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LAW AND GOVERNANCE

DEVELOPMENT OF RUSSIAN LEGISLATION

INTERNET PUBLICATION OF THE NORMATIVE LEGAL ACTS IN THE RUSSIAN FEDERATION: ALTERNATIVES AND PERSPECTIVES

S. V. Boshno Doctor in Law, Professor, Head of Chair at the Russian Presidential Academy of National Economy and Civil Service

Summary: Although internet publication of laws and legal acts has been introduced by the government of Russia, the official online portal for legal information has not yet become an everyday tool for citizens or the professional legal community. The article discusses the reasons for this complicated transition to electronic publication, traces the historical traditions of the publication of normative legal acts in Russia, and analyses the problems of the judicial practice regarding the official publication of laws.

Keywords: publication, normative legal acts, Internet publication, electronic publication, digest of laws, consolidation, www.pravo.gov.ru

Relevance. The publication of legislative acts is a crucial stage of the law-making process. It defines the moment when the law enters into force and also manifests the constitutional right to access legal information. The institution of the official publication in Russia has a rich history.

The Code of Laws of the Russian Empire[1] stipulated that the laws would be made public by the Governing Senate in a certain defined order and would not come into force before being made public.

The history of law publishing in the Soviet Russia started with the Decree of the *Sovet Narodnykh Komissarov* [the Council of the People's Commissars] of October 30, 1917 "On the Order of Enacting of and Publication of Legislative Acts"[2]. According to the decree, "legislative act shall be published and made available to the public. The legislation becomes effective on the day and time of its publication in the official gazette *Gazeta Vremennogo Rabochego i Krestjanskogo Pravitelstva* [The Provisional Workers' and Peasants' Government's Gazette].

However, the publication procedure was changed as soon as 1924[3]. Some legal acts were exempt from publication by a special executive order[4]. An important act in this regard was the USSR *Sovet Narodnykh Komissarov's* Decree of February 6, 1925. According to the degree, legal acts would be published in the Statute of Laws and Decrees of the USSR's *Raboche-Krestianskoje Pravitelstvo* [Workers' and Peasants' Government], the newspaper *Izvestia TsIK and VTsIK SSSR* [News of the Central Executive Committee and the All-Russian Central Executive Committee], and the newspaper *Economicheskaja Zhizn* [Economic Life]. The decree also allowed for making legal acts and degrees public via radio or telegraph.

The next revision of the publishing procedure took place in 1958[5], further narrowing the number of legislative acts subject to publication. It was decided that: "The most important acts subject to immediate and wide publication can be published in the newspaper *Izvestija Sovetov Deputatov Trudjashchikhsja SSSR* [News of the Workers' Deputies' Councils of the USSR]. When necessary, such acts could also be made public via radio or telegraph. That was the defining decree that laid the legislative foundation for the "shadow" law-making practices whose results were unknown to the public. In particular, it was established that decrees and regulations of the USSR' *Prezidium Verkhovnogo Soveta* [Presidium of the Supreme Council] that did not have a general application and did not have a normative character would be sent to the respective government agencies and departments who would then be responsible for informing the individuals being affected by such legislation. So the circle of those who were informed about legal acts was narrowed and the official publication rules were further complicated.

The next stage in the development of the official publication regulations was the USSR's Law of 1989 "On the Procedure of the Publication and Entry into Force

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[1] Volume 1, part 2, Chapter 9, p.51.

[2] Here and below all the names and titles in texts and references are respelled according the norms and rules of the Library of Congress.

[3] Postanovlenije Tsentralnogo Ispolnetelnogj Komiteta SSSR "O Porjadke opublikovanija zakonov i rasporjazhenij Pravitelstva Sojuza SSR [The ruling of the USSR Central Executive Committee "On the Procedure of the Publication of Laws and Decrees of the Government of the USSR"] of August 22, 1924 // SZ SSSR [CL USSR], 1924, No. 7, p.71.

[4] The decision about exemption from publication could be made by several government bodies, such as: Tsentralny Ispolnitelnyj Komitet (the Central Executive Commmittee), and its Presidium, Sovet Narodnykh Komissarov (the Council of Peoples' Commissars) and Sovet Truda i Oborony (the Council for Labor and Defence), their chairmen and secretaries.

of the USSR's Laws and Other Legal Acts, Adopted by the *Sjezd Narodnykh Deputatov* [Congress of People's Deputies] of the USSR, the *Verkhovny Sovet* [Supreme Council] of the USSR and their Agencies and Bodies". At that time, the country already started the process of democratization of its civil and legislative institutions, but law publication regulations were not yet affected by this trend.

The Constitution of the Russian Federation (Article 15) contains a very important principle of the "legal state". It provides that all laws of the state are subject of official publication and that unpublished laws shall not be applied. The road to the adoption of Article 15 consisted of several important, but at the time inconspicuous, steps, which ultimately broke the established order and made the legislative process open to the people. The latest (since 1993) history of the official publication regulations includes several important events and is still evolving to this day. Over the last twenty years, the most progressive and significant trends have been: (i) the transition from printed to machine-readable sources, and (ii) introduction of internet publication.

The legislation regarding the due order of legislative process and the official publication of normative legal acts has not been evolving. Fundamental laws regarding legislation and the law-making process have not been fully updated for purely political reasons despite the obvious societal need. Instead of adopting new contemporary legislation on official publication, the government has been introducing sporadic changes to the existing laws which are over 18 years old, such as: The Law of the Russian Federation, of June 14, 1994 "On the Procedure for the Publication and Entry into Force of the Federal Constitutional Laws, Federal Laws, Legal Acts of the Chambers of the Federal Assembly" and the Decree of the President of the Russian Federation of April 5, 1994 "On the Procedure for the Publication and Entry into Force of Federal Laws". Those legal acts are completely outdated and no amount of airbrushing can fundamentally change them.

While talking about these two pieces of constitutional legislation, it is important to point out that the constitutional institution of official publication of laws in Russia is not well-developed. At the same time, over the past several years, we have witnessed the creation and a very rapid development of the information law. The constitutional right to access to information has been developing successfully. However, in a "legal state" such notions as "right" and "law" are not equal to each other. So the "right to information" cannot be equated with "the right to have access to law". Law cannot be regarded as just a type of information. Law is an important cultural asset defined by the moral, ethical and historical attributes of

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[5] Dekret Prezidiuma Verkhovnogo Soveta SSSR "O Porjadke opublikovanija I vstuplenija v silu zakonov SSSR, postanovlenij Verkhovnogo Soveta SSSR, ukazov i postanovlenij Prezidiuma Verkhovnogo Soveta SSSR" [The Decree of the Presidium of the Supreme Council "On the Order of the Publication and Entry into Force of the Laws of the USSR, the Rulings of the Supreme Council of the USSR, Decrees and Rulings of the Presidium of the Supreme Council of the USSR"] of June 19, 1958 // Vedomosti VS SSSR [Records of SC USSR], 1958, No. 14, p.275

the society and reflecting the norms and understanding of justice accepted in that society.

The government of the Russian Federation set a goal "to ensure public access to accurate, comprehensive, contemporary legal information in electronic form, through (among other things) modernization of the official legal publication process and integration and harmonization of the legal information systems of government agencies".[6]

Compared to the constitutional approach, the informational approach is much more developed, however, it does not ensure the proper development of the law and legislative system. The publication of law should be guaranteed by the constitution. Law should not be drowned in a massive pool of other types of information. Law is not information per se, it is a social and cultural asset.

Regulations on the official publication procedure must take their rightful place in the system of constitutional law. Such regulations must address the following important issues: ensure the authenticity of the published text of the law and its conformity to the text of the adopted law, establish an official place of publication, and make officials responsible for the accuracy of the information published on the official online portal.

The Importance of the Official Publication. Publication represents a very short period in the life of a legislative act. After being published, the law is stored in the massive body of existing legislation along with many other documents. However, the official publication is an important process as it documents the fact of making the law public and the authors and the source of the first publication. Whether or not the official publication was performed in accordance with the established due procedure will have an impact on the way the law will work in the future and will determine the date of its entry into force.

In general, if there are no disputes about the very fact of the official publication of a law, the date of the publication is not as important. As a rule, a legal act enters into force on the date of its official publication. And in most cases, there are no disputes about the fact of its publication if the legal act was published in a printed edition of a newspaper or a journal. However, if the law was never officially published in a printed source, the very fact of its publication may be disputed.

It is important to note that in some (rare) cases the date of entry into force is not the same as the date of publication. For the purposes of this research, it is only important that the law in not applied before its publication, except in the cases

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[6] Gosudarstvennaja programma "Informatsionnoje obshchesnvo (2011—2020 gody)" ["State Program "Information Society (2011-2020)"], // SZ SSSR [CL USSR], 2010, No 46, item 6026.

[7] See Boshno S. Obratnaja sila zakona: obshchie pravila i predely dopustimosti [Retroactive law: general rules and limits of application] // Vash nalogovyj advokat [Your Tax Counselor], 2008, No. 4, pp. 61-67.

when the law is applied retroactively. In certain exceptional cases and within constitutional limits, a law can be applied to events that occurred before the time of its adoption and publication. However, such cases are beyond the scope of the present research.[7]

The main purpose of the publication of legal acts is to provide public access to the legal texts, as this is a part of the application of the law. During court trials, it is usually investigated whether the subject of law had access to the text of the law.[8]

In this regard, the main issue is not the source of the first official publication of the legal act, but the very fact of its publication. Information that has been published in a paper source is harder to temper with. In case of any dispute, paper documents are presented in court as evidence. If there is a dispute in court about the fact of the publication it means that one party argues that the act was published and the other party disputes that fact. If the law was published in a newspaper or a journal, there is no ground for such a dispute. If such dispute arises, it means that the law was not published at all or that there were violations in the process of its publication.

The existence of such disputes indicates that the subjects of the law are not certain whether or not there is a legal document and whether or not it came into force. In this situation, the form of the publication (paper or electronic) is not important. The more important issue is whether or not citizens have access the state's legal information.

State authorities are responsible for providing citizens with accurate and complete information about legislation. However, throughout Russia's history, there have been many disputes regarding the very fact of the publication of certain legislative acts. The most famous of those disputes involved legal acts regarding privatization of the most valuable state assets (e.g., energy company Gazprom). Legal acts regarding the privatization of such assets were never published in paper sources (which was the law at the time) and were only

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[8] Postanovlenije Plenuma Verkhovnogo Suda Rossijskoj Federatsii "O praktike rassmotrenija sudami del ob osparivanii normativnykh pravovykh aktov polnostju ili v chasti" [The Ruling of the Plenum of the Supreme Court of the Russian Federation "On the Practice of the Ajudication in Courts of Disputes Regarding Normative Legal Acts, in Parts or as a Whole"] of October 29, 2007, No. 48.

[9] The Decree of the President of the Russian Federation of April 5, 1994 stipulated the procedure of the official Internet publication of laws . According to the decree, all legal acts were to be published on the official website of Scientific and Technical Center of Legal Information Systema (http://www.systema.ru).

[10] The Ruling of the Supreme Court of the Russian Federation of 08.09.2000, No. ГКПИ00-178. The Document was not published. See the legal data base KonsultantPlus.

[11] Postanovlenije Pravitelstva Rossijskoj Federatsii "O merakh po vypolneniju Ukaza Prezidenta RF ot 28 maja 1997 g. No 529 "O porjadke obrashcenija aktsij Rossijskogo aktsionernogo obshcestva "Gazprom" na period zakreplenija v federalnoj sobstvennosti aktsij Rossijskogo aktsionernogo obshcestva "Gazprom" [The Act of the Government of the Russian Federation of May 30 1997, No. 654 "On the Measures on the Execution of the Decree of the President of the Russian Federation of May 28, 1997 No. 529 "On the Order of the distribution of the shares of the Russian joint stock company Gazprom during the Period of Confirming the State Ownership of the Shares of the Russian Joint Stock Company Gazprom"].

published on the website "Systema"[9]. To mitigate that fact, the Supreme Court of the Russian Federation[10] ruled that the words "official publication" and "official text" should be considered synonyms. By this controversial ruling, the Supreme Court gave legitimacy to the legal acts that were never properly published in the order stipulated by the Russian law.[11]

In our opinion, the words "official publication" and "official text" cannot be regarded as synonyms as they refer to two completely different things. Official publication is a process of publishing of a legislative act in a number of specific sources defined by the law. The official text, on the other hand, is the accurate undistorted text of the legislation provided by a certain authorized body. At the time of privatization, internet publication of legal acts was not regarded as official publication by the Russian law. Therefore, the acts that were not published in a newspaper or a journal could not be considered legitimate.

At the same time, if the act was first published in a newspapers or a journal before its electronic publication on the portal, another question arises: can the date of the internet publication be considered the official publication date? Strictly speaking, the law on official publication says no, since the text of the act has already been published in official (paper) publications. However, the law does not forbid the first official paper publication. But if the first official publication occurred in a paper source, the text of the law should still be displayed on the official online portal www.pravo.gov.ru with a note on the source of its first official publication. At present, the online portal contains information on the dates of publication in all official sources.

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[12] Pigolkin A.S.Ofitialnoje oglashenije normativnykh aktov – smostojatelnaja stadija pravotvorcheskogo protsessa [The Official Publication of Normative Acts as an Independent Stage of the Law-Making Process] // Pravovedenije [Legal Studies], 1976, No.6; Bloom M.I., Tille A.A. Obratnaja sila zakona [Retroactive Law]. Moscow, 1969, p. 4. Also see Strogovich M.C. Uchenije o materialnoj istine v ugolovnom protsesse [A Study on the Material Truth in a Criminal Procedure]. Moscow, 1947, p.207; Tumanov V.A. Vstuplenije v silu norm sovetskogo prava [The Entry into Force of the Norms of the Soviet Law] // Uchenyje zapiski VIJUN [Scientific Notes VIUN"], 1958, ed. 7, pp.102-104; Trotskiy N.M. Vstuplenije zakona v silu [Entry into Force of the Law] // Pravo i zhizn [Law and Life], 1925, book1; Arkhipov K.A. "Opublikovanije i vstuplenije v silu sovetskikh zakonov [Publication and Entry into Force of the Soviet Laws] // Sovetskoje gosudarstvo i pravo [Soviet State and Law], 1926, No. 1(19); Mantnek A., Zakharov V. Objedinit opublikovanije zakonov i vedomstvennykh aktov [To Join the Publication of Laws and Agency Acts] // Sovetskaja justitsija [Soviet Justice], 1930, No. 34; Volkov P. Neobkhodimo izmenit porjadok publikovanija zakonov i izdanija vedomstvennykh aktov [It is Necessary to Change the Procedure of the Publication of Laws and Agency Acts], Sovetskaja justitsija [Soviet Justice], 1930, No. 35; Djablo V. Obnarodovanije, ego juridicheskaja priroda i organizatsija v Zapadnoj Evrope i Sojuze SSR [Publication, its Legal Nature and its Organization in the Western Europe and the USSR] // Sovetskoje pravo [Soviet Law], 1925, No. 6 (18).

[13] Khurgin V.M. Ofitsialnoje opublikovanije pravovykh aktov [Official Publication of Legal Acts] // Mezhotraslevaja informatsionnaja sluzhba [Interindustry Information Service], 2003, No.2, pp. 72-86; Idem. Porjadok opublikovanija pravovykh aktov [The Procedure of the Publication of Legal Acts], Informatsionnyje resursy Rossii [Information Resources of Russia], 1996, No.6, pp.20-24.

[14] Rakhmanina T.N. Opublikovanije normativnykh pravovykh aktov: informatsionno-pravovoj aspekt [The Publication of Normative Legal Acts: Informational and Legal Aspect], Zhurnal rossijskogo prava [Journal of Russian Law], 1998, No.10-11.

[15] "Ofitsialnoje elektronnje opublikovanije: Istorija, podkhody, perspektivy [Official Electronic Publication: History, Approaches, Perspectives] // Ed. by V.B. Isaakov. Moscow: Formula prava, 2012.

Literature Overview. There has been done extensive research on the issue of official publication and there are several classic works on this topic[12]. Such experts as V.M. Khurgin[13], A.I. Abramova and T.N. Rakhmanina[14] have done research on electronic publication of laws.

One of the most interesting books on the subject is a collection of works edited by V.B. Isaakov[15]. The authors have done tremendous work on the topic paying a special attention to the history of publication going back to the very first stages of the history of law. At every stage of the development of the publication law, the authors find preconditions inevitably leading to the development of electronic publication. The research gives an overview of electronic publication in other countries and presents projections regarding the development of digital sources of legal information in Russia.

At the same time, some of the authors' propositions and conclusions seem doubtful. For example, while comparing official internet publication experience in Russia and the U.S. one should recognize the differences in document formats of internet publication in those two countries. In the US, all legal texts are published in PDF-format, which is not the case in Russia. In Russia, only the laws adopted after November 10, 2011 are posted on the official website as PDF files. The texts of the laws adopted before that date are published directly on the website and therefore are not protected from changes.

The authors also seem to suggest that the U.S. is a country of purely "electronic" legislation, which is not the case. In fact, the U.S. is quite conservative in this regard and still relies on paper sources of legal information. The U.S. federal laws are stored in the multiple volumes of the U.S. Code. This does not exclude electronic publication of legal acts on various websites. However, the National Archives are obligated to store paper copies of all legislative acts. Upon enactment of a law, the original bill (or amendment) is delivered to the archives in a brochure form (Slip Law). The main edition of the United States Code is published every six years (the 51th edition was published in 2013, and the 52th edition is currently being planned).

History of Electronic Publication Law in Russia. History of the electronic publication of normative legal acts in the Russian Federation started in 1994 with the Decree of the President of the Russian Federation No. 662 of April 5, 1994 "On the Procedure for the Publication and Entry into Force of Federal Laws". However, that could not be called "internet publishing" in the full sense, this term was not used at that time. The decree introduced a new term: "the official text", which referred to the text of an official law published in a machine-readable format on the website *Systema* [System]. The new decree allowed for

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[16] Ruling of the Supreme Court of the Russian Federation of 09.08.2000 No. ГКПИ00-178

other forms of official publication. Laws could also be made public through TV and radio announcements.

In its literal interpretation, the above mentioned decree allows for official publication on paper only. However, subsequently, the Supreme Court of the Russian Federation ruled[16] that the terms "official publication" and the "official text" are equal in their meaning and can be used interchangeably. In this approach, the most important aspect that defined the legitimacy of the law was whether or not the text of the law was made available to the public (regardless of the source). In other words, if the official text of a legal act was made available to the public (through a printed source or internet), such act should be considered acting law. In this way, the Supreme Court ruling combined two completely different notions: the publication of the law by a state authority in a certain source (official publication) and providing access to information.

