic crisis began to be evident — unemployment increased, the level of production fell, and the number of bankruptcies increased compared to the previous year. The opposition, of course, blamed the government and the new tariffs for everything, and at any moment the oligarchs could join these voices, creating the mood they needed in society together with the Republicans. In these circumstances, Wilson decided not to aggravate relations, and if possible to negotiate with the oligarchs, sacrificing the radical norms of antitrust laws. As a result, the Clayton and Federal Industrial Commission laws were not so radical, but they also contributed to defusing the rather tense situation in relations between workers and employers.

Therefore, the behavior of Wilson and his administration in the current conditions was quite predictable, and the point here was not at all in the reactionary amendments of the senators, introduced allegedly against the will of the President. It is well known how Wilson was able to influence the legislative process, at least in the first years of his tenure. Any decision undesirable to the administration simply could not be made until the opposition began to prevail in the legislature in 1919.

In this regard, the president's letter to the leader of the Democratic faction of the lower house of Congress, Underwood, sent before the closing of the 1914 session, on the eve of the midterm elections, is indicative. In the letter, Wilson expressed satisfaction with the two years of work of the Congress, and most importantly, the results of this work. Customs legislation was reformed, the Federal Reserve System was created, and antitrust laws were adopted. In this regard, the President declared the program of the "new democracy" completed. "It was a great program" — he wrote — "and I feel the deepest satisfaction in remembering how effectively it was conducted[22]."

Wilson stressed that all the laws adopted were based on the intention to eliminate private control and ensure freedom of enterprise. All of this was directly related to the highest goal of the American state, the president argued, namely, the assertion of individual freedom and initiative "against any kind of private domination[23]." Wilson's believed the only drawback to be that the agricultural producers never received the Farm Credit Act promised by the Democrats during the 1912 election campaign. However, the existence of a well-functioning banking system, which the Federal Reserve Act should have contributed a lot to, could, in the president's opinion, correct the situation[24].

The New York Times published this letter on October 19, two weeks before the congressional elections. The campaign part of the letter, in which Wilson calls his party "a model of strength and cohesion" that is "completely free from the tangled alliances that made the Republican Party absolutely unable to carry out any reforms even before its split,"[25] drew particular attention.

Of course, Wilson was not completely honest here. He himself made alliances with the business community, only these alliances were not as public as those of the Republicans. Moreover, Wilson managed to convince the monopolists of the need for change in order to preserve social peace and stability in the country. True, they themselves were beginning to understand this, but they did not have a single position on the question of what should be done. The democratic administration managed to walk on a knife edge and create rules of the game, though not perfect, but acceptable to the majority of society. And in order for them to be such for the general population, a fine and well-coordinated work of the mass media was necessary, which in such conditions actually turned into mass propaganda media. Wilson was one of the first, if not the first, to understand this among politicians of this level.

References

1. Antitrust Laws with Amendments, 1890–1937. Wash., 1938.
2. Baker, R. S. Woodrow Wilson. Life and Letters. Vol. 1–6. Garden City, 1927.
3. Congressional Record. 64th Congress.
4. Gompers, S. Seventy Years of Life and Labor. N. Y., 1957.
5. Link, A. Woodrow Wilson and the Progressive Era (1910–1917). N. Y., 1963.
6. National Party Platforms. Urbana, 1956.
7. The New York Times.
8. The Papers of Woodrow Wilson. Vol. 1–2. Princeton, 1966.

[22] Supra note 7. Vol. 1, p. 187.
[23] Ibid. Vol. 1, p. 190.
[24] Ibid. Vol. 1, p. 192.
[25] Ibid. Vol. 1, p. 194.

Overview of the online conference "Second Baskin Readings. Changes in Law: Innovation and Continuity" (Saint Petersburg, October 14, 2020)

Conference "Second Baskin Readings. Changes in Law: Innovation and Continuity" was held on October 14, 2020 on the Zoom platform by the North-West Institute of Management of the RANEPA with the organizational assistance of the journal "Theoretical and Applied Law" and the Anatoly F. Koni Foundation for the Support and Development of the Historical Heritage. The conference was attended by prominent Russian and foreign legal scholars.

The scientific discussion at the conference was organized within three panels: "Theoretical problems of legal changes" (moderator — Andrey V. Polyakov), "The Constitution of the Russian Federation: the Dialectic of Stability and Development" (moderator — Sergey L. Sergevnin) and "Civil Law reform at the present stage" (moderator — Evgeny B. Khokhlov). We present to the readers an overview of the speakers' presentation at the conference, during which topical issues related to the need for a theoretical, doctrinal rethinking of the changes taking place in the law and the reflection of these changes in the adopted normative acts, including the adoption of the so-called law on laws[1], were brought up.

1. Theoretical problems of legal changes

Andrey V. Polyakov[2]. In order to talk about the changes in law, it is necessary to understand what law is. At the same time, it is clear that depending on what is considered law, will also depend the possibility of defining the concept and criteria of what can be considered changes in law. Thus, looking at law from a narrow perspective, when it is identified with legislation, will narrow down the possible answers to questions about what constitutes its change. On the other hand, if the law is understood more broadly, then we are expanding the horizons of our ideas about this problem.

Personally, I am interested in the degree of changes in law or the variability of law in this area. The fact that the law is changeable is quite obvious. And sometimes, if we take, for example, the aspect of legislation, it changes, quite radically. But does this mean that these changes occur solely for rational reasons and that everything related to changes in law can be rationally calculated? Or, on the contrary, development in law, change, is a purely spontaneous development that is not subject to rational control and is carried out by adapting something to something, for example, the social mentality to some external social conditions. These are all problems that require their own understanding and response.

In my opinion, it is obvious that if there is variability in law, if the law changes, then there must be something unchangeable, permanent, fundamental in it, that is, some basis that can serve as a foundation for these changes, explain these changes and, perhaps, even in some sense predict these changes or even formulate some normative, appropriate changes in the law, that is, determine the criteria that the law must meet, if we consider its normative, even legislative aspect.

In this context, of course, I imagine the immensity of this task, because for centuries, if not millennia, this question has been tried to be solved within various scientific and non-scientific philosophical approaches. And up to the present time, the conflict, in a broad sense, of approaches, for example, positivism, jus naturalism, historical and other schools, including modern theories, persists in relation to this issue. From these positions, one can compare, for example, the ideas of scientists of the St. Petersburg scientific school, in particular Leon Petrazycki, and the positions of other schools that are of no less interest, for example, the ideas of the Moscow school of Pavel Ivanovich Novgorodtsev. It seems to me that the ideas that were formulated within these approaches in general have not lost their significance today. Moreover, since L. Petrazycki was no stranger to a very peculiar understanding of natural law and even considered himself one of the founders of its revival, his ideas still have their own scientific potential within the theory of the revival of natural law.

[1] A video recording of the conference is also available at the following links: https://www.youtube.com/watch?v=IXTAfeOgBSo; https://www.youtube.com/watch?v=XA4bs0DGJf8; https://www.youtube.com/watch?v=DqUECOduKgw.

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In the very understanding of L. Petrazycki of law and the changes that occur in it, one can notice some ambiguity, since, as he said, law develops spontaneously, that this is some kind of unconscious ingenious adaptation of the people's mentality to the ideals of good and the public welfare. And, according to Petrazycki, it turns out that sooner or later the development of human society will come to a state in which the ideal of the common good in the form of common love will prevail. In the politics of law, he put forward this ideal of love as the crown of social development. At the same time, it is interesting that Petrazycki did not associate the ideal of love with law, that is, for him love meant the triumph of love, but not of law and morality, that is, love overcomes law and morality, which become unnecessary if the ideal of love triumphs. At the same time, the very concept of love was quite mysterious in Petrazycki's works: by it he understood the highest beauty of the soul, and it is obvious that this ideal of love by Petrazycki is rather an aesthetic perception of this phenomenon than an ethics of duty.

Leon Petrazycki, as it seems to me, had been an opponent of the Kantian approach for all his adult life. And if we consider this ideal of love, put forward by him, then, strictly speaking, as an ideal, it, in my opinion, does not have the necessary features, it does not correspond to a certain main regulatory rule, on the basis of which one can build relationships with other people. If we try to rethink the ideal of love in this context, then its well-known formulation "thou shalt love thy neighbour as thyself!" is a kind of rule based on the recognition of the communicative equality of subjects. In this sense, it is not sexual love, which requires the exclusivity of some object chosen as the object of love, but love, which requires equal treatment of all, and this is inevitably based on the recognition of all subjects as objects of such love. From this point of view, love is an equal treatment of all, giving due to all neighbors, by which we can understand, of course, different subjects, but in general, it is undoubtedly the recognition of everyone as a person, which, accordingly, on the basis of the premise of communicative equality, means the recognition of their legal personality.

By the way, this kind of recognition of the other as an object of due respect and, in this sense, love means not only imperative emotions in relation to such subjects, but also attributive ones. This is what we can consider law under Petrazycki. From my point of view, it is this recognition of another subject that allows us to consider such other subjects as rightholders, personable entities, and, accordingly, to conclude that the reciprocity of recognition is the basis of this kind of relationship. If one interprets Petrazycki's approach in this way, one can find its similarity to the ideas of P. I. Novgorodtsev, who formulated the ideal of an autonomous moral person with natural rights, freedom and equality with other subjects, which essentially coincides with the idea of recognizing the legal personality of another, and one can say that his ideas also implement the principle of mutual recognition. In this context, we see the convergence of the ideas of Petrazycki and Novgorodtsev. The same principle of mutual recognition as the basis for understanding the law can be found in the students of Petrazycki, for example, in Pitirim Sorokin or John Finnis.

Thus, in my opinion, the principle of mutual recognition can and should be considered as the basis of law as such and the existence of the legal in law.

Vladislav V. Denisenko[3]. If we consider criteria for such phenomena as changes in law and what those changes should be in present, then, in my opinion, the so-called theory of citizenship in the context of foreign philosophy of law, to which authors such as Will Kymlicka and others related the issues of public communication, is of special interest. In this aspect, we should recall the ideas of the libertarian theory of law, which stated that the development of law is an increase or even the mathematics of freedom. A couple of years ago, a Canadian scientist Bjarne Melkevik criticized in his works the ideas of Giorgio Agamben about the potential threat of a legal hell. Meanwhile, we are now seeing the emergence of a certain threat to citizenship and the ideas of the so-called open society. Thus, the modern reality to some extent embodied the ideas and futuristic forecasts in the spirit of Karl Schmidt, when the rights of citizens are not canceled, but suspended for, in general, an indefinite time.

It can be noted that, as a lot of classic authors — Rawls, Habermas, etc. — wrote, if the modernization of society and the legal system during the late modernism or post-modernism followed the path of development of civic consciousness and greater freedom, than at the moment, which is accompanied by elements of emergency and biopolitics[4], in the sense that the question of recognition of rights is a

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[4] We are talking about the concept of biopolitics, which was developed in the works of M. Foucault and J. Agamben (see: *Foucault M.* The Will to Truth: Beyond Knowledge, Power, and Sexuality [Volya k istine: po tu storonu znaniya. vlasti i seksualnosti]. Moscow : Kastal, 1996 (in rus); Agamben, G. Homo Sacer: Sovereign Power and Bare Life. Stanford : Stanford University Press, 1995). — ed. note

kind of fiction, we can talk about the emergence of such phenomena as “democracy without the people”. Under these conditions, the idea of a fortress state, classical sovereignty, and the formation of a certain biopolitical threat to the theory of citizenship arises again, as Kissinger wrote.

Thus, the society is currently at a crossroad, we can go along the path of so-called “paper equality”, where rights and freedoms have a formal consolidation, but do not receive a real embodiment in life, or the path of implementing the concept of so-called random or aleatory democracy using digital technologies. For example, in France, back in 2016, the law on the digital republic was adopted, which reflects the concept of continuous democracy.

Yuri Yu. Vetyutnev[5]. Discussion of the problems and issues of changing the law, changes in the law is not possible without taking into account the ongoing socio-cultural changes.

To begin with, I would like to give an example. Just now, a democratic plot is unfolding in my hometown, Volgograd. The plot is quite grotesque and prolonged, it is connected with the local referendum on changing the time zone. Some time ago, a referendum was held, that is, a purely democratic procedure as part of direct democracy. People were given the opportunity to decide which time zone to live in: Moscow time or local time. The majority of the population voted to live according to local time, as it is more appropriate to the geographical coordinates of our city and the physiological needs of the population. The decision came into force, the city switched to local time. Almost immediately, after the decision was made, the citizens’ dissatisfaction with the decision began, which was expressed, interestingly, not only by those who voted against this decision, but also by many of those who voted for it. There was a campaign for a year or two, and this year a new vote was held on the question of returning to Moscow time, for which the majority voted. Simultaneously, a campaign was initiated to return to local time even before the vote took place and the decision was made to return to Moscow time under the second procedure. That is, the city, without waiting for the transition back to Moscow time, based on the decision taken on the results of the second vote, while in the local time mode, fights for the vote to be announced on the transition back to local time.

This example does not discredit the idea of democracy in general and direct democracy in particular, but, in my opinion, shows certain limitations that exist for the possibility of implementing procedural forms of democracy, namely, it demonstrates that the democratic form itself in no way guarantees the legitimation of the decision taken. For democracy to truly be this effective tool of legitimation, something else is needed. Democracy is not magic, it is not a ritual that is sufficient for the decision to be valid, it is not enough just to perform a certain set of actions, to come to the polling station, to cast a ballot, in order to achieve the desired legal and socio-cultural result. No, it is necessary to add some more value component to this action, for example, so that people who expressed their will through voting appreciated their own will and were ready to cultivate this will for a long time. If popular opinion changes so rapidly that the relevant legal acts reflecting earlier decisions do not even have time to enter into legal force, then it turns out that democracy, at least, does not perform its legitimizing functions, that is, it performs its will-forming function, its formative function, but does not perform the function of recognition, because, as we see, the decision is made, but is not recognized, even by those who made it, because those who made the decision have no value of their own will.

Thus, it is necessary to investigate the value component of legal changes, which, in my opinion, is determined by two main parameters that should be taken into account in order to control this aspect of any changes. The first is the deficiency aspect. We can find it as a hypothesis in the works of the world’s leading expert on the problem of values, Indu Hart, who conducts world-wide sociological research on values. He also comes to the conclusion that, as a general rule, values are what is missing. Not every social phenomenon can acquire a value character, but only that which has objective utility and significance, and, importantly, that, which is perceived as limited in its scope, that, which causes the effect of need, that is, deficiency. The second aspect necessary for the formation of value, — is reflection, that is, a certain level of theoretical generalization, and in this sense, of course, any value is the product of interaction of a sufficiently broad social basis with the obligatory participation of the intellectual elite, which can establish, reflect, describe and conceptualize this or that objectively existing need, that is, give an adequate verbal designation that could then be used in official documents and become the subject of broad public awareness and recognition. In this context, I believe that today, at least, the Russian legal system is facing certain difficulties of a kind of value jam. The value basis, which is assumed to be present in the Russian legal system and is settled at the level of legislation, is a fairly broad

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value basis, represented by a large set of different benefits, values enshrined in the constitution, generally recognized in international documents, starting with freedom, justice and equality, the three basic values offered by the libertarian concept of law, and supplemented by other values, such as social solidarity, which received exactly this formulation in the new version of the constitution, and also the values of order, unity, and peace.

