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Dear Readers,

I would like to present for your attention the first regular issue of KAZAN UNIVERSITY LAW REVIEW 2018.

The articles in this issue cover topical issues of the theory and practice of Russian law and law of foreign countries.

The opening article by *Olga Alexandrova*, Rector of the All-Russian State University of Justice (the RLA of the Ministry of Justice of Russia) is dedicated to an extremely relevant problem for today's realities: "Anti-corruption policy as an institutional framework for countering terrorism." It is important to note that the article gives conceptually substantiated idea that corruption destructively affects national security of the state as a whole and it is one of the main negative legal and socio-economic phenomena that generates the growth of terrorist threats. The author has identified the internal cause-and-effect relationship of terrorism and corruption and developed directions for building anti-corruption activities in the area of strengthening the fight against terrorism.

The article by our colleague from the USA *Richard C. Chissoe*, the University of New Mexico, "Pueblo Lands and the Spanish Land Grants: A Punishment and an Accommodation" is on rather specific, but interesting and indicative problem generated by the history of the state of New Mexico. The state passed from the jurisdiction of Spain and Mexico to the jurisdiction of the United States at different times and this, in turn, had influence on the land issue and the regulation of the land grants in that area.

I am very pleased to present research of my colleagues from Kazan Federal University, professor *Alexander Epikhin* and associate professor *Andrey Mishin*, on the problems of security of a person who participates in a criminal procedure. I think it is necessary to support the authors of the article in their main idea that at the present time there is a tendency of fragmentation of a scientific issue dividing the main problem into more detailed "subproblems". However, within the framework of one branch of law, the criminal procedure as an example, it is no longer possible to study problems that arise in the sphere of legal enforcement. It is necessary to use knowledge from the related areas of law (theory of law, criminology, victimology, criminal law, criminal procedure, prosecutors supervision, criminalistics, civil law, family law, etc.), as well as other academic disciplines (for example, psychology and conflictology). Therefore, the issues of ensuring the security of the individual in the sphere of criminal justice and criminal proceedings is an effective tool of countering the criminalization of society and it must be addressed in a comprehensive and joint manner by all law enforcement and other state bodies.

Last year, in 2017, Russia celebrated the 100th anniversary of the October Revolution by a number of scientific events and publications dedicated to the event. This theme is also a subject of scientific research of our friend from the University of Warsaw (Poland) *Michał Patryk Sadłowski*, who wrote the article “Selected actions and draft reforms of the Provisional Government concerning working class relations in 1917.” It is noteworthy that the author keeps track of the most positive changes that occurred in Russia after the Revolution in relation to the activities of the Provisional Government. The changes that began in 1917 in Russia forced the Provisional Government to take action aimed at a fundamental reconstruction of relations involving the working class. Social pressure, aggravated by pressure from socialist political forces, led to the fact that the revolutionary authorities were forced to carry out profound social reforms and create a system of workers’ protection. This in turn marked a new stage in the development of the Russian Labor Law and Russian state.

The central question of civil law is the correlation of private and public principles. And with great pleasure I present the conceptual article of our colleague from Perm University *Olga Kuznetsova* on the fundamental problem “Private-public coercion in civil law.” The significance of the problem allowed the author to formulate serious conclusions that should be supported. In particular, the measures of civil law enforcement, which are applied in the interests of an individual, but by the court initiative (a powerful state body) without the statement of the interested party are proposed to be called measures of private-public compulsion. Such measures have not been properly regulated in the Russian legislation and are not developed in legal doctrine either. Their specificity is in the presence of characteristics of both public and private enforcement. The author of the article has proved that private-public coercive measures can only be used within the framework of protective coercion, i.e. when committing an offense as a negative reaction to it. In this case, the guilt of the offender should be acknowledged as a prerequisite for the use of private-public enforcement. The assignment of such measures in the field of civil-legal regulation stipulates the presumption of guilt of the offender and the possibility of using the entire arsenal of the mechanism of civil law enforcement, including the statute of limitations, the rules for calculating the size of penalties and the possibility of its reduction.

The “Comments” section contains two very interesting articles of young researchers from Izhevsk and Kazan on topical issues of international commercial arbitration and interpretation of the *Lex mercatoria* principle, which is a completely new and innovative concept of “law without the state” (*Anastasiia Moskvina*) and business law in terms of issues and trends of legal regulation of activity of industrial parks in the Russian Federation (*Lilia Sungatullina and Lyaisan Mingazova*).

The materials of our colleagues from Kazan complete the practical section of the current issue of “Conference Reviews” and give an account of events that were held at Kazan University in the autumn-winter of 2017.

With warm regards,
Editor-in-Chief
Damir Valeev

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ARTICLES

OLGA ALEXANDROVA

Rector of the All-Russian State University
of Justice (RLA of the Ministry of Justice
of Russia), Candidate of Legal Sciences

ANTI-CORRUPTION POLICY AS AN INSTITUTIONAL FRAMEWORK FOR COUNTERING TERRORISM

DOI:

Abstract: The article conceptually substantiates that corruption destructively affects the state of national security of the state as a whole and yet is one of the main negative legal and socio-economic phenomena that cause the growth of terrorist threats. The purpose of the research is to identify the internal cause and effect relationship of terrorism and corruption, develop directions for building anti-corruption activities in the area of strengthening the fight against terrorism. In the course of the analysis, the conclusion is drawn that corruption and terrorism presuppose the presence of rather definite destructive ideologies that, on the one hand, justify the commission of specifically targeted crimes, and on the other, mobilize persons inclined to commit them. In conclusion, the author summarizes her research, pointing out that in today's society a serious reevaluation and further improvement of anti-corruption activities is required, which will certainly contribute to effective counteraction to terrorist threats.

Key words: anti-corruption policy, terrorism, corruption, organized crime, prevention, counteraction to the ideology of corruption and terrorism.

Among the main measures ensuring national security in the modern world is strengthening the role of the state as a guarantor of personal security and property rights and improving the legal regulation of crime prevention activities in general, as well as corruption, terrorism, extremism and organized crime in particular.

According to the National Concept¹, the main task of counteracting terrorism is to identify and eliminate the causes and conditions that contribute to the emergence and spread of terrorism, that is, its prevention. Therefore, in order to ensure that the state policy in the field of counterterrorism continues to be effective, it is necessary to constantly explore and identify the main determinants of modern terrorism and skillfully influence them with a view to minimize and phase them out.

At this moment, the causes of terrorism are not geopolitical, but rather socio-economic. One of the main negative social and economic phenomena that generate terrorism is corruption. The phenomenon of corruption is known to our society since ancient times. It is obvious that manifestations of corruption are among the most dangerous factors of public life, which destructively affect the state of national security of the state as a whole. However, the main danger of corruption is its destructive impact on the foundations of the state structure and the constitutional basis for the legal regulation of society's life. The global scale of corruption creates favorable conditions for the creation of domestic sources of financing for terrorist and extremist activities.

In May 2016, the Vienna International Anti-Corruption Academy hosted a special session of the UN Commission² dedicated to investigating the relationship between corruption and terrorism, where, in particular, the view was expressed that it was the destructive influence of corruption that promoted the growth of terrorism.

Corruption, shaking the foundations of the statehood, creating the illusion of permissiveness in society, acts as a factor conducive to the development of terrorism, destructively influencing the political and economic systems, the army, law enforcement agencies, etc.

In the framework of the above-mentioned event, it was also noted that corruption contributes to the creation of conditions in which terrorism flourishes abundantly. According to experts, punishing corrupt officials, uprooting corruption, it is possible to inflict decisive blows on terrorism³, and it is difficult to disagree with such a point of view.

Corruption crime in any society is intertwined with other antisocial manifestations and, above all, with organized crime, shadow economy and terrorism, being at certain stages, on the one hand, the source of their financing, and on the other, is itself financed by them.⁴

¹ The concept of counteracting terrorism in the Russian Federation (approved by the President of the Russian Federation on October 5, 2009) // Russian newspaper, № 198, 20.10.2009.

² <http://www.un.org/russian/news/>. Reference date 15.01.2017

³ Commission on Crime Prevention and Criminal Justice. Twenty-fifth Session. Statement by the International Anticorruption Academy. Vienna. Austria. 24 May 2016. P.2.

⁴ See: STEPANOJ E. Countering the Financing of Terrorism // International Processes. – Volume 7. – 2009. – №1 (19); VAHANJJA V. Non-profit organizations and their connection with the financing of terrorism. // Criminal Law. – 2004. – №1; LUKASHUK I.I. International law. General part: textbook. M.: BEK, 1997. – P. 165; IVANOV E.A. The system of international legal regulation of combating the legalization (laundering) of criminally-obtained income: Thesis Diss. Doctor in Legal Science. M., 2001. – P. 141–149.

Thus, terrorism and organized crime take the form of a single whole, where organized crime often plays a leading role in the formation and operation of terrorist structures. At the same time, organized crime is a form of crime characterized, among other things, by links to government bodies based on corrupt mechanisms.¹

Some authors² in their works note that the documents of the UN Secretariat indicate the corruption of organized crime. Organized crime, including terrorism, is not feasible without corrupt ties.

However, it should be noted that corruption is by no means the only factor contributing to the intensification of the terrorist threat. Other factors also play a significant part: the radicalization of Islam, extremist sentiments, and a combination of these factors with economic tension in the society, that also lead to similar negative consequences.

In this regard, the most important task in the study of this topic is analysis of the internal cause and effect relationship of terrorism and corruption, as well as study of the directions of building anti-corruption activities in the area of strengthening the fight against terrorism.

Corruption and terrorism are not isolated social phenomena. They are in interrelation, and in some cases are the reason for formation of favorable conditions: corruption for terrorism, and terrorism for corruption. This interrelation is currently characterized by the fact that it becomes institutionalized, that is, rather stable relations are formed between different, previously (in historically preceding periods) non-contiguous asocially minded social groups (corrupt bureaucracy and terrorist groups and organizations). And it is characteristic that each of these social groups looks for achieving those unlawful goals that they set for themselves in interaction with each other. This is despite the fact that these goals differ: in one case, it is illegal enrichment, in another it is the destabilization of society, the imposition of political decisions through the use of various forms of violence.

Terrorism for corruption is a growth medium through which it is possible to receive significant material benefits. Moreover, this aspect of interaction between terrorism and corruption has been drawing attention for quite some time. Thus, when investigating terrorist acts in Moscow in the fall of 1999, it was established that explosives with a mass of more than 14 tons were made by handicraft in Krasnodar Territory and from there were brought to commit crimes³. And already then the question was raised about how such a large volume of explosives was transported around the country without any obstacles.

It is quite obvious that the origin of the money given to the corrupt official as a bribe and the goals pursued by the person who transfers them have no significance for the

¹ See: Big Law Dictionary / Ed. by Professor A.YA.SUKHAREV. – 3-d enlarged ed. – M., 2007. – VI. – P. 658.

² See: GRIGOR'EV A.A. The relationship between terrorism and organized crime and corruption. // Management issues. Access mode: vestnik.uapa.ru.

³ The explosion of an apartment house on Kashirskoye // RIA News, 13 September 1999 [Electronic resource]. – Access mode: <https://ria.ru/spravka/20140913/1023703052.html>.

official. The decisive argument here is the size of these funds. The corrupt official is indifferent to any human values, and therefore he or she can fully assist any antisocial phenomena including terrorism. Terrorism and corruption are antisocial phenomena that are destructive in nature: despite different goals, they both seek to destroy the foundations of the state, its structure, only using different methods and means, which certainly creates the prerequisites for their interaction.

It should be noted that the statement about the interaction of corruption with terrorism, nevertheless, needs a clause. Corruption is patchy, and therefore not all its types are equally capable of contributing to the development of terrorism. From this point of view the most dangerous one is the systemic corruption. It is formed by dishonest officials and functions in the way when the whole structure is oriented not to the solution of state problems but exclusively to personal enrichment.

In the recent history of Russia there are precedents, when this type of corruption was one of the reasons for extremist and separatist sentiments of entire regions. Everyone remembers that the Chechen issues followed after major financial frauds with the advice notes. In the era of so-called “wild capitalism” when almost everyone wanted to earn as much as possible, and state control was at a minimum, it turned out that getting the forms of advice notes and related information was easy enough. This could have been just a bribery of employees of cash settlement centers.¹ Significant financial resources, derived from the crimes committed, went to finance the activities of bandit formations and the commission of terrorist acts. Moreover, the distribution of extremist, terrorist and separatist ideas was in fact only a cover in order to conceal the desire of corrupt officials to evade criminal responsibility. These corrupt officials were united by a system which gave them the opportunity to strongly resist the identification and exposure of its members.

As noted in the works of well-known criminal law experts,² terrorism has a public character, which is true in the view of the peculiarities of the construction of the relevant *corpus delicti*.

However, on the other hand, terrorism, like corruption, is characterized by the secrecy (conspiracy) at a certain stage. Terrorism often uses those corruption links that can ensure not only the peaceful existence of the terrorist group or organization, but also create new channels for financing terrorist activities. Such connections allow terrorists to covertly move considerable money, both on the territory of the country and abroad; create conditions where law enforcement bodies do not notice the activities of terrorist associations at certain stages; allow involving corrupt officials for solving specific problems, etc. Corruption, in our opinion, made it possible to secretly form terrorist organizations of nationalists who actively participated in the coup in Ukraine in

¹ Chechen advice // Myrta. Reading room [Electronic resource]. – Access mode: <http://myrt.ru/public/892-chechenskie-avizo.html>.

² RAROG A.I. The Criminal Code of Russia against Terrorism // *Lex Russica*. 2017. № 4. P. 160; EMELYANOV V.P. Terrorism as a phenomenon and as a component of a crime. Kharkov, 1999. P. 26. See also: EMELYANOV V.P. Terrorism and crimes with signs of terrorism: criminal law study. St. Petersburg, 2002. P. 36.

2014. According to the Ukrainian media, it is for certain that the formation and training of the above-mentioned terrorist organizations was facilitated by law enforcement officers themselves, including state security bodies. For instance, V.A. Nalyvaichenko, who occupied the highest posts in the structure of the Security Service of Ukraine at various times, was in the closest connection with the militants of the “Right Sector”, as well as with other nationalist organizations. Moreover, he participated in organizing the training of militants, who later were involved in the Maidan.¹

It is quite obvious that such interaction with terrorist organizations by high officials is often not a disinterested act. In this case, there is a mutual use of opportunities, both by terrorist organizations, and by relevant high-ranking corrupt officials.

The logic of criminal activity in this situation is quite simple and consists of the fact that the achievement of this goal justifies any actions taken and committed. It allows officials involved in corruption relations, without any remorse or looking back at moral principles, to start connections with terrorists. The main thing for them in this case is getting illegal income. There are quite obvious moral (or rather immoral) prerequisites for the entry into contact with terrorists and persons sharing extremist views. The institutional foundations of terrorism also show themselves in this aspect, as relations, which manifest indifference to humanistic values that prevail in modern society, are formed.

It is legitimate to assert that corruption presupposes the existence of a certain ideology justifying the commission of other unlawful acts. It is based on the seemingly obvious views. For example, the belief that corrupt activities are intended to make up for the insufficient payment of the relevant official. This and similar views become corrupt dogmas, which gradually supplant the generally accepted moral ideas. Gradually, not only ideology is formed, but also a special kind of morality, inherently destructive, because it not only justifies but encourages corrupt practices. That is, as ideology is supposed to do, it effectively influences consciousness of certain people, pushing them to active actions of a corrupt orientation.

Ideology is also a characteristic of terrorist activities. According to the Art. 3 of Federal Law “On Counteracting Terrorism”,² terrorism is the ideology of violence. It affects the mind with the purpose of zombifying and transforming a person into an instrument for resolving definite political tasks. The ideology of terrorism contains primitive ideas and views, largely based on human fears and instincts. For example, the basis of nationalist ideas focused on appeals to terrorist activities is the fear that a specific national community may be deprived due to unjust actions on the part of other ethnic groups and nationalities. Often this is a formed sense of deprivation. At the same time, this ideology tends to

¹ Right Sector: the organization and activities of the main forces of the coup. [Electronic resource]. – Access mode: <http://zarodinu.org.ua/page/675>.

² Federal Law of 06.03.2006 No. 35-FZ “On Counteracting Terrorism” // Collection of Legislation of the Russian Federation, 13.03.2006, No. 11, Art. 1146.

be as understandable and accessible as possible, for which it resorts to simplifying the situations that develop in the domestic political life of the country. Furthermore, in order to increase the attractiveness of terrorist activities, its ideologists resort to symbolism designed to glorify the bearers of relevant ideas. Symbolism is one of the instruments for “zombification” the consciousness of the people, turning them into a means of achieving quite definite political goals.

Consequently, both corruption and terrorism presuppose that the actors have a very definite ideological orientation, which, on the one hand, justifies the commission of specific crimes, and on the other hand, mobilizes persons inclined to commit them.

However, both ideologies, in our opinion, are quite compatible, since they consider a specific person only as an instrument to achieve certain goals: it is unreasonable enrichment in corruption; and in terrorism – influencing decision-making process by government bodies or international organizations. Both ideologies are inherently destructive, as the result of their spread is only the collapse of society and the state, and not the improvement of their individual institutions and bodies, as often proclaimed by other ideologies. Therefore, due to the destructiveness of ideologies, we can conclude that corruption and terrorism are close enough to each other.

Moreover, it should be noted that corruption creates social conditions that contribute to terrorism, its ideology and activity. Thus, corruption leads to underperformance of state bodies. They stop reacting on time to problems and solving them. At first their work is seen as bureaucratization with its overwhelming formalization and red tape in making decisions in important situations. Then it starts to irritate, because it becomes obvious that state bodies stop justifying their existence. Moreover the work of the state bodies start to entail multiple mistakes and power misuse by the officials. That leads to the situation when population feels that state bodies live their own life, which is far apart from the needs of common people, who have to live on their own. This way corruption contributes to the rise of social tension, which is a fruitful soil for the growth of terroristic ideas and movements.

Corruption is especially dangerous in the law enforcement agencies and courts. In that case law enforcement agencies turn out to be unable to respond quickly to the so-called “widely publicized” crimes and felonies and do not promote social justice when citizens expect it from them. Usually it is a consequence of the phenomenon which was already mentioned in this work. It is called a system corruption and it unifies all the unlawful activity of the officials in different law enforcement bodies. When such corruption becomes widely practiced, people lose their faith in justice and they feel the desire to find it beyond the existing government institutions. And that is what the leaders of terrorist ideology rely on. They try to exaggerate the impression of injustice, weakness of state authorities and to offer their allegedly fairer model of court system, state and society as a whole.

This leads us to conclusion that corruption creates a congenial climate among people for development and spread of extremism and terrorism, which acknowledge only the

supremacy of violence and usage of the most radical means of achieving of terrorist aims. Therefore corruption becomes an institutional base for terrorist ideology, and consequently, terrorist actions.

To a large extent the conditions for extremist and terrorist ideology are being created by social inequality among people which is partly a result of corruption. One of the conditions promoting inequality is offshoring of capital. Firstly, it creates the status of anonymity of the owner of this capital. Secondly, it gives opportunity to hide income criminally obtained. And thirdly, it creates a possibility of using money for sponsoring crime. This feature of offshores is appealing to both corrupt officials and to terrorist organizations. Via offshores terrorist organizations are able to pay the officials who “provided services”, without which crimes could not be prepared and committed. And there can be cases when terrorist organizations are receiving “replenishment” via offshore accounts. Therefore the illicit relations between terrorist organizations and corrupt officials using offshore accounts become obvious.

Of particular note is that offshores facilitate a great concentration of money and other values in hands of a small group of people which leads to social stratification. At the same time living beyond one’s means is conspicuous, it creates social discontent and feeling of inequality and injustice which is a favorable condition for promoting extremist and terrorist ideology. Unfortunately it is hard to give the examples when offshores are linked with terrorism. This is due to carefully hidden financial flows where it is difficult to identify either the direction of the money flowing or its source.

However a conclusion can be drawn that frequently the direct purpose of the offshore functioning is concealment of proceeds of crime.

One can see the link between corruption and extremist-terrorist ideology through the example of ex-mayor of Makhachkala Said Amirov. Being a high-ranking official, he created a criminal group which not only committed a series of corruption-orientated crimes, but also acted violently against political rivals and other oppositionists of ex-mayor.

In particular, this organized criminal group prepared and committed an assassination of the official of Investigative committee of Russia Arsen Gadzibekov¹. The investigation revealed that during preparation for crimes this group had acquired an anti-aircraft missile system and had planned to shoot down a plane². The activity of this criminal group represents a symbiosis of corruption and terrorist actions of organized crime, when corrupt officials found a certain territory and sphere of influence as a source of illegal money.

Summing up we come to the conclusion that the inner factor contributing to the genesis and spread of extremism and terrorism in Russia is insufficient efforts in adopting

¹ ALIYEV T. The mayor of Makhachkala was officially indicted // Rossiyskaya gazeta [Russian newspaper], 04.06.2013 [E-database] – <https://rg.ru/2013/06/04/reg-skfo/prediaвлено-anons.html>

² LARINA A. The assistant prosecutor will be convicted for terrorism // Rossiyskaya gazeta [Russian newspaper], 10.09.2014 [E-database] – <https://rg.ru/2014/09/10/reg-ufo/proces-anons.html>.

and implementing measures aimed at fighting organized crime and corruption. Only creation of effective mechanism of counteracting corruption and organized crime will allow our society to anticipate considerable success in counteracting terrorism in the long run. It can be surely stated that anti-corruption activity is an institutional basis for fighting terrorism.

In view of the above, we think that on a national scale a serious reflection and further development of anti-corruption measures have to take place, and that will effectively broaden our options in the sphere of fighting terrorist threat.

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PUEBLO LANDS AND THE SPANISH LAND GRANTS: A PUNISHMENT AND AN ACCOMMODATION

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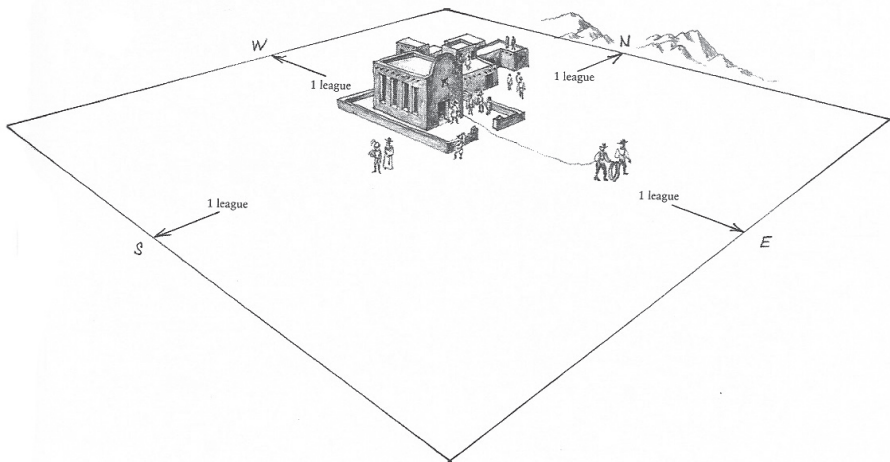
Abstract: The author presents specific but interesting and indicative problem generated by the history of the state of New Mexico. The state passed from the jurisdiction of Spain and Mexico to the jurisdiction of the United States at different times and this, in turn, had influence on the land issue and the regulation of the land grants in that area. The European concept of private property was foreign to the people of the Pueblos territory. The western notion of “owning” individual portions of land as a property right was simply incompatible there as the Pueblos territory had special rules of regulation. Anyway, Spanish Conquest and religion had influenced it. The author analyses the history and reasons of the established order of a punishment and an accommodation on land grants; presents understanding of continued politics. The article is given in unusual form of narration for this issue.

Key words: pueblo lands, Spanish lands, history, New Mexico, punishment

A Narrative

It is a cloudy spring morning in New Mexico around the turn of the 18th century. At a Pueblo village, men have gathered in the square near the mission church. They have prepared themselves for a long and exhausting task, bringing water and food for the day. Among these men are Spanish and Pueblo officials, assistants, witnesses, helpers, and an all-important “counter”. Two men carry a long, thick cord. When all have assembled, the men gather at the door of the mission church – generally considered by Spanish officials to be the center of the village – and begin the long, tedious, critically important task that lies ahead. A Spanish official takes position at the door of the church, holding one end of the long cord, or *cordel*. Another, holding the opposite end, proceeds due east. He unravels the cordel as he walks and checks his direction by compass. Others in the group

observe closely the official's movements, some confirming his direction with compasses of their own. The official continues to unravel the cordel until he reaches its end, tied to a wooden stake. The group observes most intensely as he pulls the cordel snugly, ensures that it is free of obstacles, kinks, or snags, and double checks his compass. Satisfied, the official then holds the stake firmly while a helper hammers the stake into the ground. The group's attention now turns to the counter, who records this procedure on a paper document. There is a moment of collective acknowledgement among the witnesses. Then the first official, having held his end of the cordel at the mission door throughout this process, proceeds due east. He passes the first embedded stake, checks his direction by compass, and continues east until the cordel is taught once again. Pull snugly, check compass, hammer, record, and repeat. This process will continue throughout the day and into the next. The cordel is made of horsehair. Officials have often ordered that it be dipped in wax to keep it from stretching, but as a natural material, horsehair will still shrink and stretch with changes in temperature and moisture. The cordel sometimes breaks while being used and is repaired with rope or other material to maintain a proper length. This particular cordel is 100 Spanish *varas* in length. It is generally accepted in New Spain that a vara measures 33 inches. 5,000 varas equal one Spanish league, or 2.6 miles. On this day, the group of Pueblo Indians and Spaniards will repeat this measurement and recording process 50 times in order to mark a directional boundary of one Spanish league from the center of the Pueblo village. The group will then return to the mission church and repeat this grueling process in each of the four cardinal directions until a full perimeter is delineated and recorded. This perimeter will constitute the exterior boundaries of the Pueblo's land, purportedly to be acknowledged by all, and contains a total area of four square leagues, or approximately 17,350 square acres.¹



¹ MALCOLM EBRIGHT et al., *Four Square Leagues* 11-14 (2014): (This fictional narrative is based on material presented in the cited pages.)

