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Dear readers,

I would like to present for your attention the fourth regular issue of the journal “KAZAN UNIVERSITY LAW REVIEW” in 2019.

This issue contains articles on problematic discussions of legal theory and reviews of two particular conferences.

I am glad to share the research of our colleague from Hungary. The opening article is written by *Spindler Zsolt*, a disarmament diplomat at the Permanent Mission of Hungary to the UN in Geneva, on the topic “Just War Theories from Jus ad Bellum to Jus post Bellum – Legal Historical and Legal Philosophical Perspectives.” The article elucidates the issue of a universally accepted normative definition of the terms ‘jus post bellum’ and ‘armed conflict’ from the legal historical and legal philosophical perspectives, and attempts to find a generally acceptable working definition of ‘jus post bellum’ in the mirror of just war theories, and an ‘armed conflict’ from the perspective of war and aggression. The article might sound historical or theoretical but I do believe it has a good input for current trends in the global sense.

The next article of the issue is the article of Doctor of Legal Sciences, Professor of Kazan Federal University *Alexander Pogodin*. His article “Practical foundations of the integrative theory of law” is devoted to the idea of constant updating and development of the integrative theory of law, in accordance with the dynamics of the development of society and the state.

The “Commentary” part contains the research “Mixed contracts in the Russian legal doctrine: contribution of Kazan civil law science”, written by *Dmitriy Ogorodov*, Candidate of Legal Sciences, Arbitrator of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. The author introduces the essence of the mixed contracts theory and highlights the contribution of Kazan scholars of civil law, mainly to the development of the theory.

The issue finishes with the “Conference reviews” containing two articles: “X Perm Congress of legal scholars ‘Modern Economy in the Legal Dimension’”, written by Professors *Valery Golubtsov* and *Olga Kuznetsova*, Perm State University, and “Review of the XV International Scientific and Practical conference ‘Derzhavin readings 2019’”, prepared by *Nikolay Rybushkin*, Candidate of Legal Sciences, Associate Professor of Kazan Federal University, and *Nigina Nafikova*, *Yulia Nasyrova* (Kazan, Russia), the 4th year students of the Faculty of Law, Kazan Federal University.

*With best regards,
Editor-in-Chief Damir Valeev*

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ARTICLES

ZSOLT SPINDLER

Disarmament diplomat of the Permanent
Mission of Hungary to the UN in Geneva,
Switzerland

JUST WAR THEORIES FROM JUS AD BELLUM TO JUS POST BELLUM – LEGAL HISTORICAL AND LEGAL PHILOSOPHYCAL PERSPECTIVES

<https://doi.org/10.30729/2541-8823-2019-4-4-237-272>

Abstract: The aim of the article is to elucidate the issue of a universally accepted normative definition of the terms ‘jus post bellum’ and ‘armed conflict’ from the legal historical and legal philosophical perspectives. The main concept of just war theories is based on the human desire to control interracial aggression. It is known that the “morally justifiable war” based on a series of criteria is split first into two, and later into three groups: right to go to war (jus ad bellum), right conduct in war (jus in bello), and right after the war (jus post bellum). Jus post bellum approach appeared just after the Second World War. In the author’s opinion, **jus post bellum** is the most important part. The author’s task is to find a generally acceptable working definition, or at least a generally acceptable meaning of **jus post bellum** in the mirror of just war theories, and an **armed conflict** from the perspective of war and aggression, as well as to describe the historical evolution of the two classic parts of just war theories: **just ad bellum** and **jus in bello**.

Keywords: just war theories, jus post bellum, just ad bellum, jus in bello, armed conflict, definition, war.

Just War Theories (Jus bellum justum)

The law of armed conflicts is based on the pillars of jus ad bellum/jus contra bellum, jus in bello and jus post bellum.¹ The evolution of the law of armed conflict based on the

¹ Dieter Fleck, *Jus Post Bellum as a Partly Independent Legal Framework*. In Stahn-Easterday-Iveson: *Jus Post Bellum*. 2014, Oxford, Oxford University Press p. 43.

just war theories and later on the general and objective prohibition of aggression. Neither *jus post bellum*, nor armed conflict as a term of art have a universally accepted normative definition, but several scholars, international organizations and bodies tried to find the significance of them. The first task of my research is to find a generally acceptable working definition, or at least a generally acceptable meaning of **jus post bellum** in the mirror of just war theories, and **armed conflict** from the perspective of war and aggression. If we understand the meaning of armed conflict, we can define **the end of armed conflict as a starting point of the applicability of transitional justice and jus post bellum**.

In the medieval ages or before we cannot find any evidence that a distinction was made between *jus ad bellum* and *jus in bello*, and *jus post bellum* approach appeared just after the Second World War. According to the early Christian writers, the conduct of war was an integral part of *jus ad bellum* and just war had a punitive character.¹ **Ian Clark** points out that “since war was a limited activity, and since what was justified was only that which was strictly necessary to its purpose, there was no felt need to proceed to elaborate a separate set of principles for its conduct...”² The work of Scholastics and the Salamanca School became a mark of a transitional interval from the **punitive approach to just war to the non-punitive one**.³ The first marks of the distinction between *jus ad bellum* and *jus in bello* emerged in the works of Hugo Grotius with the separation of **bellum justum and bellum lege**.⁴ Starting after the Peace of Westphalia treaties had an emerging importance in international relations and just war thinking as well, and in the nineteenth century **positive law** based on **customary law and treaties** took the place of natural law approach,⁵ and at the same time the jurists took the place of theologians and philosophers in just war thinking.⁶ The revival period of history reaffirmed the distinction between *jus ad bellum* and *jus in bello*.⁷ The restrictions of use of force were set in treaties and by customs, and efforts were made to proscribe war (League of Nations 1920; Kellogg Briand Pact 1928).⁸

¹ Serena K. Sharma, Reconsidering the *Jus Ad Bellum/Jus in Bello* Distinction. In Carsten Stahn-Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 10. See also: W. L. La Croix, *War and International Ethics: Tradition and Today*. London, 1988, University Press of America, p. 69.

² Ian Clark, *Waging War: A Philosophical Introduction*. Oxford, 1990, Clarendon Press, p. 38.

³ Serena K. Sharma, Reconsidering the *Jus Ad Bellum/Jus in Bello* Distinction. In Carsten Stahn-Jann K. Kleffner (eds.): *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 13.

⁴ Hugo Grotius, *The Law of War and Peace*. In Hugo Grotius: *A háború és béke jogáról*. Budapest, 1999, Pallas Stúdió/Attraktor Kft.

⁵ Serena K. Sharma, Reconsidering the *Jus Ad Bellum/Jus in Bello* Distinction. In Carsten Stahn-Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 15.

⁶ *Ibid.*, p. 15.

⁷ *Ibid.*, p. 11.

⁸ *Ibid.*, p. 17.

After the Second World War, Article 2(4) of the United Nations Charter restricted the use of force and the threat of force as well with the sole exceptions of self-defence and enforcement actions authorized by the UN Security Council.¹ This made the relation of *jus ad bellum* and *jus in bello* questionable. Some scholars even question the existence of *jus ad bellum*, and instead of it they use the phrase *jus contra bellum* when they refer to the just war thinking after 1945.²

According to Sulyok, the law of armed conflict – international humanitarian law or with the pre-U.N. denomination: the law of war – is a widely used term for those consuetudinary and contractual rules, that aim

1) to resolve humanitarian problems emerged directly because of the existence of armed conflicts – both international and non-international ones – with the help of the limitation of the Parties' right to choose the military equipment and measures and

2) to protect the victims and their possessions.³

From a different approach, humanitarian law is just a part of the law of armed conflict, and it is a synonym for the law of the Geneva Conventions. In this context, the adjective 'humanitarian' means an ambition to reduce brutality and sufferings caused by an armed conflict.⁴

Nevertheless, the main concept of just war theories is based on the human desire to control intraracial aggression. The "morally justifiable war" based on a series of criteria and first split into two, later three groups: right to go to war (*jus ad bellum*), right conduct in war (*jus in bello*), and right after the war (*jus post bellum*). *Jus post bellum* deals with the moral problems of post-war settlement and reconstruction. From my reserach perspective, ***jus post bellum*** is the most important part, but to have a complete picture, we have to describe the historical evolution of the two classic parts of just war theories: ***jus ad bellum*** and ***jus in bello***. The history of international law contains a significant red line border which divides the interval before and after the Second World War. The interval before the end of the Second World War can be described as the *jus*

¹ Charter of the United Nations, Ch. 2(4), www.un.org/aboutun/charter/.

² Robert Kolb, *Jus contra bellum. Le droit international relatif au maintien de la paix*. Helbing/Lichtenhahn-Bruylant, Bâle-Bruxelles, 2003. Bruhács János, *Jus contra bellum – Glosszák az erőszak nemzetközi jogi tilalmához*, http://acta.bibl.u-szeged.hu/34781/1/juridpol_077_069-084.pdf. Serena K. Sharma, *The Legacy of Jus Contra Bellum: Echoes of Pacifism in Contemporary Just War Thought*. *Journal of Military Ethics*, Volume 8, 2009, Issue 3: James Turner Johnson and the Recovery of the Just War Tradition, pp. 217-230. P. Ramsey, *The Just War: Force and Political Responsibility*. New York, 1968, Charles Scribner's Sons, chs. 12, 17.

³ Sulyok, Gábor, *A humanitárius intervenció elmélete és gyakorlata*. Budapest, 2004, Gondolat, p. 17. See also: Gasser, H-P., *International Humanitarian Law: An Introduction*. Separate print from Hans Haug, *Humanity for All*, The International Red Cross and Red Crescent Movement. Haupt, 1993, Henry Dunant Institute, p. 3, 16. Herczegh, Géza, *A humanitárius nemzetközi jog fejlődése és mai problémái*. Budapest, 1981, Közgazdasági és Jogi Könyvkiadó, p. 79-81. Partsch, K. J., *Humanitarian Law and Armed Conflict*. In Bernhardt, Rudolf (ed.): *Encyclopedia of Public International Law*. Vol. 3. Use of Force, War and Neutrality, Peace Treaties (A-M). New York-London, 1982, North-Holland Publishing Co. – Collier Macmillan Publishers, p. 215-216.

⁴ Sulyok, Gábor, *A humanitárius intervenció elmélete és gyakorlata*. Budapest, 2004, Gondolat, p. 18.

ad bellum epoch, while with the Geneva Conventions a new epoch emerged where aggression was generally not accepted and the jus contra bellum interval started.

1. The historical experience of just war theories from jus ad bellum to jus contra bellum

According to the minimalist interpretation, international law is based on the contracts among states, while many thinkers view international law as a conglomerate of customary practices and ethical principles of natural law as well.¹ There are several common contact points between international law and just war theory – like just cause, self-defense, last resort, resist aggression, proportionality, etc. – but there are differences as well: for example, international law does not explicitly reinforce the right intention as a just war rule.² International law and just war theories are basically new elements of the history of law. According to the generally accepted scientific thesis of Lassa Oppenheim, international law – and just war theory as well – is the product of the Christian civilization³, and it is not older than five hundred years. However, there are scholars like Rory Cox, who expands the time interval of the existence of just war theories as far as the Ancient Egypt.⁴ Ian Brownline presses the idea that since the beginning of the written history of humankind it was rare for advanced societies to leave war completely unregulated.⁵ On the other hand, we have to admit that before the Christian writers, or more precisely, before Hugo Grotius, most of the remarks on legal termination of war were more or less incidental and based on ethical, religious and moral discussions. However, it is useful to mark some critical historical points in different times and cultures which show that the desire to control of intraracial aggression occurred almost everywhere, where human beings started to live on society level.

1.1. Pre-Christian just war theories

In the Sumerian Epic of Gilgamesh, slaying prisoners – as Enkidu persuaded Gilgamesh to do so – was an act against the gods' favor.⁶ This statement, or more precisely this opining tells nothing about jus ad bellum, but gives us a picture of the generally accepted moral attitude in and after war (jus in bello and jus post bellum) in Mesopotamia.

¹ Hans Kelsen, *Principles of International Law*. New York, 1966, Holt, Rinehart & Winston. J.L. Brierly, *The Law of Nations*. New York, 1963, Waldock. H. Lauterpacht, *International Law*. Cambridge, 1978, Cambridge University Press.

² Brian Orend, *Jus Post Bellum: A Just War Theory Perspective*. In Carsten Stahn-Jann K. Kleffner (eds.): *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 32.

³ Oppenheim, Lassa, *International Law: A Treatise*. Vol. I. Peace- London-New York-Bombay, Longmans, Green & Co., 1905, p. 45.

⁴ Cox, Rory, *Expanding the History of the Just War: The Ethics of War in Ancient Egypt*. *International Studies Quarterly*. 2017, no. 61 (2), p. 371.

⁵ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 3.

⁶ Cox, Rory, *Historical Just War Theory up to Thomas Aquinas*, https://www.academia.edu/12482439/Historical_Just_War_Theory_up_to_Thomas_Aquinas.

Manoj Kumar Sinha, a visiting Professor at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, argues that the laws of armed conflicts were founded in ancient **India** on the principle of humanity.¹ The epic narrative of the Kuruksetra war in the Indian Hindu Mahabharata indirectly refers to the criteria of proportionality and just cause. The Dharma Sastras prescribe the rules of society and they distinguish between righteous war (Dharma Yudda) and unrighteous war (Adharma Yudda).² The Mahabharata war is considered as a war fought according to the rules of Dharma (righteousness). The two sides agreed that it was forbidden to attack combatants in distress, i.e. none of the warriors may kill or injure a warrior who has surrendered, an unarmed warrior, a person or animal not taking part in the war; a warrior whose back is turned away, and fighting must begin no earlier than sunrise and should end by exact sunset. The rules protect the lives of women, prisoners of war, and farmers and specify the rules for each weapon. According to the text, chariots cannot attack cavalry, only other chariots. The fact that attacking cities and farmers were forbidden has two major consequences: first from the perspective of *jus in bello*, as it was a restriction during the conduct of war, but from an indirect perspective it has an effect on the life of the population after the war. Since cities and farmers were not ruined and killed, reconstruction became an easier task, and the “civil” population suffered less after the war, no matter which side won. The basic logistic tasks of society were not ruined. In my opinion this adumbrates the need of the existence of after-war rebuilding and reconstruction laws, in another world, *jus post bellum*.

There is another peculiar spot of proportionality, when Rama and the enemies of Rama ask help from Krishna. The idea of proportionality occurs when Krishna says that they have to choose between himself and his army: Rama chose Krishna so the army of Krishna fought for the other side.³

In **China**, in the Ch'unch'iu Period (722-481 B.C.) war was a legal institution and the Parties were strictly defined. War could exist between equal states, but not between a feudal state and its dependencies, nor between Chinese family of states and barbarians.⁴

The Babylonian Talmud made a distinction between voluntary wars, where the aim was the extending of the territory, and obligatory wars, which were conducted against an enemy attacking Israel or against the seven nations inhabiting Canaan.⁵

¹ Manoj Kumar Sinha, Hinduism and international humanitarian law. *International Review of the Red Cross*. Volume 87 Number 858 June 2005, p. 285, https://www.icrc.org/eng/assets/files/other/irrc_858_sinha.pdf

² Manoj Kumar Sinha, Hinduism and international humanitarian law. *International Review of the Red Cross*. Vol. 87, no. 858, June 2005, p. 287.

³ More on the topic: Manoj Kumar Sinha, Hinduism and international humanitarian law. *International Review of the Red Cross*. Volume 87 Number 858 June 2005. pp. 285-294, https://www.icrc.org/eng/assets/files/other/irrc_858_sinha.pdf.

⁴ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 3.

⁵ *Ibid.*

In ancient **Egypt**, the creation of a jus ad bellum doctrine based on universal and absolutist claims to justice interfered in the development of jus in bello.¹

In ancient **Greece**, from informal socially obliged standards the rules of war were formed for the wars among different Hellenic tribes (formal declaration of war, intervals of truce for sacred holidays, special rules for prisoners, etc.).² Plato examined war from an ethical point of view, and established the categories of proper war (against barbarians, unlimited and natural) and faction (unnatural and limited). In Plato's work, Socrates made a distinction between wars fought amongst Greeks, and wars fought between Greeks and barbarians (non-Hellenes).³

Philosophical background – Aristotle and the *Nicomachean Ethics*: Aristotle followed Plato in distinguishing between intra-Hellenic and „international” armed conflicts and declared that “we wage war in order to have peace”.⁴ This maxim, deriving from Plato (Laws, 628e, 803d), was passed down to medieval theorists via Cicero (*De Officiis*, bk. 1, §35), Augustine (Letter 189 to Boniface), and Gratian (Decretum, Causa 23, q. 1 c. 3).⁵ However, there is an outstandingly important element of the philosophy of Aristotle, which later occurs in Grotius and it can be described as one of the basic elements of the future ius post bellum thinking. Aristotle made an equivalence of the results of pleionexia and meionexia.⁶ Pleionexia – taking too much – as a vice, not different from meionexia – taking too little. Justice requires to take as much, as one's due,⁷ but there are other interpretations which argues that meionexia is a requirement to accept, or demand less than what they are due if this is necessary for achieving justice in a wider sense.⁸

In the **Roman Empire**, formal legality of war and formal concept of just war were established; the category of *iustum bellum* dealt with the formalities and *pium* was in accordance with religious sanctions and implied commands of gods (*bellum iustum et*

¹ Cox, Rory, Expanding the History of the Just War: The Ethics of War in Ancient Egypt. *International Studies Quarterly*. 2017. 61 (2) : 371. Cox, Rory, Historical Just War Theory up to Thomas Aquinas, https://www.academia.edu/12482439/Historical_Just_War_Theory_up_to_Thomas_Aquinas.

² Adriaan Lanni, The Laws of War in Ancient Greece. *Law and History Review*. Vol. 26, no. 3 (Law, War, and History: A Special Issue), Fall 2008, pp. 469-489.

³ Plato, *The Republic of Plato*, trans. A. Bloom (New York: Basic Books, 1968), bk. 5, 470c, p. 150.

⁴ Arisztotelész, *Nikomakhoszi etika*. Budapest, Európa Könyvkiadó, 1987, trans: Szabó Miklós, 1177b, p. 293.

⁵ Cox, Rory, Historical Just War Theory up to Thomas Aquinas, p. 5, https://www.academia.edu/12482439/Historical_Just_War_Theory_up_to_Thomas_Aquinas. See also J. Barnes, 'The Just War', in *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100-1600*, ed. N. Kretzmann, A. Kenny, J. Pinborg (Cambridge: Cambridge University Press, 1982), p. 771-84, at 780.

⁶ Arisztotelész, *Nikomakhoszi etika*. Budapest, Európa Könyvkiadó, 1987, trans: Szabó Miklós, 1129 pp. 121-124.

⁷ Dieter Fleck, Jus Post Bellum as a Partly Independent Legal Framework. In.: Stahn-Easterday-Iveson: *Just Post Bellum*. Oxford, 2014, Oxford University Press, pp. 43-57.

⁸ Larry May, Jus Post Bellum, Grotius and Meionexia. In: Stahn-Easterday-Iveson: *Just Post Bellum*. Oxford, 2014, Oxford University Press, p. 21.

pium). The moral content of the rules of war became the base of early Christian writers' just war theories.¹ Cicero (106-43 BC) in the first book of his work *De Officiis* wrote a well summarized explanation of the just war theories of the pre-Christian classic world (sections 33-41.). Referring to principle of Plato and Aristotle he wrote: "The only excuse, therefore, for going to war is that we may live in peace unharmed; and when the victory is won, we should spare those who have not been blood-thirsty and barbarous in their warfare."²

1.2. Just war theories at the early Christian period: Saint Ambrose, Augustine, Byzantium and the just war idea in the Islam religion

Until 170 AD the early Christian attitude was simply restrictive towards war and for Christians it was forbidden to be soldiers.³ **Saint Ambrose** in *De Officiis* accepted the idea that there are some situations in which war might be justified.⁴ **Augustine of Hippo** continues the tradition of "waging war to gain peace" idea when he writes the aphorismatic sentence: "For every man seeks peace by waging war, but no man seeks war by making peace."⁵ He held to the opinion that the involvement in a just war is not forbidden for Christians. "Do not think that it is impossible for anyone to please God while engaged in active military service" – he wrote in a letter to Boniface.⁶ But when war was not started in accordance with an order of God (*bellum Deo auctore*), than it can be a just one in that case, if it is necessary and imperative. Waging war has to be in obedience to the divine command, or in conform with God's laws in any other way. In Augustine, the main characteristic of just war is the punishment of an unjust act.⁷ In his work, *The City of God*, he emphasized that wise man wage exceptionally just war, and if it is not just, he would not wage one at all.⁸ Augustine tried to justify the Christian participation in warfare.⁹ In Byzantium, a special concept of holy war emerged, which

¹ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 4.

² Cicero, *De Officiis*, Book 1, section 35, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Aatext%3A2007.01.0048%3Abook%3D1%3Asection%3D35#note-link1>.

³ John Cecil Cadoux, *The Early Christian Attitude to War*. London, 1919, Headley Bros. Publisher Ltd., pp. 96-97 seq., <http://oll.libertyfund.org/titles/cadoux-the-early-christian-attitude-to-war>.

⁴ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 5.

⁵ Augustine, *The City of God*. Book XIX, Chapter 12 – That even the fierceness of war and all the disquietude of men make towards this one end of peace, which every nature desires, p. 511, <http://www.unilibriary.com/ebooks/Saint%20Augustine%20-%20City%20of%20God.pdf>.

⁶ Augustine, *Epistula ad Bonifatium CLXXXIX*. (Letter to Boniface CLXXXIX), 4, <http://www.ccel.org/ccel/schaff/npnf101.vii.1.CLXXXIX.html?letter,boniface,war>

⁷ Sulyok, Gábor, *A humanitárius intervenció elmélete és gyakorlata*. Budapest, 2004, Gondolat, p. 26.

⁸ Augustine, *The City of God*. Book XIX, Chapter 7, p. 508, <http://www.unilibriary.com/ebooks/Saint%20Augustine%20-%20City%20of%20God.pdf>

⁹ Serena K. Sharma, *Reconsidering the Jus Ad Bellum/Jus in Bello Distinction*. In: Carsten Stahn-Jann K. Kleffner (eds.): *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 15.

may have been derived from the Islamic concept of jihad, a war against the unfaithful. The Islamic concept was based on the religious doctrine as a guidance on lawful reasons for resort to war – jihad – (defence, punishment for apostasy, action against non-Moslems).¹ While according to Brownline, at the territory of Russia in the XI-XII century amoral states occurred, where peace was not regarded as the normal state.²

1.3. Just war at the Scholastics, some XIV-XVth century scholars and the School of Salamanca

Gratian arrived at basically the same principles as the previous Christian scholars, while **Saint Thomas Aquinas** summarized the conditions under which a war could be justified. It is important to note that his explanations were based on more theological and philosophical principles than pure legal ones. According to Thomas Aquinas, just war is waged by a properly instituted authority. It must be based on a just purpose and not merely on self-gain. The third principle of Thomas Aquinas is the rightful intention – the advancement of good, or the avoidance of evil. Thomas Aquinas wrote detailed answers on the questions of *jus in bello* (whether a bishop can take part in the war, the acceptability of ambushes, or fight on holy days), but the *jus post bellum* approach is not recordable in his works.

In the fourteenth and fifteenth centuries, the approaches towards just war were based on either theological statements or practical aspects of law (postglossators). **Bartolus** (1314-57) made an equivalence between war and reprisals. He and Giovanni da Legnano saw the legality of the use of force very similarly. In 1360 Giovanni da Legnano in his *Tractatus de bello, de represaliis et de duello* described war as part of creation, since it can clear out the diseases of the world. The war is lawful if it is declared by the highest authority or if it occurred between equal parties and legalized by a just cause.³ The conclusion of their work is that the Pope has the right to wage war against infidels. In accordance with the war between Teutonic Knights and the Kingdom of Poland⁴, **Stanislaw of Skarbimierz** (1360-1431) formalized the just war theory in his work *De bellis justis* (c. 1410). **Martino da Lodi** in *De Bello* (cc. 1455) also made a distinction between just war and unjust war, but he emphasized the importance of the previous warning and the imperative manner of use of force to enforce rights.⁵ **Tomaso da Vio** (1469-1534) described war as a judicial procedure, where the main motive was the punishment of the guilty party.⁶

¹ More on this topic: Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 6.

² *Ibid.*

³ *Ibid.*, p. 7.

⁴ Polish-Lithuanian-Teutonic War 1409-1411.

⁵ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 7.

⁶ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 8. Tomaso da Vio: *Summa Theologicae*, 1517. Tomaso da Vio: *Summula*, 1524.

Philosophical background – Thomas More and *Utopia*: In *Utopia*, **Thomas More** (1478-1535) describes the ideal attitude of the ideal people towards war as inglorious and despised, although war as a necessity is accepted. The inhabitants of Utopia wage war in the following three circumstances: if they have to protect their borders, if they have to chase off the enemy from their friends' state, or if they have to free a deprived nation from slavery. Since this is the ideal state, we can suppose that according to More, these are the just causes of waging war. More argues that not only the defensive war is acceptable, but taking revenge on an unjust act can be a just cause as well. He sums the attitude towards war in a slightly different way, then we saw it in Plato and Augustine. In his opinion, the one and only aim of war is gaining the result, which would have been gained previously, if the war had not been waged. It is kind of a restriction – it limits the results of war. More initiates the idea of extraterritorial preemptive strike, when he accepts waging war out of the territory of Utopia, if another state threatens the peace, territorial integrity and sovereignty of Utopia. More described some parts of *jus ad bellum*, first of all the just causes, and refers to *jus in bello* as well, when he endorses the idea of war with the necessary minimum level of human suffering. In the book there is a detectable farseeing post-war attitude, but it is hardly describable as a *jus post bellum* initiative: "...they never lay their enemies' country waste nor burn their corn, and even in their marches they take all possible care that neither horse nor foot may tread it down, for they do not know but that they may have use for it themselves." It is more like an economic focus since not post-war justice is the key element, rather than rationality from the perspective of the occupational forces (use for themselves).

Pierino Belli (1502-75) established five requirements of just war: a just person, a just matter, a just intent, a just cause and an adequate authority.¹

The representatives of the **School of Salamanca** described war as the worst evil and they accepted a war as a just one only if it was waged because of self-defense, to prevent an attacking tyrant or punish the guilty enemy. The wider social acceptance of waging war was a new element: governing authorities may declare a war, but if the people oppose it, it is illegitimate. The key element of just war was using force as a last resort. From *jus post bellum* perspective, they still focused on the punishment element rather than the rebuilding part. **Francisco de Vitoria** (1480-1546) argued that the committed wrong should be punished on the base of proportionality, and he also advanced an opinion that the injured state can obtain satisfaction. Vitoria made attempts to apply the theory of **natural law** across cultural, religious and geographic boundaries in connection with the Spanish conquest of the Americas,² and also made the first efforts to approach just war theory from a non-punitive perspective.³ **Balthasar Ayala** (1548-84) in *De Iure et Officiis*

¹ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 8.

² W. L. La Croix, *War and International Ethics: Tradition and Today*. London, 1988, University Press of America, p. 78.

³ Francisco de Vitoria, *On the Law of War*. Question 1(3): What are the Permissible Reasons and Causes of Just War? In A. Pagden and J. Lawrence (eds.): *Vitoria: Political Writings* (Cambridge, 1991, Cambridge University Press, p. 303.

Bellicis et Disciplina Militari Libri wrote about just war from an orthodox point of view. He is of the opinion that there can be a just war on both sides.¹

1.4. The European state system and the Protestant school

Philosophical background – Niccolo Macchiavelli and *The Prince*: The European state system and the colonizing interests brought a new, more pragmatic philosophy. **Niccolo Macchiavelli** (1492-1550) did not elaborate specific categories of just war, but declared that “that war is just which is necessary”, and every entity which has its own sovereignty may wage a war.² Macchiavelli points out the disadvantages of imposing extraordinary taxes related to war or the problem when a prince must “rob his subjects”,³ and he emphasizes that war is desirable only as an ultima ratio.⁴

Alberico Gentili (1550-1608) was the first scholar who developed a secular and originally legal system of norms for state relations.⁵ He also states that a war must be fought between sovereigns, and a just cause is necessary as well, but he also declares that a war can be just on both sides objectively, and not just because one of the parties made a mistake in the judgement. Gentili denies the justice of war for religious motives.⁶

The rebuilding part of jus post bellum appears in **Hugo Grotius** (1583-1645) in an indirect way: all the soldiers that have participated in common acts are responsible for the total damage, and he adds that there are certain duties which must be performed toward those from whom you have received injury. Grotius referred to the previously mentioned meionexia principle as well. The pragmatic limitation (or more precisely the pragmatic self-limitation) as a key element of jus post bellum goes back to the logic system of Aristotle. Grotius – as a writer of the first comprehensive and systematic book about the law of nations⁷ – used a rationalist and secular basis which originated in natural law. In Grotius’s opinion, third parties could support the side which they considered had a just cause. His conclusion, which was strengthened by the Bible, as well as several Roman sources and Christian scholars, was that war was a judicial and punitive procedure, and

¹ Balthasar Ayala, *De Iure et Officiis Bellicis et Disciplina Militari Libri III*. J. Westlake (Ed.), Vol. 2, Washington, 1912, *The Classics of International Law*, Book I, ch ii, p. 34-35. In Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 10.

² Niccolo Machiavelli: *Il Principe*. chs. 3 and 26. <https://www.victoria.ac.nz/lals/about/staff/publications/paul-nation/Prince-Adapted2.pdf>.

³ Niccolo Machiavelli: *Il Principe*. ch. 14. p. 25.

⁴ *Ibid.*, ch. 26. p. 42. „war is just which is necessary, and arms are blessed when there is no other hope but in them”.

⁵ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 11. More on this topic: Van der Molen, *Alberico Gentili and the Development of International Law*. Amsterdam, 1937.

⁶ Alberico Gentili, *De Iure Belli Libri Tres*, *The Classics of International Law*, Oxford, 1933, Book I. chs. IX, X, XI. Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 12.

⁷ Hugo Grotius, *De Iure Belli ac Pacis Libri Tres*. First published in 1625. In Hungarian: Hugo Grotius: *A háború és béke jogáról*. Budapest, 1999, Pallas Stúdió – Attraktor Kft.

public war must have been distinguished from a private one.¹ Compared with Gentili, it is an important difference that Grotius did not accept the probabilistic idea of “just war on both sides”, however he accepted the existence of factual deception (fallibility).²

1.5. Positivist views of just war theories

After the signature of the general settlement of the **Peace of Westphalia** (1648), the role of the Papacy as a political regulator weakened and the role of public law as a base for public peace was becoming more and more important. A new epoch emerged, where the public opinion became more important and the governments tried to find reasons of righteousness of the war they waged.³ It is just a minor note here, that this efforts have been increasingly important since the 17th century. Later, at the beginning of the 20th century, with the cheap printed newspapers and the increasing role of media it became more and more crucial and in the 21st century a new type of war – the mass media war – emerged, which became almost as important as the real war itself as we will see in the chapters of the Iraqi conflict (2003) or the Russian-Georgian conflict (2008).