So, this value basis is to some extent eroded, emasculated, because, in fact, the element of deficiency is lost, although it is clear that society as a whole is never satisfied fully by the level of freedom that it has, and the level of justice that it has achieved under this or that social structure, but the fact is that to realize, to settle the deficit of a particular good and, accordingly, its value weight can only be in the presence of such a value, instrumental or secondary, as openness, that is, any changes involve some comparative aspect. Cognition comes through comparison. In order for us to come to a conclusion about what needs to be changed and what needs to be saved, we need to compare the different options. These may be variants presented in different national cultures, or they may be variants presented in different models and concepts within the same national culture. In my opinion, it is this value that is in an objective deficit today, namely, the openness of the worldview and the openness of communication, namely in the legal environment, in the legal sphere.

On the one hand, the functional closeness of the legal community, that is, a professional legal corporation, is completely inevitable and appropriate, because this secrecy keeps the entropy from various unnecessary outside influences, from extra-legal effects and allows to keep the same dogma, a legal doctrine that is fairly conservative and characterizes legal science and legal practice as more slowly varying in comparison with the surrounding reality. On the other hand, the same closeness also renders a disservice to the legal system and the legal community, because there is a moment of value stagnation, and because of this, it was very difficult, for example, for jurists to understand the current situation from a value point of view. If we look at what has been happening with the legal system today, over the past year, it looks like a value revolution. With a cursory glance at what is happening, you can see that a single value, and not the most important value, which has never been evaluated as a leading legal value — health — actually crushes all other values.

For example, in our state, at a certain period of time, a good half of all constitutional human rights and freedoms were restricted, and every human right enshrined in the constitution or any other text protects a certain value or group of values. So, it turned out that health is at the official level, at the level of rights in state policy is more important than all these values, more important than freedom, justice, equality. But the professional legal community has not formed or expressed its opinion on this issue. We see that neither philosophy nor the theory of law has yet analyzed all these events associated with pandemic restrictions, with a clear change in the value configuration of the legal system. This insensitivity to rapid social changes, I believe, is a value defect of the legal system and gives this legal system a certain insecurity. It turns out that with visible conservatism, it is not so difficult to break the existing legal guarantees, because the value core at the level of philosophical concepts is one thing, and the value instruments at the level of specific legal decisions is completely different, and these instruments are not provided in any way doctrinally. They have a purely situational business character, which leads to a divergence, a split between two value models, official and generally accepted at the level of philosophical thinking.

From my point of view, greater openness is needed both at the procedural and communicative levels, for example, as part of mass, public discussions on the legality of the measures taken from a value point of view, as well as on the formal, legal correctness of these restrictions. It seems to me that the leading task of the scientific community in this process, including our theoretical and legal community, is precisely a communicative task, that is, the creation of communication platforms and the discussion of emerging problems not in the mode of emergency and assault, some one-time actions, but in a permanent mode. Unfortunately, until such an infrastructure is created, we do not have the ability to quickly respond to current events, as, perhaps, it would be worth doing. Modern technological instruments can help solve this problem. If we manage to set such a task and solve the problem of operational theoretical and philosophical support of current events on the legal agenda, this in itself will be a positive change for our situation and for the common cause as well.

Andrey N. Medushevskiy[6]. The question of changes in law is one of the fundamental topics in the philosophy of law and the theory of constitutionalism. As Georg Jellinek wrote, the history of law is the history of revolutions in law. He separated such concepts as change in law and transformation of law

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for a reason. The latter was understood as a change in the content of legal norms in a changing social context. This division of concepts, in my opinion, is important in order to correlate legal changes and actually social, political changes and to be able to talk about the dynamics in the development of law. In this aspect, I believe, the balance of legal and political factors is important to ensure the legitimacy of changes. Constitutional amendments are one of the tools for maintaining legitimacy.

So I would like to raise a number of questions. The first is the theory of legitimacy in the context of constitutionalism. I understand legitimacy as the consent of the governed, based on the belief that this power is just. It is clear that the basis of legitimacy in different epochs may be completely different ideas that define this belief. But the theory of legitimacy must relate these ideas to law and constitutionalism. The classical theory of legitimacy, if we turn to Max Weber, did not directly raise these questions, because for him legitimacy was the subject of the sociology of religion, and he mainly wrote about the motivation of social behavior, referring to the traditional rational charismatic legitimacy, and paid less attention to the legal aspects. It is clear that in modern situation, when all states are law-bound, or at least declare that they are, that is, law is the fundamental principle of the legitimacy of power, the question of the relationship between legitimacy and constitutionalism, legitimacy and legality, arises in a completely different way. Therefore, it is important to supplement the theory of legitimacy with a number of new aspects, such as positive and negative legitimacy in relation to the adoption of values, substantive and instrumental legitimacy, legal and extra-legal legitimacy, stable and unstable legitimacy.

In general, we can say that legitimacy acts as a dynamic process of reproducing the public's trust in the government, based on a particular perception of constitutional values, principles and norms. And this legitimacy is largely determined by the interaction of public expectations and all the actors of constitutional reform. From this point of view, the question of what is the contribution of the constitutional amendments of 2020 as an element of the justification of the legitimacy of the government becomes relevant. To answer this question, it is necessary to consider such aspects as the content and structure of the legitimacy of the Russian government in the context of the amendments. In this direction, in my opinion, it is necessary to distinguish three areas of analysis.

First, the revision of the ratio of positive and negative legitimacy in the categories of space and time and the meaning of existence, which means a change in the balance of constitutional and international law; the inclusion in the constitution of historical legitimacy, the parameters of identity as the basis of constitutional development and what is called the nationalization of elites. Secondly, it is a revision of the ratio of substantive and instrumental legitimacy, in this regard, the interpretation of the so-called social contract is important, the transition from its liberal interpretation to an interpretation based on the ideology of solidarism, and the use of a neoconservative type of legitimization of power, as well as a number of instrumental parameters, guarantees of certain social obligations of the state, the justification of social paternalism and the formation of institutions that can give a certain mobilization effect. Third, it is a revision of the ratio of the levels of legitimacy in a federal state, namely, national, regional and local, that is, the institution of self-government, which are united by the concept of a system of public power. Within this new concept, which is gaining constitutional consolidation, there is an idea of the functional unity of all levels and branches of government, both horizontally and vertically, resembling the neo-imperial structures of statehood. In general, of course, we are talking about a significant fundamental change in the legitimizing foundations of Russian political power.

The next question from the standpoint of the theory of legitimacy, which is related to the amendments, is the ratio of legitimate goals and means of transformation of public power. In this respect, it is important that between them there is a certain contradiction: as a legitimate purposes increasing the flexibility of power and the expansion of parliamentarism that was really settled by a number of amendments in relation to the status of legislative, executive and judicial authorities was declared, but it is obvious that all three branches of government became more limited in relation to presidential power, which is their focus, it executes the function of a mediator and even a controller for them. In general, we can say that it is a further revision of the model of a mixed form of government. The key point in this issue is the formal endowment of the head of state with the functions of leading the government. In fact, we are moving from the dualistic form that was declared initially to the concept of a quasi-presidential regime with a very centralized nature of the powers of the head of state.

In this regard, it is important to consider another issue concerning the balance of the constitutional and metaconstitutional foundations of the legitimacy of power. Under the constitutional foundation, we understand the legally settled powers of the head of state, under the metaconstitutional — those that rely on the role of the president as a symbolic figure in the public space. It can be stated that the amendments significantly altered the balance of constitutional and metaconstitutional authority, because

the amendments reinforced a new symbolic status of the President as the guarantor of civil peace and accord in the country, which implies a series of consequences, namely, the extension of immunity of a head of state, the change of the ratio between legal and personalist legitimacy in favor of the latter, and thus there are prospects for an unlimited term of office of the incumbent leader. All this, of course, indicates a significant change in the structure of the legitimacy of power that has existed up to now.

The next aspect of this problem that I would like to address is related to what can be defined as the institutional or procedural legitimacy of power. Currently, there is an active dispute between the two polar points of view. The developers of the amendments and their supporters say that these amendments are essentially technical, they have not changed anything, since they do not affect the fundamental chapters of the constitution, namely the provisions of the 1st, 2nd and 9th chapters. Their opponents, on the contrary, say that this is a constitutional coup, because the fundamental values, principles and norms of the constitution have been changed. I believe that, paradoxically, they both are correct. The developers are teetering on the edge of constitutionality: while formally remaining faithful to the fundamental principles, they practically introduce a new legitimizing concept of power. This is achieved through the use of the "amendment-repeal" tool, when the continuity of constitutionalism is simultaneously broken by the adoption of an amendment law, but immediately restored by the law itself. In fact, the law itself contains a mechanism for legitimizing amendments: an appeal to the Constitutional Court, which gets the right to evaluate these amendments on the basis of the law on amendments itself, that is, there is such a kind of autolegitimation of power.

In this situation, there are three key points of contention. Firstly, linking the adoption of the law on amendments with the President's appeal to the Constitutional Court, secondly, the extremely broad interpretation of the issue by the Constitutional Court itself, which granted legislators huge delegated powers to change the articles of the Constitution, and thirdly, it is the creation of the institution of all-Russian vote, which, strictly speaking, has nothing to do with the amendments, but rather acts as an additional institution of political legitimization of power. This problem of tension over constitutional norms was resolved at the political level, namely by the unanimous support of the law on amendments and the method of its adoption by all branches of government, the State Duma, the Federation Council, the Constitutional Court, regional legislatures, and ultimately by a plebiscite. It is clear that this whole process of adopting amendments was accompanied by a rather skilful use of political technologies, which proved effective in the conditions of the information monopoly of the government. As a result, the combined legitimacy of the amendments was formed as a synthesis of legal, institutional and socio-political arguments.

If we compare the current legitimizing form of power in its new form with what was previously in the constitution, then, in my opinion, this formula looks contradictory, since it has a dual nature. It combines the constitutional-democratic basis of the political system and at the same time connects it with the non-legal extra-constitutional parameters of legitimation, such as culture, history, nation, solidarity, the special symbolic nature of public power, etc. This achieves an important result: within this formula, the sovereign, that is, the people, democratically delegates its power to the head of state, who thereby performs the function of its permanent and sole representative. This formula requires comprehension from a theoretical point of view and shows how it is possible to change the law by its directional interpretation and the directional inclusion of amendments.

In conclusion, we can raise the question of what positive and negative aspects has this reform brought. If we talk about the positive contribution of the reform, I would define it as overcoming the growing contradiction between the constitutional form and the real content of the political regime, which I interpret as constitutional re-traditionalization, which in principle corresponds to the third phase of the great post-Soviet constitutional cycle. Yes, this is the basis of stability, but this stability is achieved by resuscitating the more traditional content of constitutional provisions. If we talk about the shortcomings or negative aspects of the reform process, I would point out here the internal contradictions of the legitimizing formula, composed of different legitimizing principles, that is, constitutional and meta-constitutional, as well as the unresolved issue of the transfer of power, which was raised during these reforms, but actually postponed to the future, which, of course, lays down possible contradictions and a potential split of elite groups for a certain time.

What is the result of the amendments in terms of legitimation of the Russian political power? I believe that the most accurate definition of the current political regime is the concept of constitutional authoritarianism, some also use the concept of constitutional dictatorship. If we approach this definition from the point of view of legitimacy, then this is a system of government in which, on the basis of the constitution, with the consent of society, confirmed by a plebiscite, and with the unanimous approval of all branches of government, the institution of the head of state, personified in the figure of the current

leader, is established with almost unlimited power. The stability of the legitimizing formula and the power itself now depends mainly on one factor — the success of this leader.

In general, observations on modern Russian constitutional amendments in the context of legitimacy allow us to draw a number of general conclusions. One of them is that the theory of constitutional cycles, which examines the various stages of the relationship between positive law and the legal consciousness of society, works and shows us how, decades after the adoption of the constitution, we largely restore the ideas that existed before its adoption or, in any case, at the initial stage of constitutional reforms. It is important to combine the analysis of constitutional changes and constitutional transformations. We can talk about the correlation between formal legal and political analysis of these processes. And the third thing that is also important for the theory of legal transformations is the understanding of the process of legal construction of a new reality using such a tool as constitutional reform[7].

Iya I. Osvetimskaya[8]. I would like to discuss progress or regress in law. On the one hand, a cursory historical view over the development of law allows us to talk about its movement towards improvement and humanism, because, first, in the history of the development of law, there is a gradual transition from prohibitive to permissive norms, to a corresponding emphasis on permission and subjective rights. Second, the private autonomy is becoming more and more stable. It would seem that the interests of the individual are increasingly taken into account, and the legal equality of the individual is gradually being consolidated. Third, the state's activities are subject to increasing regulation and control by society in the historical perspective, compared to the previous stages of society's development. And fourth, humanistic principles are clearly manifested in the improvement of the legal regulation of public relations.

However, all that has been said does not yet give grounds to state what direction this process is subject to — progress, regress or stagnation. In order to determine this direction, appropriate criteria are needed. I would like to refer to the criteria that Pitirim A. Sorokin once identified. He said that we must first decide by what objective measures we can determine whether the legal state of humanity is approaching or moving away from the ideal state with the course of history. In his work, which he devoted to the study of the legal progress of mankind and the study of the main rules of development of law, P. Sorokin wrote that the criteria of law progress and criteria for its measurements are based on certain postulates, such as the free personal development, humanization of public life. He says that if with the progressive course of history law liberates the individual more and more, enhances freedom and basic rights and also values the personal development, this is the first proof of legal progress of mankind. He also highlights a lot of rules that, in his opinion, confirm the progressive development of law, but it is also interesting what limits the law should reach, what it should come to. P. Sorokin compares law to the role of the animal handler, believing that law will teach people to live in society, and when a superhuman is formed, for which no compulsion will be required in order to build their relationships with other people, the need for law will become irrelevant.

In my opinion, this is too lofty an idea of society, and in the earthly life it is impossible to achieve this state of a superhuman, so the goal of law, rather, is to ensure the freedom of the individual from the arbitrariness of power. And to my surprise, I found that S. S. Alekseev wrote about this quite accurately. In particular, he said that "from the socio-political and humanitarian side, legal progress consists in such a development of law in world history, in which with its help universal, democratic values are established, the principles of legality that resist arbitrariness and lawlessness, and a democratic civil society are formed."[9]. He developed the idea of social progress as a legal progress, believing that without law there is no social development.