Most of the Pueblos in present day New Mexico experienced some form of this narrative. Though these original Pueblo land surveys did not utilize uniform methods in every instance, did not always yield consistent results when replicated, nor have they been faithfully acknowledged over time¹, the four square leagues of land that they established, designated by the Spanish as the “Pueblo League”, was the standard and primary grant of land to the various Pueblos by the Spanish Crown in the decades following the Pueblo Revolt of 1680. These land grants were acknowledged as the Pueblos’ legal entitlement and property right guaranteed under Spanish law.²

Concepts of Land and Property

The European concept of private property was foreign to the people of the Pueblos. The western notion of “owning” individual portions of land as a property right was simply incompatible with the more holistic worldview of the Pueblos. This is not to say, however, that Pueblo peoples did not understand the value of their lands. In an indigenous world devoid of such things as a market economy and wage labor, where cash as a medium for trade is unknown, where commodities cannot simply be purchased at local markets, but must be produced; human subsistence depends wholly upon the bounty of the land. On good land with ample and irrigable water, good soil, abundant game, and natural features favorable for defense, agriculture, and flood control, people thrived and prospered in a perpetual coexistence with the land. On land that lacked such favorable resources and features, people struggled, suffered, and sometimes starved. Thus the Pueblo peoples, having settled upon good lands within the region over many centuries, understood well the enormous value of the lands they occupied. They also held a sense of territorial integrity with respect to themselves and other groups. Boundaries of Pueblo lands were often marked with shrines, petroglyphs, and rock art.³ There is clear evidence that Pueblo peoples knew how to map their lands. The Galisteo Basin in north central New Mexico, for example, contains a petroglyph depicting an irrigation system of the valley below, including two reservoirs and irrigation canals leading to cornfields. Other evidence indicates that Pueblo peoples had maps showing areas of land use, sacred shrines, and recognized boundaries of other Pueblos.⁴ So, while the Pueblo peoples

¹ Pueblo of Sandia v. Babbitt, 231 F.3d 878-79 (2000) (The Solicitor of Interior denied a request by the Pueblo of Sandia for a corrected survey designating the eastern boundary of its land grant as the “main ridge” of the Sandia Mountains, located directly east of Albuquerque, New Mexico. The Pueblo claimed that an 1859 survey commissioned by the United States, subsequent to the Treaty of Guadalupe Hidalgo, erroneously set the Pueblo’s eastern boundary at the base of the Sandia Mountains rather than along the Mountains’ crest line, as allegedly set forth in the Pueblo’s 1748 Spanish land grant confirmed by the United States Congress in 1858).

² Ebright, *supra*, at 6-7.

³ *Id.* at 1.

⁴ *Id.* at 1. (Citing CLAY SCOTT, Mapping Our Places Introduction (2005). “At the most fundamental level, many Native communities continue to pass down traditional knowledge of our territories through oral history, song, subsistence activities, and other customary ways. Through a variety of mapping

did not embrace a western notion of land ownership in which land is encumbered as property, they did realize the value of the lands they occupied (differentiating lands that lacked such value), maintained a sense of territory or “place” to which *they* belonged, and revered the close social and spiritual connections they had to their lands¹.

The Spanish held an entirely different view regarding land ownership in New Spain. Like other European nations, Spain claimed possession and ownership of territories in the Americas. In order to posit a legal property interest in lands claimed to be “discovered” in the New World, European explorers were vested with the royal authority of their sovereigns to assert the “Doctrine of Discovery” as the legal and moral basis for land appropriation. This Euro-crafted principle of claimed land ownership, with roots in ancient Roman law, was mutually recognized among European powers as establishing a legal property interest in land by the European nation asserting such claim.² Additionally, the Doctrine of Discovery sanctioned the subjugation and regulation of any indigenous people occupying lands claimed under European authority.³ The story of Spanish land tenure in New Mexico began with Spanish conquistador and provincial governor, Juan de Oñate y Salazar (1550–1626), whose expedition into New Mexico claimed possession of lands north of the Rio Grande (beginning near present day El Paso) on behalf of the King of Spain, Phillip II.⁴ An earlier expedition, led by Francisco Vázquez de Coronado y Luján (1510–1554), had taken the Spanish through New Mexico,

strategies that blend cultural, technological, and philosophical approaches, indigenous peoples are maintaining, rekindling, and wielding profound knowledge of our homelands”).

¹ LINDA TUHIWAI SMITH, *Decolonizing Methodologies: Research and Indigenous Peoples* 148-49 (2006). (“Connectedness positions individuals in sets of relationships with other people and with the environment. Many indigenous creation stories link people through genealogy to the land, to stars and other places...to birds and fish, to animals, insects and plants. To be connected is to be whole. Connecting is related to issues of identity and place, to spiritual relationships and community wellbeing”).

² *Johnson v. M'Intosh*, 21 U.S. 543, 573 (1823). (“On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. But, as they [Europeans] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, *that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.*” [emphasis added]).

³ STEVEN T. NEWCOMB, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* 23-30 (2008). (“[Under the Doctrine of Discovery] The conqueror posits a central figure, such as a king, monarch, emperor, or pope, who is considered divine or whose power is considered to come from a divine source. The presumption of the conqueror’s divinity leads to the additional presumption that the conqueror has the ‘divine right’ to exert control or force...[over] those people whom the conqueror has subjected to his control. In the context of the conqueror’s moral system, the ‘divine right’ to conquer and subdue includes the divine right to forcibly convince ‘new’ peoples in ‘new’ lands that they owe the conqueror tribute and obedience...even those peoples he has not yet subdued.”).

⁴ Ebright, *supra*, at 1.

though did not result in lands claimed on behalf of the crown. Yet both expeditions were driven by the fierce desire to acquire mineral riches; to find and conquer the fabled “Seven Cities of Gold” ever rumored to be over the next horizon. The Spanish view of land ownership in New Mexico was thus considered to be a divine right and legal prerogative – a natural result of conquest sanctioned by divine authority¹ – and a means of accessing, securing and extracting material wealth to the enrichment of the Crown and to the individual benefit and prestige of the conquerors.

So, while the Spanish conquistadores and colonists ventured north of the Rio Grande in 1598 to win mineral riches and the glory conquest, they did not understand – as did the people of the Pueblos – that the true wealth of New Mexico was the land itself.²

Spanish Conquest and Religion

Having a different concept of land ownership than that of Europeans meant that the Pueblo peoples were ill prepared for the arrival of the Spanish who came to claim and occupy the lands that the Pueblos had always known to be theirs.³ It was understood by the Crown that Spanish conquest in the Americas would necessarily include the use of force against indigenous inhabitants. In exercising the Crown’s authority by divine sanction, Spanish conquistadores nonetheless needed to meet the acknowledged requirements concerning Just War. To justify the use of force upon the Indians they encountered and their property, the conquistadores utilized a document titled the *Requerimiento* (Requirement).⁴ Written sometime between 1509 and 1513, the *Requerimiento*, also called the Acts of Vassalage and Obedience,

¹ S. LYMAN TYLER, *The Bull Inter Cetera, 1493 The Indian Cause in the Spanish Laws of the Indies*, 1980, at XXX. (“...by the authority whereof, Pope Alexander the sixth of that name, gave and granted to the kings of Castile [Spain] and their successors the Regions and Islands found in the West Ocean sea by Navigations of the Spaniards...to our most dear beloved son in Christ King Ferdinand, and to our dear beloved daughter in Christ Elyzabeth [Isabella]...give, grant, assign, unto you, your heirs, and successors...all those lands and Islands, with their dominions, territories, cities, castles, towers, places and villages, with all the right, and jurisdictions thereunto pertaining...It shall therefore be lawful for *no man* to infringe or rashly to contradict this letter of our commendation.” [emphasis added]).

² Ebright, *supra*, at 1.

³ *Id.* at 2.

⁴ TYLER, *The Requerimiento, supra*, at XXXVI-VII. (“On the part of the king, Don Ferdinand, and of Doña Juana, his daughter, queen of Castile and Leon, subduers of barbarous nations, we their servants notify and make known to you...God our Lord gave charge to one man called St. Peter, that he should be lord and superior to all the men in the world, that all should obey him. One of [his] pontiffs... made donation of these [lands] to the afore-said king and queen...with all that there are in these territories. Indeed all those to whom this has been notified [must] receive and serve their highnesses as lords and kings. If you do so you will do well...and we in their name shall receive you in all love and charity, and shall leave you your wives and your children and your lands without servitude. But if you do not do this...I certify to you that with the help of God we shall forcefully enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their highnesses; we shall take you and your wives and your children and shall make slaves of them...and shall take away your goods.”).

was based on the assumption that the Pope, acting on behalf of Christ, had authority over all kingdoms of the Earth. Accordingly, the Pope could delegate to specific rulers both spiritual and secular authority over people who were not Christians. Acting on this premise, the Requerimiento would be read to a group of Indians at the time the Spanish encountered them. If the encounter was friendly, the Spanish would not attack. If, however, the Spanish encountered resistance, the Requerimiento had served as formal notice of the conquistadores' divine authority – notwithstanding the fact that the document was read in a language unknown to the Indians. Thus the Requerimiento served as justification by the Spanish for the use of force and the appropriation of property.¹



Reading the Acts of Vassalage and Obedience at Acoma. Drawing by Glen Strock.

From the early years of the Spanish conquest of New Mexico, a governor officially assumed authority over the land and people on behalf of the Crown, again through the use of a Requerimiento. Governors were in turn authorized to grant controlling

¹ *Id.* at XXXV.

estates, or *encomiendas*, throughout the region. An *encomienda* was a grant of land as well as a grant of legal authority over those living on the land. This grant designated the recipient a *hidalgo*, or a member of the Spanish nobility in New Spain, and established a hereditary property right. Initially, any Spaniard who served the Crown in New Mexico for five years at his own expense was eligible to receive an *encomienda*.¹ Most of the *encomenderos'* *estancias*, or ranch estates, were located in the mid Rio Grande region of New Mexico, which contained the best agricultural lands and, of course, numerous Pueblos.² Around 1640, the New Mexico governor's authority to grant *encomiendas* was limited to no more than 35 grants at any given time.

The grant of an *encomienda* also entitled the recipient to an annual stipend. This stipend was not paid to the *encomendero* directly from the Crown, however. Rather, the *encomendero* was authorized to extract their annual sum from the people living within their jurisdiction in the form of tribute. The Pueblo people living within the authority of these *encomiendas* thus became a source of both labor and tribute to their *encomendero* overlords. Payments of annual tribute were calculated by the number of Pueblo households within an *encomienda* and could take the form of cash or quantities of other goods.³ The size of *encomiendas* varied greatly, with some containing several hundred tributaries to those containing fewer than thirty. While there is disagreement among scholars as to whether *encomienda* tribute placed undue burden on the Pueblo peoples during this period of Spanish colonization,⁴ what is certain is that tribute was not voluntary. In theory, at least, *encomenderos* were obligated to provide military protection for the Indians and Spanish colonists living within their estates. In reality, few *hidalgos* were inclined to leave the comfort and safety of the provincial capital of

¹ Ebright, *supra*, at 3. (The number of *encomiendas* granted in New Mexico during the early years of Spanish colonization is unknown. No documents of formal land grants to Spaniards or Indians are known to have survived the Pueblo Revolt of 1680. There are, however, references to grants of *encomiendas* in other documents, such as wills and estate inventories of possessions.).

² *Id.*, at 4. (The 1641 census listed eight *estancias* at Santa Clara Pueblo, fourteen at Isleta Pueblo, and an indeterminate number at Sandia Pueblo. Later censuses note several *estancias* at Santa Fe and Nambe Pueblos, six at San Ildefonso Pueblo, three at San Marcos Pueblo, thirty at Sandia Pueblo, fourteen at Isleta Pueblo, and two at Socorro Pueblo.).

³ *Id.* at 4-5. (Generally, *encomenderos* received trade merchandise worth one peso per Pueblo household per year. In addition, however, many *encomenderos* also received a significant amount of corn from each household as part of their annual tribute, so the total value of annual household tribute could well exceed one peso per year. Usually, the *encomenderos* preferred shawls, skins and other trade goods as tribute.).

⁴ *Id.* at 6. (Citing DAVID SNOW, Note on *Encomienda Economics in Seventeenth-Century New Mexico*, WEBER, *Spanish Frontier*, 410n12. Argues that, at least initially, the *encomienda* was not a hardship on Pueblo households.) (Also citing ELIZABETH A. H. JOHN, *Storms Brewed in Other Men's Worlds: The Confrontation of Indians, Spanish, and French in the Southwest, 1540-1795*, 149 (1996). Asserts that tribute payment was the greatest economic grievance and worst source of friction between Spanish and Pueblo populations.) (Also citing TRACY L. BROWN, *Pueblo Indians and Spanish Colonial Authority in Eighteenth-Century New Mexico* 2nd Ed. 77 (2013). "Any labor or craft production the Pueblos did for Spaniards was burdensome because it was required of them – it was not done voluntarily.").

Santa Fe and did not consider military campaigns against outside raiding tribes to be of high priority.¹

In 1570, King Don Felipe II commissioned a review and recompilation of laws for the governing of New Spain. The *Recopilación*, it was titled, included an extensive body of laws concerning the Indians of New Spain.² These laws focused on such areas as the regulation of tribal internal affairs, the property and land rights of Indians, laws regarding Indian marriages, trade with and among Indians, and other topics. Numerous laws of the *Recopilación* could be considered, even by today's standards, to be quite liberal and many laws command the respect and well-treatment of Indians. Indeed, some of these laws may represent the origin of Pueblo traditions and customs that are still observed to this day.³ But despite the Crown's efforts to provide an extensive body of law intended to promote social stability and, in theory at least, the contented well-being of New Spain's vast Indian labor force and economic driver, the *encomienda* system that was imposed on the Pueblo peoples of New Mexico was inherently designed to breed resentment, distrust, discontent, and ultimately revolt.

It is important to note the role of religion in the Spanish system of conquest and colonization in the New World. While conquest of non-Christian peoples on behalf of the Sovereign, as previously discussed, carries with it indisputable divine sanction under accepted Christian doctrine, the European desire to conquer, in and of itself, may be bolstered, perhaps even compelled, by a fundamental Judeo-Christian principal described as the Chosen People-Promised Land cognitive model.⁴ In the Old Testament of the Bible, God acknowledges Abraham and his descendants as His "chosen people" and cedes to Abraham ownership of the "Promised Land" of Canaan. God then commands Abraham and his people to go forth, subdue, seize, and take possession of this land.

¹ *Id.*, at 5. (Colonists and missionaries complained that many *encomenderos* were reluctant to provide military protection to those under their jurisdiction. But, it seems clear that such military considerations were subordinate to the economic importance of the *encomiendas*.)

² TYLER, *The Requerimiento*, Book VI, Title 1: Concerning the Indians, *supra*, at 71.

³ TYLER, *The Requerimiento*, Book VI, Title 1, *supra*, at 74. (Law 7: "The Indian woman who marries shall follow her husband. If widowed...[and] her children have been raised in her husband's town for at least three years, she must leave her children there." Law 10: To clarify disputes with regard to filial relationships, "the children of married Indian women shall be presumed and are considered to be those of her husband." In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the plaintiff, an unmarried Santa Clara woman, challenged the Pueblo's membership ordinance that disallowed the enrollment of her children as Santa Clara tribal members because their father, her ex-husband, was a member of another tribe. The Pueblo argued that the recently enacted tribal ordinance was merely a codification of the longstanding Santa Clara tradition and custom that tribal women follow their husbands and that children fathered by a husband from another tribe are considered to be members of the father's tribe.)

⁴ Newcomb, *supra*, at 37-58. ("The Chosen People-Promised Land cognitive model serves as a significant part of the conceptual and religious backdrop of the 'right of discovery'. According to this view, and in keeping with the Conqueror model, 'God' is considered to have granted the [Christian European Sovereign] the divine right to conquer and subdue the 'heathen' or 'pagan' lands of [the Americas]." This concept is affirmed and legitimized in the Old Testament scriptures describing God's promise to Abraham and his descendants as His "chosen people" the possession of a promised land that they must conquer.)

The story describes the indigenous peoples already living in Canaan as “pagans” and “heathens” and treats their occupation of the land as entirely irrelevant. Thus, the task of obeying God’s command and fulfilling God’s promise necessarily required God’s chosen people to conquer indigenous pagans to make room for themselves, effectively cleansing and sanctifying the Promised Land.¹ The Chosen People-Promised Land cognitive model thus represents a fundamental underlying assumption and paradigm of thought in the minds of Judeo-Christian Europeans with regard to indigenous peoples in general; an assumption that allows for and reconciles the complete suspension of emotional, ethical, and spiritual regard for those viewed to be devoid of any human or spiritual legitimacy. Any doubts or crisis of conscience that may arise within the conqueror would be redeemed by the application of a core principle of Christianity itself: pity. The founding decrees and authorizations of Spanish conquest and occupation in the New World – from the Bull *Inter Cetera*, to the *Requerimiento*, to the Crown’s Laws of the Indies – are replete with an implied pity for the unredeemed souls of the pagan Indians. And, through this pity arises a duty on the part of the Christian conqueror to bring the indigenous heathens – by the very act of conquest itself – into the presence of God so that they may know redemption through the Son, Jesus Christ. Christian religion, with its ordained representatives being a permanent and indispensable component of European conquest and colonization, provided this ever-present, unwavering justification and redemption for the Spanish conqueror.²

The Pueblo Revolt

Initial planning of the Pueblo Revolt of 1680 began at Taos and Picuris Pueblos by numerous Pueblo leaders. One man, a San Juan holy man named Popé, would later to be revered as the leader of the revolt. Taos and Picuris Pueblos had historically demonstrated strong resistance to Christianization, sometimes visiting violence or death upon their resident Christian priests. A spiritual battle persisted over differing beliefs and religious authority. The Church, which had also been granted numerous *estancias* at or near various Pueblos, forced Indians to work without pay and often subjected them to physical abuse.³

In the early morning hours of August 10, 1680, the people of the Taos and Picuris Pueblos, together with Apache allies, killed their priests and most of the *Hispaños* living near the Pueblos. The Tewa Pueblos also killed all *Hispaños* in the nearby areas, forcing others to flee to Santa Fe. Two days later, on August 12, reports of uprising reached Santa

¹ *Id.* at 51.

² *The author’s own reflections.*

³ Ebright, *supra*, at 91-92. (Taos and Picuris were two of the largest of the New Mexico Pueblos and were considered to be hotbeds of discontent. In 1675, Popé was among 47 Pueblo religious leaders arrested and charged with plotting to overthrow the provincial government. Three were hanged and the others were severely punished. Popé’s anger towards the *Hispaños* was firmly solidified by this experience.)

Fe, where surviving Hispaños had begun to gather. The Northern Pueblos had revolted.¹ While the uprisings drove Hispaños into Santa Fe from the north, the Tano, Pecos, and San Marcos Indians attacked Santa Fe from the south. Provincial Governor, Antonio de Otermín, offered the attackers full pardons if they would lay down their arms and swear allegiance to the King of Spain. The Tano leader, speaking on behalf of the Indian force, replied that peace would only come if the Hispaños left the Rio Grande region entirely; if they refused, all remaining Hispaños would be killed. Governor Otermín refused. On the evening of August 15, after two days of skirmishes, Tewa, Taos, and Picuris forces arrived in Santa Fe. Reinforcements from Jemez and the Keres Pueblos soon joined them. By the next day, the Indian force totaled over 2,500 warriors². As they began to close in on the villa of Santa Fe, the remaining Hispaños were forced to retreat within the government compound. The Indians blocked the small stream supplying water to the compound and the ensuing siege lasted six days. Driven by thirst, hunger, and desperation, Governor Otermín finally agreed to lead his people out of Santa Fe, south through the Rio Grande Basin, and out of New Mexico.³

The many years of abuse under the encomienda system as well as resistance to efforts of Christianization were the driving factors in the Pueblos' decision to revolt. After the departure of the Spanish, the Pueblo peoples appropriated the goods and cattle of their former overlords, burned their houses, and destroyed their churches.⁴ Popé and other Pueblo leaders then visited numerous Pueblos and called for the casting off of all things Spanish, including Christianity.⁵ They called for a return to the old ways. The Pueblos lived in freedom once again, although this freedom was not to last. Though a few attempts by the Spanish to retake the region north of the Rio Grande were successfully thwarted the following year, the Spanish would eventually return to rule New Mexico once again.

A New Perspective

The Spanish reestablished presence in New Mexico in 1692 under Don Diego de Vargas. Vargas immediately sought surrender from the leaders of the Tewa, Tano, and

¹ *Id.* at 92-93. (Runners had been dispatched from Taos, carrying a knotted cord to all Pueblos. The number of knots in the cord indicated the number of days until the revolt was to begin, which was August 11. On August 9, Provincial Governor, Antonio de Otermín, heard of the August 11 plot, at which point the decision was made to launch the revolt on August 10.)

² *Id.* at 92.

³ *Id.* at 93. (In leading the remaining Hispaños south from Santa Fe, Governor Otermín hoped to meet the government supply caravan heading north with food, weapons, and ammunition. He also hoped to contact Hispaños believed to be remaining in the southern settlements. If enough weapons, supplies and people could be gathered, perhaps Santa Fe could be retaken. This was not to be, however, and Otermín's march to the south was monitored by Indians while the group left New Mexico.)

⁴ *Id.* at 92, 94. (After taking Santa Fe, the Indians brought the Spanish government archives into the village plaza and burned them. Because of this, very few formal documents of the Spanish Government of New Mexico prior to the 1680 revolt are known to exist.)

⁵ *Id.* at 94. (Spanish language, Spanish marriages, even the use of Spanish crop seeds were disregarded.)

Picuris. When meeting with Luis Tupatú, leader of the Picuris, Vargas noted his strength and power as something to be acknowledged by the *Hispaños*.¹ While Vargas returned to New Mexico to restore Spanish sovereignty to the region and bring the Pueblo peoples to heel once again, the Spanish returned with a new perspective. There were no cities of gold to discover and capture, no conquistador glories to win over the next horizon, no fierce and treacherous race for quick royal titles and the prestige of nobility for common Spaniards. The Spanish had come to understand, as the Indians had known all along, that the true wealth of New Mexico lay in the land. While still determined to be the overlords of the Indians, the Spanish dealings with the Pueblos were now influenced by a more practical approach: how to live together.



Measuring the Pueblo league. Drawing by Glen Strock.

The “grant” of lands to the Pueblos – though they were lands the Pueblos had already long occupied – was a reflection of this new perspective. The Pueblo land grants

¹ *Id.* (Luis Tupatú appeared in Santa Fe with a sizable contingent of armed guards, both on horseback and on foot. Vargas entertained him as a guest, as they sat and drank chocolate together. Later, they exchanged gifts. In contrast to Spanish/Indian interactions of earlier times, Vargas received Tupatú as a legitimate leader and spokesperson for his people, treating him with a discernable degree of respect.).

represented at once both a punishment and an accommodation for the Pueblos of New Mexico. They were punishment for the revolt, in that the boundaries of each Tribe's territory were strictly delineated in a way previously unfamiliar to the Pueblo peoples. The standard grant of four square leagues of land was a miniscule territory compared to the vast stretches over which the Pueblos had ranged since time immemorial. Alternatively, however, the land grants were also an accommodation in that the lands that *were* recognized as Pueblo lands were formally acknowledged as such under Spanish law. Later, it will be determined that "Indians" do not hold title to their lands beyond "Indian Title", characterized as a right of use and occupancy; thus, Indians hold no title to land that can be recognized by the courts of the united States.¹ Here, however, the Pueblos under the new Spanish rule enjoyed a property interest in their lands recognized under Spanish law. The punishment aspect of the land grants was the result of the Pueblo Revolt and the Pueblos' repudiation of Spanish authority. The accommodation, however, was an admission that the Pueblos wielded the collective power to successfully resist their European overlords; an ever-present potential to which the Spanish remained wary. The accommodation of a recognized property interests by the Pueblos in their lands would continue under the government of Mexico and, eventually, under the government of the United States.

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¹ JOHNSON, 21 U.S. at 587, 588, 604 ("The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest... An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it... the plaintiffs do not exhibit a title which can *605 be sustained in the Courts of the United States.").

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**PROBLEMS OF IMPROVEMENT OF SECURITY OF PARTICIPANTS
OF CRIMINAL PROCEDURE IN RUSSIA**

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Abstract: The article gives analysis of the current issues in the sphere of criminal procedure in the Russian Federation such as security of its participants. The existing nowadays regulation of safety of individuals participating in the sphere of criminal process needs improvement. This activity is reflected in a number of international documents. At the same time, the institution of state protection and security for participants in the Russian criminal justice system today is well developed. Currently there is a tendency to divide the scientific object of the main problem into more detailed “sub problems”. However, within one branch of law, for example, the criminal process, it is no longer possible to study the problems emerging in law enforcement activities in isolation. We need to attract knowledge from related areas of law (theory of law, criminology, victimology, criminal law, prosecutorial supervision, criminalistics, civil law, housing law, family law, etc.), as well as other academic disciplines (for example, psychology or conflictology).

Key words: safety; protection; criminal case; criminal procedure; participants; witness; victim; fighting crime; cross-sectorial solution; cross-disciplinary links; unity and differentiation.

The obviousness of protection of witnesses and victims, as well as other participants in the criminal case, does not cause any doubts in the situation where the modern crime world has changed and it has increased the active resistance to the investigation of the criminal cases and to court proceedings. The existing problems related to active and safe support in the criminal case are increasingly being drawn to the attention of Russian¹ and foreign specialists². Some publications are aimed at studying the problems of the adopting and implementing certain security measures in criminal procedure³.

The legal institution of safety of participants in the Russian criminal procedure system is currently regulated by various normative acts. Undoubtedly, it is connected, first of all, with the criminal process, because this very type of activity in criminal cases is a foundation of the criminal process. The participation safety of witnesses, victims and other persons in a criminal case is recognized as an essential guarantee in achieving the

¹ See for example: DMITRIEVA A.A. Security measures applied to participants in the process at the stage of preliminary investigation of a criminal case // *Russian Investigator*. 2017. No. 1. P.3 – 6; ZAYCEV O.A. The concept of state protection of participants in criminal proceedings in the Russian Federation // *Problems of state protection of participants in criminal proceedings: Materials of an interdepartmental scientific and practical conference (Moscow, 27 September 2012)*. M.: FGKU "VNII MVD of Russia", 2013. P. 14–28; EPIHIN A.Y. Preconditions for the application of security measures for participants in criminal proceedings // *Materials of the International Scientific Conference "Tatishchev Readings: Current Problems of Science and Practice"*. Humanities and education: experience, problems, prospects. Togliatti, 2004. P. 180–183 et al.

² See for example: SANGKUL KIM. The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals // *Journal of East Asia and International Law*. – 2016. – No. 1; VARINDER SINGH. Witness protection in India: The Judicial endeavour // *International Journal of Advanced Research*. – 2016. – No. 1. – P. 367-372; MONICA SEMRAD, THEA VANAGS, NAVJOT BHULLAR. Selecting witness protection officers: developing a test battery for Australian police // *Police Practice and Research*. – 2014. – No. 1. – P. 6-16; MARKUS EIKEL. Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice // *Criminal Law Forum*. – 2012. – No. 1. – P. 97-133; BRENDAN O'FLAHERTY, RAJIV SETHI. Witness Intimidation // *The Journal of Legal Studies*. – 2010. – No. 2. – P. 399-432; PAMELA E. HART. Falling Through the Cracks: The Shortcomings of Victim and Witness Protection Under § 1512 of the Federal Victim and Witness Protection Act // *Valparaiso University Law Review*. – 2009. – No. 2. – P. 771-858; FELFÖLDI ENIKŐ. The rising importance on the protection of witnesses in the European Union // *Revue Internationale de droit penal*. – 2006. – No. 77. – P. 313-322; GERT VERMEULEN. EU standards in witness protection and collaboration with justice. – Antwerp: Maklu Publishers, 2005; RISDON N. SLATE. The Federal Witness Protection Program: Its Evolution and Continuing Growing Pains // *Criminal Justice Ethics*. – 1997. – No. 16. – P. 20–34.