The concept of neutrality was defined by **Cornelius van Bynkershoek** (1673-1743) and **Samuel Pufendorf** (1632-94). Bykershoek argued that the only correct ground for war is defense and recovery. Pufendorf in the *Law of Nations* followed the moralist natural way which was described by Grotius.⁴ **Richard Zouche** (1589-1660) expressed his opinion that if the belligerents are acting in good faith, their act cannot be unjust.⁵ From my point of view, **Johann Wolfgang Textor** (1638-1701) has a great importance, since he tried to give a definition of war as a “condition of lawful hostile offence existing for just cause between royal or quasi-royal powers, declared by public authority”.⁶ **Emerich de Vattel** (1714-67) in *Le Droit des gens* (1758) followed the legal philosophic way of the law of nature and accepted the view of justice of war on both sides.⁷ According to Vattel, the sovereigns have the right to make war and he gave a number of just causes like preventive self-defence, the maintenance of rights and the maintenance of the Balance of Power: „En traitant du Droit de sûreté, nous avons montré, que la Nature donne aux hommes le droit d’user de force, quand cela est nécessaire, por leur défense et por la conservation de leurs droits.”⁸ After the collapse of the Ancien Régime, the French constitution of 1791 became a milestone

¹ Hugo Grotius, *A háború és béke jogáról*. Budapest, 1999, Pallas Stúdió – Attraktor Kft. Book I. ch. 2; 3.

² *Ibid.*, book II, ch. XXIII. 13. 2, p. 135.

³ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 14.

⁴ Samuel Pufendorf, *De Iure Naturae at Gentium Libri Octo*. 1672, *The Classics of International Law*, no. 17. London, 1934, Vol. II. Chs. III and IV.

⁵ Richard Zouche, *Juris et Judicii Feccialis sive Juris inter Gentes Explicatio*. Oxford, 1650.

⁶ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 15.

⁷ Emerich de Vattel, *Le Droit des gens*. 1758

⁸ Emerich de Vattel, *Le Droit de Gens*, Book III, ch I, para. 3. and Book II, ch IV, para 49. „En traitant du Droit de sûreté, nous avons montré, que la Nature donne aux hommes le droit d’user de force, quand cela est nécessaire, por leur défense et por la conservation de leurs droits.”

in the history of just war theories, since it contained a prohibition of aggressive war and a regulation using the army for defensive acts.¹ Vattel was the last writer who referred to natural law as a basis of discussions about war.² From the nineteenth century positive law based on customs and treaties took the place of natural law.³

Philosophical background – Immanuel Kant and *The Philosophy of Law*: Immanuel Kant (1724-1804) in "*The Philosophy of Law*"⁴ divided the right of nations to wage a war into three parts: (1) the right of going to war; (2) the right during war; and (3) the right after war.⁵ This is the first mention of the three pillars of just war as a logic system, although it is important to note that Kant divided the subject as a whole into not three, but six subchapters as parts and elements of *jus gentium* and the Right of Nations. Kant gave the title of the main chapter "The Right of Nations and International Law" and as a subtitle he gave "Jus Gentium". He separated the right of going to war (*jus ad bellum*) whether it is related to the subjects of the state or to hostile states, gave a subchapter to the right during war (*jus in bello*), and another one to the right after war (*jus post bellum*), and he separately dealt with the right of peace and the right against an unjust enemy as well.⁶

Kant accepts that free juridical states have the right to go to war.⁷ But since free states are juridical equals, punitive wars (*bellum punitivum*) are not acceptable: "for punishment is only in place under the relation of a Superior (*imperantis*) to a Subject (*subditum*); and this is not the relation of the States to one another"⁸. Kant uses the term "right after war" slightly different than we use it nowadays: according to him, right that follows war begins not earlier than the Treaty of Peace was signed, and Kant refers to the conquerors rights, but he emphasizes that the conquered State do not lose its political liberty by conquest of the country.⁹

Kant was also the precursor of *jus contra bellum* idea, since he criticized contemporary international lawyers for their efforts to regulate war instead of abolishing it.¹⁰

¹ The Constitution of 1791 National Assembly, 3 September, 1791, TITLE IV OF THE PUBLIC FORCE 1. <http://www.historywiz.com/primarysources/const1791text.html>

² Serena K. Sharma, Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In: Carsten Stahn-Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 16.

³ *Ibid.*

⁴ Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, originally published 1887, Edinburgh, tr. W. Hastie), <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/kant/sciencelaw.pdf>

⁵ *Ibid.*, pp. 213-225.

⁶ *Ibid.*, pp. 215-223.

⁷ *Ibid.*, p. 215.

⁸ *Ibid.*, p. 219.

⁹ *Ibid.*, p. 221.

¹⁰ Immanuel Kant, *Perpetual Peace: a Philosophical Proposal*. trans. by H. O'Brien (London, 1927). Serena K. Sharma: Reconsidering the Jus Ad Bellum/Jus in Bello Distinction. In: Carsten Stahn-Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, TMC Asser Press, p. 17.

1.6. The Final Act of the Congress of Vienna and the First World War

The Final Act of the Congress of Vienna (1815) re-established the principle of the Balance of Power in Europe.¹ The right of the states to wage war was unlimited. The general opinion was that the right to go to war was more a moral and political question than a legal one.² Most of the contemporary scholars described war as a judicial procedure involving deaths.³ Following the failure of peaceful negotiations, war was waged as a last resort in cases of extreme necessity. Although the World Wars may show something different, the instruments of peaceful settlements improved. Just before the First World War, in 1914 the Hungarian Prime Minister, Count István Tisza argued that war was the ultima ratio, which must had not waged until all other methods of finding a peaceful solution had failed, but on the other hand, for which every state must be prepared for.⁴

At the same time “The Treaties for Advancement of Peace” (Bryan Treaties) provided a buffer zone in timing, since they guaranteed the agreeing parties that they would not declare war or begin hostilities during the investigation and report period of a dispute. Although the results of the report were not binding, the parties must observe a moratorium for twelve months.⁵ As a result of the different treaties and alliances, several diplomatic and political discussions occurred about the meaning of “provocation” and “aggression”. The meaning of “aggression” more or less covered a cross-border military attack. As I previously mentioned, the cheap and numerous newspapers pass the daily news about wars and foreign political steps to society. Before the 20th century, war had been an affair of monarchs and professional armies, but after the millennium, it became a national issue. New terms occurred in the newspapers to avoid “war” as a term of art. Nowadays we would say that politically more correct and justifiable terms appeared like “reprisals”, “pacific blockades”, “justifiable interventions”, “naval demonstrations” from one side and “unprovoked aggression”, “self-defense”, “self-preservation”, “defense of vital interests” from the other one.⁶ Diplomats, politicians and journalist edited a new dictionary of war and pre-war steps, and experts of international law tried to find the exact and confineable legal and practical meaning of these words. Later this new and sophisticated terminology led the way from “war” to the “arm conflict” as a term of art.

¹ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 19.

² Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 20. Lawrence, *The Principles of International Law* (1911), p. 333. John Westlake, *International Law*, II (1907), pp. 3-4.

³ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 21. Holland, *Studies in International Law* (1898), p. 163. Lester Hood Woolsey, *Introduction to the Study of International Law* (1860), sect. 116. Wheaton, *Elements of International Law* (1866).

⁴ Ian Brownline, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 22.

⁵ *Ibid.*, p. 23.

⁶ *Ibid.*, p. 26.

1.7. *The State of War Doctrine*

From the nineteenth century, state practice has accentuated an absurd and weird approach of war. Although it was absurd, it influenced the legal and etymological evolution of the armed conflict as a term of art. According to the contemporary scholars, war as a term of art is not a legal concept which can be recognized by intensive and large-scale hostilities between armed forces of organized state entities and similar objective phenomena, but a legal status “the existence of which depends on the intention of one or more states concerned”.¹ If the parties did not declare that a “state of war” existed between them, the situation was not accepted as a war, despite of the hostilities, the number of wounded or dead, etc. War as a term of art gained a meaning of “de jure war”, or “war in the legal sense”, and sometimes “war in the sense of international law”.² From the nineteenth century to the beginning of the First World War, numerous invasions, occupations, blockades and conflicts took place without the declaration of state of war.³ I can absolutely agree with Brownlie’s harsh statement: “war became such a subjective concept in state practice that to attempt a definition was to play with words.”⁴ The declaration of war brought and brings many inconveniences for the governments, such as the cut of diplomatic and economic ties, the preparation and mobilization of society, putting pressure on public opinion, sometimes the uncalculated steps of different states, and it brakes the “pacific sentiment”. It is much more convenient not to declare a war, even if the armed forces are acting the same as in wartime. The freedom of using war as a term of art brought uncertainty and made the nature of the term unsatisfactory, since it might include situations without hostilities and might not include conflicts with human loses and full scale military activity.⁵ That was the legal status at the time of the First World War.

1.8. *The First Geneva Conventions of 1864 and the Hague Conventions of 1899 and 1907*

Here we need to point out that new approaches emerged also in connection with *jus in bello*. Henry Dunant witnessed the Battle of Solferino in 1859 and published his account *Un Souvenir de Solferino*. Based on this work and with the help of Geneva Society of Public Welfare, the International Committee of Red Cross was established in 1863. In the same year Abraham Lincoln signed the **Lieber Code**,⁶ the first codified law

¹ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 26.

² *Ibid.*, p. 27.

³ American naval operations against France 1798-1801; Battle of Navarino 1827; French military operations in Annam and the blockade of Formosa 1882-1885; Collective intervention in China 1900-1901; Joint blockade of Venezuela by Germany, Great Britain and Italy 1902-1903; United States landing at Vera Cruz 1914; etc.

⁴ Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 27.

⁵ *Ibid.*, p. 40.

⁶ Lieber Code of 1863. https://archive.org/stream/pdfy-NG4E2nsEimXkb5mU/The+Lieber+Code+Of+1863_djvu.txt, <https://fr.scribd.com/document/180878118/The-Lieber-Code-of-1863-pdf>

about regulations of martial law and the legal rules of engagement. In 1864 the Swiss government invited the governments of European and some American countries to an official diplomatic conference in Geneva and the conference adopted the first Geneva Convention “for the Amelioration of the Condition of the Wounded in Armies in the Field”. Based on the Lieber Code, the **Hague Conventions** in 1899 and 1907 tried to formalize and unify the laws of war and war crimes as a part of international law. The First Hague Conference took place in 1899 on the proposal of the Russian Tsar Nicholas II. Several conventions were signed and adopted at both of the conferences. The Hague Convention (I) for the Pacific Settlement of International Disputes 1899 created the Permanent Court of Arbitration.¹ Convention (II) on the Laws and Customs of War on Land regulated the rules of engagement among the signatories and included the provisions of the Geneva Conventions 1864. Convention (III) dealt with maritime warfare and provided protection to marked hospital ships. Convention (IV) prohibited the discharge of projectiles and explosives from balloons, the use of projectiles to spread poisonous gases and expansive bullets. The Second Hague Conference in 1907 created a few advancements in fourteen treaties. Convention (I) of 1907 expanded Convention (I) of 1899; **Convention (III) of 1907 set out the procedure for a state making a declaration of war.** Convention (IV) dealt with the laws and customs of war on land and contained minor modifications of Convention (II) of 1899. The other conventions of 1907 regularized the legal positions of merchant ships, war ships, the rules of laying automatic submarine contact mines, the bombardment of naval forces during warfare and the adaptation of the maritime warfare principles of the 1906 Geneva Conventions. The third conference was planned for 1914 and rescheduled for 1915, but because of the First World War, it did not take place at all.

1.9 The Treaty of Versailles, the League of Nations and the Kellogg-Briand Pact

After the First World War ended, a **Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties** was founded.² The Commission was a product of the newly emerging post war legal mentality, but as its name says, it focused on the retribution and reparations instead of rebuilding. The Treaty of Peace 1919 (**Treaty of Versailles**)³ brought the First World War to an end and in Article 227 and Article 231 (War Guilt Clause) created a basis for moral conviction and material reparations. The initiation of the League of Nations in 1920 started a new era in international relations. One might say that it was the first attempt of the globalization of international law. Although a lot of criticism was expressed against the unsatisfactory

¹ Convention pour le règlement pacifique des conflits internationaux. <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-FR.pdf>; <https://pca-cpa.org/en/home/>

² *The American Journal of International Law*, Vol. 14, No. 1/2 (Jan. – Apr., 1920), pp. 95-154 (60 pages). Published by: Cambridge University Press. https://www.jstor.org/stable/2187841?origin=crossref&eq=1#metadata_info_tab_contents. Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 52.

³ Treaty of Peace between the Allied and Associated Powers and Germany, 28. June, 1919, Versailles.

actions of the **League of Nations** and the Covenant of the League of Nations¹, it was an important legal step that Article 10 of the Covenant expressly forbid aggressive war aiming at territorial enlargement or political advantage.² However, the other problem – namely, a gap between the legal meaning of war and war as reality – still existed. In 1927 the Report of the Secretary-General of the League of Nations stated that “...from a legal point of view, the existence of a state of war between two States depends upon their intention, and not upon the nature of their acts.”³

Philosophical background – Hans Kelsen and *The Pure Theory of Law*

Hans Kelsen (1881-1973) in his neo-Kantian work about the normative description of the theory of law establishes the connection between State and International Law. The role of Kelsen is important not only because of *The Pure Theory of Law*, but also because he dealt with jus post bellum in practice: after the end of World War I, Kelsen was a legal adviser to the Austrian government, and he wrote several drafts of the constitution for the newly established Austrian republic, one of which became the Austrian Constitution of 1920. According to Kelsen, international law is based on those norms, which were enacted by states for the regularization of their interstate affairs, and which originated from customary law.⁴ He tries to resolve the pseudo-antagonism between international law and state law.⁵ Kelsen argues that international law has the same characteristic as state law, since it originates rights and obligations for states and points out the primacy and at the same time the primitivism of international law, which has not developed such centralized executive organs as state law. Kelsen describes war and reprisal as the specific consequences of breaking the international law.⁶

After the First World War, states and governments were well aware of the importance of pacific settlement of disputes. A number of different conferences, treaties and protocols between 1920-1945 show us that several experts of international law, diplomacy and foreign and security policy tried to find a solution for a safer future.⁷ Here I will

¹ See Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 61.

² Covenant of the League of Nations, 28 April 1919, Article 10. https://www.crimeofaggression.info/documents/6/1919_The_Covenant_of_the_League_of_Nations_Art_10_to_16.pdf

³ Report of the Secretary-General of the League of Nations 1927. <http://digital.library.northwestern.edu/league/le00207a.pdf>. Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 38.

⁴ Hans Kelsen, *Reine Rechtslehre* (1934) ch. 9. Hans Kelsen: *Tiszta jogtan*. Budapest, 1988, ELTE Bibó István Szakkollégium, Fordította: Bibó István, p. 72.

⁵ Hans Kelsen, *Tiszta jogtan*. Budapest, 1988, ELTE Bibó István Szakkollégium, Fordította: Bibó István, p. 80.

⁶ *Ibid.*, p. 73.

⁷ Draft Treaty of Mutual Assistance; The Geneva Protocol 1924; The Locarno Treaties of 1925, the Resolution of the Sixth International Conference of American States; The General Treaty of the Renunciation of War, 1928; The Chaco Declaration of 1932; The Anti-War Treaty of Non-Aggression and Conciliation of 1933; The Seventh International Conference of American States, Montevideo, 1937; Inter-American Conference for the Maintenance of Peace, Buenos Aires, 1936;

mention one as an example, i.e. the **General Treaty for the Renunciation of War as an Instrument in National Policy of 1928** (Kellogg-Briand Pact), ratified by sixty-three states, where the parties condemned war as a solution of international disagreements and renounced war as an instrument in their relation with each other.¹ On the other hand, it is important to note that the rule of “using force except in self-defence” had not been definitively established as illegal in this period of international law.²

1.10. The UN Charter, the Geneva Conventions, their Protocols, International Tribunals and ICRC opinion papers

The **Charter of the United Nations of 1945** was the first legal document which declared expressis verbis that the use of force or threat of force otherwise than in self-defence or with the authority of the United Nations was illegal.³ With the adaptation of the UN Charter a new era started in international law: the epoch of *jus contra bellum* instead of the previous *jus ad bellum*.

The period between 1945 and our current days (2019) can be divided into four intervals from the perspective of just war theories and especially just post bellum:⁴ (1) The most important legal achievements of the period between 1945-1980 were the **1949 Geneva Conventions** and the two **1977 Additional Protocols**.⁵ However, I need to mention the **1972 Biological Weapons Convention (BWC)** as well. (2) Between 1980-2000 two international criminal tribunals were established, i.e. the International Criminal Tribunal for the former Yugoslavia (**ICTY**) and the International Criminal Tribunal for Rwanda (**ICTR**), as well as the **Rome Statute** of the International Criminal Court (**ICC**).⁶ A major achievement was the signing of the **1993 Chemical Weapons Convention (CWC)**. (3) Between 2000 and 2010 five legal documents of major importance were published in accordance with the regulation of *jus in bello* and *jus post bellum*. In **2005 Additional Protocol III** was edited. In the same year, **ICRC** published a study with the title of “**Customary International Humanitarian Law**”⁷ as

¹ General Treaty for the Renunciation of War of 1928, Article I.

² Ian Brownlie, *International Law and the Use of Force by States*. Oxford, 1963, Oxford University Press, p. 107.

³ The Charter of The United Nations, San Francisco, 1945, Art. I. 4. „All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations“. <https://treaties.un.org/doc/Publication/CTC/uncharter.pdf>

⁴ ILA, *Final Report on the meaning of Armed Conflict in International Law* (2010). <https://www.scribd.com/document/221733348/Final-report-Meaning-of-Armed-Conflict>. http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf

⁵ ILA, *Final Report on the meaning of Armed Conflict in International Law* (2010), p. 10.

⁶ *Ibid.*, p. 14.

⁷ J.M. Henckaerts – L. Doswald-Beck: *Customary International Humanitarian Law I-II* (Cambridge University Press, 2005). <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> . <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

a practical guide, and three years later it published a working paper about the differences between international and non-international armed conflicts with the title “**How is the Term “Armed Conflict” Defined in International Humanitarian Law?**”¹ And in 2009 another important document came out about the widening applicability of the rules of non-international armed conflicts in the case of organized armed groups identified as armed forces of a non-state party: the “**Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law**”². (4) The interval between 2010 and 2019 brought detailed **Commentaries of the First Geneva Convention** from 2016 and from 2017 (the later do not contain major differences regarding the definition of armed conflict).³

2. Summary of *jus ad bellum/ jus contra bellum* and *jus in bello*

2.1. *Jus ad bellum – Jus contra bellum*

The criteria of *jus ad bellum* and *jus in bello* were based on the Christian philosophical and legal construction. *Jus ad bellum* summarizes the criteria system of the right to go to war. Starting a judicial (just) war it was essential to fulfill a list of requirements. Sulyok summarizes the criteria as follows: first of all, the cause of the war must have been a fair one – a **just cause**. It meant that the pure goal of punishing people who have done wrong cannot be a just cause, although the fight against the evil as a moral obligation was accepted. From a slightly different point of view, we can call a cause of using force a just one, when the parties use force to stop aggression or violation of basic human rights of the population.⁴ It was necessary to start the war according to the **adequate process**. Further on, it was necessary to have the **right intention**: peace as a final result. However, the UN Charter and Geneva Conventions disqualified the existence of *jus ad bellum*, the right intention as a cause of an armed conflict still exists as a moral obligation. Pure material gains or economic interests cannot be described as right intentions, while correcting a suffered wrong is considered as acceptable intention. The importance of a just cause, a moral cause is still an important factor in armed conflicts and their resolution. During the recent armed conflicts, for example in Bosnia and Herzegovina, the coalitional forces were called Implementation Force (IFOR) and Stabilization Force (SFOR); in Iraq in 2003, the US led operation was called Operation of Iraqi Freedom (OIF). It is obvious that the political leadership of the international forces felt an obligation to explain the world, why the military involvement is necessary: because of stabilization, because of freedom, in

¹ ICRC, How is the Term “Armed Conflict” Defined in International Humanitarian Law? (2008). <https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>

² ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>

³ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>

⁴ US Catholic Conference, 1993

other words because of a morally acceptable intention. The Western allies used positive worlds to describe their armed presence.

It has to be proved that aggression occurs as *ultima ratio*. The **probability of success** and **proportionality**¹ were also key elements. Before 1945, the right to go to war contained the element of comparative justice: the injustice suffered by one of the parties must be greater than the injustice suffered by the other one. The competence of the constituted public authority can make a distinction between war and peace and justice and injustice, and it implemented the right to wage a war, but dictatorships or deceptive military actions were ruled out. The use of force had to be a last resort. Before the use of force, all peaceful alternatives must be tried, and the benefits of waging a war must be proportionate to the wrong that has been done.

2.2. *Jus in bello* – Right Conduct in War

The main characteristic of the right conduct in war is the distinction between belligerents and non-belligerents and the obligation to spare the non-belligerents. Furthermore, this part of the just war theories makes a distinction between intended and non-intended results. Generally speaking it defends the civilian life and property and as an added criteria, it expects proportionality of the used military equipment and measures.²

The rules of the fight must be based on the **distinction between combatants and non-combatants**. It is prohibited to attack civilian residential or neutral areas, committing acts of terrorism or reprisal against civilians, shipwrecked people, etc. **Proportionality** is also a part of *jus in bello*, since the suffering of civilians and the harm to their property cannot be bigger than the concrete military advantage. We have to note here that this is quite a subjective category and hard to find a generally accepted exchange rate between military advantage and civilian suffering or harm to civilian property. **Military necessity** and proportionality are inseparable terms of art. The right conduct in war limits unnecessary death and destruction. Military actions must be based on the concrete aim of defeating the enemy and not on other goals like punishing civilians or any other forms of reprisal. The surrendered and captured enemy combatants are not involved in active military operations anymore and they deserve a fair treatment as prisoners of war. Unacceptable methods, treatment and weapons of uncontrolled effect are ruled out either.

The fair treatment of prisoners of war became an important element as well as the distinction between *malum prohibitum* – wrong because it is prohibited – and *malum in se* – wrong or evil in itself. *Malum in se* is not acceptable according to *jus in bello*.

3. *Jus post bellum*

It is generally accepted that *jus post bellum* as the youngest part of just war theories is not as well settled as *jus ad bellum* and *jus in bello*. *Jus post bellum* concerns justice after a war, or armed conflict ended. In a wider meaning, *jus post bellum* governs the

¹ Sulyok, Gábor: *A humanitárius intervenció elmélete és gyakorlata*. Budapest, 2004, Gondolat, p. 27.

² *Ibid.*

justice peace treaties, reconstruction, war criminal trials and war reparations. In a tighter meaning, jus post bellum deals with exclusively the settlement and reconstruction and let the work of war criminal trials and war reparations on the international criminal tribunals. I myself prefer the narrow interpretation, since it focuses on the positive side of the reconstruction of social institutions and ordinary daily life, while war criminal trials always have a subjective and negative element (rebuilding contra revenge).

3.1. *Jus Post Bellum – Normative approach and principles*

Brian Orend, one of the earliest theorists of justice after war identified five principles of jus post bellum, such as: **just cause termination, right intention, public declaration and authority and proportionality**. In his interpretation, a state can end a war if the aggressor is willing to negotiate the terms of the surrender and the vindication of violated rights or if the just goals cannot be reached. Revenge is not permitted and the victor state must investigate the war crimes committed by its own armed forces on objective grounds. A legitimate authority must state the terms of peace and another legitimate authority must accept it. Proportionality must be accepted as the initially violated rights are the base of terms of surrender.¹

Larry May suggests that just post bellum and transitional justice relate to each other, and it has an importance when we examine the documents like the Transitional Administrative Law of Iraq (TAL) or the Dayton Peace Accord. According to May, there are **six post bellum principles: retribution, reconciliation, rebuilding, restitution, reparations and proportionality (5R&P)**.² It is questionable at the very minimum, whether May is right when he asserts that retribution would be one of the most important conditions after a war is over. I myself as an eyewitness of the results of armed conflicts in Bosnia-Herzegovina and Iraq can declare that for those, who suffered from the losses, food supply, the daily work of hospitals, potable water, electricity, heating, etc. – in other words, reconstruction – were much more important than retribution. Reconciliation as a second principle is an important factor as a basis of normal daily life, but in my opinion rebuilding should be named as the first and most important among jus pots bellum principles. Restitution and reparation help to restart normal life, since they are important as an integrated part of rebuilding, while proportionality assures that application of jus post bellum principles do not cause more harm to the population than the harm that is alleviated by the other principles. May refers to meionexia – demanding less than we can – and Grotius's idea about the limits of possible actions even in a “lawful war”³ as principles of post bellum justice. May emphasizes the **transitional characteristic** of just post bellum, and says that after the mass atrocity or oppressive conditions (i.e. armed

¹ Brian Orend, *Jus Post Bellum: A Just War Theory Perspective*. In Carsten Stahn – Jahn K. Kleffner, *Jus Post Bellum. Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, T.M.C. Asser Press, pp. 31-52.

² Larry May, *Jus Post Bellum, Grotius, and Meionexia*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum. Mapping the Normative Foundations*. Oxford, 2014, Oxford University Press, p. 15.

³ Hugo Grotius: *De Jure Belli ac Pacis* Book III, ch. 11.

conflict) have been stopped, a new, **more democratic** regime must be formed.¹ In my opinion, it has a major importance that May uses the phrase “more democratic” instead of “democratic”. The “more democratic” term points out the limits of just post bellum, the rebuilding of legal and administrative instructions after the end of an armed conflict. Later I will describe the importance of understanding the capacities of the export of democracy and building new administrative organs after an armed conflict. However, May also points out the differences between transitional justice and jus post bellum. According to his opinion transitional justice focuses on a democratic or at least less repressive regime and the requirement of Responsibility to Protect (R2P), while in the goal of jus post bellum are achieving peace and the previously mentioned 5R&P. I argue with May’s opinion that jus post bellum seeks only the just end to military operations, but accept the view that transitional justice and just post bellum aim at the long-term just peace.² Later, discussing Dieter Fleck’s proposal, we will see a more constructive interpretation of the role of jus post bellum.

Mark Evans brings up a practical approach of jus post bellum in his essay “At War’s End: Time to Turn to Jus Post bellum?”³ His idea of a “conceptual toolkit for just post bellum”⁴ has some minor similar characteristics to my idea about a practical algorithm, or protocol, an “international legal first aid”, which can help to reorganize the daily normal life at the shortest time after the end of an armed conflict, and which I mentioned in the chapter about methodology. Evans argues with Seth Lazar’s argument that the morality of peacebuilding must be distinguished from just post bellum, and Darrel Mollenforff’s views about the limited focus of just post bellum on how a just war should be ended.⁵

The previously mentioned **Dieter Fleck** summarizes the value of jus post bellum as a key tool to achieve a lasting peace with normative regulations. Although he emphasizes the temporary characteristics of jus post bellum, and as a result he describes jus post bellum as a special discipline, distinct from other branches of international law. Fleck adds that the typical rules of just post bellum are **(1) assistance in creating a new constitutional order; (2) robust law enforcement post-conflict and (3) organization of an international territorial administration**. I myself can fully accept these views instead of those, which focus on retribution and reconciliation. Fleck refers to the antagonistic problem between Article 2(7) of the UN Charter, which does not permit any foreign state to introduce institutional changes in an occupied territory and the need for post-conflict peacebuilding, where the maintenance of the previous status quo may

¹ Larry May, *Jus Post Bellum, Grotius, and Meionexia*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 24.

² *Ibid.*, p. 25.

³ Mark Evans, *At War’s End: Time to Turn to Jus Post Bellum?* In, In: Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum. Mapping the Normative Foundations*. Oxford, 2014, Oxford University Press, pp. 26-42.

⁴ *Ibid.*, p. 26.

⁵ *Ibid.*, p. 27.

be counterproductive. And to make the picture more complex: the limitations of the law of occupation may no longer be adequate after the armed conflict has to come an end.¹ Fleck also emphasizes that the law of armed conflict is based on the pillars of *jus ad bellum*, *jus in bello* and *jus post bellum*.² According to him, the main principles of *jus post bellum* are the following: **pragmatic limitation**, instead of *meionexia*, in the meaning of taking what is one's due;³ **conciliation**, since criminal justice has its limits in post conflict situations; widest possible **participation** of all actors of the peacebuilding process; and **temporary nature of post bellum rules**. According to my field experience, Fleck's approach is the most practical and operable in real life in post-conflict situations.

James Gallen sees *jus post bellum* as an interpretive framework which should be concerned with transition from armed conflict to peace.⁴ He accepts the views of Ruti Teitel about the uncertainty of the length of the post bellum interval, since there is not an adequate measurement and boundary between conflict, post-conflict situation and peace.⁵ In his opinion transition is not an exact date, but a flexible and dynamic process and transition and *jus post bellum* have an overarching and overlapping character. He refers to Brian Orend phrase: "it is unclear when night ends and day begins, the period of dawn is a gradual period that is difficult to ascertain."⁶ According to Gallen, international law has not fixed the exclusive meaning of *jus post bellum*, but the role of *jus post bellum* and the relevant subjects can be determined, such as transitional justice, peacebuilding, security sector reform, economic development, statebuilding, peace agreements, refugee and migration law, constitutionalism, elections, democracy.⁷ *Jus post bellum* has an integrative character. Although complexity is important for post-conflict environments, fragmentation must be avoided, since it can lead to restarting the conflict. **A coherent approach of *jus post bellum* would not necessarily solve the problems of the transitional period of a state or society, but it can make the significant issues of transition more public and explicit.**⁸

Jens Iverson traces the historical roots of transitional justice and *jus post bellum* to Grotian tradition.⁹ In his opinion, *jus post bellum* completes the logic and temporal idea of

¹ Dieter Fleck, *Jus Post Bellum as a Partly Independent Legal Framework*. In Stahn-Easterday-Iverson, *Jus Post Bellum*. 2014, Oxford, Oxford University Press, pp. 43-57.

² *Ibid.*, p. 43.

³ Aristotle, *Nicomachean Ethics*, 1129.

⁴ James Gallen, *Jus Post Bellum: An Interpretative Framework*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 58.

⁵ Ruti Teitel, *Rethinking Jus Post Bellum in an Age of Global Transitional Justice*. *European Journal of International Law*, 2013. 24(1). pp.335-339.

⁶ Brian Orend, *Jus Post Bellum: The Perspective of a Just-War Theorist*. 20 Leiden *Journal of International Law*. 2007, p. 574. James Gallen, *Jus Post Bellum: An Interpretative Framework*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 59.

⁷ James Gallen, *Jus Post Bellum: An Interpretative Framework*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 60.

⁸ *Ibid.*, p. 79.

⁹ Sir Hersch Lauterpacht, *The Grotian Tradition in International Law*. 1946. 23 *British Year Book of International Law* 1.

the law of armed conflict. *Jus ad bellum* refers to the beginning of an armed conflict, *jus in bello* governs the acts during the conflict and *jus post bellum* sets the rules for the aftermaths of it.¹ He declares that the post Cold War period generated the framework of *jus post bellum* from the mixture of occupation, peacebuilding and international territorial administration. Iverson accepts and cites Ruti Teitel's definition of **transitional justice** as "a conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."² Iverson sees the aims of transitional justice in stopping violations and establishing a new political order. While no authoritative definition for **jus post bellum** is given, Iverson finds that the main characteristics of *jus post bellum* can be found in the Kantian philosophy: *jus post bellum* is "a body of legal norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace."³ The main conglomerate is the term of art of armed conflict, which concerns the use of armed force. *Jus post bellum* cannot be separated from the context of *jus ad bellum*/*jus contra bellum* and *jus in bello*, and all of them are existing in the frame of the armed conflict.⁴ Iverson emphasizes the system aspects of *jus post bellum* and the importance to understand that transitional justice is not a special kind of justice, but more like a method, which has the goal to establish peace in the interval of transition from conflict.⁵ Iverson points out a critical problem of the acceptability of *jus post bellum*: to apply *jus post bellum*, the identification of states and governments (or in my opinion at least authorities) is evitable.⁶

3.2. *Jus Post Bellum – Applicability in transitional period*

Kristen E. Boon deals with a very specific part of the application of *jus post bellum*, namely the usage of *jus post bellum* in non-international armed conflicts (NIACs).⁷ The importance of the essay is in the fact that non-international armed conflict is still the predominant form of conflicts.⁸ Boon makes a distinction between international and

¹ Jens Iverson, *Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 83.