Current legislation on the publication of legal acts. According to the Notes to the bill on internet publication of legislative acts, internet publication will enhance the efficiency and accuracy of the publication process and will improve access to the text of legal acts for the state and municipal government bodies, organizations, legal bodies and individuals. Those were the goals that legislators were aiming to achieve by this law.

According to Article 4 of the law on official publication, the official publication of federal constitutional laws, federal laws and the acts of the chambers of the Federal Assembly of the Russian Federation is the first publication of its full text in *Parlamentskaja Gazeta* [Parlament Newspaper], *Rossijskaja Gazeta* [Russian Newspaper], the official gazette *Sobranije Zakonodatelstva Rossijskoj Federatsii* [Collection of Laws of the Russian Federation] or its first publication at the *Official Internet Portal of Legal Informaiton* www.pravo.gov.ru. At the same time, the Decree of November 17, 2011 states that internet publication at the official portal should be considered the only official publication. Such discrepancies have been common since 1994. For example, the Decree of the President of the Russian Federation of April 5, 1995 was kept in place despite the existence of a (more recent) Law of June 14, 1994 on the same subject. In legal theory, the order of the publication of a law of a higher legal force cannot be dictated by a law of a lower legal force (in this case, the order of the publication of federal laws is defined by a presidential decree, which is a law of lower legal force). And although the text of the decree makes a reference to Paragraph d. of Article 84 of the Constitution, it does not resolve the issue.

According to the amendments of November 17, 2011 (Decree of the President of the Russian Federation No. 1505), the official publication of a legal act is the first publication of its full text on the official internet portal of legal information (www.pravo.gov.ru).

Furthermore, the decree and the law differ in the subject of regulation which

further complicates their interpretation and application. The decree refers only to the publication of federal laws, whereas the Law covers the publication of federal constitutional laws, federal laws and the acts of the chambers of the Federal Assembly. However, the fact that the presidential decree regulates the rules of publication of the federal law (a higher law) makes such decree inapplicable. Once again, like 17 years ago, the decree and the law contradict each other, thus undermining the consistency and clarity of the country's legal system.

Official Online Portal: the Content Problem. The online portal has been given the status of the place of the official publication of legal acts by the Federal Law of October 21, 2011 No. 289 "On the Introduction of Changes to the Federal Law "On the Procedure for the Publication and Entry into Force of Federal Constitutional Laws, Federal Laws and the Acts of the Chambers of the Federal Assembly". The official online portal of legal information contains the following types of documents: federal constitutional laws, federal laws, acts of the chambers of the Federal Assembly (on the issues that were placed under the chambes' prerogative by Part 1 of Article 102 and Part 1 of Article 103 of the Constitution of the Russian Federation), decrees and orders of the President of the Russian Federation, as well as other acts.

The portal contains a *Calendar of official publications* which appears to be an interesting resource. The calendar lists all legal acts passed since November 2011 by date. Perhaps, this resource may be useful if one knows the exact date of the publication of the legal act they are looking for. However, more often people search a document by the date of its adoption, not by the date of publication on the website. Thus, it is hard to say how useful this resource will be in practice.

Another new resource of the portal is the *Digest* of the newly adopted legislative acts. It seems unusual that the authors of the website chose to publish new legal acts in a "digest form", not in their full-text version. This approach does not appear to be suitable for an official publication source. The commentaries of the authors of the digests appear sporadic and arbitrary, and often do not fully reveal all aspects of the new law. The official status of the portal leads one to believe that the descriptions of the legal acts should be accurate and comprehensive. However, since the website does not give the full text of the law, but only its "summary" there is a risk that certain important parts of the text might be arbitrarily omitted by the editor. Such approach diminishes the reliability and usefulness of the website as a source of legal information.

Another resource of the portal is the *Laws of the Russian Empire*. The fact that the official state portal contains the laws of a different state appears somewhat perplexing. Perhaps the national pride for Russia's imperial past combined with lobbying efforts of certain groups played a role in this decision. While the laws of the Russian Empire are a thing of past, many legal acts of the former Soviet Union are still in force in the present day Russia and will remain so for years to come. According to Part 2 of the Constitution, many legal acts of the former USSR and RSFSR still have legal power,

provided they do not contradict the Constitution of the Russian Federation. In this regard, it would be advisable to publish those legal acts that are still in power, instead of the purely historical documents of a state that is long gone.

The website contains several documents with the legislation passed before 1994, such as *Sobranije aktov Prezidenta i Pravitelstva Rossijsoj Federatsii* (1992-1994) [The Collection of the Acts of the President and the Government of the Russian Federation] and *Vedomosti Sjezda Narodnykh Deputatov Rossijskoj Federatsii i Verkhovnogo Soveta Rossijskoj Federatsii* (1992-1993) [Records of the Congress of the People's Deputies and the Supreme Council of the Russian Federation]. However, legislation from earlier periods, especially the Soviet era, is not presented on the portal. Apparently, such content choice (new legislation and the laws of the Russian Empire) is temporary and will be changed later when the concept of the portal is better defined and when it becomes clear what types of legal information are demanded by users.

User Activity. User activity is an important indicator of the efficiency of internet publication. According to the law, the portal is the only source of official publication. Therefore, it should demonstrate a high user activity among the citizens, because they cannot learn about new legislation without visiting the portal.

However, the available information on the number of users points to the contrary. According to *Wikipedia*, the portal is at the 697,429th place by popularity in the world. According to *Alexa.com*[17], most of the portal's users are Russian citizens. The portal does not have a tool for tracking the number of visitors, so it is hard to give a precise estimation of its popularity.

However, the results of an expert survey showed that law students, practicing lawyers and law professors are not aware of the portal's existence. It is necessary to carry out a more in-depth specialized survey on the user composition of the website and the reasons for its low popularity within the professional legal community.

The low popularity of the portal could be partly explained by the poor choice of name www.pravo.gov.ru. The Russian word "*pravo*" has several meanings ("rights", "law"), but it is not usually associated with the notion of legal system or legislation in the legal consciousness of Russian people. The key word in this regard should be "*zakon*" [law] or "*zakonodatelstvo*" [legislation]. *Pravo* is perceived as a more abstract notion of law. The Constitution of the Russian Federation does not use the word "*pravo*", it uses the term "*zakon*" [law] and "*normativnyi pravovoi akt*" [normative legal act]. The word "*pravo*" is never used in the same sense as "*normativnyi pravovoi akt*" [normative legal act]. The word "*pravo*" is more often used to mean an authority or opportunity to do something, as in "a right to something" or "somebody's right". This meaning is completely

[17] Alexa.com is a company that measures the user activity on websites.

different from “law” or “legislation”.

Another meaning of the word “*pravo*” is the law in a more general sense, but even in this meaning is not the same as “legislation”. Textbooks on the theory of law specifically teach law students that the notions of *pravo* (law more generally) and *zakon* (law made by the government, legislation) are not equal to each other. The term “*pravo*” can be used to mean the whole system of law or different types of law. This discussion on meaning of the Russian word “*pravo*” could be continued. It will suffice to say, however, that this word is never used to mean “legislation” or “legislative acts made by the government” which are the subjects of official publication. This linguistic and legal analysis shows that the word “*zakon*” [law, legislation] would be a more logical and adequate choice for the portal’s name. A Russian-speaking internet user looking for legal information on the web would never start his or her search by typing the word “*pravo*” in the search engine. More likely, such user would type in “*zakon*”, which means the search engine will never return the official legal portal www.pravo.gov.ru among the search results.

Another issue is the combination of two types of translation in the name of the website www.pravo.gov.ru. The word “*pravo*” is a Latin transliteration of the Russian word “*право*”. There is no word “*pravo*” in the English language. The English translation of this word would be “law” or, less likely, “right”. The second part of the name – gov – is a part of an English word “government”. It is a common abbreviation used in the names of websites of Russian government agencies. The abbreviation “gov” has negative connotations in the Russian language. So, to use a consistent approach, one can translate both parts of the name into English: www.law.gov.ru, or use a more appropriate Russian version: www.zakon.ru

Ethical Aspects of Portal Management. In legal practice, issues of the authenticity and accuracy of legal texts from different sources are of great importance. Through the official portal, citizens are supposed to have access to the authentic texts of laws. The portal is owned and managed by the government, who is the only authority that can confirm the fact of the publication and authenticity of the texts.

Judicial Practice Regarding Official Publication. There have been several court cases involving the publication date of laws, however, more often than not such dispute involve subordinate laws[18]. At the same time, there have been cases of violations in the procedure of the official publication. One of the most famous cases involved the publication of Tax Code, when a side-by-side comparison

[18] See Boshno S. Sudebnaja vlast ob opublikovanii normativnykh pravovykh aktov v svjazi s otsenkoj ikh deistvija i primenenija [Judicial Power on the Publication of Normative Legal Acts vis-à-vis their Application] // Vash nalogovyj advokat [Your Tax Councellor], 2009, No.2.

[19] Urumova E.S. Po kakomu Nalogovomu kodeksu platit nalogi [According which Tax Code taxes should be paid] // Zakonodatelstvo [Legislation].1999. № 3.

of its official text published in the gazette Sobranie Zakonodatelstva Rossiiskoy Federatsii and Rossiiskaya Gazeta and the original document sent from the Administration of the President revealed over 80 discrepancies[19].

Another well known dispute regarded the date of the official publication of the law "On the Intruduction of Changes into the Law of the Russian Federation "On Excise Duties"". The law was published in the official gazette Sobranie Zakonodatelstva Rossiiskoy Federatsii. The gazette was dated March 11, 1996. In this dispute, the Constitutional Court of the Russian Federation in its Ruing of October, 24 1996 No. 17-П decided that the date when the issue went into print could not be considered the official date of the publication of the law. The date on the issue's cover coincided with the date when it was signed into press, so in reality, at that moment the information in the paper still did not reach the readers.

In order to resolve the issue of the true meaning and the future of the official internet publication it is necessary to study the experience of the government agencies which have already used that method of publication. The risks of paper publication are well-known: failure of publication, disputes regarding the date of the publication. It is important to know whether internet publication mitigates those risks or introduces new ones.

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Based on the present research, the author suggests the following measures to improve the concept of the official online portal and its certain options:

Change the name of the portal.

Start publishing the official publications with the texts of Soviet laws passed before 1992.

Move the Collection of Laws and the Digests of Legal Events from the section *Zakonodatelstvo Rossii* [Russian Legislation] to a separate database of information and reference materials.

Develop and implement a new method of adoption of amended versions of laws: new amended texts of laws (combining the original texts and all subsequent amendments) should be adopted by the legislative body through a simplified (fast-track) procedure.

Update the consolidated texts in a timely manner (within one day).

DEVELOPMENT OF RUSSIAN LEGISLATION

IMPORTANCE OF COURT PRACTICE REVIEW IN RUSSIAN ARBITRATION (COMMERCIAL) COURT PROCEEDINGS

A. A. Solovyev Judge, Chairman of the Judicial Board of the Arbitration Court for Moscow Region, Doctor in Law.

Summary: The article concerns the matters of court practice review in terms of participation in arbitration (commercial) court proceedings. The author gives general description of the system of the arbitration courts administering business and economic justice in the Russian Federation, covered the key areas and worked out the practical recommendations concerning the focal points of arranging the appropriate work in respect of review of law enforcement practice of such courts.

Docuterms: court practice, law enforcement, court proceedings, the High Arbitration Court, arbitration courts.

Studying and summarizing of court practice are aimed at assurance of uniformity in law enforcement and are undoubtedly significant for activity of any judicial body, including the arbitration courts of the Russian Federation, due to the fact that, pursuant to the provisions of the Federal Constitutional Law of 28 April 1995 No.

1-FKZ "On the arbitration courts of the Russian Federation", the arbitration courts pertain to the federal courts and belong within the Russian judiciary system.

The arbitration courts administer justice by resolving arbitration disputes and reviewing other legal matters within their competence. The principal objective of the arbitration courts in the Russian Federation in course of resolving disputes subject to their jurisdiction are the following: (i) to protect the rights and lawful interests, infringed or contested, of the enterprises, institutions, entities and individuals in the area of business and other economic activities, and (ii) to contribute to strengthening of legality and preventing wrongdoings in the area of business and other economic activities.

The system of state arbitration courts is composed by: 1) the High Arbitration Court of the Russian Federation (HAC RF); 2) federal district arbitration courts (arbitration courts of cassation); 3) arbitration courts of appeal; 4) first instance arbitration courts in republics, territories, regions, federal cities, autonomous region and autonomous districts (arbitration courts of constituent entities of the Russian Federation); 5) specialized arbitration courts.

In literature on law judicial enforcement practice is understood to be, in particular, a range of judge opinions imposed by various courts in respect of the similar cases and acknowledged as valid and reasonable by the court of higher judicial instance. Moreover, the court practice can be deemed "established" as soon as the legal positions reflected in the judgments issued by the courts of lower judicial instance to settle certain legal disputes are approved by the courts of higher judicial instance[1].

Chairman of the HAC RF A. A. Ivanov fairly mentioned that "each judge should perceive as an imperative the prescription to settle disputes in accordance with the established court practice – in the manner as the cases of such kind are generally resolved. He should elaborate this prescription by himself and it will require from him a certain approach to dispute settlement which may be in fact contrary to some personal or scientific principles of this judge or even to his understanding of justice."[2]

Therefore, it is obvious that in course of preparation of sitting the judges as well as the representatives of the parties should thoroughly and carefully review law

[1] K. A. Kovalenko Ponyatije "slozhivshajasja pravoprimenitelnaya praktika" v federalnom konstitutsionnom sudoproizvodstve [The idea of "established law enforcement practice" within the framework of federal constitutional proceedings] // Zhurnal Konstitutsionnogo Pravosudija [Constitutional Justice Magazine]. 2012. No. 1.

[2] A. A. Ivanov Jedinoj praktika stanovitsja v rezultate jezhednevnoj kropotlivoj raboty kazhdogo sudji [Practice becomes uniform due to daily hard work of every judge] // Vestnik Federalnogo Arbitrazhnogo Suda Moskovskogo Okruga [Bulletin of the Federal Arbitration Court for Moscow District]. 2010. No. 3. P. 9.

enforcement practice of the arbitration courts regarding the similar legal situation. In this context, it is necessary to dwell briefly on the main directions of such work:

1. REVIEW OF LAW ENFORCEMENT COURT PRACTICE OF THE HAC RF.

It appears that review of law enforcement court practice of the HAC RF should become the main focus point for the topic concerned. It is due to the fact that the HAC RF is the supreme judicial body to settle business and economic disputes as well as other cases resolved by the arbitration courts, carry on judicial supervision of their activities in the procedural forms settled by federal law and provide explanation as to the matter of court practice.

The most convenient method of achieving this objective is to refer to the official site of the HAC RF (http://arbitr.ru) where all the required files are available and to the server “Arbitration Cases Catalogue” (http://kad.arbitr.ru). Review of law enforcement court practice of the HAC RF can be carried out in the following principal directions:

1.1. Review of the Decisions of the Plenum and Information Letters of the Presidium of the HAC RF.

The HAC RF provides explanations in respect of various matters arising in court practice in order to assure its uniformity. Such explanations are issued in the form of Decisions of the Plenum binding upon the entire system of arbitration courts. It is necessary to point out that references to the Decisions of the Plenum of the HAC RF can be contained in the declaration of reasons of a arbitration court ruling.

In addition to review by means of judicial supervision of legality of the final and binding judicial decisions of arbitration courts, the Presidium of the HAC RF is also engaged in exploring special matters of the court practice, working out recommendations for arbitration courts in the form of Information Letters.

1.2. Review of legal situations considered by the Presidium of the HAC RF in course of performing its functions of the court of supervision.

It is necessary to note that law enforcement practice is considered to be established exactly from the date when the Decision of the Presidium is placed to the full extent on the site of the HAC RF. So, it is crucial to detect when the texts of judicial acts of the HAC RF are published on the correspondent site in order to work out a correct legal position.

It is especially urgent in light of the provisions of Clause 5 Part 3 Section 311 of the Arbitration Procedural Code of the Russian Federation. Pursuant to these provisions, if there is a designation or amendment of law enforcement in the Decision of the Plenum or Presidium of the HAC RF, or if there is a reference

in the corresponding act of HAC RF to the possibility of review of the final and binding judicial acts, such fact shall be deemed a new matter as a ground for review by the arbitration court of the final and binding judicial act issued by this court. The most efficient method to detect updates is to subscribe on the site of the HAC RF.

1.3. Review of judgments of the HAC RF imposed when considering first instance cases in respect of contestation regulatory and non-regulatory legal acts in the business or economic area of interest for the corresponding party. In particular, it can be referred to the documents of the Government of the RF, the Ministry of Finance, the Ministry for Economic Development, the Ministry for Culture, the Ministry for Public Health and Social Development, the Ministry of Education and Science, the Federal Anti-Monopoly Service, the Federal Tax Service, the Federal Customs Service.

1.4. Review of legal position stated in the rulings of judicial panel of the HAC RF to dismiss the case referral to the Presidium of the HAC RF. In this case, as Chairman of the HAC RF A. A. Ivanov correctly mentioned, "one should not jump to conclusions on the basis of unfavorable rulings. This practice cannot be equaled with the practice of judgments of the Presidium of the HAC RF. It is necessary to understand that a refusal is nothing but an opinion of three certain judges, while some other judges in their place could have taken an opposite decision. Court rulings are, if you can put it like this, more impaired area of practice"[3].

2. REVIEW OF JUDICIAL ACTS AND SURVEY OF COURT PRACTICE OF OTHER ARBITRATION COURTS.

Besides the law enforcement court practice of the HAC RF, it appears reasonable to review the judicial acts of the first instance arbitration courts, arbitration courts of appeal and cassation where the similar cases were examined. In this case, it is highly advisable to focus on the law enforcement practice being established in that specific arbitration court district[4] where the dispute is to be settled.

All the judicial acts of the arbitration courts are available on the server of the HAC RF "Arbitration Cases Catalogue" (http://kad.arbitr.ru). Moreover, it is reasonable to use legal reference systems, the most popular ones in Russia being KonsultantPlus, Garant and Kodeks.

It is also necessary to pay attention to the subject surveys of the court practice

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[3] A. A. Ivanov. Nelzja byt "svjateje papy rimskogo" [One cannot be "more Catholic than the Pope"] // Nalogovyje Spory [Tax Disputes]. 2009. No. 1.

[4] There are 10 such districts in Russia: Volgo-Vjatskiy, Vostochno-Sibirskij, Dalnevostochnyj, Zapadno-Sibirskij, Moskovskij, Povolzhskij, Severo-Zapadnyj, Severo-Kavkazskij, Uralskij, Tsentralnyj.

performed by the first instance arbitration courts, arbitration courts of appeal and cassation. The mentioned surveys are available in the section “Summaries of arbitration courts of the RF” on the site of the HAC RF (http://arbitr.ru/as/pract/ac_prac) and on the respective sites of the corresponding courts.