³ EPIHIN A.Y., MISHIN A.V. Cross-sectoral problems of monitoring and recording telephone and other negotiations as measures to ensure the safety of participants in criminal proceedings: procedural and criminalistic aspects // *Strategic priorities in managing the natural resource potential of the European North-East and the Arctic zone: materials of the All-Russian Scientific Conference (with international participation) (October 19-21, 2016, Syktyvkar)*: in 2 vols. – Syktyvkar: Komi Republican Academy of Public Administration and Management, 2015. – V.2. – P.27-32; MISHIN A.V. Carrying out the identification with the participation of the protected person as a security measure (Part 8, Article 193 of the Code of Criminal Procedure of the Russian Federation) // In the collection: *Current issues of legal science and law enforcement practice – a collection of materials of the VI International Scientific and Practical Conference dedicated to the 25th anniversary of the Faculty of Law*. 2016. P. 438-443 et. al.

criminal justice. However, regulating security of a person in criminal proceedings only by the norms of the criminal procedural legislation of Russia is nowadays impossible. The Code of Criminal Procedure of the Russian Federation¹ provides only a few procedural security measures (assigned pseudonyms and questioning, identification without visual control, closed court hearing, etc.). Other measures, for example, relocation of the protected person to another safe place, changing the biographical information of the witness or the victim with the issuance of new personalized documents, plastic surgery, etc., are not regulated by the norms of the Code of Criminal Procedure. Such measures (it is proposed to call them universal² or organizational³ measures), are allocated to other branches of laws, and their realization is provided by by-laws.

Applying particular state protection measures leads to inevitable development and improvement in consistency of Russian juridical branches that are conterminous with criminal proceedings to improve the efficiency of security. For instance, such measure as resettlement of the protected person to a new place of living, work or studying brings the need to provide confidentiality of this procedure from the point of labour law, family law, housing law, education law and etc.

The inter-branch connection of personal safety institute in the sphere of criminal proceedings goes beyond the borders of national Russian law to the international level. Institute of participants' safety in criminal proceedings has long ago acquired an international character due to its legal regulation being mentioned in a number of documents with a status of international convention. Apart from that, there is a number of decisions of the European Court of Human Rights, the basis for which is the European Convention on Human Rights⁴.

It is a question of balance of interests with implementation of the right to question prosecution witness by the defense on one side and protection of the person, whose life is in danger, on the other side. Thus, judgement in the case of *Doorson vs. the Netherlands*⁵ states: "Article 6 specifically demands not to take into consideration the interests of

¹ The Code of Criminal Procedure of the Russian Federation of December 18, 2001. No. 174-FZ (as amended on December 31, 2017) // Collection of Legislation of the Russian Federation. 24.12.2001. No. 52 (Part I). Art. 4921.

² BRUSNITSYN L.V. Commentary on legislation to ensure the safety of participants in criminal proceedings (articles). M.: Yustitsinform, 2009. P. 304.

³ EPIHIN A.Y. Ensuring the security of the person in criminal proceedings. SPb., 2004. Seria Theory and practice of criminal law and criminal procedure / Association Legal Center.

⁴ "Convention of Human Rights and Fundamental Freedoms" (drafted in Rome, 04.11.1950) (corrected, 13.05.2004), with Protocol No. 1 (signed in Paris, 20.03.1952), Protocol No. 4 about guaranteeing the rights and freedoms besides the ones included in Convention and Protocol 1 (signed in Strasbourg, 16.09.1963), Protocol No. 7 (signed in Strasbourg, 22.11.1984) // Collection of Legislation of the Russian Federation. 08.01.2001. No.2. Art. 163.

⁵ Judgment of the European Court of 26 March 1996 re application no. 20524/92 *Doorson v. the Netherlands*. § 70.

witnesses. But when the life, freedom or safety of a human are at stakes then, following the general rule, the problem falls within the scope of Convention Article 8¹.

The judgement cannot be based only on the testimony of the anonymous witness, otherwise the right to protection is violated (Judgment of the European Court of 28 February 2006 concerning application no. 51277/99 *Krasniki v. Czech Republic*, § 64–86; another example: Judgment of the European Court of 20 September 1993 concerning application no. 14647/89 *Saidi v. France*, § 44).

The existence of sufficient evidence for witness anonymity is mentioned in ECHR Judgement of 23.04.1997 “*Van Mechelen and others v. Netherlands*”². Court’s duty to motivate its decision in detail in dealing with keeping anonymity during the court hearing is mentioned in ECHR Judgement of 28.02.2006 in the case of “*Krasniki v. Czech Republic*”³.

ECHR acknowledges checking the procedure and conditions of receiving testimony from anonymous witnesses to be a duty of the court. Thus, failure to check the order and conditions under which anonymous witnesses’ testimony was received during the court hearing leads to violation of Article 6 of European Convention on Human Rights⁴.

In L.V. Brusnitsin’s opinion, the Code of Criminal Procedure of the Russian Federation (CPC) does not provide announcing anybody’s testimony for the reasons of safety, although it is considered acceptable by ECHR under the condition that the defense was able to question the protected person during pre-trial proceedings – directly or through the person in charge of proceeding⁵. At the same time, current CPC regulations do not prohibit court’s decision to read out the testimony for safety reasons.

The issues of legal regulation of personal safety during the criminal proceedings are reflected in the modern European lawmaking⁶.

The existing variety of witness defense mechanisms is caused by different national law systems of countries that are members of the EU, their legal traditions, as well as the

¹ Russian yearbook of the European Convention on Human Rights, volume 1. “Statut”, 2015 // Consultant Plus law reference system.

² ECHR Judgement of 23.04.1997 “*Van Mechelen and others against Netherlands*” (claims N 21363/93, 21364/93, 21427/93 and 22056/93) [extract] // European Court of Human Rights. Selected judgements. V. 2. - M.: Norma, 2000. P. 440–454.

³ ECHR Judgement of 28.02.2006 in the case of “*Krasniki v. Czech Republic*” (application no. 51277/99). The case appeals to the fact that the court did not evaluate and failed to check the grounds for taking the testimony of anonymous witnesses as evidence while the testimony was used to underpin the guilty verdict.

⁴ Judgment of the European Court of 28 March 2002 concerning applications no. 47698/99 and 48115/99 *Birutis and Others v. Lithuania*, § 34, 35.

⁵ BRUSNITSIN L.V. Ensuring the security of persons, assisting in criminal justice: international experience and developing Russian legislation (proccessual investigation). M.: Yurlitinform, 2010. P. 284–287.

⁶ *Example*: Agreement on collaboration of Ministries of Internal Affairs in fighting against organized crime (With “Central offices of MIA in charge of organizing Agreement performance...”) (Signed in Ashgabat on 17.02.1994) // Yearbook of international agreements of the MIA of the Russian Federation. M.: “SPARK”, 1996.

conditions of fighting against crime in general and organized crime in particular. Experts connect the increase in number of WPP in the EU with the rise in the number of organized crime manifestations and the expansion of the fields of activity of terrorist groups¹.

The international cooperation in this area has also been represented in Post-Soviet area²: e.g. Agreement³ and Model Law⁴ were adopted in CIS countries.

The origins of personal safety institute in criminal proceedings can be traced to the period from the end of 80-s to the beginning of 90-s of the past century.

The concept of 1991 law reform⁵ in Art. 10 “Logistic support” establishes: “...to make sure to incorporate rooms of witnesses, parties and escort rooms in the projects of court buildings; to guarantee the safety of all present in the court room with the forces of judicial police units (at first by secondment of the officers of the local Department of Internal Affairs to the court).”

Some amendments to the Fundamentals of Criminal Proceedings in USSR and Soviet republics⁶ were introduced at that time. USSR law “About editing and amending of the Fundamentals of Criminal Proceedings in the USSR and Soviet Republics” of 12.06.1990 added a new duty to the authorities in charge of criminal case in Art. 27.1, which obliged them to take actions to protect life, health, honor, dignity and property of the protected persons provided there was enough evidence of the existing threat. However, the cases of application of Art. 27.1 in the history of jurisprudence were rare, especially since similar changes were not introduced into the CPC RSFSR of that period.

¹ KRASNOVA K.A. Institutional basics of witness protection in EU // *International criminal law and international justice*. 2014. No. 1. P. 20–23.

² The Agreement on cooperation of countries that are members of the Commonwealth of Independent States in fight against crime (With “List of authorities of countries that are members of the Commonwealth of Independent States in fight against crime”) (Signed in Moscow on 25.11.1998) // *Bulletin of international agreements*. 2000. No. 3. P. 3–10.

³ Federal law of 25.12.2008 No. 275-FL “About ratification of Agreement on protection of participants in criminal proceedings” // *Russian Newspaper*. No. 266. 30.12.2008.

⁴ Model law on state protection of victims, witnesses and other people, contributing to criminal proceedings. (Signed in St. Petersburg on 06.12.1997. Order 10-14 of 10th plenary session of Inter-Parliamentary Assembly of members of CIS) // *Informational bulletin. Inter-parliamentary Assembly of members of CIS*. 1998. No. 16. P. 241–254.

⁵ Order of the Supreme Council of RSFSR of 24.10.1991 No. 1801-1 “About the concept of legal reform in RSFSR” // *Bulletin of the Council of People’s Deputies and the Supreme Soviet of the USSR*. 31.10.1991. No. 44. P. 1435.

⁶ USSR law of 25.12.1958 (edited on 28.11.1989) “About the approval of the Fundamentals of Criminal Proceedings in the USSR and Soviet Republics” (with the Fundamentals of legislation) // *Bulletin of the Supreme Soviet of the USSR*. 1959. No. 1. Art. 15. The document is cancelled: Federal law of 18.12.2001 No. 177-FL (edited on 13.07.2015) “About implementing of the Code of Criminal Procedure” // *The collection of Legislation of the Russian Federation*. 24.12.2001. No. 52 (part 1). Art. 4924.

⁷ USSR law “About editing and amending of the Fundamentals of Criminal Procedures in the USSR and Soviet republics” of 12.06.1990. // *Bulletin of the Council of People’s Deputies and the Supreme Soviet of the USSR*. 1990. No. 26. Art. 495.

Before adoption of the corresponding legal acts there were single cases of taking safety measures (in the end of 80s, in Kirov region at the trial for abduction of the businessman and his family, the victim was constantly guarded in the apartment and on the way to the court; after announcing the verdict the police helped him to leave the Kirov region). Thus, it can be noted that at that time the practice outran both theory and legislation as there were not enough scientific studies.

The analysis of the current national law shows that it gives sufficient legal means to law enforcing authorities.

An essential breakthrough in legislative process happened due to the adoption of two specific laws: Federal law “On legal protection of judges and law controlling and enforcing authorities” in 1995¹ and Federal law “On state protection of victims, witnesses and other participants of criminal procedures” in 2004². Apart from that, there were adopted Administrative regulations³ and other subordinate legislations⁴. At the same time, one can observe inaction of many legal acts, which is due to delay in adopting subordinate legislations that work out in detail main regulations of the laws⁵.

From 2006 and up to the present time, there have been three State Programs⁶ that contain corresponding budget financing of the protection mechanisms, including the safety means and social support.

¹ Federal law of 20.04.1995 N 45-FL (edited on 03.02.2014) “On state protection of judges and law enforcement and regulatory personnel” // Collection of Legislation of the Russian Federation. 24.04.1995. No. 17. Art 1455.

² Federal law of 20.08.2004 No. 119-FL (edited on 08.03.2015) “On state protection of victims, witnesses and other participants of criminal proceedings” // Collection of Legislation of the Russian Federation. 23.08.2004. No. 34. Art. 3534.

³ *Example:* MIA of RF Order of 21.03.2007 No. 281 “On approval of Administrative regulations of Russian MIA in performing state function of protection of judges, law enforcing and regulatory authorities and the safety of participants of the criminal proceedings and their relatives” (Registered in Ministry of Justice of the RF on 17.10.2007 No. 10337) // Bulletin of legislation of federal executive authorities. No. 47. 19.11.2007.

⁴ *Example:* RF Government Order of 21.09.2012 No. 953 (edited on 14.07.2015) “On approval of Regulations of using safety measures such as the resettlement of the protected person to other place of living in regard to the victims, witnesses and other participants of the criminal procedures” // Collection of Legislation of the Russian Federation. 24.09.2012. No. 39. Art. 5290 et al.

⁵ *Example:* RF Government Order of 14.07.2015 No. 705 “On the order of informational safety about performing state protection, releasing such information and implementing safety measures in the form of keeping the confidentiality of the protected person’s information” (with the “Regulations of informational safety about performing state protection and releasing such information”, “Regulations of implementing the safety measures in the form of keeping the information about the protected person confidential” // Collection of Legislation of the Russian Federation. 20.07.2015. No. 29 (part II). Art. 4503.

⁶ RF Government Order of 10.04.2006 No. 200 “On approval of the state program ‘Safety of the victims, witnesses and other participants of criminal proceedings in the period of 2006-2008’” // Collection of legislation of the Russian Federation. 17.04.2006. No. 16. Art. 1739; RF Government Order of 02.10.2009 No. 792 (edited on 16.12.2013) “On approval of the state program ‘Safety of the victims, witnesses and other participants of criminal proceedings in the period of 2014-2018’” // Collection of legislation of the Russian Federation. 22.07.2013. No. 29. Art. 3965.

Some issues of implementing safety means are reflected in the resolutions of the Plenum of the Supreme Court of the Russian Federation¹. The appeal of certain provisions of the legislation on state protection of participants in criminal proceedings was reflected in a number of decisions of the Constitutional Court of the Russian Federation.² However, we ought to state the lack of a specific order of the RF Supreme Court Order Plenum on the subject, the adoption of which is long overdue. Such order will undoubtedly lead to uniformity in the existing and future jurisprudence and will allow to apply accordingly the standards of RF CPC in order to bring safety to participants of criminal proceedings during pre-trial and trial process.

In our opinion, the existing scientific research is sufficient. The foundation of personal safety theory in criminal proceedings was laid by three doctoral dissertations (of prof. O.A. Zaytsev³, prof. L.V. Brusnitsin⁴ and prof. A.U. Epikhin⁵) while their of fundamental principles were developed in the candidate's dissertations by A.K. Tikhonov⁶, I.V. Kharitonov⁷, T.K. Kurbanmagomedov⁸ and others.

The "splitting" of the issue followed in other candidate's dissertations. Criminal procedure safety measures are studied in the dissertation by G.A. Skripilev⁹, while the issues of enforcement in the field of security are the subject of A.B. Abramov's dissertation¹⁰.

¹ *Example*: item 25 of Order of the Supreme Court Plenum of the RF of 13.12.2012 No. 35 "On the openness and publicity of trial and the access to information about court performance" // Russian Newspaper. No. 292. 19.12.2012; item 17 of Order of the Supreme Court Plenum of the RF of 28.06.2012 No. 16 "On the practice of implementing a specific order in criminal court if pre-trial cooperation agreement is concluded" // Russian Newspaper. No. 156. 11.07.2012 et al.

² *See, for example*: Definition of the Constitutional Court of the Russian Federation of 25.02.2010 N 314-O-O "On refusal to accept the complaint of the citizen of the Republic of Uzbekistan A. Kh. Eshonkulov for on violation of his constitutional rights by the Federal Law "On State Protection of Victims, Witnesses and Other Participants of criminal proceedings" // The document was not published. SRS Consultant Plus and others.

³ ZAYTSEV O.A. Theoretical and legal frameworks of state protection of participants in criminal proceedings: Thesis Diss. Doctor in Legal Science. M., 1999.

⁴ BRUSNITSIN L.V. Theoretical and legal fundamentals and worldwide experience in providing personal safety of those who cooperate with criminal justice: Thesis Diss. Doctor in Legal Science. M., 2002.

⁵ EPIKHIN A.U. The concept of personal safety in the field of criminal proceedings: Thesis Diss. Doctor in Legal Science. Syktyvkar, 2004.

⁶ TIKHONOV A.K. Criminal procedure measures to provide honor, dignity and personal safety of the victim and witness: Thesis Diss. Candidate in Legal Science. M., 1995.

⁷ KHARITONOV I.V. Criminal procedure measures of safety, implemented in relation to the victim during pre-trial process: Thesis Diss. Candidate in Legal Science. M., 2010.

⁸ KURBANMAGOMEDOV T.K. State protection of victims during the proceedings in the court of first instance: Thesis Diss. Candidate in Legal Science. Makhachkala, 2011.

⁹ SKRIPILEV G.A. Application, amending and cancellation of safety measures of participants in Russian criminal proceedings: Abstract to the Thesis Diss. Candidate in Legal Science. M., 2013.

¹⁰ ABRAMOV A.B. The issues of correlation between procuratorial supervision, administrative and court monitoring of person's safety in present-day Russian criminal justice: Abstract to Thesis Diss. Candidate in Legal Science. M., 2013.

The need to single out protected person's status is justified in Y.I. Bobkov's dissertation¹. In the last decade there is a tendency to scientifically prove legal regulation of certain safety measures (for example, examination under a pseudonym by M.N. Naduyev² and others).

The problems of protection and security of certain participants in criminal proceedings were studied in monographs³, three published commentaries on law⁴ and course books⁵.

Security as a subject attracts attention of scientists within the framework of other scientific disciplines as well. For example, I.A. Bobrakov wrote a monograph "Protection of participants in criminal proceedings: criminological and criminal law fundamentals"⁶ (specialty 12.00.08) which was published in 2005. Indeed, this type of crime is one of the most critical among the infringements of the interests of justice. Therefore its prevention is one of the top-priority goals in the modern criminal law policy. Also in 2010 O.P. Voloshina in her dissertation studied the problems of criminological characteristics and prevention of violent crimes against justice, committed against witnesses and aggrieved people⁷.

Different approaches in application of security measures are reasoned and studied, for instance, in the dissertations of I.A. Bobrakov⁸ and V.V. Voynikov⁹ (specialty 12.00.12),

¹ BOBKOV Y.I. Criminal procedure status of persons in relation to whom state protection and safety measures are applied: Thesis Diss. Candidate in Legal Science. M., 2015.

² *Example*: NADUYEV M.N. To the issue of implementing the mechanism of questioning under a pseudonym during the criminal proceedings.

³ *Examples*: ZAYTSEV O.A. State protection of participants in criminal proceedings. Moscow, Examen Publ., 2001; BRUSNITSYN L.V. Providing security of the persons assisting criminal justice: Russian, foreign and worldwide experience in the twentieth century (procedural study). Moscow, OOO Urlitinform Publ., 2001; EPIHIN A. Y. Providing the person's security in criminal proceedings. Saint Petersburg, Law Center Association, 2004; et al.

⁴ BRUSNITSYN L.V. Commentary on legislation on providing security for participants in criminal proceedings (article-by-article). Moscow, Ustitsinform Publ., 2009, 304 p.; SHNITENKOV A.V., VELYKIY D.P. Commentary on the Federal Law "On state protection of victims, witnesses and other participants in criminal proceedings" (article-by-article). Moscow, Ustitsinform Publ., 2007, 112 p.; KOBTSOVA T.S., KOBTSOV P.V., SMUSHKIN A.B. Commentary on the Federal Law No. 119-FZ dated 20 August 2004 "On state protection of victims, witnesses and other participants in criminal proceedings" (article-by-article). SRS Consultant Plus law reference system, 2006.

⁵ NIKITIN S.Y., NOVIKOVA M.V., SERGEEV A.B. *Zashita prav svideteley v ugovnom sudoproizvodstve Rossii*: Uchebnoe posobie [Protection of the rights of witnesses in the criminal procedure in Russia: Course book]. Chelyabinsk, 2006; etc.

⁶ BOBRAKOV I.A. Protection of participants in criminal proceedings: criminological and criminal law fundamentals: Thesis Diss. Doctor in Legal Science. Moscow, 2005.

⁷ VOLOSHINA O.P. Criminological characteristics and prevention of violent crimes against justice, committed against witnesses and aggrieved people: Thesis Diss. Candidate in Legal Science. Moscow, 2010.

⁸ BOBRAKOV I.A. The impact of criminals on witnesses and victims and criminalistic methods of overcoming it: Thesis Diss. Candidate in Legal Science. Moscow, 1997.

⁹ VOYNIKOV V.V. Tactics of ensuring security in criminal proceedings: Thesis Diss. Candidate in Legal Science. Kaliningrad, 2002.

and in other (extra-procedural) studies, focused on resolving the problems with safe participating in criminal proceedings¹.

It should be noted that interbranch connections between related branches of jurisprudence in Russia are not a new topic for research and it was studied before by Russian scholars² who studied the problems of interrelation between criminal procedure and criminalistic³, as well as other branches of law⁴. The interconnections of certain law principles and institutes have also attracted our attention previously⁵.

At the same time, considering the current scientific status of the institute of person's safety in criminal proceedings, we come a conclusion that **the interbranch connections need to be further expanded and researched**.

This interbranch character of the law institute research is reasoned by the fact that at this time it is impossible to confine ourselves to the boundaries of one law or one branch of law while applying certain measures of state protection and security provision. However, there are some exceptions from this rule: for instance, the dissertation of I.E. Kozyreva (specialty 12.00.09, criminal proceeding) on the subject of "Procedural, psychological and forensic problems of witness's participation in preliminary investigation"⁶ and others⁷.

¹ *Examples:* SHKODA A.A. Criminal liability for disclosure of information about security measures imposed on an official of a regulatory or law enforcement agency: Thesis Diss. Candidate in Legal Science. Stavropol, 2006; MALTSEVA N.V. Legal regulation of ensuring the security of victims and witnesses, sentenced to imprisonment: Thesis Diss. Candidate in Legal Science. Ryazan, 2007; et al.

² *Examples:* CHELYSHEV M.Y. A study of interbranch relations system in civil law: Thesis Diss. Doctor in Legal Science. Kazan, 2009; etc.

³ *Examples:* NIKOLYUK V.V., ANTONOV V.A. Problems of the interconnection between the criminal process and criminalistics in the context of the CCP RF (2002–2016). // Russian investigator, 2016, No. 17. P. 19–24; KOZUBENKO Y.V. Criminal prosecution: complex research experience. Saint Petersburg, 2006; etc.

⁴ *Examples:* TOLKACHENKO A.A. Interbranch aspects of modern criminal law regulation. Criminal law, 2015, No. 2. P. 85–93; KOZUBENKO Y.V. Investigation of the criminal law regulation system at the interbranch level // Lex Russica, 2013, No. 6. P. 655–661; DAYEV V.G. The interconnection between the criminal law and the criminal proceeding. L, 1982; etc.

⁵ See: EPIHIN A.Y. Interbranch problems of qualifying the illegal coercion to testify (Criminal Code, Art. 302). Legal science and law enforcement practice, 2015, No. 4 (34). P. 86-90 (in Russian); EPIHIN A.Y. The improvement of the status of an expert in Russian criminal procedure law: the interconnection between the Criminal Code and the Code of Criminal Procedure of the Russian Federation. Current problems of adaptation of regional organizations to the conditions of globalization of legal and economic relations, collection of articles of the All-Russian Scientific and Practical Conference, dedicated to the 20th anniversary of the Batyrevsky branch of the FSBI HPE "Chuvash State University named after I.N. Ulyanov". The editorial board: N.V. TUMALANOV, L.V. LYALINA, T.V. YAKOVLEVA, M.V. SHORKINA; the Federal State Budgetary Institut of Higher Professional Education, "Chuvash State University named after I.N. Ulyanov", the Batyrevsky branch, "Interactive plus" Scientific cooperation Center, 2014. P. 30-36; EPIHIN A.Y. Interbranch problems of qualifying the offense of perjury, false expert's statement or incorrect translation (Criminal Code, Art. 307). Political, economic and socio-cultural aspects of regional governance in the European North, collection of articles, proceedings of the Concluding (thirteenth) All-Russian Scientific and Practical Conference. Academy of Public Service and Administration of Komi Republic, 2014. P. 89-96.

⁶ KOZYREVA I.E. The procedural, psychological and forensic problems of witness participation in the preliminary investigation: Thesis Diss. Candidate in Legal Science. Ufa, 2009.

⁷ *Example:* ZAMYLIN E.I. Legal and forensic problems of ensuring the safety of persons who contribute to solving or investigating crimes: Monograph. Moscow, Urlitinform Publ., 2010.

In this regard, our understanding is that the key to improving person's security in criminal proceeding is interbranch research which is undoubtedly difficult to accomplish in the framework of only one scientific specialty. It is true especially for doctoral research scholars. That is why this problem has to be studied from the perspective of at least two branches.

We have certain hopes for the timely structural decision on specialization of higher educational institutions of the Internal Affairs Agencies system of the Russian Federation. Thus, Ufa Law Institute of the Ministry of Internal Affairs of the Russian Federation already functions also as an Educational and Research center, where the priority program named "*Training of specialists in security provision for people in need of state protection*" is realized. It was established by Order No. 591 of the Ministry of Internal Affairs of Russia dated 2 August 2013 "On the amendments to the Order No. 820 of the Ministry of Internal Affairs of Russia dated 29 August 2012 'On the profilisation of educational institutions of the Ministry of Internal Affairs of Russia'". As part of the program, only in 2015 research for 6 scientific research projects¹ was conducted here. Furthermore, this institute, sponsored by government agencies, organizes specialized all-Russian research and practice conferences on state protection of participants in criminal proceedings.

There is a vast number of various interbranch connections for the question of protection of participants in criminal proceedings. These connections can exist in material or procedural branches of law. Apart from that, the problem should be studied not only from the juridical (law) side. The process of state protection also includes extra juridical aspects, connected, for example, with psychology, conflictology etc.

The problem of defining the legal status of a person under protection in criminal proceedings requires further interbranch research from the point of view of the theory of law. The status of a person under protection in a criminal case is not clearly regulated and still has interbranch contradictions not entirely resolved. That is the main focus of the legal theory: to define the content of rights, duties and responsibilities of a person under protection, his or her freedoms, legally protected interests and to establish adequate safeguards of realization of rights.

In our opinion, an obvious interbranch connection would be the development of procuracy supervision in the enforcement process of security provision. The legality and validity of the enforcement, amendment (addition) or repeal of the state protection measures or criminal procedural security in criminal proceedings by an interrogator, investigator or by the court should be under the department or judicial control, as well as under the procuracy supervision. A protected person has the right to appeal against decisions, actions (or lack of action) by the person in charge of the criminal case.

It appears that a special attention should be paid to anti-corruption issues in the realization of state protection of participants in criminal proceedings. The law

¹ Available at: https://ufali.mvd.ru/Nauka/Nauchno_issledovatelskaya_deyatelnost

enforcement system itself should be protected against corruption. Otherwise, the procedure for preserving confidentiality may not have the effect intended. And the data protection should be provided not only for the protected persons, but also for the law enforcement officers who implement these security measures.

It should be noted that numerous course books in criminal procedure do not discuss the issues of state protection and security provision. If this subject is mentioned at all, it is mentioned only in relation to article 11, part 3 of the Code of Criminal Procedure as one of the aspects of the protection of the rights and freedoms of individuals and citizens.