² Ruti Teitel, *Transitional Justice Genealogy*. 2003. 16 *Harvard Human Rights Journal* 69. James Gallen, *Jus Post Bellum: An Interpretative Framework*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 85.

³ Jens Iverson, *Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 85.

⁴ *Ibid.*, p. 85.

⁵ *Ibid.*, p. 86. See also: International Center for Transitional Justice (ICTJ), *What is Transitional Justice?* <https://www.ictj.org/about/transitional-justice> (accessed 11th December, 2018).

⁶ Jens Iverson, *Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 94.

⁷ Kristen E. Boon, *The Application of Jus Post Bellum in Non-International Armed Conflicts*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 259.

⁸ International Committee of the Red Cross (ICRC): *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31st International Conference of the Red Cross and Red Crescent (ICRC 2011) 5-6.

non-international armed conflicts based on the text of the Geneva Conventions and their Protocols. He emphasizes the differences between Common Article 2 and Article 3, and later on tries to minimize the distinction, which is based on the historical roots of state sovereignty.¹ Boon uses three different ways of description based on Geneva Conventions and the commentaries on the Geneva Conventions², the international criminal law perspective and the application of human rights obligations to internal conflicts.³

Freya Baetens analyses the role of the United Nations Peacebuilding Commission (PBC) in post-conflict resolution.⁴ Baetens points out that the UN Security Council (UNSC) is connected to the present conflict situations, the Economic and Social Council (ECOSOC) deals with stable states and the purpose of the **Peacebuilding Commission (PBC) is to establish institutional background for recovery, reintegration and reconstruction of states**, which are emerging from a conflict.⁵ The legal and operative framework of the Peacebuilding Commission is based on Article 7, 22 and 29 of the UN Charter, and was established at the 66th plenary meeting of the United Nations General Assembly in 2005.⁶ The PBC proposes integrated strategies for institution-building and sustainable development.⁷

Yaël Ronen in his essay about post-occupation law⁸ deals with the **state dependence on a former occupant state**. He makes an important point that although the length of occupation may interfere with the dependence of the occupied state, there are long term occupations which do not create such dependence at all (4 year occupation of Belgium by Germany in the First World War, the 3 year occupation of Germany by the Allied Forces in the Second World War, etc.)⁹, and points out the overlaps between occupation and colonialism.¹⁰

¹ Kristen E. Boon, *The Application of Jus Post Bellum in Non-International Armed Conflicts*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 262.

² Jean S. Picket, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field (ICRC 1952)*.

³ Kristen E. Boon, *The Application of Jus Post Bellum in Non-International Armed Conflicts*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 263.

⁴ Freya Baetens, *Facilitating Post-Conflict Reconstruction: Is the UN Peacebuilding Commission Successfully Filling an Institutional Gap or Marking a Missed Opportunity?* In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 346.

⁵ *Ibid.*, p. 346.

⁶ UNGA Res. 60/180 (2005) UN Doc. A/RES/60/180.

⁷ UNGA Res.60/180 (2005) para.2.

⁸ Yaël Ronen, *Post-Occupation Law*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 428.

⁹ *Ibid.*, p. 430.

¹⁰ *Ibid.*, p. 439.

Matthew Saul examines the problem of creating **popular governments in post-conflict situations**.¹ He defines just post bellum as a process of creating the norms of justice to end war and build peace.² Saul examines the problem from a prescriptive and an effectivity view (namely what are the impacts of the law), and what kind of impacts has the extant law of political participation on the post-conflict interim governments.³ Saul emphasizes that although the value of an electoral process in a post-conflict situation is more than questionable, the element of popular input can improve the legitimacy of the rebuilding.⁴ International law has a major responsibility when domestic legal system in a post-conflict geographic territory cannot guarantee functional rebuilding.

Aurel Sari tries to find the answer to the prickly question of the status of foreign armed forces in post-conflict environments.⁵ Sari knots together the end of armed conflict with the presence of foreign armed forces which may remain there for several years.⁶ The reason of the presence of the foreign forces can be different: they can be previous parties of the conflict, like it happened in Germany, after the Second World War, or they can be third parties like in Bosnia-Herzegovina, after the Dayton Peace Accord.⁷ In Sari's opinion, one of the greatest challenges of the presence of foreign troops is the transition from a non-consensual (occupation, or quasi occupation) to consensual presence.⁸ Sari point out that the legal status of the deployment and actions of foreign armed forces is not adjusted by a self-contained regime of international law, but derives from multiple sources, and this makes the normative regulation difficult.⁹ Although, I have to admit that the case-by-case approach helps to avoid using unconsidered law transplantations and analogies. Sari refers to recent examples as test-cases (Kosovo and

¹ Matthew Saul, *Creating Popular Governments in Post-Conflict Situations: The Role of International Law*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 447.

² *Ibid.*, p. 447.

³ *Ibid.*, p. 448.

⁴ See also Jennifer Widner: *Constitution Writing in Post-Conflict Settings: An Overview*. 2008. *William & Mary Law Review*, Volume 49, Issue 4, 1513. <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1151&context=wmlr>

⁵ Aurel Sari, *The Stetus of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, pp. 467-501.

⁶ Aurel Sari, *The Stetus of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 467.

⁷ *General Framework for Peace in Bosnia and Herzegovina (Dayton Agreement)*, 14 December 1995, 35 *International Legal Materials* 75.

⁸ Aurel Sari, *The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles*. In Carsten Stahn – Jennifer S. Easterday – Jens Iverson, *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 468.

⁹ *Ibid.*, p. 499.

Iraq) to certify the close legal link between the presence and status of foreign forces and the combination of consensual and non-consensual elements for legal and for practical reasons, and to establish the legal framework of foreign military deployments.¹

3.3. *Jus Post Bellum and the export of democracy*²

As for the export of democracy, the main question is how can the system be transformed from authority to democracy after the end of the armed part of the conflict? How can we avoid the situation when the winner party represents exclusively its own interests? Going from one extreme to the other: how can we avoid the situation when the victorious powers shuffle a puppet-government? Or how can we avoid the previous regime gaining power again?

Philosophical background: democracy and fallibilism

The knowledge of fallibility is an important part of the discussion of democracy. It does not mean that we can never know the truth, but rather we are never justified in behaving as if we know it. We always ought to know that we might be wrong. Fallibilism is the acceptance of the fact that our knowledge is never absolute, but it always exists in a continuum of uncertainty.³

Fallibilism is a bridge between the superior knowledge and the contingent knowledge: most of our so called superior knowledge is a contingent knowledge at the same time, because generally it has a connection to a special, technical reality. Saward gives the example of a garage mechanic: it is obvious that a garage mechanic knows better than an average person how to fix a car. This is a superior knowledge and a contingent knowledge at the same time.⁴

It is coherent with the ideas of Plato, who says that dealing with political issues is not different from any other special knowledge or competence. The political reality is the reality of the contingent knowledge: those who hold the relevant abilities and skills will always be better than those, who do not.⁵

In the international conflicts after World War II, democracy, the export of democracy and the initiation of democracy became the key element of the resolution process. Before the conflict the 'defense of democratic values', after the conflict the 'democratic settlement' became battle-cries in the media and in the rhetoric of – generally western oriented – countries involved in the conflict to support the social acceptance of the intervention.

Why the social acceptance is important in the Western culture? Democracy is the central element of western civilization. Because of the dominance of democracy-idea,

¹ *Ibid.*, p. 501.

² Spindler Zsolt, *International Conflicts and the Costs of Democracy*. In Smuk Péter (ed.), *Costs of Democracy*. Budapest, 2016, Gondolat. pp.195-208. https://dfk-online.sze.hu/images/egyedi/Smuk_Costs_of_Democracy%20.pdf

³ Saward, Michael, *Democraic Theory and Indices of Democratization*. p. 6. In Beetham David (ed.), *Defining and Measuring Democracy*. Sage Modern Politics (36). London, UK: Sage. <http://oro.open.ac.uk/16187> (24th April, 2016), p. 9.

⁴ *ibid.*

⁵ Plato: *The Republic*

and the relative welfare of these states, pure economic advantages are not strong enough to build a stable social background for the political authority which decides to intervene. Without the stable social background not only the success of the military intervention, but also the position of the political power came under question: in western type democracy, the government comes to power by the vote of the constituents.

A profane remark: during an armed conflict the political authority invests into the constituent and their relatives as human resources, and a significant part of the taxes of the citizens as material resources to gain economic advantages. In our prudish western civilization – and by the way, also in the eastern one – justification of an intervention by economic interests is just not acceptable. We cannot declare that human rights are more important in Iraq than in North-Korea just because there are a lot of oil in Iraq, while in North-Korea there is not even a drop; Iraq has no nuclear weapons, so it is a softer target than North-Korea.

In the western civilization the keywords are ‘democracy’ and ‘human rights’, among them ‘women rights’ and ‘equality’ are of high priority, as well as ‘freedom’, ‘torture and humiliating and degrading treatment’, ‘weapons of mass destruction’, ‘not peaceful use of nuclear energy’, ‘terrorism’, ‘financing terrorism’. These are the categories ‘for what’ or ‘against what’ we need to fight (i.e. ‘fight against terrorism’, ‘war on terrorism’).

In the eastern civilization, especially in the Muslim world, these keywords are ‘sharia’, ‘Quran’, ‘Allah’, the ‘true religion’.

If we intervene into a conflict just because we want cheaper oil, it is not ‘appropriate’ according to our own standards. It makes us look acquisitive, and if we suffer losses involving our own human resources, it is more condemnable. On the other hand, if we want to ‘liberate people’, we are already on the moral side, we fight for a majestic, sacred goal, our losses are heroes (...and by the way, we can fuel up cheaper for a good Sunday shopping with the kids). It means that we want to export our own views, our own democracy to other countries in the hope of economic advantages.

In reality, international conflicts are based on economic and cultural causes. The cause of World War I was the emergence of new international economic and political actors (Germany, Italy, USA, Japan) who wanted their own share in colonial raw materials and markets.¹

The conflicts of the second half of the 20th and the first decades of the 21st centuries occurred exactly there, where Huntington (1993) draw the borderlines and buffer-zones of different civilizations. From this point of view the Balkan Wars were not the mere fight for regional dominancy among Croats, Serbs and Bosnians, but a clash of western catholic, Slavic orthodox and Islamic civilizations.² Cultural clashes interweaves with economic interests: in case of Yugoslavia, whether the pro-Russian Serbs, the pro-western Croats and the pro-Islamic Bosnians should dominate the region? According to

¹ Tóth Benedek, *A jog és a gazdaság megváltozó viszonyrendszere* (Changing Relation between Law and Economy), *Európai Jog*, Vol. 2013/5 pp. 7-8.

² Huntigton, Samuel P., *The Clash of Civilizations? Foreign Affairs*, Vol. 72. No. 3., Summer 1993, pp. 22-49.

the categories of Huntington (1996)¹, the Balkan Wars were clashes among the Western, Orthodox and Islamic civilizations like nowadays for example the Syrian conflict. In Syria, the Orthodox civilization supports Assad, western civilization supports the ‘moderate opposition’, while radical Islam supports ISIS.



Source: Huntington, Samuel P., *The Clash of Civilizations and Remarking of the World Order*. New York, Simon&Schuster, 1996.

The World of Civilizations: post 1990 scanned image Archived March 12, 2007, at the Wayback Machine

At the beginning of the 21st century the interests of the USA dictates lower oil prices to support the industry and industrial investments. On the other hand, in the word or in thought, two thirds of the budget of the Russian Federation is still based on the price of oil and the oil exploitation in Russia is much more expensive than in the Arab World. (It is a result of a few coefficients, but the main factor is the climate condition: Russian oil is extracted from frozen earth, the technology is behind the times, and the exploitation cannot give a flexible reaction for the demands of world market. Nevertheless if the demand declines, exploitation cannot be stopped, because restart would cause huge extra expenses.)

¹ *Ibid.*The World of Civilizations: post 1990 scanned image Archived March 12, 2007, at the Wayback Machine

The ideological basis of the war on Iraq in 2003 was the – un-existing – threat by Iraqi weapons of mass destruction and the – also un-existing – contact with Al-Quaida. When it cleared out that these motives were false, the Bush administration started to communicate that ‘establishing Iraqi democracy’ would have been the main goal of intervention from the first days of the war.

In November, 2003 Bush vocalized that a failure of the Iraqi democracy would strengthen the terrorists of the world and extend the hazard onto American citizens, and ruin the dream of millions in the region. As Bush said, a free and democratic Iraq in the center of the Middle East could cause a ‘domino effect’ of democratic revolutions in the region.¹ (Personal note: in my mind ‘global democratic revolution’ rhymes a bit with the ‘global communist revolution’, or the slogan ‘Proletarians of the world, unite!’) As a matter of fact, the main motive of the Iraqi war was the control of the oil price on the world market. According to Ishakan (2012), the Bush-doctrine was written in colonial style, where ‘civilized forces’ try to liberate the barbarian non-western world from eastern despotism.²

During the time of ‘Arab Spring’, the main motive was also the same: the price of oil and the orientation of Islamic governments (whether they support western or orthodox civilization). At first glance, in Syria the story is about the ‘tyrannical’ Asad supporters, the ‘moderate opposition’, and the ISIS. In reality, Asad supports the orthodox civilization: the Russian fleet has an access to the Mediterranean Sea, because they can rent the port of Tartus. People from the ‘moderate opposition’ belong to those, who oppose this orthodox orientation and prefer the western type badinage. The goals of Turkey are particular: they want to reestablish the influence of the Ottoman Empire at least on an economic level, and at the same time, they want to solve radically the ‘Kurd-problem’.

If you start writing about democracy, the first sentence should include the term ‘ancient Greece’. However, most of the definitions of democracy belong to a liberal or a civil republican scheme. Ishakan & Slaughter (2014) claim that liberal democracy is a minimalist and elitist model: the role of people is limited in electing their representatives. The civil republican democracy is a more inclusive and participative way of governance, where people are involved directly in decision making.³ To order to emerge for a democracy, it is an essential but not sufficient requirement to have an entity on a territorially unit, with borders and a group of people defined as nation.⁴ Saward (1994) tries to examine some of the democracy definitions in his work.⁵ In our case

¹ Barbash, Fred, Iraq Part of ‘Global Democratic Revolution’ *The Washington Post*, 6th of June, 2003. Ishakan, Benjamin: *Democracy in Iraq: History, Politics, Discourse*. London, Ashgate, 2012, p. 119.

² Ishakan, Benjamin, *Democracy in Iraq: History, Politics, Discourse*. London, Ashgate, 2012 p. 120.

³ *Ibid.*, p. 4.

⁴ Saward (2006), op.cit., pp. 402-403. Cites: Ishakan&Slaughter (2014), op.cit., p. 4.

⁵ Saward, Michael: *Democratic Theory and Indices of Democratization*. In: Beetham, David ed.: *Defining and Measuring Democracy*. Sage Modern Politics (36), London, UK: Sage, pp. 6-24.

democracy means exclusively the western type of democracy – which is not homogenous either as we will see in the case of death penalty – , an exportable social and cultural model which is acceptable and comfortable for western people. The Bush-doctrine from 2003 also made remarks on democracy. In Ishakan's opinion (2012), the doctrine declares that the United State of America – widely: the western world – is the only legitimate successor of democracy, and it has the right to democratize non-western world even with military force or occupation.¹

The term of 'democratization' has an interesting connotation. 'Self-democratization' is an explainable term, because it refers to a voluntary decision of a group of people, while 'democratization' is a process which is forced from outside. 'Democratization' and the 'right of democratization' presuppose an outer power, and it is a pre-condemned antagonistic with self-determination and autonomy. It is a special paradox, but we can declare that those, who are democrats, do not have the right to democratize the others.

The problem of exporting democracy can be examined from two different points of view:

- Democracy 1.0 version: We fully accept the theory of democracy, including the freedom of self-determination (i.e. the right of people to self-determination). It means that democracy cannot be forced, people have to decide whether they want it or not, and if they want to live in democracy, they have to decide the contents of it. The actual society has to mature for the reforms, whether they are political or economic ones. Historical experiments show that top-down attempts to change of paradigms without social demand and basis are seldom successful. (The reforms of Kemal Atatürk in Turkey are among the few exemptions, but the Iraqi, Bosnian, and Russian reform attempts – Peter I, Catharina II, or the current Russian attempts of import substitution – were absolute failures.) First and last, democracy can develop and evolve, but we cannot clone it.
- Democracy 2.0 version: The other possible track is to declare that we call 'democracy' a social and political model what we – the representatives of the western civilization – think acceptable and comfortable for us. Other values may long term jeopardize the physical existence of our own democratic values (the pinch of living-space and niche, where the democratic values are accepted). In this case, as prevention, it can be reasonable to spread the democratic values as a crusade to prevent other, more 'combative' civilizations and values to sweep away our values. Although, it is questionable whether we can still call this model a democracy. Or is it just a special way of democracy? A western type democracy?

The legal resolution of an international conflict is a political evolution from military occupation towards political legitimacy.

The legal anthropology, the history of law, cultural history of law and comparative legal studies are of primary importance in *ius post bellum*.

¹ Ishakan (2012), *op.cit.*, p. 120.

Democracy is a broad term for a variable reality, which has its own evolution and its evolutionary path depending on time, place and culture. Democracy can be a philosophical or political term, but is not a legal category. Determining a non-legal category with legal terms will hardly give us positive or useful results.

Hassin & Ishakan (2016) declared that the neo-liberal state building model in Iraq – at least in most of its details – were a complete failure.¹ During the reconstruction, the minimalist and short term approach of neo-liberal state building model focuses on the governmental organizations and free trade. It tries to establish and strengthen military, police, legislation, central bank, taxation, healthcare, education.² Top-down paradigm means that the rule of law, strengthening economy, (re)establishment of key governmental organizations have the most important role and this is the main assurance of avoiding dictatorship and break humanitarian laws. This is the paradigm which was adopted in most of the international conflicts after World War II. (Especially in those ones, where foreign authorities wanted to minimize their post-conflict commitments with the help of a preferable local government supported by foreign military force.)³

According to the critics of neo-liberal state building model, this paradigm is not effective and it divides society socially, ethnically, politically and ideologically.⁴

If we want to reach an acceptable compromise, we have to study the legal anthropological conditions, legal historical development, legal cultural history of the states involved in the conflict, which means that in most cases we have to deal with religious, religious historical and religious legal issues as well. From an exclusively western point of view, we cannot decide what is important and what is not so important for the local people involved in the conflict. The science of comparative law has a key role in the process of conflict resolution in a legal way, because it can make comparison between the pre-conflict state, the current state and the required legal outcomes.

4. Summary of jus post bellum

As we have seen, there is no universal definition of jus post bellum. Some scholars emphasize the just cause termination, right intention, public declaration and authority and proportionality,⁵ while others allocate six post bellum principles: retribution,

¹ Hassin, Ahmed – Ishakan, Benjamin, The Failure of Neo-Liberal State Building in Iraq: Assessing Australia's Post-Conflict Reconstruction and Development Initiatives. *Australian Journal of Politics and History*, Vol. 62, no. 1, 2016, pp. 87-99.

² Fukuyama, Francis, *State Building: Governance and World Order in the Twenty-First Century*. London, 2004, p. 159. Cite: Hassin&Ishakan (2016), op.cit., p. 89.

³ Berger, Mark T., From Nation Building to State Building: The Geopolitics of Development, the Nation-State System and the Changing Global Order. *Third World Quarterly*. Vol. 27, 1, 2006, pp.5-25. Cite: Hassin&Ishakan (2016), op.cit., p. 89.

⁴ Barbara, Julien: Rethinking Neo-Liberal State Building: Building Post-Conflict Development States. *Development in Practice*. Vol. 18, 3 (2008), pp. 307-318. Cites. Hassin&Ishakan (2016), ibid.

⁵ Like Brian Orend. See also Brian Orend.; Jus Post Bellum: A Just War Theory Perspective. In Carsten Stahn – Jahn K. Kleffner, *Jus Post Bellum. Towards a Law of Transition from Conflict to Peace*. The Hague, 2008, T.M.C. Asser Press. pp. 31-52.

reconciliation, rebuilding, restitution, reparations and proportionality (5R&P),¹ others make a stress on the assistance in creating a new constitutional order, post-conflict law enforcement and the organization of a territorial administration.² As a scholar who has some field experience, with the respect to other scholars' opinion, I consider Dieter Fleck's approach to be the most practical one with the amendments mentioned below.

As I examined different approaches of jus post bellum, I could highlight some general thoughts which can be defined as essential and imperious, although not necessarily sufficient elements of jus post bellum as follows:

- 1) jus post bellum is applicable after the end of an armed conflict and before peace;
- 2) jus post bellum has a temporary character and it is counterproductive to harshly separate it from transitional law;
- 3) although it has a transitional character, it is not a "special justice", but a practical working approach to gain justice;
- 4) jus post bellum has to help to create the base of legislative power and constitutional order;
- 5) based on the constitutional order, a new basis of executive branch (post-conflict law enforcement) has to be established;
- 6) also based on the constitutional order, the basis of jurisdiction and generally public administration (territorial state administration) has to be introduced.

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¹ Larry May: *Jus Post Bellum, Grotius, and Meionexia*. In: Carsten Stahn – Jennifer S. Easterday – Jens Iverson: *Jus Post Bellum*. Oxford, 2014, Oxford University Press, p. 15.

² Dieter Fleck: *Jus Post Bellum as a Partly Independent Legal Framework*. In.: Stahn-Easterday-Iverson: *Jus Post Bellum*. 2014, Oxford, Oxford University Press p. 43.

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PRACTICAL FOUNDATIONS OF THE INTEGRATIVE THEORY OF LAW

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Abstract: The integrative theory of law, like any social theory, needs constant updating and development in accordance with the dynamics of the development of society and the state. This requirement to a greater extent refers to the practical part of the theory, but the conceptual basis of integrative legal understanding (the fundamental component of the theory) should also be in the focus of research. This article attempts to identify and form some elements of the practical basis of integrative theory. It shows what is law, what elements it consists of and how they are situationally manifested in practice. All these aspects of law are important for the effective work of the legislator, the practicing lawyer, since they form the basis of the methodology used by the effective lawyer. The author discusses what constitutes law, as an element of practice, in different situations from the point of view of the integrative theory: in a situation outside of a specific legal relationship; in a situation of the emergence and functioning of a simple specific legal relationship; in a situation of the emergence and functioning of a complex specific legal relationship; in a situation of a gap in objective law; in the situation of the offense in a specific relationship; in the situation of the offense in a specific destructive relationship.

Keywords: integrative legal understanding, situational complex of science of objective law, situational complex of individually defined norms of cognitive law, legal measure of behavior, “living” law, effective lawyer’s methodology.

The concept of law (legal understanding) which is scientifically theoretical and instrumentally suitable for effective activity is possible only on the basis of studying it as an element of practice. Practice and only practice, and not the ideas of the luminaries

of law (even if they are very convincing in the first approximation), contains all the necessary and sufficient data for the integrative theory of law, since practice, primarily positive practice, is a criterion of truth of any social theory. The identification of law as an integral element of practice, the formation of an empirical image of the phenomenon of law, the clarification of its practical specificity is the first and inevitable stage in the process of defining the integrative concept of law.

Law in practice is always specific to the situation. It becomes not only a formal, but also a real regulator if it is needed in a specific situation by specific entities that, in accordance with the conditions of the situation, their interests and capabilities, use the regulatory potential of a set of abstractly general norms of objective law addressed at the participants of the situation.

Let us consider typical situations of the existence of law as an element of practice. The criteria for distinguishing one or another typical situation are related to the features of a) the subject composition of the situation, b) the regulatory action and manifestation of law, c) the legal form (the necessary legal documents). In any practice (the practice of maternity capital, elective practice, the practice of transporting passengers in public transport, etc.), the following typical situations can be distinguished:

- a situation outside of a specific relationship;
- a situation of the emergence and functioning of a simple specific legal relationship;
- a situation of the emergence and functioning of a complex specific legal relationship;
- a situation of a gap in objective law;
- a situation of the offense in a specific relationship;
- a situation of the offense outside of a specific relationship.

What constitutes law, as an element of practice, in these situations from the point of view of the integrative theory?

1. A situation outside of a specific legal relationship. Here the subject of law acts (or refrains from action) unilaterally and does not interact with another subject or entities. For example, a person is in stairs of a residential building, no one and nothing controls that person. In this situation, law is a synthesis of 1) a complex of situationally significant, abstractly general norms of objective law (norms of housing law, civil and administrative law) and 2) a complex of individually defined norms that arise in the legal consciousness of the subject (subjective rights, obligations, prohibitions, etc.).

Objective law establishes statutory (non-personalized) rights and obligations, prohibitions and restrictions, procedures for their implementation, punishment, encouragement and other requirements that are relevant to the situation and are addressed to the subject of law. The situational complex of norms of objective law is a potential (formal) regulator, the situational binding of law exists only on paper (legal requirements are binding everyone and not a specific person); this complex becomes a real regulator, the binding of law really manifests itself if a person concretizes abstract general norms in the mind and psyche, i.e. creates individually defined norms in the form of subjective law, obligations, etc., therefore, a person is ready to fulfill and really

fulfills situationally significant legal requirements, for example, a person does not leave rubbish in the stairs or damage the communal property. Individually defined norms in the analyzed situation are not formalized in a legal document but they exist in the system of cognitive law in the human mind and psyche.

However, a person may not know the situational complex of norms of objective law, not concretize it in accordance with the conditions of the situation, interests, or opportunities. Therefore the situational complex of individually defined norms does not emerge and does not function, and thereby the law does not fulfill the function of a fully functional regulator; it exists by itself, remaining as an element external to the person and practice, being only a formal and not real regulator as it should ideally be. In this case, the function of the regulator is performed by the custom that has developed in practice, and in its absence, situational expediency; they regulate the behavior of the subject of law (can we use the term “subject of law” in this situation?) and drive the law out of practice. At the same time, custom and expediency may correspond or contradict to the situational complex of norms of objective law.

Thus, in the aforementioned situation, law consists of two elements: firstly, a complex of situationally significant norms of objective law (the law as a potential regulator), and secondly, a situational complex of individually defined norms of cognitive law (law as a real regulator). Without and outside of cognitive law at the level of person’s legal consciousness, law cannot be a fully functioning regulator; it exists as a “thing in itself”, as a relatively independent, not integrated into practice, “not working” phenomenon in practice. Should cognitive law be included and taken into account in the process of determining law? The answer is obvious for the integrative legal understanding: since it exists in practice (and the theory is based on practice, it is a model of practice), therefore, it should be present in theory. In this aspect, the integrative theory uses all rational concepts that exist in the *normative and psychological theory of law*.

2. A situation of the emergence and functioning of a simple specific legal relationship. There are situations in each practice where two or more entities interact, simple legal forms can be used (payment receipt, travel ticket, warrant, mark entered into university system, etc.) and there is no need to draw up complex legal documents fixing the subjective rights, obligations, terms, etc. For example, travel in public transport, taking an exam, simple types of interaction between representatives of legal entities both with each other and with representatives of the state.

In such a situation, law, as an element of practice, has a structure consisting of three components. Firstly, the situational complex of abstractly general norms of objective law for participants in a particular situation (for a passenger and a carrier, an examiner and a student, etc.). It includes the norms of various legal institutions of a specialized industry and the norms of other industries, for example, criminal law. Secondly, the situational complex of individually defined norms as a result of concretization of abstractly general norms in a given situation, i.e. situational cognitive law of the subject. Thirdly, along with these components, one should distinguish “*living law*”. It arises (or

does not arise and then the legal relationship is deformed giving rise to an offense) in the process of interaction between the subjects, but this is not the behavior of the subjects of a particular legal relationship and not the legal relationship as a whole, but a measure of its (behavior) compliance with the abstract general and individually defined norms. The third component can be identified using the terminological construct “legal measure of behavior” or “*legal normative behavior*”. This terminology shows the real manifestation of law in practice, reflects the real action and power of law as a regulator, its relationship and interaction with regulated practice.

The inclusion of a legal measure of behavior into the structure of law, which is present in the situation being analyzed, is justified not only by the intention to use the conceptual basis of the *sociological theory of law*, but primarily by the needs of practice. In the event of a conflict between participants or between them and third parties, including the representatives of the state and local self-government bodies, a specially authorized entity, for example, a judge determines which situationally important norms of objective law are involved, how the parties to the conflict interpret them and how the behavior complies with the norms. In fact, the judge identifies all three components, especially the legal measure of behavior (“living law”) and, on this basis, makes a decision in the form of an enforcement act. Moreover, the decision itself also becomes an integral part (optional element) of law in this situation.

3. A situation of the emergence and functioning of a complex specific legal relationship. Law, as an element of practice, depends on the conditions of a particular situation, the interests and capabilities of subjects of law. This is clearly seen in the situation where it is necessary to formalize individually defined norms of cognitive law and even with the agreement (permission) of the state to create additional individually defined rules that do not have a direct analogue in objective law (legal uncertainty of objective law, discretionary and recommendatory norms, a partial gap in law, discretionary norms). This is a situation of buying and selling real estate, renting a land plot, concession, etc. Here, law is a specific system (microsystem), as situational law at the micro level. Indeed, the structure of law is formed by: 1) a situational complex of norms of objective law (an ideally-required level of law), 2) a situational complex of individually defined norms of cognitive law (a psychological level of law), 3) a situational complex of individually defined norms, enshrined in legal form, for example, an agreement, will, etc. (formal legal level of law), 4) “living law” (practically applicable level of law), 5) optional element in case of conflict, for example, a judicial act (conflict level of law).

The specific nature of the legal system in a particular situation is that it is formed by the elements which seem heterogeneous at first glance. These elements cannot fully exist without each other; they complement each other. New systematic traits arise when elements interact with each other. The inevitable contradictions between heterogeneous elements are resolved to a certain extent within the system, ensuring its stable functioning.

Indeed situational norms of cognitive law can correspond to situational norms of objective law, or contain more or less content, i.e. they can include additional situational

norms. In turn, formalized situational norms do not necessarily repeat the norms of cognitive law and “living” law may not coincide in full with formalized norms. For example, individually defined rules in a rental agreement establish subjective rights, obligations, the procedure for their implementation, or terms for the parties. However, the cognitive law of the lessee and the lessor (legal representatives of the parties) and especially the “living” law do not necessarily correspond to objective law and the contract. In particular, in subjective law only the power in relation to your own actions is realized. Other powers (the requirement of the proper conduct of the obliged, the entitlement to protect, not abuse the subjective right) exist at the formal legal level as a declaration, as unclaimed legal means.

Under certain conditions, “living” law may be characterized by relative independence in the system of situational law and may perform the function of a quasi-regulator. It happens when specific actors create a “living” law and then the majority of participants in the practice recognize the “living” law as the most effective regulator in this situation, as a particular legal custom. It should be borne in mind that the regulator may not fully comply with the situational complex of objective law norms and even the formalized situational complex of cognitive legal norms. However, in this case, “living” law is characterized by the ability to meet the interests of a functionally stronger side. One can use the Constitutional Court of the Russian Federation as an example. The Constitutional Court recognizes a provision of law that does not contradict to the Constitution of the Russian Federation or legal principles in some cases. However, the Court requires adjusting the “living” law, changing the algorithm of legal realization, if the norm does not correspond to law in essence and fact.

Being multilevel and overall systematic in the situation in question allows law to be a flexible and effective regulator, the element of practice. The form and content of situational law are determined in turn by the dynamics of the development of regulated practice, its diversity and complexity.