At the same time, S. S. Alekseev believed that the progress of law is measured by the natural-legal scale, that is, the implementation of human and civil rights, and the achievement of the social-legal ideal, and on the way to this, the main point of social progress is the rule of law. He distinguished four basic stages of development of law: the rule of force, the fist law, the rule of power, the rule of civil society. Then he concretized these stages, combining the rule of force and the fist law, singling out another stage — the rule of the state between the ruleof power and the rule of civil society, and called the last stage of development the humanistic law. The regulation of social relations at this stage is based on the idea of natural undeniable human rights, they are the criteria for the legality of the legitimacy of

[7] A more detailed presentation of the author's views is contained in the article "2020 Constitutional Reform as the Problem of Legitimacy Theory", published on the pages of this issue.

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[9] *Alekseyev S. S.* Theory of law [Teoriya prava] Moscow : BEK Publishing House, 1995. 320 p. (in rus)

social norms adopted by the state. That is, the humanistic ideals and principles of the rule of law should determine the vector of social development, the organization of society. And here, I believe, the idea of revived natural law plays a dominant role.

Taking into account all these criteria, it is interesting to analyze how the 2020 amendments to the Constitution meet these principles. I will allow myself to refer to the research conducted by A. N. Medushevskiy in his article "Rebirth of the Empire? Russian Constitutional Reform 2020"[10], where he argues that the amendments create a hyper-centralized system, where the public interest prevails over any private interest, all levels of the managerial hierarchy, institutions of power are subordinated to the maintenance of functional unity, embodied and expressed in the institution of the head of state, and this type of political system actualizes a number of stable historical stereotypes of public perception, such as: passivity of society, weakness of parliamentarism, the predominance of the state and paternalistic expectations, the dependence of the judicial system and the sustainability of the commitment to a strong individual standing above the law and institutions. And if we correlate this with the criteria that were highlighted by P. Sorokin and S. S. Alekseev, it seems to me that there are sufficient grounds to assume that such changes in law do not correspond to the ideas of these scholars about progress, but rather indicate the opposite, a certain regression in the development of both law and society.

Nikolay V. Razuvaev[11]. Despite the fact that the problem of legal changes, transformations, and the problem of the evolution of law, apparently, is more interesting for historians than for legal theorists and philosophers of law, given the importance of the issues at hand, we all enter this field, and many of us share common methodological and paradigm positions. Many scholars, although with certain reservations, proceed from the post-classical legal understanding, which, as I. L. Chestnov wrote, is characterized by two basic ideas — the idea of relativism and the idea of the construction of legal phenomena and legal reality.

Within the idea of relativism, any changes and transformations are possible only on the basis of the existance of certain invariable values of invariant concepts that are generally significant for all participants and subjects of legal communication, including for future generations, which make up the semantic core of phenomena and allow us to assess the degree of transformational activity and generally talk about transformation as such. This dialectical approach, which reveals the presence of both changeable and unchangeable in any legal phenomenon, in my opinion, should be fundamental when we talk about changes in law and the dynamics of legal reality.

But as for the constructivist paradigm, the question arises: is it possible to reconcile the construction of legal reality with its historical dynamics and changes? Such attempts are being made, and such approaches exist. I myself have been trying for quite a long time to reconcile these two ideas: the idea of construction and the idea of evolution, the evolutionary dynamics of law. It seems to me that this can be done if we consider the construction of legal reality as a semiotic situation, as the dynamics of sign vehicles of construction. We can speak of signs as vehicles of language, that is, in the specific sense in which this term is used by linguists: vehicles of language, phonemes, morphemes, words, grammatical constructions.

When applying them, we have the problem of transformational grammars, as Noam Chomsky and Steven Pinker wrote, namely, that there are deep-level grammars that are prerequisites for language transformations as such at the surface level. This idea can also be applied to law. There is a very interesting book by Yu. Vedeneev: "Grammar of Law and Order"[12], whose ideas I share. Indeed, the generative grammar of law, which ensures the coherence of legal reality, acts in the diachronic dimension as a transformational grammar that determines the evolution of legal phenomena. At the same time, the dynamics are manifested at the level of specific legal signs, not just linguistic signs.

It is in this perspective that there is a dispute about what is primarily subjective rights or legal norms. It seems to me that the idea of legal evolution is manifested in the gradual acquisition by signs of properties of general significance: originally from the concrete subjective rights and duties attached to particular legal situations and growing out of these legal situations, and only then, on the basis of these

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[10] *Medushevskiy A. N.* Rebirth of the Empire? Russian Constitutional Reform 2020 [Vozrozhdenie Imperii? Rossiiskaya konstitutsionnaya reforma 2020 goda]. [Electronic resource] URL: https://publications.hse.ru/articles/372430522 (date of reference: 03.12.2020).

[11] Doctor of Laws, Professor, Head of the Department of Civil and Labor Law, Faculty of Law, North-West Institute of Management, RANEPA, Editor-in-Chief of the journal "Theoretical and Applied Law", Saint Petersburg, Russian Federation.

[12] See: *Vedeneev Yu. A.* A. Grammar of law and order : monograph [Grammatika pravoporyadka : monografiya]. Moscow : "Prospekt", 2018. (in rus)

subjective rights by their generalizations, to giving them general significance by various means, through doctrine, through judicial decisions. By the way, this can be perfectly demonstrated on historical material. As a result, norms are formed and, accordingly, the modern legal order, which acquires a normative dimension, which allows us to contrast it and at the same time correlate it with such legal orders as Roman private law, where, after all, the normative change was not so significant and was associated more with specific legal situations, subjective rights.

And here arises the question: what allows individuals as holders of these subjective rights to avoid conflict? After all, if we say that there is no general rule on the basis of which we build our behavior, there are only specific subjective rights and people who are their holders, shouldn't the situation of "war of all against all" arise, the very fist law, the rule of force, about which S. S. Alekseev, Rudolf von Ihering, and other authors wrote? However, this view seems simplistic to me. Nevertheless, in every legal order, no matter how early in its evolution, there is this value idea of mutual recognition by subjects of each other as participants in legal communication. And this mutual recognition as the initial prerequisite of legal communication, the construction of legal reality in the process of communicative interaction of individuals allows us to avoid mutual conflict, the war of all against all, the fist law, etc.

But it is natural that a general harmony will never be achieved, which is why there are various mechanisms for resolving contradictions, including judicial ones, on the basis of which specific situations, subjective rights are generalized and ultimately given the property of general significance, fully embodied in the norms that arise at the subsequent stages of the evolution of legal communication.

Roman A. Romashov[13]. My presentation is devoted to the amendments to the Constitution of the Russian Federation. The first thing I would like to draw attention to is the change in the attitude to the constitution itself in the history of Russian political and legal science, and the second, in my opinion, important question is related to the legal technique of constitutional amendments, to what extent these changes are justified and innovative.

So, if we are talking about changes in the attitude to the constitution in the political and legal system of Russia, then we should distinguish three main stages: the attitude to the constitution in pre-constitutional history — in the Russian Empire, then — the period of attitude to the constitution in the conditions of the Soviet state and law, and finally — in the modern period. If we talk about the Russian Empire, the constitution for that period is an act of an extremist nature, the attitude to it, from the point of view of Tsar Alexander III — is an inscription on the project of Loris-Melikov[14]. In the Soviet period, the constitution is the Basic Law, equal in status to the Holy Scripture and in this respect it is unchangeable. If there is a global change in public relations, then the constitution changes. Changes to the text of the Basic Law begin when the Soviet state begins to experience a serious crisis. So, since 1988 serious changes have been, indeed, made to the Constitution. However, if we take the Soviet Constitutions themselves, they can be divided into two main groups: founding constitutions of the 1918 and 1924, which task was to ensure the emergence of state type of the USSR and the RSFSR, and two subsequent constitutions — they were milestones, the task of which was to justify the appropriate stage of building of communism: the Constitution of 1936, the Basic law of victorious socialism, and the Constitution of 1977 — of the Developed socialism. At the same time, within the Soviet constitutionalism and federalism, there was a clear constitutional tradition, when starting in 1924, the union autonomous republics adopted regional constitutions that clearly corresponded to the Constitution of the USSR.

If we talk about the modern Constitution, it, on the one hand, combines a founding nature, since it establishes a new state — the Russian Federation, which has declared itself the legal successor of the Soviet Union, and at the same time it is a milestone constitution, since it defines Russia as the next stage of a sole millennial Russian state, which in amendments to the Constitution is designated as the Russian Federation with a millennial history. In addition, if we talk about constitutional transformations, the real transformation is that regional constitutions are essentially independent, that is, they are not connected in any way with the Constitution of the federation. In particular, the Constitution of Tatarstan was adopted in 1992, almost a year before the adoption of the Federal Constitution, and has no direct connection with the latter.

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[14] "Thank God, this criminal and hasty step towards the Constitution was not taken, and the whole fantastical project was rejected in the Council of Ministers by a very small minority." cited by: Constitutional projects in Russia in XVIII-beginning. XX centuries [Konstitutsionnyye proyekty v Rossii XVIII — nach. XX vekov]. Institute of Russian History of the Russian Academy of Sciences, 2000. P. 70. (in rus) (editorial comment)

The Law on the Procedure for the Adoption and Entry into Force of Amendments to the Constitution of 1998[15] clearly regulates in Article 3 the requirements for proposals for amendments. Together with the draft law on the amendment to the Constitution of the Russian Federation, the justification for the need to adopt this amendment is presented, as well as a list of laws, federal laws, etc., the addition and adoption of which would require the adoption of such an amendment. Thus, the introduction of amendments to the Constitution must be justified at a certain legal and technical level.

If we consider the amendments to the Constitution from the standpoint of legal technology, we can note the following. First, the semantic content of the Constitutional Chapters 1 and 2 can be changed by making amendments to Chapters 3-8. Second, the instruments of amendments initiated by the President, such as the establishment of a working group, the All-Russian vote, are provided for neither in Chapter 9 nor in the law on amendments to the Constitution. In fact, they represent exclusive, non-normative legal and technical means to amend Chapter 9 of the Constitution. That is, the main constitutional transformation that took place during the adoption of amendments is that the constitution can be changed without changing the text of those chapters that cannot be corrected.

In my opinion, the provisions of the first and second chapters are particularly seriously affected by such amendments as changing the structure of the unified multinational people of the Russian Federation. This structure is settled in the preamble and in the article 3, but article 68 assumes that the Russian language is established in the state as the language of the state-constituting people, by which, it seems, the Russian people is understood, despite the fact that the state-constituting people is a multi-ethnic people. This change is very serious, because it brings us back to the structure of federalism that was enshrined in the Russian Constitution of 1918 and 1925, where the Russian Soviet Republic was defined as a union of free nations, a federation of union national republics and did not contain a list of federal subjects.

Another important innovation is, in fact, the abolition of Article 15 of the Constitution, which establishes the priority of international law, since Article 79 determines that international law will enter the legal system of Russia only if it does not contradict the national law enshrined in the Constitution.

An important change is the consolidation in the Constitution of the legal structure of public power, which unites state power and local self-government.

Another significant innovation is the actual establishment of the absolute presidential veto, since the introduction into the legal and technical structure of overcoming the constitutional veto of the Constitutional Court with its final decision implies that if the Constitutional Court supports the point of view of the president, then it is considered impossible to overcome this veto.

A significant change is in giving the constitution a personalized character by enshrining the resetting of all expired and served presidential terms of the current president. This amendment is substantially similar to the amendment made to the Constitution of the Republic of Tajikistan.

In fact, the Russian Federation is indeed a strong presidential republic, and the amendments actually consolidate the existing functional status of the President as the head of the executive branch. Article 83 specifies that the President executes overall leadership of the government, article 110, part 1 establishes that the Executive power is vested in the government under the overall guidance of the President, the Prime Minister bears personal responsibility before the President, these provisions suggest that the President of the Russian Federation heads the Russian Government.

If we talk about the conclusions that follow from the analysis of the changes made, which in fact are constitutional transformations in relation to the form of government and the form of the political regime of Russia, then, in my opinion, it is necessary to draw two conclusions: the amendments complicate the text of the Constitution, cause its internal inconsistency to increase. The second conclusion is that the constitutional reform carried out from above clearly demonstrates the flexibility of the current Constitution of Russia and indicates its potential readiness for subsequent changes in the future.

Oleksiy V. Stovba[16]. I want to focus on the changes in law, looking at them from the perspective of a theorist, a philosopher of law, and consider how the dominant ideas about law change in this regard. The starting point for my reasoning will be the ideas of the non-classical philosophy of law. From this perspective, I would like to consider how the fundamental concepts of law are changing from the point of view of non-classical theory. And in turn, changes in these fundamental concepts of law can become a theoretical and methodological basis for a more adequate writing and formulation of statutory instruments

[15] On the Procedure for the Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation : Federal Law No. 33-FZ of 04.03.1998. (editorial comment)

[16] Doctor of Laws, Vice Rector for Research and Methodological Work of Kharkiv Institute of Management Stuff, Kharkiv, Ukraine.

or for a more rational interpretation of them. In my opinion, it is fundamental for the non-classical theory of law to strictly distinguish between the law sphere and the legal sphere. After expression by Michel Foucault of his ideas, we can no longer argue that the legal sphere is the sphere of power discourse, of decision-making by those who actually have power, in relation to those who obey. And in order to legitimize this state of affairs, these decisions can be given a legal character, they can be put in the legal form. At the same time, they do not have a strict connection with the sphere of law.

I will explain this with an example. Legislation may prohibit, for example, same-sex marriage. From the point of view of law, it does not matter who a person lives with, it is obvious that same-sex marriage, for example, does not pose any threat to the rule of law, but due to, for example, some traditions, etc., the current government may consider that such marriages should be legally prohibited. The same regards to other ambiguous phenomena in different legal systems, such as: prostitution, drug legalization, carrying weapons. Obviously, from a point of view of law, it does not matter whether such phenomena are allowed or prohibited in a particular society. We see that, for example, in such developed legal systems as German, where prostitution is legalized, Dutch, where light drugs are legalized, American, where the free carrying of weapons is allowed, which may seem shocking from the point of view of the Russian or Ukrainian citizen, the law and order there does not collapse. We must clearly recognize that such prohibitions are purely consensual and belong entirely to the sphere of legal prohibition or legalization. By separating the law and legal spheres, we conclude discussions on a number of issues, for example, whether the death penalty is in accordance with the law or not — this is an exclusively conventional issue in a particular community. If we move into the sphere of law, then the fundamental thing from the point of view of non-classical theory is, in my opinion, the destruction of the myth of the continuum of the legal field and the reinterpretation of law as a discrete and self-reproducing phenomenon. In other words, we are faced with the obvious fact that law does not exist in itself, in some ideal dimension of what is due, whether it is naturally legal, positive or otherwise. The law must be constantly reproduced in the form of a certain algorithm of relations between people. If the law does not exist by itself, but must be reproduced, then we will try to see what changes, for example, at the level of constitutional doctrine, it can lead to.