In conclusion, I would like to emphasize that in order to obtain positive result in terms of participating in the arbitration court proceedings it is necessary to possess not only of the detailed knowledge of the provisions of law, but also of certain analysis skills.

DEVELOPMENT OF RUSSIAN LEGISLATION

PROTECTION OF ECJLOGICAL RIGHTS OF CITIZENS IN GLOBALIZATION CONTEXT

N.A. Geit Ph.D., Associate Professor at the Chair of Corporate and Entrepreneurial Law, Speransky Law Department, Russian Presidential Academy of National Economy and Civil Service

Summary: The paper discusses the legal aspects of human and civil rights to a healthy environment and the impact of globalization on the environmental situation in the country. The analysis of the environmental legislation of the Russian Federation and of the need to address gaps in it and to amend it in order to ensure citizens' rights for compensation in the case of man-made and other environmental disasters.

Keywords: ecology, ecological rights, human rights, environmental law, environmental disaster, information about the risks, the European Court

Approximately one sixth of the territory of Russia with its population of more than 60 million people is considered to be environmentally neglected[1]. Decreasing healthy population and increasing the death rate owing to environmental despoliation present a direct threat to the society and the state. By the 1970's environmental challenges appeared to have come to climax, which

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[1] Mironov O.O. Ekologija i narushenija prav cheloveka [Ecology and Violation of Human Rights: Special Report of the Human Rights Commissioner in the Russian Federation]. Moscow: Jurisprudentsija, 2002. P. 8.

[2] Percival R. V., Schroeder Cr.H., Miller A.S., Leape J.P. Environmental Regulation: Law, Science, and Policy //Law & Business, 2009.

brought about common comprehension that environmental abuse and further environmental pollution will cause disastrous consequences[2]. Accordingly there were taken complex measures on national and international level, being intended to save nature from undergoing degradation.

On June, 14, 1992 in Rio de Janeiro the UN Conference on Environment and Development adopted the Rio Declaration on Environment and Development, which recognized the right of man to lead a healthy and productive life in suit with nature. In accordance with this Declaration, states are obliged to frame national legislation that would stipulate amenability for environmental offence, liability to compensate an environmental damage, and procedures aimed at realization of human rights in the field of environment. To declare the right of people to live in healthy environment means to acknowledge a possibility for everyone to live in such a state of the Earth biosphere, which secures maximum permissible level of physical and psychological health, and also to apply such a system of remedies that would eliminate global threats to biosphere resulted from human activities.

Today the term “ecological rights” is used as a collective description of all the rights that citizens and public associations can exercise according to such laws of the Russian Federation as “On Environment Protection”, “On Environmental Assessment”, and a number of other regulatory enactments[3]. Ecological rights of man are understood as established and secured by legislation rights of individuums, which would allow them to satisfy their various needs arising from their interaction with natural environment. This term has also become part of common use vocabulary and a popular term in practice of ecology movement.

The right to enabling environment forms the basis of ecological rights of citizens and by today’s standards is regarded as one of fundamental natural rights of man, as it provides for their right to life (Article 3 of Universal Declaration of Human Rights).

Current legal practice of foreign countries shows that ecological rights of citizens are violated not only by organizations that directly cause harm, but also by state agencies that do not publish information on environmental situation and cancel programs aimed at environmental improvements[4].

Ecological rights are supranational. One nation alone cannot deal with environmental issues due to vulnerability and quick changeability of ecological situation. This fact accounts for increasing significance of international legal

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[3] For example, relevant sections in textbooks: Ecological Rights of Citizens – see: Bogoljubov S.A. Ekologicheskoje pravo [Environmental Law]. Moscow: Norma, 2001. P. 92 – 156, Dubovik O.L. Ekologicheskoje pravo [Environmental Law]. Moscow: Prospect, 2003. P. 160 – 165; Environmental Legal Status of the Man – see: Brinchuk M.M. Ekologicheskoje pravo [Environmental Law]. Moscow: Jurist, 2003. P. 116 – 141; Right to enabling environment – see: Krassov O.I. Ekologicheskoje pravo [Environmental Law]. Moscow: Norma, 2004. P. 75 – 95.

[4] Environmental Law: Seminar for Judges. Washington (DC). Oct. 19-20, 2000.

regulation of relationships in the field of environment protection and environmental control. One of possible means to ensure consistent progression in minimizing ecological remedial risks, in our opinion, is to conduct systematic conceptional research on the given range of problems by combined effort of political scientists, ecologist lawyers and scholars from all over the world.

As a moderate contribution into this prospective theoretical construct we offer our definition of the notion "ecological rights risks". We suggest that they should be regarded as actions performed by public authorities and civil society institutes, when taken with the purpose of defending ecological rights of man and citizen and leading to overcoming an uncertainty in situations, which are related to complex forces that determine environmental conditions and have an effect on achieving specific ecological rights objectives.

Taking into consideration importance of informing citizens about environmental hazards, we should note a great legal tenor of those stipulations in the Constitution of the Russian Federation that rest responsibility on officials who hold back facts and circumstances, threatening human life and health (Part 3, Article 41)[5]. Several legislative acts stipulate the civil right to have information related to environmental conditions. Thus, citizens have a right to be aware of factors that can influence their health (Article 19 of "Fundamental Principles of Legislation of the Russian Federation on Health Care for Citizens"). Article 8 of the Federal Law "On Sanitation and Epidemiological Well-Being of Citizens" makes provisions for citizens to ask for information about sanitary and epidemiological situation, environmental conditions, quality and safety of technical and industrial goods, food products, commodities used to satisfy private and domestic needs, and on what potential hazards for human health any work or service can have. According to the Russian Federation legislation, citizens have the right to make inquiries about such data from governmental authorities, local authorities, agencies and institutions of state Sanitation and Epidemiological Service of the Russian Federation and from legal entities. Citizens have the right to be informed about hazards they can be subjected to if they stay in certain places in the territory of the country, and about necessary safety measures (Article 18 of the Federal Law "On Protection of Population and Territories from Emergencies Generated by Natural or Technogenic Factors").

Problems related to protecting ecological interests of citizens can be solved in laws and regulations devoted to tackling issues of environmentally neglected zones, which would cover the procedure of identifying such a zone, and of assigning it a legal status of a zone of ecological disorder. They will also state a complex of standards designed to provide for preferential socio-economic conditions for citizens who live in such zones.

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[5] Sobranije Aktov Prezidenta i Pravilelstva Rossijskoj Federatsii (SAPP RF) [Collection of Acts Ordained by President and the Government of the Russian Federation]. 1993. No 29. Article 2675

In view of essential legal features of ecological damage caused to the population health, it is necessary to introduce a number of amendments into ecological, civil, civil procedure and other legislation. These amendments should aim at leveling-off the procedural status of injured citizens and the party guilty of causing the damage. It should be done in order to enable practical implementation of already existing norms of overall character.

According to Russian Federation legislation, observance of the principle of access to information, for example in the area of waste management, is guaranteed by provision for a fundamental ecological right stated by Article 42 of the Constitution, namely the right to gain reliable information on environmental conditions. Violation of this right entails administration of justice in the form of administrative and criminal responsibility.

The Constitution of Russia provides for system of legal guarantees of ecological rights of citizens; it also determines the legal procedures, within the framework of which protection of such rights can be carried out. Such legal procedures are as follows:

judicial defense of rights and freedoms;

right to appeal in court against decisions and actions (or inaction) of governmental authorities, local authorities and other entities;

right to be reimbursed by the state for the damage afflicted with unlawful actions (or inaction) of governmental authorities or other entities;

right of access to interstate agencies designed to protect human rights and freedoms, when all existent domestic means of legal defense have been exhausted.

Therefore, if all judicial instances of the Russian Federation dismissed the plaintiff's action or suit, their complaint can be directed to international agencies, for example, to the UN Human Rights Committee created in accordance with the International Covenant on Civil and Political Rights. In this case in order to defend the violated right the complaint in question is brought to the notice of the state concerned, and the state is obligated within six months to submit to the Committee arguments in writing or any other statements that interpret the matter and inform on the actions taken. The Committee is not authorized to render binding decisions, but it publishes annual reports on complaints that were processed within the past year.

European Court of Human Rights acts as an agency for international protection of civil rights and freedoms (the Court was founded in 1959 as provided by the European Convention on Protection of Human Rights and Fundamental Freedoms). Jurisdiction of this Court embraces cases related to interpretation and application of the Convention, but only for the states that recognized it as mandatory, Russia being among them.

Both states and physical entities have a right to bring before the Court an application (petition); however, first the application must get through European Commission on Human Rights, and its purpose is "to reach amicable settlement".

In cases when entrenchment on rights and freedoms is accompanied by causing harm to man, the constitutional guarantee implies not only restoration of the violated rights, but also compensation of the caused material and moral harm (Article 53 of the Constitution). Today it is difficult to assess the harm caused to people by industrial accidents resulted from usage of nuclear power and by nuclear tests (military training area in Semipalatinsk; Chernobyl; wreckage of the submarine Komsomolets, the industrial accident at the factory of the production association Mayak in Chelyabinsk, the accident in Arzamas). A person subjected to an environmental offence (radiation exposure) needs social protection, including that provided by officially stipulating his right to have social assistance.

The state allows for certain budgetary funds not only to ensure recovery from accident consequences, but also for life-time assistance for the people who suffered from those consequences. The assistance is not always fully correlated with the amount of damage caused to health and property of the person, and to the inflicted moral injury. A number of scientific research institutes, including Russian Academy of Sciences and Russian Academy of Medical Sciences, conducted and coordinated investigations aimed at developing methods of determining the amount of caused harm.

Russia applies experience gained by a number of foreign countries in the area of social protection of their citizens subjected to radiation exposure. It has proved to be very fruitful to work within framework based on agreements between Russia and the USA, France, CIS countries. Much has also been achieved after implementation of the International Chernobyl Project, which was carried out under the aegis of IAEA in partnership with about 200 independent scientists from 23 countries and international organisations.

According to Paragraph 2 of Article 55 of the Constitution, in the Russian Federation there must not be ordained laws that cancel or derogate rights and liberties of man and citizen. At the same time the Constitution allows for possible restrictions of rights and liberties of person and citizen, but they can be imposed only for the purposes strictly specified by the Constitution and only to extent the situation proves it to be necessary; such restrictions are not identic with cancellation or denial of rights and liberties.

In the socialistic period of our state external pomposity of environmental policy would conceal tragic events and their consequences, since information about them was suppressed by official data sources. In the beginning of 1980's there

[6] Poljanskaja G.N. Zakony ob Okhrane Prirody – Novaja Forma Pririodookhrannogo Zakonodatelstva [Nature Conservation Laws – New Form of Environmental Legislation] // Pravovyje Voprosy Okhrany Prirody v SSSR [Legal Matters of Nature Preservation in the USSR]. Moscow, 1976

were made decisions that initiated performance of ecologically destructive projects, such as water diversion of some northern rivers into the river basin of the Volga, cultivation of raw lands in the south-eastern part of Russia, etc.

During socialist period academic lawyers already noted that frequently environmental laws "are insufficiently correlated with the rest of effective legislation, are practically unsupported with sublegislative legal norms, and statutory regulations of the Soviet Union do not correlate appropriately with those of Soviet Socialist Republics"[6].

When establishing structures that were to manage and monitor use of natural resources and environmental activity, it was considered first and foremost to adhere tenaciously to current political and ideological approaches, as well as to certain individual views of high ranking officials on how to administer nature and science. To illustrate this it is enough to cite Joseph Stalin, who used to be referred as "the leader of all nations". Stalin declared, for example, that in foreseeable phase of history natural resources were inexhaustible[7]. A. Golichenkov concludes that throughout socialist period there was persistently developed a system of agencies performing ecological functions that was built upon the so called departmental approach, i.e. an agency in charge of protecting environment was a department of the branch that potentially could cause harm to nature. This approach appeared to blossom despite evident invalidity of the postulate "to protect natural resources should those who use them"[8].

Apart from drastic loopholes in legislation, one basic fault inherent in the Russian legislation of socialist period was absence of a "workable" mechanism, which would enable legislative execution. Low efficiency of legislation, exhaustion of environmental assets, constant degradation in qualitative aspects of environmental conditions – these and other factors called for introducing a fresh approach to legal regulation in the area of the ecosystem exploitation and environment protection[9].

Taking into consideration that Russia entered the WTO, social and economic relations are being transformed, diverse forms of ownership of environmental assets are introduced, it proves to be a pressing objective to change regulatory enactments dealing with defining and protecting ecological rights of man and citizen. These changes are an integral part of the current process of developing a progressive environmental legislation and its harmonization with advanced international and national legislation.

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[7] Stalin J.V. O Dialekticheskom i Istoricheskom Materializme [On Dialectical and Historical Materialism]. Moscow, 1953.

[8] Golichenko A.K. Ekologicheskij Kontrol: Teorija i Praktika Pravovogo Regulirovanija [Environmental Supervision: Theory and Practice of Legal Regulation]. Doctor in Law Thesis. Moscow, 1992.

[9] Sobranije Postanovlenij Pravilelstva SSSR (SP SSSR) [Collection of Regulations of the Government of the USSR]. 1973. No 2. Article 6; Sobranije Postanovlenij Pravilelstva SSSR (SP SSSR) [Collection of Regulations of the Government of the USSR]. 1979. No. Article 6; Sobranije Postanovlenij Pravilelstva SSSR (SP SSSR) [Collection of Regulations of the Government of the USSR]. 1988. No 6. Article 14

COMPARATIVE LEGAL STUDIES

TRAINING OF A LAWYER IN RUSSIA AND USA: ABOUT THE UNIVERSAL BASIS

M. L. Davydova Doctor in Law, Professor, Head of Chair of Constitutional and Municipal Law, Volgograd State University

Summary: In the article the author reflects on the distinctions between the Russian and American traditions of professional juridical education, coming to conclusion that, in spite of specific forms, methods, technologies of training of a lawyer, the specific features of juridical profession always define the final purpose of this training – making of professional legal thinking.

Keywords: Legal profession, professional juridical education, training of a lawyer, professional legal thinking

Me: – What do you mean saying "professional skills of a lawyer"? Give me a list: we must teach students how to write, how to speak…

Arnold M. Weiner, attorney, Baltimore, Md:
– No. Only how to think.

(From personal conversation)

It is assumed that technologies for training of lawyers are completely different in various countries. There are plenty of formal criteria for comparing educational systems, including the term of education, total amount of academic hours, specialist area naming, list of educational subjects, forms and methods of pedagogical monitoring etc.[1] Most such formal differences[2] are generally indicative of the following substantive difference: West-European and Russian universities and colleges are focused on fundamental theoretical training of specialists, while American juridical education system is targeted at practical application of law[3]. The reasons for such divergence are undoubtedly rooted in the specificity of national system of law requiring a lawyer to implement certain specific job skills.

The matter of common, generic characteristics of legal profession and, therefore, professional training of a lawyer in the countries appertaining to various juridical families is still outstanding.

It is the understanding of legal profession itself that has methodological significance. It is a known fact that the lawyer's activities are irregular in respect of subject matter, areas of application and legal status of implementing, which sometimes gives reason for scientists to doubt in the appropriateness of existence of the very notion "legal profession" reflecting certain internally uniform phenomenon.

In academic literature the following attributes are specified as the attributes of this profession: (a) the essence that consists in providing the legal regulation mechanism; (b) the contents in the shape of professional actions, which generally result in legal effect; (c) the subject matter of the professional activities being the behavior of people; (d) the aim, which is to establish the legality mode and to secure the sustainable law order; (e) instruments of juridical labor being the regulatory and individual legal prescriptions and other instruments of legal technique; (f) specific methods of performing professional actions that form juridical technology; (g) forms of professional activities subdivided into external (documents issued by lawyers) and internal (procedure)[4].

It can readily be noted that in such interpretation the notion of legal profession obtains descriptive nature and is reduced to citation of separate elements or qualities non-unified by certain systems attribute. Indeed, the differences in the activities of the lawyers in the spheres of law-making and law enforcement are substantial; most specialties of legal profession are deeply distinguished in respect of contents, targets and methods; the work areas of the lawyers operating in the private and public law spheres are completely different in terms of their goals and directions. For instance, the quality of special social responsibility of a lawyer for his activities[5] or the statement that any legal activities are aimed at general establishing the legality mode can be regarded solely as the wishes

imparted to all the legal profession members, not least because it is the protection of private interest in the focal point of the private law sphere (this interest should obviously be protected by legal means, however it can fall apart from the public or governmental interests).

There are even more differences revealed when we address to the matter concerning the specific features of legal professions in the countries appertaining to various legal families. Thus, while in the USA the legal profession is unified, which establishes horizontal mobility between its branches[6], in France there is no such notion of "legal profession" that would unite all the lawyers, each category of lawyers (attorneys, notaries, judges etc.) forming its own profession with the appropriate licensing procedure, system of training of new members, standards of ethics and disciplinary responsibility, so it would be more correct to speak of various legal professions[7] in the context of French law.

The exact number of lines of the legal profession is a separate matter of argument as well. Thus, C. Osakwe relates about eight branches forming the structure of legal profession (including the specialist fields of scientific researcher and lecturer in law)[8], while T. V. Kashanina notes that the list of kinds of professions will never be exhaustive as the specialization of legal activities will increase due to complication of social life[9].

Nevertheless, one can ascertain that the attributes being peculiar to any legal specialist field and tending to be system qualities of a legal profession still do exist. In our opinion, there are two of them.