4. A situation of a gap in objective law. Constant updating of the system of practices of modern society and the state, the emergence of each new practice, for example the practice of organ transplantation, causes the presence of legal defects. We are talking about a gap in the situational complex of norms of objective law (partial gap) or about the absence of this complex (complete gap). In case of a partial or complete gap, subjects of law face a dilemma. One can 1) enter into a non-legal social relationship, and therefore expose yourself to the risk of inability to provide and protect your own interests by legal means; 2) wait until the state (or another specially authorized entity) develops a legal basis for the new situation in the form of a situational complex of abstractly general norms. Alternatively one can carry out individual normative legal regulation and create a situational complex of individually defined norms formalized in the contract in accordance with the principle of “everything that is not prohibited by law and morality” is permitted. Of course this is permissible only in a private legal situation, where as a rule private entities operate and mainly private interests are affected.

If participants in a private legal situation decide to overcome a gap in objective law and in the process of individual normative-legal regulation create a situational complex of individually defined norms in the process of individual legal regulation based on the principles of law, taking into account the conditions of the situation, their interests and capabilities, in this case law includes the following elements: 1) a situational complex of individually defined norms of cognitive law, 2) a situational complex of individually defined norms in the form of an agreement, 3) “living” law, 4) an additional element in case of conflict, for example a court decision, when the judge uses the provisions of the contract as a source.

In such situations, the role of a practicing lawyer is extremely important. A lawyer in their mind and psyche forms situationally defined norms, then explains them to the principal and coordinates with the legal representative or directly with the other participant (participants) of the private law situation. An integrative legal understanding of a lawyer is the methodological basis of their effective work in the situation being analyzed.

5. The situation of the offense in a specific relationship. The situational complex of objective law norms may contain norms that determine the inadmissibility of behavior in a particular situation or particular legal relationship. These norms constitute, for example, a specific crime. If both parties or one of the parties of the legal relationship, for example a seller of real estate is a fraudster who acts or refrains from action illegally, then in a particular legal relationship there occurs an offense which deforms the relationship, destroying it like a cancer cell. What is law in this situation? As in the above mentioned situations, there is a situational complex of norms of objective law which includes the offense and appropriate penalties, as well as a situational complex of cognitive law norms. If the legal relationship is complicated, a situational legal document might be used: for example, a sales contract for real estate and in general or a set of documents based on formalized individually defined standards. However, there is no legal way of behaviour and this destroys the situational system of law because law does not fulfill the function of a real regulator. The injured party or other authorized legal entities may initiate legal proceedings against the perpetrator. Then an additional element appears in the form of an enforcement act, for example a court decision.

6. The situation of the offense in a specific destructive relationship. Subjects commit offenses outside of a specific legal relationship in various practices. That is the offense exists in its “pure” form and becomes an independent so called destructive relationship. Let us address a crime. A specific crime is committed not only within a specific relationship, but also exists by itself. Theft, robbery, etc., are not only a deviant social attitude due to the fact that law enforces a ban, restriction, or punishment. This is also a negative type of legal relationship – a destructive legal relationship. It destroys the legal system of society and the state. It is a factor of destabilization. What is law in this situation?

Firstly, law is a situational complex of objective law norms that defines a crime and punishment for committing it. Secondly, law is a situational set of norms that is formed (or is absent for some reason, for example ignorance, temporary insanity), in the mind

and psyche of the criminal. Thirdly, law is a situational complex of individually defined norms of cognitive right of a judge or a number of judges. Fourthly, if the offender is identified, if the offender's guilt is proven in court then formalized individually defined rules are created in the form of a sentence. These rules result from narrowing down the criminal law rules taking into account the conditions of the situation, the personality of the offender and the victim, and the public danger of the crime.

Main conclusions:

1. Law is an integral regulating element of any socially significant practice. Law is always situational and specific as an element of practice. There is a number of typical situations where the situational nature of law is clearly manifested.

2. Law is a multilevel and systemically organized regulator in a specific situation. The integrative theory contains a comprehensive understanding of law, taking into account all aspects of its manifestation in practice.

3. Integrative legal understanding, namely its conceptual component, which integrates everything valuable and rational in the normative, sociological and psychological theories of law – this is the methodological basis of the work of an effective lawyer.

4. It is necessary to take into account the situational nature of law in the process of studying and defining law. Is it possible to develop a universal definition (universal theoretical model) of law? From a practical point of view, all the nuances are important for the effective work of a practicing lawyer. Therefore there can be as many definitions as there are typical situations. Moreover, we need a general definition within the framework of the integrative legal understanding which covers all the features of the manifestation of law in practice.

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COMMENTARIES

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MIXED CONTRACTS IN THE RUSSIAN LEGAL DOCTRINE: CONTRIBUTION OF KAZAN CIVIL LAW SCIENCE

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Abstract: The article presents an interesting issue of the Russian legal doctrine, mixed contracts, and the way the research of this question was developing. The author highlighted the contribution of Kazan civil law science which had a significant input for the mixed contracts theory. The author provides the historical overview of the issue and gives an impressive literature review, discusses the main issues of the theory of mixed contracts, their elements and essential terms. The study of mixed contracts is a traditional direction of the civil law school of Kazan University. A.A. Simolin, M.Yu. Chelyshev worked a lot on the phenomenon of mixed contracts. The author also worked together with Professor M.Yu. Chelyshev and published some joint works. The approach proposed by them was useful not only for solving the problems of civil law doctrine, but also for describing a number of special issues in the development of legal practice.

Keywords: mixed contracts, limits (borders) of freedom of contract, named contracts, non-named contracts, hybrid contract, gemischte Verträge, classification, cross-branch interaction, principaliter mixta, per accessionem mixta.

1. Mixed Contracts: Background

D. Nettelbladt apparently was the first to mention mixed contracts in Russian legal literature. He noted: “Mixed contracts can be of two types. There is a mixed contract, consisting of many contracts, which together constitute a new type of agreement different

from its constituent parts. There are also mixed contracts formed by joining one contract to another. In the first case, contracts are called initially mixed (*principaliter mixta*), and in the second case mixed through accession (*per accessionem mixta*)¹¹.

After that A.A. Simolin, L.S. Tal², G.F. Shershenevich³, V.I. Sinaisky⁴, I.A. Pokrovsky⁵ subsequently studied mixed contracts in their scientific works.

A number of issues related to the doctrine of mixed contracts were raised in the works of Soviet time scholars⁶. The question of mixed contracts has been studied before and after 1991 by highly respected Russian civil law scholars such as I.B. Novitsky and L.A. Lunts⁷, O.S. Ioffe⁸, O.N. Sadikov⁹, M.I. Braginsky and V.V. Vitryansky¹⁰ and other well-known specialists¹¹.

However, in Russian literature with rare exceptions¹², there were no special monographic and dissertation works on mixed contracts until 2008. The degree of research and the volume of scientific discussion on the issues of mixed contracts are totally insufficient in view of the doctrinal and practical significance of this legal category.

The study of mixed contracts is a traditional direction of the civil law school of Kazan University. One of the pioneers in this area was A.A. Simolin¹³, a well-known civil law scholar, a graduate, and later a professor of Kazan University.

¹ Nettelblatt D. The initial foundation of universal natural jurisprudence, adapted to the use of the foundation of positive jurisprudence and translated from Latin. Moscow, 1770, p. 171.

² Tal L. S. Positive law and unsettled contracts, *Legal notes of Demidov Law Lyceum*. Vol. III (XIII), Yaroslavl, 1912, pp. 386-434.

³ Shershenevich G.F. Commercial law course. 4th ed., vol. 2. Product. Trade deals. St. Petersburg, 1908, pp. 240-241.

⁴ Sinaisky V.I. Russian Civil Law. Vol. II. Obligatory, family and inheritance law. Kiev, 1915, pp. 87-90.

⁵ Pokrovsky I. A. The main issues of civil law. Moscow, 1998, pp. 126-127.

⁶ See, for example: Oygenzikht V.A. Atypical contractual relations in civil law. Training allowance. Dushanbe, 1984; Sobchak A.A. Mixed and complex contracts in civil law, *Soviet State and Law*. No. 11, 1989, pp. 61-66.

⁷ Novitsky I. B., Lunts L. A. General doctrine of commitment. Moscow, 1950, p. 102.

⁸ Ioffe O. S. Law of Obligations. Moscow, 1975, pp. 37-38.

⁹ Sadikov O. N. Atypical institutions in Soviet civil law, *Soviet State and Law*. no. 2, 1972, pp. 36-37.

¹⁰ Braginsky M.I., Vitryansky V.V. Contract law: general provisions. Moscow, 1997, pp. 331-334.

¹¹ See, for example: Efimova L.G. Banking transactions: law and practice. Moscow, 2001, pp. 243-246; Romanets Yu. V. System of contracts in the civil law of Russia. Moscow, 2006, pp. 74-80.

¹² Braginsky M.I. The fundamentals of the doctrine of unnamed (unmarked) and mixed contracts. Moscow, 2007; Pischikov V.A. Mixed and atypical contracts in the civil law of Russia. Diss. Cand. of Legal Sc. Moscow, 2004.

¹³ Simolin A. 1) Mixed treaties and exercises on individual liability, *Law. Weekly legal newspaper*, 1911. No. 47, art. 2619-2626; 2) Mixed gift agreement, *Bulletin of civil law*. 1917, no. 3-5, pp. 26-48. For a brief sketch of the life and work of A.A. Simolin, see: Em V.S., Komarova T.E., Simolin A.V. "Chekhov type" professor (on the 125th anniversary of the birth of Kazan civilist A.A. Simolin (10 (22).10.1879 - 12.23.1919)), *Legislation*. 2004, no. 12, pp. 75-82; Em V.S., Komarova T.E., Simolin A.V. The sphere of freedom, Simolin A.A. Retribution, gratuitousness, mixed contracts and other theoretical problems of civil law. Collection of works. Moscow, 2005, pp. 7-47; Krotov M.V., Maksotsky R.A., Shcherbak N.V. A study interrupted by the revolution, *Ibid.*, pp. 48-90.

Modern representatives of Kazan civil law, including Professor Mikhail Yuryevich Chelyshev, who headed the revived Department of Civil and Business Law at Kazan University, as well as the author of these lines, a graduate of Kazan University, continued the study of mixed contracts.

Our scientific views with Professor M.Yu. Chelyshev on the phenomenon of mixed contracts were set forth in joint publications¹. Not all scientific plans were implemented during the unfairly short but vibrant life of Mikhail Yuryevich. Our work on a monograph on mixed contracts was interrupted by the tragic death of Professor Chelyshev when he was saving members of his family. Mikhail Yuryevich was not only a wonderful friend, a brilliant scientist and an excellent co-author, but he was also an example of personal courage and determination in everyday life.

Our proposed approach to the study of mixed contracts resonated among Russian researchers – civil law scholars², including researchers of private international law³, as well as representatives of other branches of legal science⁴.

¹ 1) Ogorodov D.V., Chelyshev M.Yu. Mixed contracts in private law: some issues of theory and practice, *Legislation and Economics*, 2005, no. 10, pp. 50-53; 2) Id., On the question of the types of mixed contracts in private law, *Legislation and Economics*. 2006, no. 2, pp. 53-59; 3) Id., Mixed contract and questions of the theory of legal regulation, *Legislation and Economics*. 2007, no. 3, pp. 49-55; 4) Id., On mixed contracts in part four of the Civil Code of the Russian Federation, *Intellectual property. Industrial property*. 2007, no. 10, pp. 49-58; 5) Id., Some debatable problems of the doctrine of mixed contracts, *Izvestiya vuzov. Pravovedenie [Universities bulletins. Jurisprudence]*. St Petersburg, 2007, no. 6, pp. 41-63; 6) Id., The design of a mixed contract in civil (private) law, *Transactions: problems of theory and practice: Collection of articles*, ed. M.A. Rozhkova. Moscow, Statut Publ., 2008, pp. 310-355.

² Braginsky M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts. Moscow, Statut Publ., 2007; Novitskaya A.A. Invalidity of a part of the transaction: comparative legal analysis of Russian and German legal regulation, *Bulletin of Civil Law*, 2011, no. 1, pp. 4-51; Karapetov A.G., Savelyev A.I. Freedom of concluding unnamed contracts and its limits, *VAS Bulletin of the Russian Federation*, 2012, no. 4, pp. 12-56; Karapetov A.G., Savelyev A.I. The freedom of the contract and its limits: in 2 vols. Moscow, Statut Publ., 2012, vol. 2: The limits of freedom to determine the terms of the contract in foreign and Russian law ("ConsultantPlus"); Aliev T.T. Differentiation of unnamed contracts from mixed contracts, *Lawyer*, 2016, vol. 9, pp. 20-22; Savelyev A.I. Some issues of legal regulation of mixed contracts in Russian and foreign civil law, *VAS Bulletin*, 2011, no. 8, pp. 6-39; Romanets Yu.V. The system of contracts in the civil law of Russia, 2nd ed. Moscow, Norma, Infra-M Publ., 2013; Kulakov V.V. Obligation and complications of its structure in Russian civil law, 2nd ed. Moscow, RAP, Walters Clover Publ., 2010; Bychkov A.I. Mixed contract in the civil law of the Russian Federation. Moscow, Infotropic Media Publ., 2013; Didenko A.A. An agreement on the use of a part (structural element) of a thing, *Lawyer*, 2013, no. 18, pp. 24-29; Gapanovich A.V. The legal nature of the agreement on the payment of the registration fee and its relationship with the law on placing orders, *Lawyer*, 2013, no. 1, pp. 30-33; Uralova A.A. Mixed contract bypassing the law, *Lawyer*, 2014, no. 3, pp. 13-15; Fetisova E.M. Mixed contracts as an implementation of the principle of freedom of contract, *Law*, 2013, no. 2, pp. 146-159; Levushkin A.N., Fedechko F.I. The legal essence of an unnamed contract and its implementation within the framework of the principle of freedom of contract, *Legal World*, 2014, no. 4, pp. 27-30; Safonova N.S. Mixed contracts with elements of a contract agreement, *Eurasian Law Journal*, 2016, no. 2 (93), pp. 194-195; Pilipson E.G. The genesis of contractual inheritance and its legal evolution, *Social Sciences*, 2016, no. 1, pp. 297-311; Baturina A.A. Mixed contract and some related civil-law constructions: correlation, *Siberian Law Journal*, 2017, no. 4, pp. 37-43; Bulygin A.V., Kryukova Yu.Ya. Hidden clause on a guarantee in a contract between legal entities: interpretation problems, *Eurasian Law Journal*, 2018, no. 10 (125), pp. 136-138.

³ Mazhorina M.V. The choice of applicable law to cross-border mixed and unnamed contracts, *Journal of Russian Law*, 2012, no. 10, pp. 72-81.

⁴ Korshunova T.Yu. The question of the possibility of including the conditions of a civil law nature into a labor contract (as exemplified by the discussion of "golden parachutes"), *Civil Law and the Present: a collection of articles dedicated to the memory of M.I. Braginsky*, ed. V.N. Litovkina, K. B. Yaroshenko.

The proposed approach was useful not only for solving the problems of civil law doctrine, but also for describing a number of special issues in the development of legal practice. The publications listed in the footnotes here cover the following issues:

- procedural law¹;
- corporate law and the securities market²;
- tax law and currency legislation³;
- regulation of concession agreements and public-private partnerships, issues of technology-innovative zones⁴;
- regulation of auctions and tenders⁵;
- regulation of energy and energy supply⁶;
- settlements and banking law⁷;
- legal problems of capital construction, common ownership in housing and utilities and the management of apartment buildings⁸;

Moscow, Statut Publ., 2013; Mikryukov V.A. On the interindustry analogy in the practice of overcoming the gaps in the legal regulation of the payment of “golden parachutes”, *Important Problems of Russian Law*, 2018, no. 7 (92), p. 100-107.

¹ Shemeneva O.N. Discussion issues of the concept of procedural agreements in the works of Russian scholars, *Herald of Voronezh State University, Series: Law*, 2016, no. 2 (25), pp. 110-120.

² Osipenko K.O. Agreements of participants (shareholders) in Russian and English law, *Legislation*, 2010, no. 4 “Garant”; Shitkina I.S. Some problems of legal regulation of education and activities of the sole executive body, *Economy and Law*, 2011, no. 4, pp. 3-17; Borodkin V.G. Corporate agreement during the reform of the Civil Code of the Russian Federation, *Law*, 2014, no. 3, pp. 160-174; Vasilchenko D.D. On the acquisition and alienation of shares (stocks) in an agreement on the exercise of the rights of members of a company, *Law and Politics*, 2017, no. 4, pp. 158-171; Shitkina I.S. Chapter XII. Legal support of corporate governance, *Corporate law: training course: in 2 volumes*, E.G. Afanasyeva, V.A. Waipan, A.V. Gabov and others, ed. I.S. Shitkina. Moscow, Statut Publ., 2018, vol. 2.

³ Shitkina I. The legal nature and procedure for corporate registration of an agreement on the creation of a consolidated group of taxpayers, *Economy and Law*, 2012, no. 5, pp. 3-23; Pykhtin S.V. Mixed contracts from the standpoint of the requirements of the currency legislation on issuing a transaction passport, *Banking law*, 2015, vol. 2, pp. 20-24.

⁴ Rachkov I., Sorokina A. Lacunae in the Federal Law “On Concession Agreements”, *Law*, 2007, No. 4, pp. 141-145; Dyatlova N.A. The legal nature of the public-private partnership agreement, *Herald of St. Petersburg University. Law*, 2017, vol. 8, no. 3, pp. 306-313; Trotsenko O.S. The question of complex legal nature of public-private partnership agreements, *Legal thought*, 2018, no 5 (109), pp. 74-79; Gromova E.A. The agreement on the implementation of technological development activities in special economic zones. Moscow, *Justicinform Publ.*, 2015.

⁵ Belyaeva O.A. Legal issues of auctions and tenders. Moscow, *Yurisprudenciya [Jurisprudence]*, 2011.

⁶ Balzhirov B.V. The modern design of the energy supply contract, *Lawyer*, 2013, no. 2, pp. 3-6; Grachev N.K. Energy service agreement as a developing institution in Russian law, *Issues of Russian and international law*, 2018, vol. 8, no. 5A, pp. 149-156.

⁷ Churakov R.S. Escrow account in Russian law, *Law*, 2007, no. 8 (“Garant”); Sadykov Renal R., Sadykov Rishat R. The settlement forward contract in bank practice and its judicial protection, *Legal work in a credit organization*, 2009, no. 3 (“Garant”); Mikheeva I.E. Security deposit in banking practice, *Legal work in a credit institution*, 2014, no. 2 (“Garant”); Popkova L.A. Legal structure of a syndicated loan, Moscow, *Prospect Publ.*, 2018.

⁸ Kozlova E.B. The system of contracts aimed at creating real estate, Moscow, *Contract Publ.*, 2013; Korneeva S.V. Ways to improve legislation in the field of investment in construction, *Legislation*,

- exclusive rights (intellectual property)¹;
- issues of sports law²;
- regulation of outsourcing and outstaffing³;
- authors of works on family law topics⁴, including legal aspects of surrogacy⁵, as well as social services⁶;
- land and environmental law⁷.

It is gratifying that the responses differ significantly: some scholars positively evaluate our ideas, some sharply criticize them. This means that the questions raised in the cited works are not scholasticism. These questions spark keen interest among colleagues; it is a starting point for discussion and, therefore, for the further development of legal science.

Our approach – mine and M. Yu. Chelyshev's approach – to mixed contracts including the concept of poly-branch contracts have found support in Russian jurisprudence over

2008, no. 12 ("Garant"); Kropotov L.G. Commercial investment in capital construction projects: legal regulation, Moscow, Infotropic Media Publ., 2012; Bychkov A.I. Distribution of apartments according to the model of a complex contract, Family and Housing Law, 2012, no. 2, pp. 36-39; Yurieva L.A. Management agreement for an apartment building, ed. I.D. Kuzmina, Moscow, Justicinform Publ., 2011; Gordeev D.P. Management agreement for an apartment building: qualification, concept and content, Laws of Russia: experience, analysis, practice, 2009, no. 2, 3 ("ConsultantPlus"); Nazarov R. Legal issues of the activities of managing organizations in the light of the decisions of the judiciary (second article), Housing Law, 2012, no. 9, p. 49-64.

¹ Vitko V.S. Civil law nature of the license agreement. Moscow, Statut Publ., 2012; Rainikov A.S. Commercial concession agreement. Moscow, Statut Publ., 2009; Evstafieva I.V. Problematic issues of the transfer of exclusive copyright to official publications, Law and Politics, 2011, no. 11, pp. 1956–1959; Kanatov T.K. The implementation of exclusive rights of authors and related rights in contract use in the EEU countries, 2017, no. 2 (27), pp. 57-61; Vitko V.S. The legal nature of relations in the creation of official publications, Economy and Law, 2018, no. 9 (500), pp. 69-78.

² Alekseev S.V. Labor relations in sports: a general characteristic of labor regulation of athletes and coaches, Law and State: Theory and Practice, 2016, no. 9 (141), pp. 102-106; Vaskevich V.P. Contractual regulation of professional sports activities, Laws of Russia: experience, analysis, practice, 2009, no. 1 ("ConsultantPlus"); Govorov P.S. Some issues of the legal regulation of the activities of athletes in team sports, Civilist, 2013, no. 1, pp. 109-114; Kozykin I.V. The question of the employment law nature of the transfer contract, Young scientist, 2016, no. 3-2 (107), pp. 26-29.

³ Vitko V.S., Tsureyan E.A. Legal nature of outsourcing and outstaffing contracts, Moscow, Statut Publ., 2012.

⁴ Plieva S.E. The legal nature of the marriage contract in modern family law of Russia, Laws of Russia: experience, analysis, practice, 2014, no. 4., pp. 95-101; Saveliev D.B. Family agreements: study guide, Moscow, Prospect Publ., 2017 ("ConsultantPlus"); Barkov A.V. The legal nature of the social assistance agreement for children without parental care, Civil Law, 2008., no. 4, pp.25-27; Zubareva O.G. The legal nature of the agreement on the implementation of guardianship or wardship (foster family agreement), Legislation, 2011, no. 3 ("Garant"); Ksenofontova D.S. The ratio of contracts on the provision of support in family law, Bulletin of notarial practice, 2011, no 2, pp. 22-24.

⁵ Mubarakshina A.M. The legal nature of surrogacy agreement, Family and housing law, 2014, no. 4., pp. 24-27.

⁶ Barkov A.V. The contract as a means of legal regulation of the social services market. Moscow, Lawyer Publ., 2008.

⁷ Luneva E.V. The legal regime of land in specially protected natural areas, Moscow, Statut Publ., 2018 ("ConsultantPlus").

the past ten years. For example, our views were positively evaluated by M.I. Braginsky in his work on mixed contracts¹.

Of course, criticism was also expressed, especially among the labor law scholars. They did not accept our concept of poly-branch mixed contracts combining the concepts of labor and civil law².

However, it must be said that labor law was formed into an independent branch of law during the USSR. To date the independence of the branch of labor law in relation to civil law is subject to the specificity of the legal system of the Russian Federation, the successor of the USSR, the successor not only in the narrow international law aspect. Lawyers in the sphere of labor law uphold the status quo inherited from the legal system of the USSR. They are jealous of what even resembles the “civilian annexation” of the subject of labor law in modern Russia.

* * *

Our views with M.Yu. Chelyshev on the phenomenon of a mixed contract as they were in December 2008 will be set forth below.

Undoubtedly, legislation and the Russian civil doctrine have changed since 2008. We are talking about the reform of the Civil Code of the Russian Federation (not successful in everything), about the publication of new works³ on this issue. Today, we would formulate some arguments in a slightly different way and more accurately, pay special attention to the justification of some details...

In any case, the author of these lines can only attest that Professor M.Yu. Chelyshev made every effort to ensure that this modest contribution of Kazan civil law to the study of a mixed contract would benefit the domestic legal system. Now it is your turn to assess the extent to which our goal has been achieved...

¹ Braginsky M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts. Moscow, 2007, pp. 51-52, 58, 60.

² See, for example: Korshunova T.Yu. The possibility of including in a labor contract conditions of a civil law nature (for example, the discussion of “golden parachutes”), Civil law and the present time, collection of articles dedicated to the memory of M.I. Braginsky, ed. V.N. Litovkina, K. B. Yaroshenko. Moscow, Statut Publ., 2013 (“ConsultantPlus”); Eremina S.N. Property relations in the sphere of labor and civil law: Problematic issues of the subject of legal regulation, Russian Justice, 2015, no 6, pp. 8-12; Kuznetsova V.V. The work of the head of the organization. Legal regulation, ed. Yu.P. Oryol. Moscow, Contract Publ., 2016; Lushnikov A.M., Lushnikova M.V. On the interpretation of the employment contract, News of universities. Jurisprudence, 2005, no. 2, pp. 62-70; Lushnikov AM, Lushnikova MV. The course of labor law, vol. 2, 2009, Moscow, pp. 368-371; Lushnikov A.M. The development of the doctrine of the employment contract in the post-Soviet period: an overview of some issues, Herald of labor law and social security law, 2016, no. 10, pp. 26-48; Tarusina N.N., Lushnikov A.M., Lushnikova M.V. Social contracts in law. Moscow, Prospect Publ., 2017; Chesalina O.V. The legal nature of the contract on the provision of labor for workers, Journal of Russian Law, 2015, no. 4, pp. 66-77.

³ For example, A.I. Bychkov published a work that absorbed a number of his journal publications: Bychkov A.I. Mixed contract in the civil law of the Russian Federation. Moscow, Infotopic Media Publ., 2013.

2. Mixed contracts: main issues

The formulation of the main provisions of the doctrine of mixed contracts is under development and needs to be studied on indicated as well as other aspects of this issue, including consideration of the specifics of regulation of mixed contracts in private international law; comparative legal studies of the institution of mixed contracts are relevant as well. The analysis of a number of other pressing issues is required, including the following questions:

1. the relationship of the terms (elements) of various contracts that are part of the mixed contract;
2. classification of mixed contracts;
3. separation of mixed contracts from other similar legal phenomena;
4. limits of freedom of will during the conclusion of mixed contracts;
5. characteristics of obligations derived from mixed contracts;
6. validity of mixed contracts (including questions of loss or invalidity of contracts);
7. breach (of terms) of mixed contracts and legal consequences of their breach;
8. questions connected with the termination (including volitional termination) of mixed contracts;
9. possibility of the existence of poly-branch mixed contracts and their specificity.

The appearance of a mixed contract in legal science and legislation is based on the diversity of real economic life, which is much richer than the formalized constructions.

Nowadays, the category of “mixed contract” is one of the main categories of civil law, since with its help one of the facets of the fundamental principle of freedom of contract is revealed (Article 1 and Article 421 of the Civil Code of the Russian Federation). A mixed contract allows to bring specific contractual forms closer to the specific circumstances of legal reality and the needs of the parties to the contract, while not at all weakening the effectiveness of civil regulation.

3. Elements of a mixed contract

One of the most important tasks in the context of understanding the meaning of a mixed contract is the understanding of the category of “contract elements”. This is connected to the fact that the legislator in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation, as well as researchers on this issue define mixed contracts through the category of “elements”. Strictly speaking, the elements of contracts may be understood as different legal phenomena based on the context in which we consider the contract: transaction, contractual relationship (obligation), contract-procedure, or contract-document.

Without going into a discussion about the essence of a civil law contract, we refer to paragraph 1 of Art. 420 of the Civil Code of the Russian Federation, according to which the contract is an *agreement* of two or more entities on the establishment, amendment or termination of civil rights and obligations.

Given this legal definition, it appears that in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation the legislator described the contract as a transaction, and we are talking about combining in a contractual form the *content* (i.e. *terms*) of several different agreements (contracts).

The terms of the contract in the Russian doctrine are usually understood as a way of fixing the rights and obligations of the parties arising from the contract legal relationship(s)¹. As Yu. A. Tarasenko points out in this case, “when speaking of the content and terms of the contract, we mean the content of the rules of conduct that the parties have established for themselves and which constitute an agreement (consent)”².

Thus, a mixed contract involves a combination of several groups (“bundles”) of terms that are characteristic of several different contracts. These large structural units that make up the content of a mixed contract can be conditionally referred to as component contracts.

4. Essential terms of a mixed contract

What are the requirements for essential component contracts of a mixed contract? The essence of this issue is whether the general form of a mixed contract can give “vitality” to one of its component contract, for which there is no agreement of the parties on all the essential terms of this component contract and which would, in ordinary circumstances (in the form of an unmixed contract), be “not viable”, that is, recognized as not concluded.

In our opinion, a mixed agreement requires all the essential terms (first of all, terms in relation to the subject) that are necessary for recognition of each of the component contracts that make up the mixed contract.

There is interesting interpretation used by the legislator in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation for the expression “the elements of *various* contracts”. Apparently, the indicated contractual structures should be understood as contracts the dissimilarity of which is indicated in the Civil Code of the Russian Federation, in other laws, as well as in decrees of the President of the Russian Federation or in resolutions of the Government of the Russian Federation³. This conclusion follows

¹ Braginsky M.I., Vitryansky V.V. *Dogovornoe pravo: obshchie polozheniya* [Contract law: general provisions]. Moscow, p. 238.

² Civil law: important issues of theory and practice, ed. V.A. Belov. Moscow, 2007, p. 413 (author of essay 11 – Yu. A. Tarasenko).

³ S.A. Khokhlov pointed out this nuance: “Part two of the Civil Code does not solve the question at which level of legal regulation the allocation of new types and varieties of agreements is possible. This is a problem to be solved in the first part of the Code... According to the literal meaning of this article (we are talking about Art. 421. – D.O., M.Ch.), named, typical contracts can be provided and regulated in addition to the Civil Code by other federal laws, as well as by decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation.” (Khokhlov S. A. The conceptual basis of part two of the Civil Code, Commentary on the Civil Code of the Russian Federation (part two), ed. O. M. Kozyr, A L. Makovsky, S. A. Khokhlova. Moscow, 1996 (“ConsultantPlus”).

from the fact that according to paragraphs 3-4 of Art. 3 of the Civil Code of the Russian Federation other legal acts containing civil law norms include two types of regulatory legal acts: decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation. This should be taken into account, since paragraph 3 of Art. 421 of the Civil Code of the Russian Federation mentions various contracts stipulated by law or other legal acts. In other words, the law describes contracts named in civil law, i.e. unitary (unmixed) contracts.

The difference in contracts may be due either to the structure of the contract itself, enshrined in legal norms, and / or due to the structure of a regulatory legal act (for example, in the Civil Code of the Russian Federation the rules on different contract types are placed in different chapters, while the rules on different subtypes of contracts within the type are mentioned in different paragraphs).

In our opinion, it follows that various contracts, according to the meaning of paragraph 3 of Art. 421 of the Civil Code of the Russian Federation, shall be appended with *different types* of contracts (purchase and sale, lease, contract, etc.) or *different classes* of contracts within the same contract type (e.g., the terms of contracts for the supply and sale of real estate may constitute a mixed contract).

The system of civil contracts enshrined in law is an objective phenomenon. This is seen as one of the manifestations of the fundamental property of law – *the formal certainty of civil law norms*¹. This is expressed, in particular, in the fact that the normative models of contracts (sets of terms and other essential contractual signs established by law) are formalized.

It is important to emphasize that when named (unitary, unmixed) contracts are indicated, it is a question of the existence of a specific contractual model, rather than simply mentioning the name of a contract. The name of the contract implies the existence of its special regulation, expressed in fixing the elemental and non-elemental features of the contract. The direct (indication of the name) or indirect reference to the mixed agreement should be distinguished from named contracts. For this reason, it is hardly possible to agree with some authors who propose to distinguish mixed contracts designed by the legislator², citing as such a lease-sale contract (Article 501 of the Civil Code of the Russian Federation).

To our opinion, mixed groups should include two groups of such contracts:³

- mixed contracts combining elements of contracts known only to objective law as named contracts;
- mixed contracts combining elements of contracts which are both named and unnamed in objective law. In relation to this case, it is worth noting that even

¹ Regarding the problem of formal certainty of law, see for example: Shaburov A. S. Formal certainty of law. Diss. Cand. of legal sciences. Sverdlovsk, 1973.