At the same time, Law Faculties of some higher education institutions (for instance, Moscow State University¹ or Kazan Federal University²) include a special course on the issues of state protection for the trial participants who assist in criminal proceedings.

Nowadays, there can be observed problems in systematization and analysis of good practice in law enforcement agencies on the organization and tactics of applying security measures for state protection of victims, witnesses and other participants in criminal proceedings. Therefore, the systematic interbranch approach to law-enforcement aspects seems to be even more relevant.

Analysis of the investigative and judicial practice shows that there are issues of development of the effective and agreed personal security measures and their procedural and forensic provision at all stages of a criminal procedure. These issues require further development and modernization. It is becoming increasingly relevant to develop modern, scientifically reasoned forensic recommendations on tactics and techniques of security measures for participants during the investigation, which is specified in article 11, part 3 of the Code of Criminal Procedure, and other security measures, provided for under the law of the Russian Federation.

Providing security for participants in criminal proceedings is one of the modern tactic goals of preliminary investigation and judicial proceeding. In this regard, forensic studies aimed at developing model forensic programs for solving practical tasks become even more relevant. These programs can provide an investigator or a judge with the choice and the sequence of specific criminal procedure and other measures to ensure security for protected persons in accordance with the given practical task³.

It should be noted that these specific security measures in criminal procedure may be taken in different tactic directions: in case of conducting separate investigative and judicial actions; providing the investigation confidentiality or preventing disclosure of information pertaining to a preliminary investigation; applying preventive measures; dealing with actions against investigation and prosecution of criminal conduct.

¹ Available at: <http://istina.msu.ru/courses/teachings/8583043/>

² Available at: <https://kpfu.ru/law/struktura/kafedry/ugolovnogo-processa-i-kriminalistiki/informaciya-dlya-studentov-i-magistrov/magistrum>

³ *Read more:* MISHIN A.V. Ensuring the security of participants in pre-trial proceedings in a criminal case: a tactical task and its solution. Bulletin of Volzhsky University named after V.N. Tatischev, 2017. Vol. 2. No.4. P. 183-189. (in Russian)

Providing security for participants of the criminal proceedings is an effective measure of crime prevention. In this regard, the activity of designated officials for providing security of participants in criminal proceedings should have organizational, forensic and investigative support.

The forensic characterization of improper influence on conscientious participants of criminal proceedings has practical significance. The information about particular elements of this characterization gives to an investigator an opportunity to timely recognize the activity of people who have such influence and to take measures for its prevention and neutralization.

Conclusions

Thus, we can make a conclusion that the analysis of the ongoing processes in modern Russian society and the status of law enforcement practice shows the scale of the social law problem of providing state protection and personal security in criminal proceedings.

In addition to that, at the present time the main directions of the development of personal safety institute are characterized by interbranch (interdisciplinary) connections and integration processes. Therefore, we should carry out further scientific and practical research aimed at elimination of interdisciplinary contradictions and improvement of coordination between law principles that regulate security of participants in modern Russian criminal proceedings.

In this regard, the complicated and diverse process of legal regulation has to be optimized, considering coherence and consistency in some cases and variety and differentiation in the others.

It should be taken into account that the person's security in criminal proceedings is an efficient tool against the criminalization of society in general. That is why it should be provided and all the connected problems should be resolved by joint efforts of all the law enforcement agencies and other public authorities.

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SELECTED ACTIONS AND DRAFT REFORMS OF THE PROVISIONAL GOVERNMENT CONCERNING WORKING CLASS RELATIONS IN 1917¹

DOI:

Abstract: The author presents the most positive changes that occurred in Russia after the Revolution of 1917 in relation to the activities of the Provisional Government. The changes that began in 1917 in Russia forced the Provisional Government to take action aimed at a fundamental reconstruction of relations involving the working class. Social pressure, aggravated by pressure from socialist political forces, led to the fact that the revolutionary authorities were forced to carry out profound social reforms and create a system of workers' protection. This in turn marked a new stage in the development of the Russian Labor Law and Russian state. The revolutionary process in Russia was accelerating and it was characterized with increasing expectations. The author gives historical analysis of reforms and gives links for the other research on the topic and shows the most outstanding works on condition of the labour law and its reforms.

Keywords: reforms, class relations, Provisional Government, Russia, 1917

Introduction

The changes that started in 1917² in Russia forced the Provisional Government to undertake actions aimed at “a fundamental reconstruction of the working class relations”³.

¹ This research work is financed from the budgetary means for education for the years 2014-2018 as a research project under the “Diamond Grant” Programme.

² The dates in this paper are stated in accordance with the so called old style then in place in Russia, namely the Julian calendar.

³ Н.С. БАРАНОВА, История трудового законодательства в России в 1917-1920 гг // Вестник Адыгейского государственного университета. Серия 1: Регионоведение: философия, история, социология, юриспруденция, политология, культурология. 2016, №1 (174), с. 32.

Social pressure, compounded with pressure on the part of the socialist political forces, led to a situation that the revolutionary authorities were forced to carry out deep social reforms and to create a system for employee protection. It marked a new stage of development of the Russian labour law. Since the takeover of power, the Provisional Government had been aware of backwardness of Russia in this respect and that without changing it, they would not succeed in carrying out social and economic reforms within the Russian society effectively¹. They knew that this task must be performed effectively as it was a precondition for successful revolutionary changes and transformation of the state.

Condition of the labour law and its reforms during the 1917 revolution was presented in the most comprehensive way by Professor Lev Semenowicz Tal² in his article “The coming assignments concerning working class” published in the weekly newspaper “Pravo” [Law] dated 25 April 1917.³ He claimed that the Russian “special legislation concerning labour protection is in the embryonic phase and refers mostly to industrial workers”, and the “working class law (both private and public) is not even included in the teaching programme of our faculties of law at universities”⁴. He was also critical about courts that, according to him, were not able to consider duly any cases concerning workers’ interests. L.D. Tal approved the starting legislation works at the Ministry of Trade and Industry, and also the development of revolutionary legislation in the field of the possibilities of creating trade unions. However, he was of the opinion that it was only a partial guarantee of the workers’ rights. He proposed that the legislation should be based on a principle stating that the workers are not only an object of norms and undertakings defining their legal situation, but that they should be able, like other “interested classes”, to take part in their creation and application⁵. He thought it indispensable to pass a law that would govern comprehensively the “workers’ agreement”⁶. According to him, a future All Russian Constituent Assembly should announce the basic economic rights of workers, such as: a right to dignified existence, a right to work, a right to the fruits of work, that should be directives for the Russian legislation⁷.

¹ И.В. Евдошенко, Временное правительство и реформы трудовых отношений в России (февраль-октябрь 1917 г.) // Вестник ЮУрГУ. Серия: Право, 2006 №13 (68), с. 67.

² Lev Semenowicz Tal (1867–1933) – a lawyer specialising in the civil law and workers’ law, the author of a concept of a work contract. In May 1917, he became a senator of the Civil Cassation Department of the Governing Senate. At the beginning of the 20s, he was affiliated with the economic and labour law section of the Soviet Law Institute in Moscow and the Plekhanov Institute of the People’s Economy where he lectured on the civil law. In 1926, he went to France, where he became a professor at the “French-Russian Institute” in Paris.

³ Л.С. Таль, Ближайшие задачи по рабочему вопросу // Право: еженед. юрид. газ. 1917, №12 (25 апр.), с. 673.

⁴ *Ibidem*, p. 674.

⁵ *Ibidem*, p. 675.

⁶ *Ibidem*, p. 680.

⁷ *Ibidem*, p. 673.

Selected concepts and draft normative acts concerning civic rights, basic working class rights and trade unions

On 9 March 1917, Minister A. I. Konovalov established the Labour Division at the Ministry of Trade and Industry chaired by Professor M. W. Bernacki whose primary task was to deal with legislative works concerning development of trade unions, creation of factory committees, labour exchanges and arbitration institutions¹. Besides the above, one of the main tasks of the Division was an analysis of the existing legislation on labour protection². On 5 May 1917, Ministry of Labour was formed in connection with formation of the first coalition government. M.I. Skobielev was appointed as Labour Minister³. Six divisions were established in the Ministry of Labour, namely divisions for: proposed legislation, labour protection, regulation of capital and labour relations, social security, labour market and statistics⁴.

Discussions about it and work on various concepts and projects were also in progress in other centers. On 24 March 1917, the so called “Legislative Proposals” were handed over to the Labour Division at the Ministry of Trade and Industry (font size!) by the Council of Workers’ Delegates⁵. They included a catalogue of demands on which legislation of the new authority should be based as regards civic rights and freedoms and working class rights. The above types of rights were tended to be treated integrally.

In accordance with Article 1 of the Proposals, all citizens of Russia, regardless of their sex and age, should have the right to organise meetings indoor and “outdoor”⁶, and also the right to organise demonstrations of any type without prior notification of the police about it. Thus, the said Article formed practically unlimited right to assemble. In accordance with Article 2 of the Proposal, all citizens of Russia, regardless of their sex and age, should have the right to organise unions/associations and social organisations. In such cases, as in case of assemblies, no police permission was required. However such entities could get legal personality only upon registration by local government bodies that maintained relevant registers.

Article 3 of the Proposals indicated that all citizens of Russia should have the right to use a language of their choice during the meetings, and that they should have the right to keep their accounting books freely in a language selected by them, in the entity run by them. Article 4 formed the so called right of coalition. In accordance with that Article, all employees (inclusive of state officials) could accede to and form various

¹ И.В. Евдошенко, Временное правительство..., *op.cit.*, с. 67.

² *Ibidem.*

³ *Ibidem*, p. 68.

⁴ *Ibidem*, p. 68-69.

⁵ ГА РФ. Ф. 4100 Оп. 2. № единицы хранения 30. Законы, постановления, положения Временного Правительства и циркулярные распоряжения отдела, л. 1.

⁶ *Ibidem.*

social organisations and conclude agreements in order to protect their economic, legal and political interests.

Article 8 provided for a norm according to which participation in a strike would not give grounds for dismissal of its participant from work. However, should an employee infringe law during such a strike, the employer could lower his/her salary and prolong working hours of such an employee. In accordance with Article 9 of the Proposals, strike participants could be detained neither by military forces nor by representatives of civil and martial administration.

However the most important norm of the Proposals was laid down in Article 12. According to that Article any stipulations of the Russian legislation that are contrary to the proposed stipulations should be removed from the system.

An answer to and continuation of the “Legislative Proposals” was the “Draft developed by a commission at the committee of the Labour Division at the Ministry of Trade and Industry”¹, namely the Trade Unions Act. The draft consisted of two parts. It was stated in the first part that all acts issued until then (that is until 1917), interim regulations, as well as government decisions, regulations, circulars and instructions concerning trade unions were no longer effective. The second part included detailed regulations concerning types of entities that may be created by employees. In accordance with regulations of the draft law, everyone, both the employees of private and state enterprises, as well as employees of government offices, should have a right to establish freely any associations/unions to protect and support interests of their members. In pursuance of Article 1, any entities formed by the employees could realise their purposes by any legally allowed means. Most notably, they could:

- represent and protect their rights and interests before the state authorities;
- agree, by way of collective agreements, on terms and conditions of work with entrepreneurs or associations of entrepreneurs;
- establish mutual aid funds;
- provide legal and medical aid for their members;
- organize undertakings aimed at spiritual and physical development; as an example thereof, organization of trips, holidays and competitions was specified.

Item 8 enumerates things that had to be included in articles of association of a given association/unit, namely: purpose, name, region of operations, registered office, general conditions concerning accession and withdrawal of its members, rights and obligations of members, methods of election of managing bodies and their powers.

Legal personality was acquired by such an entity by entry to the register, made by local government authorities or relevant Labour Division of the Ministry of Trade and Industry. An order of registration, as well as an order of consideration of potential disputes resulting therefrom were to be determined, in a form of instruction, by the Minister of Trade and Industry. Registration time was to be 7 days from submission of documents.

¹ *Ibidem*, с. 5. Закон «О профессиональных обществах и союзах».

The worked out and reported demands were executed by issuing “A regulation of the Provisional Government concerning meetings and associations/unions of 12 April 1917”¹. In accordance with its norms, all citizens of Russia could organize meetings of any type without any prior permission. Also, they did not need any permit to form various organizations, however they had to be registered to gain legal personality. The instruction issued for the commissioners of the Ministry of Labour on 12 September 1917 draws attention to the fact², that associations/unions may operate without any permission by their registration date.

“A Resolution of the Provisional Government About the Factory/Workers Committees At Industrial Institutions” of 23 April 1917 was another step aimed at further liberalization³.

In accordance with the norms of the Resolution, workers committees could be established both as private and public enterprises. The committees could be formed for the entire enterprise as well as for its parts. In accordance with the procedure, the committees could be formed at a request of 1/10 of all employees as well as on the initiative of the administration of the enterprise. The committee was composed of members elected by the workers, inclusive of women and “minors”, in equal, secret and direct balloting. The committee operated following the manual developed by themselves⁴. Such a manual was to be approved at the general meeting of the workers of a given enterprise. Stipulations of the manual regarding relations between the committee and administration of the enterprise were subject to negotiations between both parties. The meetings organised by the committees were to take place after hours. The committees were to deal with the following matters: cultural-educational ones, wages/salaries, working time, and internal working order.

It should be noted that in 1917 in Russia there was a strong competition between trade unions and factory/workers’ committees⁵. The Third All-Russian Conference of Trade Unions was attended by representatives of 967 trade unions⁶.

One of the more important legal regulations concerning legislation of the Provisional Government related to the labour law regulation was “A Decision of the Provisional Government of 2 July 1917 About Local Commissioners of the Ministry of Labour”⁷.

¹ *Ibidem*, p. 7.

² *Ibidem*, p. 23.

³ *Ibidem*, p. 8.

⁴ *Ibidem*.

⁵ Д.О. Чураков, Конфликт между производственной и профессиональной формой самоуправления рабочих в 1917-1918 гг.: фабзавкомы и профсоюзы // Экономическая история. Обзорение, Под ред. Л.И.Бородкина. Вып. 8., Москва 2002, с. 97–101.

⁶ А. Гусев, Образование профсоюзов в России и опыт их деятельности в начале XX века // Рабочее и профсоюзное движение в России. Из прошлого в будущее, Москва 2016, с. 15.

⁷ ГА РФ. Ф. 4100 Оп. 2. № единицы хранения 30. Законы, постановления, положения Временного Правительства и циркулярные распоряжения отдела, л. 10.

According to that decision, by the time the labour inspection and other local organs of the Ministry of Labour were to be established, local labour commissioners were appointed. A region within which the commissioner was to work was to be determined by the Ministry of Labour. Their powers included general supervision over the execution of the legislation stipulations concerning labour protection and insurance of the workers. Based on an agreement reached by and between the Ministry of Labour and the Ministry of Trade and Industry of the Provisional Government, the tasks could be fulfilled by the local labour commissioners together with the local factory inspectors and district engineers¹. As regards practical side of the above, for instance, on 28 August 1917, the Ministry of Labour issued an instruction addressed to its commissioners, factory inspectors and district engineers, stating that they should keep in mind that in accordance with the applicable legislation the workers cannot hold their meetings at the enterprises during working hours because it would cause significant production losses². Analysis of the activities of the Ministry of Labour shows that issue of instructions for the commissioners was a frequent practice used for having a continuing impact on the relations between the workers and factory owners.

Another of the legislation drafts that were aimed at increased protection of workers' labour was the "Draft Law About Settlement Books"³. In accordance with that draft law, settlement books were to be issued to workers, inclusive of agricultural ones and anyone whose annual remuneration exceeded the amount of 6,000 roubles. The book was to specify any settlement matters, period of employment, types of remuneration, types of activities. It was to be issued by the employer free of charge.

Issues concerning protection of labour of minors

In accordance with legislation drafts of the Ministry of Labour of the Provisional Government of 1917, minors up to the age of 14 would not be allowed to work, and in case of underground work – up to the age of 17⁴. Minors aged 14 through 17 could work only 6 hours a day. A minor's age should be determined based on an excerpt from the Orthodox church registers. In accordance with the proposals of the Ministry, minors could not work at night, that is between 7:00 p.m. and 7:00 a.m. Also, a candidate for work was required to pass certain medical examination to be allowed to work.

During debates that took place on 3 and 9 September 1917 at a Division for Labour Protection of the Ministry of Labour of the Provisional Government, the shape of the future law on protection of minors' labour was discussed⁵. A reporter W. I. Tchavroz

¹ *Ibidem*, p. 11.

² *Ibidem*, p. 15.

³ *Ibidem*, p. 68

⁴ *Ibidem*, p. 85

⁵ ГА РФ. Ф. 4100 Оп. 3. № единицы хранения 1, *Бюллетень Министерства Труда*, л. 76.

drew attention to the fact that despite of the law of 1872 that protected labour of minors at factories, Russia lacked of legal acts that would assure labour of minors in crafts, industry, construction and trade companies.¹ Basic terms and conditions of working would be in line with the presented hereinabove drafts in this respect, with an exception that a medical examination required to be allowed to work would take place twice a year, and a minor would be entitled to a mandatory break after 3 hours of work. The debates stirred stormy discussions. During the debates, a representative of the workers showed that the regulations of the law should also cover minors working in agriculture, and in future the age from which minors could work should be 16². A representative of the Union of Industrialists said that acceptance of the law in its present form in the revolutionary and wartime conditions would be catastrophic for the Russian industry due to a difficult situation caused by wartime and due to foreign competition³. A representative of the Division for Industry of the Ministry of Trade and Industry, A. N. Opackij, showed that such a law was necessary even though it could cause losses in industry, whereas a representative of the Division for Trade of the Ministry of Trade and Industry emphasised that the age of 14 should be taken into consideration because, for instance, working in trade was much lighter than in other areas of economy⁴.

As regards work of minors we shall also mention a decision of the Provisional Government of 8 August 1917 that put a ban on working at factories at night shifts, that is from 9:00 p.m. to 5:00 a.m. in relation to women and minors up to the age of 17⁵. However, under the agreement reached among the Ministry of Labour, the Ministry of Trade and Industry and the Ministry of War and Navy, an exception to this ban was allowed for enterprises that were of strategic importance from the point of view of defence needs of the state⁶.

The Provisional Government themselves, despite being strongly criticised, did not decide to implement the 8-hour working time⁷. It was mostly justified by the fact that industry operated in wartime, and that it was opposed by a part of elite and industrialists.

¹ *Ibidem*.

² *Ibidem*, p. 77.

³ *Ibidem*.

⁴ *Ibidem*, p. 78.

⁵ ГАРФ. Ф. 4100 Оп. 3. № единицы хранения 2, *Бюллетень Министерства Труда*, л. 4. В. ГОРШКОВ, *Russia's Factory Children. State, Society and Law, 1800-1917*, University of Pittsburgh Press 2009, p. 158–159.

⁶ *Ibidem*.

⁷ In 1917, a demand for implementation of the 8-hour working time was one of the most important watchwords of the reforms of the working class relations. Extensive journalism and publishing activities were observed in this respect. See: 8 часов // *Правда* 1917, № 23, с. 4, Ф.И. Дан, 8-ми часовой рабочий день и Армия. Петроград 1917, Н. В. ВАСИЛЬЕВ, 8-ми часовой рабочий день и его значение. Гельсингфорсь 1917, *Ibidem*, 60 лет борьбы за 8-ми часовой рабочий день. Петроград 1917 (the Introduction to this edition quotes G. W. Plekhanov's words about the necessity of taking this issue into consideration in connection with wartime and operation of industry).

Establishment of industrial courts

On 18 September 1917, a debate took place at the Ministry of Labour concerning a draft law on establishing the so called industrial courts¹. Such a draft law was developed by the Legislation Division of the Ministry of Labour. Industrial courts were to settle any matters concerning hiring for work/employment relationship. The judicial panel would consist of equal number of persons selected by workers and industrialists, however such a court member could be neither a worker nor an industrialist. Members of the court were to be elected for a two-year term in districts relevant for the workers and industrialists, should be Russian citizens, have writing and reading skills and [at least] one-year professional experience.

Establishment of arbitration institutions

An outbreak of the 1917 revolution allowed for rebirth of the institutions of arbitration chambers (*примирительные камеры*)², arbitration courts (*третейские суды*), collective agreements (*коллективные договоры*) and tariff agreements (*тарифные соглашения*)³, which, as it is mentioned by W. B. Morozov, occurred in Russia in a great number during the 1905-1907 revolution.⁴ Arbitration chambers consisted of equal number of representatives of workers and industrialists. The chambers had a two-instance structure, with Central Conciliatory Commission in Petrograd (set up on 10 March 1917). As of 3 October 1917, there were 90 arbitration chambers in the capital city of Russia⁵.

The institution of labour exchanges

On 19 August 1917, the Provisional Government established an institution of labour exchanges⁶. Their activities were to include registration of needs and offers of employment, intermediation in this respect, and also statistical activities⁷. Labour exchanges were to be established in the cities with population of at least 50,000 inhabitants. As it is stated by I. W. Jevdoshenko, by the end of October 1917, 27 labour exchanges were established⁸.

¹ ГА РФ. Ф. 4100. Оп. 3, № единицы хранения 2, Бюллетень Министерства Труда, л. 7.

² О.А. Виноградова, Из истории становления института разрешения индивидуальных трудовых споров в России // Управленческое консультирование, 2013, №3 (51), с. 96-97.

³ In 1917, tariff agreements substituted lack of regulations concerning minimum wages/salaries.

⁴ В.Б. Морозов, К истории становления социального партнерства в России в 1905–1917 годах // Известия РГПУ им. А.И. Герцена, 2007, №41, с. 120.

⁵ *Ibidem*, p. 125.

⁶ И.В. Евдошенко, *Временное правительство...*, *op.cit.*, с. 71.

⁷ *Ibidem*.

⁸ *Ibidem*.

Insurance cover for the workers

Despite the demands of representatives of the owners of enterprises to postpone the reform of the insurance system, the Provisional Government managed to force through new regulations concerning the sickness insurance of the workers¹. In accordance with the new regulation that was in fact an extension of the law on sickness insurance of workers of 1912, the sickness insurance covered workers employed at the enterprises (inclusive of craft and construction businesses) that employed at least five workers on a permanent basis². Because of different conditions of work, and due to chaos caused by revolution, the new regulation did not cover employees of the state owned enterprises, railways, agricultural workers and office workers of commercial partnerships³. To compare the level of differences and the scale of backwardness of Russia⁴ in terms of legislation concerning social insurance, one shall use the data regarding (font) the world leader of reforms and social legislation, namely Germany of that time. A historian Piotr Szlanta states that the Second Reich allocated as much as 3% of its GDP for social insurance in 1913⁵. The Act on Sickness Insurance For Workers was implemented there in 1883, the first industrial courts were implemented in 1890, and a year later working hours of children, minor and women were limited⁶. Such data show the scale of neglect as regards insurance cover for workers.

Conclusion

As it is noticed by a German researcher Michal Reiman, after the so called military putsch of General L. Kornilov, the events in Russia evolved towards the “plebeian revolution”⁷. Social pressure and dissatisfaction as well as radicalization of public feeling were hard to stop with political promises. The revolutionary process was accelerating. It was characterised with increasing expectations as regards democratization and social security while the country faced economic crisis⁸ and demise of the state

¹ С.М. ШВАРЦ, Социальное страхование в России в 1917–1919 годах. New York 1968, с. 50.

² *Ibidem*, p. 52.

³ *Ibidem*, p. 53-54.

⁴ In general, serious problems with social insurance in Russia existed not only before 1917, but remained in Soviet Russia until 1970s. А.В., МОРОЗОВ, Социальное страхование в теории и практике большевизма // Наука. Мысль: электронный периодический журнал, 2017. №1-2, с. 38–39.

⁵ P. SZLANTA, Początki państwa opiekuńczego w Niemczech [Beginnings of the Welfare State in Germany] // Mówią Wieki [“The Ages Speak” monthly] 2017, no. 5, p. 53.

⁶ *Ibidem*.

⁷ M. REIMAN, About Russia, Its Revolutions, Its Development and Its Present. Frankfurt am Main 2016, p. 18. According to M. Reiman, the events of the 1917 March Revolution resulted from two parallel, concurrent phenomena and processes, namely, civic and plebeian revolutions that were determined by such factors as the level of economic development, civic education and relationships within the society.

⁸ А.И. ШИНГАРЕВ, Финансовое положение России. Петроград 1917, с. 3-4., *ibidem*, Финансы России во время войны. Петроград 1917, с. 19-20.

structures¹. Only decisive actions taken by central authority could relieve the political and social stress².

Numerous authors draw attention to the fact that the Provisional Government decided to implement certain reforms of political nature (including, but not limited to, announcement of full civil and political rights, amnesty, preparations for elections), but resigned from key reforms in the social and economic field³. It resulted from its nature and declarations that were formed at the end of February and beginning of March 1917 and which assumed that the main reforms should be put off until the All Russian Constituent Assembly is convened⁴.

Analysing the activities of the Provisional Government concerning working class reforms, it shall be stated that it was more acting “like an intermediary among various social groups”⁵, remaining impartial, which was not good for solving more and more fierce social conflicts. It certainly was one of the reasons why it was terminated. However, we cannot forget about activities and widespread analytical, statistical, conceptual and legislative works undertaken by the Provisional Government in difficult conditions prevailing in 1917 that were aimed at execution of its revolutionary visions of changes in the field of the working class relations.

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² *Ibidem*, p. 293.

³ Р.Т. ЛАТЫПОВ, *Государственное строительство антисоветских правительств в годы гражданской войны в России (1918–1920)* // *Падение Империи, революция и Гражданская война в России*, Москва 2010, с. 145.

⁴ M. SADŁOWSKI, *Rewolucja 1917 r. w Rosji...* [1917 Revolution in Russia...], *op. cit.*, pp. 292–293.

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PRIVATE-PUBLIC COERCION IN CIVIL LAW

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Abstract: The article is devoted to the means of civil coercion which are applied for the interests of the individual, but on the initiative of power public authority – of the court, without statement of the interested party. It is proposed to call such sanctions as means of private and public coercion which exists in civil law along with the private coercion applied only for the benefit of the individual, but exclusively at their initiative. The conclusion is that such measures have not received appropriate normative formulation in Russian legislation, and appropriate development in legal doctrine. Their specificity lies in the presence of signs of both public and private coercion. It is proved that private and public coercive measures can be used only within protective coercion, i.e. in committing the offense as a negative reaction to it. At the same time the fault of the offender shall be recognized as a requirement for the application of private and public coercion. The assignment of such measures to the sphere of civil regulation causes action of a presumption of guilt of the offender and a possibility of application of all arsenal of the civil coercion mechanism, including a limitation period, rules of calculation of the size of sanction and a possibility of its reduction.

Keywords: legal coercion, civil coercion, private coercion, public coercion, private-public coercion, protective coercion.

