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ARTICLES

COMMENTARIES

• ПРОСПЕКТ •

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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 2020 .

The issue you are holding now has articles on vital questions of theory and practice of Russian and foreign law.

The issue starts with the article by Doctor of Legal Science, Professor of the Kazan (Volga region) Federal University Aleksandr Maly «On political and legal causations of constitutional changes of Russian Federation». The article reflects the legal content of the main amendments and attempts to show the political prerequisites for the decisions taken. Firstly, it notes the readiness of the political leadership to heed the opinion of constitutional scholars on the need to make adjustments in the system of relations between the branches of power, to enhance the role of parliament in the formation of government and control over its activity. Secondly, it is necessary to take steps towards eliminating political uncertainty caused by the forthcoming change of the state leader in 2024 due to the expiry of his constitutional term in office.

The issue is continued by the article by skilled researcher from St. Petersburg, Doctor of Legal Sciences, Professor of the University of the Ministry of Internal Affairs of the Russian Federation Pavel Astafichev, titled «Faith in god as constitutional principle: legal system novations in modern Russia». The author proves that while there is unquestionable respect for religious systems and unconditional recognition of the important role of religion in human history, including Russian history, every religious system has a mystical element at its core, while mysticism itself is alien to positive jurisprudence. Princes and tsars used religion in Russian state history to ensure obedience of subjects, but these times are in the distant past. Modern Russia, which raised several generations in an atheistic environment, has generally lost its organic connection with religion, and a large-scale revival of this trend could hardly be considered appropriate from a state-legal perspective.

I am very pleased to introduce the research of Anna Kachalova Candidate of Legal Sciences, Assistant Professor of the Kutafin Moscow State Law University: «On the question of legal nature of pre-emptive right». The subject of this report is the legal nature of the pre-emptive right, which, in the author's opinion, should

be seen as an independent subjective right that is, in some cases, an element of a civil legal relationship.

The "Commentaries" section has interesting article: Natalia Frolova Candidate of Legal Sciences, Assistant Professor of the Kutafin Moscow State Law University, titled «Protection of civil rights through mechanism for suppression of unfair competition and avoidance of abuse of exclusive right to a trademark». The author has analyzed the possibility to define some special corpus delicti constituting the abuse of the exclusive right to a trademark and unfair competition and made a conclusion about the inexpediency of the legislative definition of such corpus delicti.

With best regards,
Editor-in-Chief
Damir Valeev

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Aleksandr Maly

Doctor of Legal Science,
Professor of the Kazan (Volga region) Federal University

ON POLITICAL AND LEGAL CAUSATIONS OF CONSTITUTIONAL CHANGES OF RUSSIAN FEDERATION

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Abstract: The amendments to the Constitution of the Russian Federation of 2020 have generated a wide response both within Russia and abroad. The article reflects the legal content of the main amendments and attempts to show the political prerequisites for the decisions taken. Firstly, it notes the readiness of the political leadership to heed the opinion of constitutional scholars on the need to make adjustments in the system of relations between the branches of power, to enhance the role of parliament in the formation of government and control over its activity. Secondly, it is necessary to take steps towards eliminating political uncertainty caused by the forthcoming change of the state leader in 2024 due to the expiry of his constitutional term in office. Thirdly, the constitutional provisions aimed at protecting the sovereignty of the state and the rights of citizens. Fourth, the clarification of the powers of the state supreme bodies, which have been developed in federal laws. In the meantime, the task of introducing new constitutional constructions (public authority, senator, senator-for-life) was solved.

It is concluded that the result obtained in the nationwide vote was the result of a well-constructed step-by-step preparation of the amendment bill, its substantive content, the feelings and expectations of the country's citizens, and the general domestic and foreign political environment. The 2020 amendments solved a number of legal problems. However, at the same time, the process of their discussion made

it possible to demonstrate the presence in society of a consolidated core capable of upholding its national interests. This is a kind of assessment by the participants in the nationwide vote of the policy pursued by the current head of state and the country's leadership as a whole. Despite the fair (in many people's minds) criticism of the decisions taken by the authorities at all levels, the preservation of the fundamental values (stability, certainty, security) proved to be a priority for the majority of voters.

Keywords. Constitution, constitutional changes, parliament, president, powers, voting.

Changing the Russian constitution through amendments is always interesting, both in terms of the political background to the decisions made and the legal formulation of those decisions. The 2020 Amendment Act is already the fifth since the adoption of the 1993 Constitution and is obviously the most high-profile. This is primarily due to the innovations in the procedure of its adoption (nationwide vote) and the possibility for incumbent President V.V. Putin to stand for election as head of state in 2024.

Numerous comments have touched on the political dimension of the decision and there is a natural bias inherent in the political confrontation. Can legal professionals avoid this influence in their assessments? I think they cannot. We all have subjective ideas about what is proper, based on established stereotypes formed by our predecessors at different times and reflecting the state of social relations (and expectations) at a particular historical stage of their development. However, the diversity of opinions makes it possible not only to identify the most acceptable option for solving existing problems, but also to form the best approach to their legal entrenchment.

It is clear that such constitutional reforms are based on public expectations, reflect these expectations to a greater or lesser extent and are not possible without the political will of the top leadership of the state. The formulation of this will by constitutional provisions does not exclude their detailed analysis and critical evaluation, which is also part of the ongoing process of searching for a model of constitutional regulation of the most important social relations that reflects the needs of the country's development and evokes the approval of society.

Criticism of the current Constitution of the Russian Federation (both in terms of its contents and the way it was adopted) began almost immediately after its adoption in 1993[1]. Discussions on the merits and shortcomings of the Constitution have been initiated among scholars throughout the years of its existence. Problems

[1] See: *Isakov V.B.* [Konstitutsiya, po kotoroy nevozmozhno zhit'] The Constitution which is impossible to live by // Konstitutsionny vestnik. 1994. No. 1 (17). P. 33–35.

of gaps in the Constitution and the possibility of remedying them have been the subject of discussion in various forums[1].

General conceptual proposals concerning possible amendments to the Basic Law of the state have been outlined in numerous works. V.E. Chirkin, for example, proposed the model of a socially instrumental constitution, the norms of which could "serve as an indicator of the level of social compromise achieved, the degree of inclusion of elements of the social contract in the constitution"[2]. In some publications, the modernisation of the Russian Constitution was justified by the need to overcome its shortcomings caused by the possibility of establishing authoritarian rule and the lack of appropriate checks and balances on the part of other branches of power[3].

The Constitution itself provides for three procedures for modifying its provisions: adoption of a new constitution (Article 135), amendment of Chapters 3–8 (Article 136) and a simplified modification of Article 65 through a presidential decree initiated by the legislative body of the Russian Federation when changing the name of the Russian Federation subject. A simplified procedure for amending Article 65 is provided for by the federal constitutional law on the admission of a new subject into the Russian Federation or the formation of a new subject through their merger, as well as by a change in the status of a constituent entity of the Russian Federation.

Text amendment of the Constitution of the Russian Federation in a simplified procedure (Article 65) is a legal procedure, but the ideology of such a change lies in the political sphere. The political decision to specify, for example, the name of a subject of the Russian Federation by a regional legislative (representative) body is entirely within the competence of the subject of the Russian Federation. The President by his decree only formalizes the legal inclusion of the new (clarified) name in the text of Article 65. Since the Constitution of the Russian Federation

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[1] See: [Probely i defekty v konstitutsionnom prave i puti ikh ustraneniya: Materialy mezhdunarodnoy nauchnoy konferentsii] Gaps and defects in constitutional law and ways to eliminate them: Proceedings of an international scientific conference. Faculty of Law, Lomonosov Moscow State University. Moscow, March 28–31, 2007 / Under the editorship of Professor S.A. Avakyan. M.: Publishing house of Moscow State University, 2008. 720 p.

[2] *Chirkin V.E.* [Vyzovy vremeni I Konstitutsiya: element obshchestvennogo dogovora] Challenges of time and the Constitution: elements of the social contract // Constitutional law and politics: collection of materials of the international scientific conference: Faculty of Law of Lomonosov Moscow State University. March 28–30, 2012 / Responsible editor, Doctor of Law, Professor S.A. Avakyan. M.: Jurist Publishing Group, 2012. P. 54.

[3] See, for example, *Krasnov M.A.* [Iskazhenie smysla rossiyskoy Konstitutsii – sledstvie nesbalansirovannosti sistemy vlasti] Distortion of the meaning of the Russian Constitution – a consequence of unbalanced system of power // Constitutional law and politics: collection of materials of the international scientific conference: Lomonosov Moscow State University Law School. March 28–30, 2012 / Responsible editor, Doctor of Law, Professor S.A. Avakyan. M.: Jurist Publishing Group, 2012. P. 30–41.

came into force, the head of the state issued 6 decrees supplementing or changing the name of the subjects of the Russian Federation in Article 65. The change of the name of a subject of the Russian Federation also occurs when the legal status of the subjects of the Russian Federation is changed, for instance, in connection with their unification in accordance with the Federal Constitutional Law of December 17, 2001 On procedure for joining the Russian Federation and formation of a new constituent entity of the Russian Federation within it[1]. Amendments made on the basis of the adoption of the Federal Constitutional Act on the formation of new constituent entities of the Russian Federation (on the basis of the previously existing ones) and on the accession of Crimea and Sevastopol have been implemented 6 times. The unification process takes place within the framework of the legal procedure, but the decision itself is political in nature and is motivated by no legal provisions at all. The law only allows to implement the will of the legislative bodies of the subjects of the Russian Federation and the will of the people (a referendum in the process of unification is mandatory).

Serious political motives are also needed to initiate the adoption of a new constitution. The arguments of the constitutionalists in favour of such a decision have not yet been supported. However, today it is also impossible to adopt a new constitution because the Constitutional Assembly, which is responsible for drafting the new constitution, does not exist. There are initiative projects of such a federal constitutional law, but they do not find an appropriate political solution.

Proposals for a new constitution for the Russian Federation have been actively debated over the last twenty years. Such a radical reform of constitutional legislation was justified by a number of circumstances, including the need to overcome all disputes about the legitimacy of the current "Basic Law, the adoption of which was accompanied by numerous far from democratic actions, including the dispersal of the then Parliament by the President of the Russian Federation"[2].

In the opinion of a number of authors, the norms of the first chapter should be modified, which inevitably leads to the adoption of a new constitution. Thus, N.A. Bobrova substantiates the need to adjust articles 3,7,10 of the first chapter, to clarify the name of the second chapter of the Constitution, and proposes a number of other novations[3].

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[1] Russian Federation Code. 2001. No. 52 (p.1). Article 4916.

[2] *Avakyan S.A.* [Proekty zakonov o popravkakh k Konstitutsii Rossiyskoy Fedratsii] Draft laws on amendments to the Constitution of the Russian Federation: is round four coming? // [Konstitutsionnoe i munitsipal'noe pravo] Constitutional and Municipal Law. 2020. No. 1. P. 32.

[3] *Bobrova N.A.* [20 let i 20 nedostatkov Konstitutsii Rossii] 20 years and 20 shortcomings of the Russian Constitution // [Konstitutsionnoe i munitsipal'noe pravo] Constitutional and Municipal Law. 2013. No. 3. P. 33.

Changing the content of the norms of the first, second and ninth chapters of the current Basic Law is problematic, as it requires the adoption of a new constitution (these chapters cannot be amended), so other options are proposed, such as the inclusion of new chapters in its text, supplementing the first two in their meaning. For example, S.A. Avakyan suggested supplementing the Constitution with Chapter 2.1. "Civil Society and the State", by including three articles supplementing the content of the current Articles 13 and 30[1].

The real way to modify the Constitution of the Russian Federation is to introduce amendments, which makes it possible to meet the expectations of society, to satisfy the desires of the political elite at the helm of the state, to sow the hopes of citizens for a positive result of the introduced changes, associated with the social and economic growth of the people's welfare. For constitutionalists, another result is also important. It consists of the possibility to bring constitutional constructions in line with the rules of legal technique, to clarify the wording, to give them legal certainty.

However, political motivation plays an important role too. Not only the vagueness of certain constitutional norms, but also outright technical and legal miscalculations (which cannot be corrected by the interpretation of the Constitutional Court) for a long time did not constitute a valid argument for the legislator to start drafting and amending the Basic Law. Thus, only the Amendment Act of February 5, 2014 changed the title of Chapter 7 of the Constitution. The new title in Russian translating as Judiciary and Public Prosecutor's Office most accurately reflects the content of this chapter. No interpretation could explain why the chapter Judiciary included an article on the Public Prosecutor's Office, and how the Public Prosecutor's Office, as a state supervisory body that does not administer justice, relates to the judiciary.

In general, the procedure for adopting amendments to the Constitution is provided for in Article 136. From the point of view of legal technique, it cannot be called flawless, as the ambiguity prevents the direct application of the provisions of this Article. The Russian parliamentarians had questions about both the name of the amendment law and the procedure for adopting it. The uncertainty was clarified by the Constitutional Court of the Russian Federation, which at the request of the State Duma, adopted a Decision on the Interpretation of Article 136 of the Russian Constitution (No. 12-P of October 31, 1995)[2].

The Constitutional Court of the Russian Federation concluded that amendments should be adopted in the form of a special legal act, a law of the Russian

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[1] *Avakyan S.A.* Op. cit. P. 36.

[2] Russian Federation Code. 1995. No. 45. Article 4408.

Federation on an amendment to the Constitution. In addition, the Court clarified that the legislator has the right to regulate other issues of the procedure for adopting an amendment law, as well as the way in which the approved amendment is reflected in the text of the Basic Law.