I will focus on the example of rethinking human rights. From the point of view of classical constitutionalism, human rights are essential human capabilities that are given to one by nature. Of course, the state can recognize or not recognize them, but they do not disappear, remain immanent content of the legal personality, the person's status as a legal subject that belongs to them by birth, by nature. But if we consider human rights from the point of view of the doctrine of the discreteness of law, we will face the fact that most often a person acts freely without any restrictions, without having any ideas about their undeniable constitutional rights. In fact, the coincidence or contradiction of his actions with these natural human rights is exclusively accidental. If we consider from this point of view the human rights enshrined in the constitution, we will face the fact that this is nothing more than a directive from the legislator to the representatives of the executive branch or the judiciary on how to act due to certain actions of a person, that is, they represent a certain disposition.

Let me explain with an example. Freedom of movement is restricted due to the pandemic. An ordinary person learns about this when he cannot move from one point to another, and if he tries to move, a representative of the state authority will forbid him to do so. Thus, a person learns that he has some right when he is faced with the inability to realize his normal physical abilities, the need to move in one direction or another. And in this case, the right of a person to move is revealed in the fact that they can apply to a certain state body with a request to remove this restriction, and then the state body decides on the basis of the disposition of the legislator whether to help him in this or not. As I. D. Nevvazhay said, if you want to eat, it does not mean that you have the right to eat. This ability— to eat — turns into the right to eat, when someone does not let you eat, then you are fighting for the exercise of this right, self-reproducing through your struggle for this right this real physical ability of yours, as a constitutional right or an undeniable human right. From this point of view, it is possible to interpret the norms of the criminal code, where there is no prohibition on murder, theft, but there is a disposition for a judge and other officials to choose measures of restriction against a certain person if he commits certain acts.

Thus, from the point of view of non-classical theory, the spheres of law and legal must be strictly distinguished. The sphere of legal is the sphere of power, which is occasionally put in a legal form. From this point of view, law is not a continuum, but a discrete self-reproducing phenomenon. And if we consider many dogmas of the classical theory of law and classical constitutionalism from this point of view, it turns out that what we call the undeniable human rights is nothing but the disposition of the legislator to representatives of other branches of government. At the same time, the sphere of human actions is in the sphere of law, not legal sphere, and it intersects with legal sphere only in some cases, which I have mentioned.

2. The Constitution of the Russian Federation: the Dialectic of Stability and Development

Suren A. Avakyan[17]. In my presentation, I would like to consider issues related to the constitutional reform that has taken place, which leads to the need to identify areas of scientific research in this area. First, despite the fact that the constitutional amendments do not affect Chapter 1 of the constitution "Foundations of the constitutional system", it is impossible to talk about the Constitution and the future without taking into account the chapter on the constitutional system. We should consider the constitutional order in two aspects. The first aspect is that the foundations of the constitutional order form the basis of our entire system of authorities. It turns out that the system of authorities is a constitutional system. The second aspect, which follows from the current perception of the constitutional system, is that the constitutional system is also bodies: state authorities and local self-government bodies, included in the conceptual range of public power. The concept of public power is not disclosed in the Constitution, although we proposed a possible formulation of this concept at the working group on amendments to the constitution, and it was supported by the working group, but it was not included into the final version of the text of the amendments. It is necessary to proceed from the understanding of public power as the power of the people, carried out in society with the support of the institution of civil society. Thus, one of the directions for future research is to fill the structures that have been included into the constitution with the legal content.

The second area of constitutional and legal research is the analysis of regulation and prospects for the development of social relations. At the moment, the term "social" is used three times in essential aspects of the Constitution, in particular: the social state, social solidarity and social partnership. The concept of the social state was in the Constitution before the amendments, it is enshrined in Article 7 of the Constitution, but the concepts of "social partnership" and "solidarity" are new. Although in real life they were used before. The concept of social partnership appeared in the legislation and study of labor law and was reflected in the Labor Code of the Russian Federation. Thus, social partnership becomes a relevant category in our state and society. For example, in Kazakhstan, this category has received constitutional regulation to a certain extent. In formal terms, this concept includes the state, civil society institutions, business institutions, local self-government, citizens' associations. All these elements of social partnership are necessary in order to act not only in the labor sphere, but also in all other aspects of the social life of citizens and country as a whole. The concept of the social state is also included into the Constitution, and legal scholars need to begin the disclosure and study of the actual content of these concepts.

The 1977 Constitution contained such a concept as a social basis — an unbreakable union of workers, peasants and intelligentsia. Now we use three key concepts, but we are not talking about any social union, social strata. We need to decide: either they do not exist, or if they do, then we need to study them and talk about them. What does the concept of social solidarity include? Is this solidarity between each individual person? For example, in the Constitution of 1977 there was such a concept as a labor collective. Now we use such a concept as an assembly of employees. What is the difference? There are countries where the labor collective is not opposed to the employer, it is in cooperation. For example, in Japan, employers regularly hold meetings of labor collectives and report on production results. That is, such phenomena exist, and we will have to talk about it using the concept of social solidarity to determine what is behind it.

Another issue that needs to be studied is the content of the concept of "civil society". The constitutional order cannot exist solely as a combination of state power and local self-government, both public associations and political parties are also elements of civil society. There is no concept of civil society in the Constitution itself. It is mentioned once in connection with the powers of the government. At the same time, the concept of civil society is used in other documents. It would be worth defining this concept in the constitution. It is also necessary to talk about legal institutions that claim to somehow guide the development processes in civil society: parties and movements are not only associations of people, they participate in the management of society, that is, public institutions can be added to the institutions of state power and local self-government as elements of the management of civil society. If we talk about civil society, it may be necessary to make some changes to the Constitution in connection with such an existing institution as the church, which is one of the institutions of the constitutional system

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of our country, and in Article 14 of the constitution, religious associations are mentioned as existing in our state.

My fourth point is that we need to reduce the number of positions that are filled through elections. The elections have become a means to express not only positive, but also negative emotions, especially in the case of neighboring republics. We should think about how many elections to hold and whether we really need them at all the levels at which we hold them. For the purposes of restricting access to elections, it may be appropriate to introduce a system of making a deposit by candidates to participate in elections. If the candidate wins the election, the money is returned to him, and if he loses, it goes to the budget. Another possible tool could be the introduction of a material qualification as a legal fact that generates legal consequences, at least for someone who wants to be elected as a deputy or official.

The constitutional reform showed that those who said that we should not get carried away with the concept of a living constitution were right, we should reform the constitution, and not limit its development to the interpretation of only 11 members — judges of the Constitutional Court — a few representatives of society as a whole.

Konstantin V. Aranovsky[18]. If we talk about what is more important for the Constitution, stability or development, then I, as a judge who took an oath to serve the Constitution of the Russian Federation, would choose stability, otherwise I would have violated this oath. The Constitution of 1993, in its two fundamental chapters, which set out the list of human rights and freedoms, enshrining the fundamental importance of the individual, is an outstanding work of constitutional creativity, faith in the law and submission to the law. Some authors of the text of the Constitution later expressed their disappointment with the result of their work, for example, S. S. Alekseev, Oleg Rumyantsev, who said that he would like the concept of civil society to be included in the Constitution. In my opinion, the failure to specify the concept of civil society and its role in the Constitution in itself does not preclude its existence, and if civil society in Russia is not sufficiently formed, it is not a problem of the Constitution, but a problem of a society that is not quite ready for these fundamental institutions.

In 2001 and later, I wrote about how the constitutional tradition was originally formed and how constitutional law is now accepted by Russian society, which has developed its own aesthetic preferences. These preferences are partly correlated with constitutional law, and in other parts are not fully supported by society or supported with significant reservations. In general, when the constitutional material enters a new space, it always portends difficulties in its rooting, or sometimes even rejection. This trend can be seen in the motley constitutional geography, where the constitutional tradition knows both success and failure. Constitutional law emerged in its own guidelines and coordinates, and this means that the Constitution is not such a mobile and flexible legal formation, so that the nation could handle it irresponsibly. I wrote then about the risks and difficulties that the Russian constitutional law was going to face with the inevitable pauses and failures in its development, with retreats and restorations. This reasoning can now be tested for diagnostic and predictive validity.

In further constitutional forecasts, and perhaps even in prescriptions, I would suggest taking into account some general circumstances. First, I would suggest paying attention to this general observation: deviation from the constitutional norm and even encroachment on the norm do not in themselves refute it. The fact is that there is no such thing as legislation without deviations, especially if the rule comes to the national environment from borrowing. But offenses and disenfranchisement do not cancel the law. In general, a person has the ability to deviate. And as long as there is a norm, it will certainly be violated from time to time. It is possible to remove a violation of the norm from people's lives only by removing the rules and people themselves. Conflicts with the local environment also do not prejudge the final failure of constitutional law.

For example, the fate of constitutionalism among Catholics in the European south or in Latin America is not linear; in Spain, the Constitution, working its way up, immediately fell at the beginning of the XX century, and then spent 40 years in lethargy. But these are not fatal defeats of constitutional law. These are symptoms of a dangerous heredity, which may mean something in diagnoses and prognoses, but still both in the south and in the center of Europe the problems of constitutionalism are not considered groundless and hopeless. Even in the Far East, the prospect is not completely denied, although with complex reservations. Among the Japanese, in some Chinese societies, and in Korea, there are signs of a confident adaptation of constitutional law. In Russia, however, despite the socialist upheavals, an influential peasant culture developed and persisted. It is, of course, not identical to the tradition that has developed over the centuries in the Protestant culture of the German root, but it is not so different as to completely exclude a commonality in constitutional preferences.

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In any case, this makes Russia's attempt to settle into the contours of constitutional law at least not hopeless. The adaptation of this law is a difficult task, for which success is not a foregone conclusion, but it is also not excluded. We will take into account the positions of the legal profession separately, bearing in mind that the Constitution is, of course, a common cause, but at the same time it is a matter of legal profession. And it is not for lawyers, in any case, to hesitate in a constitutional enterprise, especially since some of them are bound by an oath to the constitutional rule of law, order, and justice. And even if the initial positions of the constitutional case seemed hopeless, and it sometimes happens, is this a reason to get out of it and retreat to a lawyer who has spent considerable time in the profession and has probably become convinced that it makes sense to work hard, without guessing about the prospects, even in hopeless cases, and that the surest case can be lost through misfortune and negligence even with the best prospects.

Therefore, it is not always useful to gain prospects in a profession that lives by faith in the law. In general, constitutional law has something to rely on and someone to rely on in Russia. And by the way, perhaps most of all it is based on hopelessness. This hopelessness has long been working for the constitution, forcing the nation to rely on constitutional law in its core values, despite all disagreements. Of course, it is impossible to oblige every person to value and cherish something, but if the Russian Federation subordinate itself to the Constitution as a people's state governed by the rule of law, then loyalty to these values, that is, civil freedom, is attached by itself. Excessive hesitation in the execution of a constitutional foundation decision is fatally dangerous. The constitution is a real prospect, otherwise the country would have to end in disintegration.

As for the living Constitution, there is a frame part which can not be canceled, the fundamental provisions, deviations from which lead to the degradation of constitutional law, but there are more flexible provisions subsidiary to the fundamentals, which, however, provide it with vitality and adaptability. For example, in relation to the term solidarity: this concept is really important, but since the constitution also prohibits the establishment of a single state ideology, it is obvious that the content of this concept does not include mandatory participation in common ideas, in common political lines.

It seems to me that as a result of the recent amendments to the constitution, there have been no dramatic changes that would cancel the fundamental constitutional and legal foundation decisions that have already taken place, that would seriously shake these decisions and revise them radically.

Lyudmila B. Eskina[19]. The fact that we are discussing issues, topics, and problems related to constitutional law today shows that there is an opportunity to conduct such a discussion, which is important in itself. The presence of such a discussion shows that the constitution still works, because it stipulates that everyone has the right to their own opinion. And in this case, I believe that our dialogue embodies this constitutional message. I agree that the Constitution of 1993 is the greatest achievement of constitutionalism in our country. I am deeply convinced that this is one of the best documents created not only in our country, but also within modern constitutionalism, because it was created at the peak of reform, society was ready for changes, and, most importantly, it was based on all the developments created by world modern constitutionalism. However, I want to say that changes in law and changes in regulatory framework are different phenomena. Changes in legislation and even amendments to the Constitution do not coincide completely with changes in law, and they should not coincide. Law is a deeper process, it is something that society will perceive. Thus, later we will be able to understand which amendments to the constitution our society will accept, that is, begin to implement. Then we will be able to say that these are changes in law, for now these are changes in regulatory framework.

In the end, it is possible to include anything in a regulatory act, we have repeatedly encountered this in our history, but whether such provisions will turn into law is an issue of interest to us.

In my opinion, this reform should be considered together with the reform that began in 2008, that is, with all the amendments that are currently made to the Constitution of 1993. And they should be evaluated systematically, in their entirety.

Two different questions arise in connection with these amendments. The first is the question of stability of the Constitution, the second is the subject of constitutional regulation, which has become one of the most relevant and practically significant.

As for the stability of the Constitution, no one, neither the Soviet government, nor the modern theory of constitutional law, refused that the stability of the Constitution is one of its most important qualities. Unfortunately, the Constitution is not stable in our country, although we all recognize and postulate its significance in theory, nevertheless, the Russian constitution is a flexible Constitution, and

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it is constantly changing. This fact largely speaks about the attitude of Russian society, traditional consciousness and the attitude of the government and the population to the Constitution. Nevertheless, legal nihilism still remains a very important feature of our society. This was mentioned by the President of the Russian Federation D. A. Medvedev. Therefore, we do not treat the Constitution as a mandatory legal act, we treat it as a document in which you can always change something. But society cannot always move on the escalator, there must be unshakable principles of reasonableness and justice, and these are the principles of law. Thus, the 1st, 2nd and 9th chapters of the Constitution compile such a framework, the basis of the social structure. The discussion about changing the Constitution has been going on for years, at various levels. So, there were proposals to return the death penalty, the institution of deprivation of citizenship, to change Article 13 and return the state ideology, to abandon the priority of international generally recognized principles and norms, etc. In my opinion, it is necessary to create a worldview, to do everything so that the Constitution is perceived as something sacred, which can not be encroached on, at least in its main postulates.