The first and the most significant is the existence of professional legal thinking. The

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[1] Levitan K. M. Juridicheskaja pedagogika [Juridical pedagogics]. Moscow, 2011. P. 155.
[2] C. Osakwe provides detailed comparative characteristics of the systems of legal education in Russia, the USA, France and Germany (Osakwe K. Sravnitelnoe Pravovedenie v Skhemakh: Obshchaja i Osobennaja Chasti [Comparative Law in Diagrams: General and Special Parts] Moscow, 2002. P. 113-124).
[3] Levitan K. M. Sravnitelno-pedagogicheskij analiz soderzhanija professionalnoj podgotovki juristov v rossijskikh i zarubezhnykh vuzakh [Comparative and pedagogical analysis of training of lawyers in Russian and foreign higher educational institutions] // Rossijskoje juridicheskoje obrazovanije v uslovijakh integratsii v jevropejskoje i mirovoje obrazovatelnoje prostranstvo: Materialy Vserossijskoj uchebno-metodicheskoj konferentsii [Russian juridical education in terms of integration into the European and global educational space: Data for the Russian National Educational and Methodological Conference] (Jekaterinburg, 18-19 December 2003). Jekaterinburg, 2004. P. 37.
[4] Sokolov N. Ya. Professionalnaja kultura juristov i zakonnost [Professional culture of the lawyers and legality]. – Moscow: Prospect, 2011. – P. 49-63.
[5] Ibid. P. 56.
[6] Osakwe K. Op. cit. P. 125.
[7] Ibid. P. 128-129.
[8] Ibid. P. 125.
[9] Kashanina T. V. Juridicheskaja tekhnika [Legal technique]. Moscow., 2007. P. 84.

essence of legal education seems to be, first and furthermost, producing a specific method of information perceiving for an agent, rather than transmitting of a certain amount of such information perceived by this agent. The main instrumentality of professional thinking of a lawyer is represented by legal construction, thanks to which each notion, category and legal phenomenon is regarded as a complicated structure unit composed by a set of legally significant elements or attributes[10]. As Mr. N. M. Korkunov precisely noticed, "the main hint of legal construction consists in objectifying the legal relations occurring between people and regarding them as separate essences, occurring and changing within the period of their existence and, finally, terminating"[11]. Constructions are the main category in specificity of professional legal thinking, yet not the only one.

Moreover, the thinking of lawyer is designated by existence of a certain paradigm, defining the basic presets of consciousness which are the legal axiomatic statements. It is the juridical training that provides for the assimilating of the most significant values recognized within the framework of the legal paradigm to be the absolute and unconditional truth and answering for the ideal platform for professional thinking. Most of these truths have been widely known since the period of Roman law: (Ius est ars boni et aequi – The law is the art of good and fair; Lex est quod populus iubet atque constituit – The law is what the people order and establish; Qui suo iure utitur, neminen laedit – He who exercises his legal rights, harms no one's interests; Audiatur et altera pars – Let the other side be heard, too; Cuius commodum, eius periculum – He who gains the profit, bears the risk; Ei incumbit probatio, qui dicit, non qui negat – The burden of proof lies with who declares, not who; Um nulla est obligatio – Nobody has any obligation to the impossible; Iura novit curia – The court knows the law; Manifestum non eget probatione – The obvious needs no proof). From viewpoint of commonplace sense, such statements by no means always appear unconditional, but for professional sense they compose the platform for the "frame of references". The "paradigm effect" is activated: what is absolutely obvious for the protagonists of one paradigm can be concealed from the ones who support another[12]. The mental models rooted deeply inside us arrange our perception of reality in a certain way. It is something like filters built in our eyes and brain.[13]

So, it is the professional legal thinking that, in our opinion, would make the lawyer of a lawyer, and it is working out of such thinking in the process of legal training that determines the readiness of the graduate to the professional activities, which, however, does not imply his practical ability to perform it. In addition to internal platform of appertaining to the profession (legal thinking), the external platform is essential as well, which is to have practical skills and methods of professional activity (legal technique).

Legal technique, first and furthermost, is a set of professional instruments, skills and abilities, which allow one's applying practically legal knowledge[14]. Managing of this technic is assumed to be competence of a lawyer constituting the ground of his professionalism and ensuring his professional success. The skills of drafting, interpreting legal texts, providing arguments for one's legal position are essential for any lawyer, irrespective of his particular specialty and working sphere. These skills are exact the ones which should be primarily developed in the course of training.

It is widely known that the American system of legal training is much more focused on developing such professional competence than the Russian one. A range of courses studied by American students possesses of a complete juridical technic directional effect. Here are some examples of the textbooks, The Process of Legal Research[15], Legal Research and Citation16, Legal Drafting in a nutshell[17], Reading like a lawyer: time-saving strategies for reading law like an expert[18], Writing and Analysis in the law[19], Academic Legal Writing[20], Where the Law is: an introduction to advanced legal research[21]. Irrespective of the fact whether such courses are general law oriented or focused on specific sectorial matters (e.g. Tax Research Techniques[22]), they represent practical guides, accompanied, as a general rule, with exercises and other materials assisting in mastering and developing the appropriate professional skills.

In Russia such practical guides and manuals are traditionally published with

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[10] Davydova M. L. Juridicheskaja tekhnika: problemy teorii i metodologii [Legal technique; theory and methodology issues]. Volgograd, 2009. – P. 153.
[11] Korkunov N. M. Lektsii po obshchej teorii prava [Lectures for general theory of law]. 2nd edition, Saint-Petersburg, 2004. – P. 427.
[12] Barker, Joel A. Paradigmy myshlenija: kak uvidet novoje i preuspet v menjajushchemsja mire [Paradigms: The Business of Discovering the Future] / Translated from English by T. Gutman. Moscow, 2007. P. 74-75.
[13] O'Connor, Joseph, McDermott, Yan. Iskusstvo sistemnogo myshlenija: Neobkhodimyje znanija o sistemakh i tvorcheskom podkhode k resheniju problem [The art of systems thinking: Essential Skills for Creativity and Problem Solving] / Translated from English, 2nd edition. Moscow, 2008. P. 82.
[14] Davydova M. L. Op. cit. P. 127.
[15] Schmedemann D. A., The Process of Legal Research / by Deborah A. Schmedemann, Matthew P. Downs, Ann I. Bateson, Susan L. Catterall, Christina L. Kunz. N.Y.: Aspen Publishers, 2005.
[16] Teply L. L. Legal Research and Citation. St.Paul: West Group, 1999.
[17] Haggard T. R. Legal Drafting in a nutshell. St.Paul: West Publishing Co., 1996.
[18] McKinney R. A. Reading like a lawyer: time-saving strategies for reading law like an expert. Durham: Carolina Academic Press. 2005.
[19] Shapo H. S. e.a. Writing and Analysis in the law / by Helene S. Shapo, Marlin R. Walter, Elizabeth Fajans. N.Y.: Foundation Press, 2003.
[20] Volokh E., Kozinski A. Academic Legal Writing: law review articles, student notes, seminar papers, and getting on law review / by Eugene Volokh with foreword by judge Alex Kozinski. N.Y.: Foundation Press, 2005.
[21] Armstrong J.D.S., Knott C. A. Where the Law is: an introduction to advanced legal research. 2007.

relation to practical lawyers[23], though more and more practical guides have appeared lately to support higher educational training courses[24]. The process of implementing the juridical technic element into the curriculum has been recently intensified due to adoption of the new Federal State Educational Standard designed to enhance the practical orientation of the professional education. In particular, it provides for the list of common cultural and professional competence and specific practical skills a graduate should possess of. The balance between the amount of time allocated for the lectures and the discussion sessions or seminars is to be changed in favor of the latter (60-70 per cent); the compulsory minimum of the time allocated for active and interactive sessions is to be set (20 per cent). The special emphasis is put on the links between the education process and legal practice: shaping educational profiles on the basis of the employers' requests, having the management of the corporate employers involved in teaching and monitoring the students' knowledge.

All these trends are in full harmony with the growth of interest to the legal technic that has occurred for the last decade. On one hand, it gains the attention of the researchers as the challenging and practically significant scientific field. On the other hand, its importance as a training course required for shaping the professional skills of a lawyer has been now recognized by most specialists[25].

The issue is not about the trends or the effect of globalization introducing foreign experience to the legal system. The issue is about the objective impartial need for improving quality of professional training of the lawyers, which cannot be provided without enhancing of the juridical technic element. Generally speaking, shaping of practical skills for juridical activities is a path to professional thinking. Theoretical

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[22] Gardner R. L. e.a. Tax Research Techniques / by Robert L. Gardner, Dave N. Stewart, Ronald G. Worsham, Jr. N.Y.: American Institute of Certified Public Accountants, Inc., 2003.

[23] Advokat: navyki professionalnogo masterstva [Attorney: professional skills] / Ed. by L. A. Voskobitova, I. N. Lukjanova, I. P. Mikhajlova. Moscow, 2006; Vasiljeva T. A. Kak napisat zakon [How to draft a law]. M., 2011; Vorobjova O. Sostavlenije dogovora: tekhnika i prijemy [Drafting a contract: technique and hints]. Moscow, 2011; Gongalo B. M. e.a. Nastolnaja kniga notariusa [Notary's manual]. In 2 vols. Moscow, 2004; Koryakovtsev V. V. Pitulko K. V. Rukovodstvo advokata po ugolovnym delam [Attorney's criminal cases manual]. Saint-Petersburg, 2006; Koryakovtsev V. V., Pitulko K. V., Fedorov K. P. Rukovodstvo advokata po grazhdanskim delam [Attorney's civil cases manual] / Ed. by K. P. Fedorov. Saint-Petersburg, 2005; Kudryavtseva E., Prokudina L. Kak napisat sudebnoje reshenije [How to draft a court decision]. Mowcow, 2012; Nastolnaja kniga sudji po grazhdanskim delam [Civil cases manual for a judge] / Ed. by N. K. Tolcheyev. Moscow, 2008; Ponomareva N. G. Spravochnik kadrovika: rukovodstvo po oformleniju tipovykh dokumentov: prakticheskoje posobije [HR's guide: sample documentation manual: practical guide]. Moscow, 2007.

[24] Vakhnin I. G. Tekhnika dogovornoj raboty [Contractual technique]. Moscow, 2009; Davydova M. L. Juridicheskaya tekhnika (obshchaja chast): Uchebnoje posobije [Legal technic (general part): Teaching guide]. Volgograd: Izdatelstvo VolGU [VolGU publishing], 2009; Kashanina T. V. Op. cit.; Khazova O. A. Iskusstvo juridicheskogo pisma [Art of legal writing]. Moscow, 2011; Tsvetkov I. V. Dogovornaja rabota [Contractual work]. Moscow, 2010, etc.

training isolated from practical skills appears to be too abstract to achieve this principal aim. It is no coincidence that legal constructions are regarded in the science as thinking structures and the means of legal technique at the same time. The doctrinal and practical sides of this phenomenon are inextricably intertwined. It is not enough to understand what the legal constructions are or to know the principal constructions contemplated in the existing laws. It is necessary to be able to reveal the construction in the legal text and to correlate the ideal model with a particular real-life situation. It is important that the mental operation should be implemented into the consciousness at the level of automatism, when, figuratively speaking, a man is looking out of the window and seeing legal constructions there yet. As soon as the constructions become the part of consciousness, they start working on each level where the law exists. Not until then they can be regarded as logical and mental methods for legal practice problem solving[26]. And only in this case we can speak of sufficient professional competence of a lawyer and that he to the full extent possesses of the tools of legal technique.

The Russian and American systems of legal education being considerably different in the context of forms and methods of implementation have factually one final goal to pursue which is to shape professional thinking of the students. However, the ways to this goal are inversed.

The American system comes to achieving this aim by means of induction: from particulars to generals, from developing specific professional skills to perception of the student of the sense of profession and adopting the essence of professional activities, while the Russian system uses deductive logic: from generals (systems theoretical study of law) to particulars (the issues of practical use of the theoretical knowledge gained). Thus, the need in the training courses of juridical technique matters occurs not until the final stage of training in the Russian higher educational

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[25] Please see, e.g.: Juridicheskaja tekhnika: Jezhegodnik [Legal technique: Annual]. 2009. No. 3: Spetsialnyj vypusk "Juridicheskaya tekhnika v sisteme vuzovskoy podgotovki pravovedov: nauchno-metodicheskoje obespechenije i didakticheskije puti yego sovershenstvovanija" [Special edition "Legal technique in the system of jurisprudent higher education: scientific-methods framework and didactical ways to improve it"].

[26] Ponomarev D. E. Genezis i sushchnost juridicheskoj konstruktsii. Avtoref. dis. … kand. yurid. nauk [Genesis and essence of legal construction. Synopsis of a thesis for Candidacy of Juridical Sciences]. Jekaterinburg, 2005. P. 18.

[27] Concerning the importance of such courses in the system of professional legal training, please, see: Davydova M. L. Obshcheteoreticheskij i prikladnoj podkhody k prepodavaniju juridicheskoy tekhniki: preimushchestva i problemy sovmestimosti [Common theoretical and practically applicable approaches to training of legal technique: advantages and problems of compatibility] // Juridicheskaja tekhnika [Legal Technique]. No. 3. – Nizhny Novgorod, 2009. P. 155-160; Davydova M. L. Juridicheskaja tekhnika kak nauchnaja osnova formirovanija professionalnogo masterstva jurista [Legal technique as the scientific platform for developing professional skillfulness of a lawyer] // Pravo i obrazovanije [Law and Education]. No. 7. – Moscow, 2007. P. 42-50.

institutions[27], while in the American system the technique is factually taught straight away.

It is not correct to pose question concerning the advantages or disadvantages of the approaches concerned. Each legal system develops its specific means of self-reproducing, including the particular system of training lawyers. However, it is important to discern that sometimes there are universal platforms behind the formal divergences and that completely different educational methods can pursue the similar goals – to teach the student to think as a lawyer.

COMPARATIVE LEGAL STUDIES

TRANSPORT AS THE SPHERE OF LEGAL REGULATION IN RUSSIA AND THE USA

D. V. Zabelina Head of contract department of the company A.B.Rail LLC

Summary: In the article general provisions on transport as the sphere of legal regulation of Russia and the USA are considered: reasons and need of development of transport legislation; means of transport; transport legal relationship; a subject of a transport law; tasks facing executive bodies regulating activity of a transport branch.

Keywords: transport law, means of transport, transport legal regulation, legal space, globalization.

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The sphere of legal regulation (legal space) means the relations which have already been settled by the law or must be settled by it. The sphere of legal regulation is something initial in relation to a law-making activity of the state. It represents a set of the disordered relations and facts which adjustment is objectively impossible without use of legal means. The sphere of legal regulation is the area of potential legal relations. Consideration of the sphere of legal regulation of a transport branch is of current interest since the modern world is being internationalized. In

this regard there is a formation of the new world economy in which the development of transport communications is of vital importance.

The changes of the world economy connected with globalization, lead to the need of carrying out reforming of transport system of the states and legislation improvement in this field to increase efficiency of already existing rules of law. It is directly reflected in quality of provided services.

Transport is a link in economy of any country and represents a single set. Depending on a type of vehicles used for transportation there are the following means of transport: automobile, railway, air, water (ferry, river), sea, pipeline. Each of these types provides its own means of transportation and ways of safety appropriate only to this type of transport. It demands an individual approach in legal regulation of the activity of each type of transport.

The transport system of the USA is the most powerful in the world. It provides permanent and reliable operation of the national economy. The transport system represents a very branched and advanced system which includes different means of transport: air, automobile, railway and water. The majority of transportations are carried out by the motor transport. The main means of transport of the population of the country is private motor transport. The public means of transport is developed less than the private one.

The air transport takes second place. It provides both internal and international flights. The network of internal air transportation covers more than tens cities that gives the chance to make flights around America. Railway and water means of transport are not popular.

The vast territory and severe climate of Russia had a great impact on the choice of land transport. Railway and pipeline became the main means of land transport in Russia. They have to bear the main volume of freight transportation. The water transport of Russia is of less importance because of a short navigation period. The role of motor transport isn't important either, as its average distance of transportation (for example, within the cities and suburbs, on forest roads in areas of logging) is not long, though it transports more than a half of freights.

The sign of transport legal relationship is providing services connected with transportation of goods, passengers and baggage. Respectively, the subject of a transport law is public relations between transport enterprises and clients, arising in connection with providing services in use of vehicles, for implementation of a transportation process. Public relations on activity of transport enterprises and organizations, and also individuals involved; labor relations and social development relations; relations on use of natural

resources being in transport enterprises using, environmental protection on transport; relations arising at activity of executive bodies of the government and administrative structures of the transport organizations; responsibility for offenses and crimes are also the subject of a transport law[1].

In the early nineties the USSR broke up. There was a shift both in a political and in an economic system of Russia at that time. The market economy that caused fundamental reorganization of a control system and a transport branch came to change the planned economy.

The main objective of development of Russian transport system today is creating the market of transport services to maximize satisfaction of economic requirements while achieving high level competitiveness. Efficient transport and logistics infrastructure providing commercial rate and reliability of transport services is necessary for its decision[2]. Taking into account the vast territory of Russia and remoteness of its certain areas, development of transport infrastructure has a direct influence on providing the unity of the country. Its optimization is a nation-wide task and as the President of the country in the Message to Federal Assembly of the Russian Federation noted, well developed transport infrastructure is capable of turning geographical features of Russia into its competitive advantage[3].

The ministry of transport of the Russian Federation is federal executive authority in the field of the transport, carrying out functions on development of a state policy and standard legal regulation in this field and responsible for implementation of the reform of transport system of the country, according to the strategy of development of a Russian transport system till 2030[4].

The modern transport legislation of Russia represents a unit of the nation-wide legislation which bases on Article 71 of the Constitution of the Russian Federation where it is told that federal transport and lines of communication are in the jurisdiction of the Russian Federation. The laws on forwarding activity, transport safety, obligatory insurance of responsibility of owners of vehicles, a tax on separate types of vehicles, etc. are passed. The regulations

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1 E.g.: Chapters 11 and 12 of the Administrative Offences Law, Chapter 27 of the Criminal Code of the Russian Federation, Chapter 40.41 of the Civil Code, Chapter 51 of the Labor Law of the Russian Federation, etc.

2 Kvitchuk A.S. Transport i grazhdanskoje zakonodatelstvo Rossijskoj Federatsii[Transport and Civil Law in Russian Federation] // Transportnoje pravo [Transport Law]. 2006. No 1. P. 2-4.

3 Poslanije Prezidenta RF Federalnomu Sobraniju RF [President Message to Federal Assembly] of May 26, 2004 // Rossijskaja gazeta [Russian Newspaper]. 2004. May 27.

4 Government Ruling of July 30, 2004 No 39 «On Approval of Statute of Ministry of Trasport of Russian Federation"; Government Order of November 22, 2008 No 1734-p "Transport Strategy of Russian Federation till 2030"

5 Air Law of Russian Federation; Water Law of Russian Federation; Internal Water Transportation Law of Russian Federation; Charter of Railways of Russian Federation; Charter of Motor and Urban Surface Electric Transport of Russian Federation; e.a.

such as the law on federal railway transport are passed to regulate each of main types of transport. In particular, during 2007 till 2009 The Ministry of Transport of the Russian Federation did a great job, having updated the regulatory legal base in several directions. The Russian aircraft refused the regulations of the Soviet period according to this fact the regulatory legal base is completely brought into conformity with the Air Law of Russia. The Charter of motor and Urban Surface electric transport which had been revised according to the market policy came into force. Some more codes and charters are passed[5].