The clarification of the Constitutional Court is reflected in the provisions of the Federal Law of March 4, 1998 On the Procedure for Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation[1] as well as the Rules of Procedure of the State Duma (Chapter 16: Consideration of proposals for amendments and revisions to the Constitution of the Russian Federation) and the Rules of Procedure of the Federation Council (Chapter 16: Procedures for consideration by the Federation Council of issues related to the adoption and entry into force of a law on amendments to the Constitution of the Russian Federation)[2].

The first two Laws of the Russian Federation on amendments to the Constitution were passed by the State Duma on November 21, 2008, approved by the Federation Council on November 26, 2008 and signed by the President on December 30, 2008 after the approval by the subjects of the Russian Federation. Undoubtedly, the adoption of the Laws was preceded by a political decision, but their content was legal, because they enshrined the rights and obligations of the participants of the constitutional relations and fixed the change in the term of election of the supreme power bodies. The first Law On Changes in the Term of Office of the President of the Russian Federation and the State Duma increased the presidential term to 6 years and the term of office of the State Duma to 5 years[3]. The second Law On the Control Powers of the State Duma in Relation to the Government of the Russian Federation[4] obliged the Government of the Russian Federation to submit annual reports to the State Duma, while the Duma obtained the right to hear reports by the Government of the Russian Federation.

The Constitutional Amendment Act of February 5, 2014 on the Supreme Court of the Russian Federation and the Public Prosecutor's Office of the Russian Federation also had legal content, as it dealt with the constitutional status of the highest judicial branch and the highest supervisory body, the Prosecutor's Office. The political will of the country's leadership was embodied in the amended constitutional provisions. Eight articles of the Constitution were modified, one article was deleted and the title of chapter 7 was changed. The purpose of the amendments was to fix in the Russian Constitution the political decision to abolish the Supreme Arbitration

[1] Russian Federation Code. 1998. No. 10. Article 1146.

[2] Consultant Plus legal reference system.

[3] Russian Federation Code. 2009. No. 1. Article 1.

[4] Russian Federation Code. 2009. No. 1. Article 2.

Court of the Russian Federation and transfer its functions to the Supreme Court of the Russian Federation. By the way, the name of Chapter 7 was changed to reflect its content more accurately. The amendments extended the powers of the President in relation to the appointment and dismissal of procurators of constituent entities of the Russian Federation, procurators other than city, district and equivalent procurators. The Federation Council has been given the power to appoint deputy general Prosecutor.

The legal content of the amendments to the Russian Constitution can also be discussed in relation to the next stage of its modification. The Amendment Act of July 21, 2014 amended Article 83 and Article 95. The main purpose is to give the President the right to introduce representatives of the Russian Federation into the Federation Council (not more than ten per cent of the number of member of the Council of the Federation, the representatives of the subjects of the Russian Federation). The political motivation of this authority of the head of state is clear, it lies on the surface. The President has been given the opportunity to introduce his supporter into the chamber of parliament directly, without going through the procedure of appointing (electing) a representative from a constituent entity of the Russian Federation. This makes it easier for the head of state to nominate the desired candidate for the post of Chairman of the Federation Council.

The first four laws on amendments to the Constitution have been the subject of analysis by Russian constitutional scholars[1]. In addition to a purely political assessment, judgments were made as to the consistency of the legal content of the amendments with the fundamental constitutional values. Professor V.A. Kryazhkov, analysing the first four laws on amendments to the Constitution, critically assessed their content, believing that any amendments should be consistent with the fundamental constitutional values[2]. In his opinion, the adopted amendments "(with the exception of giving the State Duma supervisory powers over the Government of the Russian Federation) are not fully consistent with the foundations of the constitutional order"[3]. The right of the President to appoint members to the Federation Council is criticised, which "distorts relations in the sphere of the federal structure, narrows the rights and guarantees of the subjects of the Federation in their relations with the federal bodies of state power, destroys the system of checks and balances vertically". The amendment to extend the President's term of office (detracting from a whole series of constitutional rights of citizens) has

[1] *Kryazhkov V.A.* [Popravki k Konstitutsii Rossiyskoy Federatsii: pravovye osnovy, predely i ikh obespechenie] Amendments to the Constitution of the Russian Federation: legal framework, limits and their enforcement // [Gosudarstvo i pravo] State and Law. 2016. No. 1. P. 6.

[2] *Kryazhkov V.A.* Op. cit. P. 7.

[3] *Kryazhkov V.A.* Op. cit. P. 7.

been criticised[1]. The amendment to abolish the Supreme Arbitration Court of the Russian Federation[2] caused considerable controversy among specialists.

The ambiguous assessment of the constitutional amendments is evidenced by attempts to challenge the amendment laws in the Constitutional Court of the Russian Federation. The challenge was initiated not only by citizens' associations, but also by parliamentarians. A group of State Duma deputies submitted a request to the Constitutional Court of the Russian Federation, questioning the constitutionality of the Law of the Russian Federation on Amendments to the Constitution On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation dated February 5, 2014. According to the Duma members, the contested Law does not comply with a number of provisions of the Constitution, included in the foundations of the constitutional order, and other norms thereof. Doubts have been expressed as to the observance of the established procedure for adopting the Law. The Constitutional Court of the Russian Federation in its Ruling of July 17, 2014 No. 1567-O pointed out that a law on an amendment to the Russian Constitution after its entry into force cannot be the subject of the Court's review, because the new norm becomes part of the Constitution, while the amendment law itself loses its independent meaning as soon as it enters into force. The Court Ruling contains an important conclusion on the possibility to amend the Constitution of the Russian Federation and the provisions of the Federal Constitutional Law On the Constitutional Court of the Russian Federation in terms of granting the Court the right to check the compliance of the constitutional amendment law with its Chapters 1, 2 and 9 before its entry into force, i.e. before they become part of the Basic Law[3]. Such a conclusion found support among constitutional scholars[4].

The decision to make the first four amendments to the Constitution of 1993 was political, but the substance of the changes was legal in nature. They were born

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[1] *Kryazhkov V.A.* Op. cit. P. 7.

[2] See: *Blankenagel A., Levin I.* [Novy Verkhovny Sud Rossiyskoy Federatsii – reshenie mnimo sushchestvuyushchikh starykh ili sozdanie novykh problem?] New Supreme Court of the Russian Federation – Solution of imaginary old problems or creation of new ones? // [Sravnitel'noe konstitutsionnoe obozrenie] Comparative Constitutional Review. 2014. No. 3 (100). P. 79.

[3] The Court Ruling of the Constitutional Court of the Russian Federation dated 17.07.2014 No. 1567-O At the request of a group of deputies of the State Duma on checking the constitutionality of a number of provisions of the Russian Federation Law On Amendments to the Constitution of the Russian Federation On the Supreme Court of the Russian Federation and the Procuracy of the Russian Federation.

[4] See, for example: *Presnyakov M.V.* [Naravne s Konstitutsiey: istochniki prava, obladayushchie vysshey yuridicheskoy siloy v Rossiyskoy Federatsii] On a par with the Constitution: sources of law with supreme legal force in the Russian Federation // [Zhurnal rossijskogo prava] Journal of Russian Law. 2016. No. 8. P. 96–108.

when the opportunity for their adoption, ensured by political certainty, appeared. It could not be otherwise, since the constitution of any government enshrines the balance of political forces at the time of its adoption[1], and the subsequent point modifications reflect the determination of the ruling political forces to give the existing constitutional relations the legal format that meets their perceptions of what is proper and situationally permissible. A.A. Dzhagaryan is right when he writes: "Ensuring the measure of socio-political interests is one of the most important legal issues, and the search for legal solutions, all the more concerning the evaluation and interpretation of concepts, norms, institutions that characterize the implementation of constitutional values, fundamental in nature, is always a certain art of the possible"[2].

The 2020 amendments clearly demonstrated the "art of the possible" in the execution of the political leadership of the government. The public was ready for the modification of the Basic Law. Various assumptions about the forthcoming constitutional reform were made in political circles and in legal forums. However, only after the official statements of the influential government politicians it became clear that another modification of the Constitution of 1993 was long overdue. The neglect of the scientists' proposals for constitutional reform was gradually replaced in the political leadership of the government by the recognition of its possibility.

D.A. Medvedev as Prime Minister, in an article of the Zakon journal, allowed for changes to the Constitution, but without reducing the protection of the individual or undermining the foundations of the "democratic order of the country"[3]. The Chairman of the State Duma of the Federal Assembly, V.V. Volodin outlined his vision for amending the Constitution in the Parlamentskaya Gazeta[4]. At a press conference on December 19, 2019, V.V. Putin spoke about the possibility of amending the Constitution, but ruled out the adoption of a new constitution[5].

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[1] See: *Lassal F.* [O sushchnosti konstitutsii. Rech', proiznes`nnaya v odnom berlinskom byurgerskom okruzhnom sobranii v 1862 godu] On the essence of the constitution. Speech delivered at a Berlin burgher district assembly in 1862 // Constitutional Law Reader. Textbook. Vol. 1: History, theory and methodology of constitutional law. Doctrine of constitution / Compied by Doctor of Law, Professor N.A. Bogdanova and D.G. Shustov. SPb.: Aleph Press Publishing House, 2012. P. 446.

[2] *Dzhagaryan A.A.* [Territorrial'nye granitsy i granitsy konstitutsionnosti: v tekste i kontekste Postanovleniya Konstitutsionnogo Suda RF ot 6 dekabrya 2018 № 44-P] Territorial boundaries and boundaries of constitutionality: in the text and context of the Ruling of the Constitutional Court of the Russian Federation of December 6, 2018 No. 44-P // [Sravnitel'noe konstitutsionnoe obozrenie] Comparative Constitutional Review. 2019. No. 1. P. 107–121.

[3] Zakon. 2018. No. 12. P. 16.

[4] Parlamentskaya Gazeta. 2019. July, 17.

[5] Rossiyskaya Gazeta. 2019. December, 20.

The President of the Russian Federation launched the process of amendments by his decree of January 15, 2020, creating a working group to prepare proposals for amendments to the Constitution of the Russian Federation[1]. The group consisted of representatives of various professions, which was intended to ensure that the amendments were broadly representative and reflected the views of different segments of society. Lawyers, who are specialists in constitutional law, were represented but far from dominating.

Obviously, the text of the amendments had already been prepared when the working group was set up and it only had to assess their content, which predictably happened. A few days later (on January 20, 2020), the President of the Russian Federation submitted to the State Duma of the Federal Assembly of the Russian Federation a draft law On improvement of regulation of certain issues of organisation and functioning of public authorities[2]. The text of the law was legally correct, but there were questions about the norm of putting the amendment law to a national vote. Under Article 136 of the Constitution, such a procedure is not mandatory for the adoption of an amendment. Further developments showed that the initiators of this constitutional reform had plans, the implementation of which required careful preparation. In this context, the President's order of February 14, 2020, to hold a national referendum on the approval of the amendments to the Constitution of the Russian Federation[3] seems logical. The inclusion of the nationwide voting stage in the process of the amendments approval by the constituent entities of the Russian Federation did not allow to determine in advance the date of its holding, as it is impossible to predict the exact dates of the approval of the amendments by 2/3 of the constituent entities of the Russian Federation.

The January draft amendment law proposed the redrafting of 22 articles, and did not envisage the inclusion of new articles in the Basic Law. All subsequent transformations of the norms of the Constitutional Amendment Law were the result of extensive discussion, making and adopting proposals, which significantly changed the Law itself and led to unexpected (for some analysts expected) results. It was these innovations that ensured that the proposed amendments received close public attention, as they were in line with public expectations.

The State Duma approved the Law on Amendments to the Constitution of the Russian Federation, as amended and supplemented, on March 11, 2020. The amendments affected 46 articles: 41 articles were subject to editorial changes and 5 are new. Some of the articles have been significantly expanded by adding new parts.

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[1] http://www.pravo.gov.ru

[2] http://www.pravo.gov.ru

[3] http://www.pravo.gov.ru

The novations that emerged in the draft amendment law as a result of its broad discussion considerably broadened the range of regulated relations. The working group (and the political leadership) recognised the possibility of including a number of provisions in the constitutional text, which could be characterised as declarative, lacking normative content, and reflecting the patriotic views of a significant part of citizens. For example, a new part 2-1 has been added to Article 67. It expressly prohibits activities aimed at the alienation of part of the territory of the state, as well as calls for such actions. A new Article 67-1 has been added to the text of the Constitution, the content of which brings to the constitutional level a number of problems discussed in Russian society. It stipulates that Russia is the legal successor of the Soviet Union on its territory, "The Russian Federation honours the memory of the defenders of the Fatherland and ensures the protection of historical truth. Deterioration of the significance of the feat of arms of the people in defending the Fatherland is not permitted" (Part 3 of Article 67-1). The content of part 2 of article 67-1 has ideological significance: "The Russian Federation, united by a thousand years of history, keeping the memory of ancestors who communicated to us their ideals and faith in God, as well as the continuity in the development of the Russian government, recognizes the historically established state unity. The same goal can be seen in the content of Part 4 of Article 67-1: "Children are the most important priority of state policy in Russia. The government shall create conditions conducive to the all-round spiritual, moral, intellectual and physical development of children and to fostering in them patriotism, citizenship and respect for elders. The government, ensuring the priority of family upbringing, assumes the responsibilities of parents with respect to children without parental care". This has resulted in legal constructions whose constitutional significance has yet to be understood.