As for the issue of the subject of constitutional regulation, if we look at the amendments that have been made to the Constitution over the past ten years, we can assume that these amendments largely demonstrate a return to the Soviet constitutional model. They lead to the expansion of the subject of constitutional regulation. The Soviet Constitution regulated all spheres of life in society: both the economy and the social structure, there were norms that allowed the state to interfere in almost all spheres of society. It was perceived as a kind of a society life program. The new model of the Constitution of 1993 proceeds from a different understanding of the subject of constitutional regulation, which has specific boundaries. It answers the question of how the society wants to see our public power. Therefore, the subject of constitutional regulation, laid down in the Constitution of 1993 — is the relationship about the organization of public power and nothing more. As a result, the Constitution does not interfere in the spheres of culture, morality, the upbringing of children, or the problems of solidarity, it only regulates what concerns the organization and exercise of public power, and in this sense it is more clear and specific. The amendments made, in fact, show that the state is making a side turn, because social development does not go in a straight line, it happens both in zigzags and with turns to the past. To some extent, this whole system of amendments brings us back to the Soviet understanding of the Constitution and to the Soviet models that were enshrined in the constitutions of 1936 and 1977.

This is relevant to the state of a heterogeneous society. The return to the Soviet constitutional modeling to some extent reflects the state of society, in which there is a very different understanding of what relations the Constitution should regulate. In this situation, the theory of law becomes important, in particular constitutional law, which should give more or less satisfactory answers to the raised questions in such a way that they are acceptable to the majority of society. Naturally, although in the Soviet era we perceived the Constitution as a program, the foreign constitutions, which appeared two centuries earlier, were not programs, they appeared as a mechanism of legal restriction of power demanded by society. It is still difficult for our society to realize this, which is understandable, because over the course of a century, our Constitution has developed according to a different scenario and has absorbed a different understanding. Sooner or later the society will choose adequate and moderate forms that will reflect the balance of proportionality that our society needs, and on the basis of this confidence, it will try to adjust the law in accordance with its needs and level of development. The society itself must answer the question of which norms will turn from formal to legal norms.

Society does not need to be corrected, it just develops in a certain way, but the Constitution can be corrected, it itself provides such a possibility, but there must be a consensus in society that such changes are required, that without them it will be much worse. The state itself is a product of society, and it must serve society, as Article 2 of the Constitution tells us, establishing the duty of the state to recognize, observe and protect the human and citizen rights and freedoms.

Sergey D. Knyazev[20]. Certain adjustments in the perception of the Constitution, in its meaning and role in the formation and functioning of the Russian state on the basis of the constitutional legal order still took place.

In such circumstances, is there any reason to say that the provisions of the constitutional foundations that were established by the adoption of the Constitution in 1993 were seriously questioned? It seems to me that there is no reason for this, if only because the textual content of the 1st and 2nd chapters is not affected. It is in my view symbolic and correct, that the preamble to the Constitution stayed untouched, although the 9th Chapter does not insist on that it cannot be changed, but the purpose

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of the preamble is settling those circumstances and the goals set by the Russian society and the authors of the Constitution at the time of its adoption.

Why does the amendment not affect the foundations of the constitutional system, the basic constitutional principles and values, and should not affect the constitutional format of the individual, human and civil rights and freedoms in our state? At least because with all the new material that has become part of the Constitution, if we look at it critically, we will see that a significant part of it is not some kind of a know-how, but provisions that are well known to the Russian legal system, which at the time of introduction to the Constitution were already tested either by the legislator or as legal positions of the Constitutional Court of the Russian Federation. You must admit, that the prohibitions that have appeared in the Constitution, provided for persons running for the position of president or for the positions of deputies of the State Duma or applying for senior positions at the regional and federal levels, are not new norms. For example, let us take the provisions that constitutionally assigned the Constitutional Court the authority to check or review decisions of supranational, interstate jurisdictional bodies in terms of whether the Constitution of the Russian Federation allows the execution of relevant documents, whether such execution will lead to a violation of the Constitution and a deviation from its norms. This is also nothing new: first, this provision was formulated by the Constitutional Court, and then it was established by the legislator after the Constitutional Court. Why has this been done, what is the purpose? From my position as a researcher, not a judge of the Constitutional Court, there are two points here: if you look at the conclusion that the Constitutional Court adopted on the President's address, in which he assessed the proposed amendments to the Constitution, saying that, in his opinion, these amendments to the constitutional text do not contradict the first and second chapters of the Constitution, which does not mean that only such amendments could take place, then you can see that the legislator had a wide range of possibilities, and not the only option for changes. But by adopting these amendments, the legislature has actually bound itself to the introduced provisions and has no right to deviate from the amended constitutional provisions.

I do not know how this will be implemented in practice, but if we take, in particular, the amendments that established prohibitions on having bank accounts in foreign credit organizations, a ban on running for office or holding positions for persons with a second citizenship, who have the right to permanent or preferential residence abroad — these amendments were previously in the law, and now have become part of the constitutional text. At the same time, we are well aware of the legal positions of the Strasbourg Court, which has already recognized such bans and restrictions on voting rights on the grounds of having a second citizenship as not complying with the provisions of the European Convention. From this point of view, it is quite possible to predict that sooner or later the relevant institutions may receive an assessment from the Strasbourg Court, including in relation to the Russian national legal system. And then the Constitutional Court may face the question of what standards to follow.

Often the initiators of the amendments and, to a lesser extent, the members of the organizing Committee, who worked on the text of the amendments, stated, after the adoption of the amendments, that Russia's Constitution will indeed acquire a constitutional identity, as many of its provisions will reflect our national perception of constitutional values and that it will ensure that Russia will stand up against Western constitutional counterparts. The very question of Russian constitutionalism does not provoke any rejection on my part. Of course, the question of the constitutional identity of the Russian Federation has a right to exist, and I absolutely agree with the way it is justified in the decisions of the Constitutional Court of the Russian Federation. What is meant by constitutional identity? For example, when we talk about a jury trial, this is an element of constitutional identity, since the constitution provides for the functioning of such an institution, which in itself is not an inviolable attribute of the constitutional order. The procedure for filling the vacancy of the President of the Russian Federation — direct elections — is also an element of Russia's constitutional identity. The principle of a federal structure is also an element of Russia's constitutional identity, but when constitutional values are abandoned under the guise of creating their own constitutional identity, independence and uniqueness, this raises big questions. Academy of Science member O. E. Kutafin was once asked about how he related to the concept of Russian constitutionalism, the goals of its content and creation. He replied that he had a very positive attitude, but on one condition, that initially it was necessary to determine what would prevail in Russian constitutionalism: Russian or constitutional. From this point of view, I am not against the constitutional identity of Russia, but on the condition that there will be enough constitutional traditions, values, and constitutional order, and there should be no rejection of the foundations of this constitutional order.

The Constitutional Court in its conclusion on the amendments, speaking about the amendment that caused the greatest resonance in society, I am talking about the amendment that allowed the current president to run for two future terms, expressed a number of assessments and judgments, but indicated

that such an amendment is permissible and possible provided that such unshakable foundations as the separation of powers, parliamentarism, the rule of law, legal equality, independent fair justice, etc. shall be unconditionally observed. That is, when speaking about the admissibility of amendments, that they do not contradict the Constitution and the foundations of the constitutional system, the Constitutional Court was forced to once again articulate that all amendments are appropriate, permissible and can be implemented only if the foundations of the constitutional system are unconditionally followed.

Of course, the adoption of the Constitution itself has largely influenced the assessment of how the concepts and categories of stability and development of the Constitution and constitutionalism relate and should relate in constitutional practice in Russia. But it is equally important to understand that the constitutional text, the Constitution itself, is an indispensable normative base of constitutionalism, but how it will be implemented in practice will largely depend on the legislator, who is now making titanic efforts to implement amendments to the Constitution by adopting or changing the relevant laws and regulations. And of course, it will depend on the law enforcement agency, including the courts. How this will affect our lives, what real changes the amendments to the Constitution will entail — all this we have yet to learn.

Rebekka M. Vulfovich[21]. I am not a lawyer or a specialist in constitutional law, but everyone will admit that the adoption of certain constitutional norms, their consolidation and reflection in laws and regulations, is certainly important and creates the basis for management activities. No less important is the point that is associated with the implementation of all these provisions in practice. Since our constitution still stipulates that Russia is a social state, the goal of this state in a democracy can only be to create an optimal, that is, the highest possible, uniform quality of life throughout the country. And as we know very well, this is impossible without effective activity of the subjects of the Russian Federation, as well as municipalities. After all, what the local government does is directly related to the quality of life in each particular place. And all the social guarantees that are now additionally enshrined in the Constitution, are, of course, implemented through the management of territories, through their development.

When we say that local self-government is an element or a part of a unified system of public power, we must first imagine how this provision will be implemented in practice. The fact is that the term “public” in our case is almost synonymous with the state, it has not yet found its meaningful specific understanding and definition. Initially, when the question arose about what to call the management in the Constitution and the legislation adopted in accordance with it, we came to the term “state”, because the very word “public” was perceived as something inappropriate and not suitable for enshrining in laws, etc. The understanding then gradually matured that the term “public”, is something that significantly expands the spectrum, the set of actors involved in the process of ensuring the quality of life, and local government is the cornerstone here. Having included local self-government in the system of public power, we must clearly define the place and role of this institution, because in accordance with Article 12 of the Constitution, it is not only an institution of government, but also the level of power. And we must clearly define how decisions will be made, how powers will be separated, and how functions will be divided between all levels of the management system.

Local self-government in accordance with the federal law on the general principles of the organization of local self-government is primarily regulated by the federal center and only then by the subjects of the federation. The mechanism of regulation in the direction from the federal level and below is currently settled by law, that is, the algorithm for regulating the activities of local self-government from top to bottom. Given that Russia has signed and ratified the European Charter of Local Self-Government, it has direct effect on our territory, and its principles were laid down in the Constitution of 1993: the principle of the right to local self-government (Article 12, chap. 8), the principle of general competence, which is expressed in the fact that municipalities have the right to carry out any activity on their territory, if it is not illegal or unconstitutional, but when they are squeezed into a very strict framework established initially by federal law, and then by the law of the subject of the Russian Federation, the scope where they can independently determine what to do and how to do it, is very limited; the principle of subsidiarity, which stipulates that the movement of separation of powers, separation of functions must occur in the opposite direction — from bottom to top, that is, for the basic functions of life necessities, the municipalities should be empowered to do everything they are able and meant to do best.

The question of funding immediately arises. The same European Charter establishes the obligation of the states that have ratified it, to support local self-government financially for the performance of its

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basic functions. If we act from the positions indicated in the European Charter, then local self-government, in cooperation with the federal subjects, exercises the maximum amount of powers, including with financial support not only from the subject, but also from the federal budget. The federal level assumes those absolutely general functions and powers that the subjects of the Russian Federation and municipalities are not able to perform or it is not rational and effective in accordance with the laws of modern management.

If this is how we understand the inclusion of local self-government in the system of a single public authority, then perhaps we will get good results. The public authority unites not only state bodies and local self-government bodies, but also public organizations, on which the state and local authorities should rely as part of the system of public power. In addition, in the system of public power, there is also an individual who makes the most important, fundamental decisions independently or together with their family, and if they are supported in this by the state, the possible results will be more positive. If the state decides for the individual how and where to live, what kind of housing to apply for, it is unlikely that this will have a positive impact.

The most important thing is that we have passed through all this many times during the long history of our state. And the main thing that we need to strive for today, that we need to develop, is what today, primarily in democratic countries, is called collaboration. This is not just an interaction in which someone acts as a pointing finger, someone in the role of executing various kinds of instructions, orders, programs, projects that come down from above, but it is a process in which all its participants act as equal partners, support each other and take on everything that they are able to perform best. Such a system of public authority, where we have a very solid foundation in the face of local government will have greater efficiency, because there are only 85 subjects of the Federation, and tens of thousands municipalities, and each of them has its own characteristics, which are neither the subject nor the Federal center is able to take into account, as they are not able to catch and channel all the many needs and interests of different groups and different people. To do this, there should be sufficient opportunities for the manifestation of municipality's own will in the law and, of course, in the constitutional document, including political will, to organize its life in accordance with the interests and needs of the individuals, families, public organizations, municipalities, regions and the Federal center. The intense process that we have observed in recent years, in the transfer of basic functions, such as, for example, health care service, from not only the settlement, but also municipal district level at the level of the subject of Federation, as we have seen in recent months has led not only to erosion of the essence of local self-government and its underlying purpose, but also to quite serious consequences in general.

Today, once again, it is necessary to restore paramedic and midwifery centers, strengthen the primary local element, allocate money for this and delegate the corresponding functions to a lower level. As for finance, there are still such tools as dotations, subsidies, subventions, the use of which is quite well established, and it is possible to use these tools in full, based on the needs of municipalities. Thus, it is necessary to determine what local self-government means for us –management or power, while there is still a constant ambivalence of attitude towards the institution of local self-government. The current trend of state-building of local self-government bodies lies in the fact, that it has practically no financial sources of its own, and, therefore, it is not self-sufficient. But the main problem is not finance, but understanding the place and role of the municipality in the overall system of public administration. Determining the role of local self-government in the system of public administration is not only a political question, but also to some extent a philosophical one, on the answer to which the prospects for the development of municipal government in Russia depend.

Nikita S. Malyutin[22]. I would like to devote my presentation to analyzing the impact of the reform on the institution of human rights and freedoms in the Russian Federation. As part of my presentation, I will allow myself to identify several problems that I think are most significant in this area. As a result of the reform, the constitutional text was changed, which did not formally affect Chapter 2 of the Constitution, which concerns human rights and freedoms. However, in terms of their legal effect, these changes have an impact on our entire national legal system, and a number of adjustments relate to the part of human rights and freedoms. The question arises as to how to evaluate such changes in terms of their location in other chapters, and not in the chapter that the constitution intentionally originally contained these provisions.

The following four questions can be identified. What is the nature and status of the additional guarantees of human rights and freedoms that have emerged as a result of the amendments to the Consti-

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tution? Super-guaranteed, when the scope and list of rights and freedoms enshrined in Chapter 2 of the constitution is expanded? These are, for example, the provisions of the Constitution regarding guarantees of cultural identity, established by Article 26-44, and the provisions of Article 67.1 of the Constitution.

The next question that arises in this connection is: can a future legislator who wants, for example, to renounce these guarantees and who can technically do so, since they are enshrined in Chapter 3 of the Constitution, renounce them without a real invasion into the content of the right, which cannot be implemented based on a systematic understanding of the constitutional text?