The basic transport provisions and provisions on the activity of separate means of transport in the USA are included into the United States Code[6]. The activity of separate means of transport in the USA is regulated by numerous laws. The labor legislation on transport and the legislation on transport safety are examined in detail. The problems of road construction, ecology, responsibility insurance and so forth are regulated. The Department of Transportation deals with working out the concept of transport development and its policy, preparation of acts, investment policy and issues of scientific-and-technological advance.

To increase the branch operational efficiency, the Department of Transportation is carrying out the programs on improving the transport system of the country. For example, programs of economic development, mobility, development of the social sphere and environmental protection. The program of economic development of transport provides a slight price rise for transport services; increase in volumes of transportation; reduction of trade restrictions connected with transport development; possibility of involvement in small business. The program of mobility solves the problems of improvement of a transport condition in the USA according to modern requirements; minimizing time consumption for movement; improvement of transport safety and reliability; reduction of transportation costs. Within the social and environmental programs it is planned to provide the decrease in negative transport influence on the environment and ecosystem; improvement of activity and condition of all spheres of public relations; reduction of polluting factors connected with transport.

Thus, implementation of programs on transport development, upgrading its infrastructure and increasing the service quality are the integral part of reforming of national economy. Achieving the global technology level, further development of high-performance transport and logistics infrastructure, providing safety and environmental standards, development of methods

6 United States Code and United States Code Annotated. 2007. Vide e.g.: Title 23 «Highways»; Title 45 «Railroads».

of state regulation of the market will be possible only during changes and formation of new legal relationship, emerging new subjects of the transport branch, laws and regulations improvement. All these can't be achieved without proper legal support by taking into account foreign experience.

Global tendencies of the world economic development influence both competitiveness of the state with advanced market economy (as the USA) and the countries that (as Russia) are only opening this door. Having high potential, these countries are accelerating at a tremendous rate to be considerable competitors on the world economic market.

COMPARATIVE LEGAL STUDIES

COMPARATIVE STUDY OF LEGAL ASPECT OF PREVENTION AND FIGHT AGAINST CORRUPTION IN RUSSIA

V. Konakov Master of Economics, an independent expert on Management, Finance and Law

Summary: The fight against corruption in Russia is gaining momentum: in the past years a series of regulations aimed at improving measures to detect and prevent crimes related to the use of official position for personal gain were enacted. Author examines psycho-judicial and socio-economic characteristics of the phenomenon of corruption in Russia, makes an attempt of a legal-terms analysis of the newly adopted acts, presents a comparative study of legal aspect of improvement of legislation in this area.

Keywords: administrative reform, shadow economy, corruption, official malfeasance, anti-corruption expertise, comparative law aspect.

During the 20-year period of formation and development of a new socio-economic and constitutional order of Russia there was enacted a huge number of legal instruments for the detection and prevention of crimes related to the use of official position for personal gain. The years have passed since their adoption, but even today it is difficult to appreciate the real contribution of the lawmaking in the fight against corruption and in the development of the appropriate legal institutions in this field. However, experience obtained in Russia can be useful for the purpose of improving the legal regulation in other countries.

THE EXTENT OF CORRUPTION AND ITS IMPACT ON RUSSIAN SOCIETY

Analysing the conditions of the existence along with ways and methods of combating corruption, V.D. Andrianov[1], put an interesting approach suggesting by the following types of corruption: administrative, business, associated with the «captivity» of state[2], political.

Under the **administrative corruption** investigator understands the deliberate distortions into the process of making the prescribed implementation of existing laws and regulations in order to provide benefits to parties concerned. He also provides estimates of the scale of this type of corruption in the CIS countries: about 3.7% of the gross annual income of companies (for small businesses this figure is almost three times higher). This suggests a very high level of administrative corruption impacts on the economic development of the entire sector in Russia: with an average return on sales of 9.6% Russian companies have to «allocate» for these purposes more than 40% of their profits, so taking into account the 30% share of the corporate sector, suggested losses could amount to 30-40% of the total GDP of Russia.

Since a significant portion of the financial resources of administrative corruption is illegally withdrawn abroad or used for other criminal purposes, this phenomenon is of an extremely high risk to the social development of Russia. At the same time, it is obvious that the reduction of administrative corruption even at a fraction of a percent can lead to higher rates of growth of the national economy. So improving the anti-corruption legislation in the administrative, procedural and other related areas of the law will lead to an improvement in the socio-cultural conditions of life of the majority population.

As opposed to administrative corruption, which is a distinctly permissive, **business corruption** occurs in the interaction of business and authorities and manifest itself in the form of fees for state and municipal employees from benefits firms. According to the State Statistics Committee of Russia there were about 145 thousand crimes in the Russian economy in 2011, of which about 33 million were committed in large and extra large size. Thus the effect of bribery as a result of business corruption can be very high, because it allows someone to accumulate significant amounts of illegally obtained money «in the same hands». Such conclusions are supported by the media materials, according to which the average size of bribes in the most corrupt departments of Russia

1 Andrianov V.D. Opyt zarubezhnykh stran po borbe s korruptsiej [Foreign Countries Experience in the Fight agains Corruption] // Obshchestvo i ekonomika [Society and Economics]. 2001. № 1. C.1-5
2 “Captivity of the state functions” would be more exact.
3 Course of lectures of V.A. Prokoshin.

reaches 630,000 roubles (US$ 21,000). Business corruption can be considered as the most important component of corruption in Russia, so to «break the back» monster of the shadow economy and to reduce the extent of penetration of corruption in key areas of public and business life of the population is possible only with the strengthening of the investigation and search operations and crime prevention measures, with the improvement of anti-corruption mechanisms of interaction between state and society along with the legal awareness of the population.

In turn, the **corruption associated with the capture [of functions] of the state** uses a variety of methods of influence on the formation of laws, regulalations and other policy instruments to an unfair redistribution of state property and funds. To imagine the destructive power of the negative consequences of this type of corruption is made possible by wording of V.A. Prokoshin: «the growth of corruption was contributed by the fact that equal rights and opportunities of all sectors of Russian society to participate in the privatization had not been provided with the law so the principle of social justice was not respected». It should be noted another excellent point, stating that «one can not ignore the psychological aspect that characterizes the ongoing psycho-judicial processes against corruption in the economy»[3].

Indeed, this type of corruption appeared largely due to psychological unpreparedness of the population, the lack of the required elements of legal awareness, as well as the complete absence of any law enforcement practice in this field. As a result, more than contrast differences in the spectrum of psychological and moral qualities of the individual classes have led to a situation commonly called «grab-what-you-can privatization», and the mechanism of privatization itself began to work by the rule of «who was in time, and then eaten». Even in the capital of Russia, most people do not have a clear idea of where to put their voucher, while the representatives of the Russian ruling elite could not find or just did not try to look for ways to improve situation[4].

The conclusion is obvious: the huge scale of corruption in Russia is the result of poorly thought-out government policies in the area of privatization of public goods along with the lack of relevant legal rules and institutions, while their presence would significantly reduce the potential for abuse in this field.

Political corruption involves the use of corruption mechanisms to achieve their national (above all – political) interests in other country. This phenomenon is

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4 As the former Vice-Prime Minister told: «we need just to close our eyes and jump into uncertainty». Gaidar E. Pryzok k rynku [Jump toward Market]// Pravda. 1990. Apr. 16.
5 “On the Measures on Realization of Certain Clauses of the Federal Law “On Counteraction agains Corruption” and “On the Measures on Realization of Certain Clauses of the Federal Law “On Supervision under Equivalence of Expenses of Persons taking Government Positions and Some Other Persons to their Incomes”

not new. Today, however, political corruption in many ways lives through the processes of globalization, and the achievement of corrupt interests occurs with the use of financial resources coming from abroad through an intermediary (or, as we now call «foreign agent»), whose role is played by non-profit (public) organizations. In an interview with German media group ARD of April 6, Russian President Vladimir Putin said that «only four months after we adopted a law there came from abroad ... almost US$ 1 billion on the accounts of these organizations». However, only 855 million roubles (about US$ 30 million, or 3%) received through diplomatic missions.

Political corruption as its special form has only recently attracted the attention of the Russian legislature, whereas in other countries such as the United States, legislation like it is valid from 30-ies of the last century. Besides, the registration and monitoring of the activities of «foreign agents» in the United States, as now in Russia, is executed by the Ministry of Justice, and all this is done by virtue of the NPO statement. However, the **penalty for the offense in the United States may be more severe** – alongside with a fine, imprisonment for up to 5 years is possible. Questions of political corruption are pressing today for other countries too: for example, the number of lobbyists of the EU in Brussels is estimated at 15,000 people, so one of the deputies of the European Parliament has recently proposed to oblige his colleagues to publish their lobbying contacts, regardless of the form in which they are being paid. Another example is the fact of a legal payment of salaries to Georgian officials by the Foundation of American billionaire G.Soros that periodically causes indignation of the population of Georgia.

Law enforcement practice in the fight against corruption in Russia

Diverse strata of the people participate in domestic debate on the mechanisms and methods of prevention and fight against corruption in Russia, and that has led to a number of anti-corruption laws and regulations. «The first swallow» was the Federal Law of December 25, 2008 No 273-FZ «On Counteraction against Corruption».

Then followed the Federal Law of December 28, 2010 № 403-FZ «On the Investigative Committee of the Russian Fedaration», and a relevant Presidential Decree was signed. These acts make provision for the creation of a Russian investigative body, independent of the other branches of government. Investigative authorities prescribed to this body, as it was intended, were a continuation of those of the President, and they can be considered as an element of checks and balances in the system of separation of powers. Further activity of the Investigative Committee of the Russian Federation led to the prosecution on a number of high-profile cases, containing the signs of corruption, including charges against: several high-ranking officials in the main supervisory authority of the country on charges of bribery; high officials of the company, directly controlled by the Ministry of Defence on charges of “fraud”, “abuse of power”, “abuse of office”, “abuse of

authority"; several oppositioners on charges of "preparation of a crime and attempt to commit a crime" and "mass riots" (here the elements of political corruption have been seen).

Changes were made to the Federal Law "On Non-Profit Organizations", according to which in the case of foreign funding, NPOs have the duty to supply the relevant application for the inclusion of the organization in the "Register of Non-Profit Organizations Acting as a Foreign Agent". Apparently, the American legislation had been taken as a basis for making changes in the Russian act. As a legal consequence the Ministry of Justice began proceedings entailing administrative sanctions against officials of the Association "Golos" (Voice).

Another set of regulations of 2008-2013 led to such legal consequences as the revocation of the deputy credentials of several members of the State Duma (Parliament) on suspicion of "illegal participation in business activity".

Russian legal practice of recent years presents examples of complex multiplier effect of law enforcement of the entire mass of anti-corruption legislation on offenses in this area, for example, the dismissal of a number of metropolitan officials suspected of receiving bribes for issuing diplomas and certificates of education.

Strengthening of the powers of government agencies and departmental committees, as well as the formation of new structures to monitor the income, expenditure, assets and liabilities of public officials has become an important factor. It should be noted that the enacting large volume of anticorruption regulations during 2008-2013 turned to be an integral part of the ongoing administrative reform and affected the interests of virtually the entire system of government.

Analysis of a number of distinct trends of Russian law-making and law enforcement in recent years can be of practical importance for the purpose of improving anti-corruption legislation.

Birth of these trends considered to be in 2008, when the President of the Russian Federation signed the abovementioned Decree that approved the measures on counteraction against corruption, as well as the Federal Law that defines the basis for such counteraction. In all during the period 2009-2013 more than 40 laws and regulations (mostly of bylaw character) were enacted in this field.

Special attention should be paid to the April 2, 2013 Presidential Decrees No 309 and 310[5], that authorized the Government Service and Personnel Department of the President's Administration to verify the accuracy and completeness of information about income and property of any official (with spouse and their under age children) who are obliged to provide such information.

In view of the aforesaid, two key features of the Russian legislative and law enforcement of recent years are clearly reveal: the first, the improvement of anti-corruption legislation in the Russian Federation has a distinct character of by-law, and the second, "extension" of the vertical of public authorities with competence in the anti-corruption field is clearly manifested. This is expressed in the legislative consolidation of the vertical going down directly from the Government Service and Personnel Department of the President's Administration, that received the absolute powers at the anti-corruption field.

Referring to the international experience, it should be noted that these features are not unique for Russia. For example, a real political earthquake was after the confession made by the former French Minister for the State Finances about his accounts in Swiss and Singapore banks, while he himself aggressively urged entire EU to fight resolutely against money laundering and tax evasion. Immediately after French President F. Hollande announced the need to prepare a draft law on the establishment in France "financial prosecutors" and a draft decree on the creation of the "office on fraud and corruption" in April 2013. Such experiences have already been successfully implemented in some other countries – for example, in Singapore (the least corrupt country in the world), where the Bureau of Investigation of Corruption was established in 1960.

PREVENTION OF CORRUPTION–RELATED OFFENSES

Establishment or alteration of the penalty for a particular violation of the rules or standards of behavior lets us talk about the features of the national policy on the prevention of crime in a specific area. It is noteworthy that despite the growing number of corruption charges brought against officials of the highest official level, as well as growing of the monetary value of bribes and corruption damage caused as a result of, the Russian lawmakers at the end of 2012 approved amendments to the Criminal Code. For infringement of the clause 290 "Bribe" at the Criminal Code of the Russian Federation, they prescribed an alternative punitive measure in the form of forced labor or a fine instead of imprisonment. In my judgment, such a change of the law, as a matter of fact, mitigate the extent of criminal liability. Here we can see one of contradictions of the Russian legislation.

Other examples could be given, but in general, one can make a conclusion about a rather confusing government policy in this area, while the policy itself for the prevention of corruption is more like a "patchwork", so that it remains unclear: when the number of anti-corruption acts develop into quality.

With regard to international experience, the situation here is ambiguous. For example, the Criminal Code of Canada, which has one of the world's lowest

levels of corruption, for consent to receive a bribe only one can get a sentence of imprisonment of 14 years. On the other hand, in the penal codes of Italy and Germany, where the level of corruption also considered to be low, criminal sanctions are similar to the Russian those: corruption, depending on their character is punished both with imprisonment and alternative penalty in the form of a fine at the rate of several amounts of damage.

And yet, in my opinion, the most effective measures for prevention of corruption should be raising the level of social sense of justice, along with a higher level of salary of civil servants, as well as ensuring the possibility of public control and efficiency of the judicial system – as the example of an effective system of prevention of offenses is Singapore, the least corrupt country in the world.

INTERNATIONAL LAW

RATIO OF INSTITUTE OF DIPLOMATIC PROTECTION WITH OTHER FORMS OF PROTECTION OF THE INDIVIDUAL'S RIGHTS

D. S. Gvozdetsky Senior lecturer of chair No. 501Moscow Aviation Institute (MAI)

Summary: The paper deals with the diplomatic protection of the rights of individuals and businesses, making particular emphasis on the relationship of the rules of this institution with other forms of protection of the rights of the individual, as well as with the main provisions of consular assistance, the international protection of human rights and quasidiplomatic protection afforded by international intergovernmental organizations to their employees. Addressing many controversial issues of enforcement standards of institution of diplomatic protection it is offered to develop multilateral convention on diplomatic protection, which would include those provisions that has the least discrepancy.

Keywords: diplomatic protection, functional protection, retaliation, human rights, international organizations, international protection of human rights.

Today in the Russian Federation and in many European states the institute of diplomatic protection is usually based on standards of international law. It has not received special attention from legislators yet[1]. In

[1] Kovalev A.A. Aktualnyje voprosy diplomaticheskoj zashchity [Pressing Issues of Diplomatic Protection] // Moskovskij zhurnal mezdunarodnogo prava [Moscow Journal of International Law]. 2006. V. 64, No 4. P. 71.

[2] Caflisch L. La pratique suisse de la protection diplomatique // La Protection Diplomatique /Ed. J.-F. Flauss. – Paris, 2003, p. 77.

this regard I think if 19 draft articles on diplomatic protection accepted by the International Law Commission of the UN in 2006 find a form of convention with its subsequent signing, many European states for practical implementation of provisions of this act will face the need of completion of available legal gaps in the domestic legislation.

It is necessary to pay attention to the fact that modern research of institute of diplomatic protection are limited by classical questions of protection of the rights of physical and legal entities, thus studying a ratio of norms of this institute with other forms of protection of the rights of the individual in science and practice is almost absent.

In this article the ratio of institute of diplomatic protection with basic provisions of consular assistance, the international protection of human rights, and also the quasidiplomatic protection provided from the international intergovernmental organizations to the employees (further in the text – functional protection) is the aim of research.

The practical importance and the purpose of this comparative research consists in disclosure of a problem of realization of diplomatic protection in practice and carrying out an accurate side of distinction of concepts of diplomatic protection against other concepts of international laws also relating to protection of individuals and assigning particular obligations of erga omnes to subjects of international law.

This comparative research allows to determine a legal regime of procedure of providing diplomatic protection by law-enforcement government bodies of external relations, its difference from other conventional procedures provided by international treaties. In this regard it is possible to designate some starting positions of institute of diplomatic protection in the ratio with other forms of protection of the rights of the individual.

Considering the provision of consular assistance and diplomatic protection it should be noted their following features:

1) The limited nature of consular functions provided in the Vienna convention of 1963 about the consular intercourses in comparison with broader functions of diplomats specified in the Vienna convention of 1961 about the diplomatic intercourses.

2) Distinction in representation level in cases of consular assistance and diplomatic protection. Thus diplomatic protection represents the interstate intervention which is carried out by diplomats in the case when harm as a result of the international and illegal act made by other state is done to the citizen or the legal entity. Such intervention is aimed at correction of the international and illegal act. It can accept the most various forms, including a protest, negotiations and judicial settlement of a dispute. In turn consular assistance represents

assistance to citizens (probably also to stateless persons and refugees) who get into difficulties in a foreign state. The assistance is provided by the professional or honorary consuls who aren't engaged in political representation.

3) Consular assistance has generally a preventive character and it is provided before exhaustion of internal remedies or before violation of norms of international law. Owing to this fact consular assistance is less official than diplomatic protection, and more acceptable to a host-country[2].

4) Consular assistance is connected, mainly, with protection of the rights of the individual, and its rendering requires consent of a corresponding person[3] (the standard provision of Art. 36 of the Vienna convention on the consular intercourses of 1963) while diplomatic protection can be provided to the individual without his consent.

5) Consular assistance assumes rendering protection to physical and legal entities on their behalf and on the conditions determined by the Vienna convention on the consular intercourses of 1963 by the state. In case of providing diplomatic protection the state acts on its own behalf on a basis of the rights of protected physical and legal persons. These rights have passed to the state.

From consideration of provisions of consular assistance and diplomatic protection, it is possible to draw a conclusion that rules of law of considered institutes regulate only general matters without regulating the procedure of consular assistance and diplomatic protection for physical and legal entities.