The coercion is directed to make the person to commit undesirable actions, which go against their wishes, to restrict their free will in general. It is important to distinguish non-legal and legal coercion. Non-legal coercion is a form of infringement¹. In civil circulation non-legal coercion may occur, for example, in case of committing invalid

¹ SUSLOPAROV I.A. Extortion in Russian Law: retrospective analysis // Herald of Perm University – science journal. 2015. Issue 4. P. 114 (110-116).

deals or exceeding self-defense measures. In this context “coercion in civil law” and “civil coercion” are distinguished¹.

Legal coercion is exercised within the terms of law. It is no coincidence that the problem of free will and legal coercion is one of the main issues in modern jurisprudence²; the category of “coercion” has a fundamental, methodological value for legal science.

The problem of coercion is developed at rather high level in legal theory and in public sciences³. However results of the relevant researches concern only the question of public (state) coercion which is exercised by competent authorities and public officials, on their own initiative, on the basis of a power under law, and such coercion is in public interest. In general, the state coercion is an expression of authoritative activity of the state, manifestation of its public status. However, it is difficult to agree with the opinion that the monopoly for lawful coercion implementation belongs only to the state⁴. We believe that it is necessary to change a view on legal coercion as the exclusive right of competent public authorities and their public officials. The modern legislation provides a large number of coercive measures which can be applied by powerless (private) subjects. Individuals are also capable to influence the free will of other individuals legitimately within civil relationship. And in this context the issue of non-state private legal coercion existence has to be raised.

Unfortunately, the theory of civil coercion, having a high degree of branch specifics, is in the very initial state. Though, according to a fair remark by N.A. Barinov, “a coercion problem in civil law is one of the most important problems of the theory that requires due attention and corresponding development at the monographic and dissertation level and introductions in science and practice as an innovation”⁵.

First of all, it is vital to distinguish private and public coercion. At present, for example, the state registration of transfer of the rights of ownership, the state registration of legal entities and individual businessmen, licensing, the compulsory cessation of the legal entity, and the compulsory cessation of an ownership right are regarded as public elements in civil law, as civil coercion⁶.

¹ BEREZNOV R.JU. The correlation between the concepts of “coercion” and “compulsion” in civil law // Management in social and economic systems. Minsk, 2017. № 26. P. 96. (in Russian).

² BAUMGARDNER P. The Fundamental Contradiction Redux? Liberty, Coercion, and American Legal Development // Law and social inquiry-Journal of the American Bar Foundation. Sum 2017. Vol. 42. Issue. 3. P. 924-942; Force of law reaffirmed: Frederick Schauer meets the critics; ed. by C. BEZEMEK, N. LADAVAC. Series: Law and Philosophy Library. 2016. Vol. 117; TRETAKOV S. The concept of legal coercion and power-conferring legal regimes // Russian Law Journal. 2017. Vol. 1. P. 33-56.

³ KUDIN F.M. The theoretical basis of coercion in Soviet criminal procedure: Thesis Diss. Doctor in Legal Science. Sverdlovsk, 1987; NOKHRIN D.G. State coercion in civil proceedings: Thesis Diss. Candidate in Legal Science. M., 2006; RAZGIL'DIEVA M.B. Theory of financial and legal coercion and the spheres of its application: Thesis Diss. Doctor in Legal Science. Saratov, 2012. (in Russian).

⁴ POTACS M. Does Law Without Force Exist? // Force of law reaffirmed: Frederick Schauer meets the critics; ed. by C. Bezemek, N. Ladavac. Series: Law and Philosophy Library. 2016. Vol. 117. (P. 121–128).

⁵ BARINOV N.A. The problem of coercion in civil law // Civil Law. 2012. № 1. P. 6. (in Russian).

⁶ See: NIYAZOVA A.N. Limits and Limitations of the Title to Land: Analysis of Approaches // Herald of Perm University – science journal. 2016. Issue 1. P. 208-215.

Of course, such coercion is closely connected with civil turnover, ownership relations, business activity and other traditional spheres of civil regulation. Moreover, measures of such coercion are quite often provided in civil legislation acts. However none of this cancels the public nature of such coercion as it is implemented on the initiative and in the interest of state and society in general.

Private coercion is applied in the interest of the personified, individualized person and purely on their initiative. It has to be the subject of civil science. In this regard any coercive intervention of the state as of the powerful subject in “private affairs of civil turnover participants” cannot be recognized as civil coercion¹.

The civil law is based on the principle of optionality: the citizens (natural persons) and the legal entities acquire and exercise their civil rights of their own free will and in their own interest (paragraph 1, item 2 of Art. 1, Civil Code of the Russian Federation). According to this principle subjects of civil law exercise the rights they are entitled to at their discretion, including the right of protection of these rights.

The right of defense itself, including via the application of coercive measures, can be exercised both in jurisdictional (by means of competent authorities and public officials), and in non-jurisdictional (without such assistance, independently) forms. But this coercion occurs on the initiative and in the interest of the coercing person. The majority of coercive measures are private in civil law. The civil law allows an individual to limit the will of other individual in their private interests legitimately, without leaving a freedom to choose a pattern of behavior. As V.F. Yakovlev rightly noticed, “the empowering nature of coercion has two aspects in civil law: the first one is that coercion is used generally as means of protection of the subjective rights; the second aspect is that the use of means of protection depends on the will of the injured person and represents an individual’s ability which is established by the law, i.e. his right”².

At the same time in the Russian legislation it is possible to find coercive measures which are applied by a public body (court), without will or statement of the victim – the individual, but in the private interests of that individual, and their nature is not defined in the legal doctrine.

Such coercive measures may include, for example:

a) penalty for the violation of the voluntary meeting consumer requirements (item 6 of Art. 13, Law of the Russian Federation on Consumer Rights Protection);

б) recovery of property damage by the judge simultaneously with imposition of administrative punishment (item 1 of Art. 4.7, Code of Administrative Offences of the Russian Federation);

¹ KARHALEV D.N. Civil law coercion // Bulletin of the Ufa Law Institute of the Ministry of Internal Affairs of Russia. 2014. № 1. P. 26-30. (in Russian).

² JAKOVLEV V.F. Civil-law method of regulation of public relations. Sverdlovsk, 1972. P. 117–118. *See also:* JAKOVLEV V.F. Coercion in Civil Law // Problems of modern civil law: a collection of articles. M.: Statut, 2000. P. 210–222. (in Russian).

В) elimination from civil circulation and destruction at the expense of the violator of the tool, equipment or other means which are mainly used or intended for the infringement of the exclusive right to the results of intellectual activity and the means of identification (item 5 of Art. 1252, Civil Code of the Russian Federation).

The specifics of these coercive measures are that they are implemented at the initiative of competent authorities or public officials (without will of the victim), but in the interest of the individual. Taking into account the existence of such sanctions, it is impossible to agree with the opinion that “the use of coercion in civil law ... is entirely dependent on whether the person, who was injured from tort, submitted a claim to apply it”.¹ We believe that the civil science can raise the question of existence of private and public coercive measures along with private ones.

Unfortunately, the emergence of such coercive measures considerably outstripped development of the legal theory in legislation on this matter which still does not know the answer to the question about the signs of their implementation mechanism.

First of all, the law does not give a clear reference to the possibility of application of such civil coercion measures without the will (statement) of the injured person. Nonetheless, under the paragraph 2 of item 2 Art.1 of the Civil Code of the Russian Federation, civil rights may be restricted on the basis of the federal law and solely insofar as it is necessary for the purposes of protecting the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, defense of the country and state security.

At present we can see the possibility of application of such coercive measures without a petition of the claimant (victim) only in the acts of judicial interpretation or in commentarial literature.

Thus, in terms of the penalty for the violation of the voluntary meeting consumer requirements, the Supreme Court of the Russian Federation clarified: “If the court grants the consumer’s claims for violation of their rights established by the Law on Consumer Rights Protection which were not satisfied voluntarily by the producer (the contractor, the seller, authorized organization or the authorized individual-entrepreneur, the importer), the court imposes a fine on the defendant in favor of the consumer regardless of whether such a claim was submitted to court or not (paragraph 6 of article 13 of the Law)”².

Regarding the elimination from civil circulation and destruction of the tool, equipment or other means which are mainly used or intended for the infringement of the exclusive right to the results of intellectual activity and the means of identification (item 5 Art. 1252 of the Civil Code of the Russian Federation), the highest judicial authority

¹ Grazhdanskoe pravo: uchebnik: v 2 t. [Civil Law: textbook: in 2 volumes] / Ed. by B.M. GONGALO. M.: Statut, 2016. Volume 1. P. 56. (in Russian).

² Resolution of the Plenum of the Supreme Court of the Russian Federation of June 28, 2012 № 17 “On consideration by courts of civil cases on disputes over protection of consumer rights” (item 46) // Bulletin of the Supreme Court of the Russian Federation. 2012. № 9.

clarified that this measure can be applied “also in the absence of the corresponding statement of the holder of the exclusive right” (Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 5, Plenary Session of the Supreme Arbitration Court of the Russian Federation No. 29 of 26th March 2009 “About some issues arising from the implementation of Part 4 of the Civil Code of the Russian Federation”). Furthermore, the view of law-enforcers on this matter is not shared by everyone in the legal doctrine. Thus, it is noted in one of commentaries to the Civil Code of the Russian Federation that the elimination from civil circulation and destruction of the tool, the equipment or other means which are mainly used or intended for the infringement of the exclusive right to the results of intellectual activity and the means of identification “are possible solely upon request from the rights holder, but not on the initiative of the court”.¹

Concerning the recovery of property damage simultaneously with imposition of administrative punishment, commentators come to the conclusion that “the decision of compensation of property damage can be made by the judge both independently and upon petition of the complainant”.²

In our opinion, taking into account the permissible orientation of civil regulation and other principles on which the private law is based, the possibility of use of civil sanctions by the state without initiative of the person, but in their private interests has to be directly and unambiguously specified in the law.

It is also necessary to note that in the court practice in most cases claimants made the statement (imposed a claim) about application of private and public coercive measures³. However, there are also cases in which the decision on application of coercive measures in favor of the claimant was made on the initiative of the court. Thus, citizen T. sued the LLC over the exaction of a forfeit for delay in a transfer of the apartment in the apartment building and for the compensation of moral damage. The court, having partially met the stated claim of the consumer, also exacted penalty for the refusal of the voluntary meeting claimant's requirements.⁴

The greatest difficulties are raised by the question of what legal principles should be used at application of private and public coercive measures. Such measures have

¹ Commentary on the Civil Code of the Russian Federation, Part Four (itemized) / Ed. by L.A. TRAHTENGERC. M.: “KONTRAKT”, “INFRA-M”, 2009. P. 191. (in Russian).

² AMELIN R.V., BEVZJUK E.A., VOLKOV Ju.V., VOROBEV N.I., VAHRUSHEVA Ju.N., ZHEREBCOV A.N., KORNEEVA O.V., MARCHENKO Ju.A., STEPANENKO O.V., TOMTOSOV A.A. Commentary on the Code of Administrative Offenses of the Russian Federation of December 30, 2001 №195-FZ (itemized) / prepared for SRS “ConsultantPlus”, 2014. (in Russian).

³ Decree of the Court on Intellectual Rights of December 13, 2017 №C01-1011/2017 on the case №A40-2659/2017; Decree of the Court on Intellectual Rights of December 9, 2015 №C01-502/2015 on the case №A56-83807/2014; Decree of the Seventeenth Arbitration Appeal Court of June 27, 2017 №17АП-6194/2017-AK on the case №A60-62337/2016; Appeals definition of the Perm Regional Court of October 9, 2017 on the case №33-10881/2017.

⁴ Appeals definition of the Perm Regional Court of July 5, 2017 on the case № 33-6902/2017.

attributes of both public, and private law. In addition the mechanism, the order, conditions, application terms of coercion, responsibility measures included, are different in these subsystems of the right. The opinion on this matter is also formed mainly by the highest judicial bodies. However in their interpretation they try to remain within the dichotomy “private or public coercion” therefore they do not manage to create a uniform position.

For example, in item 6, article 13 of the Consumer Rights Protection Law it is provided that if the court satisfies the claim of the consumer established by law, the court exacts a fine of fifty percent of the amount awarded by the court in favor of the consumer from the manufacturer (executor, seller, authorized organization or authorized individual entrepreneur, importer) for non-compliance with the consumer’s requirements voluntarily.

Subsequently, the Supreme Court of the Russian Federation qualified this “fine as a measure of responsibility for improper performance of an obligation”: the fine provided for in article 13 of the Consumer Rights Protection Law of the Russian Federation has a civil nature and is essentially a measure of responsibility provided by law for improper performance of obligations. This means that it is a form of penalty provided for by law”¹.

Obviously, with this approach to recovering the fine, the rules on civil liability should be applied: in particular, on statute of limitations, failure to account for entrepreneur’s fault (article 401), or amount restrictions (article 333).

Another position on this issue was taken by the Constitutional Court of the Russian Federation. The Court considers this fine to be “an independent kind of responsibility”, which exists “along with civil liability”. “As the Constitutional Court of the Russian Federation repeatedly pointed out in its decisions, in view of the special social significance of consumer protection in the sphere of trade and services and the need to ensure the proper quality of goods, the legislator along with civil liability of the manufacturer (seller, authorized organization or authorized individual entrepreneur, importer) envisaged in item 6 of article 13 of the Consumer Rights Protection Law of the Russian Federation a separate type of responsibility in form of a fine for violation of the voluntary order to satisfy the consumer’s claim as less protected party of retail sale contract, that has a public character (item 2 of article 492 of the Civil Code of the Russian Federation)...”².

With this approach, the penalty in question is not a measure of civil law coercion. And since the fine is imposed in a mandatory manner by a public authority (the

¹ Definition of the Supreme Court of the Russian Federation of October 29, 2013 № 8-KG13-12.

² Definition of the Constitutional Court of the Russian Federation of October 17, 2006 № 460-O; Definition of the Constitutional Court of the Russian Federation of December 16, 2010 № 1721-O-O; Definition of the Constitutional Court of the Russian Federation of July 14, 2011 № 946-O-O; Definition of the Constitutional Court of the Russian Federation of November 21, 2013 № 1836-O; Definition of the Constitutional Court of the Russian Federation of April 22, 2014 № 981-O.

court), regardless of the will of the consumer, by its sectoral nature, it “is drawn” to the administrative law and the mechanism of bringing to administrative responsibility is applied, including such elements as the terms of [attraction – imposing liability?], guilt as compulsory condition, or circumstances, excluding, mitigating and aggravating responsibility. It should be noted that the Constitutional Court of the Russian Federation considers it necessary to take into account the fault while applying item 6, Art. 13: “... the fault is a necessary element of the general concept of the offense, the presence of this fault is a prerequisite for the imposition of legal liability is in all the branches of law, unless otherwise directly and unequivocally established by the legislator ... The item 6 of the article 13 of the Consumer Rights Protection Law does not contain any exceptions to the general requirement specified above regarding the elements of the offense”¹.

However, if this fine is considered to be a civil coercion, in item 3 of article 401 of the Civil Code the legislator established “directly and unambiguously” that persons engaged in entrepreneurial activity regardless of the existence of guilt.

It is obvious that the recognition of guilt as a mandatory condition of application of private-public coercion should become one of its particular features, since the use of such coercion is initiated by the authority – the court. This recognition of guilt as a necessary element of the offense is due precisely to the “public legal” part of the coercion under consideration.

But in public sector of law there is a presumption of innocence i.e. the guilt of the offender is proved by the forcing person. In civil law, guilt is presumed, and its absence is proved by the forced person. The presumption of guilt in civil law is explained by the fact that “the creditor does not have data on the activities of the debtor and therefore the duty to prove the guilt of the debtor would be an insurmountable obstacle to hold the latter accountable”².

A question which arises is how should the issue of proving guilt (or innocence) under private-public coercion be resolved? Especially with the fact that the application of such coercion takes place in a civil proceeding. According to part 1 of article 56 of the Code of Civil Procedure of the Russian Federation, each party must prove the circumstances to which it refers as the grounds for its claims and objections, and in private-public coercion, the court is on the claimant’s side³.

Although private-public sanctions are applied on the initiative of the court, they are implemented in the sphere of private law regulation, and they are measures of compulsory response to civil law violations. For example, it is difficult for court to prove the fault of the seller or producer in evading the voluntary order of satisfying

¹ Definition of the Constitutional Court of the Russian Federation of December 16, 2010 № 1721-O-O.

² SHEVCHENKO G.N. Guilt as a condition of civil liability in Russian Civil Law // *Modern Law*. 2017. № 3. P. 67. (in Russian).

³ KRASHENINNIKOV P.V., RUZAKOVA O.A. Commentary on the Civil Procedure Code of the Russian Federation // *Herald of civil procedure*. 2014. № 6. P. 71-120. (in Russian).

the consumer's requirements due to a number of reasons. Firstly, the circumstances that indicate the guilt or innocence are within the sphere of the activities of the forced person. Secondly, the court is not the authority that is capable of searching for such circumstances. Thirdly, the court is objectively deprived of the opportunity to prove anything during the consideration and the resolution of cases. It should also be agreed that in general "the presumption of guilt not only ensures the interests of the victim, but also distributes the burden of proving the guilt, and significantly simplifies the civil process in cases of bringing to civil liability"¹.

Therefore, in our opinion, in applying private-public coercion guilt should be presumed, and this is the effect of its "private-legal" part.

We can find confirmation of this conclusion also in legal positions of the Constitutional Court of the Russian Federation. In particular, clarifying the application of part 1 of the article 4.7 of the Code of Administrative Offenses of the Russian Federation, the Constitutional Court of the Russian Federation explained: "A person who has been brought to administrative responsibility participates in such a dispute not as a subject of public law, but as a subject of private law and can prove in civil proceedings procedure both their innocence and the damage done to them"².

It should also be noted that, in a broad sense, coercion can be both regulative and protective. For example, in civil law, such actions as control and supervision (for example, in contract agreement control over the work of the contractor), and the need to obtain approval or consent for certain transactions limits the free will of a person.

Such coercion has an exclusively regulatory nature, and it takes place outside of any offences. In this regard, it is difficult to agree with the opinion expressed in the civil literature that "coercion can be implemented only in a protective legal relationship as regulatory law is not able to protect itself: only protective law has the ability to force by which an authorized person may satisfy his interest without or against the will of another person as a result of applying coercive measures against them"³. This approach was formed under the influence of the concept of legal coercion as a measure exclusively for unlawful behavior: "the law is protected and provided primarily by the state, and in case of violation of the requirements contained in the norms of law, state coercion is applied"⁴.

¹ GODOVALOVA M.N. The concept and meaning of presumption of guilt in civil law // Herald of Perm University – science journal. 2013. № 4. P. 141 (P. 139–146). (in Russian).

² Definition of the Constitutional Court of the Russian Federation of June 16, 2009 № 9-P "On the case on verification of the constitutionality of a number of provisions of articles 24.5, 27.1, 27.3, 27.5 and 30.7 of the Code of Administrative Offenses of the Russian Federation, item 1 of article 1070, paragraph three of article 1100 of the Civil Code of the Russian Federation and article 60 of the Civil Procedural Code of the Russian Federation in connection with complaints of citizens M.Yu. Karelin, V.K. Rogozhkin and M.V. Filandrov" // Bulletin of the Constitutional Court of the Russian Federation. 2009. № 4.

³ TKACHEVA M.A. Coercion in Russian Civil Law: Thesis Diss. Candidate in Legal Science. Saratov, 2016. P. 80. (in Russian).

⁴ SUSLINA I.A. Philosophical-legal analysis of the correlation of concepts "right", "state", "power" and "coercion" // History of State and Law. 2014. № 6. P. 3-4. (in Russian).

However, in civil law, a compulsory action can be carried out not only within the protective legal relationship. Certainly, regulatory law is unable to defend itself, but it can ensure its smooth implementation without being disrupted, and with such provision there are also elements of coercion. This approach to coercion corresponds more also to the concept of legal socialization as “the process whereby people develop their relationship with the law via the acquisition of law-related values, attitudes, and abilities”¹, that focuses not only on the use of force and punishment, but also on building consensus in execution of the requirements of law. In this case, legal coercion can be preventive and reactive.

Private-public coercion is always protective, because it arises as a reaction to a violation of subjective law and is implemented as a sanction for the civil offense.

The legal doctrine has yet to reveal all the reasons for the emergence of private-public coercion in the legislation. However, even today it is obvious that, despite the application of such measures in the interests of a particular individual, they arouse a great public, socially significant interest (full protection of rights of the consumer as a weak party in legal relations, prevention of further use of tools, equipment or other means to commit violations of exclusive rights to the results of intellectual activity and means of individualization, procedural savings in the recovery of property damage simultaneously with the imposition of administrative penalties). Measures of private-public coercion are largely due to state paternalism, in which the authoritative subject takes care of the right to defend the plaintiff, patronizes a particular victim, while not forgetting about public interest. Certainly, such “protection”, which limits the free will of a person, must be regulated in detail by law, which expressly and unequivocally establishes the conditions for the use of private-public coercion.

In this regard, it is very important that the application of private-public coercion is possible only in court, while other jurisdictional bodies and officials, and even more non-jurisdictional institutions, should not have such competence. This is due primarily to the fact that such coercion is exercised in a situation of restriction of the freedom of an individual to exercise the right to [protection – defence ?] at their own discretion.

Apart from that, it is important to establish that, since these private-public coercive measures are types of civil coercion, they are subject to the civil-legal mechanism for the application of sanctions, including in terms of the period of application (within the period of limitation), the calculation of their amount, or the possibility of reduction. For example, in respect of the amount of fine for failure to satisfy consumer claim voluntarily, the Supreme Court of the Russian Federation explained that its reduction “is possible only in exceptional cases when the penalty payable is clearly disproportionate to the consequences of the breached obligation, at the request of the respondent, indicating the reasons for which the court believes that reducing the amount of the fine is permissible”².

¹ TRINKNER R., TYLER T.R. Legal Socialization: Coercion versus Consent in an Era of Mistrust // ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE; ed. by J. HAGAN. 2016. Vol. 12. P. 417 (417-439).

² Resolution of the Plenum of the Supreme Court of the Russian Federation of June 27, 2013 №20 “On the application by courts of legislation on voluntary insurance of property of citizens” (item 45) // Bulletin of the Supreme Court of the Russian Federation. 2013. № 8.

Thus, in conclusion, we should note that in civil law there are measures of private-public coercion, which combine the signs of both private and public coercion. Even if they are used in private interest, they are used regardless of the victim's application. By fixing such measures, the legislator must clearly and unequivocally provide for the possibility and foundation for their application by the court, regardless of the victim's application. The public component of such coercive measures does not permit their application regardless of the offender's guilt, which must be presumed through the private legal component of this type of coercion. In general, they should be subject to a mechanism for imposing civil sanctions.

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COMMENTARIES

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PARTY CHOICE OF *LEX MERCATORIA* IN INTERNATIONAL COMMERCIAL ARBITRATION

DOI:

Abstract: *Lex mercatoria* is quite new and innovative concept of ‘law without state’ which proclaims a genuine freedom of private actors to create efficient rules they need. The freedom to choose applicable rules of law is based on the party autonomy principle. The article discusses practical application of *lex mercatoria* in international commercial arbitration in case of party choice. First of all, a brief overview of concept of *lex mercatoria* is given; it should be noted that theoretical views on sources of non-state law differs from the arbitration practice. The author examines the problems of effective choice of *lex mercatoria* as applicable rules of law for different sources, in various wordings, in cases of a priori and a posteriori agreements on the applicable law. A special chapter is devoted to the problem of negative (or implicit choice) of *lex mercatoria* where the attention is paid to the borderline between implicit choice of non-state law and absence of any choice of law.

Keywords: international arbitration, *lex mercatoria*, party choice of applicable law, negative choice of law

I. Introduction

The article is devoted to practical application of *lex mercatoria* in international commercial arbitration practice concerning an effective party choice of such rules as law applicable to disputes.

Lex mercatoria is a relatively new concept emerged in legal science in the second half of the twentieth century with the works of Schmitthoff and Goldman who have founded the basis for this theory.

The paper does not seek to scrutinize deep philosophical disputes on the nature of *lex mercatoria*, though it may be understood in quite different ways. Thus, *lex mercatoria* can be defined as ‘a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law,’¹ a ‘regime for international trade, spontaneously and progressively produced by the *societas mercatorum*,’² ‘a single autonomous body of law created by the international business community,’³ ‘a hybrid legal system finding its sources both in national or international law and in the vaguely defined region of general principles ... called “Transnational law”⁴ – but also as ‘[the] phenomenon of uniform rules serving uniform needs of international business and economic co-operation,’⁵ or as consisting of ‘all law stemming from or under the influence of transnational sources of law and regulating acts or events that transcend national frontiers.’⁶

The differences between ‘purists’ and ‘autonomists’ are left out of the scope of the discussion as well, as it requires a separate study. Discussions on the basic approaches to ascertainment of *lex mercatoria* (collation of rules vs. *ad hoc* determination approach) will not be discussed here either; it should be just briefly mentioned that there are two basic approaches (codification and *ad hoc* determination), and arbitrators tend to apply the second one.

The first approach suggest a ‘creeping’ codification (term of Professor Berger⁷) of general principles of international commercial law, i.e. dynamic reestablishment of the general principles of *lex mercatoria* in the form of lists. The most famous of them was prepared by Lord Mustill,⁸ and includes 20 principles. Another well-known list was

¹ BERTHOLD GOLDMAN, *The Applicable Law: General Principles of Law – the Lex Mercatoria, Contemporary Problems in International Arbitration*, Julian Lew ed. 116 (1986) available at <https://www.trans-lex.org/112400/> (accessed 04 January 2018).

² BERTHOLD GOLDMAN, *Introduction in Lex Mercatoria and Arbitration*, as cited in Nikitas E. Hatzimihail, *The Many Lives-and Faces-of Lex Mercatoria: History as Genealogy in International Business Law*, Law and Contemporary Problems 170 (2008).

³ BERNARDO CREMADES, STEVEN PLEHN, *The New Lex Mercatoria and the Harmonization of the Laws of the of International Commercial Transactions*, as cited in Hatzimihail, above n. 2, 170

⁴ HORACIO GRIGERA NAÓN, in *The Transnational Law of International Commercial Transactions* as cited in Hatzimihail, above n. 2, 170.

⁵ NORBERT HORN, *Introduction in Transnational Law* as cited in Hatzimihail, above n. 2, 170.

⁶ NORBERT HORN, *The Use of Transnational Law in the Contract Law of International Trade and Finance*, as cited in Hatzimihail, above n. 2, 170.

⁷ KLAUS BERGER, *The creeping codification of the Lex Mercatoria* (1999).

⁸ LORD MICHAEL MUSTILL, *The New Lex Mercatoria: the First Twenty-Five Years*, J. Int. Arb. 86, 109 (1988).

made by Professor Berger and comprises 78 rules or principles, a number of which are shared with Lord Mustill's list.

The role of *lex mercatoria* is different in litigation and arbitration. National courts, in principle, do not recognize transnational law as possible applicable law. Moreover, party choice in favor of non-state law will also either be considered invalid or, in case of reference to 'general principles of law' these principles will be applied as a part of national legal system. International trade usages may take force as a part of contract, to allow which their implementation into the contract should be made.¹ However, when being interpreted in the light of domestic national law, they cannot be really considered as *lex mercatoria* due to the lack of international uniformity. Thus, it is still early to speak about the existence of *lex mercatoria* in litigation.