The second point, which within the framework of this problem is of serious importance. As a rule, when the state focuses its attention not on the list of rights and additional guarantees, government policies, what we see, for example, under the position that children are the most important priority of state policy etc., for these formulas, the state seeks to hide the impossibility of real provision of rights. And we see this in many foreign countries, such as India, Central and Eastern Europe, Brazil, etc. And it seems that the transition from rights to such guarantees, in fact, still reduces the guarantee effect of fundamental rights, which are enshrined in Chapter 2 of the Constitution. Although today this problem does not have a clear answer.

Another set of questions is raised by the provisions of the Constitution, which do not directly relate to the law. For example, Article 68 establishes that the state language is Russian. There is no novelty in this provision, but this language has become the language of the state-constituing people. And since we can assume that if the state language is Russian language, this constituent people is the Russian people. Then the question arises, how to correlate the right of the state-constituent people to the language with the provision of Article 26 of the Constitution that the right to the native language is secured for everyone and equally. It turns out that the equality that underlies the construction of the entire chapter 2 and the entire constitution as a whole is called into question, since these chapters are the foundations of the constitutional system. This is a question that needs to be considered somehow.

The third set of problems is the so-called disputed rights and guarantees. Debatable, from my point of view, because there is a number of new provisions concerning such spheres of life, which are probably still shouldn't be touched, as they relate to very sensitive aspects of social life in which the state should act in the most correct and minimal regulatory, to intervene in these relations as little as possible. We have the opposite picture, when three sensitive areas — the family, marriage, as a union of men and women, and God — were affected by changes in the constitution. It seems to me that the examples of our foreign colleagues quite seriously demonstrate that the invasion of the state and the attempt to over-regulate these sensitive areas, despite the fact that they may carry a certain positive context, as a rule, always exacerbate the problems associated with these areas, especially in the conditions of our multinational state. This is, for example, the problem of the ratio of language groups, religious relations, taking into account the mention of God in the Constitution, this is the problem of same-sex unions, which can be treated differently, but the aggravation of this problem is unlikely to contribute to stability in society and its consolidation.

The fourth set of issues is the adjustment of the protective mechanisms of human and civil rights, primarily the main mechanism of protection — the Constitutional Court. The amendments to the Constitution led to a significant degree of nationalization of the Constitutional Court. Thus, before the amendments to the Constitution, the Constitutional Court, according to N. S. Bondar, was more than a court, because in its activities it was more focused on a certain spirit of the constitution, its idea, meaning, which made it possible to ensure greater protection of human rights and freedoms. Now, in fact, the amendments formalize the activities of the Constitutional Court to a greater extent and make it more focused on the interests of the state.

Thus, the provisions on the competence of the Constitutional Court were reformulated in the law. If earlier the competence was formulated with a focus on the powers, that is, on the essential task of the court, now the powers are formulated with a focus on the subject of the appeal, and in this regard, the fact that from this huge set list of grounds for applying to the Constitutional Court a citizen has the right to apply only in one case becomes particularly striking. Increased degree of involvement of the President in the constitutional court's activities, in particular, the grounds for the appeal of the President to the constitutional court narrowed the scope of citizen participation in constitutional justice, which creates additional regulatory barriers related to the exhaustion of domestic remedies, the inability of persons to apply for protection of other persons without the consent of the subject etc. The state becomes more and more involved in the constitutional process, and the citizens — less and less involved. This trend is also reflected in the introduced constitutional compliance of the decisions of the interstate courts, bodies on their compliance with the Constitution, which in itself is true because the Constitution, as the

source, the top of the mountain of national legal system must ensure its stability and uniformity, therefore, all that comes in from outside, has to be checked for conformity with the Constitution. But the introduction of this tool provides for the possibility of filing a constitutional complaint for the state, when only the state can challenge the law enforcement decisions of foreign courts, and the applicant, a citizen, cannot. And this also shows that the model of constitutional justice is now focused on protecting the interests of the state, not citizens.

Kimmo NUOTIO[23]. Finland has followed an evolutionary path of constitutionalism. Finnish constitutionalism has its roots in the Swedish Constitution, many of the provisions of which were reflected in the Finnish Constitution of 1899, which was then applied for 200 years. Thus, Finnish constitutionalism is characterized by a long-term development.

The great difference between the Finnish constitutionalism and the Russian one is the system of bodies responsible for the interpretation and application of the Constitution. The Finnish system includes several actors through which the institution of human rights is embodied. We started the process of changing the Constitution in 1995, in particular by writing a new chapter on human rights. In our system, the constitutional committee of the Parliament is responsible for checking and monitoring ordinary laws for compliance with the Constitution. It invited lawyers and scientists to consult and express opinions. There are systems, as in Russia, where the right to appeal to the Constitutional Court is limited to certain cases, and there are systems where anyone can appeal to the court with questions of interpretation and application of the Constitution. In Finland, it is quite rare for the Supreme Court to analyze the problems of constitutional law enforcement in order to identify contradictions in the provisions of ordinary laws of the Constitution, when the constitutional committee of the Parliament could not foresee and identify the occurrence of such a contradiction. The doctrine says that if the constitutional committee of the parliament has acknowledged the conformity of the adopted law with the Constitution, the court cannot contradict this position. But sometimes the constitutional committee may not take something into account, and then there are such exceptional cases, as, for example, a couple of years ago, when the Helsinki Court of Appeal considered a case on the application of the provisions of the Constitution.

It is also necessary to monitor what actual trends are developing in society, the very development of society is driving the development of law enforcement. For example, same-sex marriage is actually recognized in Finland not at the government level, but at the public level, which, in the end, is also embodied in the legislation.

Another observation I want to make is that in the 1970s there was a realisation of the need to think of law not as acting in the interests of the State, but rather in the interests of the individual. This turn in the public consciousness led to the emergence of a lot of judicial practice related to the problems of access to justice, and as a result, it was embodied in the accession of Finland to the Council of Europe and in the constitutional reform of 1995, in strengthening the role of the Constitutional Committee in the development of the system of public administration. The new Constitution established not only the powers of state authorities, but also the obligations to implement and ensure the realization of human rights.

Many states have a constitution, but not all of them have the provisions of the constitution translated into ordinary law enforcement, because we are trying to build a real state of law, where the constitution is an important part of the legal system. Of course, the legal history of Finland is very different from the Russian one, both in historical turns and in the duration of its development. Of course, we understand that the Constitution is a living instrument, but it is also the product of scientific schools, judicial practice, politics, the activities of the Constitutional Committee and broad international public communications. Therefore, it is impossible to choose one thing — stability or development of the Constitution, we value both of these aspects. The Constitution does not so much speak about the proper content of the law, as it contains the basic principles necessary for the work of the rest of the legislation. It is clear that the Constitution should reach people through certain channels, such as courts, regulatory acts, ordinary laws. An important and debated question is how to implement the provisions of the Constitution in the real life of people. The work of the Constitutional Committee of the Parliament has developed over the years, and the committee has earned special respect among other parliamentary committees. The collapse of the Finnish constitutional system, in my opinion, can occur if the committee becomes politicized, if members of various political parties use it for their own political interests, and if the consensus reached so far on the role of the committee solely as a source of legal interpretation is destroyed. Such events may trigger an increase in the role of the Supreme Court in building constitutionalism. But for now, the committee retains its role solely as an interpreter of the constitution.

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3. Civil Law reform at the present stage

Vladislav V. Arkhipov[24]. I would like to devote my presentation to general approaches in considering the impact of information technologies on law as such, as a social phenomenon in the broadest sense of the word, and I think that one of the main issues that arise here is caused by the general enthusiasm about information technologies and their some re-evaluation for the purposes of law. No one denies that information technology is changing the world and that the current sad conditions of the coronavirus pandemic and self-isolation have pushed the world towards greater digitalization and made technology more widespread. But in the discourse of the conversation on the law and information technology, especially information about the law in the theory of law structure, and, in a sense, in civil law, there is a very common question: "does law changes with the development of information and telecommunication technologies?".

The history of this issue is quite well known, the discussion on this topic arose a long time ago, in the early 90s, as to whether the so-called "cyber-law", as it was then called, even had its own subject. The 90s were the beginning of the commercial use of the Internet in some Western countries, that is, digital technologies at that time had not yet acquired the universal nature. L. Lessig believed that technologies change the world to some extent, as they change the format of social interaction. When we are in a real physical environment of communication, we do not have the ability to influence the architecture of this environment, as he said, and the architecture sets the boundaries of legal regulation. He gave an example that we do not see a special regulation that would prohibit, for example, theft as a thing of the property of a skyscraper, that is, in this case, we are talking about the possibility of theft only of rights, since otherwise it is physically impossible to do. The contrast lies in the fact that as we move into the digital environment, a certain "space" itself (although there are doubts that it is possible to identify the concept of space in the traditional legal sense with digital space, because space does not literally arise here, but a long-lasting communication occurs) exists constantly, in contrast to discrete communication through the telephone, telegraph, etc. My personal position is that if we consider this situation within the post-classical rationality, then, even taking into account my enthusiastic attitude to information technologies, there is no significant impact of these technologies on the law.

It is obvious that new subjects of legal relations have appeared, that new forms of communication are given legal significance by analogy with previously known ones. In my opinion, the law should be distinguished from the form by which relations are organized, and the law in this sense has not changed in any way. For example, the essence of smart contracts is that with the help of software tools, a mechanism for fulfilling obligations is constructed, which the parties do not have the right and technically cannot change after this mechanism has been launched, and thus the obligations cannot be violated. This is the ideology of smart contracts, but there is no reason to link the technical implementation and the fact that we cannot change the technically legal rights and obligations of the parties. Thus, the list of possible legal changes required under the influence of technology is extremely small and specific. For example, the most striking change is the idea of the place of activity in an interdisciplinary way in both private and public law, as in modern practice, the idea is developing that the place of activity, which is mediated by information and telecommunications technologies, between different jurisdictions is determined by the direction of the company's business strategy (we are talking about the well-known cases of Facebook and Twitter).

When considering this legal construction, the first thesis that I would like to propose as a general principle that should be implemented within the context of law and information technology is the principle of "Occam's razor", which will be expressed here in two key terms: the first is that we must act on the rebuttable theoretical presumption that technology does not change the essential foundations of law until proven otherwise; and the second is that we do not need to introduce or even produce new legal constructs until proven necessary. Law always remains a matter of the relationship between people as individuals. And the digital rights enshrined in Article 141.1 and Article 128 of the Civil Code of the Russian Federation, taking into account the changes of the latter, are an example of a rather controversial construction. A new object of civil turnover was legally settled, and its goal was fundamental — to explain the legal nature of objects that are constructed using blockchain technology. One of such striking objects that do not fit into the legal paradigm is a cryptocurrency that exists at the level of open blockchain technologies. In fact, an interesting construction has appeared, the law on investment platforms, which provides for the concept of utilitarian digital rights, which is true from the point of view of the regulatory approach, but no fundamental changes on the part of the law have occurred here, in my opinion.

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Recently, as part of our work on the philosophical and legal aspects of artificial intelligence, we came to another conclusion: the issue of modern technologies and artificial intelligence, in particular, is related to the issue of legal personality. Not in the sense that the most daring authors now discuss the hypothetical legal personality of artificial intelligence, creating a fiction or a real legal personality, but from the position that law itself is determined by the idea of the legal personality of a person acting on the basis of free will, endowed with freedom and responsibility, regardless of whether such freedom actually exists. This is such a fundamental ontological presumption of law, because without it, law disintegrates. This concept of legal personality affects various ideas about technology, including the possibility or impossibility of making legally significant decisions in an automated way, because, as I see it, it can cause our rejection not even that the decision is made without human participation, but that the logic of law is based on the idea that the one who makes the decision must obey it himself, and an automatically generated decision in this sense does not imply a subject of subordination on the part of the law enforcement agent, or hypothetically may not assume it.

The main thing in law is the subject of law, endowed with freedom and responsibility. Human nature has changed little, and law is the relationship between people.

Elena N. Dobrokhotova[25]. I would like to discuss the positive lessons of the pandemic as a perspective for regulating the work of high school teachers. I believe that the period of anti-epidemic restrictions provoked many unexpected decisions, primarily in the organization of teachers' work. The organizational aspect is a forerunner to think about the main question, which of these practices of self-regulation should take legal form in terms of the specifics of regulating the work of teachers, in particular, the work of higher school teachers; we have categorized version of the regulations for teachers, and what we refer to temporary anti-crisis measures, including in terms of self-regulation as a mechanism of legal regulation of social, labour and civil relations, because the teachers are working under contracts of different sectoral nature of the service contract, employment contracts, civil contracts for services. The period of the pandemic regarding the regulation of work of higher school teachers, in my opinion, gave some positive lessons to lawyers, it was this period which highlighted those unresolved problems in the regulation of work of higher school teachers and educational organizations in general, on which we closed our eyes. We thought that solving them could wait.

The first, key problem is the need for a radical change in the approach to the rationing of teacher labor. As soon as the labor standards are introduced, employers will be placed in conditions of restrictions for the exploitation of the labor of employees and will be obliged to comply with them, as well as bear responsibility for violating these standards. Nevertheless, I believe that this is a key problem for labor legislation, because labor standards are a sign that constitutes the sectoral nature of relations of non-independent labor. It is the regulation of labor that distinguishes labor legislation from other organizational and legal forms of involving teachers in educational activities.

The second problem is the need to review the fundamental theoretical approaches to the existence of such a phenomenon in education as the nomenclature of positions. When we talk about the nomenclature of positions, we understand that, for example, in relation to the teaching staff, the positions of professor, docent, senior lecturer, assistant, teacher with higher education have been introduced, but just in the time of the pandemic, when the means of information and telecommunications technologies have been actively used, allowing the student and the teacher to interact remotely. These technologies have revealed the fact that It is not so much important to squeeze lecture hours into the structure of the teacher's activities, as it is the question of seminar hours. What was previously solved in terms of achieving educational goals with the help of seminars and practical classes, technologies and educational platforms have significantly taken over, which revealed a huge amount of individual independent work, including the work of a teacher in the form of individual support for a student. And this significantly brings the pedagogical technology of teaching closer to the legal category of individual pedagogical training, assistance by a teacher for each student.

Given the individualization of the learning process it is necessary to raise the question that, in conjunction with individual pedagogical support it is needed to revise the burden on teachers and assign them to students. Now the teacher has to evaluate each work uploaded by the student with an individual review and adjust the student's training, the stages of their professional growth, so that they achieves the results that they set for themselves, including the features of inclusive education, in which the question of individual programs is also raised. Thus, individual pedagogical support is a new type of teacher's work, as part of evaluating students' independent work and improving their professional

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activities, and this type of teaching activity should be correlated with the positions in the nomenclature of employees' positions in the education system. In this situation, the position of a tutor becomes relevant, which, although it appeared in the list of positions in the field of education, is still understood as auxiliary. But in the current conditions, a tutor can and should be a person who really has a fairly high range of qualification characteristics in the professional field.