Owing to the lack of conventional regulation of these forms of protection of the rights of the individual, government bodies of external relations cannot always *render* effective protection to their physical and legal entities.

In this regard it should be noted that it is expedient to point to the distinction of provisions of consular assistance and diplomatic protection in the draft of the international act of diplomatic protection from 19 articles. This draft was developed in 2006 by the UN International Law Commission. It is necessary to state Article 1 of that edition:

1) Diplomatic protection consists of diplomatic measures or application of other means of peaceful settlement from the state acting on its own behalf in interests of the individual, being its citizen, or the legal entity having its nationality, in connection with causing them harm as a result of international and illegal act of another state.

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3 Zourek J. Quelque problèmes théoriques du droit consulaire//Journal du Droit International. 1963. Vol. 90. Pt. 4. P. 54–55.

4 Thus, according to Phil Kaye, diplomatic protection is based on the obligations imposed by international law on states to guarantee foreigners, who are on their territories, treatment not below a certain minimum standard.

2) Diplomatic protection shouldn't be interpreted as including rendering consular assistance according to international law.

Alongside with it in practice the work of staff of diplomatic missions and consular establishments in the sphere of protection of the rights of citizens is facilitated by the fact that democratic states provide foreigners in their territory with a certain minimum of rights[4], which consists of provisions of the international treaties concerning human rights. In turn, diplomatic protection shouldn't be confused with the matters of protection of human rights though some regulations on the international protection of human rights are included in regulatory enactments of institute of diplomatic protection.

The international protection of human rights is a broader concept than institute of diplomatic protection as it includes: legal, political, economic, social, cultural and other issues. So, the international protection of human rights means providing a certain standard of human rights in various areas of public life, which is recognized by international human rights structures, fixed at interstate and international level and accepted to execution by all subjects and participants of the international relations.

Study of the situation in a number of regions of the world allows to draw a conclusion that internal conflicts and poverty, as a rule, are destiny of the countries in which democratic standards and human rights are violating[5]. As for the rights of foreigners, similar violations are often promoted by unfair work of the staff of diplomatic missions operating in the territory of foreign states. For example, numerous requests of Russian citizens to protect their constitutional laws sent to the Russian diplomatic mission in the territory of Latvia remained in most cases ineffective.

Institute of international protection of human rights, as well as diplomatic protection represent the system of legal norms directed to achievement of a certain legal result. These norms order behavior of subjects of international law and its participants, they give the chance to know what this or that subject has to do, and what it can end up. Thereby the similar actions are predictable, they give the chance to supervise behavior of a subject of the international law and to a certain extent limit his arbitrary behavior.

The international mechanisms fixed by a number of international agreements in the field of the rights of the personality (for example, Convention's provisions of 1950 about protection of human rights and fundamental freedoms and 12 additional protocols to it, including the protocol on abolition of the death penalty) are a necessary element and an additional guarantee of protection of the

5 Kartashkin V.A. Prava cheloveka: mezhdunarodnaja zashchita v uslovijakh globalizatsii [Human Rights Protection in the Globalization Conditions]. - Moscow: Norma, 2009. P.8

individual's rights. Alongside with it the activity of international control bodies in this field (for example, the UN Human Rights Committee, The Office of the High Commissioner of the UN on Human Rights, etc.) is not effective enough for a number of reasons. The main thing is that the international documents on human rights don't authorize similar bodies to pass obligatory decisions to the states.

In this regard the states should surrender of a part of the sovereign rights and be determined to give authority to the international bodies on human rights.

As distinct from the international recommendations directed by human rights committees to the authorities of the states violating standards of human rights, the positions of institute of diplomatic protection are based on instructions to respect the rights and freedoms of the individual for which violation certain measures of impact on the offender follow.

So, if in practice the positions of institute of diplomatic protection aren't observed, the state concerned has the right to apply measures of impact on the offender. Retortions, measures which aren't going beyond the international law, can be used in this situation. They are usually applied in response to unfair, discriminatory actions.

Generalizing the abovementioned it is necessary to highlight general features of institute of international protection of human rights and standard provisions of diplomatic protection.

1. Focus on achievement of a legal result, i.e. recognition (official establishment), realization and ensuring protection of the right of the individual.

2. The government and international bodies and their officials, and also other participants of the international relations authorized to work in legal interest of others are obligatory participants (addressees) of a procedural regulation.

3. The official legal nature of a procedure of providing protection, primary and secondary nature of its norms.

4. Preliminary official definiteness of procedural norms.

5. Proof existence as an element of a procedural regulation.

6. Legal consequences of non-compliance with procedural requirements.

The results of comparison of institutes of international protection of human rights and diplomatic protection allow to issue the concept of international protection of human rights, and also to highlight differing and similar provisions of these two institutes.

Considering the norms of international civil servants' (employees') diplomatic protection from the state and the provisions of functional protection by the international intergovernmental organizations of their employees, it is necessary to pay attention to the following legal criteria of binding (priority).

I. Priority of providing functional protection from the international intergovernmental organization to the employees consists in the following:

- the employee was on duty at the time of causing him harm. In this case the organization has to claim responsibility for protection of the employee. It is important for the organization to show the potential employees its desire to offer protection, and it is impossible to leave it to the discretion of the state of nationality which cannot always wish or be able to provide the corresponding protection;

- in most cases the state of nationality isn't interested in upholding the requirement about compensation of harm to its citizen, an employee of an international organization considering the expenses connected with it, its ignorance of all the facts of the case and probability to damage the relations with the respondent state.

II. Priority of providing diplomatic protection from the state of nationality to an employee of the international organization arises in the cases, when:

- harm is inflicted to an employee of an international organization when he is not on duty but, for example, when he is on holiday in the third country;

- an international organization is not able to provide functional protection to its employee if the latter doesn't correspond to the criteria of protection;

- constituent documents of an international organization need not recognize protection of its employees as a whole or in private circumstances of this case.

It is seen from the above that at procedure of implementation of diplomatic protection there are two competing factors – the principle of nationality of an employee of the organization and the principle of mutual loyalty of the international organization and its employee. While defining of the one who has to carry out protection – the international organization or the state of nationality – the criterion of priority determined by what an international and illegal act is directed against(against the organization or the state of nationality) has to be used.

When providing diplomatic protection subjects of the international law have the right to use any legal ways and means stipulated by modern international law, such as diplomatic negotiations, diplomatic intervention, appeals to international judicial authorities, etc.

General matters of institute of diplomatic protection and its ratio with other forms of protection of the rights of the individual are considered in this article. These matters are to be looked into in order to define the sphere and a practical procedure of this form of protection.

As the recommendation it is possible to suggest that an order of providing diplomatic protection from the authorized government body, and in some cases from international ones should be included in the text of the Vienna convention on the diplomatic intercourses of 1961. This order includes the following stages:

a)before directing a claim from the subject of the international law to the respondent state or the international intergovernmental organization which has made an international and illegal action, it is necessary to estimate the validity of this claim and to give accurate interpretation of the rule of law which, according to the dissatisfied party was broken;

b) an official presentation of a claim to the respondent state or the responsible international intergovernmental organization;

c) providing the subject of international law with the respondent of restoration of the violated rights, and also his compensations of the damaged harm to the state, his physical and legal entities including compensation payment. This procedure is also applicable to the international intergovernmental organizations.

It is necessary to pay attention to the fact that the ideal option at the solution of many controversial issues of right application of the norms of institute of diplomatic protection would become preparation of the multilateral convention on diplomatic protection in which those provisions having the least disagreements should be included.

LAW AND GOVERNANCE

ON THE POSSIBILITY OF IDENTIFICATION OF WESTERN AND RUSSIAN NEO–LIBERALISM IN THE XX CENTURY

A.V. Popova PhD, Associate Professor, Financial University at the Government of the Russian Federation

Summary: The analysis of the theoretical propositions of neoliberalism in Russia and Western Europe and the U.S. as a special type of law. The author comes to the conclusion belonging to the Russian neo technological type of Western liberalism, the distinctive feature of which is its integral character.

Keywords: liberalism, neo-liberalism, individualism, egalitarianism, meliorism, universinalizm, types of liberalism, integral character.

Liberalism arose in Western Europe in the 19th century as a doctrine focused on the protection of individual liberty, as opposed to the use of the state power in the forms that undermined personal dignity. “The roots of liberalism date back to antiquity to such well-developed concepts as *legal person* and *subjective right*, as well as some of the institutions through which citizens participate in government, especially in the legislative process, which belong to liberalism’s primordial foundation”[1]. The roots of the liberalism ideology can be traced in the writings of J. Locke, A. Smith, C. Montesquieu, D. Hume, Voltaire, E. Kant, H. Grotius, B. Franklin, T. Jefferson, D. Diderot and many other thinkers.

According to John Gray, what all types of liberalism have in common is a specific form of interaction between an individual and a society. This form of interaction claims the moral priority of an individual over any social group, recognizes the equal moral status of all individuals and denies legal and political regimes based on the differentiation of moral value of individuals. It also claims a moral unity of all human beings and, therefore, a secondary nature of concrete historical associations and cultural forms. In its' belief in the possibility of rectification and improvement of social and political institutions, it complies with the melioristic theories, including those of "unintended evolution" of F.A.Hayek[2] and pragmatic constructivism of I. Bantman[3].

Russian researcher of liberalism B. G. Kapustin proposed a triple classification of the liberalism types: an epimostological type, an ontological type and a technological type. In Kapustin's view, the first one is typical for the beginning of the classical period of liberalism (T. Hobbes, J. Locke, C. Montesquieu, leaders of the "Scottish Enlightenment", and B. Mandeville). The second type is intrinsic for the period starting from the middle of the 19th century through the middle of the 20th century (G. W. H. Gegel, T. H. Green, B. Croce, social-liberalism of the 19th and the beginning of the 20th century). The third type is common to the contemporary stage of liberalism in the late 20th to early 21st centuries (German liberal theories of civil society and law-governed state, which justified for an exit from social conflict by means of state-governed radical reforms as opposed to revolutionary exit[4]). New versions of the core liberalism ideas emerged in Europe at the end of the 19th century to the beginning of the 20th century, and took the shape of "new" liberalism (neo-liberalism) in 1920-30s. Those liberal thinkers, who regarded such a transformation as a betrayal of the classical perspective and a transition towards Marxism and socialism, defended their exclusive right to be the successors of the liberalism tradition and considered their opponents using the classical notion of «liberalism» as a misnomer.

The crisis of liberalism in the 20th century touched almost all of its basic principles, which reflected in the emergence of a number of theories that confirmed the dividing line between the two liberal tendencies, «the negative versus positive freedom», «commutative vs. distributive justice,» «equality before the law vs. equality of social opportunity,» «property as an individual right vs. the property as a social right», «minimal state vs. welfare state», etc. In general, Western neo-liberalism took shape in the period between the First and the Second World Wars, and became a dominant ideology in some of the Western countries after F. D. Roosevelt's "New Deal". Development of its key provisions are attributed to

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[1] Leontovich V.V. Geschichte des Liberalismus in Russland [History of Liberalism in Russia, 1762-1914, Russian edition] / Translated from German to Russian by I. Ilovayskaja/ Preface by A. Solzhenitsyn – Moscow: Russky Put'; Poligrafresursy, 1995. – P. 3.

[2] Hayek F.A. New studies in Philosophy Politics, Economics and the History of Ideas. London;Heniey: Routledge and Kegan Paul, 1978. P.119.

3 Gray J. Liberalism. Milton Keynes, Open Univ. Press, 1997. - P. X.

T.H. Grip, J. Hobson, L. Hobhouse (England), Haymann F. (Germany), B. Croce, G. Giolitti (Italy), L. Crowley, L. Ward, C. Beard, and J. Dewey (USA).

Hayek says, "This [liberal] movement derives … from two distinct sources, and the two traditions to which they gave rise, though generally mixed to various degrees, coexisted only in an uneasy partnership and must be clearly distinguished if the development of the liberal movement is to be understood"[5].

The first tradition tracing back to classical antiquity, took its modern form during the late 17th and the 18th centuries as the political doctrines of the English Whigs and as the concept of "social contract"[6]. The second tradition considers western neoliberalism of the beginning of the 20th century as a form of disguised socialism. Prior to the 70's of the 20th century Élie Halévy's point of view was the most popular among researchers according to which liberalism has two faces – individualist and collectivist[7]. At the turn of the century neoliberals have adapted liberalism to the requirements of a new time, resulting as a qualitative shift in liberal ideology.

In the last two decades, this position was subjected to a critical review, which had two interpretations as a result. According to the first interpretation, in fact it was not divided into classic and new liberalism, and both of them were parts of a very slurred doctrine. The second point of view argued that the terminology itself differentiating liberalism by different types of liberalism was shading complex work in liberal thinking. Central, but purely formal themes received their individuality in various contexts. They were studied and reviewed; there was no qualitative change but constant development of interpretations around a specific set of formal topics[8].

A. Arblaster notes that "liberalism is more than the structure's values. Liberalism is a more coherent view of the world than many people realize, including Liberals ... relationship between the political and moral values and the ontological or metaphysical theory is not always clearly stated"[9]. A. Arblaster aimed to detect an adequate concept of liberalism "that" supports "the basic liberal values. He believed individualism was such a concept: individualism is the metaphysical and ontological core of liberalism. It is from this premise follows a specific liberal request for freedom, tolerance and human rights"[10].

Russian neo-liberalism of the late 19th and early 20th centuries, in our view, refers to the type of technology and represents the transformation of ideas of classical liberalism in the direction of Marxism and socialism. Neo-liberalism in

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[4] The concept of rationality by M. Weber, F. Dalman, R. von Mohl, K. Rottek, C. Welker, J. Froebel and others.
[5] Hayek F.A. Op. cit. P. 119.
[6] Ibid. - P. 120.
[7] Halevy E. Imperialism and the Rise of Labour 1895-1905. - L., 1961.
[8] Vinsent A. Classical Liberalism and its crisis of identity. // History of Political Thought. - 1990. - Vol. XI. - № 1.

Russia as sending political and legal thought occurs in the time when free-market ideas, perceptions of the State as "the night watchman", which were the main ideas of the classical liberalism, has become a requirement of unlimited freedom of competition, which, in the view of neo-liberal thinkers could not ensure social justice in society.

Russian neo-liberalism has arisen in our country at the turn of XIX-XX centuries in conditions of socio-political ideological crisis as an attempt of synthesis of values common to classical liberalism, economic materialism, as well as sociological positivism. "The democratic principle is logical and moral consequence of liberal programs. In the development of Russian liberalism, these trends are a strong historical tradition, and an urgent practical necessity. Every other than democratic liberalism (neo-liberal – *A.P.*), would not have grounds in the Russian society and wouldn't have found in it a response." In support of this approach argued that "political reform should be preceded by a social"[11], and it is this statement of principle was put forward in the political arena.

While retaining the core of classical liberalism, the Russian version of "new liberalism," added his new ideas in three ways: in the interpretation of human rights (claim) in relation to the State; in the understanding of the principle of equality (equality of initial launch), and finally, the interpretation of the right of ownership. These provisions have, in our view, a feature of neo-liberal political and legal doctrine. Their specificity in comparison with other liberal ideas, was not only a consistent design concept of reciprocal rights and duties of the individual and the State, but also in an attempt to put them into practice of the existing State system in Russia, and on that foundation – reform the entire political system.

The basis of the political program of the Russian neo-liberalism became the thesis of the need for intervention in the affairs of the State, civil society and the duty of the State to ensure the right of the people to live in dignity. Therefore, the pluralism of political parties representing the interests of various groups and at the same time conscious of the need for a State law restricting their activities to prevent the dictatorship of one of them has arisen.

Model of social reorganization of the State, was aimed at building the objective rule of public order, rejecting the will of individuals and linking it. The basic principle of Russian neo-liberalism has become the belief that the social order is based on entrepreneurial spirit and the will of individuals and is justified to the extent that protects individual subjective rights[12]. Thus, if in the West, neoliberal

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[9] Arblaster A. The Rise and Decline of Werstern Liberalism. - Oxford: Basil Blackwell, 1984. - P. 13-14.
[10] Ibid. P. 15.
[11] Miljukov P.N. Vospominanija [Memoirs]. In 2 vols. Moscow, 1990.V. 1. P. 266
[12] Leontovich V.V. Op. cit. P. 4.

theory of State and law was adopted only in the mid-20th century, the Russian neo-liberal political and legal doctrine was already in the late 19th century, for a long time ahead of Western designs.

Describing the current national realities, Vladimir Putin, President of the Russian Federation said that, " the new Russian idea will be born as a fusion of the organic connection of universal human values with traditional Russian values that followed the test of time"[13]. Therefore, in our view, an integrative approach is needed for the use of the two possible ways of development of legal ideology: adhering to the classical Western European Liberal public-legal regime or the revival of traditional forms of Russian statehood and the rule of law, as it was characteristic of Russian neo-liberal theory of State and law of the late 19th and early 20th centuries is required.

[13] Putin V.V. Rossija na rubezhe tysjcheletij [Russia at the turn of the millenium // Nezavisimaya gazeta [Independent Newspaper].1999. Dec. 30.

LAW AND GOVERNANCE

LOSS OF CONTROL IN SUPERLARGE ORGANIZATIONS AND ITS RECOVERY BY IMPLEMENTING SYSTEM CONCEPTS INTO LAW

Z. A. Kuchkarov Doc. Econ. Sciences, Head of the Department conceptual analysis and development of MIPT

Summary: We introduce the idea of the superlarge organizations that arise in the course of and for the socialization of the fundamental ideas and discoveries, discuss symptoms of so-called “loss of control” in such organizations, reveale and explaine this effect. To restore the controllability we provide definitions of such new concepts as the organizational form, the ratio of mediation, the conceptual model of a sphere of controlling and a conceptual model of “full legal relationship of generalized scope of controlling”, conceptual “model of controlling”. The article indicated the idea of restoring controllability, starting from the conceptual analysis of concepts in the field of structurally isomorphic to the (exact) implementation of system objects and relationships in the legal relationship, and completing with the development and introduction of the system of legal relationship.

Keywords: Superlarge organization, loss of controllability, concept, ratio of mediation, organizational form, legal relationship, conceptual model, tmodel of sphere of controlling, model of full legal relationship, model of controlling.

SUPERLARGE ORGANIZATIONS

The world in the 20th century has become the world of organizations. We are all made in a matter of organization.

Joint efforts to hunt mammoth to get him to cut and eat, it took “the organization”. Nobody established these first associations, appointed to office, develop the organizational structure, and even accept the “official regulations” beaters and stonethrowers. But the fact of role specialization and self-feedback actions of many people for a common purpose took place. It is an empirical fact.