No less significant for Russian citizens have been the norms concerning the social and economic rights of citizens, aimed at strengthening the guarantees of their protection by the government. Article 75 has been supplemented with three new sections, the content of which has a pronounced social orientation. They enshrine the constitutional obligation of the government to establish a "minimum wage not lower than the minimum subsistence level of the working population in the Russian Federation", the obligation to index pensions at least once a year and the obligation to guarantee compulsory social insurance and the indexation of social benefits. The need for targeted social support for citizens is highlighted.

The new Article 75-1 has a socio-economic orientation and is oriented towards a positive perception of the amendments. It reflects the norms on the need to create conditions "for sustainable economic growth of the country and improvement of the well-being of citizens", ensuring a balance of rights and obligations of citizens, proclaiming the need for social partnership, ensuring economic, political and social solidarity.

This approach, among other things, strengthened a large proportion of voters in their conclusion of support for constitutional amendments.

The group of amendments affecting the system of the government authorities is quite significant. In addition to the emergence of a new constitutional body (giving it constitutional status) which is the State Council, the amendments affected the relationship between them. The initiators of the amendments responded to the public demand to strengthen the role of the parliament and expand its oversight function. First, this means giving the State Duma new powers concerning the formation of the government of the Russian Federation. It has got the right to approve the candidacy of the chairman of the government presented by the President (previously, the Duma had to approve the candidacy presented by the President). The head of government retained the right to appoint him. The president cannot ignore the chamber's decision and is obliged to appoint the person approved by it.

The State Duma has the right to approve the composition of the Government (except for the heads of the power bloc). The Chairman of the Government submits nominations for Deputy Chairmen and Federal Ministers to the State Duma instead of the Head of State (previous version). Once approved by the chamber, the President appoints them. The Constitution includes a provision stating that the President cannot refuse to appoint these persons once the House of Parliament has approved them.

The President's right to dissolve the State Duma is retained. He can dissolve it if the Duma rejects a candidate for the position of Prime Minister three times. The novation is the replacement of an imperative requirement (he is obliged to dissolve and call new elections) with a dispositive rule (he can dissolve it but is not obliged to do so).

As we can see, the expectations related to granting the State Duma the right to participate in the formation of the Government are reflected in the Constitution, but it can hardly be called a fundamental change in the procedure for forming the supreme executive body. The President retained the right to participate in the selection of candidates for the Government, although this is not explicitly stated in the Basic Law. If the Head of State does not present candidates for ministerial positions to the House of Parliament, this does not mean that he is excluded from the process. It is difficult to imagine that the Chairman of the Government nominated and appointed by the President would form the highest executive body of the State without the participation of the Head of State.

However, it is important that the Duma is able to approve not only the Chair, but also members of the Government. Such an arrangement strengthens the role of parliament, and parliamentary parties are given the opportunity to publicly express their attitude to this or that candidate for public office. Still, it is premature to talk about the beginning of movement towards a parliamentary republic in

Russia, although we can observe some elements of parliamentarism in the Russian version, including a strengthening of the parliament's supervisory powers. The Constitution includes Article 103-1, which enshrines the concept of parliamentary control, which implies the existence of appropriate procedures, the implementation of which is defined by constitutional provisions, by the rules of the chambers and by federal laws. For example, the Federation Council has been given the right to hear the Prosecutor General's report on the state of law and order in the Russian Federation. The State Duma will hear the report of the Central Bank of Russia.

The adoption of the amendments has increased the President's influence on the formation of the most important bodies exercising compliance monitoring by the government and financial control. It is no longer the Federation Council that appoints the Prosecutor General, his deputies and the prosecutors of the constituent entities of the Russian Federation on the President's proposal, but the President after consultation with the Federation Council. The right of the President to participate in the formation of the Accounts Chamber of the Russian Federation has been enshrined at constitutional level. He submits candidates for appointment as Chairman and deputies, auditors of the Accounts Chamber to the State Duma and the Federation Council. The Head of State forms a newly created body, the State Council of the Russian Federation, whose status will be determined by federal law.

Major novations have been introduced in the Federation Council. A member of this Federal Assembly is now officially called a senator, the post of senator for life has been introduced, and the term of office of senators who are the representatives of the Russian Federation (except those appointed for life) has been set at six years. The number of senators appointed for life by the President may not exceed seven years, and the basis for such appointment must be "distinguished service to the country in the field of state and public activities". The position of senator for life is also foreseen for a president who has terminated his term of office due to expiry of his term or early resignation. A president removed from office by a decision of the Federation Council has no such privilege.

The amendment related to the possibility for the incumbent President to run for the post of Head of State in 2024 received the greatest resonance in political circles in Russia and abroad. The constitution was amended to limit the President's term of office to two terms (it used to be two consecutive terms, which did not preclude him from taking office again after a break). Such a limitation was to be expected, but the intrigue is that an exception was made for V.V. Putin. He is not subject to this requirement, as the rule applies only to future Heads of State. This constitutional rule opens up the possibility for a sitting president to run in elections in 2024. This decision makes it more difficult to find an answer to the question of Putin's successor, if the incumbent Head of State does not wish to run for president (position of senator for life and immunity is guaranteed to him).

Attention may also be drawn to the adjustment of the powers of the Constitutional Court of the Russian Federation. The extension of the right of citizens to appeal to the Constitutional Court of the Russian Federation should be considered positive. According to the previous version, a person could appeal only against the norms of the law. Updated version of Part 4 of Article 125 gives the right to appeal not only against the legal norms that violate the constitutional right of an individual, but also against the provisions of other legal acts (presidential decrees, acts of the Federal Assembly, acts of the Russian Government, acts of public authorities of the Russian Federation). The acts of the subjects of the Russian Federation (provisions of constitutions of republics, charters as well as laws and other normative acts of the subjects of the Russian Federation issued on the issues that fall within the competence of the public authorities of the Russian Federation and joint competence of the public authorities of the Russian Federation and the public authorities of the subjects of the Russian Federation) are also subject to appeal.

At the constitutional level, the right of the Constitutional Court of the Russian Federation to examine cases on "the possibility to enforce decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation in their interpretation contradicting the Constitution of the Russian Federation, as well as on the possibility to enforce a decision of a foreign or international (interstate) court, foreign or international arbitration court (arbitration) imposing obligations on the Russian Federation, in case this decision contradicts the constitution, is enshrined. This right of the Constitutional Court was already enshrined at the level of a federal constitutional law, but now it is reflected in the Constitution.

The undoubted political implication can also be seen in the increasing influence of the President on the judiciary. The amendments provide for the possibility to terminate the powers of the presidents, deputy presidents and judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, the cassation courts and the courts of appeal in case they commit an act "that dishonours or discredits a judge or in other cases provided for in the federal constitutional law and proving the impossibility of the judge to exercise his or her powers". Such a decision shall be taken by the Federation Council on the proposal of the President of the Russian Federation.

The enormity of the amendments to the Constitution justifies putting the proposed amendments to a national vote. The Law of the Russian Federation On Improving the Regulation of Certain Issues of the Organisation and Functioning of Public Power received the support of Russian citizens on July 1, 2020. A total of 67.97 per cent of eligible citizens participated in the nationwide vote. The amendments were approved by 77.92% of those who came to the polling stations; 21.27% were against the amendments to the Constitution. All the subjects of the Russian Federation supported the amendments, except for Nenets Autonomous District. However, the reason

for that vote was not an assessment of the changes that were being introduced, but rather the negative attitude of the population to the proposal of the heads of the regions (Nenets Autonomous District and Arkhangelsk Oblast) who had initiated the unification procedure for those subjects of the Russian Federation.

This is an impressive result when compared with the results of voting on December 12, 1993. For example, voter turnout in 1993 in Tatarstan was only about 15%[1]. The people of the Republic thus ignored the vote on the Constitution. In the Republic of Mordovia, 37.14% of those who came to the polls in 1993 voted for the Constitution, and in the Tyva Republic 31.21% voted for it. The result in the Tyva Republic in 2020: 92% turnout; 96.79% – for; 2.99% – against.

This result was not only the result of a well-structured step-by-step preparation of the amendment bill, its substantive content, the sentiments and expectations of citizens, but also the overall internal and external political environment. Voters chose stability. It is unlikely that most of them go into the content of constitutional constructions and their preferences are formed taking into account their historical experience (living conditions in the 90s), availability of alternatives to today's socio-economic development and trust in the country's leader.

The 2020 amendments solved a number of problems of a legal nature. However, at the same time, the process of their discussion made it possible to demonstrate the presence in society of a consolidated nucleus capable of upholding its national interests. This is a kind of assessment by the participants in the popular vote of the policy pursued by the current Head of State and the country's leadership as a whole. Despite the fair (in many people's minds) criticism of the decisions taken by the authorities at all levels, the preservation of the fundamental values (stability, certainty, security) proved to be a priority for the majority of voters.

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FAITH IN GOD AS CONSTITUTIONAL PRINCIPLE: LEGAL SYSTEM NOVATIONS IN MODERN RUSSIA

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Abstract: This article is devoted to the study of religious issues in the constitutional regulation of modern Russia. The author proves that while there is unquestionable respect for religious systems and unconditional recognition of the important role of religion in human history, including Russian history, every religious system has a mystical element at its core, while mysticism itself is alien to positive jurisprudence. Princes and tsars used religion in Russian state history to ensure obedience of subjects, but these times are in the distant past. Modern Russia, which raised several generations in an atheistic environment, has generally lost its organic connection with religion, and a large-scale revival of this trend could hardly be considered appropriate from a state-legal perspective. Religion in modern Russian society is also unable to fulfil a state and ideological mission. The constitutional amendments of 2020 ended up being more far-reaching than what the President of the Russian Federation had officially proposed when introducing the bill in the State Duma. The President's restraint of initiatives, often not entirely reasonable, could be seen by participants in the rulemaking process as a kind of intransigence of the initiator of the amendments. In this regard, there has been an overly uncritical approach to constitutional law-making, the legal consequences of which are only beginning to emerge today and will continue to arise as legislative and law enforcement practice develops.

Keywords: constitutionalism, human rights, secular state, faith in God, judicial review of constitutionality.

In 2020, our country underwent a major constitutional and legal reform, the significance and legal implications of which have yet to be understood by contemporary constitutional and legal scholarship. Among them, new Article 67.1 has an important

place, with its part two, which literally reads as follows: "The Russian Federation, united by a thousand years of history, preserving the memory of its ancestors, who transmitted to us their ideals and faith in God, as well as the continuity in the development of the Russian State, recognizes the historically established state unity"[1]. This legal norm is next to the prescriptions of Articles 14 and 28, which have a higher legal force and oblige society to "The Russian Federation is a secular state; no religion may be established as state or obligatory; religious associations are separate from the state and are equal before the law; everyone is guaranteed freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or not to profess any, to freely choose, have and disseminate religious and other beliefs and act in accordance with them. According to the Conclusion of the Constitutional Court of the Russian Federation of March 16, 2020, "the inclusion in the text of the Constitution of the Russian Federation of a reference to faith in God, handed down to the people of Russia by their ancestors (Art. 67.1, part 2) does not mean a rejection of the secular nature of the Russian State proclaimed in its Article 14 and of freedom of conscience guaranteed by Article 28, since its wording does not imply *confessional affiliation*, does not declare certain religious beliefs *to be mandatory* in the Russian Federation, does not place Russian citizens in *unequal conditions* depending on *the presence of* such faith and its *specific orientation*"[2] (italics added).

The author of this article certainly does not pretend to have an exhaustive and competent opinion on complex theological issues, including the problems of God's existence and deeds. It is a matter of constitutional legal, hence legal questions about the relationship of state and law to religion, which should be based on one rather simple presumption: *some citizens trust God and others do not, along with this the citizens are entitled to both*. On this basis, the positive legal attitude of the constitutional legislator towards religion should be tolerant, non-imposing and neutral, since it is constitutionally established that religion is not a state sphere. It is constitutionally protected from state interference and is the object of inviolability by the public authorities[3].

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[1] See: Constitution of the Russian Federation (official text as amended on 14.03.2020) // http://www.pravo.gov.ru.

[2] See: Conclusion No. 1Z of the Constitutional Court of the Russian Federation of 16.03.2020 On the correspondence to the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation, on the improvement of regulation of certain issues of organization and functioning of public authorities, as well as on the correspondence to the Constitution of the Russian Federation of the procedure of coming into force of Article 1 of this Law in connection with a request of the President of the Russian Federation // Russian Federation Code. 2020. No. 12. Art. 1855.

[3] See: *Osipyan B.A.* [Smysl zhizni, dostoinstvo, prizvanie i svobodnoe samoopredelenie cheloveka v kontekste neprekhodyashchey idei prava] The meaning of life, dignity, vocation and free self-determination of man in the context of the enduring idea of law // [Voprosy pravovedeniya] Voprosy jurisprudence. 2012. No. 1.

Opponents of this scholarly position often refer to the foreign experience of constitutionalism. Indeed, in many constitutions of foreign countries the attitude towards religion looks quite active and is clearly not limited to the mere thesis of *secularization as an achievement of civilized humanity*. At the same time, it is logical to ask the following question: after *many decades of purposeful "atheization"*, does anything compel Russia to necessarily adopt this experience if the Constitution already states that our Motherland is a secular state? Was it necessary for Russia in 2020 to establish, to a large extent contrary to the prescriptions of Articles 14 and 28 of the Russian Constitution, a provision on "faith in God", which our ancestors passed on to us and which we are therefore legally obliged to keep as a sign of remembrance of them?