When we talk about revising the approach to the nomenclature of positions, we also turn to the system of qualification requirements, which even before the coronavirus began to change in the direction of formulating professional standards. Standards are formed by types of professional activity, and within each type, possible types of positions are defined, for which the so-called generalized labor functions are determined. These functions outline the very field of self-regulation at the level of an educational organization, when the employer, based on the structure and shared definition of the types and educational programs implemented by this educational organization, for which it has a license, understands what kind of personnel structure it needs and in what capacity it should hire professors, docents, etc. And when the employer solves this issue, it has a good tool in determining the labor functions for a person who occupies an appropriate position in the teaching staff system, using a system of effective contracts. Thus, we come to the conclusion that it is necessary to coordinate the system of effective contracts with the nomenclature of positions and professional standards that should appear in the regulation of work of higher school teachers.

So, the problems of revision of approaches to the formation of teachers' labour and the nomenclature of positions are centralized issues involving the state regulator, as is the attitude to the formation of the qualification requirements in the field of empowerment and involvement in the activities of the academic universities teachers, whose physical presence on the territory of the University is not always necessary. The pandemic has shown that the opportunities for inviting teachers from all over the world have expanded, but foreign teachers have a different structure of qualifications, titles, degrees, a different idea of the educational space and the educational environment, each has their own experience. Thus, on the one hand, the question arises whether we should have centralized exclusively national approaches to the system of qualification requirements and, on the other hand, whether we should leave it to the employer to establish and expand the list of qualification requirements. Perhaps it would be better to give the employer only the definition of the limits of responsibilities in adapting qualification requirements to international standards, given that each teacher has their own individual interest in participating in a particular type of educational program. And if a teacher aims, for example, to work in a specific university, in a specific master's program, then we should correctly determine both the qualification requirements and the content of an effective contract for that teacher, so that the educational organization could create conditions for fulfilling the requirements of such a contract, so that the teacher had time to prepare a publication and publish it with indication of affiliation with this educational organization.

Thus, I come to a very simple decision that the category of the calendar year or academic year, as the term of the employment contract with the teacher, has ceased to be universal and defining. Now it is necessary to link the term of inclusion of a teacher in the activities of an educational organization rather with the type of the educational program that the teacher is aimed at, and to achieve those effective indicators of an effective contract that are significant for the educational organization and that it expects to increase when it invites a teacher from another region or country.

And finally, the revision of the competitive procedures in this canvas looks quite natural. The period of the pandemic showed that we can not be tied to the fact that the personnel potential of higher school teachers is a closed market not just for specialists in this field, but also a closed regional and national labor market.

It is also necessary to review the structure of teachers' activities. We are now focused on the academic hours, but we still have scientific work and the need to publish, there is a long-term strategic work on the preparation of monographs and textbooks. Each teacher relates oneself to a particular scientific school, participates in its work and, thus, is not only an employee of this employer. At the same time, the issue of including scientific activity in the structure of the workload and the content of labor duties to this employer is also a diverse issue, which requires a combination of different regulatory mechanisms.

Thus, it is necessary to harmonize the legislation on education, legislation on science, civil legislation from the standpoint of the protection of intellectual property in terms of regulating the work of higher school teachers; in relation to the regulation of labor it is necessary to harmonise the legislation on education and labor laws, in which we see mostly the stages of movement of regulation of the employment relationship: features of the employment contract, transfers, changes in the employment

contract, termination, but we do not see regulations of use of the property of the employee who works remotely or in combined mode, when the employee is actually creating a mini office at home. It is also necessary to review the issue of monitoring the performance of the teacher's duties, the degree of power of the employer in relation to the employee.

I cannot but draw attention to the fact that the rules and modes of using remote work cannot be directly extended to hybrid modes, such as, for example, restrictions on the employer's obligations in the field of labor protection in terms of monitoring compliance with the requirements of labor protection at a remote workplace to regulate the work of remote workers. When we talk about teachers working in a hybrid mode, these issues are at the forefront. And the practice of self-regulation during the pandemic has shown that educational organizations are puzzled by this issue. And in terms of the additional agreements that were signed by the parties, a labour protection was identified as the payment of the cost of the employee that it has incurred in connection with the fact that It has to pay for Internet, access to information and legal bases, buying office equipment, etc.

Thus, during the pandemic, we have gained a large and diverse experience of self-regulation. And it seems to me that from the point of view of evaluating the effectiveness and mechanisms of regulating the work of higher school teachers, this experience requires communication and consideration. We need to create some centers and research groups that would analyze it and answer the question of what will be ultimately attributed to temporary special norms, and what will be included in our lives forever.

Vladimir F. Popondopulo[26]. I would like to devote my report to the problem of ensuring the quality of legislation in general and civil legislation in particular. At the same time, I use the phrase "activity environment of private individuals" as a category that allows me to reveal the task of ensuring the quality of civil legislation more clearly. I must draw your attention to the fact that we all make a clear distinction between the activities of private individuals and public authorities. Ensuring the necessary regulatory treatment for private activities, the activities of private individuals, means that the legislation complies with the nature of the activities regulated by it and the relations that mediate this activity. It is well-known that the legislation should only define the necessary requirements for a particular type of activity, leaving a wide scope for the individual — private person's own discretion. But the regulatory treatment of the activities of public authorities, on the contrary, assumes, or should assume, detailed regulation, since the competence of the bodies, the limits of the powers of these bodies, officials, legal procedures through which certain powers are exercised, judicial and administrative procedures are important here. This clear separation of differences in regulatory principles is important to emphasize.

As a general preliminary conclusion, we should note that to the extent that legislation creates regulatory opportunities for human freedom and to the extent that it strictly defines the powers of public bodies, it contributes to the task of ensuring the necessary regulatory treatment for a particular activity. This conclusion is of practical importance, which is that these provisions of regulatory treatment of activities can be used in the process of improvement of legislation, its implementation, in the formation of modern legal thinking of those involved in lawmaking, law enforcement, and the resolution of social conflicts. The correct definition of the necessary regulatory regime allows us to establish the general direction of the development of legislation and reflect the existing system of law more adequately, to express the concept of a particular regulatory act being designed, to use the appropriate legal tools and various legal means, structures, mechanisms.

Determining which regulatory treatment should be the basis for the regulatory act being developed is the first step in translating socio-economic requirements into legal language. This is what determines the strategy of statutory regulation in the society.

Taking into account these provisions on the regulatory treatment of human activity, we turn to the question of the legal nature of legislative acts, which can be largely ensured by solving the following tasks. Perhaps I will not mention all of them, but I will point out, in my opinion, the main ones and immediately draw attention to the fact that, unfortunately, they are not solved in the best way in Russia.

First, it is the definition of the purpose and subject of legislative regulation.

Second, it is necessary to ensure the necessary balance of federal legislation, regional legislation and acts of local self-government. At present, we have insufficient regional governance and virtually no local self-government, so federal, regional and local regulation in terms of legislation is not provided.

Third, it provides the necessary balance of centralized and local regulation. In this matter, we also see a tendency for the state to constantly expand into public life, which is considered almost an axiom, but we, as lawyers, should be aware that solving all issues from the center, both by legislative means

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and by direct means, is not a solution to the issue of ensuring the quality of life of society and the quality of regulation of public relations.

Finally, it is ensuring the balance of unification and specialization of regulation. Here, too, we see that the more specialized the legislation is, the more differentiated it is, the more it shows that the legislator, through this specialization, differentiation, essentially intervenes, imposes its various ideas about how natural relations should develop. And the practice of adopting numerous normative acts, which is now being implemented, leads to the fact that these numerous acts contain very detailed rules for regulating various relations, and there is not much benefit from them.

The solution of these tasks will also allow us to understand the existing trends in the legislative regulation of public relations and determine the optimal limits of this regulation, to provide the necessary regulatory treatment of human activity, to show what ratio of means of regulating public relations will provide such a treatment to the greatest extent.

The first task, that is, the definition of the goals and subject of legislative regulation, I would like to consider in more detail: how would a solution to this problem make possible to ensure the legal nature of legislative acts. It is also known that the question of the limits of the activity of the legislator is considered in legal science from the standpoint of sufficient minimization of the legislative regulation of public relations. Soviet, Russian, and foreign lawyers wrote about this. It is known that the domain of law exists as an objective reality, regardless of whether we are aware of it or not. And regulatory treatment is essentially a subsidiary means of regulation, by which the legislator gives legal relations legal force, brings them under the protection of the state, confirms in the public consciousness the fact that the relations have a normal and correct character. Thus, the initial limiter of the activity of the legislator is the scope of the law, legal relations. Legal are, in my opinion, the relationship of individuals based on equality, autonomy of will and property independence of their participants — it is a well known formula and it is contained in article 2 of the civil code. Legal relations arise from the division of labor and the exchange of its results on an equivalent basis. The external regulator should take into account this social pattern, since it is an objective constraint on the will of the legislation. Since legislative regulation is a subsidiary, complementary means of regulating relations, complementary to legal regulation, and essentially self-regulation, it is necessary to determine the goals of such legislative regulation.

Let us turn to the Constitution of the Russian Federation, which states that human rights and freedoms are the highest value, and the role of the state, including its legislative branch, is to recognize, observe and protect the human and citizen rights and freedoms. Human and citizen rights and freedoms are directly applicable, they determine the meaning, content and application of laws, the activities of the legislative and executive authorities, local self-government, and are provided by justice. The objectives of legal regulation are confirmed by the provisions of article 55 of the Constitution, according to which an enumeration of fundamental rights and freedoms shall not be construed as a derogation of other universally recognized human and citizen rights and freedoms, there must not be laws that abrogate or derogate the human and citizen rights and freedoms. At the same time, these norms state that the human and citizen rights and freedoms may be restricted, but only for the purposes and in accordance with the procedure strictly specified in the Constitution. It seems that these provisions of the Constitution determine not only the goals of legislative regulation, but also its limits. It is necessary to support the authors who write about the need for a fundamental definition of the subject of legislative regulation, which can be done both directly in the Constitution of the Russian Federation and in a special law on normative acts. The main thing is not about where the subject of legislative regulation will be determined, but how the list of issues that should be regulated by legislation should be determined, including the borders, as the legislation should not go beyond the established goals and limits.

There are suggestions to comprehensively define the subject of legislative regulation, but, in my opinion, it is unlikely that this corresponds to external conditions — life is very diverse. There is a suggestion to define the subject of legislative regulation by reflecting the basic open list. And there is a suggestion to consolidate the principles by which the issue of attributing public relations to the subject of the exclusive regulatory impact of the law should be resolved. It seems that it would be reasonable to solve the issues that are the subject of regulation of the law, based on the objectives of legislative regulation, enshrined in the special law on normative acts by defining their basic list and settling the principles and criteria for determining the subject of legislative regulation. This approach is applied, for example, in Article 34 of the French Constitution, which specifies not only the institutions and relations that are regulated by legislative acts, but also the principles that determine the subject of legislative regulation.

Let us turn to the Civil Code of the Russian Federation. In accordance with paragraph 2 of article 3 of the Russian Civil code the norms of civil law contained in other laws, should correspond to the Civil

code of the Russian Federation. This legislative provision is evaluated in the legal literature in different ways, and mostly critically, since we are talking about legislative acts that are often of the same legal force. The Constitutional Court of the Russian Federation drew attention to this in one of its resolutions. I believe, however, that to solve the issue of the relationship of civil law contained in the civil code and other legislative acts, we should not use traditional formal criteria (form, the legal validity of the act), but the determining the bonding strength of these external forms of expression of law with law as such objective criterias; of how the right is directly reflected in legislation. When determining the priorities of legislative acts, one should proceed from such a criterion as the degree of compliance of the legislative norm with the fundamental human and citizen rights and freedoms.

From this point of view, there should be no doubt that the codified norms of legislation have priority over the norms of the same civil legislation contained in other normative acts. I would venture to suggest that the codified norms of civil legislation should play a system-forming role in the system of all legislation, not just civil legislation. From these perspective, for example, the Civil Code of the Russian Federation is often called the economic constitution. Given that the norms of the Civil Code regulate not only property relations, but also personal non-property relations based on equality, autonomy of will, its meaning is much broader. On the basis of the value of the Civil Code of Russian Federation in the system of legislative acts, which directly provides along with the Constitution the freedom of the human activities, other legislative acts (not only the special norms of the civil law, but also norms of administrative, criminal, procedural law) should define only the necessary restrictions for human activity, leaving wide scope for private discretion of the individual.

The only question that remains is how to legally consolidate the leading role of codified norms of the civil code? It would be logical to do this in the law on regulations, which would need to be adopted. In many countries of the world, including all the CIS member states, except Russia, such laws have been adopted, and a model law on normative legal acts for the CIS member states has also been developed. Based on this, it would be logical to suggest to develop such a regulatory act on regulatory acts in Russia and adopt it.

This law should regulate all the main aspects of legislative and other rule-making activities.

First, it should define the concept of a normative act, the boundaries of regulation, the principles of the regulatory activities for the purpose of regulation, taking into account differences in the nature of the activities of private persons and activities of public institutions. This act should define the types of normative acts and their relationship to each other, in particular, legislative and subordinate acts, federal, regional and local, centralized and local, general and special, etc., including case law, customs, generally recognized principles and norms of international law, international treaties, all external forms of expression of law, in my opinion, should be reflected in this act. It should also reflect other aspects: the procedure for developing the draft law, including its public discussion, adoption, publication, amendment and repeal. Such a normative act can become a certain restriction on the arbitrariness of the activities of the legislative power, executive bodies and the judiciary.

Natalia Yu. Rasskazova[27]. Any complex system, according to Gödel's theorem, is objectively contradictory and incomplete. This is mathematically proven and fully applicable to our legal system. It is very complex, objectively contradictory and incomplete, and in such a system we will always face gaps and contradictions, and the need to eliminate them. Of course, when we talk about law, we cannot restrict law as a part of culture by regulation or legislation, but in practice, lawyers are primarily faced with mandatory norms. At the same time, it is the legislation as a set of normative acts that should be the main interest of the state, or rather legislation. The main general trend of the existence of law in legislative acts is, of course, the deterioration of the quality of legislation, and it is in the field of civil legislation. First, it is a noticeable decrease in the necessary degree of abstractness of the law norm. The general rule is that the law works when the norms that are set out in it are abstract, which means that the law enforcement officer, primarily the court, has the opportunity to apply these norms in changing life circumstances. Current laws, which can not be understood in substantive terms, formally look often impossible to comprehend, contain articles into multiple pages with a thorough description, with the transformation of the text of the law into step by step instructions, that leads to a disaster for the proper law enforcement — to limit of judicial discretion.