Even more obvious the fact of the existence of the organization is, if we imagine a “plan” of building the pyramids in Egypt or the “project” of manufacturing 6000-men terracotta army of Emperor Qin Shihuang in Xi’an, China’s ancient.

Its further history is known and need not be described in the re-presentation. Artel organization. Manufactory organization. In the Middle Ages the organization evolved by trial and rejection, polished, distributed viable forms.

Then university, plant design bureau. Number of organizations is growing. Taken coordination, organization of power: commissions, ministries and committees. Knowledge needed for the organization of the Academy of Sciences. As a result of specialization and the difficulties caused by the inverse co-operation, the gap between specialization and direct activities to achieve the objective continues to grow. Compounded by the problem of responsibility for achieving (NON-achieving) the goal. A need to control division of roles and competencies springs up. Legal institutions with a view to standardize behavior and punish deviation come into existence. Laws start working but they are not enough for the settlement of all forms and types of organizations, new ones are in need.

Case variety of situations requires differentiation and relevance. By-laws emerge, statutes are written, regulations, orders and standards are introduced. Duty regulations are accepted, there is hope for them, then frustration comes and abolition follows up. All forms are fulled in scrupulous records. Accounting overflows. Supervision, oversight, audit, examination are introduced. Then control monitoring, supervision of audit control ... What’s next? Uncontrollability continues to grow.

Scholars are investigating a new (the third?) Nature – Organization. Great M. Weber makes the diagnosis: «bureaucratic organization». He echoes back by others, but the result is zero. It is believed that organizations are created according to a plan, that they are artificial systems controlling by their creators. Organization, on the contrary, began to “consider themselves” to be living, i.e. natural systems, and behaved not as it was conceived of, when deliberated.

Till the 20th century, organizations had never been created in such a mass and were not so different. They never were created explicitly for solution of so non-market tasks. In advance we shall call such goals “artificial”. Organizations were

created to achieve objectives which were invented by the mind, but still are not very clear and measurable.

In the 40th of the 20th century in the United States, the Soviet Union, Britain, France and China there came into existence very big organizations which vere established for creation of super-weapons, that is, under the artificial targets. The process was simultaneous and concurrent. They were founded under the ideologic maxims, or rather not under IDEOlogic, but IDEAlogic doctrines. These "unnatural structures" swept the world, involving in the turnover a large part of the nation's intellect. The world then entered the specific historical practice of **artificial super-large organizations**, and that resulted problem of loss of their controllability.

We have identified, studied and diagnosed manifestations, or phenomena of "large-scale" and "loss of controllability" in organizations and systems of public and corporate governance, including those in areas of health, education, oil production and processing, security, transport, environmental protection, etc., conducted research of organizational control systems (OCS) of more than 150 empirically established corporations and agencies. Thaks to that, we made a generalization of the OCS as a new class of large-scale control systems which are of structural and conceptual difficulties, have multi-faceted subject content and function in a controversial normative legal enviroment and carried out analysis of symptoms and causes of loss of controllability in these organizations. There were identified the following key characteristics of large organizations:

• The number of levels of the organizational structure is 17 (including associated and subsidiary units);

• The number of direct subordinate units in organizational structure is 18;

• The number of organizational units (divisions, departments) within an organization reaches 80;

• The number of civil servants in governments of regions and republics lays in the range 1100 – 2500 persons;

• The functional structure of large organizations is a conglomerate;

• Lack of methods to streamline functions, to enlarge, to divide or to specialize them, and also to perform any operations without the risk of losing the initial idea or purpose;

• The total number of government functions at the regional level reaches 2000, at the federal – oversteps 3000;

• The administrative burden of individuals and units is uneven and can vary several times;

• When decomposing functions to the most grass-roots units, number of sub-functions, procedures and operations may reach 15 000;

• The number of official letters[1] of such structures as the Federal Tax or the Federal Customs Services may come up to 30,000 or more.

It became clear that before creating the organizations, they should be designed, not less scientifically and carefully than airplanes and telecommunications systems.

SOCIALIZATION OF SUPER–POWER IDEAS

The last the 20th century was the era of the material realization of the fundamental ideas and discoveries. The idea of wing lift power embodied in the plane. But it is just the top of the pyramid of the conceptual notions and ideas. Socialization of idea of wing lift power brought to life the aviation and the aviation industry, new professions and organizational forms. The effect of the modulation of waves of some frequency with the waves of a different frequency gave radio and telecommunications, which radically transformed the organization of mankind. Reactive force embodied in the jet aircraft and rocket technology, and the idea of the first cosmic velocity required for its realization a large-scale organization – Mission Control Center (MCC), which was built in the town of Zhukovsky near Moscow. The chain fission reaction of uranium gave nuclear weapons and nuclear industry. Semiconductor effect has given electronics. The idea of a networking protocol gave the Internet. The idea of equity gave socialism. The organization of the world was changed repeatedly, and each time drastically.

For our purposes, it is important to observe that any big idea, any newly discovered significant effect, new fundamental knowledge, or even innovative hypothesis can be embodied in a structurally complex social forms, and these ideas “come to life” into great material and human forms.

Such ideas function only because of the large organizational forms. The small village on its own can not go to space communications. There is a need of a big country for that. “Small” Google in handphone is provided by tens of thousands of servers, eating hundreds of megawatts of electricity and heating radiation, as the whole city.

THE CONCEPT OF MEDIATION OF MAN BY MAN

Author of any intention of significant scale or based on a major idea needs like-minded companions, helpers and personnel towards implementation of his initiative. He embodies his idea not only personally and achieves the goal not straight (not “by his hands”), and does so indirectly through the organized actions of many other participants. He has to explain the concept to the nearest social surroundings, which, in turn, must decide how to bring the

[1] In Russia official letter is a kind of normative document having binding effect in sphere of authority of government body issued. There are, for example, Letters of Ministry jf Finance or Federal Tax Service.

idea up to the second circle of people, *et cetera* to more specific solutions and eventually till human actions and machine operations.

The need for mediation of the author of an intention is stipulated by the fact that an individual is very limited. He is neither six-armed nor three-headed. But there are a lot of people of of such "limitations". Mankind is a discrete or "piece" multitude[2], and because of that the task of providing adequate set of mediating action gives birth to the organization of people.

At the same time piece character of human being and a need of mediation process generates a large part of organization and management problems, and they are all secondary to the function of mediation. It should be "something" from a certain "A" referred to many "Bs", breaking into pieces and without distortion. Each of the "Bs" should not forget his piece of work and had to perform it in time. After a while, the "A" should get a lot of partial results of the many "Bs"and collect them into the integrated result. So it begins: the hierarchy, bosses, subordinates, communication, documentation, monitoring, promotion, registration, storage, staff motivation ... All-Seeing and All-Knowing does not need any organization. He knows, remembers and makes everything by himself. Personally. But the human needs mediators to go from an idea to its material embodiment.

The process of Mediating is an Organization.

THE CONCEPT OF "ORGANIZATIONAL FORM"

The organizational form is an aggregate of selves (individuals, subjects) and their relationships to each other, as well as their relationships to a variety of subjects as a whole, and that to a subset(s) of subjects (individuals) as a whole. Organizational form (orgform) is obligatory part of any other form of community of people. It is something deeper and more fundamental than the economic, administrative, legal and other relations, that is, it serves as a generic, the most general or abstract concept.

Sophisticated orgforms are built as a set of simple orgforms entering or setting in relation to each other. Orgform types can be distinguished by set or combination of aspects – legal form, organization and economic form, social form, socio-economic form, international organization. Of course, all these forms require specification and explication of its own conceptual content. Considering the types of orgform by subject content, by functional activity, by other grounds we will come to the company, firm, holding, ministry, court, club, mafia, sect, project (in the sense of "project management" rather than design, drawings or calculations) bank management, management company, factory, etc.

Orgform there is also an array of constraints imposed on each participant. If

[2] Mankind just began to turn into "intellectual ocean" of Solaris type due to Internet.

orgform is a role one, restrictions can vary by role. But this restrictions impose on any participant – whether he is a director, a clerk, an operator, a minister or a president. Each participant "enters" orgform only by taking for themself (voluntarily or forcedly) limitations in behavior, i.e. limiting his freedom. He should be ready to play by the rules of the organization.

If an entry to the organization is not free, then orgform provides a mechanism for enforcing certain regulatory behavior. Wanting to regain their freedom, orgform participants may walkout of it by whatever rules (again – restrictions).

The simplest orgforms may be of two-element and not necessarily appear as a real "organization" that does not revoke their quality of "being orgform"and being part of some hidden from the eyes or external organization. Say, debtor's receipt is already orgform, of course, not a piece of paper itself, but those relationships entered into by the two entities. The parties are unrestricted to act freely outside of the assumed by each other obligations/restrictions. But if a breach – for example, of the timing of repayment – occurs, parties actualize external orgforms (as lawyers say – "institutions"). And this is a real, "materialized" organization.

THE CONCEPT OF "LOSS OF CONTROLLABILITY"

Loss of controllability of the system is understood as a complex set of events, in which the processes are carried out for goal-achievement, but the goals themselves are not achieved. This is due to deterioration / disappearance of possibility to develope adequate exposure to the system or degradation of the cause-effect relationship (transfer) fate and behavior of or deterioration / disappearance of an adequate system reaction to deterministic effects. This understanding lays in line with the development of cybernetic tradition.

By loss of controllability we also call inability to make a choice (decision) from a set of alternatives (draft resolutions), which is due to any circumstance or combination of several of them:

• deterioration of visibility set of alternatives solutions;

• blurring of the concepts which lay in the base of the objective, and those by which alternatives are formulated;

• inability to assess the consequences of one or another alternative;

• incomparability of alternatives;

• lack of time needed to evaluate and compare the alternatives on the decision-making;

• the cost for the decision of resources exceeds the future effect on the solution.

The second understanding of loss of controllability develops a theory of choice

and decision-making. No matter what understanding is applied, the loss of controllability is manifested in numerous symptoms. Here are just some of the symptoms of our research piggy bank:

• abundance of hours-long meetings of low productivity, which do not produce constructive solutions;

• systematic failure to comply with the terms, discrepancy between expectations of management objectives and their results;

• systematic overload of executives, overtime of any and downtime of some other;

• incessant growth of personnel number;

• excessive accident rate;

• exceeding of estimated costs of projects and separate activities;

• unsuccessful attempts to reform the existing staff and organizational structure in order to reduce them;

• failure of arbitrary decisions of the type “enlarge the number of staff in divisions to at least 5 persons”, or “reduce the staff in 2 times”;

• administrative personnel of all levels is inadequate contemporary challenges.

The many symptoms of loss of controllability, as well as efforts to retain it and complaints about the invincibility of it, clearly indicate the inadequacy of current approaches to the management of real complicated socio-economic structures.

The so-called crisises of reforms, when attempts to change the existing structure of social and economic relations sometimes lead to results that are directly opposite the goals of reform, have become the talk of the town. But several circumstances not yet become the object of scientific analysis. We mean that, for example, in implementation of the monetization of benefits, in realization of administrative reform, in transfer of industries and regional authorities to the Performance-Based Budgeting, and so on, the reformer is forced to deal with realms characterized by:

• regulation by hundreds of laws and thousands of by-laws;

• boundlessness and unaddresslessness of law systems;

• logical inconsistency and incompleteness of the system of rules;

• inability to make changes in the rules holistically;

• divergent interests of performers and the inability to keep their behavior within the framework of a common goal;

• loss of check over the system of concepts.

In tax, customs, licensing and supervisory structures, in the regulation of wages and other areas there is a complex system of concepts and operations containing poorly understandable contradictions and gaps even in the basic concepts and main procedures. So qualitative, logical, notional models (conceptual systems) are becoming a key task for solving the problem of controllability rather than quantitative models (number systems). Only such quality models remove the technical problem of bulkiness of features and tools to achieve the objectives and the inability to hold their organization.

THE CONCEPT OF "LEGAL RELATIONSHIP"

The area of orgforms can be adjusted by laws and regulations. At first, it may be the folding actual subject-to-subject relations, which are becoming significant problem as far as the loss of controllability and/or growth of proneness of conflict and need to be addressed. At the same regulatory administration, on the contrary, the law first installed certain orgforms, then subjects enter into this relationship and the corresponding orgforms created.

As the complecation of area underlying the settlement, as well as the dynamics of the of new fields of activity and relations on new and complicated objects grows, it becomes necessary to rely on the conceptual domain model received *a priori* before the settlement of area begins. The settlement requires implementation of new objects in law, with full and accurate differentiation diversity of kinds and types. Introducing object definitions in law, the lawyer must rely on the natural sciences about the objects and the socio-economic and psychological knowledge about the nature of the subjective processes. Knowledge must be described in a language of law and in subject language simultaneously.

To transfer the system relations into the legal relationship conceptual schemes are postulated. Basic and yet the most simple concepts that are introducing into a legal relationship are Object, Aspect, and Process. Next, we introduce an object-to-object relationships, for example, the "composition of atmospheric air"; object-to-aspect ratios, such as "the concentration of a substance X in the buffer zone"; object-to-process and process-to-object ratios, for example, "the consequences of pollution ..."; the process-to-process ratios or chains and networks of processes, such as "environmental change". The next level of schemes is the subject-to-object ratios, and the final is subject-to-subject ratios.

With these concepts full model of sphere of controlling is synthesizing. For example, the sphere of controlling in terms of industrial ecology can be represented by means of the model of "full ecological industrial relation", that is assembled, among others, from the model of objective relationships, the model of subjective relations, the model of conflict of interests and resources, the model of kind of damage, the model of organizational forms, etc. that are models appropriate to each type of objective and subjective relations. This first

synthetic models i.e. the model of the sphere of controlling deploy and contain all the variety of potential subjects of settlement.

Actually branch of law or legal institutions is represented by means of a second synthetic model – the model of "full legal generalized sphere of controlling". It includes models of: the establishment of single legal relations; rationing of legal relations; rationing of the parties of legal regulation; the hierarchy of norms; the hierarchy of authority of legislators; settlement of the conflict of parties; management of area facilities and processes; application of legislation in the area.

Finally, it is provided a third generalized model i.e. the model of the system for the first time creating or developing the existing rules and institutions of the settlement of a generalized sphere, or simply "the model of controlling". It includes models of: diagnosis and statusing of area problems; goal-setting regarding the sphere of this controlling; knowledge or competence in relation to the objects and aspects of the legal relationship, which will be implemented in law; liability of carriers of knowledge; process of introducing of norms into action.

These generic models of the sphere of controlling and of legal relations and management are synthesized, and further system effect is reached because any changes in regulation are implemented through-way from changing the norms of relations till the change (if necessary) of the forms of application of legislation.

After full deployment of the system of concepts, there is conducted full throughpassing and unified terminologization of these concepts which define the variety of objects and subjects of the sphere of controlling, then the terms and definitions developed in this first model are transferred to the terms and entities of the second model, that of developing full legal relationship. Further is move to the third model – the model of controlling. At that we identify the authorities by which powers in management and resolution are distributed, develop and distribute functions of rationing and documenting by bodies, develope procedural rules of establishing deviations from the norm, i.e. inspection, supervision, investigation, determination of guilt, and also the norms of resolution of conflict and damages, penalties imposing and execution of sanctions.

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Thus, the restoration of controllability begins with the conceptual analysis of the notions in the field. To do this, it is necessary to identify the nature of phenomena such as the socialization of super-power ideas, organizational form, loss of controllability, the ratio of the mediation of man by man, to give them constructive logic definitions, to develop and apply conceptual models of the sphere of controlling and the full legal controlling of generalized sphere of regulation. After the conceptual analysis of the notions in the field and after structurally isomorphic (accurate) implementation of system objects and relations into the legal relationship, the restoration of controllability completes with developing and introduction into action of the new system of legal relationships, that will set the effective orgforms.

LAW AND GOVERNANCE

PROBLEMS OF ADMINISTRATIVE AND LEGAL REGULATION OF PUBLIC–PRIVATE PARTNERSHIP

Z.S. Aleskerov Master of jurisprudence, President of Law firm Legal Defence Department

Promoting foreign investment, particularly upon Russia having joined the WTO, is one of the strategic tasks of the Russian economy development. Foreign investments work towards greater competitiveness of home economy, contribute to its sustainable growth and improvement of quality of life of the Russian citizens.

Development of this process encounters a lot of problems such as: frequent alteration and violation of taxation principles, lack of protection of the intellectual property and shareholders' rights, backstage lobbying of major state companies, arbitrary behavior of local authorities and unskilled performance of officials, criminal presence in the economy, incompliance of the accounting rules with the international standards etc. Imperfection of the Russian laws and legal variability in this sphere as well as in the others are of substantial importance as well, accompanied by constant enacting laws of non-grounded priority and gaps in lawmaking.

A new and trendy for Russia form of implementing investment projects, public-private partnership (PPP), has been lately evolving, expected to assist in solution of a range of long-standing problems, infrastructure-related furthermost. At that, the principal attribute of PPP is involvement of the parties in public-private cooperation value-added chain.[1]

It is worth noting that, irrespective of the relevance of the subject and intense interest in it of the governmental agencies, its administrative and legal aspects, contents and, in particular, the methods of efficient application of this "new technology of economy development"[2], in the expert opinion, have not been entirely studied yet, though certain institutional steps have been taken in order to implement it (e.g. expert councils have been established within some governmental executive agencies).

In our review, state or government is regarded as a certain agency producing public goods which cannot rely solely upon market principles. These goods can be produced partly by the government independently and partly by using resources and opportunities of the private sector. The methodological complexity lies in the nature of these public goods, the character of their practicability being evaluated rather ambiguously.[3]

The government shall under any condition remain the subject of public-private relations. This factor turns out to be essential for civil law relations as well, where the government being a sovereign cannot act as an ordinary civil law subject. That is why an issue of primary legal equality of public and private partners in PPP projects cannot ever be raised. Such legal equality can occur solely in case when the terms and specific elements of implementing civil law relations are provided on the basis of the sovereign rights of the government in the PPP agreement. In other words, the government as a sovereign becomes a specific subject of civil law. It consists in, firstly, the fact that the government defines independently the legal frames binding upon other subjects of civil law relations; and, secondly, retaining by the government of its powers of authority even if it joins the said relations on the basis of equality of parties as it may adopt administrative acts disregarding this equality. The government is supposed to participate in the civil turnover for the purposes of the most efficient delivery of public authorities, rather than for its specific benefits.

In this respect PPP projects are not merely an aggregate of resources, but basically a completely peculiar set of interests and corresponding authorities of the partners. Firstly, the government as one of the parties to the partnership acts as a carrier of public interests and purposes, performing the functions not only

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1 Derjabina M. A. Gosudarstvenno-chastnoje partnerstvo: teorija i praktika [Public-Private Partnership: Theory and Practice] // Institut ekonomiki RAN. Ekonomicheskij portal [Institute for Economy of the Russian Academy of Sciences. Economic Portal] http://institutiones.com/general/1079-gosudarstvenno-chastnoe-partnerstvo.html.