The legally obligated entity by virtue of Article 67.1 of the Russian Constitution is "the Russian Federation", that is, all of us, citizens of Russia. Are we now, after 2020, forced to trust God because our ancestors trusted him? Without being concretized and tied to the Christian faith in its Orthodox form, the prescription of Article 67.1 of the Russian Constitution complicates the problem, as it actually pushes society towards "desecularization" in any of its religious forms. This judgment applies, at any rate, to all traditional religions (Judaism, Catholic Christianity, Islam, Buddhism, etc.).

With undoubted respect for religious systems and unconditional recognition of the important role of religion in human history, including Russian history, let us emphasise that every religious system has a *mystical* element at its core, while mysticism *is alien to positive jurisprudence*[1]. The accused is not absolved of legal responsibility because he is allegedly "possessed"; the lawbreaker's will and mind are not cleared by the "as God wills" imperative. If a prosecutor or lawyer invokes Divine Revelation or Demoniacal Temptation as evidence in a court case, this is unlikely to encourage a judge to exclude an impartial assessment of legal facts, which are always specific, verifiable and ascertainable. The constitution and the law *do not deal with miracles*. The divine is always mystical, supernatural and unreal. This should not be taken as an argument against religion – it does have a right to exist in society, as does the mystical view of nature in general. The question here is what position the state and the law should take with regard to the inexplicable and the supernatural.

The state and the law are rather rigid regulatory and organisational systems, which apply severe punishments and are generally strict in their essence. Connecting the "double-edged" and "punitive" state-legal machine to issues of faith and

[1] See: *Zhirtueva N.S.* [Mistichesky fenomen v filosofii, estestvennykh naukakh i bogoslovii XX–XXI vv.] The Mystical Phenomenon in Philosophy, Natural Sciences and Theology in the XX–XXI centuries // [Filosofiya i kul'tura] Philosophy and Culture. 2015. No. 3. P. 364.

conscience is therefore fraught with very adverse societal consequences, since it affects an intrinsically non-state sphere that is quite "delicate" and "vulnerable".

Certainly, princes and tsars used religion in Russian state history to ensure obedience of subjects, but these times are in the distant past. Modern Russia, which raised several generations in an atheistic environment, has generally lost its organic connection with religion, and a large-scale revival of this tendency could hardly be considered appropriate from a state-legal perspective. Religion in modern Russian society is also unable to fulfil its state ideological mission[1].

In this regard, the emergence of the constitutional provision on "faith in God" is nothing more than a symbol, very dim and, in fact, useless for both constitutional law and traditional religious denominations. According to the accurate establishment of the Constitutional Court of the Russian Federation, this provision is intended "*only to emphasize the need to take into account* in the implementation of state policy *the historically significant socio-cultural role* that the religious component played in the formation and development of Russian statehood"[2] (italics added), nothing more.

However, the position of the Constitutional Court of the Russian Federation does not seem to be fully shared by society and even by the legislature. On June 19, 2013, Parliament criminalised "public acts expressing clear disrespect for society and committed with the aim of insulting the religious feelings of believers", considering this a form of violation of the right to freedom of conscience and religion. This act acquires a particular criminal form when it is committed "in places specially designated for religious services, other religious rites and ceremonies"[3]. It should be emphasized that we are talking not only about Orthodox, Catholic, Jewish, and Islamic worship, but also about religious rites and ceremonies in general, regardless of the type of confession and the degree of its prevalence in society. In essence, any religiously minded group of citizens is entitled to claim a degree of respect for their

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[1] See: *Noskova K.A.* [Popravka v Konstitutsiyu ob ukazanii o vere v Boga kak kosvenny otkaz ot svetskogo gosudarstva] Constitutional amendment on indication of belief in God as an indirect rejection of secular state // [Nauchnye issledovaniya molodykh uchennykh] Research of young scientists. Penza, 2020.

[2] See: Conclusion No. 1Z of the Constitutional Court of the Russian Federation of 16.03.2020 On the correspondence to the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation, on the improvement of regulation of certain issues of organization and functioning of public authorities, as well as on the correspondence to the Constitution of the Russian Federation of the procedure of coming into force of Article 1 of this Law in connection with a request of the President of the Russian Federation // Russian Federation Code. 2020. No. 12. Art. 1855.

[3] See: Federal Law No. 136-FZ of 29.06.2013 On Amendments to Article 148 of the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation to Counter Abuse of Religious Beliefs and Feelings of Citizens // Russian Federation Code. 2013. No. 26. Art. 3209.

rites and ceremonies, which implies criminal consequences. To do so, it is sufficient to prove that their certain "religious feelings" have been "offended".

Prior to the above amendment, Article 148 of the Criminal Code of the Russian Federation was limited to punishment for "unlawful obstruction of the activities of religious organisations or the performance of religious rites", i.e. it had a completely different legal meaning. There is no doubt that hooliganism in churches and other similar acts should be punished proportionately, in some cases even with criminal sanctions, but the legal meaning here should be, in our opinion, not "insulting the feelings of believers," but hooliganism itself. The fact that the act of hooliganism was committed in a church may be taken into account by the court in assessing the motives for the unlawful activity, but no more than that. The differentiation of the punishability of the act depending on the place where the offence was committed, all other things being equal, shows signs of discrimination, i.e. an unjustified departure from the constitutional principle of equality.

The sacred of religious rites and ceremonies is mainly of a moral nature. A well-brought-up person will always try to avoid offending anyone's feelings. However, state intervention in this process seems rather ill conceived in terms of the likely legal consequences: by punishing some offences, the legislator encourages others. Overall, however, this example shows that the constitutional amendment on "faith in God" is not as insignificant as the Russian Constitutional Court believes in its Opinion of March 16, 2020. It is not just a matter of "emphasising the need to take into account the historically significant socio-cultural role" of religion in the implementation of state policy. The legislator goes further by establishing new types of offences. Courts have followed this up with convictions. Those who have offended the feelings of believers become convicted and, therefore, many their constitutional rights are affected. In a number of cases, this persists even after the removal or expungement of the criminal record. The state compulsory measures, which are designed primarily for entirely different purposes, are used as *a religiously protective tool*. In today's secularized society, such an approach is rather difficult to explain and justify. Among other things, one should take into account the legal position of the Constitutional Court of the Russian Federation that "religious freedom is one of the most important forms of spiritual and moral self-determination of a person and *an internal matter of everyone*"[1] (italics added).

[1] See: Decision of the Constitutional Court of the Russian Federation of December 5, 2012, No. 30-P On the case of verification of the constitutionality of paragraph 5 of Article 16 of the Federal Law On Freedom of Conscience and Religious Associations, and paragraph 5 of Article 19 of the Law of the Republic of Tatarstan On Freedom of Conscience and Religious Associations in connection with the complaint of the Commissioner for Human Rights in the Russian Federation // Russian Federation Code. 2012. No. 51. Art. 7324.

In this respect, the preamble to the federal law On Freedom of Conscience and Religious Associations is more correct[1]. According to it, on the one part, "the special role of Orthodoxy in the history of Russia, in the establishment and development of its spirituality and culture" is recognised and, on the other part, respect for "Christianity, Islam, Buddhism, Judaism and other religions which form an integral part of the historical heritage of the peoples of Russia" is emphasised. The Constitutional Court of the Russian Federation, in its Opinion of March 16, 2020, saw mainly this very meaning in the constitutional amendment on "faith in God", but the picture is different in a literal sense.

The preamble to the Federal Law On Freedom of Conscience and Religious Associations does not mention "faith in God" in the same way that the current version of Part 2, Article 67.1 of the Constitution of the Russian Federation does not say about "the special role of Orthodoxy in Russian history, in the establishment and development of its spirituality and culture" or about "respect for Christianity, Islam, Buddhism, Judaism and other religions which form an integral part of the historical heritage of the peoples of Russia". The intention of the constitutional legislator was clearly different from the way the Constitutional Court of the Russian Federation interprets it. If the constitutional lawmaker had supplemented Article 67.1 with an abridged version of a number of preamble provisions of the Federal Law On Freedom of Conscience and Religious Associations, one could have agreed with the Court's position under analysis. On the surface, it would appear that the Court was wishful thinking, in some respects even exceeding its constitutional powers.

Constitutional jurisprudence, however, permits this in the form of a restrictive official interpretation of the country's constitution. It must, however, be remembered that the constitutional legislator was quite clear and unambiguous about "faith in God" – he did not simply emphasise the special role of orthodoxy or limit himself to calling for respect in relation to differentiated religious systems. It is precisely about *faith*, that is, about an inner moral sense, which has been transferred by the legislator to the legal, constitutional and regulatory ground. In this connection, it should be emphasised that the constitution of a democratic state should, whenever possible, avoid interfering with the inner world of a person's experiences, feelings and beliefs, confining itself essentially to the legal component of social relations.

The positioning of the "faith in God" provision in Chapter Three of the Constitution of the Russian Federation, the subject of which is the federal structure, further convinces us that this kind of amendment was, in a manner of speaking, rather artificial and even partly far-fetched. It is difficult to agree with A.I. Ovchinnikov and G.V. Nefedovsky that the "timeliness" of constitutional recognition of

[1] See: Federal Law No. 125-FZ of 26.09.1997 (ed. from 02.12.2019) On Freedom of Conscience and on Religious Associations // Russian Federation Code. 1997. No. 39. Art. 4465. 2019. No. 49. Art. 6966.

such a value as "faith in God" is due to the need for a "common unifying idea in the conditions of Russian federalism"[1]. Our opinion concerns the entire normative content of Article 67.1 of the Constitution of the Russian Federation, but this is the subject of a separate constitutional study. In relation to the analyzed topic, it should be noted that the nation-wide vote on the 2020 constitutional amendments resulted in the completion of an important stage of constitutional reforms, the meaning of which, among other things, consisted in changing the procedure of limiting and calculating the terms of office of the Russian head of state[2]. In terms of political procedure, this looked like an "amendment by V. Tereshkova" – as a State Duma deputy, she officially announced the idea of "zeroing out terms limits", while the original text of the draft law being limited to a ban on holding the President office of the Russian Federation for "more than two terms", that is, a more stringent restriction than in the previous version ("no more than two *consecutive* terms")[3].

Before V. Tereshkova's amendment, the earlier proposal to put the constitutional draft law to a national vote seemed difficult to explain, since its content did not demonstrate any constitutional changes adequate to a plebiscite. After the amendment, however, it was made clear that this purpose was implicit or at least not excluded in the initiation of the bill. The public had to accept or reject the principle of the legal possibility for an incumbent to run for two more terms of six years, with the previous four terms (two terms of four years and two terms of six years) not to be counted. This was accompanied by the constitutional possibility for future heads of state to serve a maximum of two terms in general, even excluding the more concessional "no more than two consecutive terms" limitation as in previous cases.

The importance of such a constitutional transformation undoubtedly required an additional procedure of public support, which could not be limited to the popular representatives' vote in the federal parliament and in the legislative (representative) bodies of the constituent entities of the Russian Federation[4]. The choice was

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[1] See: *Ovchinnikov A.I., Nefedovsky G.V.* [Vzaimootnosheniya Tserkvi i gosudarstva v svete konstitutsionnoy popravki s upominaniem o "vere v Boga"] Relationship between Church and State in the light of the constitutional amendment mentioning "faith in God" // [Administrativnoe i munitsipal'noe pravo] Administrative and Municipal Law. 2020. No. 5.

[2] See: *Manzhosov S.A.* [Teoriya i praktika smenyaemosti vlasti: ch'im traditsiyam sleduet Rossiya?] Theory and Practice of Turnover of Power: Whose Traditions Does Russia Follow? // [Sravnitel'noe konstitutsionnoe obozrenie] Comparative Constitutional Review. 2020. No. 3. P. 63–81.

[3] See: *Ilyin V.A., Morev M.V.* [Effektivnost'"ruchnogo" upravleniya gosudarstvom. Proverka na prochnost' – 2020] Efficiency of "manual" state management. Strength Testing – 2020 // [Ekonomicheskie i sotsial'nye: fakty, tendentsii, prognoz] Economic and Social Changes: Facts, Trends, Forecast. 2020. T. 13. No. 2. P. 9–24.

[4] See: *Marxheim M.V.* [Obnovlenie Konstitutsii Rossii: institutsional'ny eskiz] Renewal of Russia's Constitution: Institutional Sketch // [Nauka i obrazovanie: khozyaystvo i ekonomika;

made in the non-referendum popular vote[1], which was postponed due to the threat of a covid-19 pandemic, but was eventually carried out, with rather convincing success for the initiators of the constitutional reforms. The procedure for accepting and approving the amendments has now been fully completed and the public can legally consider the incumbent president's right to run for re-election legally resolved, and he can exercise this constitutional option twice more after the end of the current legislature's term.

Under such circumstances, can we consider that the appearance of the "faith in God" provision in Article 67.1 of the Russian Constitution was the result of chaotic and accelerated participation in lawmaking by a number of political figures and public representatives, who created a kind of *accompaniment for V. Tereshkova's amendment*? It is important to remember that the text of the bill, as amended by the Russian president, did not contain any "faith in God" provision. If it did, then parliament was taking a significant risk. Samplings of public opinion polls showed very mixed feelings about this amendment. Many citizens were likely to reject V. Tereshkova's initiative on the grounds of disagreement with other amendments, including the "faith in God" amendment, while generally approving of the main goal of this political action.

Risks of this kind receive little attention in the scientific and journalistic literature, but they were undoubtedly presented, and they concerned not only the "faith in God" amendment, but also several other constitutional novations (the supposed abolition of constitutional courts of the Russian Federation subjects by listing an exhaustive list of court types, establishing a unified system of public authority and the right of the state to participate in the formation of local self- government, obligatory support of "historical truth", etc.). In any case, the constitutional amendments of 2020 ultimately proved to be more far-reaching than what the president had officially proposed when introducing the bill in the State Duma. The President's restraint of the initiatives, *often not quite reasonable*, could be regarded by the participants of the rule-making process as a kind of *intransigence* of the initiator of the amendments. In this regard, there has been *an overly uncritical approach to constitutional law making*, the legal consequences of which are only beginning to emerge today and will continue to arise as legislative and law enforcement practice develops.