² Tatarskaya E. V. Op. cit.

³ M.I. Braginsky does not deny the possibility of such a combination, see: Braginsky. M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts ... P. 60.

when mixing the terms of a named and unnamed contract, we need a regulatory model (“name”) of at least one component contract. In other words, the terms of at least one named contract must be in the mixed contract. The combination of the terms of two unnamed contracts, from the point of view of the legislator, does not lead to the formation of a mixed contract.

When the mixed contract consists of the terms of the named and unnamed contracts, then the provisions on certain types of contracts are applied to unnamed component contracts only by analogy (clause 1, Article 6 of the Civil Code of the Russian Federation), since there are simply no special provisions on the subject.¹

The construction of a mixed contract is clearly necessary for those cases when there arises the question of the qualification of the contract and the competition of the rules applicable to it: is it a barter, or a “barter-like”, but legally different contract, a joint venture contract or a mixed contract combining loan, contract award and agency service? In this case, the single-order phenomena are compared: the contracts provided for in part two of the Civil Code of the Russian Federation (whereas it hardly makes sense to compare, for example, the contract of sale and agreement on forfeit, or contract award and pledge agreement).

Apparently, contracts on ensuring the fulfillment of obligations², due to their accessory character and other characteristics, do not form mixed agreements in combination with the terms of the agreements of the second and fourth parts of the Civil Code of the Russian Federation. At the same time, if we are talking about a combination of terms of single-order (accessory) nature of contracts – contracts to ensure the fulfillment of an obligation (say, a forfeit agreement with the terms of a pledge agreement), then, it seems, this combination can be recognized as a mixed contract.

5. Does a mixed contract produce a single obligation or a number of obligations?

One of the key issues in the doctrine of the mixed contract is its characterization as a fractional (fragmentary) or unified (even syncretic)³ structure. Upon discussion of this issue, we can point out the question of the unity of the content of the mixed contract.

In the academic works there is an opinion regarding a *single obligation*, which always arises by conclusion of a mixed contract. For example, A.A. Sobchak, describing a mixed contract, wrote: “In fact, when a buyer accepts an obligation to perform certain action instead of paying the purchase price, the relationship that has arisen can be divided into two separate obligations (purchase and sale, performance of action) only purely

¹ Actually, it is the absence of specific normative regulation that characterizes unnamed contracts.

² See for example Gongalo B.M. The doctrine of securing the obligations. Moscow, 2002.

³ Syncretic (from Greek *synkretismos* – connection) – consisting of heterogeneous, contradictory elements, but being holistic.

theoretically. In reality, a single obligation of a mixed nature arises.”¹ Moreover, according to A.A. Sobchak, “it is precisely such a combination within the framework of a single obligation that determines the uniqueness of mixed contracts.”²

In support of this position, D.I. Stepanov argues: “A mixed contract should be distinguished from a complex contract: the first contract, combining the elements of different contracts, serves as the basis for the emergence of a single obligation, and the second one generates two or more obligations combined by a single economic goal.”³ According to V.A. Pischikov, in the case when the contract of sale is modified in such a way that payment of the purchase price is replaced by counter-performance of the work (transfer of the thing versus performance of the work), a certain “*single mixed obligation*” arises.⁴

In our opinion, such a conclusion is hardly correct, at least because of the relative autonomy of the parts of the contract, which, in particular, is indicated by the content of Art. 180 of the Civil Code of the Russian Federation.

Most contracts give rise to a certain set of known obligations. In the fair opinion of I.B. Novitsky and L.A. Lunts, “a mixed contract is a contract, which gives rise to obligations that are part of two or more typical contractual relations regulated by law.”⁵

Obviously, for example, the obligation to transfer the property to the buyer by the seller cannot in any way be part of another obligation, or be identified with it (e.g. the obligation to pay for the purchased item by the buyer), regardless of whether it is the mixed or the unitary contract formed the basis of both obligations.

At the same time, the contract is a construction of *interrelated* obligations.⁶ Otherwise (if this mutual connection did not exist), for example, a contract of sale could be qualified as two separate donation contracts (donation of things and donations of money).

Most contracts are bilaterally binding and equivalently reimbursable. This is reflected in the presence of, as a rule, *two different obligations* which are reciprocal and interdependent:

- non-monetary property obligation (for the transfer of ownership of a thing, the provision of services, the performance of work, transportation, the provision of other property not in the form of money);⁷

¹ Sobchak A.A. Mixed and complex contracts in civil law, *Soviet State and Law*, 1989, no. 11, p. 64.

² *Ibid.* P. 64.

³ Stepanov D.I. Services as an object of civil rights. Moscow, 2005, p. 209.

⁴ Pischikov V.A. Op. cit., p. 70.

⁵ Novitsky I. B., Lunts L. A. A general doctrine of commitment. Moscow, 1950, p. 102.

⁶ See for example: Rybalov A.O. “Simple” and “complex” obligations (some aspects of the dispute about the concept of obligation), *Lawyer*, 2005, no. 5, pp. 2-7.

⁷ In international private law, these obligations are commonly referred to as characteristic performance of a contract or performance that is critical to the content of the contract. This category is of key importance for the purposes of conflict regulation using dispositive norms based on the *lex venditoris* binding. In Russian law, this is carried out in paragraphs 1–4 of Art. 1211 of the Civil Code of the Russian Federation.

- monetary obligation, the performance of which (payment of money) economically compensates the performance of a non-monetary (“commodity”) obligation.

Different types of contracts differ mainly in their non-monetary property obligations. A monetary obligation (payment of money) is the same for any onerous contracts, whether it is a payment for the purchased goods, or a payment of rent, or payment for the services provided. Whereas the content of a commodity obligation is specific for each type of agreement: transfer of ownership of a thing or transfer of a thing for temporary possession and use, etc. The above also confirms that the price, as a rule, is not an essential condition of the contracts and can be replenished in other ways (clause 3, Article 424 of the Civil Code of the Russian Federation), while the condition on the subject is always essential (paragraph 2 of clause 1 of Article 432 of the Civil Code of the Russian Federation).

Given the foregoing, it seems important to distinguish between mixed contracts in which:

- non-monetary (“commodity”) obligations are non-reciprocal, and a monetary obligation is opposed to them; for example, a party to such a mixed contract is a debtor in all non-monetary property obligations (say, in an obligation to transfer things into property and in a obligation on performance of services); the other side of the mixed contract is the debtor only for a monetary obligation;
- non-monetary obligations (“commodity”) are reciprocal and interdependent; such a contract is not legally a barter, although in an economic sense it is similar to it.¹

The indicated nuance is important both for the classification of mixed contracts and for solving the practical *question of restrictions on the conclusion of mixed contracts* (on restrictions on freedom to conclude a mixed contract, see above).

Thus, it seems that *no specific* (“mixed”, etc.) *obligations* by virtue of concluding a mixed contract *are formed*.

The obligation to transfer things into property from a mixed contract is exactly the same as if it arose from a unitary contract of sale. A monetary obligation from a mixed contract is no different from the same obligation, but from a unitary contract. Actually, this is what determines the applicability of the same rules to both unitary and mixed contracts – the generated obligations are the same.

The obligations of the mixed contract, considered separately, are not specific.² They are united only by the fact that the set of all these obligations has a *common ground*, a single legal fact (conclusion of a mixed contract) and a single goal. One mixed contract

¹ See Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69 (Bulletin of the Supreme Arbitration Court of the Russian Federation, 2003, no. 1), which states the following: bilateral transactions involving the exchange of goods for services that are equivalent in value do not relate to the barter contract (clause 1); a contract under which goods are transferred in exchange for the right to claim property from a third party cannot be regarded as a barter contract (clause 3).

² In particular, A. A. Simolin relied on this logic in his reasoning, see: A. Simolin. Mixed contracts and studies on particular obligations. P. 2623-2625.

replaces several legal facts (contracts), acting as a single common form for several different groups of contractual terms.

On the other hand, in the group of obligations from a mixed contract, there exists not just a mutual conditionality of obligations, but a interrelation between obligations that are characteristic for *different contract types* (classes) at the same time, and this interrelation can have legal significance.

In other words, neither in a unitary nor in a mixed contract occurs or can occur a merger of two (or more) completely different obligations. The practical significance of this argument lies in the fact that each of these obligations may be fulfilled or not fulfilled (improperly performed). This affects the fate of the mixed contract in different ways, depending on the design of a particular contract and, accordingly, the significance of this obligation for the system of other obligations generated by this mixed contract.¹

The boundaries of freedom of contract in concluding mixed contracts. One of the aspects of studying the design of a mixed contract is the problem of the limits of civil law regulation. The very subject of civil law makes it unreasonable to excessively regulate the contractual relations. The norm on mixed contracts, formulated in paragraph 3 of Art. 421 of the Civil Code, is of course a measure of freedom in the field of contract law. At the same time, this norm acts as a normatively established boundary between the discretion of the parties and the imperativeness of legislation.

Considering the problem of the limits of freedom of contract in relation to the conclusion of mixed contracts, it is necessary to highlight and discuss, in particular, the following issues:

- the question of the compatibility of the terms of different contracts in the structure of a mixed contract;
- cases of concluding a mixed contract with the abuse of contractual freedom.

A potentially large number of options for mixed contracts, which can be concluded by “collecting” them from the terms of the named contracts, is balanced by certain restrictions on contractual freedom. From a theoretical point of view, such restrictions may be due to:

1) formal legal basis, if it is a direct prohibition of the law in a particular situation (for one person or another) to conclude a mixed contract, including adding the terms of other contracts to a binding contract, making it mixed;

2) the essence of the transaction (contract) and / or *obligations* arising from it, which exclude mutual combination with each other; the normative categories “*essence of the obligation*” (Article 156 of the Civil Code of the Russian Federation), “*essence of the transaction*” (Articles 310–316, 397, 406, 417 of the Civil Code of the Russian Federation) cover a different range of restrictions on concluding a mixed contract, including restrictions due to:

¹ A number of practically significant questions of this kind were posed and considered by Yu.A. Tarasenko: can any part of a mixed contract be declared void (invalid) or is it possible to terminate a mixed contract due to violation of any part of its terms? (Tarasenko Yu.A. Mixed contract, Arbitration justice in Russia, 2007, no. 4).

- subject composition, the availability of special legal capacity;
- the specifics of the content of the rights and obligations of the emerging legal relationship (obligation);
- the object of the emerging legal relationship (obligation).

The conclusion of a mixed contract as a form of *abuse of law*. Finding the optimal balance between the free will of the parties to the contract and the imperativeness of objective law, among other things, serves to achieve the effectiveness of civil regulation.

Clause 3 of Art. 421 of the Civil Code of the Russian Federation does not extend the freedom of contract per se: this freedom has already been established by norms of a more general nature (clause 2, Article 1 and Article 8 of the Civil Code). The value of clause 3, Article 421 of the Civil Code of the Russian Federation is different and it consists in the *stabilizing contractual practice and law enforcement*. Its goal is to create a legislative core for areas of contractual practice that need new flexible forms.

The general legislative construction of a mixed contract is a sort of a “spine” for flexible contractual constructions. For the market or business, not only freedom is important in the sense of a variety of contract types. No less, but often more important is the predictability and stability of the rules of conduct. No market is able to function effectively in the absence of well-known and consistent rules of the game. This entails the most difficult task: *to combine rigidity* (in the sense of structural harmony, clarity of the ratio of the *contractual construction* to the existing standards and, accordingly, its predictability) with the *flexibility and uniqueness of a specific economic situation*. This task is precisely solved by the normatively fixed structure of the mixed contract.

Attention should be paid to the paragraph 2 clause 3 Art. 421 of the Civil Code of the Russian Federation: *the rules on contracts*, the elements of which are contained in the mixed contract, *are applied* to the relations of the parties under a mixed agreement, *unless otherwise provided by the agreement of the parties* or the substance of the mixed contract.

From the literal interpretation of the above provision of clause 3 of Art. 421 of the Civil Code of the Russian Federation, it follows that the parties may by their agreement *exclude* the application to their relations of any (!) provisions of civil law (for example, the relevant imperative norms contained in the legislation on consumer protection). Thus, when a consumer concludes purchase and sale contracts and work and service contracts separately, the relations of the parties will be subject to the relevant imperative (and dispositive) rules. However, if one concludes a *mixed contract* with the specified subject composition, combining all the same conditions for sale, work and services, then the parties will formally be able to free themselves from the action of all imperative norms on contracts, elements of which make up the mixed contract.

In this case, we are talking about distortions, that is about the attempts to give a contractual construction a meaning that is completely non immanent to it, about the attempts to distort the key properties of the contract (presumption of retribution, etc.). In our opinion, in the studied case of clause 3 of Art. 421 of the Civil Code of the

Russian Federation, the legislator was inaccurate, allowing the parties to the contract to practically paralyze¹ the effect of imperative norms of contract law contained in part two of the Civil Code of the Russian Federation. This does not correspond to the true meaning of the design of the mixed contract on the scale of the whole mechanism of civil law regulation.

In these conditions, it is advisable to apply the position of clause 3 of Art. 421 of the Civil Code of the Russian Federation restrictively and in conjunction with clause 1 of Art. 422 of the Civil Code of the Russian Federation, not allowing the derogation from the relevant peremptory rules of contract law. In our opinion, freedom from the relatively clear framework of normative regulation of the system of named contracts should be granted only to unnamed contracts. It is they (and not mixed contracts) that can be based only on general provisions on obligations and the analogy of law.

6. Differentiation between mixed contracts and other phenomena of the law of obligations

First of all, mixed contracts, as mentioned above, should not be equated with *unnamed contracts*².

A named contract is notable for a certain rigidity of construction; and it is precisely this rigidity that does not always suit entrepreneurs and other participants in civil turnover.

An unnamed contract, on the contrary, is flexible, but its practical use and stability in the context of the relevant judicial arbitration practice are often unpredictable in nature – the conclusion of an unnamed contract is a kind of “leap into the unknown”³.

In descending order of the existence of loopholes in regulation, reducing the degree of flexibility and atypicality of the contract, we can build the following linear series of contractual structures:

- Unnamed, completely novel contract. This is the most flexible structure, but also with the greatest likelihood of loopholes. Here the regulation is based on the

¹ This apt word, used in the work of M.I. Braginsky and V.V. Vitryansky in the analysis of the construction of a mixed contract, very accurately reflects this legal situation (Braginsky M.I., Vitryansky V.V. Op. cit., p. 331).

² This is also indicated by M.I. Braginsky, see: Ibid., pp. 7-8, 61.

³ For example, some time ago, entering into unnamed contracts in the form of settlement forward contracts, entrepreneurs faced the problem of qualifying these contracts in judicial arbitration practice as aleatory transactions, and therefore not enjoying legal protection (see: Decree of the Constitutional Court of the Russian Federation of 16 December, 2002, no. 282-O “On the termination of proceedings in the case of verification of the constitutionality of Article 1062 of the Civil Code of the Russian Federation due to a complaint of Bank Societe Generale Vostok Commercial, joint-stock bank, Legislation Bulletin of the Russian Federation, 2002, no. 52 (part two), Article 5291.). To solve this problem, it was necessary to amend the Civil Code of the Russian Federation, which was subsequently done by the legislator (Federal Law of 26 January, 2007, no. 5-FZ “On Amending Article 1062 of Part Two of the Civil Code of the Russian Federation”, Legislation Bulletin of the Russian Federation, 2007, no. 5, Article 558).

general norms of civil law on contracts (obligations), business customs¹, analogy of the statute and analogy of law².

- Mixed contract consisting of the terms of the named contracts combined with the terms of the unnamed contracts (partially unnamed contract). From the position of every participant in a civil turnover, a mixed contract is a compromise between the convenience, flexibility of the contractual structure, on the one hand, and the stability, predictability of law enforcement, on the other. Regulation is based on a combination of relatively free from loopholes regulation of named contracts with general rules on contracts (obligations), as well as business customs, analogy of statute and analogy of law.
- Mixed contract consisting only of the terms of the named unitary contracts. A fairly flexible construction is present here. The regulation of such contracts is relatively loophole free, however, the general originality of the contractual structure as a whole imposes some specificity in relation to unitary contracts. In addition, in relation to these contracts, there is a certain amount of judicial arbitration practice³.
- Unitary contract (named in a regulatory act). This is the most stringent of all the legal structures listed above. However, with respect to unitary contracts, there is both the most loophole free legal regulation and the most established judicial arbitration practice.

It follows that civil law *rules on mixed contracts* can only be of a *general nature*. A mixed contract exists in the rule of law only in the form of general permission, but not in the form of a detailed legal model.

If the legislator proceeds to a detailed and thus largely imperative regulation of the contract, then such a contract will inevitably turn into a named type (variety) of contract. For example, a vehicle rental contract with the provision of management and technical operation services (rental of a vehicle with a crew⁴) is a complex multicomponent contract stipulated and regulated by civil law (Articles 632-641 of the Civil Code of the Russian Federation), based on elements of simple traditional contracts. At the same time, strictly formally, this contract is assigned by the legislator to independent contract types.

One can also cite as an example the debatable issue of classifying a contract on “report” transaction as a mixed contract, which is a purchase and sale contract with an obligation to repurchase⁵. In particular, V.A. Belov characterizes it as a complex

¹ See, for example: Porotikov A.I. Custom in civil law, Extended abstract of Cand.Sc. (Law) Dissertation. Moscow, 2003, pp. 19-20.

² Braginsky M.I., Vitryansky V.V. Op. cit., pp. 328-329.

³ See for example a number of provisions in the mentioned above Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69.

⁴ See Vavilin E.V. Rental of vehicles: Legal aspects. Moscow, Alfa-Press Publ., 2005, pp. 59-71.

⁵ See Belov V.A. Civil law: General and special parts, course book. Moscow: Center YurInfoR Publ., 2003, pp. 210-211; Ivanova E.V. Settlement forward contract as a forward transaction. Moscow, Walters Kluver Publ., 2005, pp. 129-139.

contract¹. In this case, the terms of two sequential and inverse (“mirror”) purchase and sale contracts are combined. Herewith, both **contracts-components** will be the same not only in type, variety, but even in their subject, since in both cases the same securities are sold (whereas a mixed contract, in the generally accepted sense, involves a combination of contracts of various types or varieties). However, these contracts-components are *different* from the point of view that each of the parties to the “report” contract exchange the status of the seller and the buyer at a different time. In this regard, the question arises: should the “report” contract be considered a mixed one? In other words, should we interpret clause 3 of Art. 421 of the Civil Code of the Russian Federation in the sense that a mixed contract necessarily involves a combination of contracts of various types or varieties?

It seems very interesting to look at the question of the relation between mixed contracts and *contracts, named in part one of the Civil Code of the Russian Federation*.

The construction of a mixed contract is clearly necessary for those cases when the question arises of the qualification of the contract and the competition of the rules applicable to it. Is it a contract of exchange or a similar but legally different contract? Is it a joint venture contract or a mixed contract combining a loan, labour and agency service? And other situations. In this case, we compare the same order phenomena – the contracts provided for in part two of the Civil Code of the Russian Federation. Whereas it hardly makes sense to compare in a competitive context, for example, a purchase and sale contract and a penalty agreement, or a labour contract and a loan contract. Apparently, the security agreements of part one of the Civil Code of the Russian Federation², due to their security arrangements and other characteristics, in combination with the terms of the contracts of part two or part four of the Civil Code of the Russian Federation, do not form mixed contracts.

At the same time, part one of the Civil Code of the Russian Federation also mentions another variety of contracts (for example, the agreement on compensation – Art. 409), the combination of which with the contracts regulated in other parts of the Civil Code of the Russian Federation may perhaps be recognized as mixed contracts. Therefore, the question of the relation between mixed contracts and contracts of part one of the Civil Code of the Russian Federation requires further study.

One should not ignore the question of the relation between the mixed contracts and *contracts with the original name*.

The legal meaning of the “mixed contract” category follows directly from the content of clause 3 of Art. 421 of the Civil Code of the Russian Federation. In essence, it is introduced by the legislator for the purpose of ensuring the proper qualification of contractual forms concluded in the practice of civil turnover. In particular, in law enforcement it is extremely important to distinguish between the *novelty* of the

¹ Belov V.A. Op. cit., p. 210. However, regarding the category of “complex agreement”, the doctrine today lacks the unity of opinion. For more detailed analysis see Braginsky M.I. Fundamentals of the doctrine of unnamed (unmarked) and mixed contracts... Pp. 65-67.

² See, in particular: Gongalo B.M. The doctrine of securing obligations. Moscow, Statut Publ., 2002.

construction and content that are inherent in unnamed contracts and the superficial *originality of the name* of the contract.

This problem is relevant due to the fact that most of these contracts with new, original names (“investment contract”, etc.) are actually mixed, not unnamed, contracts. A similar situation often arises in contractual practice when the parties uncritically, mechanically reproduce economic concepts (“investments”, “business project”, etc.), replacing the setting of the terms of the contract on the basis of civil law categories. As a result, specific actions for the execution of such contracts are still a combination of the execution of several traditional contracts (purchase and sale, labour, loan, joint adventure, etc.). In such cases, the construction of a mixed contract allows qualifying such contractual relations without prejudice to the interests of the parties, but with the preservation of the effectiveness of civil regulation.

The need to draw borders between the mixed contracts and *unitary contracts with delivery terms* cannot be ignored either.

We think that purchase and sale contract involving the delivery of goods to the buyer is not a mixed contract. In such cases, it is hardly possible to talk about the presence of the terms of the contract of carriage in the purchase and sale contract. In our opinion, we are talking only about changing the place of fulfillment of the seller’s obligation to transfer the sold goods into the ownership of the buyer (Articles 316, 458, 497, 499 of the Civil Code of the Russian Federation), but not about a mixed contract. It does not matter for the buyer who exactly physically moves the goods to the necessary point in space (the seller himself and his employee, or delivery will be carried out by the carrier, seller’s counterparty). Having delivered the goods to the required place, the seller will be deemed to have fulfilled precisely the obligation of the purchase and sale contract, and not a contract of carriage.

One should also distinguish between mixed contracts and *unitary contracts containing terms on the obligation of one of the parties to the contract to conclude other contracts* that relate to the subject of this agreement.

For example, the seller’s obligation to insure the goods being sold at the time of their delivery to the buyer is characteristic of international trade practice¹. From this point of view, the following example, which is given as an illustration of a mixed contract (in terms of insurance terms), is not perfect: “For example, a contract for supply of goods may include conditions for its insurance, storage, carriage, loading and unloading, etc., which go beyond the traditional purchase and sale agreement, but at the same time do not require the conclusion of several contracts”². Such conditions, as well as the condition for the transfer of goods to the buyer in a designated place, in our opinion, do not make the purchase and sale contract a mixed contract, since the seller does not

¹ Thus, the seller’s obligation to conclude an insurance contract is covered by the delivery bases of CIF and CIP Incoterms as in force in 2000 (publication no. 560 of the International Chamber of Commerce).

² See: Civil law: Course book, ed. Prof. E.A. Sukhanov, 2nd ed., vol. 2, part 1. Moscow, BEK Publ., 1999, p. 154.

become an insurer, and the buyer does not become their counterparty-insurant. In such cases, it is not a mixed contract between the seller and the buyer, but a reference to other independent contracts that one of the parties is required to enter into, along with other actual or legal actions to fulfill the obligations of the purchase and sale contract.

7. Classification of mixed contracts

In the domestic civilistic doctrine, it is customary to classify contracts on various grounds¹, highlighting following contracts:

- compensated and uncompensated;
- unilaterally binding and mutual;
- real and consensual;
- main and preliminary;
- free and binding;
- mutually agreed and adhesion;
- for benefit of parties to the contract or of the third party;
- fixed-term;
- conditional;
- aleatory and commutative;
- fiduciary and commercial;
- concerning all citizens and requiring special legal capacity of the parties to the contract².

Mixed contracts also make it possible to distinguish their various types, i.e. allow classification based on the grounds mentioned. The need for their classification is due to the fact that for each independent type of a mixed contract there may exist a fundamentally different legal regulation.

At the same time, looking ahead, we note that, apparently, the above mentioned traditional classification of contracts is applicable only to **mono-branch** (single-branch) mixed contracts, in their well-established narrow civic understanding.

As regards **poly-branch** (different-branch, many-branch) mixed contracts, the applicability of this classification requires a separate discussion (such contracts will be discussed in more detail below).

¹ For the classification of contracts, see in particular Belov V.A. Civil law: General and special parts, course book. Moscow, Center YurInfoR Publ., 2003, pp. 179-181; Braginsky M.I., Vitryansky V.V. Contract law: general provisions. Moscow, Statut Publ., 1997, pp. 308-323; Civil law of Russia. General part: Course of lectures, ed. O.N. Sadikov, Moscow, Yurist Publ., 2001, pp. 724-729; Civil law: Course book, ed. E.A. Sukhanov, 2nd ed., vol. 2, part 1. Moscow, BEK publ., 1999, pp. 156-163; Civil Law: Course book, ed. Yu.K. Tolstoy, A.P. Sergeeva, vol. 3, 6th ed. Moscow, Prospect Publ., 2003, pp. 594-602; Ioffe O.S. Law of obligations. Moscow, Juridical literature Publ., 1975, pp. 33-38.

² e.g. the status of an entrepreneur (for a commercial concession contract) or license (for a bank account contract, insurance contract), etc.

Let us consider some types of mixed contracts in the context of the particular basic contractual classifications mentioned above.

Speaking of the division of contracts into **main** and **preliminary**, it should be emphasized that the preliminary contract may precede the conclusion of various contracts, including mixed ones. However, the preliminary contract itself cannot due to this relate to mixed contracts, since its meaning consists only in the parties accepting the obligation to conclude the main contract in the future (Article 429 of the Civil Code of the Russian Federation).

A mixed contract can be either **unilaterally binding** (for example, a combination of the terms of gratuitous loan (uncompensated use) and interest-free loan), and **mutual**.

On the basis of the presence of a counter property grant, mixed contracts can be divided into **compensated** and **uncompensated**.

As a general rule, the presumption of compensatory nature of contracts applies to mixed contracts (clause 3 of Article 423 of the Civil Code of the Russian Federation). An example of an uncompensated mixed contract is an agreement combining elements of donation (Article 582 of the Civil Code of the Russian Federation) and a loan (Article 689 of the Civil Code of the Russian Federation). However, uncompensated mixed contracts should be distinguished from contracts in which there are two or more counter non-monetary property obligations. For example, an agreement on the transfer of an item into ownership with a counter obligation to perform work (such an agreement has compensated nature).

In our opinion, it is the existence of mixed compensated-uncompensated (or vice versa) contracts is also theoretically permissible. For example, the donor, under a single contract, presents an item and provides paid services to the donee, receiving payment not for the item, but for the named services. In this case, gratuitousness takes place in the gift obligation following from the contract, and compensatory nature is present in another obligation of the same contract – for the provision of services.

There is also a classification of mixed contracts into **real** and **consensual**. In the framework of this classification, in our opinion, one should admit, firstly, the existence of generally consensual mixed contracts (for example, purchase and sale contract or services contract), which are in the majority. Secondly, there can be real mixed contracts (loan and one-time transportation of goods). Thirdly, the possibility of concluding a contract, which in a single form covers the terms of consensual and real contracts, is not excluded. For example, this may include a contract that combines the terms of a services contract and a loan contract.

Thus, it can be argued that the application of the established classification of contracts does not represent the complexity of civil law mixed contracts that combine the same or extremely close component contracts, say, purchase and sale and labour (both contracts are compensated, consensual, mutual). And, on the contrary, the usual classification should be applied with certain reservations when it comes to mixed

contracts, which involve a combination of very heterogeneous component contracts (a real and unilaterally binding loan contract together with a consensual bilaterally binding lease contract).

The above classifications are mainly dichotomous, therefore, a unitary contract cannot have both mutually exclusive features that underlie the classification: a consensual contract (compensated, unilaterally binding, etc.) itself cannot be real at the same time (uncompensated, bilateral, etc.), and vice versa. A mixed contract, by virtue of its synthetic nature, contains the features of several mixed contracts at once. At the same time, such synthetics should not be absolutized, because although a mixed contract combines the terms of several contracts in a single form, there is no complete merger of all the properties of component contracts.

The opposite features of the various component contracts that are part of the mixed contract do not, as one might think, give rise to a single by nature compensated-uncompensated or consensual-real agreement. A mixed contract is an autonomous system of contracts (contractual terms) united by a common form, therefore it is obvious that such a *system is characterized by individual qualities* of each of its *elements*. However, despite the commonality of their form, the component contracts still remain different contracts. This is especially pronounced at the stage of the implementation of various contractual terms, when we are talking about a contract-procedure.

Accordingly, it is important to understand that the *generally accepted dichotomous classification refers to its individual component contracts*, but not to the mixed contract as a whole. This removes the apparent inconsistency in the classification of mixed contracts on generally accepted grounds. Thus, for example, it is impossible to conclude a contract that *simultaneously* combines the conditions of sale and gift of *the same item* (the impossibility of simultaneously qualifying a separate contractual obligation both as compensated and uncompensated).

According to the **type and** variety of mixed contracts de lege lata, mixed civil law contracts in their generally accepted interpretation should be divided into:

- Mixed contract *within one contract type* (type – single, varieties – different). In particular, a combination of certain types of purchase and sale contract is not excluded. Thus, this can be the sale of real estate (Article 549 of the Civil Code of the Russian Federation) and delivery (Article 506 of the Civil Code of the Russian Federation), if the seller's obligation to transfer real estate (building) and deliver movable property (equipment specifically for this real estate property) is established by a single contract. It is also permissible, for example, to combine the terms of construction contracts (Article 740 of the Civil Code of the Russian Federation) and the contract for design and survey work (Article 758 of the Civil Code of the Russian Federation), etc.
- Mixed contract consisting of *different contract types*. In particular, the practice allows for the combination, as noted above, of the terms of a purchase and sale contract and labour contract, or a sales contract and paid services contract. It

seems that *such combination* within a mixed contract of various contractual terms is of the *most common (typical) nature*. It should be noted here that some contracts (in the sense of the totality of the contractual terms) are not capable of independent existence, and are usually objectified only within the framework of another contract. For example, this includes the condition of a commercial loan (clause 1, Article 823 of the Civil Code of the Russian Federation). Therefore, we can say that the existence in the agreement of such provision (even if it is the only provision) automatically makes the contract where it appears a mixed contract¹.

In addition, speaking of mono-branch mixed contracts, the temporal characteristics of the emergence of legal relations generated by a mixed contract should be taken into account, in particular, the following:

- *simultaneous* emergence and existence of several *obligations* characteristic to various contracts;
- *stage-by-stage, gradual* emergence and existence of *obligations* characteristic to various contracts. An example of such a staged approach is obligations arising from such mixed contracts as a hiring-sale one (Article 501 of the Civil Code of the Russian Federation), when prior to the transfer of ownership of goods to the buyer (Article 491 of the Civil Code of the Russian Federation), the buyer is the hirer of the goods transferred to them; a rent with the subsequent redemption of the rented item (Article 624 of the Civil Code of the Russian Federation), when, on the contrary, obligations first arise from the rent, and then replaced by other obligations².

¹ S.S. Zankovsky, emphasizing the fact that the provision of a commercial loan is inextricably linked with the contract the condition of which it appears, he writes: "Any mismatch in time of counter obligations under the concluded contract when goods are delivered (work is performed, services are provided) before payment or payment made prior to the transfer of goods (performance of work, rendering of services) can be considered as a commercial loan", see Commentary on the Civil Code of the Russian Federation (part two), ed. T.E. Abova, A.Yu. Kabalkin, Moscow, Urite Publ., 2003 ("ConsultantPlus") (author of the commentary – S.S. Zankovsky).