Meanwhile, arbitration, being a wider representation of the principle of party autonomy, by its nature tends to be more flexible and innovative. Thus, the same institutions (such as International Chamber of Commerce) may represent interests of international commerce and produce secondary sources of non-national law in relation to international business actors, and settle disputes in international commerce. Non-recognition of *lex mercatoria* in such circumstances would be quite illogical. It is the international business community, that move transnational law forward and are interested in its application.

Moreover, arbitration is more widely spread method of settling international business disputes comparing to litigation. Thus, research in the frame of arbitration is more practicable in this regard as well.

II. Sources of *lex mercatoria*: theoretical and practical views

Nevertheless, a few words should be said on the sources of *lex mercatoria*. Many theoretical researches have been run on the topic, for example, Professor O. Lando has elaborated the following (non-exhaustive!) list of sources of non-state law (hereinafter the terms 'non-state law' and *lex mercatoria* are used as synonyms):

- A. Public International Law;
- B. Uniform Laws;
- C. The General Principles of Law;
- D. The Rules of International Organisations;
- E. Customs and usages;
- F. Standard Form Contracts;
- G. Reporting of Arbitral Awards.²

¹ ICC study, *Developing neutral legal standards for international contracts. A-national rules as the applicable law in international commercial contracts with particular reference to the ICC model contracts*, <http://store.iccwbo.org/content/uploaded/pdf/Developing%20neutral%20legal%20standards%20for%20Intl%20contracts.pdf> (accessed 04 January 2018)

² *Ibid.*

However, arbitral tribunals have their own understanding of scope and sources of *lex mercatoria* which differs from the given above. Thus, in the ICC case 9875 the tribunal defined *lex mercatoria* as ‘rules of law and usages of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the decisions of international arbitral tribunals and some institutions like UNIDROIT and its recently published Principles of International Commercial Contracts.’¹

In other cases tribunals make an implicit difference between ‘genuine’ and ‘secondary’ sources: general principles of law and trade usages constitute the first one, while all the others, ‘written’ and ‘codified’ sources (i.e. model laws such as the UNIDROIT Principles, for instance) are secondary sources which may contain general principles of law and trade usages or may not (not for all the provisions of the secondary sources the status of widely recognized general principles or trade usages can be granted; here, case by case examination should be carried out).

The most ‘popular’ written instruments among the arbitrators where the ‘genuine *lex mercatoria*’ can be found are the UNIDROIT Principles of International Commercial Contracts and Convention on Contracts for the International Sale of Goods. Principles of European Contract Law (PECL) are also an active source of genuine *lex mercatoria* though it may be considered a less widely used instrument (an example of application – arbitral award of Netherlands Arbitration Institute² where the Tribunal applied PECL as a more definite and precise source, while the UNIDROIT Principles could not provide the answer to the matter in question).

Tribunals do not make references to other arbitral awards as a source of *lex mercatoria*, though, the existing arbitral practice cannot have any effect on the future awards.

Standard form contracts in the narrow literal sense, again, are more about theory rather than practice: tribunals do not consider them as an expression of general principles of law or trade usages and understand their role merely as a way to facilitate international business practice.

However, such instruments as Incoterms rules, or Uniform Customs and Practice for Documentary Credits can be considered as a part of ‘standard form contracts’ section of *lex mercatoria* as they become ‘active’ only when parties have explicitly agreed on their application (i.e. practically implemented them in their contracts). By its nature, this kind of instruments is a secondary source of the ‘genuine’ trade usages of international commercial practice rather than general principles of international commercial law. Thus, unlike scholars arbitrators understand *lex mercatoria* in more restrictive way; the scope of this research in regard of sources of *lex mercatoria* is limited to a practical view of arbitration tribunals.

¹ ICC Case 9875 (1999), <http://www.unilex.info/case.cfm?pid=2&id=675&do=case> (accessed 04 January 2018)

² Arbitral award of Netherlands Arbitration Institute (2005), <http://www.unilex.info/case.cfm?pid=1&do=case&id=1235&step=Abstract> (accessed 04 January 2018)

III. *A priori* agreement on application of *lex mercatoria*

Non-state legal instruments can be chosen by parties as law governing their contract on the basis of the principle of party autonomy: 'the arbitrator must apply the law or standard selected by the parties provided that it is considered compatible with any applicable domestic law. In the event of inconsistency, it should be only a clash with *ordre public international* or mandatory rules of domestic law applicable to international transactions that would exclude application of the parties' chosen law'.¹

Lex mercatoria may be chosen by the parties as a governing rule of law *a priori* (by expressing such will in a contract), as well as *a posteriori* after the dispute has already arisen, and may be defined as principal or supplementary rules of law applicable to the dispute. Hereinafter, 'party choice' means 'party choice in favor of *lex mercatoria*'.

Speaking on contractual agreement on application of *lex mercatoria*, it should be said that the mechanism of implementation of such clause varies from instrument to instrument.

Thus, the preamble to UNIDROIT Principles 2010 provides two options: the Principles can be applied when the parties in the contract refer to the Principles directly ('The parties have agreed the contract be governed by UNIDROIT Principles,' for instance), or by inserting more vague wording as 'The contract to be governed by general principles of law, the *lex mercatoria*' or the like.² Actually, in the second case it is the arbitration court that will determine the certain instrument of *lex mercatoria* to be applied.

There is no unequivocal understanding of relations between UNIDROIT Principles and *lex mercatoria*, between *lex mercatoria* and trade usages. Both positive and negative arbitration practice can be found in this regard. Further details on this issue will be given below while discussing *a posteriori* agreement, as usually parties opt for non-state law after a dispute have already arisen.

In May 2013, the Governing Council of UNIDROIT adopted standard clauses³, grouped into four categories in accordance with the role of the *lex mercatoria* that they can play:

- (i) to choose the UNIDROIT Principles as the rules of law governing the contract (see Model Clauses No. 1, *infra* P. 4 et seq.),
- (ii) to incorporate the UNIDROIT Principles as terms of the contract (see Model Clause No. 2, *infra* P. 14 et seq.),
- (iii) to refer to the UNIDROIT Principles to interpret and supplement the CISG when the latter is chosen by the parties (see Model Clauses No. 3, *infra* P. 16 et seq.), or

¹ ANTHONY C. SINCLAIR, *Using the UNIDROIT principles of international commercial contracts in international commercial arbitration*, International Arbitration Law Review (2003). Westlaw database.

² UNIDROIT Principles, Preamble (Purpose of the Principles), <https://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (accessed 04 January 2018).

³ Unidroit, Model Clauses for the Use of the Unidroit Principles of International Commercial Contracts, Unidroit, Rome, 2013, <https://www.unidroit.org/english/principles/modelclauses2013/modelclauses-2013.pdf> (accessed 4 January 2018).

(iv) to refer to the UNIDROIT Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law (see Model Clauses No. 4, *infra* P. 20 et seq.).¹

The ‘strongest’ clauses are from the second group (when the parties choose to incorporate the principles into the contract): in the strict sense, it is not even a choice of law, but a part of contract which is the primary source of regulation of the parties’ relations due to the principles of party autonomy.

The first group of clauses (when the parties choose the UNIDROIT Principles as the rules of law governing the contract) is sufficient when all the issues of the dispute are covered by the Principles. However, the issues staying outside of their scope may raise questions on the supplementary law: should it be national law defined by conflict of law rules or other sources of *lex mercatoria*? To exclude such uncertainty, the parties should choose supplementary law (state or non-state) as well.

The third group of clauses allows parties to express their will to make the CISG (which they have chosen as governing law) interpreted in the light of the UNIDROIT Principles. Though these instruments have different scope of regulation (international commercial contracts for the Principles v. international B2B contract sales of goods), UNIDROIT Principles as more detailed instrument can provide the answer when the CISG cannot. Quite often arbitration courts apply these two instruments together.

The fourth group of clauses is the most ‘popular’ among the business actors: the parties usually choose the Principles as supplementary to national law source. More often parties decide to apply *lex mercatoria* as supplementary rules of law, while opting for national law as a principal source. This can be explained by incompleteness of non-state law: sometimes it is difficult to find a sufficiently defined source which covers all the issues of the contract or the dispute arisen between the parties.

Thus, in an *ad hoc* arbitration held in Paris in 1997, the parties made an *a posteriori* agreement on the applicable law, stating that the tribunal should apply Russian law, “if necessary supplemented by the UNIDROIT Principles”²

PECL applies a slightly different approach compared to UNIDROIT Principles (Art. 1:101 (2-3)):

‘(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.

(3) These Principles may be applied when the parties:

(a) have agreed that their contract is to be governed by “general principles of law”, the “*lex mercatoria*” or the like; or

(b) have not chosen any system or rules of law to govern their contract.

(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.³

¹ *Ibid*, 2.

² Unpublished *ad hoc* award of April 4, 1997, Paris., as cited in Sinclair, above n.13.

³ Principles of European contract law, <https://www.trans-lex.org/400200> (accessed 04 January 2018).

Thus, PECL may be incorporated into the contract, in case of a 'vague' party choice in favor of *lex mercatoria* (and, logically – when the parties chose the instrument itself); the PECL can be applied as principal (Art. 1:101 3(b)) or supplementary (Art. 1:101 3(c)) source of law. The text of the Principles is silent on the possibility of its application for interpretation of CISG, however, nothing precludes arbitral tribunals to refer to the PECL, and the practice confirms that.¹

CISG is an international public law instrument, and it does not provide instructions for parties who wish to refer to the Convention as *lex mercatoria source*. However, the direct reference to the CISG, as well as reference to 'general principles of law' or the *lex mercatoria* seems to be sufficient.

INCOTERMS seem unlikely to be applied as a result of reference to general wording, as it is not a codified set of international commercial practices but model contract terms and need to be explicitly incorporated into the contract. Moreover, not only the instrument should be chosen by parties, but also the certain Incoterms term.

UCP 600 applies only when the parties have expressly agreed the contract to be governed by the principles (which is expressly stated in the Art. 1 of the document).

Thus, specific instruments containing trade usages in specific business area are restricted in its application under the wide 'general principles' or '*lex mercatoria*' arbitration clause: they require direct and explicit agreement on their use. While instruments containing general principles of law and trade usages relevant to various commercial sectors can be invoked in the case of party agreement on the application of 'general principles of law, *lex mercatoria*, or so'.

Speaking on practical aspects of a priori agreement, the ICC Statistics for 2014 shows, however, that only 2% of a priori agreements on choice of law were made in favor of Non-State rules. UNILEX Database on application of UNIDROIT Principles shows similar attitude of contracting parties: in two cases only the parties agreed on application of UNIDROIT Principles to govern their contractual application (ICC cases No.11739 of 2002 and No.11880 of 2004). Moreover, in all these cases *lex mercatoria* was chosen as supplementary but not primary applicable rules of law.²

Therefore for the moment, commercial actors are not ready to opt for the application of non-State law as primary rules of law governing their relations. Some authors explain such attitude to *lex mercatoria* (on the example of UNIDROIT Principles) by insufficient awareness of the Principles (which seems quite doubtful), and by difficulties of their comprehending: 'This low proportion is due to various reasons. One of them is based on the fact that the UNIDROIT Principles are not yet sufficiently known in the international business community and counsel for these actors does not encourage them to choose them. Similarly, the large number of rules (even if the parties can expressly exclude them

¹ Arbitral award of Netherlands Arbitration Institute (2005), above n 11.

² ALEXANDRA MUNOZ, DORA GENY, *The UNIDROIT Principles in international arbitration*, International Business Law Journal (2016). Retrieved from Westlaw database.

in part) makes their understanding by the actors of international trade, who prefer not to choose them at all, more difficult'.¹

IV. A *posteriori* agreement on application of *lex mercatoria*

Nothing precludes parties to decide on application of *lex mercatoria* during the arbitral proceedings, when they have a more precise understanding of the legal conflict, and when the need for effective set of rules to solve the dispute becomes apparent. A *posteriori* agreement seems to be expressed in accordance with the same requirements of accuracy as a *a priori* agreement, i.e. it should comply with the chosen instrument.

In ICC arbitration proceedings, a *posteriori* agreement can be made during drafting Terms of reference, as it took place in ICC Case No.8331, where 'the parties have agreed that the Arbitral Tribunal shall apply the relevant agreements between the parties and, to the extent that the Arbitral Tribunal finds it necessary and appropriate, the UNIDROIT Principles of International Commercial Contracts of May 1994 shall be applied by the Arbitral Tribunal'.

A similar situation occurred in ICC case No.12889: 'it was at the suggestion of the Arbitral Tribunal, that the parties agreed to apply the UNIDROIT Principles to settle the dispute between them'.²

Here, a few words should be said on the reference to the UNIDROIT Principles when the parties agreed to '*lex mercatoria*, general principles, or so' to be applied for the dispute resolution.

Let us start with positive practice where arbitration courts applied UNIDROIT Principles when parties determined their contract to be governed by 'general principles of law, the *lex mercatoria* or the like'.

Thus, in ICC Case 7110 the court applied UNIDROIT Principles as the parties (an English supplier and a Middle Eastern governmental agency) had agreed their dispute to be solved 'according to natural justice'. Though, a 'natural justice' concept can be referred both to the UK common law and religious Middle East law, the court found that by such reference the parties had expressed their will to exclude application of national law, and applied UNIDROIT principles for solving the dispute. The majority of the tribunal 'proceeded to draw a link between general principles of law and the UNIDROIT Principles, although it is true that when this solution was proposed at the hearing counsel did not object. They observed that the UNIDROIT Principles primarily embodied those general legal rules and principles applicable to international contractual obligations and that they enjoyed a wide international consensus'.³ One of the arbitrators dissented: in his view the parties could not have contemplated reference to any set of

¹ *Ibid.*

² *Ibid.*

³ ICC Case 7110, (1999) 10(2) ICC ICArb. Bull. 39 at 49.

rules as vague and uncertain as ‘general principles’.¹ Moreover, reference to the Principles could not remedy the defect since they had not been conceived, let alone promulgated, at the time the contracts were concluded.²

Another example can be found in ICC Case 9474, where the parties had stipulated that any disputes should be decided “fairly” and ‘parties agreed with the Tribunal’s solution that it would apply “the general standards and rules of international contracts”, the content of these being drawn from a range of international commercial instruments including the Principles.’³

In *Arthur Andersen* case⁴ the parties agreed on the following arbitration clause:

‘The arbitrator shall decide in accordance with the terms of this Agreement and of the Articles and Bylaws of Andersen S.C. In interpreting the provisions of this Agreement, the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the Preamble of this Agreement and the Articles and Bylaws of Andersen, S.C., taking into account general principles of equity <...>’.

When interpreting these provisions the tribunal decided not to apply any national law but inter-firm agreements and general principles of equity, or, on its wording, ‘the general principles of law and the general principles of equity commonly accepted by the legal systems of most countries.’⁵ The court referred to the UNIDROIT Principles stating that these ‘are a reliable source of international commercial law in international arbitration’.

However, examples of negative arbitration practice can also be found. Sometimes, tribunals refuse to apply UNIDROIT Principles when the parties are agreed to *lex mercatoria* or trade usages to be a governing rule of law. Thus, in ICC case 9029, the Tribunal stated that ‘Although the UNIDROIT Principles constitute a set of rules theoretically appropriate to prefigure the future *lex mercatoria* if they were consistent with international commercial practice, at present there is no necessary connection between the individual Principles and the rules of the *lex mercatoria* ...’⁶ A more detailed overview of the application of trade usages will be provided later in the next chapter.

Some choice of law clauses combine elements or principles common to several legal systems. Mauro Rubino Sammartano defined this technique as the ‘*tronc commun*’.⁷ ‘The

¹ *Ibid.* 52.

² *Ibid.*

³ Interim Award in ICC Case 9474, (2001) 12(2) ICC ICArb. Bull. 60 as cited in Sinclair, above n. 13.

⁴ ICC Case 9797 (2000) available at <http://www.unilex.info/case.cfm?pid=2&id=668&do=case> (accessed 04 January 2018).

⁵ *Ibid.*

⁶ ICC Case 9029, (1999) 10(2) ICArb. Bull. 88 at 90.

⁷ MAURO RUBINO-SAMMARTANO, *Le ‘Tronc Commun’ des Lois Nationales en Présence (Réflexions sur le Droit Applicable par l’Arbitre International)*, Rev. Arb. 133(1987).

tronc commun technique was developed to provide an alternative to the application of the national law of one of the parties, a process which favours one of the parties to the detriment of the other or of a randomly selected neutral law unknown to both parties. By using the *tronc commun*, parties choose in essence a neutral set of legal rules, as they are rules common to the parties' national legal systems.¹

Channel Tunnel represents an example of the choice of the *tronc commun*: in this case, the parties have decided that their contract '[s]hall be governed and interpreted in accordance with the principles common to both English and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals.²

Let us have a look on the practical illustrations. For example, in the *Aminoil* arbitration, parties decided that 'the law governing the substantive issues between the parties shall be determined by the tribunal, having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world'.³

In the *Lena Golfield* case, arbitrators were asked to decide the dispute on the basis of the parties' 'relationships with regard to this agreement on the principles of goodwill and good faith, as well as on the reasonable interpretation of the terms of this agreement'.⁴

Another example may be even more interesting. In 1995 LCIA the parties had agreed that the arising disputes should be solved on the basis on 'Anglo-Saxon principles of law'.⁵ In the given case, the court applied the UNIDROIT Principles instead of running a complicated mediaeval legal research.

V. Absence of choice vs. negative choice of *lex mercatoria*

Another question to be discussed here is a correlation between such concepts as 'absence of choice on law' and 'negative choice on law'. The latter means that parties left the question on the applicable law unsolved intentionally: they did not agree on the application of any national legal system; thus, they have implicitly agreed on the application of non-national, neutral rules of law (thus, made an agreement by silence).

There can be underlined two main attitudes to negative choice – let us call them a 'wide' approach and a 'strict' one. A wide approach means that deliberate silence of applicable law can be interpreted as negative choice in favor of transnational law. A strict approach requires the parties to reject any national law to govern their contract.

¹ LEILA ANGLADE, *The use of transnational rules of law in international arbitration*, Irist Jurist (2003). Retrieved from Westlaw database

² RUBINO SAMMARTANO, *The Channel Tunnel and the Tronc Commun Doctrine*, 10 J. Int. Arb. 59 (1993).

³ *Ibid.*

⁴ LENA GOLFIELD (1950) 36 Cornell L.Q. 42. as cited in Angalade 2003 above n. 31.

⁵ Unpublished LCIA Award of 1995. as cited in Angalade 2003 above n. 31.

Let us start with the wide understanding of the concept. Usually, to make it possible to apply the wide negative choice approach, two cumulative requirements should be met: 1. Lack of the explicit choice of law; 2. The contract is concluded with a state or a governmental agency.

Silence of the parties on the applicable law cannot be usually interpreted as negative choice of law, but when state (or governmental agency) enters the contract the balance of the parties bargaining powers could be broken; and, sometimes arbitration tribunals interpret such silence as an evidence of genuine parties' desire to 'level playing field' for the resolution of their case. In such cases tribunals apply *lex mercatoria* as appropriate and neutral instrument.

In my opinion, such interpretation is still too wide to be justified by interests of the 'weakest' party; and 'negative choice of law' should not be characterized as a party agreement. Moreover, there is still a room for application of *lex mercatoria* by the own (?) motion of tribunals (as in *Norsolor*), even without authorization from the parties to act as *amiable compositeur* or decide their case *ex aequo et bono*.

Nevertheless, positive practice on the 'negative choice' approach exists and attracts some interest. Moreover, the concept of negative choice of law got a support in some academic works as well. For instance, Lalive reports that it is his experience that, occasionally, parties have in fact agreed, by their silence, to exclude the application of any given national law including that of a third country, while failing to agree on any satisfactory alternative formula.¹

Let us have a look at some examples of arbitration practice where the tribunal made a decision on the applicable law on the basis of negative choice of law. Thus, for instance, in the ICC Case 9875, the Tribunal could not identify any decisive connecting factors in favor of either Japanese or French law where the parties of those two nationalities had failed to agree on the law applicable to a licensing agreement in respect of a third country. Having ruled that this agreement was 'not appropriately governed by the national law of one of the parties, failing agreement on such a choice', the tribunal held that the most appropriate rules of law to be applied were the *lex mercatoria*, the content of which were in part contained in the UNIDROIT Principles.² Nevertheless the tribunal will take into account any relevant national laws concerning intellectual property rights issues raised during this procedure.³ Thus, in the given case the Tribunal applied the UNIDROIT Principles as principal source, and national law – as a secondary one.

Moreover, in this case the Tribunal defined the sources of *lex mercatoria* as 'rules of law and usages of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the

¹ E.g. P. Lalive, *The UNIDROIT Principles as Lex Contractus, with or without an Explicit or Tacit Choice of Law: An Arbitrator's Perspective*, ICC ICArb. Bull. Special Supp. 81. (2002)

² Partial and Final Awards in ICC Case 9875 (2001) 12(2) ICC ICArb. Bull. 95, 97.

³ Award in ICC Case 9875, (1999), above 10.

decisions of international arbitral tribunals and some institutions like Unidroit and its recently published Principles of International Commercial Contracts’.

The ICC Case 7375¹ is another good example of wide approach to the negative choice. The case concerned a contract for supply of goods between the US private seller and the Middle Eastern governmental agency (buyer). The tribunal concluded that the parties had made a negative choice of law, declaring that the absence of a choice of law provision, together with the fact that one party was a ministry of state, construed an evidence of the parties’ intention to avoid application of any national law as “none of the parties ... would have been prepared to accept the other party’s national law”.² Moreover, the parties did not agree on the application of any other national law (law of the third country), and no sufficient connection between the contractual relations and any third state could be found; such a choice would only be arbitrary. To provide the neutrality which the parties had manifestly desired, the tribunal chose to apply ‘those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *lex mercatoria*, also taking into account any relevant trade usages as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.’³

Anthony C. Sinclair⁴ refers to the ICC Case 8261⁵ as an example of the negative choice technique. It dealt with a contract between the private Italian company and the government agency of a Middle Eastern country that lacked a choice of law clause. The tribunal had ruled that it would base its decision on the terms of the contract supplemented by general principles of trade law as embodied in the *lex mercatoria*. Subsequently, when dealing with the merits, the tribunal referred to various articles of the UNIDROIT Principles implicitly admitting them as a part of *lex mercatoria*.

Negative choice approach is equally applied to general principles of law and trade usages of international commerce. Thus, in ICC Case No. 9479,⁶ the arbitral tribunal established an interesting ranking of sources in the case of absence of full party choice; it decided to ‘first apply the provisions of the contract, in the light of and, in case of need, supplemented by the usages of international trade, provided the validity of such provisions is not questioned by the parties or [such provisions] do not appear to the tribunal to be incompatible with international public policy in the sense of truly or transnational public

¹ Award in ICC Case 7375, (1996), <http://www.unilex.info/case.cfm?pid=2&id=625&do=case> (accessed 04 January 2018).

² *Ibid.*

³ *Ibid.*

⁴ Sinclair, above n. 13.

⁵ Unpublished ICC Award, 8261 in Sinclair, above 13.

⁶ Award in ICC Case 9479, (1999), <http://www.unilex.info/case.cfm?pid=2&id=680&do=case> (accessed 04 January 2018).

policy’ ... ‘In case the arbitral tribunal does not find in the contract or in the usages of international trade a solution to the problems raised by the parties’ claims, it must revert to the law applicable to the contract.’ Though, the parties made a partial choice of State of New York to the issues concerning the validity of the agreement, the tribunal interpreted the silence on the law applicable to other issues as negative choice in favor of non-state law. Thus, the arbitral tribunal decided those issues according to the provisions of the agreement in the light of, and, in case of need, supplemented by the usages of international trade, and referred to the UNIDROIT Principles which it considered an “accurate representation, although incomplete, of the usages of international trade’.

Another argument in favor of the wide negative choice approach is the fact that ‘in a resolution adopted in Cairo in April 1992, the International Law Association recommends ‘that the application of transnational rules by the arbitrators should not affect the validity or the enforceability of the award in case the parties have remained silent on the applicable law’.¹

On the other hand, a strict view on the negative choice also exists: it requires the parties to exclude the application of any national law. In this case, *lex mercatoria* seems the most appropriate source of the rules.

Let us have a look at the practical illustrations. For example, in the *Andersen* case, the choice of law clause stated that:

‘The arbitrator shall decide in accordance with the terms of this Agreement and of the Articles and Bylaws of Andersen Worldwide Société Coopérative. In interpreting the provisions of this Agreement, the arbitrator *shall not be bound to apply the substantive law of any jurisdiction* but shall be guided by the policies and considerations set forth in the Preamble of this Agreement and the Articles and bylaws of Andersen Worldwide Société Coopérative, taking into account general principles of equity’.² In this case the arbitrators applied the UNIDROIT Principles as they deemed the Principles to reflect general principles of international commercial law.

In another case the parties have made a negative choice by stating in the agreement that ‘the arbitrators should not apply any proper law’.³

VI. Conclusions

Thus, summing up all the above mentioned, the following conclusions should be drawn:

- Parties can make a choice in favor of *lex mercatoria a priori* or *a posteriori*; this authority follows from the principle of party autonomy.

¹ Anglade, above n 31.

² Reported in Bonell, *A Global arbitration decided on the Basis of the UNIDROIT Principles: Re Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, 17 Arb. Int. 249 at 252 (2011). As cited in Anglade, above n 31.

³ Unpublished award reported by Van Houtte in *Transnational Rules in International Commercial Arbitration*, above n.7 at 71, as cited in Anglade 2003, above n. 31.

- Parties can agree on application of a specific written instrument of *lex mercatoria* or implement vague choice of law clause in favor of ‘general principles of law, *lex mercatoria*, or so’.
- In case of choice of law in a vague wording arbitral tribunals apply either a ‘genuine’ source of law or provisions of written instruments containing general principles of law or general trade usages (not sector-specific instruments) such as CISG, UNIDROIT Principles, PECL.
- Not all the provisions of CISG, UNIDROIT Principles or PECL contain general principles of law or trade usages; tribunals decide the question of their applicability on the case by case analysis basis. Nonetheless, these instruments are mere attempts to write down ‘genuine’ *lex mercatoria* and not the whole content of transnational law.
- Choice of law in favor of *lex mercatoria* is still rare. Parties usually make such choice *a postiori* and choose *lex mercatoria* as supplementary source.
- Request of the parties to solve their dispute ‘according to natural justice’, ‘general principles of equity’, ‘fairly’, or even on the basis of on the basis on ‘Anglo-Saxon principles of law’ may be interpreted as a choice in favor of *lex mercatoria*.
- There are two approaches to negative choice of law. It can be understood as implicit silence of the parties on the applicable law (‘wide’ approach), or explicit exclusion of application of any national law (‘strict’ approach).
- Absence of choice of law may be interpreted by arbitral tribunals as negative choice in favor of *lex mercatoria*. Explicit exclusion of application of any national law usually leads to application of *lex mercatoria*.
- For application of the wide negative choice of law approach two cumulative requirements should be met: 1. lack of the explicit choice of law; 2. the dispute has arisen between the private party on one side, and public party (state, governmental agency) – on the other.
- Possible justification of this approach is necessary to ‘level playing field’ for the parties with different bargaining powers and resources.
- The wide negative choice approach still raises doubts: such interpretation of silence is may be too wide and not necessary when arbitral tribunals have a possibility to apply *lex mercatoria* by their own motion; sometimes parties try to set aside such arbitration awards arguing the absence of negative choice (will be discussed later).(?)
- The strict negative choice of law approach seems appropriate for application of *lex mercatoria* as it reflects an explicit desire of the parties to have their dispute not decided on the basis of national law.
- However, the border between wide negative choice reasoning and application of *lex mercatoria* by the own motion of tribunals is blurred: in any way, it starts from interpretation of the contract terms and establishing the parties’ will and expectations.