In such circumstances, in our view, the legislator and the enforcer should be guided by the constitutional principles of restraint, proportionality, reasonableness

predprinimatel'stvo; pravo i upravlenie] Science and Education: Economy and Economics; Entrepreneurship; Law and Management. 2020. No. 7.

[1] See: *Zhuravlev V.P.* [Obshcherossiyskoe golosovanie po izmeneniyam v Konstitutsiyu: sotsial'nye zamysly i protsedury] All-Russian Voting on Amendments to the Constitution: Social Intentions and Procedures // [Izbiratel'noe zakonadel'stvo i praktika] Electoral Legislation and Practice. 2020. No. 2. P. 3–7.

and balance. The interpretation of Article 67.1 (2) of the Constitution of the Russian Federation shall be restrictive and strictly adhere to the "fairway" of the official interpretation of the Constitutional Court of the Russian Federation, as formulated by it in its Opinion of March 16, 2020. *Enthusiasts of state expansion of religion and mysticism* should realise that there are *clear constitutional limits to* this in a democratic society. Freedom of conscience and religion involve equally the right to religion and the right to atheism. Each individual makes the choice between these competing values independently, due to the characteristics of their worldview and beliefs, based on free will and without state interference. The Constitution of the Russian Federation *does not* legally *oblige us to trust God, but a free belief in Him deserves due respect and requires adequate protection* by the state and the law.

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EXEMPTION FROM CRIMINAL LIABILITY AS A CRIMINAL MEASURE

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Abstract: The relevance of the problem and the ongoing scientific debate are due to the fact that the study of the issue of the legal nature of the criminal institute involves analysis of various aspects of its legislative regulation and law enforcement. The philosophical law stating that the essence is reflected in the manifestations (content) fully applies to the law as well; it is it (the legal essence) that determines the features of this or that block of legal provisions and their place in the system of the Criminal Code of the Russian Federation, and its identification is a condition of optimal legal regulation. Criminal law is, above all, a social tool; it is a specific way of implementing social norms and protection of social relations. The author proposes an original approach that allows revealing the nature of the said institute, considering the peculiarities of its regulation through the prism of social and legal prerequisites, as well as their respective grounds for enshrining provisions on exemption from criminal responsibility on non-rehabilitation grounds in the criminal legislation. In the discussion, the tone of which is set by scientists of Kazan University, different versions are proposed and scientific positions are substantiated; in general, as follows from the work, the question are non-repressive and non-punitive, specific measures of criminal impact.

Keywords: criminal law, liability, exemption from liability, criminal punishment, rehabilitation

The rules governing the grounds and conditions for exemption from criminal liability are contained in chapters 11, 13, 14 and 152 of the General Part, as well as in the notes to the articles of the Special Part of the Criminal Code of the Russian

Federation. This is a rather large in volume and content, and if such an expression can be considered correct, a "pervasive" institution evading the criminal law, which is currently showing a tendency towards further expansion both in terms of grounds and in terms of statistics of application.

In contrast to this assertion (on the tendency to expand the grounds for exemption from criminal responsibility and the relevant practice), there is a very strong view in the criminal literature that exemption should be regarded as an exception rather than the rule, not the usual reaction of the government to the commission of a crime[1].

This position is based on universally recognised classic ideas that assume criminal liability as the only natural consequence of an offence and a natural and logical form of government response. The legislative regulation of all criminal provisions is generally sets out imposing criminal liability on the perpetrator of the crime. The institute of exemption from criminal liability contains the opposite legal consequences of a crime and consequently reveals certain inconsistency with a number of rules and provisions as well as principles of criminal law. This circumstance indirectly supports the conclusion that exemption from criminal liability is the exception rather than the rule.

Obviously, in order to resolve questions about the correlation between the institute of exemption from criminal liability and the criminal principles and other basic fundamentals of the Criminal Code of the Russian Federation and the Russian Federation Code of Criminal Procedure, to ensure proper efficiency both in regulation and in law enforcement, it is first necessary to properly understand the social and legal nature of this institute.

Undoubtedly, exemption from criminal liability is a specific legal consequence of a crime. It contains a certain impact on the perpetrator, while the government reaction regulated in the norms of this institution, does not come within the framework of criminal liability; the law provides for it in another form, also provided for in the Criminal Code of the Russian Federation.

In its social content, exemption from criminal liability is a transfer of the criminal impact on a person beyond the "negative" responsibility, a form of implementation of criminal matter in a different, positive way. At the same time, the social and legal expediency of such a transfer of the interaction of the parties (subjects of legal relations) in a positive direction, although it is a prerequisite for the enshrinement of this institution in the criminal law, this idea cannot serve as an explanation of its legal nature.

The criminal regulations are generally retrospective and the measures are negative, and the positive transfer takes place within the same framework, within this retrospective sphere, with a derogation of negative law restrictions.

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[1] See: *Kelina S.G., Kudryavtsev V.N.* [Printsipy sovetskogo ugolovnogo prava] Principles of Soviet Criminal Law. M.: Nauka, 1988. P. 131; *Naumov A.V.* [Ugolovnoe pravo. Obshchaya chast'] Criminal law. The general part. Course of lectures. M., 1996. P. 605.

However, such versions are not discussed in the doctrine, it is usual refers only to the negative sphere of legal relations. A.I. Chuchaev and A.P. Firsova do not see impact in the content of the analyzed criminal institute, based on the position that such (criminal impact), being the response of the government to illegal behavior, should have the character of *coercion*[1]. According to A.I. Chuchaev, only separate, specific types of release, which imply imposing other obligations as a substitute for the basic, negative ones, for example, release from criminal responsibility of minors, application of coercive measures of educational influence and some others, have coercive influence[2]. A similar view is seen in the position of T.G. Pioniatovskaya[3]. T.A. Lesnievski-Kostareva believes that exemption from criminal responsibility represents a further differentiation of *criminal responsibility*. "All types of exemption from criminal responsibility are designed to create different measures of responsibility in the law", the author writes. These types differentiate responsibility depending on the characteristics of public danger of the crime and the personality of the perpetrator (his age, positive post-criminal behaviour, etc.)[4]. Such position is also held by other authors[5]. V. P. Korobov writes, "The essence of the differentiation of criminal responsibility is the obligation of the person who has committed a crime to undergo conviction, punishment and criminal record," in the "division" of responsibility measures imposed on the person, depending on the various circumstances of criminal significance[6]. In his view, one of the components of such a division (i.e. a means of differentiation) is exemption from criminal liability.

I. A. Tarkhanov in general agreeing that the institution of exemption from criminal liability represents a further division, a gradation of criminal measures in the law, rightly emphasises:"...differentiation of criminal responsibility im-

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[1] *Chuchaev A.I., Firsova A.P.* [Ugolovno-pravovoe vozdeystvie: ponyatie, ob'ekt, mekhanizm, klassifikatsiya] Criminal law impact: concept, object, mechanism, classification: monograph. M.: Prospekt, 2015. P. 17, 27, etc.

[2] See: *EsakovG.A., Poniatovskaya T.G., Rarog A.I., Chuchaev A.I.* [Ugolovno-pravovoe vozdeystvie] Criminal Impact: monograph / Edited by A. I. Rarog. M.: Prospekt, 2015. P. 7.

[3] See: Ibid. P. 220 et al.

[4] *Lesnievski-Kostareva T.A.* Op. cit. P. 129.

[5] *Knyazkov A.A.* [Osvobozhdenie ot ugolovnoy otvetstvennosti po delam ob ekonomicheskikh prestupleniyakh: tekhniko-yuridicheskie aspekty zakonodatel'noy i pravoprimenitel'noy praktiki] Exemption from criminal liability in cases of economic crimes: technical and legal aspects of legislative and law-enforcement practice: Thesis. Candidate of Juridical Sciences. Saratov, 2015. P. 14.

[6] *Korobov V.P.* [Ponyatie differentsiatsii ugolovnoy otvetstvennosti] Notion of differentiation of criminal responsibility // [Differentsiatsiya formy i soderzhaniya v ugolovnom sudoproizvodstve] Differentiation of form and content in criminal proceedings. Yaroslavl: Yaroslavl University Press, 1995. P. 46.

plies a division into parts of *this* (present, actual) responsibility. Therefore, exemption from criminal liability cannot be regarded as *its* same differentiation"[1]. The author believes that the categories of criminal responsibility and responsibility in criminal law should be distinguished. In this case, this refers to the differentiation of *responsibility in criminal law*. In its legal essence, I.A. Tarkhanov considers exemption from criminal liability to be a measure to encourage positive behaviour[2].

I. A. Tarkhanov's idea that exemption from criminal liability is a measure of encouragement has found broad support among scholars who study this institution. In one way or another, this view is expressed in the works of Yu.V. Golik[3], V.A. Gritskov[4], V.A. Novikov[5], T.R. Sabitov[6], F.R. Sundurov[7], M.A. Skryabin and H.S. Shakirov[8], S.P. Shcherba and A.V. Savkin[9], etc.

Indeed, exemption from criminal responsibility represents a further differentiation of responsibility in criminal law, as well as a result (and means) of criminal law unification, as L.E. Smirnova points out[10]. These circumstances reflect one or

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[1] *Tarkhanov I.A.* [Yuridicheskaya priroda differentsiatsii otvetstvennosti v ugolovnom prave] Legal nature of differentiation of responsibility in criminal law // Kazan State University transactions. Kazan, 2003. P. 304, 306.

[2] *Tarkhanov I.A.* [Pooshchrenie pozitivnogo povedeniya v ugolovnom prave] Encouragement of positive behaviour in criminal law. Ch. 5, §§ 2, 3, 4 etc.

[3] *Golik Yu.V.* [Ugolovno-pravovoe stimulirovanie pozitivnogo povedeniya: voprosy teorii] Criminal stimulation of positive behaviour: issues of theory. Novosibirsk: Novosibirsk University Press. 1992. P. 23, 28, 47, etc.

[4] See: *Gritskov V.*A [K voprosu ob osnovaniyakh osvobozhdeniya ot ugolovnoy otvetstvennosti] To a question on the bases of release from criminal liability // [Nauchnye osnovy podgotovki spetsialistov dlya sotsial'no-pravovoy sfery] Scientific bases of preparation of experts for social and legal sphere. Collection of scientific works. Issue 2. Kazan: ISSPO RAO, 2001. P. 154.

[5] *Novikov V.A.* [Osvobozhdenie ot ugolobnoy otvetstvennosti] Exemption from Criminal Liability: Thesis. Candidate of Juridical Sciences. Krasnodar, 2003. P. 11.

[6] *Sabitov T.R.* [Printsipy pooshchreniya v ugolovnom prave] Principles of encouragement in criminal law // [Ugolovnoe pravo] Criminal Law. 2006. No.1. P. 54.

[7] *Sundurov F.R.* [Nakazanie i al'ternativnye mery v ugolovnom prave] Punishment and Alternative Measures in Criminal Law. Kazan: Kazan University Press, 2005. P. 242, 243, etc.

[8] M.A. Skryabin, H.S. Shakirov. Op. cit. P. 4.

[9] See: *Shcherba S.P., Savkin A.V.* [Institut deyatel'nogo raskaniya v ugolovnom zakonodatel'stve] Institute of active repentance in criminal legislation // [Zhurnal rossiyskogo prava] Journal of Russian Law. 1997. No. 2. P. 73.

[10] See: *Smirnova L.E.* [Unifikatsiya v ugolovnom prave] Unification in Criminal Law: Thesis paper. Candidate of Juridical Sciences. Yaroslavl, 2006. P. 143.

another aspect of the phenomenon, but it is hardly correct to assume that the above statement reveals the essence of the institution under study.

Kh. D. Alikperov has opposing opinion, considering exemption from criminal liability as a means (a legal instrument) of reaching a compromise between the government and the perpetrator of the crime. He writes that the rules that are inherently incentive and the rules providing for compromise, despite their common features, are different in nature, i.e. the specifics of tasks, the motivation of the offender to a certain behavior, etc.[1] The legislator, in his opinion, abandoned the not-terribly-practical uncompromising fight against crime declared earlier. The norms of both the General and Special parts of the Criminal Code of the Russian Federation, providing for exemption from criminal responsibility, represent "...normative reflection of the idea of compromise in the concept of modern criminal fight against crime in the Russian Federation", writes Kh. D. Alikperov[2]. This position is supported by many scholars[3]. "In a situation where the government cannot ensure objective equality in the process and real adversarial nature", writes Ya.Yu. Yanina "compromise makes it possible to remove acute contradictions and resolve criminal cases in a way acceptable to the parties on the basis of mutual concessions"[4].

V. Maltsev criticises the idea of compromise as the social and legal nature of exemption from criminal responsibility. This approach, in his opinion, oversimplifies the essence and leads to a lower level of requirements to the bodies of enquiry and investigation, as it is associated with the difficulty of proving, revealing the

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[1] See: *Alikperov H.D.* [Prestupnost' i kompromiss] Crime and compromise. Baku: Elm Press, 1992. P. 62.

[2] *Alikperov H.D.* [Novy UK: Problemy osvobozhdeniya ot ugolovnoy otvetstvennosti] New Criminal Code: Problems of exemption from criminal liability // [Zakonnost'] Legality. 1999. No. 4. P. 12.