² M.I. Braginsky, V.V. Vitryansky rightly notes in this regard: "In other cases (outside the framework of privatization), the inclusion in the lease of the terms for the purchase of the leased property by the tenant means the transformation of the lease into a mixed contract" (Braginsky M.I., Vitryansky V.V. Contract law. Contracts on the transfer of property. Book 2, ed. 4. Moscow, Statut Publ., 2002 ("ConsultantPlus")). However, some authors reject the qualification of such a contract as a mixed contract. Thus, E.N. Vasilyeva writes: "The transfer of ownership of the leased asset from the lessor to the lessee (purchase of the leased property) is an independent basis for the transfer of ownership of the contract, one of the derivative methods of the emergence of ownership. It should not be mixed with other grounds, such as a purchase and sale contract. Purchase and sale can also formalize relations, the result of which will be the transfer of ownership of the leased item from the lessor to the lessee. However, these relations are governed by the sale and purchase rules, and in this case the parties enter into a sale and purchase agreement" (Commentary on the Civil Code of the Russian Federation (part two) / Edited by T.E. Abova, A.Yu. Kabalkin. Moscow, Urait Publ., 2003 ("ConsultantPlus") (commentary by E.N. Vasilyeva). The second position is also supported by other authors (see: Sergeev A., Tereshchenko T. Contract of property lease with the option to purchase, Corporate Lawyer, 2007, no. 1, p. 44–45).

Other classic contractual classifications are applicable to mixed civil law contracts. Moreover, among mixed contracts, in our opinion, it is necessary to distinguish the following:

- *free* contracts and contracts obligatory for conclusion (including public contracts);
- *mutually agreed* contracts and *contracts of accession* (the latter require special attention with respect to the possibilities of the abuse of freedom of contract upon their conclusion; see the above example with the contract practice of credit history bureaus);
- contracts *in favor of their participants* and contracts *in favor of third parties* (however here we should separate actually mixed contracts and related legal phenomena, as mentioned above);
- *fixed-term* mixed contracts in their different variations;
- mixed contracts concluded under *suspensive* or *dissolving conditions*.

Along with the indicated traditional classifications of mixed contracts, other divisions can be distinguished. In our opinion, mixed contracts *de lege ferenda* can be divided into:

– mixed contracts *combining elements only of contracts known to objective law, named therein*. An example is a mixed contract with a consumer, including the terms of a retail sale contract, and containing the provisions of a household contract (work on connecting purchased goods). In some cases, a very peculiar mixed contract may be concluded, which, although it includes well-known elements, but in general is not related to named contracts. This, for example, is a combination of counter-directed sale and purchase that occurs in practice: despite the economic similarity of such a mixed agreement with a barter agreement, it seems impossible to qualify it as a unitary barter agreement¹;

– mixed contracts, *combining elements of named in objective law, as well as elements of unnamed contracts*. Strictly formally based on clause 3 of Art. 421 of the Civil Code of the Russian Federation, a contract containing elements of a contract named in regulatory enactments and elements of an unnamed agreement will not be considered a mixed one (as mentioned above), however, in our opinion, such an excessively narrow interpretation does not meet the principle of freedom of contract (Articles 1, 421 of the Civil Code of the Russian Federation). In this regard, mixed contracts should include the contracts that combine elements of both contracts already known to the law and elements of unnamed contracts. In particular, this may be a contract formalizing the institute of surrogate motherhood, or a contract on bearing children (these contracts will be discussed below), which along with family law terms, may contain the terms of a contract for the gratuitous

¹ In clauses 1, 3 of the Review of the practice of resolving disputes related to a barter agreement (Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69 "Review of the practice of resolving disputes arising from a barter agreement", VAS Bulletin of the Russian Federation, 2003, no. 1) formulated, in particular, such provisions that are directly related to the institution of a mixed contract: bilateral transactions involving the exchange of goods for services equivalent in value, do not apply to the barter agreement (clause 1); an agreement under which goods are transferred in exchange for the assignment of the right to claim property from a third party cannot be considered as a barter agreement (clause 3).

use of property, a contract for the provision of medical and other services, using the design of the contract in favor of a third party, etc.

It is possible to distinguish mixed contracts depending on the **socio-economic field of their application**. On the one hand, these are *consumer* mixed contracts (with the participation of consumer citizens). On the other hand, in contrast to consumer mixed contracts, it is necessary to distinguish mixed contracts of *business* and other economic significance.

Consumer mixed contracts (with the participation of consumer citizens) contracts are quite widespread in civil circulation. For example, they include sales contracts with the conditions for the installation of purchased equipment and training of the buyer. In this case, we can talk about the existence of the conditions of a household contract (installation of equipment), or the provision of services (setting up equipment, training). At the same time, it should be noted that sales contracts with the condition of delivery of goods to the buyer are not mixed contracts (see below for more details).

In connection with the conclusion of mixed consumer contracts, the problem of hard-selling of the consumer goods, works and services that are not necessary to the consumer is often quite acute, which is expressly prohibited by Art. 16 of the Law of the Russian Federation of 7 February 1992 no. 2300-1 “On the Protection of Consumer Rights”¹ (as amended by the Federal Law of 9 January 1996 no. 2-FZ). In this case, there may be an unprofitable and unwanted by the consumer combining the terms of the contract for the sale of goods and the terms for the service (but at a price higher than the average market price). This hard-selling takes place due to the fact that contracts with the participation of consumer citizens are usually done by way of accession (Article 428 of the Civil Code of the Russian Federation).

Mixed agreements of business and other economic significance may be the following:

- Contracts with legal entities. Thus, in many cases, a contract will be mixed when concluded by the issuer of securities with the organizers or underwriters of the issue², often represented by a large bank or group (syndicate)³ of banks often acts. Of course, such contracts will have different legal qualifications, depending on the particular economic model underlying them, but they may include, for

¹ *Vedomosti* [Bulletin] of the Congress of People’s Deputies of the Russian Federation and the Supreme Council of the Russian Federation, 1992, no. 15, Art. 766; SZ RF, 1996, no 3, Art. 140; 1999, no. 51, Art. 6287; 2004, no 52, Art. 5275; 2006, no. 31 (part 1), Art. 3439; no. 48, Art. 4943.

² Such agreements of issuers of securities with the organizers (underwriters) of the issue in foreign practice are usually referred to as the “Underwriting Agreement”. In addition, the functions of the organizer of the issue, financial adviser to the issuer, the underwriter of the emission or payment agent (for settlements with purchasers of placed securities) in a number of cases are performed by one person (for more details, see, for example, Carro D., Juillar P. *International economic law: Course book*, translation from French. Moscow, International Relations Publ., 2001, p. 554-567; Nobel P. *Swiss financial law and international standards*, translation from English. Moscow, Walters Kluver Publ., 2007, p. 832-833 onwards).

³ If the organizers of the issue are a group of banks under the auspices of the parent bank (“Lead Manager”), then, in principle, a mixed contract may also be the agreements (in particular, “Agreement Among Underwriters”) concluded between member banks of such a syndicate (see Carro D., Juillar P. *Decree*, op. cit., p. 556-557, 561-563; Nobel P. *Decree*, Op. cit., p. 834).

example, the terms of the commission agreement (or agency agreement) along with the terms of the agreement for legal and consulting services, or combine the terms of the agreement on the acquisition of placed shares (bonds)¹ with the terms of the contract for the provision of the same services. Another example of such contracts is indicated by A.V. Kachalova: syndicated loans (loans provided by a group (syndicate) of banks, usually for significant amounts) should often be qualified as mixed contracts²;

- Contracts with a counterparty – with an individual. These are, in particular, agreements with the head of the organization (such agreements are subject to Articles 273-281 (chap. 43) of the Labor Code of the Russian Federation, but may also include civil law conditions). Contracts in the field of professional sport and contracts with creative workers also often combine labor and civil law conditions. Of course, not all contracts involving these categories of persons are mixed. Moreover, as a rule, such mixed contracts will be classified as poly-branch contracts (see below).

Mixed contracts have another gradation. And here again we quote the opinion of I.B. Novitsky and L.A. Lunts, who wrote: “A contract is a mixed contract, if it gives rise to obligations that are part of two or more typical contractual relations regulated by law”³. Scholars give examples of two varieties of mixed contracts: transfer of ownership of an item for work performed and provision of a dwelling for a fee for use along with the provision of services (agreement with a holiday home, sanatorium). And then they write: “In the first example, the obligation regulated by law in relation to various typical contacts is established by the mixed contract partly in relation to one party, and partly the other party; in the second example, these combined obligations take place in respect to one party.”⁴

The indicated nuance is important, because most of the contracts are bilaterally binding and equivalently reimbursable contracts, which is expressed, as a rule, in the presence of two counter-directed and interdependent obligations:

- property *non-monetary obligation* (on transfer of ownership of an item, provision of a service, performance of work, transport, provisions of other property not in the form of money)⁵;

¹ Such a transaction, when it comes to the purchase of placed securities from the issuer directly, is not a sale and purchase agreement, as V.G. Horovater rightly points out (Horovater V.G. Transactions in the placement of shares, Important problems of civil law, issue 11, collection of articles, ed. O.Yu. Shilohvost. Moscow, Norma Publ., 2007, p. 92-95).

² Kachalova A.V. Legal features of the conclusion of agreements on the provision of syndicated loans, Legislation, 2006, no. 2 (“Garant”).

³ Novitsky I.B., Lunts L.A. General doctrine of commitment, Moscow, Gosyurizdat Publ., 1950, p. 102.

⁴ *Ibid.*

⁵ In international private law, these obligations are usually called “characteristic performance of the contract” or “performance that is critical to the content of the contract.” This category is of key importance in international private law for the purposes of conflict regulation using dispositive norms based on the *lex venditoris* binding. In particular, in Russian law this is implemented in clauses 1-4 of Art. 1211 of the Civil Code of the Russian Federation.

- *monetary obligation*, the performance of which (payment of money) is economically compensated for the performance of a commodity obligation.

Different types of contracts differ primarily in **these** property **non-monetary** obligations, since a monetary obligation (payment of money) is the same for any onerous contracts, whether it is payment for the purchased goods or payment of rent or payment for services rendered. Whereas exactly the content of a commodity obligation is specific for each type of agreement: transfer of ownership of a thing, or transfer of a thing into temporary possession and use, etc. The aforementioned confirms that the price, as a rule, is not an essential condition of the contracts and can be replenished in other ways (clause 3, Article 424 of the Civil Code of the Russian Federation); while the terms on the subject are always an essential condition (paragraph 2 of clause 1 of Article 432 of the Civil Code of the Russian Federation).

Based on the above mentioned, it is important to distinguish between mixed contracts in which:

- *non-monetary obligations are not of a counter-character*, and a monetary obligation is opposed to them. One party of such a mixed contract is a debtor in all non-monetary property obligations (for example, the obligation to transfer things into property and the contractual obligation). The other party of the mixed contract is the debtor only for the monetary obligation(s). Often, a person paying for all civil rights received by this person is a consumer citizen (for example, one party combines the status of a seller and a contractor (executor), while the other is a buyer and a customer, under the terms of a sale and contract, respectively);
- *non-monetary liabilities are counter-directed* and interdependent. Such a contract is not legally a barter, although in an economic sense it is similar to a barter¹.

An important classification basis for mixed contracts of private law nature is their division into mixed contracts *complicated by a foreign element*, and into contracts that are not marked with such specificity (*without a foreign element*).

The first group – is mixed contracts complicated by a foreign element² – needs to be considered independently. The importance of the analysis of its constituent contracts (in practical terms) is due to the current specifics of the domestic economy, when the establishment by Russian entrepreneurs of legal entities abroad (primarily the so-called offshore companies) is widely used as a specific form of ensuring property interests and guaranteeing business security. Therefore, a significant part of contracts with such companies has a Russian character one way or another³.

¹ See the Review mentioned above, approved by the Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 24 September 2002, no. 69.

² As N.I. Marysheva points out, a foreign element in a legal relationship can manifest itself in various ways, for example, "Art. 1186 of the Civil Code mentions civil law relations with the participation of foreign persons "and complicated by another foreign element, including in cases where the object of civil rights is abroad" "(Commentary on the Code of Civil Procedure of the Russian Federation, ed. M.S. Shakaryan. Moscow, Velby, Prospect Publ., 2003, p. 629).

³ Suffice to say that according to the Federal State Statistics Service, among the leading countries in terms of foreign investment in the Russian economy in 2006 are the Republic of Cyprus and the British

The structure of a mixed contract is in great demand in the field of international economic relations. On the one hand, this is due to the diversity and heterogeneity of such relationships. On the other hand, the construction of a mixed contract is manifested in the form of a wide distribution of procedural and legal conditions (elements) in private law contracts complicated by a foreign element, and we are talking mainly about arbitration clauses¹.

The freedom of a contract complicated by a foreign element, as is well known, is additionally manifested in the ability to subordinate the contract to one or another rule of law. The principle of autonomy of will (*lex voluntatis*), enshrined in Art. 1210 of the Civil Code of the Russian Federation, is also valid for mixed contracts. In turn, this requires consideration of the issue of divisibility (*or splitting*) of collision binding². Thus, in contracts complicated by a foreign element, a very interesting phenomenon can occur when the contract not only has a mixed content, but each of the groups of contractual terms will be subject to the rule of law of different states. In the domestic legal system, the basis for this is paragraph 4 of Art. 1210 of the Civil Code of the Russian Federation, where the domestic legislator positively resolved the question of the divisibility of the obligatory statute of the treaty complicated by a foreign element³.

Thus, it is not difficult to imagine a mixed contract between Russian and foreign entrepreneurs, which includes three groups of contractual terms: work, purchase and sale, and on-the-spot provision of services, and by virtue of an agreement of the parties:

- the terms of the contract will be subject to Russian law;
- the terms of the sales contract will be subject to German law⁴;

Virgin Islands – a quasi-state entity, the overseas territory of Great Britain (see: http://www.gks.ru/free_doc/2007/b07_11/23-12.htm). As you know, these are the institutions of offshore companies that are popular among Russian entrepreneurs. It is noteworthy that Cyprus in terms of investment is ahead of Germany, France, the UK and the United States. This circumstance is known and taken into account by state authorities, in particular, by the Federal Antimonopoly Service (see: Lebedev V. The true owners of offshore and antitrust laws (Review), Mergers and Acquisitions, 2003, no. 2, p. 4-6.).

¹ Their wide distribution is associated not least with great opportunities for the enforcement of decisions of arbitration courts abroad (international commercial arbitration), due to the existence of a universal international agreement – the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York in 1958 (Bulletin of the Supreme Arbitration Court of the Russian Federation, 1993, no. 8), in which the Russian Federation also participates. The execution of judicial acts of state courts abroad, as you know, is a more difficult task, in the absence of a corresponding universal international agreement.

² Lunts L.A. The course of international private law: in 3 vols. Moscow, Spark Publ., 2002, p. 237-238.

³ See Commentary on the third part of the Civil Code of the Russian Federation, ed. A.L. Makovsky, E.A. Sukhanova. Moscow, Yurist Publ., 2002 ("Garant") (commentary, article 1211 – A.S. Komarov); Commentary on the Civil Code of the Russian Federation, part three, ed. T.E. Abova, M.M. Boguslavsky, A.G. Svetlanova. Moscow, Yrait-Izdat Publ., 2004 ("Garant") (authors of article 1211 – E.V. Kabatova, M.M. Boguslavsky, I.S. Zykin, M.P. Bardin).

⁴ In particular, of practical importance for the execution of such a mixed contract will be the fact that German civil law is characterized by such a feature as abstract property contracts (see Vasilevskaya L.Yu. Doctrine on property transactions under German law. Moscow, Statut Publ., 2004; Zhalinsky A., Roericht A. Introduction to German law. Moscow, Spark Publ., 2001, p. 322-323, 421-422). See also

- the terms of the consultation services contract will be subject to French law.

However, it is worth considering that the Russian legislator does not encourage such a form of realization of the autonomy of will, allowing it only by the explicit will of the parties to the contract, when they consciously, based on the actual specifics of the agreement and taking into account all legal consequences, let their contractual relations be subject to such complex fractional regulation. By default, the dispositive norm of clause 5, Article 1211 of the Civil Code of the Russian Federation, which, firstly, prevents the splitting of the obligatory statute of the mixed contract, and, secondly, ensures the establishment of a competent law and order in the absence of an agreement on the applicable law.

Let us consider in more detail the dispositive rule for determining the obligatory statute of a mixed contract. In domestic law, such conflict regulation is based on the principle of the closest relationship (“Proper Law of the Contract”)¹ and is presented in clause 5 of Art. 1211 of the Civil Code of the Russian Federation, *which provides that a contract containing elements of various contracts is applicable, unless otherwise provided by law, the conditions or the substance of the contract or the totality of the circumstances of the case, the law of the country with which this contract, considered as a whole, is most closely related.*

It seems that in conjunction with clause 5 of Art. 1211 of the Civil Code of the Russian Federation, the provisions of clauses 3 and 4 of Art. 1211 can be used to justify the close connection of the mixed contract, considered as a whole, with one or another rule of law. However, it is worth noting here that on the basis of the conflict rules noted, it is relatively easy to determine the applicable law for those mixed contracts where non-monetary obligations (characteristic performance) are not counter-directed, and are carried out by only one party to the contract, say, it acts as both the seller and the contractor. If in a mixed contract the characteristic performance is counter-вышкучеув (sale against a contract, etc.), then relying on the dispositive rules of clauses 3, 4 of Article 1211 of the Civil Code of the Russian Federation will be significantly more complicated.

The following circumstance should be mentioned here. The legislator has established that for domestic *substantive law* (clause 3, Article 421 of the Civil Code of the Russian Federation) the quantitative aspect (the proportion of the terms of a particular contract) is not of fundamental importance, as a result of which such a contract is governed by all those

the comparative legal characteristics of this institution, given to him by E.A. Sukhanov, who draws attention to the uncharacteristic nature of property contracts (transactions) for the Russian civilistic tradition (Sukhanov E.A. On types of transactions in German and Russian civil law, Civil Law Bulletin, 2006, no. 2. p. 5-26).

¹ However, there is a debate in the literature about whether the principle of closest connection is a proper conflict binding. See, for example, Zvekov V.P. Conflicts of laws in private international law. Moscow, Walters Kluver Publ., 2007, p. 133-135; Kabatova E.V. Changing the role of the collision method in private international law, Private international law: modern practice, collection of articles. Moscow, TON-Ostozhye Publ., 2000, p. 9; Private international law: Course book, ed. G.K. Dmitrieva, 2nd ed. Moscow, Velby. Prospect Publ., 2008, p. 385-393 (author of the chapter – G.K. Dmitrieva); Khodykin R.M. The criterion of the closest connection in private international law, Moscow Journal of International Law, 2002, no. 4, p. 208-221.

rules that apply to the relevant terms of contracts¹. It is worth noting that on the basis of this article of the Civil Code of the Russian Federation, the substantive qualification of not only ordinary (Russian) mixed agreements, but also those mixed agreements complicated by a foreign element that are subject to Russian law, is carried out.

A different situation develops within the framework of the conflict regulation of mixed contracts complicated by a foreign element: in clause 5 of Art. 1211 of the Civil Code of the Russian Federation, for the purpose of formulating a conflict of reference, the legislator took a different (majority) approach, i.e. the contract is considered as a whole, on the principle of “or / or”. This approach to regulation can be seen in Art. 3 of the UN Convention on Contracts for the International Sale of Goods of 1980, which stipulates that this Convention does not apply and does not regulate *contracts for the sale of goods in which the obligations of the party supplying goods consist mainly of the performance of work or the provision of other services*. In other words, the quantitative aspect of the content of the mixed contract, and above all its price, can acquire important legal significance and become a significant help for the court or arbitration in the matter of qualifying the contract and determining the law applicable to it.

8. The issue of poly-branch mixed contracts (contracts based on the norms of several branches of law)

It is reasonable to talk about a combination of single-branch terms in a contract, or conditions belonging to different branches of law in a mixed contract, therefore *single-branch* and *poly-branch* mixed contracts can be distinguished.

A new understanding of civil contractual validity is provided, in particular, by a study of this area from the point of view of the issues of poly-branch relations of civil law. Moreover, such an analysis is carried out in two main directions: consideration of the influence of the public law sphere on the field of contractual regulation, and also study of the reverse process – the use of contractual and other related civilistic structures in the field of public law. Such studies constitute one of the areas of the school of civil law, which is taking shape at the Department of Civil and Entrepreneurial Law of Kazan State University as part of the scientific direction “Interconnection of Private and Public Law Regulation of Property and Non-Property Relations”.

The category of a mixed contract can be also considered in the context of studying poly-branch relations of civil law, which allows one to distinguish such a variety as a poly-branch mixed contract, which will be discussed below.

Usually, mixed contracts are referred to as contracts that combine elements of the contracts indicated in the second part of the Civil Code of the Russian Federation. Given the content of the above norms of Art. 421 of the Civil Code of the Russian Federation, an understanding of a mixed contract in the narrow regulatory sense is

¹ In other words, a proportional or fractional approach to the regulation of mixed contracts is enshrined (application of the relevant norms to different contractual terms separately) in paragraph 3 of Art. 421 of the Civil Code of the Russian Federation.

permissible. In essence, this is a well-established view of a mixed contract as a purely civilistic phenomenon.

In addition to this, a mixed contract, in our opinion, should be considered in a broader context. Within a scientific discussion, we have put forward the thesis that such contracts can combine the conditions of private law (branches of civil, labor, family law) nature. In addition, we can talk about the combination of civil law and public law terms within a mixed poly-branch agreement.

We proposed to call such contracts *poly-branch mixed contracts*. The terminology we have chosen requires some explanation. Perhaps, it would be easier and more harmonious to use of the term “cross-sectorial contracts”. However, when we talk about cross-sectorial legal phenomena (concepts)¹, we usually mean such legal categories that are either at the intersection of different branches (in the field of their joint action), or have direct connections corresponding to other phenomena in other branches.

The essence of the mixed contract, on the contrary, is that it is a synthetic phenomenon that *embraces* and *combines* several different in terms of the branch origin conditions within a single form. The essence of a mixed contract lies precisely in such a union. Therefore, we are talking about “poly-branch”² i.e. “multi-branch” contracts combining the conditions of several branches of law in a single form.

It might be uncustomary, but the category of poly-branch mixed contracts should be attributed to the number of legal constructions that are in demand due to the development of science, technology and the complexity of modern civil circulation.

As part of the discussion on poly-branch mixed contracts, we should consider their classification.

The first group includes relatively uniform poly-branch mixed contracts, covered only by the private law subsystem. In other words, these are mixed contracts that combine in their content conditions of **only private law origin**. These include poly-branch mixed contracts, consisting of:

- *civil and labor elements*, which may include:
- contracts with professional athletes,³ persons of creative professions (show business, modeling business, etc.);

¹ It should be noted that such an expression is used not only in legal science, but also in court practice. For example, the existence of such an intersectorial concept as “individual entrepreneurs is directly indicated in paragraph 2 of the Decree of the Constitutional Court of the Russian Federation of June 6, 2002 No. 116-O “On the refusal to accept for consideration a complaint of a citizen Prytula Galina Yuryevna about a violation of her constitutional rights by the provisions of the fourth paragraph of paragraph 2 of Article 11, Articles 39, 143 and 235 Of the Tax Code of the Russian Federation” (Collection of legislation of the RF. 2002. No. 29. Article 3007).

² The Greek prefix “poly-” introduces the meaning of “many”, “multi-”, see: Efremova T.F. The new dictionary of the Russian language. Interpretation and word formation. Moscow, Russian language Publ., 2000 (<http://www.gramota.ru>).

³ For similar agreements, see, for example, Vaskevich V.P., Chelyshev M.Yu. Legal regulation of professional sports, Russian Justice, 2001, no. 7, p. 35-36; Vaskevich V.P. Civil law regulation of relations in the field of

- contracts with heads of organizations and members of collegial management bodies of legal entities;
- separate agreements between the employer and employee on non-disclosure of confidential information, or employment contracts containing such conditions, which will be discussed below;
- employment contracts containing conditions on the distribution of rights to official intellectual property objects (works, inventions, etc.).
- *civil and family law* elements (conditions), which, in particular, include:
 - o prenuptial agreement, which gives rise to both family law (regulation of alimony payments) and civil law consequences (changing the management of common joint ownership);
 - o contract with a surrogate mother for bearing a child¹;
 - o an agreement on the transfer of a child or children to foster care.²

The second group of poly-branch mixed contracts is represented by mixed contracts combining **conditions of private law origin** with **public law conditions**. Such contracts include:

- contracts combining civil law material and procedural elements³, for instance,
 - o civil contract containing arbitration clause⁴;

professional sports: Diss. Cand. Legal Scien. Kazan, 2006, p. 10, 17-18; Chelyshev M.Yu. Entrepreneurial activity in professional sports: some controversial issues of law and practice, *Business, Management and Law*, 2003, no. 3, p. 101-106.

¹ However, there is an opinion on the classification of this contract as a purely civil law one. For example, S.S. Shevchuk writes on this issue: "There is no doubt that, in accordance with part two of clause 4 of Art. 51 of the Family Code, between married persons and a surrogate mother, an agreement is concluded that is in the nature of a civil law contract that generates obligations between its participants" (S. Shevchuk. Some issues of legal regulation of the use of artificial reproduction methods, *Lawyer*, 2002, no. 9, p. 60-63). For works of other authors on such agreements, see Maleina M.N. Personal non-property rights of citizens: concept, implementation, protection, 2nd ed., Moscow, MZ Press Publ., 2001, p. 78-80; Aivar L.K. Legal status of surrogacy in Russia. Loopholes in legislation, *Legal World*, 2006, no. 2, p. 28-35.

² Decree of the Government of the Russian Federation of 17 July 1996, no. 829 "On the foster family", Collection of Legislative Acts of the Russian Federation, 1996, no. 31, Article 3721. See on this issue Mikheeva L.Yu. Guardianship and trusteeship: Theory and Practice. Moscow, Walters Kluwer Publ., 2004 ("Garant").

³ It should be noted that mixed private law contracts with procedural conditions should be distinguished from the **settlement agreement** in civil, arbitration proceedings, as well as in enforcement proceedings in civil disputes. This phenomenon, in our opinion, is not a poly-branch mixed contract, since it is a special agreement, although it is civil law in content, but at the same time it is enveloped in a special procedural form. M.A. Rozhkova gives the settlement agreement a slightly different characteristic, understanding it as an fusion of a civil law transaction and procedural actions in the form of an affirming court ruling (see M. Rozhkova Material and procedural agreements named in the Arbitration Procedure Code of the Russian Federation, *Economy and Law*, 2004, no. 1, p. 77).

⁴ When analyzing this mixed contract, one should take into account the discussion in legal science about the legal nature (material, procedural, mixed) of arbitration proceedings and, accordingly, the

- o civil law contract, which includes a condition on a state court resolving disputes arising from this contract (agreement on contractual jurisdiction, prorogation of jurisdiction);¹
- o civil contract containing a condition on the distribution between the parties to the contract of possible future procedural costs associated with the consideration and resolution by the arbitration court of a dispute under this contract²;
- contracts covering elements of only substantive law, but relating to private (civil) and public law, in particular, administrative law. For instance, the construction of a poly-branch mixed contract is required by administrative and environmental law, the example of which is the so-called production sharing agreement³. It is obvious that this agreement is largely of public law nature, defined by rules of administrative and financial law; at the same time, the question of whether they have conditions of a civil law nature remains open.

In addition, when considering poly-branch mixed contracts, as well as for single-branch mixed contracts, it is important to take into account **the temporal characteristics** of the occurrence of legal relations generated by a mixed contract, and point out the following:

- *simultaneous implementation* of several cross-sectorial conditions of a mixed contract. Thus, legal relations of different nature arising from one mixed contract may appear simultaneously. An example of this is contracts with managers or professional athletes, when contractual conditions of a labor and civil nature can objectively be implemented (in the form of appropriate legal relations) parallelly;
- *stage-by-stage implementation* of cross-sectorial contractual conditions of a mixed contract. Stage-by-stage development occurs in those cases when the simultaneous implementation (in the form of appropriate legal relations) of cross-

nature of the arbitration clause itself. For the detailed analysis of the views existing on this subject, see Rozhkova M.A. To the question of the legal nature of arbitration agreements ("ConsultantPlus"); Rozhkova M.A. A global deal: commercial use. Moscow, Statut Publ., 2005, § 4.7 Arbitration record (compromise), p. 136-144.

¹ See Art. 37 and Art. 249 of the Commercial Procedural Code of the Russian Federation, Art. 32 and Art. 404 of the Civil Procedural Code of the Russian Federation.

² See part 4, Art. 110 of the Commercial Procedural Code of the Russian Federation.

³ See, for example Voznesenskaya N.N. Agreements on production sharing in oil industry. Moscow, 1997; Drozdov I.A. Contracts on the assignment for use of natural resources. Moscow, Prospect Publ., 2001; Kalanda L.V. Issues of legal regulation of economic (entrepreneurial) activities in the oil industry. Moscow, 2004, p. 130-150; Platonova N. Issues of legislative regulation of production sharing agreements, Economy and Law, 1998, no. 3, p. 56-61; no. 4, p. 32-38; Salieva R.N. Legal support for the development of entrepreneurship in the oil and gas sector of the economy. Novosibirsk, 2001; Naletov K.I. Once again on the legal nature of the concession agreement in the field of subsoil use, Legislation and Economics, 2005, no. 10, p. 64-73. Here we consider only the legal side of the issue. The actual economic and political side of a number of production sharing agreements, in the context of Russia's national interests, is often subjected to justified criticism (see, for example G. Veliaminov, International Economic Law and Process: Course book. Moscow, Volters Kluver Publ., 2004, § 589-589 ("Garant").

sectorial conditions is objectively excluded. An example of such stage-by-stage implementation is the confidentiality agreement with the employee discussed below. Here cross-sectorial by nature legal relations in a single document agreement, arise only sequentially: first, the employee has a labour law obligation to not disclose a secret, then it is replaced by a civil law obligation of the same content.

9. A common example of a poly-branch mixed contract: a civil law clause in an employment contract

In our opinion, one of the theoretically acceptable and fairly common contacts in Russian contractual practice is a poly-branch mixed contract, generated by the inclusion of a civil law term into an employment contract.

We should note that judicial practice does not deny the possibility of such a combination of terms¹. Thus, the Plenum of the Supreme Court of the Russian Federation recognized the combination of the terms of a civil law contract and the terms of an employment contract within one contract form (possibly one document) as legal².

This interaction between different branches of law should not be understood simplistically. For example, the fact of subsidiary application by the court of certain norms of civil law to labor relations does not make such an employment contract a mixed poly-branch contract, but merely represents a way for the court to overcome a gap in labor law within the framework of resolving a specific case.

By combining the conditions arising from different branches of law in one contract, **it is unacceptable to distort the essence of the branch contract**. Civil law terms may be aimed at additional solutions for civil issues that are related to the specifics of the work of a particular employee, but not the deprivation of their rights and guarantees provided for by labor legislation.

For example, an employer's obligation to pay salaries cannot be removed and replaced with a civil obligation to pay money. This also applies to various bonuses and rewards for workers of a typical employment nature³.

¹ Resolution of the Plenum of the Supreme Court of the Russian Federation of 17 March 2004 no. 2 "On the application by the courts of the Russian Federation of the Labor Code of the Russian Federation" (as amended by Resolution of the Plenum of the Supreme Court of the Russian Federation of 28 December 28 2006 no. 63), Bulletin of the Supreme Court of the Russian Federation, 2004, no. 6; 2007, no. 3.

² We should point out that the mixed poly-branch contracts concluded in practice are very different, and the legal qualifications of their constituent elements deserve separate consideration. In particular, this refers to the terms of providing (giving) apartments to the employees, various bonuses, options for the purchase of securities, etc., included in the employment contracts with employees in top management category. Should they be qualified as labor conditions, or as the terms of a civil contract? The answer here is not always obvious. However, most of these forms of rewards and guarantees, apparently, still have a labor nature, despite the novelty of their names ("bonuses", etc.), as a rule, borrowed from foreign contractual practice.