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LEGAL REGULATION OF THE ACTIVITY OF INDUSTRIAL PARKS: ISSUES AND TRENDS

DOI:

Abstract: The object of our research has more than half a century of history. Industrial parks appeared at the turn of the XIX-XX centuries. The world's first industrial park "Trafford Park" was established in the United Kingdom in 1896 by "Shipcanal and Docks". Later, industrial parks began to appear around the world. In the Russian Federation, this institute appeared in 2014 in connection with the adoption of the Federal Law "On Industrial Policy". The article discusses issues and trends of activity and legal regulation of industrial parks in the Russian Federation. The most interesting issues are related to the provision of benefits and subsidies to industrial parks and the application of a mechanism for self-regulation of their activities by voluntary certification through the Association of Industrial Parks. The article reveals the problems of functioning of industrial parks, as well as some contradictions of legal regulation in this sphere. Proposals are made to improve the regulatory and legal regulation of industrial parks in the Russian Federation.

Keywords: industrial parks, industry, industrial policy, agro-industrial parks, entrepreneurial activity, taxation

Introduction

Industrial parks are becoming increasingly popular all over the world, including in Russia. However, at the same time, there are many new problems of legal regulation. That is why this institution requires scientific and practical evaluation.

Industrial parks appeared at the turn of the XIX-XX centuries. The first industrial park “Trafford Park” was established by Shipcanal and Docks in 1896¹. In the 1930s, industrial parks were created in crisis areas at that time. In 1960, there were already 46 of them.

In Germany, the first industrial park “Euro-Industriepark Munchen” was established in 1963. In 1984 there were already 22 industrial investment parks in Germany.

In densely populated areas, private parks gradually emerged. In Düsseldorf in 1992 there were 23 completed parks, and in Frankfurt am Main in the same year there were 19². According to the definition of the industrial park by UNIDO (United Nations Industrial Development Organization), “An industrial park can be defined as a tract of land developed and subdivided into plots according to a comprehensive plan with or without built-up (advance) factories, sometimes with common facilities and sometimes without them, for the use of a group of industrialists.”³

Industrial park is a new institute in Russia. This concept was introduced in the Russian legal system with the adoption of the Federal Law of December 31, 2014, No. 488-FZ “On Industrial Policy in the Russian Federation”⁴. It became the first comprehensive document that sets out goals, objectives and mechanisms for the implementation of industrial policy, providing for new tools to stimulate industrial production.⁵

According to the provisions of the explanatory note “To the draft Federal Law ‘On industrial policy in the Russian Federation’”, the adoption of the Federal Law “On Industrial Policy in the Russian Federation” is due to the following factors:

1) by Federal Law No. 126-FZ of July 21, 2012, the Russian Federation ratified the Protocol on the Accession of the Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization of April 15, 1994, in connection with which the bill defines new principles of state support for industry, relevant to WTO requirements;

2) by the decrees of the President of the Russian Federation of May 7, 2012, new goals and objectives in the field of industrial policy have been identified, the achievement

¹ KAREN CLIFF, Patricia Southern. Trafford Park From Old Photographs // Amberley Publishing Limited – 2008. – P. 9

² JARMILA VIDOVA. Industrial Parks – History, Their Present and Influence on Employment // Review of Economic Perspectives, 10, 1 (2010) –P. 41

³ UNIDO (1997) Industrial Parks Principles and Practice New York –1997. –P. 10

⁴ Federal Law “On Industrial Policy in the Russian Federation” of 31.12.2014, No. 488-FZ // Rossiyskaya Gazeta. – 2015. – No. 1

⁵ DIDIKIN A.B., YUDKIN A.V. Law on Industrial Policy in. Expert commentary. Moscow: Fund Modernization, 2015. – P. 5

of which requires the introduction of new industrial policy instruments, and therefore the bill establishes new measures to stimulate industrial activity.

As A.G. Karapetov said, "A lawyer is not used to looking at the development of positive law in a broad socio-economic, ethical and cultural context, being powerless to model economic and other practical consequences, which will lead to the adoption of a rule." Therefore, in this paper, a comprehensive analysis of legal regulation and problems of the functioning of industrial parks is carried out.¹

According to the list of the Association of Industrial Parks there are 187 operating industrial parks, 355 parks – at the stage of creation, 62 parks – at the stage of engineering and 134 parks – at the stage of intention².

According to data from the interview of Kommersant Business guide with the executive director of the Association of Industrial Parks, Denis Zhuravsky, as of November 28, 2017 in the Russian Federation there were 111 operating industrial parks and 55 ones were being created.³

The institute studied by us has received a distribution also in the Republic of Belarus where only one industrial park operates so far, however ideas about development of this sphere of industry start to get popularity. The creation of industrial parks, in contrast to the Russian Federation, where they are also being created on a contractual basis, is approved by a decree of the President of the Republic of Belarus. In 2012, the President issued a decree approving the establishment of the Sino-Belarus Industrial Park⁴.

Industrial parks in Russia can be created on the basis of resolutions of public authorities of the Russian Federation and subjects of the Russian Federation, and also on a contractual basis⁵. Industrial parks may be in state or private ownership, and may be formed as a public-private partnership. At the same time, the legal regulation of this institution is at the development stage and is not perfect.

¹ A.G. KARAPETOV Economic analysis of law // M.: Statute, 2016. – P.16

² The list of industrial parks in Russia – 2017-2018 [electronic resource] // Internet portal "Industrial parks and technology parks of Russia". URL: http://russiaindustrialpark.ru/industrialparks_catalo.. (reference date 27.11.2017)

³ DENIS ZHURAVSKY "The rapid emergence of new industrial parks will last for above five years" // Kommersant Businessguide. – 2017. – No. 221. – P.20

⁴ Decree of the President of the Republic of Belarus of June 5, 2012 No. 253 "On the establishment of the Sino-Belarus Industrial Park 'Industrial Park 'Great Stone'" [electronic resource] // The National Legal Internet Portal of the Republic of Belarus URL: <http://pravo.by/document/?guid=3871&p0=P31200253> (reference date: 27.11.2017)

⁵ Decree of the Government of the Russian Federation of 28.01.2016 No. 44 "On the creation of the territory of the advanced social and economic development 'NaberezhnyeChelny'" // Collection of Legislation of the Russian Federation. – 2016. – No. 6. – Art. 840

Direct government influence and self-regulation as independent ways of regulating the activities of industrial parks

Direct government influence on the economy, and thus on the activities of industrial parks is manifested in the adoption of strategic planning documents¹. For example, Resolution of the Government of the Russian Federation of April 15, 2014 No. 328 “On the approval of the state program of the Russian Federation” development of industry and increasing its competitiveness “provides for the subprogram ‘Industrial Parks’ ”².

Stimulating the development of small and medium-sized businesses in the production sector by reducing the costs associated with starting a business, supporting them at the stage of development by reducing the tax burden, creating business incubators, industrial parks and technology parks, forming demand for small and medium-sized enterprises, expanding access to procurement of state companies, participation in the implementation of major projects – one of the points of the state socio-economic policy (p. 62 of the Presidential Decree No. 683 of December 31, 2015 “On the National Security Strategy of the Russian Federation”) ³.

The authors of this article regard, that the state regulation of the activities of industrial parks is manifested in the adoption of normative legal acts and by-laws. In this case, state regulation is carried out at two levels – federal and regional (subject of the Russian Federation).

Particularly important is the role of public authorities, acting as regulators of the activities of industrial parks. In his research A.V. Mikhaylov considers a concept of “regulator”, noting the multiplicity of scientific approaches to this issue, because the regulator is an authorized state authority, which has the right to adopt rules of conduct for legal entities or legal means of influence ⁴.

Mechanism of self-regulation is very important in this area. Self-regulation is understood as an independent and initiative activity that is carried out by subjects of entrepreneurial or professional activity and whose content is the development and establishment of standards and rules for this activity, as well as monitoring compliance

¹ Note: In this article, the activity of industrial parks are considered as a special kind of organization and implementation of entrepreneurial activities. I.V. ERSHOVA notes that the state impact on the economy is achieved through the adoption of documents of strategic planning. See Business law: Legal support of business: a textbook for masters / I.V. ERSHOVA, RN AGANINA, V.K. ANDREEV [and others]. – Moscow: Prospekt, 2017. – P. 418

² Decree of the Government of the Russian Federation of 15.04.2014 No. 328 “On approval of the state program of the Russian Federation’ Development of industry and increasing its competitiveness”// Collection of Legislation of the Russian Federation. – 2014. – No. 18 (Part IV). – Art. 2173.

³ Decree of the President of the Russian Federation of 31.12.2015 No. 683 “On the Strategy of National Security of the Russian Federation” // Collection of Legislation of the Russian Federation. – 2016. – No. 1 (Part II). – Art. 212.

⁴ MIKHAYLOV A.V. Regulators in the sphere of business law // Uchenye zapiski Kazanskogo Universiteta. Series: Humanities. The Kazan University Publishing House – 2015. – Volume 157, book. 6. – P. 133

with the requirements of these standards and rules (Paragraph 1, Article 2 of the Federal Law “On Self-Regulating Organizations”)¹.

Self-regulating organizations are recognized as non-commercial organizations established for the purposes provided for by the current Federal Law and other federal laws based on membership, that unite the subjects of entrepreneurial activity on the basis of the unity of the industry producing goods (works, services) or the market of manufactured goods (works, services) or unite the subjects of professional activity of a certain type (Paragraph 1, Article 3 of the Federal Law “On Self-Regulating Organizations”).

According to D.A. Petrov, members of self-regulating organizations as subjects of economic activity, operate not only in the interests of making profit, but also in order to meet public needs, while performing public functions without exercising state power².

However, the implementation of public functions, such as setting standards for activities, monitoring their compliance and applying sanctions to offenders, is important but not the only function of self-regulation. First of all, self-regulating organizations are a mechanism of private law, and the implementation of functions to protect their members, the creation of their own system of arbitration, the creation of a mechanism for property liability, the formation of good business reputation of participants should be no less important part of their activities. The impregnation of imperative methods of legal regulation should not be confused with the public law nature. The system of self-regulation should become an effective mechanism for regulating the activities of the business and professional community³.

A self-regulating organization develops and approves standards and rules for entrepreneurial or professional activities, which are understood as requirements for the implementation of entrepreneurial or professional activities that are mandatory for all members of the self-regulatory organization (Article 2.3 of the Federal Law “On Self-Regulating Organizations”). The Federal Law also establishes the requirements for these rules and standards.

The Association of Industrial Parks (AIP) is an industry non-commercial organization established in 2010, uniting industrial parks in Russia, as well as service providers in the field of industrial construction with the aim of securing and protecting common interests. However, it should be noted that the AIP is not included in the state register of SROs. As the Executive Director of the Association of Industrial Parks, Denis Zhuravsky states, “In 2010, it was decided to establish an association in the form of a non-profit partnership with the prospect of becoming a self-regulatory organization.”⁴

¹ Federal Law of 01.12.2007 No. 315-FZ “On Self-Regulating Organizations” // Collection of Legislation of the Russian Federation. – 2007. – No. 49. – Art. 6076.

² PETROV D.A. To the question of the public law nature of the activity of members of self-regulating organizations // Civil law. – 2013. – No. 1. – P. 16

³ SUNGATULLINA L.A. Participants of self-regulatory organizations: the concept, types, features of the legal status // Gaps in Russian legislation. – 2014. – P. 87

⁴ DENIS ZHURAVSKY “‘Long money’ is needed for development” [electronic resource] // “Association of Industrial Park” URL: <http://www.indparks.ru/press/news/944/> (reference date: 10.01.2018)

From September 1, 2015, the AIP is the Authority for the certification of industrial parks for compliance with the national standard GOST R 56301 – 2014 “Industrial parks. Requirements”. Certification is voluntary, and the absence of a certificate cannot be considered an obstacle to obtaining state support measures. The average period of certification is 2 months.

The certificate is issued only to operating industrial parks. It confirms that the industrial park meets all the mandatory requirements of the National Standard of the Russian Federation GOST R 56301 – 2014 “Industrial parks. Requirements”. The requirements laid down in the National Standard are based on the existing regulatory legal acts that define the criteria for industrial parks in the framework of system support for the development of industrial infrastructure.

Following the decision of the Certification Commission, an applicant receives either a certificate of the operating industrial park or an expert opinion on the non-compliance of the industrial park with the requirements of the National Standard. Data on a certified industrial park are entered in the register of operating parks, while information on the certification is published on the websites of the AIP (www.indparks.ru) and the Geoinformation System of Industrial Parks (www.gisip.ru).

Definition of industrial park

In accordance with Article 3 of the Federal Law “On Industrial Policy in the Russian Federation”, an industrial park is understood a set of industrial infrastructure objects intended for the creation of industrial production or modernization of industrial production and managed by a management company – a commercial or non-profit organization established in accordance with the legislation of the Russian Federation¹.

The explanatory note to “the Bill of the Federal Law” On Industrial Policy in the Russian Federation “provided for another definition of an industrial park – as a special economic zone created in accordance with the Federal Law ‘On Special Economic Zones in the Russian Federation.’” However, later this definition was not included in the provisions of the federal law².

At the same time, the Ministry of Economic Development of Russia gives a broader definition of an industrial park. According to paragraph 14.1.4. of Order of the Ministry of Economic Development of Russia No.167 from 25.03.2015, industrial park, industrial park, or agro-industrial park – is a set of real estate properties and infrastructure, land, administrative, production, storage and other premises that provide the park, intended

¹ Federal Law “On Industrial Policy in the Russian Federation” of December 31, 2014 No. 488-FZ // Rossiyskaya Gazeta – 2015. – No. 1

² Explanatory note to the Bill “On Industrial Policy in the Russian Federation” [electronic resource] // URL: <http://asozd.duma.gov.ru> (reference date: 27.11.2017)

for production by small and medium-sized businesses and providing conditions for their effective operation, managed by a single operator (management company)¹.

In paragraph 3.1.p.3 of GOST R 56301-2014, National standard of the Russian Federation “Industrial parks. Requirements”, an industrial park is defined as a complex of real estate objects managed by a specialized management company, consisting of a land plot (plots) with production, administrative, storage and other buildings, structures and constructions, provided with the engineering and transport infrastructure necessary for creation of new industrial production, as well as possessing the necessary legal framework for carrying out production activities².

The absence of a single concept can lead to problems in legal regulation practice. It is necessary to distinguish between similar definitions:

1. industrial park
2. agro-industrial park
3. industrialtechnopark
4. technopark in the sphere of high technologies.

Also is worth noting that the Order of the Ministry of Finance of Russia of June 16, 2017 No. 94n “On approval of the methodology for calculating the total added value received on the territory of an industrial park, industrial technopark or technopark in the sphere of high technologies”. The industrial technopark and the technopark in the sphere of high technologies are not mentioned in the law on industrial policy. There is a lack of unification of concepts and use of definitions without legal justification. This can lead to confusion and blurring of boundaries³.

Based on the information of the Association of Industrial Parks and sites of the parks themselves, it can be concluded that industrial parks also include open economic zones and technopoleis. For example, the Innovative Industrial Park “ Technopolis ‘Himgrad’ ”that operates in the Republic of Tatarstan⁴.

¹ Order No. 167 of the Ministry of Economic Development and Trade of the Russian Federation of March 25, 2015, “On Approval of the conditions for the competitive selection of subjects of the Russian Federation, whose budgets are subsidized from the federal budget for state support of small and medium-sized enterprises, including peasant (farmer) farms, and requirements for organizations that form the infrastructure for supporting subjects of small and medium-sized business” [electronic resource] // Official Internet portal of legal information URL: www.pravo.gov.ru (reference date: 27.11.2017)

² GOST R 56301-2014. National standard of the Russian Federation. Industrial parks. Requirements (approved and put into effect by the Order of Rosstandart of 12.12.2014 No. 1982-st) // M.: Standartinform. – 2015.

³ Order of the Ministry of Finance of the Russian Federation of June 16, 2017 No. 94n “On Approval of the Methodology for calculating the total added value received on the territory of an industrial park, an industrial technopark or a technopark in the sphere of high technologies” [electronic resource] // Official Internet Portal of Legal Information URL: <http://www.pravo.gov.ru> (reference date: 27.11.2017)

⁴ Geoinformation system: industrial parks. Technoparks. Clusters [electronic resource] // URL: <https://www.gisip.ru/#!ru/parks/> (reference date: 27.11.2017)

Signs of the industrial park

There can be distinguished the following signs of an industrial park:

- 1) land plot;
- 2) specialized objects of capital constructing;
- 3) engineering infrastructure;
- 4) management company;
- 5) compliance of activities with legally established norms and requirements.

Most of the questions arise in respect of such signs of an industrial park as a land plot and compliance of activities with statutory norms and requirements.

As for the land plot, it is the basis for the location of infrastructure in the industrial park. It is necessary to highlight the features of such land plots, since they have a certain specificity.

Firstly, in accordance with the Decree of Government of the Russian Federation of 04.08.2015 No. 794 "On the industrial parks and management companies of industrial parks", the territory of the park includes land belonging to the category of land for industry and (or) land of the settlements where industrial infrastructure can be located. The park should be no less than 8 hectares¹.

The territory of an industrial park is a set of unified land plots located at a distance of no more than 2 km away from each other and connected technologically, within which the objects of an industrial park are located and / or planned to be located. However, this resolution does not say to which categories of land belong the land plots that are in the interval between the land plots of the industrial park.

In our opinion, this can lead to complication of legal relations between land users. After all, if there is a land plot belonging to another person between the land parcels of an industrial park, it may be necessary to establish an easement to ensure interaction of parts of the industrial park. This can lead to disputes in practice.

Secondly, in accordance with GOST R 56301-2014. National standard of the Russian Federation. Industrial parks. Requirements, the developer of the industrial park, as a rule, is a person who owns a land plot through lease or ownership². In our opinion, because of this formulation, the rights of other participants in business relations may be violated. After all, a subtenant should also have an opportunity to act as a developer of the industrial park.

In some foreign legal systems, for example, in the United States, the terms "brownfield" and "greenfield" are used, which determine the type of industrial park based on the characteristics of the land.

¹ Decree of the Government of the Russian Federation of 04.08.2015 No. 794 "On industrial parks and management companies of industrial parks" // Collection of Legislation of the Russian Federation. – 2015. – No. 33. – Art. 4827.

² GOST R 56301-2014. National standard of the Russian Federation. Industrial parks. Requirements (approved and put into effect by the Order of Rosstandart of 12.12.2014 No/ 1982-st) // M. : Standartinform. – 2015.

Industrial park of the “brownfield” type, is located on the territory of an old factory, most often abandoned and decayed. Brownfield lands are far from always prepared to accommodate industrial parks, as they often have badly worn out communications and inadequate infrastructure. Greenfield on the other hand is a new industrial land plot for the construction of an industrial park.

These definitions have become firmly established in practice in the Russian Federation, but they are fixed only in point 3 of GOST 56301-2014 The national standard of the Russian Federation. Industrial parks. Requirements. In our opinion, this issue requires more serious regulation at the level of federal law.

What is the purpose of introducing this institute in the Russian Federation?

All the definitions of the industrial park considered earlier single out its industrial orientation. It can be concluded that the legislator set out to develop industry.

The second goal, of course, was to support entrepreneurship, both large and small or medium. The following order should be noted in this respect: Order of the Ministry of Economic Development of the Russian Federation No. 167 of March 25, 2015, “On Approval of the Conditions for the Competitive Selection of Subjects of the Russian Federation, whose budgets are subsidized from the federal budget for state support of small and medium-sized enterprises, including peasant (farm) organizations that form the infrastructure of support for small and medium-sized enterprises”¹.

It is noteworthy that in July 2017, Decree of the Government of the Russian Federation No. 879 “On Amendments to Resolution No. 794 of the Government of the Russian Federation of August 4, 2015” gave definitions to an operating industrial park and an industrial park which is being created. Thus, an operating industrial park is an industrial park, whose residents carry out industrial production and transfer tax and (or) customs payments to the budgets of the budgetary system of the Russian Federation. In this definition, the state’s priorities in supporting industrial parks are traced – the development of industry and the receipt of tax and customs payments by the budget ².

¹ Order of the Ministry of Economic Development and Trade of the Russian Federation of 25.03.2015 No. 167 “On Approval of the Conditions for the Competitive Selection of Subjects of the Russian Federation, whose budgets are subsidized from the federal budget for state support of small and medium-sized enterprises, including peasant (farmer) farms, and requirements for organizations that form the infrastructure for supporting subjects small and medium business” [electronic resource] // URL: <http://www.pravo.gov.ru/index.html> (reference date: 27.11.2017)

² Decree of the Government of the Russian Federation of 24.07.2017 No. 879 “On Amendments to Resolution No. 794 of the Government of the Russian Federation of August 4, 2015” // Collection of Legislation of the Russian Federation. – 2017. – No. 31 (Part II). – Art. 4935.

Support of industrial parks

It is obvious that the state is interested in increasing the number of industrial parks. To date, the state program “Industry development and increasing its competitiveness” offers two mechanisms for financial support of industrial parks: “subsidizing the interest rate on a loan” for industrial parks and “subsidies for reimbursement of costs for creating an infrastructure of industrial parks” for the subjects of the Russian Federation¹.

Decree of the Government of the Russian Federation No. 1119 of October 30, 2014 “On the selection of subjects of the Russian Federation eligible for state support in the form of subsidies for the reimbursement of expenses for the creation, modernization and (or) reconstruction of infrastructure facilities of industrial parks, industrial technoparks and technoparks in the sphere of high technologies” provides for reimbursement of costs for the creation, modernization and (or) reconstruction of infrastructure facilities of industrial parks, industrial technoparks and technoparks in the field of high technology in the form of subsidies².

According to subparagraph 12 of paragraph 1.2 of Order of the Ministry of Economic Development of the Russian Federation of 25.03.2015 No. 167 “On approval of the conditions for competitive selection of constituent entities of the Russian Federation, whose budgets are subsidized from the federal budget for state support of small and medium-sized enterprises, including peasant (farm) organizations that form the infrastructure of support for small and medium-sized businesses”, one of the conditions for granting a federal budget subsidy for financing the establishment and (or) the development of a private industrial park is the provision of land plots of an industrial park for lease or ownership to small and medium-sized enterprises, comprising no less than 20% of the total land area of a private industrial park³.

However only the minimum size of the land plots granted to small and medium-sized businesses is established. A reasonable question arises: why are there no requirements for the specifics of the activities of these entrepreneurs? After all, their entrepreneurial activities can in no way be related to industrial production. In this case, an industrial

¹ Decree of the Government of the Russian Federation of 15.04.2014 No. 328 “On approval of the state program of the Russian Federation ‘Development of industry and increasing its competitiveness’ // Collection of Legislation of the Russian Federation. – 2014. – No. 18 (Part IV). – Art. 2173.

² Decree of the Government of the Russian Federation of 30.10.2014 No. 1119 “On the selection of constituent entities of the Russian Federation entitled to receive state support in the form of subsidies for reimbursement of expenses for creating the infrastructure of industrial parks and industrial parks” // Collection of Legislation of the Russian Federation. – 2014. – No. 46. – Art. 6344.

³ Order of the Ministry of Economic Development and Trade of the Russian Federation of 25.03.2015 No. 167 “On Approval of the conditions for the competitive selection of subjects of the Russian Federation, whose budgets are subsidized from the federal budget for state support of small and medium-sized enterprises, including peasant (farmer) farms, and requirements for organizations that form the infrastructure for supporting subjects small and medium-sized business” [electronic resource] // Official Internet portal of legal information URL: www.pravo.gov.ru (reference date: 27.11.2017)

park, receiving subsidies from the federal budget, can simply turn into a specific shopping center.

In addition to subsidies, industrial parks enjoy tax benefits. Subjects of the Russian Federation can reduce rates for such taxes as profit tax (in terms of the rate credited to the budget of the subject), property tax, transport tax and land tax.

For example, paragraph 1 of article 1 of the Law of Moscow of October 7, 2015 No. 52 “On the establishment of the corporate income tax rate for organizations – subjects of investment activity, managing companies of technoparks and industrial parks, anchor residents of industrial parks and industrial parks” states that the rate of corporate profit tax to be credited to the Moscow budget in the amount of 13.5% for organizations that are residents of technopolities, technology parks and industrial parks in respect of the profits received from the activity carried out on the territory of technopolities, technological parks and industrial parks¹.

Article 27 of Federal Law No. 171 dated June 23, 2014 “On amendments to the land code of the Russian Federation and certain legislative acts of the Russian Federation” establishes a reduced rate of 0.3% of the cadastral value of the land plot – in respect of land plots intended for placement and construction property complexes of industrial parks. Of course, this is one of the factors that legislators think should attract businessmen to this sphere².

For example, companies that received the status of a resident of the Industrial park “Chelny” are granted the following preferences:

1. exemption from payment of land tax;
2. reduction of income tax to 15.5%;
3. reduction of property tax to 0.1% (for the duration of the project, but not more than 7 years, in engineering – 13 years);
4. subsidizing the loan interest rate for construction of facilities;
5. subsidizing the interest rate to 13.25% for the purchase of equipment and raw materials;
6. compensation of funds spent by entrepreneurs on the purchase of industrial equipment under the 50/50 scheme (up to 5 million rubles) under the program of the Ministry of Economy of the Republic of Tatarstan³.

¹ The Law of Moscow of 07.10.2015 No. 52 “On setting the corporate income tax rate for organizations that are subjects of investment activity, managing companies of technoparks and industrial parks, anchor residents of technoparks and industrial parks” // Herald of Mayor and the Government of Moscow. – 2015. – No. 58.

² The Federal Law “On amendments to the land code of the Russian Federation and certain legislative acts of the Russian Federation” dated June 23, 2014 No. 171-FZ // Rossiyskaya Gazeta. – 2014. – No. 142.