[3] See, e.g.: *Kelina S.G.* [Osvobozhdenie ot ugolovnoy otvetstvenosti kak pravovoe posledstvie soversheniya prestupleniya] Exemption from criminal liability as a legal consequence of committing a crime // [Ugolovnoe pravo: novye idei] Criminal law: new ideas. M.: Publishing house of IGIP RAS, 1994. P. 68 et al; *Naumov A.V.* [Ugolovnoe pravo. Obshchaya chast'] Criminal law. The general part. Course of lectures. M., 1996. P. 442; *Sverchkov V.V.* [Osnovaniya osvobozhdeniya ot ugolovnoy otvetstvennosti i (ili) nakazaniya: Sistema, zakonodatel'naya reglamentatsiya, effektivnost' primeneniya] Grounds for exemption from criminal responsibility and (or) punishment: system, legislative regulation, effectiveness of application. P. 4; *Sokolov A.F.* [O problemakh osvobozhdeniya ot ugolovnoy otcetstvennosti v sootvetstvii s primechaniyami k stat'yam 222 i 223 UK RF] On the problems of exemption from criminal responsibility in accordance with the notes to articles 222 and 223 of the Criminal Code // [Differentsiatsiya otvetstvennosti i problem yuridicheskoy tekhniki v ugolovnom prave i protsesse] Differentiation of responsibility and problems of legal technique in criminal law and procedure. Yaroslavl: Yaroslavl University Press, 2002. P. 133.

[4] *Yanina Ya.Yu.* [Teoreticheskie i prakticheskie aspekty primeneniya kompromissov dlya razresheniya konfliktov predvaritel'nogo sledstviya] Theoretical and practical aspects of the use of compromises to resolve preliminary investigation conflicts: Thesis paper. Candidate of Juridical Sciences. Kaliningrad, 2007. P. 14.

crime, is fraught with the weakening of the criminal protection of the individual, society and the government. "Among other things, compromise does not restore social justice, hardly contributes to correction, and reduces the effectiveness of general prevention"[1].

The Russian society has always been favourably disposed towards criminals and their forgiveness by the government over the years. However, it will hardly take as kindly to the behind-the-scenes agreements between the criminal and the government, which, as it turns out, are the result of the government's weakness in the fight against crime[2]. Another author, I.L. Marogulova[3] explains the legal nature of exemption from criminal responsibility, discussing, in particular, amnesty, by the mercy to the offender, forgiveness on behalf of the state and society.

Certainly, the element of forgiveness, leniency is present (in varying degrees) in almost every type of exemption from criminal responsibility. On the other part, if we consider that forgiveness is the essence of exemption from criminal responsibility[4], it must be recognised that by forgiving the perpetrator of the crime (given that he does not need criminal measures), the government in such cases does not set goals neither for the person who committed the crime, nor for the victim, nor for the interests of society and the government. Therefore, the legal nature of exemption from criminal liability is not reducible to forgiveness. For example, M.N. Kaplin believes that exemption from criminal responsibility is release from the need to undergo the *impact* provided for in the law as a *measure*. In this case, the necessary goal has already been achieved, therefore it results in the no-action decision, no-use of the means, measures[5].

Exemption from criminal liability is not a complete and absolute forgiveness of a person who has committed a crime, according to F.R. Sundurov, it is a manifestation of certain leniency towards a person in cases where public danger (its degree) *allows* not to apply to him the law restrictions included in the content of criminal

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[1] *Maltsev V.* [Osvobozhdenie ot ugolovnoy otvetstvennosti v svyazi s istecheniem srokov davnosti] Release from criminal liability due to expiry of statute of limitations // [Ugolovnoe pravo] Criminal Law. 2006. No. 1. P. 46.

[2] Ibid.

[3] *Marogulova I.L.* [Zakonodatel'nye problem amnistii i pomilovaniya] Legislative Problems of Amnesty and Pardon // [Zhurnal rossiyskogo prava] Journal of Russian Law. 1998. No. 1. P. 44.

[4] See: [Ugolovnoe pravo. Obshchaya chast': uchebnik] Criminal law. General part: textbook / *Edited by A.N.* Tarbagayev. M.: Prospekt, 2015. P. 387.

[5] *Kaplin M.N.* [K voprosu o ponyatii ugolovnoy otvetstvennosti] On the concept of criminal responsibility // [Differentsiatsiya otvetstvennosti i voprosy yuridicheskoy tekhniki v ugolovnom prave i protsesse] Differentiation of responsibility and issues of legal technique in criminal law and procedure: Collection of scientific articles. Yaroslavl: Yaroslavl University Press, 2001. P. 77.

liability, it demonstrates the negative attitude of the legislator to the formal approach in the matter of grounds and limits of criminal liability[1].

The government cannot refuse to prosecute a person who has committed a crime," stresses V.K. Duyunov, "the legal relationship that has arisen between these subjects cannot fail to reach its logical conclusion, ending in 'nothing' – the refusal to prosecute the perpetrator"[2]. He considers the exemption from criminal liability as a measure of criminal influence. F.R. Sundurov[3] comes to the same conclusion – exemption from criminal liability is a measure of criminal influence, but justifying it in a slightly different way.

Of the views expressed in the literature on the legal nature of the institute of exemption from criminal liability, the latter seems more in line with the nature of the institute in question. Indeed, if the government does not refuse, but on the contrary, assumes certain goals and objectives (in relation to the person who committed the crime, the victim, the interests of society and the state, etc.), then, accordingly, any type of release from criminal responsibility represents a measure (*measure* means implementation of something; action, a set of actions defined by socially significant task[4]). Since the institution under study is regulated by the norms of criminal law, focused on the goals and objectives defined precisely by criminal law and in the sphere of criminal law, this measure is certainly of criminal nature. And since this measure is an incentive, encouraging the perpetrator of the crime to show positive behaviour (actions for the benefit of the victim, assistance in solving the crime and special prevention, as well as many other things), therefore, it is a measure of criminal incentive. A proper understanding of the legal nature of the institute of exemption from criminal liability, in our opinion, is the basic, key condition allowing for a significant increase in its potential.

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[1] [Ugolovnoe pravo Rossii. Obshchaya chast'] Criminal Law of Russia. General part / Edited by F.R. Sundurov, I.A. Tarkhanov. Kazan: Kazan University Press, 2009. P. 587, 588.

[2] *Duyunov V.K.* [Ugolovno-pravovoe vozdeystvie. Teoriya i praktika] Criminal law impact. Theory and practice. P. 310.

[3] See: [Ugolovnoe pravo Rossii. Obshchaya chast'] Criminal Law of Russia. General part / Ed. by F.R. Sundurov, I.A. Tarkhanov. P. 587–595.

[4] *Ozhegov S.I., Shvedova N.Y.* [Tolkovyy slovar' russkogo yazyka] The Explanatory Dictionary of the Russian Language / V. V. Vinogradov Russian Language Institute of the Russian Academy of Sciences. 4th ed. M.: Azbukovnik Publisher, 1999 (2001). P. 350, 351.

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ON THE QUESTION OF LEGAL NATURE OF PRE-EMPTIVE RIGHT

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Abstract: The subject of this report is the legal nature of the pre-emptive right, which, in the author's opinion, should be seen as an independent subjective right that is, in some cases, an element of a civil legal relationship.

One of the theses is the idea that the pre-emptive right does not have a binding legal nature, since there is no counter obligation that corresponds to this right. There are no signs of obligation, including obligation arising on the basis of the law, since there is no active and passive subject. At the end of the study, the author concludes that the pre-emptive right is a set of legal norms regulating the regime of its exercise. In this regard, we can speak of a legal institution of pre-emptive rights. In a subjective sense, the pre-emptive right is an independent subjective right, established by law, of a participant in a certain legal relation (right in rem, right in personam, corporate law, etc.), which is an element of it, aimed at protecting other subjective rights of participants in such legal relations.

Keywords: civil law, preemption, civil law, legal doctrine, theory of law, realization of law, obligations

Civil law scholars who have not yet agreed on an unambiguous definition of this legal construct, have repeatedly investigated the legal nature of pre-emptive right[1].

[1] In the pre-revolutionary period, an outstanding scholar of that time I. A. Pokrovsky, within the framework of the classification of property rights to other people's things given by him, classified the right of pre-emptive purchase as the third group of rights to other people's things (author's note – limited property rights), the so-called rights to acquire a known thing. See: *Pokrovsky I.A.*. [Osnovnye problem grazhdanskogo prava] Main Problems of Civil Law. M., 1998. P. 207–208. *Professor V.P.*

It thus continues to be one of the debatable issues of civil law before and now.

Pre-emptive rights are known to be peculiar to various sub-branches of civil law. The legislator has introduced the construct in property, debt, inheritance and corporate law.

At present, there is much academic debate about the legal nature of the pre-emptive right. Scholars are trying to unambiguously determine whether the pre-emptive right is a right in rem[1], in personam[2] or is a secondary law[3], which is a

Gribanov, Russian civil expert, wrote that pre-emptive rights in Soviet civil law are understood as cases where, all other things being equal, the law grants an advantage to a certain group of people who have some special characteristics. See: *Gribanov V.P.* [Osushchestvlenie i zashchita grazhdanskikh prav] Exercise and Protection of Civil Rights. M., 2001. P. 295. One cannot disagree with the given conclusion. It is well known that the legislator in different legal relations, for example, rights in rem, rights in personam, corporate law, and so on, realizes the construction of the pre-emptive right. In other words, we can presume that this or that legal relation will determine the group of persons to whom the pre-emptive right is granted in accordance with the law. The legal relationship is the boundary within which the pre-emptive right exists. The construction of pre-emptive rights is essentially designed to protect a legal relationship from the intrusion of third parties who are not the subjects of the relationship. This is rightly pointed out by D.V. Lomakin, noting that the pre-emptive right should not be regarded as a right to protection but as one of the ways to protect subjective civil rights. See: *Lomakin D.V.* [Korporativnye pravootnosheniya: obshchaya teoriya i praktika ee primeneniya v khozyaystvennykh obshchestvakh] Corporate legal relations: general theory and practice of its application in commercial companies. M., 2008. P. 421. Consequently, the pre-emptive right is necessary for protection of subjective civil rights of participants of this or that legal relation which cannot be protected in any other way, except for granting of the pre-emptive subjective right. The legal nature of the pre-emptive right as applied to corporate legal relations has been the subject of independent scientific research. See: *Kachalova A.V.* // Legislation. No. 1. 2017.

[1] For example, L.Yu. Leonova notes that the pre-emptive right to purchase a share has the same characteristics as other rights in rem, in particular: the pre-emptive right follows the property, not the obliged person; the exercise of the right of pre-emption does not entail its termination (if there is common ownership). The right to another's property terminates in the same way as other rights in rem. In particular, when a thing is destroyed, the right in rem to it terminates and the pre-emptive right terminates accordingly. See: *Leonova L.Yu.* [Preimushchestvennye prava v grazhdanskom prave] Pre-emptive rights in civil law: Thesis, Doctor of Law. M., 2005. P. 22.

[2] Some researchers, in particular O.E. Blinkov and S.E. Nikolsky, come to the conclusion that the pre-emptive right has a binding nature, as it is implemented in a legal relationship that meets all the characteristics of an obligation arising on the basis of the law. See: *Blinkov O.E., Nikolskiy S.E.* [Preimushchestvennye prava v nasledstvennom prave Rossii i zarubezhnykh stran] Preferential rights in inheritance law of Russia and foreign countries: Monograph. M., 2006. P. 59.

[3] K. Sklovsky and M. Smirnova, consider the institute of pre-emptive purchase through the prism of secondary law. They point out that "the position of the seller who has made a declaration of intention to sell a share (thing, right) can be described as a binding, but not as an obligation. The position of the seller who made the sale bypassing the subject of the pre-emptive right can also be described: the seller is bound by the fact that the subject of the pre-emptive right can become the buyer in the contract. Moreover, which is characteristic of secondary law, the bound person can in no way affect the exercise of this right by the other party, including by committing (failing to commit) any

kind of prerequisite for the acquisition of other rights and obligations and which scientists have singled out as a special group of rights due to the fact that they are not subject to any obligation[1]. Occasionally, however, other views are expressed, in particular those that view the pre-emptive right as an element of legal capacity.

In view of the above, it should be noted that the consideration of pre- emptive rights as rights in rem does not take into account the fact that rights in rem are absolute, whereas pre-emptive rights are always relative in nature because they arise between parties to a legal relationship.

The pre-emptive right is also not of a binding nature, as there is no countervailing obligation to this right. There are no binding signs including one based on the law, as there is no active or passive subject. According to Article 307 of the Civil Code of the Russian Federation, by virtue of anobligation, one person (debtor) is obliged to perform a certain action in favour of another person (creditor) such as to transfer property, perform work, render a service, contribute to joint activities, pay money, etc., or to refrain from a certain action, and the creditor is entitled to demand that the debtor fulfils his obligation. The act of the obligated person is not present in case of subject matter of an obligation. The obligation incumbent on the person who must exercise the pre-emptive right on the other person(s) is limited to notifying them of his or her intentions. The pre-emptive right itself is limited to a certain period of time, after which the person obliged to comply with it ceases to be bound by the pre-emptive right of the other person(s). The pre-emptive right is not infinite! Only until the expiry of the statutory period may a party to a relationship exercise the pre-emptive right granted to it, under the conditions established by law. However, it arises anew each time a participant in the relationship decides to withdraw from it by selling a thing, a share or a right. In this case, the holder of right has no right to claim his pre-emptive right, which is not characteristic of an obligation, where it is almost always possible to compel the debtor to fulfil the obligation. A person, whose pre-emptive right has been violated, can only demand the transfer of rights and obligations under a contract entered into in violation of the pre-emptive right.