³ Despite that, such solutions are proposed by some authors, see Kanunnikov A.B., Kanunnikov S.A. Civil law conditions in an employment contract with professional athletes, *Labor Law*, 2006, no. 8, p. 10-14.

The same rule applies to liability. Obviously, regarding the employee's liability under labor law (substantive and disciplinary), parties cannot agree to exclude the rules of the Labor Code of the Russian Federation, subordinating the employee's liability to the Civil Code of the Russian Federation.

However, such attempts are taking place. For example, E.P. Gavrilov, criticizing the current legislation on trade secrets, writes: "The only way out of this difficult situation is seen in the conclusion of civil law agreements on the employee's compliance with a certain policy of keeping and not disclosing official and trade secrets and civil liability for its disclosure, including for transfer to third parties"¹. However, such proposals ignore the imperative provisions of labor law; therefore, the legal consequences of concluding such agreements on the replacement of the employee's labor liability by civil law will still be determined by the application of part 4 of Art. 11 of the Labor Code of the Russian Federation.

The first striking example of this category of contracts is an *agreement on non-disclosure by an employee of information² constituting a trade secret of the employer, when such an obligation of the employee is valid both during the period of labor relations and after their termination*. Such an agreement should be recognized as a poly-branch mixed contract, since the obligation of non-disclosure of information is of a labor nature during the work period, and after the termination of employment, it is civil in nature.

We should emphasize the fact that when an employment contract contains the *term that trade secrets are not disclosed only for the period of work*, the mixed contract is not present (here the obligation of confidentiality is just one of the typical duties of an employee that has a labor nature). However, if the condition on the employee's *obligation not to disclose trade secrets outside the employment relationship* (after their termination) is included in the employment contract, we are dealing with a civil law obligation: there are no separate labor law relations between the former employee and the employer, since there is no work relationship. At the same time, the employer's legitimate interest in maintaining their trade secrets, which was known to their former employee, is obvious.

A mixed employment contract containing the corresponding civil law confidentiality clause solves the practical task set here. Relations of various legal branches, based on a single document-contract, **arise only sequentially**: at first, the employee's obligation not to disclose a secret is a labor obligation, then it is replaced (renewed)³ by a civil liability of a similar content.

¹ Gavrilov E.P. On the issue of protecting trade, official and personal secrets. Civil law aspects, Management and law, 2003, no. 5, p. 28. The author confirmed his views in the future publications as well, see Gavrilov E.P. Issues of legal protection of trade secrets, Economy and Law, 2004, no. 11, p. 3-13; Gavrilov E.P. On trade secrets, Electronic publication, prepared for "ConsultantPlus", 2005.

² In practice, it can also be referred to as a "Confidentiality Agreement", "Non-Disclosure Agreement", etc.

³ Of course, the term "renewed" is used here figuratively, and such dynamics of cross-sectorial relations is not an innovation in the civil law sense of Art. 414 of the Civil Code of the Russian Federation; here we are only talking about some similarities between innovation and the phenomenon being analyzed – replacing one relationship with another.

Thus, the employment contract, which includes the term that the employee does not disclose the employer's trade secrets, both during the term of the employment contract and after its termination, legally contains two conditions¹:

- *the term of an employment contract* establishing the employee's labor obligation not to disclose trade secrets. The procedure for its implementation and the consequences of violation are regulated by labor law. Moreover, such an obligation of the employee ends with the termination of the employment relationship (dismissal);
- *a term of a civil law contract* defining the civil law obligation of a person (former employee) not to disclose trade secrets obtained during the period of work. This obligation arises at the time of termination of employment. The procedure for its implementation and the consequences of the violation are regulated by civil law.

Another typical example of poly-branch mixed contracts is employment contracts, which contain a condition on the distribution of rights between an employee and an employer for the results of intellectual activity. A number of professions (engineers, programmers, designers, artists, etc.) suggest the possibility of creating special property (inventions, works of fine art, topology of integrated microcircuits, etc.). These results of intellectual activity created by the employee in the course of their employment are commonly called official. The issue of the ownership of rights to these results in practice is one of the most pressing issues in the sphere of exclusive rights.

Part 4 of the Civil Code of the Russian Federation contains a system of contracts applicable in the field of intellectual property law (Article 1233 and others of the Civil Code of the Russian Federation), which also includes mixed contracts. For example, it is quite common to conclude mixed contracts combining elements of license agreements with respect to patentable results of intellectual activity (Article 1367 of the Civil Code of the Russian Federation) and contracts on transfer of rights to trade secrets (Article 1469 of the Civil Code of the Russian Federation).

Both in the legislation effective until January 1, 2008, and in part 4 of the Civil Code of the Russian Federation, the legislator widely uses the term "contract" when regulating relations regarding the services results of intellectual activity. Earlier, the legislator did not characterize the nature of such an agreement in any way: whether it is civil or labor law². And this is despite the fact that a lot depends on the answer to this question, i.e. what the requirements for the form of the contract are going to be, and the consequences of non-compliance with it, the requirements for the content of this contract, liability for its violation, the procedure for resolving disputes, etc. The difference between these approaches is associated with the existence of differences in

¹ Although this condition was fixed in the actual text – "The employee is obliged to keep secret during the period of work relations, as well as for 2 years after their termination" – the semantic indivisibility of such a condition is superficial – in fact, there are two cross-sectorial conditions here (labor and civil).

² It should be noted that the indication in the norms of civil law of the labor legal status of the parties to such an agreement in itself did not completely solve the question of the branch nature of this agreement.

civil and labor law regulation – as is well known, in labor and civil law the regulation of these aspects often differs significantly¹.

In the legal literature, this issue on the branch affiliation of agreements on the distribution of rights to official results of intellectual activity is debatable. Thus, O.V. Kostkova and V.A. Tymoshenko believe that the law of the Russian Federation “On Copyright and Related Rights”² refers to a civil law (copyright) agreement³. Whereas, for example, V.V. Pogulyaev, adhering to a different, more flexible approach, writes that “para. 1 clause 2 of Article 14 is a dispositive norm and is applied if the agreement between the employer and the author does not provide otherwise... Thus, the parties – the author and their employer – have the right to introduce the relevant provisions in the employment contract or conclude a separate copyright agreement, specifically stipulating the legal policy of future works”⁴. However, it is worth noting that in both cases, the authors are inclined to choose one of the two options of a mono-branch qualification of the agreement in question, not thinking of a poly-branch mixed contract.

One of the progressive introductions of Part 4 of the Civil Code of the Russian Federation was the use in a dispositive norm, by default distributing exclusive rights on official results of the intellectual activity in favor of the employer, of a unified verbal formula, “unless otherwise provided by an employment or other contract”⁵. In our opinion, this is the case of a civil contract, or a mixed poly-branch contract in the form of an employment contract complicated by a civil law condition.

Only clause 3 of Art. 1461 of the Civil Code of the Russian Federation on service topologies states that the exclusive right to a service topology belongs to the employer, unless otherwise provided by an agreement between them and the employee, i.e. in this case, the legislator uses the approach existing before 1 January 2008 to the issue analyzed here.

In our opinion, such a lack of normative reference to the possibility of choosing between concluding a mixed labor contract with a civil law term on the distribution of rights to

¹ For example, in civil law there is a presumption of guilt of the offender (clause 2 of Article 401 of the Civil Code of the Russian Federation), while in labor law the employee's guilt must be proved (see clause 4 of the resolution of the Plenum of the Supreme Court of the Russian Federation of 16 November 2006 no. 52 “On the application by the courts the legislation governing the liability of employees for damage caused to the employer”, Bulletin of the Supreme Court of the Russian Federation, 2007, no. 1).

² The Law of the Russian Federation of 9 July 1993 no. 5351-1 “On Copyright and Related Rights”, Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Council of the Russian Federation, 1993, no. 32, Art. 1242; Collection of legislative acts, 1995, no. 30, Article 2866; 2004, no. 30, Article 3090.

³ Kostkova O.V., Tymoshenko V.A. Article-by-article commentary on the Federal Law of 9 July 1993 no. 5351-1 “On Copyright and Related Rights” (“ConsultantPlus”).

⁴ Commentary on the Law of the Russian Federation “On Copyright and Related Rights” (article-by-article), V.V. Pogulyaev, V.A. Waipan, A.P. Lyubimov. Moscow, Justicinform Publ., 2006 (“ConsultantPlus”) (commented by V.V. Pogulyaev).

⁵ See clause 2 of Article 1295 of the Civil Code of the Russian Federation on creative works; clause 3, Art. 1370 of the Civil Code of the Russian Federation on business inventions, models, industrial designs; Art. 1430 of the Civil Code of the Russian Federation on selection achievements (all relate to employment).

the results of intellectual activity, or a purely civil contract, does not have any grounds. Therefore, the above provision of clause 3 of this article should be interpreted in line with the general approach of the legislator, expressed in the majority of similar rules.

In other words, in Part 4 of the Civil Code of the Russian Federation, sets two versions of the contractual distribution of exclusive rights to official results of intellectual activity between the author-employee and the employer, namely:

- conclusion of an independent civil contract;
- conclusion of a poly-branch mixed contract, combining, within the framework of the general form, the conditions of both an employment contract and a civil law contract on the distribution of rights to results of intellectual activity. In particular, such a mixed contract can be executed by a document called “employment contract”, but should include the corresponding condition (reservation) on the distribution of exclusive rights.

Thus, we can argue that with the adoption of part 4 of the Civil Code of the Russian Federation, the legislator supported the premise that we expressed earlier on the admissibility of concluding mixed poly-branch contracts, at least with respect to one of the variants of such contracts¹.

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¹ See: Ogorodov D.V., Chelyshev M.Yu. *Practice, Legislation and economics*, 2005, no. 10, p. 50-53; Id. *Types of mixed contracts in private law*, p. 53-59.

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CONFERENCE REVIEWS

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REVIEW OF THE X PERM CONGRESS OF LEGAL SCHOLARS “MODERN ECONOMY IN THE LEGAL DIMENSION”

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Abstract: The article reviews the interregional Russian forum of classical law university science “Perm Congress of legal scholars”. It was organized for the 10th time in Perm, Russia. The idea of the Congress was to give legal assessment of modern economic processes and propose solutions for pressing legal problems of the Russian economy. The review shows the outline of the event and presents the main issues that were discussed at the plenary session and talks of the participants. The issues of modern economic trends, procedural legal issues and other problematic topics were actively discussed. The results of the round table work were expressed in a form of resolutions accepted by the participants. The review also presents these resolutions which reflect the intention of a consistent consolidation of the institute of electronic financial instruments, an effective use of state and municipal property, changes of institutes of judicial jurisdictions and implementing of innovations in the judicial system.

Key words: conference, review, Perm State National Research University, Perm Congress of legal scholars, Perm Congress, resolution.

On 25-26 October 2019 hosted by the Faculty of Law of Perm State National Research University, the interregional Russian forum of classical law university science “Perm Congress of legal scholars” took place for the 10th time. The partner universities of the Congress are: Kutafin Moscow State Law University (MSAL), the Ural State Law University (USLU), Kazan (Volga region) Federal University (KFU), Saratov State Law Academy (SSLA). The Perm Congress is held with active support and under the patronage of the Governor of the Perm Region.

The main goal of the Congress was to give legal assessment of modern economic processes and propose solutions for pressing legal problems of the Russian economy.

The Congress was traditionally held as a plenary session with several round tables – discussion platforms, working on resolving economic issues with the help of legal theory of law and various branches of law.

The plenary session was opened by Chairman of the State Duma Committee on state development and legislation, Honored Lawyer of the Russian Federation, Doctor of Legal Sciences, Professor P.V. Krashenninikov, who presented his new book “Precepts of Soviet law: essays on the state and law of war and post-war time” (Moscow, Statute Publ., 2019).

Most of the talks of the plenary session of the Congress were devoted to the main issue of the scientific agenda – the reform of procedural legislation, the so-called “procedural revolution.” The discussion was opened by Chairman of the Arbitration Court of the Ural District, Honored Lawyer of the Russian Federation, Doctor of Legal Sciences, Professor I.V. Reshetnikova. The procedural issues were also discussed by the Judge of the Supreme Court of the Russian Federation, Candidate of Legal Sciences, Associate Professor N.V. Pavlova, Acting Head of the Department of Civil Procedure of St. Petersburg State University, Candidate of Legal Sciences M.Z. Schwartz, Deputy Dean of the Law Faculty of Kazan (Volga Region) Federal University, Doctor of Legal Sciences D. Kh. Valeev; Chief of the Department of Civil Law at St. Petersburg University of Ministry of Interior of Russia, Doctor of Legal Sciences, Professor A.N. Kuzbagarov.

The issues of modern economic trends were observed in talks by Chairman of the Court of Intellectual Rights, Head of Department of Intellectual Rights of Kutafin Moscow State Law University, Honored Lawyer of the Russian Federation, Doctor of Legal Sciences, Professor L.A. Novoselova; Head of the Civil Department of the Ural State Law University, Head of the Ural branch of the Russian School of Private Law, Honored Lawyer of the Russian Federation, Doctor of Legal Sciences, Professor B.M. Gongalo; Chief Researcher of the Institute of State and Law of the Russian Academy of Sciences, Corresponding Member of the Russian Academy of Sciences, Honored Lawyer of the Russian Federation, Doctor of Legal Sciences A.V. Gabov; Professor at the Department of Civil Law of Lomonosov Moscow State University, Doctor of Legal Sciences A.E. Sherstobitov; Head of the Department of Civil Law and Process of Kuban State University, Doctor of Legal Sciences, Professor L.V. Schennikova.

The economic issues requiring legal solutions via various industry tools were covered in talks of other plenary speakers: Head of the Department of Labor and Financial law

of Demidov Yaroslavl State University, Doctor of Legal Sciences, Doctor of Historical Sciences Professor A.M. Lushnikov; Leading Researcher of the Section of Administrative law and Administrative Process of the Institute of State and Law of Russian Academy of Sciences, Doctor of Legal Sciences, Professor A.A. Grishkovets; President of the consulting firm “Yukey – Consulting”, Honored Lawyer of the Russian Federation, Candidate of Legal Sciences V.G. Stepankov; Professor at the Department of Business Law, Civil and Arbitration Process of Perm State National Research University, Doctor of Legal Sciences E.V. Aristov.

The results of the round table work were expressed in a form of resolutions accepted by the participants. They contain the key findings that can be used in lawmaking, law enforcement and scientific work. Hereunder we bring to your attention the main extracts from them.

Resolution of the round table

“From the civil law reform to modernization of the civil process: some conclusions and prospects of the legislative development”

1. Civil law is expected to demonstrate a consistent consolidation of the institute of electronic financial instruments, based among others on draft federal laws on digital financial assets, on raising funds using investment platforms, on alternative ways to attract investments (crowdfunding). The further development of legal concepts of electronic financial assets and systems as well as institutional fundraising using digital technology including financial crowdfunding (professional investment activity) and non-financial crowdfunding (charity work) is an important task. We need a scientifically justified concept of specialized intermediaries for crowdfunding fundraising, we need to give them the role of professional participants of the financial market as in the sphere of securities market. One of the directions of the development of legislation is the separation of digital crowdfunding from the system of legal regulation of the market of financial instruments, introducing the concept of retail digital finance using electronic tokens, the legal nature of which is similar to the nature of uncertificated securities.

2. We need an effective use of state and municipal property. However, the current legislation does not contribute to this, since at present it is still at a formative stage. The Main Activities of the Government of the Russian Federation for the period until 2024, approved by the Chairman of the Government of the Russian Federation, 09/29/2018, no. 8028p-P13, set the task to increase the efficiency of use of state assets. In order to do so, the mechanisms of targeted redistribution of objects of state or municipal property between public owners should be used, including, among other things, the possibility of transferring of property to another level of ownership. In view of this, it is planned to develop and adopt the Federal Law “On State and Municipal Property” in the indicated areas of the activity of the Government of the Russian Federation.

In this regard, it is worth supporting the development of the concept and text of the draft of Federal Law “On State and Municipal Property”, undertaken at the initiative

of the Ministry of Economic Development of Russia and legal scholars, as a complex interdisciplinary normative act of the highest level, containing both public law standards for regulating organizational and managerial relations, and norms of private law for regulating property relations between the Russian Federation, constituent entities of the Russian Federation and municipalities.

3. Conclusions are drawn up in accordance with which the state, including the tax authorities, should ensure and encourage the creation by employers of economic conditions that ensure a decent (sufficient) standard of living for the dismissed workers. The participation of employers in providing social support for the dismissed workers is the implementation of the constitutional principles of the social state of law. The employer may provide an additional social protection, in form of “other guarantees of social protection” in accordance with Article 7 of the Constitution of the Russian Federation, and is entitled to do so.

Therefore in order to avoid disputes between the employer and the tax authority over what amount of severance pay for the release of workers as a result of modernization and robotization of hazardous production is fair and sufficient for the employees to maintain a decent life after dismissal, it is necessary to allow the employer to reduce the taxable income by attributing to labor costs, in accordance with Article 255 of the Tax Code of the Russian Federation, for the payment of severance pay to dismissed workers in the amount of reasonably exceeding five average monthly salaries, i.e. in the amount that allows them to ensure a decent life (having sufficient income) for the period before employment or retirement. The above stated, in particular, will allow for the formation of new legal approaches to ensure a decent life without work in modern economic conditions: (1) the employer can be a part of the social protection mechanism and participate in creating economic conditions for workers to achieve a decent living standard, and therefore independently establish and pay additional benefits to employees being dismissed; (2) such payments upon the dismissal of employees will constitute their social support, i.e. “other guarantees of social protection” aimed at “creating conditions ensuring a decent life” in accordance with Article 7 of the Constitution of the Russian Federation.

4. Regarding the outcome of changes to the procedural legislation, a number of general conclusions have been formulated. On the one hand, the changes in the procedural legislation in question are not revolutionary in nature, since they do not concern the principles enshrined in the procedural codes. On the other hand, these numerous changes affect the three procedural codes and are aimed at unifying the procedural form and, in general, at optimizing the civil, commercial and administrative processes. Thus, the correlation between the institutes of judicial jurisdictions is changing, the mechanism for the removal of a judge in civil proceedings is being updated, the transition from lawsuit proceeding to administrative proceeding is being considered with the court of first instance, professional qualifications for representatives are being established, judicial fines are being increased, the list of cases of simplified proceedings is being expanded, and filter of cassation appeals in the court of first cassation instance is being canceled – all these changes together with innovations in the judicial system allow us to characterize them as quite fundamental.

5. There were identified some errors that must be eliminated both at the legislative level and through the formation of the legal positions of the Supreme Court of the Russian Federation. In particular, in an attempt to clarify the norm governing the conclusion of a reconciliation agreement, the legislator supplemented the relevant provisions of the law with the fact that a reconciliation agreement is possible if it is provided for by the relevant state authority or local government. However, such a clarification is misleading, since the right to reconciliation in a trial cannot be separated from the right to reconciliation before and outside the trial.

6. In the light of the introduction of professional representation, the participation in the suit of the colleagues called to give oral evidence (accountant, engineer, technologist, tax inspector, etc.) as representatives becomes impossible, which dictates the need to clarify their procedural status.

7. The issue of protecting the rights of signatories to a settlement agreement has not been fully resolved in the context of the rules of exclusivity, incontrovertibility and general binding of a court ruling on termination of proceedings and approval of a settlement agreement: it seems necessary to proceed from the prejudice of the coincidence of the will and the declaration of will by the signatory to a settlement agreement, the existence of all the necessary powers to complete the specified transaction and to consider the appeal system and the revision of the judicial act as the only possible means of correcting a vice of the declaration of will and (or) the competence of the signatory.

8. The expansion of the list of acts of criminal jurisdiction with prejudicial force in civil and commercial proceedings does not seem sufficiently substantiated due to the significant differences in the procedure for identifying, collecting and examining evidence in criminal proceedings in comparison with civil and commercial proceedings.

9. The idea of a more active role of the court in determining the subject of evidence in a case should be recognized as promising. Along with the explanation to the persons participating in the case of their procedural rights and obligations, it is proposed to fix the following in the court transcript or interim provisions: the list of legal facts included in the subject of evidence and the distribution of the burden of proof in relation to a particular case under consideration. The passive role of the court in this case does not contribute to an objective and fair consideration of the dispute, generates unpredictability of the outcome of the consideration of the case and, as a result, makes the appeal of the judicial act to higher instances inevitable.

Resolution of the round table

“Important issues of inter-branch regulation of property relations”

1. It seems necessary to establish the obligation of state registration, which determines the moment when the right to use the living accommodation arises proceeding from a testament refusal in order to inform the third parties. To ensure the protection of the rights of the legatee, it is necessary to fix in legislation the duty of a notary public to notify a legatee of a testament refusal, as well as the rules for state registration of the

right of claim of a legatee for the living accommodation, simultaneously with the state registration of the heir's ownership of the living accommodation (giving the registered right of claim of a legatee the status of resale royalty right).

2. The application of the norm of Art. 308.3 of the Civil Code of the Russian Federation on the *astreinte* in case of non-execution of judicial acts on the demand for information and documentation causes certain difficulties, primarily related to determining the basis for the obligation to transfer the relevant information and documentation and the legal nature of this obligation (substantive or procedural). The question of the admissibility of recovery of an *astreinte* upon failure to execute a judicial act on the transfer of information and documentation within the framework of organizational legal relations requires further discussion.

3. Comparative studies in the field of contract law indicate that in Russia and other countries the protection of the weak party by the courts has long been carried out through two well-known doctrines: dishonesty and public order disturbance. In order to ensure the predictability and attractiveness of national contract law for international investment, lawmakers, law enforcers and scholars should undertake the task of creating an independent doctrine of protecting the weak party (inequality of negotiation opportunities) as a special legal instrument. Russian legislation should impose a ban on the review by the court of the subject and price of the contract due to the obvious burden of such conditions, the refusal to retrospectively amend and terminate the contract, to provide for the right of the weak party to claim damages (paragraph 2 of Article 428 of the Civil Code of the Russian Federation).

4. The main regulator of legal relations in the field of digital content distribution and the provision of digital services are user agreements between providers and consumers, concluded in the form of accession agreements. By their legal nature, such agreements are positioned as licensed, which, however, does not always correspond to the actual legal relations and infringes the interests of consumers. The Law of the Russian Federation "On the Protection of Consumer Rights" adopted in 1992 does not correspond to modern realities and cannot provide the proper level of protection of the interests of consumers of digital services. There is a need to make changes that take into account the nature of legal relations in the field of digital content distribution and the provision of digital services and regulatory experience of the European Union (Directive (EU) 2019/770 of the European Parliament and of the Council of May 20, 2019 on certain aspects regarding contracts for the supply of digital content and digital services), UK Consumer Rights Act 2015).

5. The increasing complexity of public relations requires the creation of new civil formations ensuring economic security for counterparties. Moreover, these new formations should harmoniously fit into the digital economy and take into account the interests of the digital business. Such obligations in the foreseeable future may be smart contracts.

6. In the course of legislative and law enforcement activities, it is necessary to conduct an economic analysis of law in order to form a comprehensive vision of the economic

consequences of the current legal regulation, as well as identify the economic impact of its change. Consideration of the institution of co-ownership of the exclusive copyright from the standpoint of the theory of incentives, optimization of productivity and the concept of normative economic analysis allows us to solve a number of issues related to the construction of a legal mechanism for regulating co-ownership relations and to substantiate the conclusion about the admissibility of the turnover of shares in the exclusive copyright.

7. The distribution of relations in the participation of under-aged in fashion shows determines the need for their legislative regulation in order to protect the rights and interests of under-aged models. The regulatory platform for regulating relations in the field of “child modeling” is not formed in either the civil or labor legislation of Russia. The Labor Code of the Russian Federation has an institute that establishes the specifics of the regulation of work of child actors. Norms providing for the formation and regulation of relations involving under-aged children should be inter-branch in nature.

8. Persistent failures in the rational behavior of people, actively studied in psychology and economics (behaviorism), are almost not studied in legal science. When determining the standard of reasonable behavior, one should take into account persistent failures in the rational behavior of people. Examples of legislator accounting for cognitive errors are regulatory acts on the protection of consumer rights, insolvency (bankruptcy), and accounting for normal economic risk when bringing the head of an organization to subsidiary liability.

9. The admissibility of applying Russian civil law to property and personal non-property relations between family members not regulated by family law is based on the observance of the legally established limit: “as far as this does not contradict the essence of family relations”. In judicial practice, this very contradiction to the essence of family relations is often found, even when there is no contradiction, which is followed by the refusal to apply the norms of civil law to family relations. The inconsistency of judicial practice reveals an insufficient clarity of the category “the essence of family relations” and sets the task of improving the norms of Russian family legislation and adopting clarifications at the level of Plenum of the Supreme Court of the Russian Federation.

Resolution of the round table

“Economy of the future, labor law, law of social security: strategies of interaction”

1. A change in the nature of labor under the influence of automation of production processes, an increase in the volume of distance labor under the influence of digitalization and computerization of human activity leads to an increase in labor productivity and, as a result, to the possibility of increasing the time for rest and leisure. “The flip side of the coin” is the escalating problem of increasing psychological and emotional fatigue. The proof of that is the inclusion by the World Health Organization of professional burnout syndrome into the international classification of diseases. One of the solutions to this

problem is a reduction of the working week and the introduction of an additional day off. In Russia, the initiative of the Chairman of the Government of the Russian Federation D.A. Medvedev on the introduction of a 4-day working week is widely discussed. At the same time, a survey among young people aged 21-35 years showed that the majority of respondents (78,55%) do not support this idea, and their free time will not be spent on leisure, but on searching for additional work (53% of respondents). Another key argument is that an increase in the length of the workday to 10 hours will lead to even more overload (people will stay even longer at work, running themselves “ragged”), and there will be no personal time for family, friends, hobbies, sport. The way out of this situation is the individualization of working time, in which it is not a person who adapts to the organization’s work schedule, it is a work schedule which is created to take into account person’s needs to achieve the best results.

2. A significant effect on the sphere of employment and pension security is exerted by the aging of population. While now in the world the share of the population over 65 is 9%, by 2050 it will increase to 16% of the population. For Russia, this trend carries significant social risks, for example, an increase in the cost of social obligations of the state, a deterioration of the health of population, and an increase in the cost of medical care. The effectiveness of measures taken at the legislative level (raising the retirement age, establishing in article 144.1 of the Criminal Code of the Russian Federation criminal liability for unjustified refusal to hire or unjustified dismissal of a person who has reached a pre-retirement age) raise serious doubts. In the field of labor law and social security law, more promising measures are seen as follows: the introduction of flexible forms of employment that could be used by elderly people (including distance work), retraining programs for people near retirement age, taking into account the experience of foreign countries in the development of insurance in cases of loss of work due to the need to care for disabled relatives. A foreign experience in promoting “craft economy” and the concept of “Active Aging” seem interesting.

3. The economy of the future is impossible without highly qualified employees who understand their goals, objectives, responsibilities, are motivated to achieve results, do not wait for constant instructions from the employer, are independent in choosing strategies to achieve goals. There is a shift from setting goals in the job description in the traditional sense to a labor contract of “goal setting”, which does not imply setting specific goals and objectives for the employee. Professional standards that are being implemented in our country should contribute to this goal. The following problems were noted in this area by the roundtable participants: the combination of several labor functions in one professional standard, the weak relationship between them and educational standards.

4. Decent work and economic growth, named as one of the 17 Goals of Sustainable Development until 2030, imply a decent level of remuneration. Ensuring an increase in the real wage content is one of the main state guarantees for the remuneration of workers provided for by the Russian labor legislation. The imperativeness of the requirement on indexation, which ensures an increase in the real wage content, in turn, allows one of

the principles of legal regulation of labor relations and other relations directly related to them to be implemented – the principle of ensuring the right of every employee to timely and fully receive fair wages. The estimated concept of “fair wages” is directly related to its indexation in connection with the growth of consumer prices for goods and services. Along with the establishment of uniform objective criteria for determining the size of wages, such as the qualifications of the employee, the complexity of the work performed, the quantity and quality of labor expended, fair wages must also increase due to changes in the economic situation in society. And such a real increase can be achieved by the systematic indexation of wages.

5. The protection of labor rights is the task of the state. However, a lot also depends on the actions of business that violates or promotes labor rights. In this regard, it is important to develop corporate social responsibility of business (hereinafter – CSR), aimed at disseminating best practices in the field of labor and social security relations. In Russia, the adherence to CSR is demonstrated mainly by large businesses – transnational corporations, for which CSR is also an important component of the image. Like any tool, CSR has its strengths and limitations. Since CSR is a voluntary initiative, companies selectively prioritize, focusing only on certain groups of rights. CSR in the field of labor relations is mainly based on ILO international labor standards, which have a fairly high level of abstraction. Mechanisms for objective and independent monitoring of the observance of human rights within corporations needs to be improved. At the same time, with the help of CSR standards, transnational corporations can extend the best practices in the field of labor and social security to workers from those states that have weak labor laws, and also influence the behavior of their suppliers, putting forward protection of rights of working people as one of the requirements for cooperation.

6. The participants of the round table focused on the optimization of intersectoral relations of financial and labor law. Thus, for example, among the “Main directions of the budget, tax and customs tariff policy for 2020 and for the planning period of 2021 and 2022” (approved by the Ministry of Finance of the Russian Federation, 10/03/2019) the following aspects were indicated: 1) atypical employment and self-employed persons; 2) the employee’s right to social services at the expense of the employer.

The participants of the round table discussed the issues of inter-branch legal regulation, which should be understood as the legal mechanism for the implementation of the norms of various branch affiliations, united by a common goal and a common (related) subject of legal regulation. One of the forms of inter-branch regulation is joint (parity) regulation along with subsidiary and conflict-based inter-branch regulation.

As an example of a competition between tax and labor law, the legal regulation of labor of self-employed citizens was considered. Caused initially by a fiscal goal, it can pose a threat to labor relations in connection with the transfer of workers to the status of self-employed and a reduction in this regard of their labor and social security rights. The round table participants noted the low effectiveness of the existing legal remedies in case of abuse of legislation by employers in relation to self-employed persons.

Resolution of the round table

“International law order – a regulated environment of the development of economic relations on the basis of principle of respect for human rights”

1. A high level of scientific discussion on the topic of the round table should be noted. There have repeatedly risen debates related to finding a balance between respect for human rights, declared both at the level of international law and the constitutions of states, and the interests of business, the tasks of the modern economy. Many talks indicated that the observance of human rights is the obligation of legal entities in the process of carrying out activities, it is the duty of each subject of law to refrain from violating those rules of law that are legally binding and recorded both in the rules of international acts which are in force in the Russian Federation, and national legal regulatory provisions.

2. With regards to the work of Office of the Commissioner for Human Rights in Perm Region, the talk by the Commissioner for Human Rights initiated a discussion on the mechanisms for implementing guarantees of human rights. Also, the observed increased influence of commercial enterprises provoked a discussion about the role and responsibility of these entities in relation to human rights. Thus in the talk it was pointed out that the issue of business and human rights has been on the agenda of the UN for several years. In 2005, the UN Commission on Human Rights adopted the resolution E / CN.4 / RES / 2005/69, which sets the task of appointing a Special Representative of the Secretary-General (SRSG) to determine standards of corporate responsibility and accountability of transnational corporations and other enterprises regarding human rights. In 2008, the Special Representative of the Secretary-General developed and submitted to the Human Rights Council the UN Framework Concept “Protection, Compliance and Remedies”. Based on this concept, the Special Representative developed the Human Rights Guidelines for Entrepreneurship, which were unanimously approved by the Human Rights Council in June 2011. These Guidelines for the first time defined a universal standard aimed at preventing and eliminating the threat of the negative impact of corporate activities on human rights, and continue to be the internationally recognized basis for advancing business and human rights standards and practices. The Office of the United Nations High Commissioner for Human Rights (OHCHR) performs specific tasks on business and human rights, The implementation of these tasks, including at the regional level, was discussed at the round table.