³ Internet resource of Industrial park “Chelny” [electronic resource] // URL: <http://ipchelny.ru/en/subsidies> (reference date: 27.11.2017)

Conclusion

For effective functioning of industrial parks it is necessary:

- I. To clearly define the definition to prevent disputes in legal regulation practice.
- II. To clearly prescribe the requirements in one normative legal act. This is necessary to determine the legal status of industrial parks, as well as to include them on the benefits scheme provided by the state. Individualization of any subject is necessary to avoid blurring of concepts and to delimit from entities with a similar legal framework of activity.
- III. The Association of Industrial Parks must officially acquire the status of a self-regulatory organization in order to be able to use all the opportunities provided for self-regulated organisations. Perhaps, over time, having reached a certain level of development, these relations will be regulated only by the self-regulated mechanism.

From the analysis of the legal regulation of the activities of industrial parks, it is obvious that the legislation in this sphere is non-systemic and that is the cause of all problems. It is necessary to adopt a specialized normative legal act that comprehensively regulates all legal aspects of the activities.

Similar laws have been adopted in many countries. For example, the law “On Industrial Parks” was approved by the Slovenian National Parliament on July 1, 2001¹. This allows the Slovenian economy to attract foreign investment in the business sector in conditions of minimal public funding. In the states of Commonwealth of Independent States, this process began a little later. For example, in Ukraine, the law “On Industrial Parks” was adopted in 2012².

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CONFERENCE REVIEWS

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REVIEW

OF THE II INTERNATIONAL SCIENTIFIC AND PRACTICAL CONVENTION OF UNDERGRADUATE AND GRADUATE STUDENTS “REVOLUTION IN LAW: BREAKTHROUGH IDEAS IN MODERN RUSSIAN LAW (ON OCCASION OF THE CENTENARY OF THE OCTOBER REVOLUTION)”

DOI:

Abstract: The article presents the II International Law Convention, which was held at the Faculty of Law of Kazan (Volga Region) Federal University on November 23-25, 2017. It describes the program of the Convention and reveals topical issues of legal reality, touched upon in the framework of the event. The article also tells about the results that the students came up with when discussing these legal problems. In addition, the scientific-educational, scientific-practical and cultural component of the Convention is disclosed. Formation and development of the Law Faculty of the Kazan University as the center of classical legal education in the Volga region keeps and maintains scientific

traditions of the faculty for years. The faculty always promotes the idea of improving the quality of education of students through their participation in research activities. The research work of the students shows the most talented and promising students and gives them a chance to continue their development in future.

Keywords: Faculty of Law of Kazan (Volga Region) Federal University, Convention of students and graduate students, student self-government, student scientific society, student legal science law society, conference

Formation and development of the Faculty of Law as the center of classical legal education, the cradle of many talented scientists and scientific trends in modern jurisprudence is largely due to the preservation of scientific traditions. The spirit of freedom, creativity and democratic teaching of Kazan Imperial University, the influence of the best achievements of the cultures of the East and West still retain a special atmosphere within the faculty. It is no accident that the foundation of Kazan law school was originally formed at the junction of theory and practice, a harmonious combination of the educational process and the research work of teachers and students.

Today the faculty actively promotes the idea of improving the quality of education of students through their participation in research and development activities. It is asserted that only the knowledge of students can be effective, which will be deeply conceptualized and critically evaluated in the work. The ability of deep and comprehensive legal analysis, the breadth of the professional horizon, brought up by scientific work, are recognized as a powerful competitive advantage of a young specialist in the labor market.

The research work of the students of the faculty in all the diversity of its forms reveals, and subsequently educates the most talented and promising students.

One of such forms is the International Scientific and Practical Convention of Undergraduate and Graduate students, which in turn is the successor and continuer of the traditional November International Conference held by the Faculty of Law for more than ten years.

During the years of the Conference, a huge amount of work has been done, as evidenced by more than a thousand applications for participation from students and graduate students from Russian cities and foreign countries. In the space of these ten years the event has become not just widely known, but has acquired the status of a "brand" of the Law Faculty of Kazan University.

The convention is a synthesis of the best practices of holding conferences, summer schools, scientific forums and round tables. It allows not only to exchange opinions on current issues of law, but also to receive answers to interesting questions of legal practice, trends in their development, as well as includes an extensive educational program.

In 2017 the subject of the Convention related to the revolution in law, with breakthrough ideas in it, and with the fact that autumn 2017 for our country was also the centenary of the October Revolution. During the conference, students discussed

the use of blocking technology and ICO, changes in terms of information security and anonymity in the network, and from the point of view of jurisprudence, questions about a single procedural code became important. Since there are now a civil and arbitration procedural codes, the idea of a single code that would regulate both areas and many other issues that are relevant to date and completely new in terms of regulatory and legal regulation was considered, and what could change in law in the coming years.

In 2017 the Convention expanded its geography, inviting for the round table of domestic and foreign researchers of jurisprudence, students, researchers, as well as representatives of state authorities and local self-government. This time it gathered more than 300 participants from 60 universities of the country from Kaliningrad to Vladivostok, as well as guests from Kazakhstan, Belarus, China and other countries.

The main event for the legal community of the event is the Plenary meeting, which took place in the Imperial Hall of the main building of Kazan University. The plenary session was opened by Minzaripov Riyaz Gataullovich – acting Rector of Kazan Federal University (KFU), greeting words and warm wishes to the participants were addressed by the Chairman of the Supreme Court of the Republic of Tatarstan – Gilazov Ilgiz Idrisovich, Dean of the Law Faculty of KFU – Bakulina Liliya Talgatovna, member of the Council of the Chamber of Advocates of the Republic of Tatarstan – Olga Kamaletdinova, Executive Director of the Publishing House “Statut” – Samoilov Kirill Ivanovich, Candidate of Legal Sciences, Associate Professor of the Department of Entrepreneurial Law and Administrator of the School of Masters of the Faculty of Law of Moscow State University named after M.V. Lomonosov – Alexander Molotnikov and other guests of the event.

Riyaz Minzaripov greeted the participants of the Convention on behalf of the Rector of Kazan Federal University Ilshat Gafurov and himself. According to the opinion of rector of KFU, thanks to such forums students could exchange opinions, practical knowledge, which enhances the quality of their preparation. He wished the participants successful work, as well as to introduce new trends in the legal system of the country.

Also Riyaz Gataullovich presented a letter of gratitude from KFU to Kirill Ivanovich Samoilov, Executive Director of the Statut Publishing House, for invaluable contribution to the development of student science and support of student events.

In turn, Kirill Ivanovich sincerely thanked for this gift the Faculty of Law and noted that it is significant that such project is being realized exactly within the walls of the Law Faculty of Kazan University, which is famous for outstanding scientists and figures who have made a significant contribution to the development of the science of jurisprudence. He also wished the participants and guests of the Convention success and great achievements in the legal field and presented monetary certificates for the winners of the Convention, using which they can choose the books they like.

Lilia Bakulina noted in her speech that this autumn turned out to be truly golden for Kazan University. Thus, on November 18 Kazan University and its Law Faculty celebrated the 213th anniversary of the foundation. Addressing the participants of the

Convention, Lilia Bakulina called for making a revolution exclusively in science. “So many bright heads gathered at Kazan Federal University will find the best solution to many issues that are facing legal practice and science,” she said.

In his turn, Ilgiz Gilazov stressed that such a large-scale international Convention is held within the walls of Kazan University, which has long-standing traditions of fundamental scientific research.

Immediately after the opening, a lecture on the subject “Modern problems of national statehood in the republics of the Russian Federation (through the example of the Republic of Tatarstan)” was read by Doctor of Law, Professor (of the Chair?) of Constitutional and Administrative Law of Kazan Federal University, Academician of the Russian Academy of Sciences, Russian Academy of Humanitarian and Social Sciences and the Russian Academy of Juridical Sciences, one of the authors of the Constitution of the Republic of Tatarstan – Boris Leonidovich Zheleznov.

However, the first day of the Convention was marked not only by the Plenary Session, but also by the work of roundtables and holding of master classes. Thus, after the Plenary session and the lecture, each participant was invited to attend one of four roundtables, such as: Trends in the development of the civil process, in the light of the latest Plenary Orders; Modern problems and tendencies of development of legislation on business activity; Current trends in the development of the science of criminal procedure law; Breakthrough ideas in international law: challenges of modern times. The roundtables were led by the following experts: Smolensky Igor Nikolayevich – judge of the Arbitration Court of the Volga District, Groisberg Anna Isaakovna – Dean of the Social and Humanitarian Department of the Higher School of Economics – Perm, Bogdanov Dmitry Igorevich – consultant of the department for the restoration of the rights of citizens of the Office of the Ombudsman for Human Rights in the Republic of Tatarstan and Molotnikov Alexander Evgenievich – Associate Professor of the Department of Entrepreneurial Law of Moscow State University.

The final chord of the first day was a series of master classes run by professionals in their field, friends of the Faculty of Law, who shared their rich invaluable experience with the participants.

A real stir among the tired but interested participants was caused by the master class of Alexander Evgenievich Molotnikov themed “Asia: the diversity of legal systems. What do you need to know as a practicing lawyer.” After reading the lecture, Alexander Evgenievich answered all the questions and shared his knowledge and gave useful advice to future lawyers.

No less vivid or interesting was the master class “Reform of inheritance law” which was run by Petrov Yevgeny Yurievich, Candidate of Legal Sciences, Associate Professor of the Research Center for Private Law named after S.S. Alexeyev under the President of the Russian Federation.

In addition, the students could attend the master class “Peculiarities of contractual regulation of the relationship between the representative body of students and the

administration of an educational organization of higher education in the field of social partnership”. This master-class was run by Vyal'shin Nail Ravilevich – Deputy Chairman of the Primary Trade Union Organization of Students of Kazan (Volga Region) Federal University, Assistant to the Director of the Institute of Computational Mathematics and Information Technologies for Corporate Policy of the KFU, as well as Representative of the KFU in the Youth Council of the Federation of Trade Unions of the Republic of Tatarstan.

At this point educational part of the first day of the event was over, and all participants were invited to visit the walking tour of the evening Kazan.

The second day of the Convention began with a traditional event – an indicative court session on the rules of the student judicial model process “All-Russian judicial debate”. Judges were the honorary judges of the Model Process: Degtyarev Sergey Leonidovich – Doctor of Law, Professor of the Civil Procedure Department of the Ural State Law University, Nizam Damir Alikovich – a graduate of the club “Judicial Debates” and a practicing lawyer, Ramish Talganovich Abyanov – also a graduate of the club “Judicial Debates” and a managing partner of the law firm “Abyanov and Partners”. The plot of this battle was devoted to attracting the controlling persons of the debtor to subsidiary liability in the bankruptcy of a legal entity, and the parties were represented by three teams: the winners of the All-Russian judicial debate in 2017 were representatives of the Southern Federal University, team of Kazan University and Moscow State University, and team of the Moscow State University.

After the demonstration battle, the work of 15 sections started, at which the participants of the Convention were able to present their reports to colleagues, while the competent jury was represented by the teachers of Kazan Federal University. At each of the sections in an atmosphere of stormy discussion, participants at the level of highly qualified specialists discussed narrow-profile topics together with professors and practicing lawyers from all over Russia.

The third day of the Convention allowed participants to “relax” and feel the cultural component of this event. However, even the “games” in Kazan University are intellectual!

The final day of the Convention started with the intellectual game “What? Where? When?“, where teams of students were able to test their strengths and broaden their horizons, as well as to find new friends, since almost every team was a team of participants.

After the fight in “What? Where? When?“, the students had to test their knowledge in the field of jurisprudence by participating in subject Olympiads. The participants were offered 4 Olympiads.

One of them was the All-Russia interdisciplinary Olympiad, timed to the Year of Ecology in the Russian Federation “EcoLogica – 2017”. The assignments were developed by teachers of the Department of Environmental, Labor Law and Civil Procedure of the Faculty of Law of KFU: Zafdat Safin – Doctor of Law, Professor, Head of the Department, as well as Elena Luneva and Sergey Sagitov – Associate Professors of [KFU ?], Candidates of Juridical Sciences. The Ministry of Natural Resources and Ecology of the Russian

Federation acted as an information partner for this event, and one of the leaders in the field of waste processing in the Republic of Tatarstan – Pure Environment LLC, whose representative visited the Olympiads and made at the welcoming speech to the participants, was a sponsor.

Also within the framework of the Convention was the Olympiad on the history of state and law dedicated to N.I. Lobachevsky. The assignments were developed by the teachers of the Department of Theory and History of State and Law, namely Yuri Lukin – senior lecturer of the Department, practicing lawyer of the Chamber of Advocates of the Republic of Tatarstan, head of the research work of the students of the Faculty, as well as Lidia Sabirova and Aydar Gubaidullin – associate professors of [KFU ?]. Thus, the Olympics not only revealed the connoisseurs of both domestic and foreign historical events, legal acts, and lawyers, but also presented a whole block of questions on the Copernican geometry. This is because the history of the state and law is built, in turn, by outstanding managers, which was Nikolai Ivanovich Lobachevsky. This Olympiad comprised a series of special events, which in various aspects and from different angles recalled the life of the outstanding rector of Kazan University. And it was this “twist” that made the Olympics truly unique.

There followed the Olympiad in criminal procedure law and in criminology, assignments for which were compiled by teachers of the Department of Criminal Procedure and Criminal Law, respectively. The Olympiad in criminal procedure law was attended by 30 students from such universities in the Russian Federation as Moscow State University, MSUA, Mari State University, Kazan Federal University, Southwestern State University, and North Caucasus Institute “All-Russian State University of Justice”.

A salutatory word for participants of the Olympiad was given by Antonov Igor Olegovich, Candidate of Law, Head of the Criminal Procedure and Criminalistics Department. The Olympiads took place in two rounds. In the first round, the participants were offered work with a procedural document in which they were to find mistakes. Also in the first round, the organizers included a task to simulate actions of the investigator after a specific investigative situation.

In the second round of the court hearings students [made up ?] in advance on the submitted plot. The contestants were asked to choose a side in the case (accusation or defense) and speak before the jury, which included: Safonov Eduard Evgenevich – Chairman of Kazan Garrison Military Court, Candidate of Legal Sciences, Associate Professor of the Criminal Procedure and Criminalistics Department of the Faculty of Law of KFU; Petrova Irina Stepanovna – Senior Assistant to the Prosecutor of the Republic of Tatarstan for Legal Support, Candidate of Legal Sciences, Senior Counselor of Justice; Mazurenko Pavel Nikolaevich – Candidate of Legal Sciences, Associate Professor of Criminal Procedure and Criminalistics Department of KFU, Attorney; Sadriev Niyaz Fargatovich is a 2nd class lawyer, assistant to Kazan Interdistrict Environmental Attorney.

The outcome of the day and the whole event was a solemn closing in which the winners of the sections, olympiads and intellectual games were awarded, and the results

of the drawings [?] organized jointly with the partners of the event were announced. It is also necessary to note the invaluable contribution of the team of the organizers of the Convention, since without them such a large-scale celebration of science would not take place. So the head of the research work of the students of the Law Faculty of KFU Lukin Yuri Mikhailovich and the Council of the Students' Scientific Society of the Faculty of Law together with the Chairman Makolkin Nikita did their job very professionally, thanks to which the event was held at the highest level.

Summarizing the above, it is worth saying that during all three days the guests of the Convention took part in various events carefully designed for them by the organizers. The program included sectional sessions, round tables, master classes, intellectual games, olympiads, and a rich cultural program. We can say with certainty that the Convention differs significantly in format from the usual for students scientific and practical conferences and forums. This is a unique project of the Faculty of Law of Kazan (Volga Region) Federal University, inspired by the traditions of Kazan law school.

Firstly, it is work within the framework of round tables. This form of interaction between the participants helps to avoid competition in the struggle for the prize place, and promotes the formation of a dialogue within the scientific problem. Also this form allows you to focus on one issue, without being scattered throughout the system of law. As the past Convention showed, this format is much more productive in terms of scientific results.

Secondly, the event took place in three days. This is due to a greater emphasis on the educational program. Participants of the Convention had the opportunity to attend master classes in three different areas, as well as four discussion platforms in the format of round tables, participate in subject Olympiads, play the intellectual game "What? Where? When? ", which has already become traditional.

It should be noted that the cultural program of the Convention received only positive feedback from the participants. Students from all over Russia and the CIS came together to visit the thousand-year-old beauty Kazan, the third capital of Russia.

In conclusion, it should be said that the events taking place in the world can be called revolutionary in substance, content and form. The need for their interpretation exists at the level of political and legal practice. Thus, a new trend in the sphere of the student scientific movement – Convention – will grow in the future and gain its admirers and loyal friends.

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REVIEW
OF THE ANNUAL AWARDS CEREMONY OF THE REPUBLIC
OF TATARSTAN: “LAWYER OF THE YEAR” AND RUSSIAN LEGAL AWARD
NAMED AFTER GABRIEL SHERSHENEVICH

DOI:

Abstract: The article is concerned with events that were held at the Law faculty of Kazan (Volga region) Federal University on the 7th of December 2017: annual awards ceremony of the Republic of Tatarstan “Lawyer of the year” which presents awards to the most outstanding lawyers, prosecutors, judges and other representatives of legal professions; opening ceremony of the auditorium named after Professor Gabriel Shershenevich; awards ceremony of Russian legal award named by Gabriel Shershenevich which is awarded to bright scholars and lawyers who assert influence over development of jurisprudence. These events were organized by the Tatarstan regional branch of Association of Lawyers of Russia and the Law Faculty of Kazan Federal University. The article underlines main activities of Tatarstan regional branch of Association of Lawyers of Russia, the history of origin of the awards, biography of Professor and

politician Gabriel Shershenevich and his influence on evolution of Russian legal science and statehood.

Key words: Lawyer of the Year, annual awards, Association of Lawyers, Law Faculty, ceremony, award.

The annual awards ceremony of the Republic of Tatarstan “Lawyer of the year”, which also presented the Russian legal award named by Gabriel Shershenevich, were held at the Law Faculty of Kazan Federal University on the 7th of December 2017.

The following chain of events took place: grand opening of the Gabriel Shershenevich auditorium at the Law Faculty and two awards ceremonies; congress of the Tatarstan regional branch of Association of Lawyers of Russia.

Events were organized by the Tatarstan regional branch of Association of Lawyers of Russia and the Law Faculty of Kazan Federal University, and there were special guests: *Rustam Minnikhanov*, President of the Republic of Tatarstan, *Pavel Krasheninnikov*, Doctor of Legal Sciences, deputy of the State Duma, chairman of the State Duma Committee for State Construction and Legislation, *Krzysztof Shershenevich*, great-grandson of Gabriel Shershenevich, *Jaroslav Turlukowski*, Assistant Professor at Institute of Civil Law, Head of Centre in for Research on Law of Eastern Europe and Central Asia.

First of all the Law Faculty of Kazan Federal University held a ***grand opening of the auditorium named after Gabriel Feliksovich Shershenevich***. Opening of the lecture room was held with the participation of the Co-Chair of the Association of Lawyers of Russia, Chairman of the State Duma Committee for State Construction and Legislation Pavel Krasheninnikov, and grandson of Gabriel Shershenevich – Krzysztof Shershenevich, who came from Warsaw specially for such a significant event. Poland was also represented by Jaroslav Turlukowski, Doctor of Law, Professor of Faculty of Law and Administration at Warsaw University. Pavel Krasheninnikov gave a lecture for students and lecturers of the faculty about the key events of life of Kazan scholar. Pavel Krasheninnikov is a big admirer of Gabriel Shershenevich; in his speech to the young generation of lawyers he emphasized the relevance Shershenevich works for the moment, as well as fabulosity of his personality.

After that, a congress of the Tatarstan regional branch of Association of Lawyers of Russia took place, where a new Board of the regional branch of the Association elected its chairman, it is now headed by *Ildar Khalikov*. Among the Congress participants were Co-Chair of the Association of Lawyers of Russia, Chairman of the State Duma Committee for State Construction and Legislation *Pavel Krasheninnikov*; Head of the Federal Autonomous Institution “Glavgosekspertiza of Russia”, executive Presidium Secretary of Association of Lawyers of Russia *Igor Manylov*; Executive Director – Head of the Apparatus, Board member of Association of Lawyers of Russia *Stanislav Alexandrov*. The participants discussed the history of the regional office, pointing out that it was

established in Tatarstan in 2007. Currently 568 lawyers in the republic are members of the Association: these are employees of the Bar, the Prosecutor's Office, courts, notaries, public authorities, legal services of various organizations, scientists and university professors. Professional lawyers participate in strengthening the rule of law and legal culture in society, take part in expert, advisory, scientific and educational work. In 2017, many events were devoted to the 25th anniversary of the Constitution of the Republic of Tatarstan. They were aimed at stimulating the interest of the population and studying the constitutional foundations. A positive example is the republican competition "The expert on constitutional law" organized by the Association, the project "School of Law" for school students.

The ceremony of presenting the annual award of the Republic of Tatarstan "Lawyer of the Year" and the Russian legal award named after Gabriel Shershenevich took place in the Imperial Hall of Kazan University. The latter award was founded in 2016 by the Association of Lawyers of Russia in memory of the famous lawyer, civilian, professor of Kazan and Moscow universities, deputy of the First State Duma G.F. Shershenevich.

In his opening speech, the President of the Republic of Tatarstan Rustam Minnikhanov recalled that it was not accidental that the event took place in one of the historical halls of Kazan University because this university is *alma mater* for many generations of lawyers. He also noted that the Tatarstan regional branch of Association of Lawyers of Russia became an effective tool of civil society and noted their main activities. The opening of regional office created additional opportunities for effective professional activity in this sphere. Because of the joint visits with representatives of state bodies, the Bar and notaries to rural settlements, even residents of the most remote settlements of the Republic have an opportunity to receive professional legal services. Since 2011, more than 4 thousand people have received such assistance, as the President of the Republic of Tatarstan noted. "It is especially important that professional lawyers work with residents of rural areas in the Tatar language," Rustam Minnikhanov emphasized. It is also worth noting the project launched jointly with the radio station "Bolgar Radio" aimed to provide legal services in Tatar language on-air, he added.

The annual awards ceremony of the Republic of Tatarstan "Lawyer of the Year" was established on October 8, 2014 and it is a sign of recognition of the merits of highly qualified lawyers of the Republic of Tatarstan. Prize laureates are lawyers who make the most significant contribution to the formation of the rule-of-law, strengthening the rule-of-law and all-round order, protecting the rights and legitimate interests of citizens. The President of the Republic of Tatarstan presented notes of appreciation and certificates of acknowledgement to the most distinguished figures of the legal profession of the Republic.

"Honored Lawyer of the Republic of Tatarstan" was awarded to: *Valentin Paimukhin*, Executive Director, Head of the Apparatus of the Tatarstan regional branch of Association of Lawyers of Russia; *Dilyara Fakhretdinova*, Chairman of the Bar Association "Advocate

Center of Novo-Savinovsky District of Kazan”; *Irina Petrova*, Senior Assistant to the Prosecutor of the Republic of Tatarstan on Legal enlightenment. The President of Tatarstan was thanked by *Anton Vorobyev*, the Head of the Department for Magistrate Judges Activities of the Ministry of Justice of the Republic of Tatarstan.

Ildar Khalikov, Chairman of the Board of Trustees of the Tatarstan regional branch of Association of Lawyers of Russia, thanked the participants for their great daily work in providing free legal assistance to citizens. This is not only a helping hand and patronage, but in many ways it also educates the citizens of the republic and gives an opportunity to relieve the burden on judicial bodies and a number of other law enforcement agencies. This is a large system of formation of legal literacy and conscientiousness.

In the category “Legal Education”, the winner was *Felix Fatkullin*, Head of the Department of State Legal Disciplines of Kazan Law Institute of the Ministry of Internal Affairs of the Russian Federation. *Umar Khusikhanov*, Head of the contractual and litigation section of the legal work department of PJSC “KamAZ”, won the victory in the nomination “For the provision of free legal assistance”.

In the nomination “For the dedication to the legal profession,” the award was given to deputy head of the Investigation Department of the Russia’s Investigative Committee in the Republic of Tatarstan *Ruslan Zalyaliev*. Also *Ravil Salikhov*, a member of the Chamber of Advocates of the Republic of Tatarstan, won in the nomination “Protection of Human Rights and Freedoms”.

Irek Mavlyavetdinov, judge of the Supreme Court of the Republic of Tatarstan, received an award in the category “Justice”.

Later another awards ceremony presenting the Russian legal award named after Gabriel Shershenevich took place.

The award was promoted in 2016 by the initiative of the Tatarstan regional branch of Association of Lawyers of Russia, in memory of the outstanding Russian lawyer, scholar, professor of Kazan University and professor of Moscow University, Deputy of the First State Duma of Russia Gabriel Shershenevich.

Gabriel Shershenevich was born in 1863 in a Polish noble family, and after a while the family moved to the city of Kazan, where the future lawyer was educated in Kazan school for boys and graduated from the Law Faculty of Kazan University. Gabriel Shershenevich successfully passed the Master’s examination in 1888 and received a master’s degree in Civil Law as well as the right to teach (as a privat-docent) at the Department of Commercial Law at the Law Faculty of Kazan University. He defended his doctoral thesis in 1891, and in 1892 was appointed professor at Kazan University at the Department of Commercial Law and Commercial Proceedings. The teaching period of Professor Shershenevich continued until the end of 1905 in Kazan, he was an outstanding lecturer and speaker who was able to explain the content of complex issues in a simple and clear way. He also devoted much effort to public activity and played a significant role in promoting and strengthening legal views across the Volga region,

as well as took an active part in the political life of the country. He was elected to the Kazan City Duma and became a member of the Legal Commission in 1901; then in 1906 he was elected a deputy of the First State Duma from Kazan. After the dissolution of the First State Duma, in the same year 1906, Gabriel Shershenevich moved from St. Petersburg to Moscow, where he was appointed to the position of professor of the Department of Commercial Law at the Faculty of Law of Moscow University. During the Moscow period, Professor Shershenevich was actively engaged in research activities, creating a fundamental work “History of Philosophy of Law” (1904-1907), “General theory of law and state” (1908), “Sociology” (1910), “General Theory of Law” (1910). He also participated in legislative activities – notably in the discussion of the draft Civil Code, which was to become the first Russian Civil Code. Gabriel Shershenevich was unusually talented and prolific scholar, who impressed with the grace and depth of his thoughts¹.

The award of the Russian Legal Award named after Gabriel Shershenevich was presented by Krzysztof Shershenevich, great-grandson of Gabriel Shershenevich. The laureates were: Pavel Krasheninnikov, Doctor of Legal Sciences, deputy of the State Duma, chairman of the State Duma Committee for State Construction and Legislation; Ildar Khalikov, Chairman of the Tatarstan regional branch of Association of Lawyers of Russia; Bronislav Gongalo, Doctor of Legal Sciences, Professor, Head of the Ural Branch of the Russian School of Private Law, Head of the Civil Law Department of the Ural State Law University.

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¹ Shershenevich G.F. *Izbrannoe. T. 1* [Selected works. Volume 1] / Welcoming remarks, originated by: P.V. Krasheninnikov. – 2nd enlarged ed. – M.: Statut, 2017. – 496 p. – (*Juristy, izmenivshie pravo, gosudarstvo i obshchestvo*. [Lawyers who changed law, state and society])

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