Therefore, this is solely an obligation to respect the pre-emptive right of the person entitled to it, which arises at the onset of statutory cases, such as the sale

actions to exclude its exercise. Further, the authors note that the mere fact that the seller's declaration of sale, stating all its essential terms, should be regarded as an offer, apparently predetermines the qualification of the seller's position as a whole by means of the category of secondary law". See: *Sklovsky K., Smirnova M.* [Institut preimushchestvennoy pokupki v rossiyskom i zarubezhnom prave] Institute of pre-emptive purchase in Russian and foreign law // Economy and Law. 2003. No. 10. P. 104.

[1] See: *Alekseev S.S.* [Odnostoronnie sdelki v mekhanizme grazhdansko-pravovogo regulirovaniya] Unilateral transactions in the mechanism of civil law regulation // [Antologiya ural'skoy tsivilistiki] Anthology of Ural civilistics, 1925–1989: Collection of articles. M., 2001. P. 64–66; *Bratus S.N.* [Sub'ekty grazhdanskogo prava] Subjects of civil law. M., 1950. P. 9.

of a share in the share capital of a limited liability company to a third party, etc. This obligation does not correspond to the pre-emptive right, but is a completely independent, unilateral obligation, which terminates upon expiry of a legal term that occurs upon sending the relevant notification to the entitled person. Obligations legal relationship may arise through the exercise of the right of first refusal of the consent of the holder of right, subject to his positive expression of will to enter into this obligations legal relationship, or, in the event of a transaction with violation of the pre-emptive right of the holder of right, if the latter wishes to claim the transfer of rights and obligations under a contract concluded in breach of the pre-emptive right. In the event that the holder of right does not wish to exercise his pre-emptive right within the statutory period, no legal relationship will arise at all.

In our view, with regard to the consideration of pre-emptive right as secondary law, i.e. not imposing any obligation on anyone, but only binding a person in a certain way, the following should be noted. The category of secondary rights itself is very imperfect. It is not universally accepted by all scholars. Its justification is in itself highly controversial. It should only be emphasised that, as a rule, the adherents of the category of secondary law, as a rule, cite the offer as the main and perhaps the only example of a secondary law, which, in the opinion of the researchers of this category, although it binds the offerer, does not oblige him to take certain actions. However, for example, O.A. Krasavchikov considered the offer as an incomplete part of the legal composition, not generating any legal consequences, even though incomplete consequences. The scientist rightly, in our view, noted that the legal significance of the offer itself lies in the plane of relations to conclude a contract, but not in the plane of the legal relations, to the emergence of which it is aimed. It is a legal fact that is part of the legal composition of a contractual legal relation[1]. This is the legal significance of the offer, and recognizing it as a secondary law does not bring us any closer to establishing the essence of the phenomenon.

The concept of pre-emptive right is also present in corporate legal relations relating to participation in business companies and production co-operatives, which we can in no way refer to either right in rem, right in personam or secondary law, as rightly pointed out by D.V. Lomakin[2].

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[1] See: *Krasavchikov O.A.* [Kategoriya nauki grazhdanskogo prava] Categories of Science of Civil Law. Selected Works: In 2 vols. Vol. 2. M., 2005. P. 111.

[2] Thus, the Russian scholar D.V. Lomakin repeatedly notes in his works that legal relations of participation (membership) that develop in organizations called corporations do not have attributes of obligations, in connection with this, cannot be called binding legal relations. Regarding the proprietary nature of corporate legal relations, account notes that in the vast majority of cases participation (membership) rights are not characterized as classical proprietary rights, because it is obvious to specialists that there is no sufficient basis for this. See: *Lomakin D.V.* Op. cit. P. 114–123.

In our opinion, pre-emptive rights by their nature cannot be attributed to right in rem, right in personam, corporate law or other legal relations. These relations are an external "shell" within which pre-emptive rights can be exercised in the cases prescribed by law. It exists within these legal relationships. Their existence is a necessary precondition for the emergence, existence and termination of pre- emptive rights.

Concerning the essence of the legal construct of pre-emptive rights, it must be borne in mind that undoubtedly there is a certain relationship between the subjects, but this relationship is determined solely by the legal relationship within which the exercise of the pre-emptive right by the authorised person is possible, not by the pre-emptive right itself, which cannot exist outside of the legal relationship[1].

The pre-emptive right should therefore be seen as a separate subjective right that is an element of a civil legal relationship in a number of statutory cases.

In this connection, the following common characteristics can be identified, which are characteristic of the pre-emptive right constituting the content of the various legal relations (right in rem, right in personam, corporate law and others) set out in the current civil legislation.

Firstly, a constitutional feature of a pre-emptive right is that it is usually derived from a rule of law established by law, which determines its content, as a result of which it cannot be abrogated by the executive body[2]. As far back as Dmitry Ivanovich Meyer, speaking of privileges in Russian civil law, pointed out that privileges are established by an act of the legislature, for this authority alone is called upon to establish rights[3].

Secondly, a pre-emptive right only exists and is only exercised in a certain legal relationship.

Thirdly, the pre-emptive right for each holder of right is always the original right, not based on the former proprietor of a right.

Fourthly, the pre-emptive right is inextricably linked to an empowered person holding an interest in a particular property, so that it cannot be transferred (ceded) to a third party.

Fifthly, as stated above, the pre-emptive right can be exercised for a legally specified period, after which it expires, indicating its fixed-term nature.

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[1] In this regard, it should be noted that D.V. Lomakin rightly considers pre-emptive rights as elements of the content of corporate legal relations. See: *Lomakin D.V.* Op. cit. P. 396–421.

[2] As was the case with the adoption by the Ministry of Economic Development of Order No. 411 dated 01.08.2018 On Approval of Model Charters under which Limited Liability Companies may Act, which essentially abolished the pre-emptive right established by the imperative provisions of Article 93 of the Civil Code and Article 21 of the Federal Law On Limited Liability Companies dated 08.02.1998 No. 14-FZ.

[3] See: [Russkoe grazhdanskoe pravo] Russian Civil Law (in 2 parts) Revised and Amended 8th edition, 1902. Ed. 3, revised. M., 2003. P. 263.

Sixthly, the pre-emptive right can be exercised by all parties to a legal relationship in the event of circumstances defined by law, such as the intention of one of the parties to sell a share in the right or shares to a third party.

Seventhly, the pre-emptive right can only be violated by the subject of a legal relationship.

In essence, the legislator is creating similar rules for a comparatively wide range of relations. In this connection, it is conceivable that pre-emptive rights could well be regulated by rules of a general nature, which could be applied to various legal relations and, in relation to each specific relation, could, as now, be provided for by special rules regulating special, specific cases peculiar to that relation.

The obligation to respect pre-emptive right is common to all parties to a legal relationship. If the legal relationship is static, the pre-emptive right is reciprocal; all participants are entitled to it. As soon as one of the participants plans the dynamics of the legal relations, the other participants are obliged to respect the priority of the other participants. The person who violates the pre-emptive right of the holder(s) of right bears the disadvantage that a third party who is the buyer, may cease to be a party to the contract they have entered into.

In a narrow sense, it is the right of one participant in a legal relationship to information about the intentions of the other participant in the legal relationship, within which the exercise of pre-emptive rights is possible. In a broader sense, it is the opportunity to increase ones, for example, corporate law by applying, among other things, liability measures in the form of a claim for the transfer of rights and obligations under the contract to oneself.

It is axiomatic that[1] a subjective right is a measure of the permissible behaviour of the subject of a civil legal relationship, as enshrined in the academic literature. Recognizing the pre-emptive right as an independent subjective right and not secondary to any other right, each time the legislator clearly defines its content and the powers that comprise it, which always depend on the type of legal relation within which the exercise of the pre-emptive right is envisaged by the legislator. It is known that each type of legal relationship may have a different content of the pre-emptive right itself. Thus, the content of the pre-emptive right (the powers within it) will depend on the type of relationship within which it is exercised.

To summarize the above, it should be noted that pre-emption right is, in an objective sense, a set of legal rules governing the regime for its exercise. In this regard, we can speak of a legal institution of pre-emptive rights. In a subjective sense, the pre-emptive right is an independent subjective right, established by law, of a participant in a certain legal relation (right in rem, right in personam, corporate

[1] See: [Grazhdanskoe pravo] Civil Law: In 4 vols. Vol. I. General Part: Textbook / Under the editorship of Professor E.A. Sukhanov. 3th edition, revised and supplemented. M., 2004. P. 121.

law, etc.), which is an element of it, aimed at protecting other subjective rights of participants in such legal relations.

Thus, there is no need to distinguish between a pre-emptive right in rem, a pre-emptive right in personam or a pre-emptive corporate law. The pre-emptive is one, but with different contents, depending on the specifics of the relationship.

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COMMENTARIES

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PROTECTION OF CIVIL RIGHTS THROUGH MECHANISM FOR SUPPRESSION OF UNFAIR COMPETITION AND AVOIDANCE OF ABUSE OF EXCLUSIVE RIGHT TO A TRADEMARK

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Abstract: The article investigates separate issues of civil rights protection in case of violation of balance of rights and interests of participants of civil legal relations due to unfair competition and abuse of exclusive right to a trademark. The paper focuses on the study of the essence of abuse of rights and unfair competition and how the two categories relate to each other. The author has analyzed the possibility to define some special corpus delicti constituting the abuse of the exclusive right to a trademark and unfair competition and made a conclusion about the inexpediency of the legislative definition of such corpus delicti. The analysis of judicial practice has revealed a number of criteria that should be taken into account when qualifying actions to acquire and exercise an exclusive right to a trademark as an abuse of right or unfair competition and an obligatory component of any composition is the bad faith of participants of civil legal relations.

Keywords: unfair competition, abuse of exclusive right, trademark, balance of interests, protection of civil rights, means of protection of civil rights, general limits of realization of rights, limits of subjective right, limits of exercise of civil rights, exclusive right to a trademark

Much attention is now being paid to the problem of balancing the rights and interests of the parties to civil legal relations and protecting them. Persons, whose rights have

been infringed because of unfair competition or the abuse of rights by others, often seek the protection of a violation of the balance of rights and interests. Despite the fact that the institutions of unfair competition and abuse of law have long been known, many issues related to abuse of law and unfair competition remain unexplored. Disputes arise primarily in determining the essence of abuse of right and unfair competition and in deciding how the two categories are related. Court practice also faces the problem of defining what constitutes unfair competition and abuse of right, although the courts have gained some experience in defining the criteria to be taken into account when acquiring and using a right to be recognized as abuse of right or unfair competition. There is extensive court practice relating to unfair competition and abuse of the exclusive right to a trademark, but not all issues are resolved here either.

There is no legal definition of abuse of right and unfair competition in the Russian Civil Code. Article 10 of the Civil Code of the Russian Federation contains only prohibitions on actions that can be classified as abuse of right or unfair competition. Under Article 10(1) of the Civil Code, civil rights may not be exercised solely with the intent to cause harm to another person, to circumvent the law with an unlawful purpose, or to exercise civil rights in bad faith (abuse of right).

The use of civil rights to restrict competition and the abuse of a dominant market position are prohibited.

Since the law expressly prohibits such acts, the use and abuse of civil rights to restrict competition (unfair competition) is considered an offence. However, this is a special kind of offence. The specifics are as follows:

Firstly, it follows from Article 10(1) of the Civil Code of the Russian Federation that a person who is empowered to commit an offence is exercising the right granted to him by law.

Secondly, in exercising the right granted to the holder of right, the holder of right acts, on the one part, lawfully, within the specific boundaries established by law which define the content and scope of the right in question but, on the other part, in bad faith or consciously in bad faith by crossing the general boundaries of the exercise of rights, affecting and violating the rights and interests of others.

These characteristics are common to both right abuse and unfair competition offences. Are there differences between these types of offences? To answer this question, let us look at each of them. Let us look at the doctrinal definition of abuse of right.

V.P. Gribanov has very accurately characterised the abuse of rights, attributing it to a special type of civil offence "committed by an empowered person in the exercise of a right belonging to him, involving the use of impermissible specific forms within the general type of conduct permitted by law"[1].

[1] *Gribanov V.P.* [Osushchestvlenie i zashchita grazhdanskikh prav] Exercise and Protection of Civil Rights. M., 2001.

A.P. Sergeev holds a similar position in defining the concept of abuse of right, considering it as "actions of the subjects of civil legal relations, committed within the framework of the rights granted to them, but in violation of their limits". At the same time, he adds that it is a special type of civil offence, the main specificity of which lies in the fact that the actions of the offender formally rely on the right belonging to him, but in the concrete implementation of it, they take such a form and nature that it leads to the violation of the rights and protected interests of other persons[1].

In formulating the definition of abuse of right, A.P. Sergeev admits to an inaccuracy. There is a certain contradiction in the definition. On the one part, the author points out that in the case of abuse of rights, the actions of the subjects of civil legal relations are carried out within the limits of the rights granted to them and, therefore, are formally lawful. This conclusion also follows from the author's subsequent explanations.

However, in characterising the abuse of rights, he links the actions of a person to a violation of the limits of the right. One cannot agree with this interpretation of the category of abuse of rights. A person's actions that go beyond the content of the right (the limits of the right) are unlawful, violating specific rules of law and have nothing to do with the abuse of the right. "In the science, the limit of a subjective right is understood as the measure of permissible behaviour, the sphere of subjective right outside of which there is no right and overstepping it would mean intrusion into the sphere of another person's right"[2].