2 Varnavskij V. G. Protsessy institutsionalnoj adaptatsii chastno-gosudarstvennogo partnerstva ochen slozhny [The Processes of Institutional Adaptation of Private-Public Partnership to Real Economy are Very Complicated] // http: //www.opec.ru/point_doc.asp? tmpl=point_doc_print&d_no=50580#33

3 Rubinshtein A. Ja. Ekonomika obshchestvennykh preferentsij: Struktura i evolutsija sotsialnogo interesa. [Economy of Public Preferences: Structure and Evolution of Social Interest] // Saint-Petersburg: Aleteja, 2008.

of goal-setting, but of control as well. Secondly, acting as a participant of civil turnover it is interested both in public efficiency of PPP project and assurance of its own commercial effect. Finally, the private partner as any normal entrepreneur is aimed at profit maximization. Thus, bargaining in respect of possible allocation of emerging risks, nature of the powers delegated and the terms of their delegation and use is quite appropriate and even necessary between the partners in the commercial interests sector, in contrast with the sector of the public interests implemented by the government.

For Russia these aspects of PPP are especially important due to our legal system lacking correct division into public and private legal relations, which has already affected the process of implementing megaprojects, federal target programs (FTP) and specific investment projects. The amorphousness of relations deters potential major investors. Therefore, the first steps towards implementing into the Russian law of the categories of public parties and public legal relations are likely to be made as early as in this year.[4]

The rapid development of numerous forms of PPP in all world parts and their expansion in various sectors of industry let one consider this form of interaction between the government and the business to be an attribute of contemporary mixed economy.[5]

The term “gosudarstvenno-chastnoye partnerstvo” in the Russian language is a translation of a wide-spread notion “public-private partnership”[6]. As we can see it, the translation is almost literal, though in foreign variant it is “public” in the first place, while in the Russian variant it is “governmental” or “state”. However, it is necessary to note that both in Russia and abroad the notion of “private-public partnership” is sometimes used as well, supposedly, in order to emphasize the priority role of the private sector in such projects. However, if to be straightforward about it, proceeding from the essence of PPP and Russian realities, the term “public-private partnership” defining the leading role of the government is more correct. The most general definition of this phenomenon is, in our opinion, given by V. G. Varnavskij: “Public-private partnership is an institutional and organizational alliance between the government and the business for implementation of public worthwhile projects and programs in a wide range of sectors of industry and R&D works, up to and including the sector of services”[7].

In this respect, foreign experience appears to be of substantial interest. For example, PPP has been used in the USA for more than 200 years, thousands

4 Derjabina M. A. Op cit.
5 Chastno-gosudarstvennoye partnerstvo: sostoyaniye I perspektivy razvitiya v Rossii: Analiticheskiy doklad. [Private-Public Partnership: Progress and Prospects for Development in Russia: Analytic Report]. Moscow: Institut Ekonomiki RAN, Natsionalnyj Investitsionnyj Sovjet [Institute for Economy of the Russian Academy of Sciences, National Investment Council], 2006. P. 14.
6 T. Sannikova. Public-Private Partnership // http:// www.opec.ru/comment_doc.asp?d_no=46833

of such projects being currently implemented, particularly, in the sphere of water supply and water disposal, transport, urban territories development and social sector. Thus, in the USA the PPP is understood to be "a contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional"[8]. Such agreement usually involves a contract between an appropriate government agency and a private company, its subject matter being renovation, construction, maintenance and/or administration of a publicly owned object. The main ownership rights in respect of this object do not change, while the state retains ownership in it even upon its transfer to the private company. The term PPP determines a wide range of relations from more or less simple contracts, whereby the private company undertakes certain risks and agrees to penalty system, to complex and technically complicated projects including construction, reconstruction, operation and administration of facilities. The strategy of forming PPP in the USA is based upon the purposes of majority of manufacturers in the American industry, including material and non-material production, rather than the ones of the group of magnates.

It is also important to note that in the USA the possible forms of PPP are determined not by the law, but by the conditions of legal environment constantly and dynamically changing in accordance with the interests of the developing American economy. Thus, some kinds of PPP sometimes are not subject to the official definition, while a range of state regulation methods *de facto* appears to be PPP.

In most states of the world PPP is required in the fields where the government is traditionally responsible for publicly shared facilities (transport and social infrastructure, utility services, cultural facilities, historical and architectural listed buildings etc.), the so called public services which involve repair, renovation and maintenance of publicly shared facilities, cleaning of the territories, housing and communal sector, education, public health services.

There are tens of regions and hundreds of municipalities having the urge to construct or reconstruct roads, bridges, hospitals and heat power stations and to save from decay residential units, theatres and libraries as well as listed buildings "under governmental protection". Lots of places demand for upgrade of depreciated infrastructure and construction of residential premises, number of people in need for it exceeding the critical point threatening the social peace. Moreover, it is typical when the region does not have funds for it, while there is a need for long-term money. The need for it occurs today rather than tomorrow.

In the words of officials, PPP is something like a magic wand that can help to

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7 V. G. Varnavskij. Aljans na neopredeljonnyj srok [Alliance for an Indefinite Term] // FeldPochta [FieldPost]. 2004. No. 29. P. 5.
8 Report to Congress on Public-Private Partnerships. US Department of Transportation. 2004. P. 10.

solve all vital problems. However, the attempt to extend PPP over the Russian wide territory has revealed that PPP is a substantial problem in itself, legal, institutional, financial and economical. Business is the most "timorous deer" in any country, the government being required to show particular proficiency, statecraft, honesty and clarity in establishing the rules of the game in order to evoke among the business community trust and intention to approach, that is to part with their money for common sake.[9]

One of the efficient mechanisms of implementing PPP projects is project finance (which is not equal to "financing of a project", as projects can be financially backed with respect to other schemes and instruments), its main advantage being that it allows involving large international investment, specifically, by means of ensuring political and governmental support, which is especially timely for Russia. By the time, project finance is mostly popular in fuel and energy industry, for instance, such an ambitious infrastructure project as oil and gas Sakhalin-2 project is the largest example of project financing in Russia.

The main problem of development of project finance and financing of PPP projects in general lies in the fact that the culture of strategic planning of social and economic development of territories and the state as a whole has not been shaped yet in Russia, such culture being the key condition in making decisions to finance long-term projects. The average term of implementing an infrastructure project is from 5 to 15 years, the basic risk being whether the state, region or municipality is going to perform its undertakings in the long view? During this period, the country shall face, at least once, the change of political elite, which admits the review of governmental economic priorities, legal regulations, terms and conditions of the agreements etc. Due to this fact, the government, becoming a responsible participant of PPP agreements, should undertake certain risks, related mainly to the early termination of the contract. Moreover, there are traffic-related risks in case if the concurrent transport projects are implemented connected with operating the constructed objects where the private investor is engaged in construction of social infrastructure facilities, for instance, risks related to variation of currency exchange rates if the funds in foreign currency are used, and the risks related to change in conditions of project recovery which are beyond the control of the private investor.[10]

Therefore, it is necessary to develop instruments of insurance of the projects against risks, first of all, related to state and municipal governmental authorities performing their obligations, accompanied by establishment of the required legal framework. As soon as such mechanisms are created, it would be considerably

9 Danilov S. I. Perevernut' piramidu GCHP [To Turn the PPP Pyramid] // Initsiativy XXI veka [XXI Century Initiatives]. 2012. No. 2.

easier to attract the funds of international institutional investors and of pension funds of the Russian Federation as well.

In the ideal case of interaction, the government is presumed to undertake legal risks and to provide the private partner with long-term warranties in respect of the project (up to non-amending the legislation for the time of its implementation). The government should undertake all the political risks as well. If the project is carried out in a socially sensible sphere like housing and communal sector or toll road construction, the government shall guarantee the minimum demand level in order to ensure the cost effectiveness of the project. Another substantial problem for PPP can lie in the governmental inadequate project management (corruption in the system of project selection for tender and further processes – there is a risk that development of PPP will give rise to corruption and encourage unfair competition for the market and actually on the services market). The transparency of selection procedures and unrestricted competition of private partners are essential for efficient work of PPP institute. To create non-discriminative conditions particularly on the regional level and to ensure the principle of equal rights of the parties to the partnership represent certain difficulty due to lack of the culture required and regulation of administrative functions carried out in respect of PPP projects.[11]

Although in our country the federal level structures responsible for implementing PPP agreements have not been established yet, this form is implemented in Russia without a detailed legislative basis: about 300 such projects have been initiated and implemented in Russia by the beginning of 2013.

Concerning the PPP legal regulation area, it has been mainly set forth and is almost up there with the foreign countries. At the same time, our legislation does not contain any special provisions regulating purposively this or that aspect of implementing PPP projects, which is a substantial negative side.

In Russia the notion of PPP was initially settled in legislation in the Law of Saint-Petersburg of 25.12.2006 No. 627-100 “On participation of Saint-Petersburg in public-private partnerships”[12].

The idea of the federal law on PPP in Russia has been discussed since the mid-2000s, but the first edition of the bill was prepared only by June 2012[13]. The second edition of the bill appeared as soon as in four months, while on 15 March 2013 the Government introduced in the State Duma the third variant of the bill “On the fundamental principles of public-private partnership in the Russian Federation”.

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10 Interview with the Executive Director, Head of Center Infrastruktura Alexey Sirotin // http://www.opec.ru

11 Vorotnikov A. M., Korolyov V. A. O razvitii gosudarstvenno-chastnogo partnerstva v rossijskikh regionakh [Concerning the Development of Public-Private Partnership in Russian Regions] // Nedvizhimost' i Investitsii. Pravovoje Regulirovanie. [Real Estate and Investment. Legal Regulation]. 2010. July. No. 2 (43).

In the previous versions the law was not to extend over housing and communal facilities and emergency facilities, while there are no such restrictions now.[14] The novelties include unified contesting tender for the entire PPP project (instead of various tenders for each kind of works) and, on the contrary, cancellation of a tender for transfer of land plots needed for constructing a PPP object.

The federal law bill is sometimes colliding with regional laws. Thus, some regional laws provide for concluding long-term cooperation agreements budgeting for certain financial conditions (e.g. tariffs), while the others prohibit or restrict such actions; therefore, it is impossible to sign, for instance, a housing and communal tariff for 20-year term in Russia. By the time, such legal regulations have been adopted in 69 constituent subjects of the Russian Federation, most of them being declarative documents. In addition to regional regulations, the sphere of PPP is also ruled by the Federal Law of 21.07.2005 No.115-ФЗ "On concession agreements"[15] and the Federal Law of 21.07.2005 No.94-ФЗ "On placing orders for supply of goods, performing works and providing services for state and municipal needs"[16]. PPP is also ruled, to a certain extent, by the Federal Law of the RF of 22.07.2005 No. 116-ФЗ "On exclusive economic zones in the Russian Federation"[17] (granting privileges to business within a certain territory is also a variant of PPP wide-sense). Nevertheless, all these legal regulations cover far not all the possible forms of PPP.

The federal law bill introduced by the Government "On the fundamental principles of public-private partnership in the Russian Federation" shall finally settle the definition of PPP and provide the notion of "PPP agreement". However, the forms of PPP are not fixed, so specific features of implementation various forms and kinds of PPP agreement are implied to be set forth by other federal laws. It is indicative of the fact that, for instance, "industry laws" can appear to settle the terms of interaction between the government and business, e.g. in defense industry complex. As soon as this law is enacted, a new trend in Russian economy shall be undoubtedly defined, while business will obtain plenty of niches for development in the sector of providing government services to the general public[18]. It is advisable to consider foreign experience in course of

12 Ogorodnov S.Kto zapugal investorov? [Who has Deterred Investors?] 06.02.2013 // http://www.ppp-russia.ru/mnenia/item-81.html
13 Federal Law Draft "On Public-Private Partnership" / Developed by: the Ministry of Economic Development of the Russian Federation. Dated: 22 June 2012 // http://www.economy.gov.ru/minec/about/structure/depregulatinginfluence/doc20120622_015
14 Ljutova M. Chastniki smogut zanimatsja oboronnymi proektami vmeste s gosudarstvom [Private Sector will be Able to Tackle Defense Matters along with the Government]. 11.03.2013// http://www.vedomosti.ru/politics/news/9890671/oborona_v_chastnye_ruki
15 Federal Law of 21.07.2005 r. No.115-ФЗ "On Concession Agreements" // Sobraniye zakonodatelstva RF [Legislation Bulletin of the Russian Federation], 25.07.2005, No. 30 (part II), art. 3126
16 Federal Law of 21.07.2005 No. 94-ФЗ "On Placing Orders for Supply of Goods, Performing Works and Providing Services for State and Municipal Needs" // Sobraniye zakonodatelstva RF [Legislation Bulletin of the Russian Federation], 25.07.2005, No. 30 (part 1), art. 3105

developing the new law, specifically, in respect of establishing new PPP self-financing mechanisms.

One of them is a method of self-financing by the municipal authorities of the polluted urban areas renovation projects, created in 50s of the previous century, which allowed the local authorities to promote investment to the infrastructure and other municipal development, repaying the investor from extra tax revenues generated by the project with respect to land quality improvement, real estate growth, expansion of production etc. This instrument was named *Tax Increment Financing* (*TIF*) and has been widely used for regional and urban development[19].

In Russia *Tax Increment Financing* is going to be tested in the process of implementing the Investment Megaproject "Complex Development of Southern Yakutiya", which includes construction of Kankunskaya hydropower plant, Elconskiy uran mining and metallurgical plant, Tayozhnyy and Tarynnakhskiy iron ore mining and processing plants, Seligdarskiy mining and chemical complex, Inaglinskiy coal complex, Yakutskiy gas refining and gas chemical center. This project of utmost importance for the future of the Russian industry is coordinated with the projects to construct Eastern Siberia – Pacific Ocean oil pipeline system (ESTO), develop oil fields (Talakanskoye, Alinskoye) and create Yakutskiy center of gas production and recovery.

As the result of industrial facilities construction, tax increment for the budget will be generated, that is intended for reimbursement by the government for the investments made. It is profitable for the government, due to the fact that the budget expenses will be delayed by 5–6 years until the extra budget revenues are generated and become correlated with the income gained from implementing the project. It is also profitable for business, as the private investor is aimed at efficient investing of his funds and interested in cost minimization and reduction of infrastructure facilities construction terms. It means, specifically, that the proposed TIF-model of PPP is in its nature anti-corrupt.

The PPP model implying the recovery of private investments using future extra budget revenue is relevant throughout the country and should receive an appropriate regulatory support. Such instrument as TIF is multi-purpose. It is

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17 Federal Law of 22.07.2005 No. 116-ФЗ On Exclusive Economic Zones in the Russian Federation // Sobraniye zakonodatelstva RF [Legislation Bulletin of the Russian Federation], 25.07.2005, No. 30 (part II), art. 3127

18 Gevorkyan A., Litvinova A. Gosudarstvo ishchet partnerov [Government is Seeking for Partners]. 11.03.2013// http://www.rbcdaily.ru/economy/562949986141162

19 Sharipova E. Tax Increment Financing (TIF) — finansirovanie publichnykh investitsionnykh proektov za schyot rosta mestnykh nalogovykh dokhodov [Tax Increment Financing (TIF) — Financing of Public Investment Project Using the Growth of Local Taxation Revenues] / VEB. Tsentr razvitija gosudarstvenno-chastnogo partnerstva [Bank for Development and Foreign Economic Affairs. Center for Development of Public-Private Partnership] // http://www.pppinrussia.ru/userfiles/upload/files/artikles/TIF.pdf.

attractive for municipalities as well, lacking funds for roads, new boiler units and required social facilities[20].

The following steps should be the appropriate structuring of administrative machine ready to carry out governmental purposes in the context of partnership (rather than "shield racket" or extortion) with the business, reforming staff policy in respect of governmental and municipal officials, more careful selection of officials, settling the rules of proper official behavior, anti-corrupt measures[21] and forming transparent administrative and legal PPP mechanism in various work areas of governmental authorities.

To summarize, it is necessary to point out that PPP development in Russia is restrained not merely by lack of elaborated legislation. The lack of long-term financing mechanisms is quite as significant. Russian business, banks in particular, is not ready to participate in long-term projects, PPP agreements being generally concluded for 10-50 years, so most major infrastructure PPP projects are implemented through "manual control" mode.

Russia has still a hard way to pass in connection with economic and legal qualification of numerous PPP forms. At that, it is important to evaluate in a juridical correct manner the role of the government not only as the main regulator, but also as the representative and defendant of public interests and needs, i.e. of what is understood in the European juridical tradition under public law, public interest, public service, public legal property relations and public legal ownership[22]. This section of relations does not fit completely in the contemporary civil law rules.

The potential for development of various PPP forms is wide-scaled in our country, though it is required to solve a range of significant matters in order to implement it in practical terms. Firstly, the both parties to the partnership should clearly understand that an effective PPP cannot be considered narrowly, barely as additional fund raising for capital-intensive projects of authorities of all levels. Instead of that, the real interests of both parties should be considered.

Secondly, there is a need for a substantial progress in understanding and practical performance of public legal functions of the government. The Russian laws do not specify public legal functions yet and do not establish connection between them and public ownership. The law is constructed in such a way that the public legal functions are carried out either administratively or through civil legal functions. It is impossible to arrange allocation of the powers between the

20 Danilov S. I. Op cit.
21 Vilisov M. V. Gosudarstvenno-chastnoje partnerstvo: politico-pravovoj aspect [Public-Private Partnership: Political and Legal Aspect] // Vlast [Power].2006. No. 7.
22 Sosna S. L. O kontseptsii obshchestvennogo dostoyanija [Concerning the Concept of Public Domain] // Gosudarstvo i pravo [State and Law]. 1996. No. 2. P. 66.

parties to the partnership on the existing basis. In the countries with developed economy large experience has been accumulated in respect of successful calibrating of responses to “public amenities paradoxes”, which can be used in Russia as well with a view to Russian specificity[23]; so our legislators should review more closely the foreign experience which allows coordinating the form of private sector involvement.

Working out an administrative and legal mechanism of PPP shall allow solving several problems: ensuring sustainable development of economy of the regions of the Russian Federation; increasing budget income of all levels within the territory of the country; boosting of efficiency of interaction between the government and business; improvement of performance in respect of using the governmental resources and carrying our governmental authorities; ensuring investment attractiveness of the economy of the Russian Federation and its separate regions; implementing of sustainable development of life activities in all areas on the basis of high technologies.

23 M. A. Deryabina. Selected works.

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