The second common modern trend is an increase in the flow of legislative work, while the preparation of bills is entrusted to the relevant departments, laws in the field of private law are made by officials, people primarily with economic, managerial, accounting education. As a result, the administrative type

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of thinking actively penetrates into civil law regulations. In the texts of rules regulating civil law relations, the principle of free will, dispositivity (everything that is not prohibited is allowed) should be applied. At the same time, now in the texts of laws, we often see formulations such as "a citizen can...", "an organization can...", which means the permissive principle of regulation. I am inclined to think that the authors of the texts of the laws do not even realize what is the defect here. And we are talking about civil law regulation, in which it is enough to prohibit what is not allowed, and that's all. As a result, what is allowed by the civil code is often allowed again in current laws. This leads to a distorted perception of law, to a rejection of laws and a decrease in the authority of laws.

The problem of the low level of legal culture of the drafters of laws has become a common place. In 2016, the Constitutional Court prepared "Bulletin on the aspects of improving law-making activities". The constitutional court outlined in this document the fact that the common drawback of our laws today was the uncertainty, namely the blurring of terminology, unclear application of laws of the mechanisms used, vagueness of concepts and definitions of laws, the uncertainty of duties imposed on the subjects of legal relations. A significant part of the legislative norms that were later recognized as unconstitutional or applied in an unconstitutional way were introduced in the form of amendments at the second reading stage. Legislature processes end with the adoption of laws that embody all these defects. It is an axiom that the uncertainty of a legal norm is one of the best conditions for arbitrariness, for unlimited discretion in the application of the law. A special case of a contradiction in laws is the inconsistency of regulation between the norms of different spheres. And the most painful issue for practice is the inconsistency between the norms of real civil law and environmental standards, in particular, the Land Code of the Russian Federation. For example, in the first place the code was an act of public law regulation, which apply administrative principles of regulation of social relations, but it also include sketchy elements of civil law regulation, which does not fit into the system proposed by civil code, because they fragmentary snatched for the application of certain administrative rules that constitute the land code of the Russian Federation. The general consequence of this is a disdainful attitude to the law at all levels: the drafters of laws, law enforcement officers, participants in the turnover.

What should we do in such a situation? The first is to adopt a law on regulations and make this process transparent. The second is to teach people, especially lawyers, to respect the law. In recent years, students, according to my observations, refer more and more to judicial practice in their works and refer less and less to the law. This is one of the manifestations of a disregard for the law, an understanding of the poor quality of laws and the fact that they are not able to perform the function assigned to them.

Another trend in the development of our legislation is the usurpation of the rule-making function, primarily in the form of acts of interpretation issued by ministries and departments. Many state bodies have the right to provide explanations on the application of laws and other normative acts regulating relations within the competence of these bodies. Until relatively recently, these explanations of various bodies had been considered as the opinion of the competent authority, the reference to which relieved the person who relied on this opinion from responsibility, and nothing more. But over the past few years, the abundance of such explanations and their categorical nature has led to the fact that it has become impossible to ignore the normative nature of the explanations of state authorities. In 2016, there emerged provisions in the procedural codes that the explanations of legislation that have normative properties, if issued by the executive authorities, can be challenged. The emergence of such norms is understandable, since in the conditions of the pressure on the participants of the turnover, a legal mechanism of protection is required.

Since the executive authorities are not formally entitled to rule-making in the relevant area, then the question arises as to how to determine which explanation has normative properties. For me, as a lawyer, a regulatory act coming from a state body is an act that is subject to execution. And how to determine that the act is normative? If we are talking about classical legal acts, then the determination of whether this act contains a law norm occurs primarily from the analysis of the content of the rule. And when the acts of the executive authorities are evaluated, as explained by the plenum of the Supreme Court of the Russian Federation[28], the act has normative properties if it is used as a generally binding in law enforcement activity in relation to an indefinite circle of persons.

Thus, it turns out that the recognition of an act of interpretation of a law as normative depends only on how this act is used by the body that issued it. If the authority has posted it on its website,

[28] On the practice of consideration by courts of cases on challenging normative legal acts and acts containing explanations of legislation and having normative properties : Resolution of the Plenum of the Supreme Court of the Russian Federation No. 50 of 25.12.2018.

it is considered that such an act has normative content, if it is sent by letter to the relevant applicant, then it is an act of non-normative nature. But the main problem, in my opinion, is that this array of regulations has grown by itself and we are forced to accept them as regulatory sources. In this situation, we can talk about the usurpation of rule-making activities by the executive authorities. For example, the Bank of Russia issues regulatory clarifications, despite the fact that the law on the Central Bank of the Russian Federation[29] does not say that it can give any clarifications at all, but it nevertheless issues them, they are accepted, applied in practice, and challenged in court.

A similar problem exists in the field of case law. Unlike previous legislation, which indicated that the guiding explanations of the Plenum of the Supreme Court of the Russian Federation were binding for the courts, authorities and officers applying the rule, at the moment these provisions were excluded from the law and there is only a provision stating that the act of interpretation in a particular case is binding on lower courts. Based on the law, the Plenum of the Supreme Court of the Russian Federation on the court decision[30] stated that the resolution of the Plenum of the Supreme Court of the Russian Federation shall be taken into account by the courts, however the court shall be guided by law when making decisions. At the same time, we see that judicial practice in the field of private law claims to be a full-fledged source of law. And many colleagues assess this trend as progressive, primarily emphasizing that we are talking about the penetration of the continental legal system of case law into our legal system. First, it should be noted that a precedent in the common law system is a binding source of law. In this case, the court decision contains the reasons for its adoption, but these reasons do not depend on the plot of a particular case. And as a result, such a decision contains, in fact, a norm, a generally binding rule. Lower courts are subject to common law precedent, not because they are convinced by the reasons behind the decision, but simply because the higher court said so and for the lower court it is the source of the law. In practice, we see that judicial acts acquire great weight in the field of law enforcement. Suffice it to say that the emergence of a new law review, published by the Supreme Court of the Russian Federation, can turn around all of the legal representations on any issue, if the review contains some kind of resolution which shows that the Supreme Court changed its previous perspective for similar or analogic case.

There are no motivations that would claim to be ratio decidenti, that is, the part of the precedent that contains a normative prescription in the common law tradition. Can the Supreme Court of the Russian Federation be a rule-making body? In order to discuss this question, we must first decide whether we recognize that it is the norm that is the source of law for practical application. If we agree that a practicing lawyer who works daily in their field needs a norm, that the source of law for practical application for utilitarian purposes is a norm, then we must ask the following question: is society ready today to provide the Supreme Court with a rule-making function. If we agree with this and are ready to recognize the right of the Supreme Court of the Russian Federation to rule-making, then this provision, the convention must be consolidated at the level of law.

At the same time it is necessary to determine the place of rules that are created by the Supreme Court in the course of its enforcement activities in the hierarchical system of normative acts. It is also necessary to determine the order of official publication of these regulations and the rules of their operation in time. Huge problems arise due to the fact that the effect of the resolutions of the Plenum of the Supreme Court of the Russian Federation is preserved, but the laws are changed. Finally, it is necessary to create conditions for the rule that is born in law enforcement practice and formulated in the decisions of the plenum to be accompanied by a statement of reasons, that is, what constitutes the necessary prerequisite for the emergence of a precedent in the common law system.

Tatyana S. Yatsenko[31]. I would like to address issues related to inheritance law in the digital age. First of all, I want to note that the scientific and technological development of society is taking place at an extremely high speed and this is a serious challenge for the law. The reason for this is that traditional legal systems are not designed for the emergence of new objects of civil rights and do not take into account the peculiarities of their turnover, while this is very important for inheritance law, because it is one of the most conservative and stable legal institutions.

First of all, we are talking about the difficulties in inheriting so-called digital assets. The Russian legislator has so far reduced all digital assets to digital rights, i. e. tokens. Although there are many more

[29] On the Central Bank of the Russian Federation (Bank of Russia): Federal Law No. 86-FZ of 10.07.2002.

[30] On the court decision: Resolution of the Plenum of the Supreme Court of the Russian Federation of 19.12.2003 No. 23 (ed. of 23.06.2015).

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digital assets distinguished abroad, which include not only tokens and cryptocurrencies, but also documents created with the help of programs, digital videos and photos, domain names, legally uploaded to computers trZ files, accounts in social networks, e-mail, etc.The market of such assets is now multibillion-dollar, but almost in no country in the world is it properly regulated. And the problem, especially with tokens and cryptocurrencies, is caused by the specifics of the creation and turnover of these objects through the mechanism of distributed registries. Heirs, if the testator did not leave access codes, may not know that such an asset was available, and even if they knew about it, they will not be able to get it without an access code. In fact, inheriting such assets may not be possible right now. The issue of inheritance of accounts in the Internet is of particular relevance. The judicial practice in the world on this issue is already developing. And as practice shows, social networks strongly resist allowing the inheritance of accounts, and even include special conditions in user agreements.

Abroad, attempts are being made to solve this problem, in particular, by legislative regulation of the procedure for access of heirs to digital assets, by creating special information repositories. Such an initiative was taken in Denmark by the notary chamber. There it is planned to create a kind of repository where the corresponding keys will be stored, which, if the testator wants it, will be transferred to the heirs. So far, no initiatives have been taken in Russia on this issue. But in connection with the legalization of digital rights, this issue should be raised unequivocally. In addition, the development of the Internet, social networks, and messengers has led to the widespread use of so-called electronic wills.

And contrary to the mandatory rules on the invalidity of wills drawn up in violation of the established form, such wills in foreign countries are gradually legalized within the judicial practice. These are wills in the form of audio and video messages posted on platforms such as Youtube, these are wills created using the Microsoft Office program, etc. So, in one of the cases, the court recognized the text of a document created in the Word program as a will. This document ended with the testator's full name in the place where his signature should have been in the standard form of the will. And as circumstances confirming the possibility of recognition of the will, the court accepted such facts, taking into account that the computer had a password, the document was not changed after the death of the testator, and it legalized such a will.

The regulation of electronic wills is becoming a problem not only in the context of control over the execution of these wills, but also in the technical features of their execution. The first platform for drawing up electronic wills "To help testators" appeared in 2000, that is, it was possible to draw up the text of a will using software tools, and then apply to a notary with it. Now the situation has changed. For example, in Australia, a person wrote a will in the WhatsApp application, sent it to friends and committed suicide, and then the court legalized this will, because it considered that the will was expressed clearly and fully enough. Reading foreign literature, I see that not only authors from countries with a common system of law emphasize the need to recognize and regulate such wills, but also European scientists also express opinions that it is necessary to recognize audio and video wills as legally valid, since they allow us to more fully and clearly identify the will of the testator. Russian legislation explicitly prohibits the composing of wills using electronic means, at the moment this is absolutely true, since it is technically impossible to ensure the composing of such wills. But we need to understand that this is a temporary measure, and now we should think about how to solve this issue.

Several US states have attempted to pass laws on electronic wills. In Nevada, the law was passed in 2006, but did not enter into force. A new version appeared in 2017, but is still not in effect. As far as I know, the state of Arizona passed a law in 2019, which involves the so-called biometric identification of the testator by their physical characteristics (irises, veins, fingerprints), in addition, it is supposed to put digital markers that will warn about unauthorized interference by third parties in changing the text of the relevant will. But in the United States, as the authors of the bill themselves admit, technology does not yet allow them to technically provide everything that is provided for by this law. Therefore, to some extent, the digital optimism about the institute of wills seems superfluous. Some authors believe that with the help of blockchain technologies, the problem of electronic wills can be solved quickly and effectively, it will remove the notary figure from this area, because the will will be automatically executed and drawn up, the person will only need to appoint a guardian figure, who after the death of the testator will notify the network that this has happened, make a transaction, take appropriate actions, and the network will ensure the execution of such a transaction. But the blockchain technology itself is vulnerable, no matter what its developers say about it, and we already know about hacker attacks on the relevant systems. Nevertheless, inheritance law is a sphere of mandatory regulation, and if there is no state control in this area of relations, it is impossible to say that the interests of the testator will be respected.

It is clear that the trends in the development of legal relations, of course, need to be taken into account and already now we should think about what the scientific justification for these changes may be.

In foreign literature, different concepts are proposed, for example, the concept of virtual property. It is impossible to ignore these trends in the development of inheritance law.

Askhat N. Kuzbagarov[32]. With regard to the topic of the conference on the reform of civil legislation, I asked myself what happened to the subject of civil legislation in the end. Article 2 of the Civil Code of the Russian Federation reflects the triplicity of those relations that are included in the subject of regulation of a civil law act. The classic version of property and personal non-property relations remained, and no one disputes this. In 1994 we introduced the concept of entrepreneurship, which was enshrined in section 1 of article 2 of the civil code, and thus, a long-standing dispute, which was against the autonomy of business law, was leveled and "victory" won by those who believe that civil-law regulation is the most important and the entrepreneurial or business manifestation of law in this area is secondary. Recently, since 2012, corporate legal relations have been included in the subject of civil law regulation. Thus, today the subject of civil legislation includes a triplicity of relations: property and personal non-property, corporate relations and entrepreneurial activity. If we ask ourselves whether this is a good thing or a bad thing, then we need to look at the consequences of this reform. In my view, nothing good came out of this, because I believe that it is impossible to say that relations within the entrepreneurial activity are based on equality and autonomy of will, that corporate relations are based on the legal equality of their participants. I believe that, no, such an identity cannot be made. Our legislator follows its own path, and the combination of these three different types of legal relations under the auspices of the Civil Code subsequently formed a contradiction in law enforcement, when the same Supreme Court of the Russian Federation takes different positions on certain categories of cases with a difference only in time. It happens that less than three years pass. The courts, the district courts, take very different positions on the very same issues and relations. In my opinion, combining these types of relations for regulation in a single civil code is not entirely correct, since they have different features, for example, the nature of risks and their distribution. It seems to me that the more classical version was the dualistic order of regulation, when trade relations were separated from the subject of civil regulation into an independent area of regulation.

Konstantin K. Lebedev[33]. I would like to briefly address the issue of changing the subject composition of entrepreneurial and other types of economic activity. The concept of entrepreneurial activity in the Civil Code of the Russian Federation underwent a change in 2017. Now the concept of entrepreneurship is formulated as follows: the civil law regulates the relations between persons engaged in entrepreneurial activities, or with their participation, based on the fact that business is a separate undertaken at one's own risk activity aimed at systematical profit from the use of property, sale of goods, performance of works or rendering of services. Persons engaged in entrepreneurial activity shall be registered in this capacity in accordance with the procedure established by law, unless otherwise provided for by this Code. In the definition, the term "persons" is used not quite correct, although it is clear that we are talking about citizens, and not about commercial organizations that are registered in this capacity. But I would like to draw attention to the clause "unless otherwise provided by this Code", because now not only the Civil Code provides that citizens, who conduct business activities, are allowed not to register in certain cases, which means that the clause should not sound as it is currently formulated, but at least with reference to the current legislation.

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