3. In 2012, the Russian Federation ratified ILO Convention no. 173 “On the Protection of Workers’ Claims in Case of the Insolvency of an Entrepreneur”, which can be assessed as a progressive tool in protecting workers’ rights in case of bankruptcy of their employer. However, Russia assumed obligations under this Convention solely in terms of the system of privileges, which did not entail any significant changes to regulation of the situation of such a vulnerable category of creditors. Some other international legal mechanisms that contribute to the comprehensive protection of the rights of workers during periods of crisis for the employer may be noted, such as hiring the workers back by their former employer in the event of their solvency being restored, providing employees with time

during the workday to find a new job, etc. However, these mechanisms have not yet been implemented in Russian law. The analysis of the main international legal mechanisms for protecting the rights of workers allows us to conclude that they are only partially implemented in Russia. Despite the fact that some aspects fixed in Russian law are even more beneficial for employees, the most effective mechanisms for protecting workers, such as guarantee systems, specialized funds for expedited payments, unfortunately, do not find implementation, which does not allow workers to protect their rights in crisis and requires the speedy modernization of many branches of domestic legislation, the norms of which should help level out the impact of the crisis in the economy on labor relations.

4. When discussing the multifaceted nature and equality of legally valid forms of contracts on the applicable law when concluding foreign trade contracts, the conclusion was drawn that the participants in foreign economic activity – parties to the foreign trade contract – need to take the maximum number of measures to resolve the issue of the national legal order applicable to the legal relationship. Thus, having a sufficiently large number of documents and provisions both at the level of international law and in national legal acts on how to choose the competent law, we can state the existence of both the principle of autonomy of the will of the parties and the ways of its implementation in different ways from one legal act to another. And even compliance with the requirements of one regulator does not guarantee that in the process of considering a dispute by a court or arbitration, a decision will be made on the basis of the law chosen by the parties.

5. The enforcement mechanism of decisions of foreign courts and arbitration institutions implies a prominent role of the Ministry of Justice in the Russian Federation. The activities of state bodies and the tasks in the process of giving legal force to foreign judicial acts are regulated both at the level of international treaties and in national procedural documents, while the technical implementation of powers requires refinement in certain issues.

The activity of the Chamber of Commerce and Industry of the Russian Federation (CCI RF) in regional branches in resolving disputes arising from entrepreneurial activity involving foreign elements is undergoing changes, transformations and adjustment of the system after the recent reform of the legislation on arbitration in the Russian Federation. The competence of the branches, administration from the ICAC central office at the CCI RF, the process of accrediting the branches and the features of their functioning were discussed. The experience of the roundtable participants in arbitration of disputes with the participation of a foreign element provided an active and productive discussion on the issue.

Resolution of the round table “Current problems of the criminal law protection of economic relations”

1. The modern digital economy requires the creation of an adequate mechanism for protection of economic relations in criminal law, due to which a number of new

restrictions will be established aimed at preventing the use of digital technologies for illegal purposes and protecting bona fide participants in emerging relations.

2. Digital crime today is the “future” form of all crime, a global concept which has not been evaluated in the framework of the law, and also has not been fully formalized in society. However, today it is necessary to pay close attention to new “digital” attacks, which from the point of view of the law are not crimes, due to the lack of regulation. And here a real problem arises, which criminal law is not yet able to solve. There is no vector in criminal policy in this direction in Russia today.

3. Digital crime is a highly latent phenomenon, the fight against which requires not so much legal knowledge on the part of law enforcement officials but knowledge in the field of IT technologies.

4. The modernization of civil law creates significant problems for the applicants of criminal law, which does not undergo changes in parallel with positive legislation. As a result, qualification problems arise. For example, how should one qualify infringements of “digital rights”, which from 01.10.2019 became an object of civil rights, should they be recognized as property, along with non-cash money and paperless securities? It seems that in this case the actions of the person should be qualified according to the totality of the norms provided for by Chapter 21 of the Criminal Code and Chapter 28 of the Criminal Code of the Russian Federation.

5. Particularly acute is the question of responsibility for the actions of artificial intelligence. The legislation does not resolve the issue of the responsibility of artificial intelligence developers in case of unlawful actions of their “creations”; in this regard, society needs criminal law research in this area.

6. The desire of the legislator to respond to the rapid development of economic relations leads to unjustified, unanalyzed and casuistic amendments to criminal law. In particular, this is manifested in the artificial fragmentation of the norm, which leads to not always justified and unnecessary competition of several *corpus delicti*. To one of these examples can bring competition Art. 327 of the Criminal Code and Art. 187 of the Criminal Code; Art. 272, 273, 274 and 274.1 of the Criminal Code of the Russian Federation and others. It seems that it is necessary to look for other ways of developing criminal legislation in this area.

7. One of the important reasons for the ineffectiveness of modern criminal law is a discrepancy in the interpretation of the characteristics of a criminal law norm with terms borrowed from regulatory branches of law. However, with such an independent interpretation of the characteristics of a criminal law norm, there is no uniformity in the practice of applying one or another criminal law norm and, as a result, the requirement of legal certainty of criminal law is violated. Given the protective focus of criminal law, the need to unify approaches to understanding the terms that have already received their substantive content in sector-specific legislation should be recognized.

8. Law enforcement authorities when applying Art. 187 of the Criminal Code of the Russian Federation interpret the characteristic of “falsity” quite widely, since they

identify it with “illegality.” At the same time, the preparation by the authorized person of payment documents (for example, payment orders) that contain information that does not correspond to reality (for example, the payment order indicates the number and date of the contract that was not actually concluded by the parties or according to which work was not performed, the services were provided), cannot testify to their falsity. Because a payment order is essentially a documented will of an authorized person to manage funds addressed to a bank. In case of the production by the authorized person of such a payment document that is inappropriate, his will is not replaced and it is not possible to talk about falsification.

9. It is also worth looking from a different angle at those acts that already have an established practice of their qualifications. Thus, traditionally falsification of medical documentation, and in particular, sheets of temporary incapacity for work, is assessed as official forgery (Article 292 of the Criminal Code of the Russian Federation). The Supreme Court of the Russian Federation insists on this, citing them as an example in the Resolution of the Plenum “On judicial practice in cases of bribery and other corruption crimes.” However, if you look closely at the mechanism of the consequences resulting from the issuance of a fake “sick leave”, first of all, a person acquires the right to appropriate compensation for lost earnings from the funds of the Social Insurance Fund of the Russian Federation. Thus, the unreasonable issuance of a certificate of incapacity for work and the concomitant falsification of medical records trigger a complex mechanism of legally significant actions related to the payment. In other words, the doctor, issuing a “sick leave” without actually existing evidence for recognizing the patient as temporarily incapacitated, intervenes in the established procedure for the distribution of funds from the SIF of the Russian Federation, which corresponds to the economic sphere of public relations.

10. Crimes with administrative prejudice contained in the Criminal Code of the Russian Federation should be excluded from criminal law. With the example of petty theft (Article 158.1 of the Criminal Code of the Russian Federation), it was demonstrated that repetition should not be considered as an indicator of the increasing social danger of an act that retains signs of an administrative offense.

Resolution of the round table “State administration in the sphere of socio-economic development of modern Russia”

1. One of the principles of state administration in the field of economy is the principle of social justice, aimed at making decisions within the framework of public choice in the production and distribution of social benefits, as well as a reasonable balance between the legislative regulation of economic processes and the variety of managerial decisions made through administrative discretion in the implementation of state control and supervision, including during unscheduled inspections of business entities the

activities of which are related to the risk-oriented approach on the part of the state. The main reason for the lack of social justice in Russia is seen in the injustice of laws that determine the electoral and legislative process. It is these laws that make up the core of constitutional economy. Obviously, not one of the economic reforms in Russia can be brought to an end without the simultaneous reform of the political system. Due to this, the reform of the constitutional economy is inconceivable without introducing into the norms on electoral systems and the legislative process the provisions on the decision-making procedure showing the Condorcet principles.

2. The reforming of the constitutional economy of Russia is possible by taking into account the experience of foreign countries, including neighboring countries that have already included a number of provisions in their legal systems. For example, the principles of rationalized parliamentarism, originally developed by the French legislator, are currently embodied in the constitutions of Armenia and Kazakhstan, while the principles of a constructive government vote, which were first formulated in the Fundamental Law of Germany, can be found in the Constitution of Georgia.

3. On the problems of administrative regulation of the socio-economic development of the country, the following proposals can be identified, namely, it seems necessary:

3.1. at the legislative level, to differentiate between the jurisdiction of national tax authorities in terms of establishing and levying taxes on organizations providing services along with the sale of goods (for example, hotel reservation services along with the sale of a tourist product) through the Internet, provide for a separate tax regime using a simplified system for goods and services through e-commerce;

3.2. to empower the Russian Union of Insurers with the power to monitor the respect for consumer rights by insurance organizations that provide insurers services under compulsory insurance programs (for example, motor third party liability insurance);

3.3. at the legislative level, in order to realize the rights of citizens to medical care, it is necessary to reform the procedure for certification of medicines and the procedure for the sale of vital medicines to citizens in terms of simplifying them and ensuring accessibility and safety for consumers;

3.4. it is necessary to create legal basis for administrative offenses in the economic sphere in the Administrative Code of the Russian Federation, providing as a qualifying attribute a systematic administrative offense by a person whose activities are assigned to the corresponding risk category with increased penalties, as well as to unify in a single law the procedure for applying a risk-based approach in carrying out planned inspections of business entities, excluding the variety of regulatory legal acts adopted by the state authorities.

3.5. Reform of the state civil service in Russia is important for socio-economic development in Russia and should be carried out in the direction of guaranteeing the implementation of the replacement of posts based on the results of competitive selection, increasing the professionalism of civil servants, reducing their number while increasing the level of wages.

Resolution of the round table
“Specificities of criminal prosecution and resolving criminal cases
in the economic sphere”

1. The main feature of the current period of the country’s development is pursuing a state policy aimed at creating conditions for the successful functioning of organizational and legal mechanisms to eliminate the possibility of using criminal prosecution as a means of exerting pressure on business structures and resolving disputes of economic entities, facts of unjustified excitation of criminal proceedings and criminal prosecution of entrepreneurs, violation of their rights and interests in pre-trial proceedings.

2. One of the main problems identified is the general procedure for criminal procedural activity in pre-trial proceedings against entrepreneurs in this category of criminal cases, that has caused concern on the part of the business community, whose representatives directly point to the excessive repressiveness of criminal prosecution, which poses risks for entrepreneurs not only by the very fact of such persecution, but also by the destruction of the foundations of their economic activity, which for society also entails unfavorable consequences in form of liquidation of enterprises, loss of jobs and reduction of tax revenues to the state budget.

3. On the other hand, a specific feature of economic crimes is the existence of economic crimes, both within the framework of legal entrepreneurial activity and illegal economic activity. This is increasingly used by unscrupulous entrepreneurs, hiding behind state policy to prevent criminal prosecution of entrepreneurs.

4. The realities of the economic life of the state put on the agenda the need to optimize the criminal procedural regulation of criminal proceedings in relation to economic and other crimes committed by entrepreneurs in connection with their entrepreneurial activities in order to prevent the use of the criminal justice resource as a tool for resolving economic conflicts between legal entities.

5. The evolving state of normative regulation of criminal proceedings against entrepreneurs on economic crimes is clearly aimed at establishing an increased level of guarantees for the accused (suspects) from among entrepreneurs, which generally indicates a trend for the formation of a separate type of proceedings. This work requires a theoretical understanding, as well as producing relevant provisions that, from the standpoint of the theory of differentiation of the criminal procedure form, could become a scientific explanation of the need to generate a new type of pre-trial proceedings.

6. In this regard, there is a need to identify the prerequisites and goals of such proceedings, to analyze the amendments and addenda to criminal procedure legislation that have already been made, as well as to pass new laws to achieve the balance of public and private interests in criminal proceedings on economic crimes committed in the field of entrepreneurial activity.

7. The issue of achieving such a balance is actualized by the establishment of a criminal law ban on the actions of officials of the preliminary investigation bodies, which are objectively associated with the decision to start criminal proceedings against

entrepreneurs, but can be construed as committed in order to impede entrepreneurial activity or from selfish or other personal interest, if their actions entailed the cessation of entrepreneurial activity, or caused major damage.

8. As a result, it turned out that officials conducting pre-trial proceedings fall into the zone of criminal legal risks almost as well as entrepreneurs in connection with the criminal prosecution on charges of “entrepreneurial” crime.

9. It follows that there is a need to study the provisions enshrined in the criminal procedure law, which, despite their fragmentation, actually correct the implementation of the existing norms of the criminal and criminal procedure laws in relation to this category of criminal cases, as well as assessing their validity from the point of view of the methods of criminal procedure regulation and compliance with the requirements of the principle of equality of all before the law and the court.

10. We consider an effective mechanism of criminal procedure regulation, introduced by the legislator in the interests of entrepreneurs, the procedure for initiating private-public prosecution cases, as well as criminal cases initiated on the initiative of victims – legal entities (non-public economic organizations), as well as individuals (individual entrepreneurs and ordinary citizens).

11. An effective mechanism is the introduction of new procedural entities – the tax authority, the territorial authority of the insurer, which characterizes the specialization of production by the characteristics of the subject composition (distinctive composition – a sign of differentiated proceedings), as well as the establishment of a new and original procedural act – the conclusion of these bodies in accordance with clause 1 part 8 Art. 144 of the Code of Criminal Procedure of the Russian Federation, as a product of the implementation of administrative and legal powers and the result of their fulfillment of the criminal procedure obligation.

12. A guarantee for entrepreneurs is the introduction of a new 30-day period, within which the named conclusion is subject to consideration by the investigator, despite the fact that this period is not the result of the extension of the 10-day period in accordance with part 3 of Art. 144 of the Code of Criminal Procedure.

13. In the context of information society, when the entire document flow on the movement of inventory items is in the electronic form, and while adopting foreign experience in criminal proceedings, we consider it necessary to propose optimization of the case processing through the development of electronic document flow in the process of obtaining, recording, saving and using evidence information.

14. In order to optimize the procedure of the pre-investigation check, it is necessary to increase the basic deadline for the pre-investigation check to 30 days, which is extended, if necessary, in stages to 60 and 90 days; to establish the mandatory assigning and conduct of forensic examinations; to secure the receipt of the consent of the prosecutor to institute criminal proceedings. The private-public procedure for criminal prosecution should be effective only under the condition that they cause damage to victims who are the same business entities (individual entrepreneurs and (or) commercial organizations). The interests of ordinary citizens should be protected by public law.

15. In order to strengthen the guarantees of special entities, it is necessary to secure the right of the suspect (accused) under house arrest to use the means of communication and the Internet no more than two hours a day.

When choosing a preventive measure, we propose to establish an adequate amount of the collateral in monetary terms – no less than half the amount of the damage caused or the extraction of illegal income or debt if it was paid directly by the accused (suspect), as well as not lower than the full amount of the damage or extracted illegal income or debt in case of making a pledge by another individual or legal entity. It is also advisable to establish the procedure for ensuring personal guarantee by two persons, respectively, from among the representatives of the institutional formations of the entrepreneurial community (the Commissioner under the President of the Russian Federation for the protection of rights of entrepreneurs or representatives of his office, the regional representative for the protection of rights of entrepreneurs or representatives of his office), as well as from among citizens of the Russian Federation, characterized in their region by a good business reputation, not previously held criminally responsible for economic crimes or crimes of a corruption nature, with the establishment of liability for default in the form of a monetary penalty within one hundred thousand rubles for a provider of surety who is not related to the institution of representatives for protecting the rights of entrepreneurs.

Resolution of the round table “Economic analysis of law of traditional and modern societies”

1. Economic science and legal theory study similar phenomena: the first one examines how to produce, distribute and consume benefits efficiently, the legal theory – how to do it fairly and legitimately. The modern theory of justice recognizes the futility and even danger of adopting an ideal distribution scheme of material and spiritual wealth. It sees the way out in the development of procedural rules, honest observance of which would lead to a result recognized by all potential participants in legal relations, regardless of how satisfied they would be with this result.

The actual economic analysis of law seems to be a methodology that allows us to concretize the concept of justice as honesty. This theory, having inherited classical legal naturalism and recognizing the normativity and imperative coercion of law, based on the analysis of real social processes, indicates the optimal way to achieve a reflective dynamic balance between personal and public interests. If we accept a certain heuristic value of postmodern criticism of law, then economic analysis now provides one of the most acceptable languages for describing the essence of law, suitable for developing an integrative theory of law.

2. The economic analysis of law makes it possible to create and apply rules in the world of limited resources that would allow the best use of these resources. In this regard, it is important how we determine optimality, since the economic effectiveness of deterring violations may well imply the likelihood of punishing the innocent and not punishing the guilty. The recognition of this fact (in practice, the imperfection of any

existing legal system) is an essential basis for the search and comparison of available alternatives.

3. The difficulty in finding the optimal social solution lies in the lack of absoluteness of any social value. Each value has a positive and negative side. As a result of this, the well-known performance criteria (Pareto, Kaldor – Hicks, etc.) and methods of defining them in socio-economic relations (R. Coase's theorem, R. Posner's theorem, methods of price theory, etc.) are not absolutely perfect.

Nevertheless, economic values and related social, environmental and other values are not an immanent subject of legal science, and therefore an optimal social solution based on the unity and opposition of all socio-economic values should be created, first of all, by non-lawyers who should translate this decision into legal prohibitions and obligations.

The complexity of the optimal social solution, including economic solution, is compounded by the problems of the formation of state power – the leading force in determining socio-economic values and their correlation models, embodied in legal acts created by public authorities.

4. The criterion of reasonableness of the legal regulation of economic relations is the volume of material goods, expressed in the economic concept of gross domestic product. But economic relations are only a part of social relations, and the ratio of economic and other social indicators that ensure the highest possible economic indicators with the minimum possible absence of negative values of all other social indicators is a social criteria of reasonableness of legal regulation of economic relations.

5. The unreasonable distribution of rights, obligations and prohibitions in relations related to economy is manifested in an absolute and relative decrease in GDP indicators, in the outflow of capital from the country, a reduction in investment, a decrease in the number of entities of economic activity and a decrease in the number of jobs.

The leading legal criterion for economic relations is the legal certainty necessary for other relations. We agree with the position of Nobel laureate Ronald Coase: "It would be desirable for the courts to understand the economic consequences of their decisions and take these consequences into account in their decisions to the farthest extent possible without creating excessive legal uncertainty." Based on this, the legal criteria for the reasonableness of the legal regulation of economic relations are: a) at the level of normative legal regulation, stability of legislation, the volume of by-law rulemaking, the formal definition of obligations and prohibitions in public relations of economic entities, the existence of norms on the legal responsibility of state bodies and officials, and mechanism for their implementation; b) at the level of individual legal regulation (enforcement), legality, motivation and validity of judicial acts, the unity of law and enforcement practice, prevention of arbitrary judicial law-making, masked by the legal interpretation of law.

6. One of the principles of Russian constitutional economy, which regulates, among other things, decision-making processes within the framework of public choice in the production and distribution of social benefits, should be the principle of social justice with the mandatory observance of the principles of equality and freedom. The main

reason for the lack of social justice in Russia seems to be the injustice of laws that determine the electoral and legislative process. It is these laws that make up the core of constitutional economy. Obviously, not one of the economic reforms in Russia can be brought to an end without the simultaneous reform of the political system. In view of this, reform of the constitutional economy is inconceivable without introducing into the legislation governing the legislative and electoral process provisions on the decision-making procedure taking into account the Condorcet principles.

7. The state, faced with the contradictions of economic and other social values, proposes to resolve them by the subjects of disputed relations themselves through the introduction of corporate social responsibility. Instead of formally defined legal prohibitions and obligations, it encourages subjects of economic activity to adopt self-obligation aimed at compensating for the negative costs of their activities for society.

This creates legal uncertainty for subjects in prescriptions implicitly addressed to them by the state, ambiguity in the distribution of rights, obligations, legal liability and, as a result, creates conditions for arbitrariness of law enforcement.

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“DERZHAVIN READINGS 2019”**

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Abstract: The conference review is devoted to the XV International Scientific and Practical conference “Derzhavin readings 2019” which took place in Kazan Federal University for the fifth year already. A good tradition of united efforts of two universities, the All-Russian State University of Justice and Kazan (Volga region) Federal University created a successful platform for students to start their first steps in academic path and to travel outside of Moscow, and it is also an interesting event for experienced scholars to meet colleagues and share new ideas. As usual, the first day of the conference was opened by a bright speaker, this year a lecture by the judge of the Supreme Administrative Court of North Rhine-Westphalia Zina Stamm was organized on the topic “The German Judicial System”. The opening ceremony of the Conference was also attended by a relative of Gavriil Derzhavin, Nadezhda Bestuzheva-Gregory. Twelve round tables and two discussion platforms of the event were devoted to the professions of the future and the development of a system of self-employment.

Keywords: review, conference, Derzhavin readings, Gavriil Derzhavin, All-Russian State University of Justice, Kazan Federal University.

For the fifth year in a row, Kazan creatively unites Russian and foreign legal scholars. On 17-19 October 2019 one of the largest events took place at the Faculty of Law of Kazan (Volga Region) Federal University – the XV International Scientific and Practical Conference “Derzhavin Readings 2019 – Sociocultural and moral traditions of Russia as the basis for the development of law and legal education in the 21st century”. In 2017, the Conference entered the international level, and now every year it pleases us with new welcome guests.

The conference program was traditionally rich. Already on 17 October, there were excursions to the Laishevsky district of the Republic of Tatarstan and an excursion “Evening Kazan” for conference guests, a lecture by the judge of the Supreme Administrative Court of North Rhine-Westphalia Zina Stamm for the students of the Faculty of Law of Kazan Federal University on the topic “The German Judicial System”. Zina Stamm came specially to the event as part of the delegation in order to enjoy the golden autumn of legal science for these few days. In addition, a round table of young scientists entitled “The Evolution of the World and Law in the Context of Technological Challenges of the 21st Century” took place in a video format, as well as a press conference of the rectors of All-Russian State University of Justice and Kazan (Volga region) Federal University, the Deputy Prime Minister of the Republic of Tatarstan – Minister of Education and Science of the Republic of Tatarstan.

The official opening of the XV International Scientific and Practical Conference “Derzhavin Readings 2019” took place on 18 October in the Imperial Hall of the Main Building of Kazan University. The opening ceremony of the Conference was attended by a relative of Gavriil Derzhavin, Nadezhda Bestuzheva-Gregory, and was marked by signing of a cooperation agreement between the All-Russian State University of Justice, Kazan (Volga region) Federal University and the Ministry of Education and Science of the Republic of Tatarstan.

The following persons greeted the participants and guests of the Conference: the Chairman of the State Council of the Republic of Tatarstan Farid Mukhametshin; Deputy Prime Minister – Minister of Education and Science of the Republic of Tatarstan Rafis Burganov; Chairman of the Committee on Natural Resources, Property and Land Relations of the State Duma of the Federal Assembly of the Russian Federation Nikolai Nikolaev; Metropolitan of Kazan and Tatarstan Feofan; adviser to the Mufti Ravil hazrat Zuferov; Rector of the All-Russian State University of Justice (RPA of the Ministry of Justice of Russia) Olga Alexandrova; Rector of Kazan Federal University Ilshat Gafurov. Alexandrova Olga Ivanovna thanked the organizers and guests of the Conference for their continuing interest in Derzhavin Readings, inspiring science and young scientists.

As part of the opening of the Conference, for the first time the Ministry of Education and Science of the Republic of Tatarstan expressed their gratitude for the contribution to the organization of Derzhavin Readings to the Rector of Kazan University, Gafurov Ilshat Rafkatovich, Dean of the Faculty of Law of KFU Bakulina Liliya Talgatovna, Deputy Dean of the Faculty of Law of KFU in scientific work Valeev Damir Khamitovich,

Assistant to the Department of Criminal Procedure and Criminology Burganova Guzel Vilsurovna and others.

The plenary meeting was marked by the presentation of scientific research. The papers were by the chairman of the Committee on Natural Resources, Property and Land Relations of the State Duma of the Federal Assembly of the Russian Federation Nikolai Petrovich Nikolayev and the Head of the Department of Civil Law of Kuban State University Schennikova Larisa Vladimirovna. The topic of Nikolai Nikolaev's paper was "The reflection of sustainable development goals in lawmaking", and Larisa Schennikova spoke about "Civil law and social and moral guidelines of modern society".

After the opening ceremony, students had the opportunity to test their knowledge in the intellectual game about the historical document "Russkaya Pravda" and in the contest in the theory of state and law "The rule-of-law state and person." The organizers and presenters were teachers of the Faculty of Law of KFU: lawyer of the Bar Association of the Republic of Tatarstan, Head of Research Work of students of the Faculty of Law, Senior Lecturer of the Department of Theory and History of State and Law at KFU Lukin Yury Mikhailovich and Candidate of Legal Sciences, Docent of the Department of Theory and History of State and Law at KFU Sabirova Lidiya Leonidovna. As for the results of the intellectual game, the team of the All-Russian State University of Justice won, the team of Kazan Federal University took an honorable second place, and another team of the All-Russian State University of Justice was in the third place. A student from the KFU team won the captains competition. The contest was an individual competition, and the strongest participants in it were the representatives of Rostov branch of the All-Russian State University of Justice, who took the first, second places and shared the third place with a representative of Kazan University.

After the Plenary session, twelve round tables and two discussion platforms, which were devoted to the professions of the future and the development of a system of self-employment, also began their work. The division of sections into subjects of discussion allowed to cover single-discipline issues and ensured that discussions were held at a traditionally high scientific level. The representatives of various law schools and ideas, moderators and participants of the Conference had the opportunity not only to hear the opposite points of view of their colleagues in real life, but also to oppose them. Analysing issues from different angles, through the prism of diverse, scientifically grounded arguments, from the unique heights of scientific experience, helped to form a general view of the problem, create a practical-oriented and theoretically meaningful Final Resolution of the event. It is noteworthy that the students and moderators of Kazan (Volga) Federal University took part in all sections.

The work of the round tables on the theme of the Conference continued on 19 October.

Round table No. 1 "Nature and sources of law: secular and religious approaches." The moderators – Babenko Vasily Nikolayevich and Davletgildeev Rustem Shamilevich – were presented with twenty-one papers and ten scientific presentation in two days.

Round table No. 2 “Digital economy and electronic civil circulation: legal forms and legal procedures”. The moderators – Arslanov Kamil Maratovich, Kozlova Elena Borisovna, Sitdikova Roza Iosifovna – acquainted themselves with twenty-six papers and twenty-nine scientific presentations.

Round table No. 3 “The development strategy of the criminal policy of Russia at the present stage.” The moderators – Tarkhanov Ildar Abdulkhakovich and Kolosova Irina Mikhailovna – heard sixty papers and thirty scientific presentations.

Round table No. 4 “Reform of control and supervision activity as a change in the culture of interaction between the state and business”. The moderators – Sultanov Evgeny Batyrovich and Kozbanenko Viktor Anatolyevich – familiarised themselves with five papers and thirteen scientific presentations.

Round table No. 5 “Constitutional support for the development of civil society and international integration processes.” The moderators – Abdullin Adel Ilsiyyarovich and Vinogradov Vadim Aleksandrovich – were presented with thirty papers and twenty-nine scientific presentations.

Round table No. 6 “Judicial reform and modernization of the civil process in modern Russia.” The moderators – Valeev Damir Khamitovich and Gureev Vladimir Alexandrovich – heard twenty-nine papers and fourteen scientific presentations. The round table was attended by the Chairman of Moscow Arbitration Tribunal, Novikov Nikolai Alekseevich.

Round table No. 7 “Legal opposition to ethno-religious extremism and criminal sectarianism.” The moderators – Talan Maria Vyacheslavovna and Kulygin Vladimir Vladimirovich – discussed twenty-eight papers and sixteen scientific presentations. The round table was attended by Dean of the Law Faculty of Cheboksary Cooperative Institute of the Russian University of Cooperation, Head of the Scientific and Educational Center for Combating Extremism Timofeev Mikhail Sergeevich.

Round table No. 8 “Medical law of Russia and foreign countries: modern methodology of civil and criminal law mechanisms”. The moderators – Ilyushina Marina Nikolaevna and Egorov Konstantin Valentinovich – heard thirty-three papers and thirteen scientific presentations.

Round table No. 9 “Effective management of compliance risks at the level of an economic entity”. Thirteen papers were presented to the moderators – Badrutdinov Mars Sarymovich, Mikhailov Andrei Valerievich, and Cheparina Olga Alexandrovna.

Round table No. 10 “Issues of legal regulation of the activities of educational organizations and the implementation of state supervision in the field of education.” The moderators – Ibragimova Elena Mikhailovna and Boris Viktorovich Yacelenko – discussed twenty-eight papers and twenty-three scientific presentations.

Round table No. 11 “VIII Round table of young scientists in the video format ‘The evolution of peace and law in the condition of technological challenges of the 21st century’ ”. The organizers were Kazan (Volga) Federal University and Kutafin Moscow State Law University. The moderator of the round table – Maxim Valeryavich Voronin – heard four

presentations. The round table was attended by the Candidate of Legal Sciences, Docent of the Department of Civil Law of Kazan (Volga Region) Federal University, Zamira Asrarovna Akhmetyanova.

Round table No. 12 “G.R. Derzhavin and his era in the mirror of literary culture”. In subsection I “Poetics of G.R. Derzhavin in modern study”, the moderators – Pashkurov Aleksey Nikolaevich, Galimullina Alfiya Foatovna, and Murtazina Farida Gafulllovna – discussed twelve papers and six scientific presentations. The subsection was attended by scientific and practical workers. Within the framework of subsection II “Derzhavin era: literary dialogues and strategies” sixteen papers were presented.

In addition, two discussion platforms were organized.

The first discussion platform was called “Understanding the legal status of self-employed citizens in the framework of the implementation of the Federal Law of 27.11.2018 No. 422-ФЗ ‘On the experiment to establish a special tax regime ‘Professional income tax’ in the city of federal significance Moscow, Moscow and Kaluga regions, as well as in the Republic of Tatarstan (Tatarstan)”. The speaker was Doctor of Legal Sciences, Professor of the Kutafin Moscow State Law University Arzumanova Lana Lvovna. The moderators – Gureev Vladimir Alexandrovich and Fayzrakhmanova Leysan Minnurovna – heard eight papers.

The second discussion platform had the following topic: “Profession of the future: legislation, prospects and development of professional competencies.”

It is noteworthy that the Round Tables and Discussion platforms were attended by the representatives of state authorities of the Republic of Tatarstan, manufacturing enterprises, organizations, heads of professional educational organizations, and higher education educational organizations.

In the evening of 19 October, the XV International Scientific and Practical Conference “Derzhavin Readings 2019” was officially closed. The moderators summed up the work of their sections, thanked all the speakers and participants in the scientific discussions, noted the relevance of the selected topics and the avid interest of each of the participants of the Round Tables in reforming and improving the functioning of existing legislation. The event ended with the award ceremony for student intellectual games held by the Rector of the All-Russian State University of Justice Aleksandrova Olga Ivanovna and the Deputy Dean of the Faculty of Law of KFU for international activities Davletgildev Rustem Shamilevich.

The closure was also marked by the preparation of a resolution created upon the results of the work of the XV International Scientific and Practical Conference “Derzhavin Readings 2019”.

Summarizing all of the above, we can proudly say that such large-scale events result in the mutual enrichment of all participants with practical, educational and scientific experience.

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