Take, for example, the exclusive right to an appellation of origin. Pursuant to Article 1519 of the Civil Code of the Russian Federation, the holder of this right is given the opportunity to use this designation in any manner not inconsistent with the law, including: on goods, on labels, on the Internet and by other means specified in clause 2 of Article 1519 of the Civil Code. However, disposal of the exclusive right to the appellation of origin of goods, including through its alienation or granting another person the right to use the appellation of origin, is not allowed.

The boundaries of the exclusive rights to a firm name are similarly narrow. In accordance with Article 1474 (1) of the Civil Code of the Russian Federation, a legal entity has the exclusive right to use its firm name as a means of individualization in any way that is not contrary to the law, including by indicating it on signboards, letterheads, bills and other documentation, in advertisements, in advertising on

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[1] [Grazhdanskoe pravo] Civil Law. Vol. 1 / Under the editorship of A.P. Sergeev and Y.K. Tolstoy. M., 1996.

[2] *Nazarov A.G.* [Predely osushchestvleniya isklyuchitel'nogo prava na rezul'taty intellektual'noy deyatel'nosti] Limits of Exercising the Exclusive Right to the Results of Intellectual Activity. M.: Prospekt, 2017.

goods or on packaging, on the Internet. Like the exclusive right to the appellation of origin, the exclusive right to a firm name lacks the power of disposal.

Exclusive right to a trademark has the most comprehensive content. Possession of an exclusive right to a trademark allows the owner to use the trademark to indicate the goods produced and marketed by it, as well as to freely dispose of it.

An exclusive right does not only have limits that determine its content. There are also limits to the scope of exclusive rights defined by the rules of law (temporal, subjective, territorial and others). In the literature, they are also referred to as the limits on the existence of the right[1]. Outside these boundaries, the right also does not exist and cannot be relied upon.

For example, the exclusive right to a trademark has a time limit of existence (the duration of the exclusive right to a trademark is 10 years, counted from the date of receipt of the application at Rospatent), territorial and others. Moreover, the validity of an exclusive right to a trademark is limited to a certain list of goods in respect of which the trademark is registered.

It is not the boundaries of the right that are violated, but the limits of the exercise of civil rights, which are not defined by law. Therefore, the person abusing the right acts, without violating specific rules of law, within the limits of the rights granted to him or her. The limits on the exercise of civil rights are set by imposing general prohibitions on acts in the exercise of one's right, whether deliberately or not deliberately disregarding the rights and interests of other parties of civil proceedings.

Unfair competition is legally defined unlike abuse of right, which has no legal definition. The Law On Protection of Competition defines unfair competition as any actions of business entities (a group of persons) which are aimed at obtaining advantages in business activities, contrary to the legislation of the Russian Federation, customs of business turnover, requirements of good faith, reasonableness and fairness and which have caused or may cause losses to other business entities, i.e. competitors, or have caused or may cause damage to their business reputation.

As follows from Part 2 Article 14 of the Federal Law No.135-FZ of July 26, 2006 On Protection of Competition, these acts are connected, in particular, with the acquisition and use of the exclusive right to the means of individualization of a legal person, products, works or services. Examples of such acts, acts of unfair competition, are listed in Article 10 bis of the Convention for the Protection of Industrial Property (Paris, March 20, 1883). These include:

1) all acts capable of causing confusion in any way with respect to the business, products or industrial or commercial activities of competitors;

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[1] [Kommentariy k chasti chetvertoy Grazhdanskogo kodeksa RF] Commentary to Part Four of the Civil Code of the Russian Federation / Under the editorship of A.L. Makovsky. M., 2008.

2) false statements during the conduct of business that could discredit a competitor's company, products or industrial or commercial activities;

3) indications or statements, the use of which in the course of business is likely to mislead the public as to the nature, manufacturing method, properties, suitability for use or quantity of the goods.

Acts that would constitute an act of unfair competition can take place both at the stage of acquiring exclusive rights (e.g. at the registration stage) and at the stage of using them. This point of view is held by some academics[1]. The same position can also be seen in judicial practice.

The definition of unfair competition contained in the Act and the list of acts of unfair competition make it possible to identify its characteristic features and to compare unfair competition with abuse of law.

Firstly, it follows from the definition that in case of unfair competition actions are committed which contradict not only the requirements of good faith, reasonableness and fairness, but also the legislation of the Russian Federation. However, this does not mean at all that the rules determining the limits of the right of the person engaged in unfair competition are violated. Actions contrary to the legislation of the Russian Federation in the meaning of Article 14 of the Law On Protection of Competition shall include such actions, which violate the limits of exercise of civil rights established by law. In particular, such general limits of exercise of civil rights are set out in Article 10 of the Civil Code of the Russian Federation, Article 10-bis of the Convention for the Protection of Industrial Property. Chapter 4 of the Civil Code of the Russian Federation also contains a number of rules defining the limits of the exercise of the exclusive rights to the means of individualization. For example, according to §2 of Article 1488 of the Civil Code of the Russian Federation, the alienation of the exclusive right to a trademark is not allowed if it may mislead the consumer regarding the goods or the manufacturer. Article 1486 of the Civil Code of the Russian Federation also defines the limits of the exclusive rights to a trademark. This article contains a rule on the possibility of early termination of the exclusive right to a trademark in respect of the respective goods for the individualization of which the trademark is registered due to its non-use for three years.

It follows from the above that the use of exclusive rights to means of individualization by business entities, which is restricted by law, is lawful, which is also characteristic of the actions of abusers of their rights.

Secondly, the person engaged in unfair competition is the holder of right who is engaged in entrepreneurial activities. The direct object of protection against such unfair competition is free competition, so it is necessary to establish the existence

[1] *Korneev V.A., Rassomagina N.L.* // [Zhurnal Suda po intellektual'nym pravam] Journal of the Court of Intellectual Rights. 2015. No. 8.

of competitors of the right holder whose interests may be infringed by the actions of the right holder and due to which he acquires advantages in order to recognize the actions of the holder of right to use the exclusive right to means of individualization as unfair competition.

Since unfairness shall be present against the background of a competitive relationship, it is necessary to establish the existence of competitors both at the time of the acts to acquire the exclusive rights and at the time of their use.

The scope of protection against abuse of rights is broader. In an abuse of rights, not only business entities but also consumers and individuals are affected. Their interest will be the subject of protection.

Thirdly, in order to recognize the actions of the right holder to acquire and use exclusive rights as an act of unfair competition it is necessary to identify the unfairness of the purpose of acquisition of the means of individualization and the intention to cause harm to other business entities, competitors of the right holder. It directly follows from Article 10 bis of the Paris Convention, according to which, in the process of qualifying the acquisition of an exclusive right to a trademark as an act of unfair competition, one must take into account the presence of dishonesty, the desire to use the situation to one's advantage, to profit from it to the detriment of the interests of others.

If no bad faith target is identified (e.g. there were no competitors at the time the exclusive right to the trademark was acquired), but nevertheless the interests of business entities were affected by the exercise of exclusive rights by the holder of right, then other means of protection using the mechanism of avoiding abuse of right can be applied.

Thus, the institute of abuse of right and unfair competition, with some differences, have much in common. What they have in common is the specifics of the offences: the common purpose of prohibiting actions abusing rights and restricting competition, namely, seeking to achieve a balance between the interests of participants in civil legal relations. The form and nature of rights exercised in abuse of rights and unfair competition may also be common. In both cases, the principle of good faith is violated.

It can be agreed that there is little difference between these institutions. Some even tend to regard unfair competition as a form of abuse of right.

Unfair competition and abuse of exclusive rights to a trademark are possible both at the stage of their acquisition (registration) and at the stage of use. The forms of unfair competition and abuse of the exclusive right to a trademark are not legally defined.

A proposal has been made in the literature to define "certain special offences constituting abuse of right and unfair competition"[1] in the general provisions. The

[1] *Dozortsev V.A.* [Intellektual'nye prava. Ponyatie. Sistema. Kodifikatsii.] Intellectual rights. Concept. System. Codification. M.: Statut, 2005.

feasibility of defining such offences may be questioned because, firstly, only an indicative list is proposed. Secondly, the law already defines the criteria based on which actions related to the purchase and use of exclusive rights to a trademark may be recognized as an abuse of right or unfair competition. Thirdly, there is no need to distinguish between forms of unfair competition and abuse of right. Because whenever, in exercising one's exclusive rights to a trademark, one acts in violation of the rights of third parties, there is unfair competition, which we associate either with unfair competition if it restricts competition, or with abuse of right if the rights of third parties are infringed, not the competitors rights, either with both.

Most often, bad faith manifests itself already at the stage of trademark registration. The most common manifestation of bad faith in registration is the filing of a trademark application without the purpose of further use. Trademarks in this case are registered with a view to their subsequent reimbursable assignment to the real manufacturer, or with a view to removing from the market the goods marked by the real manufacturer.

A rightfully acquired trademark monopoly may also be regarded as an act of unfair competition if the trademark is not used by the holder of right continuously for any three years after its state registration (§1 of Article 1486 of the Civil Code) and if unfairness on the part of the holder of right is established.

The principle of compulsory use of a trademark enshrined in the Civil Code is inextricably linked to the principle of preventing the knowingly unfair exercise of civil rights and has certain aims:

– minimize trademark ownership by those who do not actually produce goods or provide services, thus preventing real manufacturers with identical or confusingly similar designations from entering the market for goods and services;

– exclude the possession of registrations of such modifications of the same mark, as a result of the existence of which obstacles are created in the production and trade of other parties to civil litigation.

Another case of bad faith is the filing of an application for registration, as a trademark of a designation, which has been developed and put into civil circulation by another person, but for some reason, has not been registered by that person in Russia.

As an example, the case connected with the use of the OVIMEX trademark, which was registered with priority on 29.03.1989 and was used, inter alia, by branches of the original holder of right. Use of this trademark without proper registration continued even after the branches had been transformed into a limited liability company. In 2009, a group of persons entered the market claiming registration of the OVIMEX trademark and all other persons, including affiliates of the original holder of right, using the trademark without the consent of the company were considered as offenders.

The court agreed with the Federal Antimonopoly Service's decision that the actions of a group of persons relating to the registration and use of a trademark contained elements of unfair competition. Attention was drawn to the following:

– when applying for registration of the trademark, the applicant was aware of the use of the OVIMEX designation by other business entities. However, for the individualization of its activities and registration of the trademark it chose this particular designation;

– knowing that the use of the disputed trademark had been carried out long before its registration, being a bona fide business entity and not wanting to cause losses to competitors, the group of persons should have notified business entities using the OVIMEX designation as a means of individualization of their intention to register the designation as their trademark. However, such information was communicated to the relevant persons after the purchase (registration) of the trademark.

Another glaring example of bad faith in applying for registration as a trademark of a designation that was used before registration by others is the use as a trademark of famous Soviet brands such as, for example, Yantar, Druzhba and others. The registration of famous Soviet brands in the name of individual private Russian organizations is "an unfair act in relation to other legal entities which were the same legal successors of other Soviet enterprises"[1] and is considered as an act of unfair competition.

In addition to these cases, manifestations of bad faith are actions related to the registration as designation trademarks presenting or containing elements, which are false or capable to mislead consumers about goods or its manufacturer. Such actions may be regarded as both an abuse of right and unfair competition where they may result in obtaining an unjustified advantage by means of acquiring the business reputation of the holder of a well-known trademark.

An example of unfair competition involving the use of designations misleading as a trademark is the registration of a trademark, which is known as a means of individualization of a certain group of goods, for the individualization of another group of goods in respect of which the trademark was originally not registered. An act of unfair competition can occur in such cases only when the possibility is allowed, using the trademark, to join the popularity of the company that manufactures its products marked with a similar trademark. In fact, such registration of trademarks is made not only for the purpose of individualizing goods, works or services, but also to promote them at the expense of previous financial and other investments made by another business entity in the trademark as such and to acquire its competitiveness.

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[1] *Gavrilov E.* ["Sredstva individualizatsii tovarov i kachestvennye kharakteristiki tovarov"] "Means of individualisation of goods and qualitative characteristics of goods" // Economy and Law. 2014. No. 3.

The unfair competition case of Tessir Partners LTD, which registered the well-known VACHERON CONSTANIN trademark (registered much earlier in relation to goods in Class 14 of the International Classification of Goods and Services (watches, clockworks, etc.) in relation to goods in Class 25 of the International Classification of Goods and Services (clothing, footwear, headwear), is a prime example.

In April 2012, the Presidium of the Supreme Arbitration Court of the Russian Federation considered a dispute between two companies, one of which (Swiss) had exclusive rights to the VACHERON CONSTANTIN (VACHERON & CONSTANTIN) trademark in respect of goods in Class 14 of the International Classification of Goods and Services (watches, watch movements, etc.), while the other had exclusive rights to the same trademark but in respect of goods in Class 25 of the International Classification of Goods and Services (clothing, footwear, headgear). The Swiss company challenged the granting of legal protection to the VACHERON CONSTANTIN trademark for goods in Class 2 of the International Classification of Goods and Services (clothing, footwear, headgear). The Presidium of the Supreme Arbitration Court of the Russian Federation, without denying the fact that both companies are producing and marketing homogeneous goods, referring to §3 of Article 1483 of the Civil Code of the Russian Federation, recognized as obvious the unfair competition from the company, which used the popularity of the VACHERON CONSTANTIN trademark, selling clothing, shoes, hats, the same group of consumers as the Swiss company. In particular, the Presidium of the Supreme Arbitration Court of the Russian Federation drew attention to the following: "In view of the evidence available in the case, including sociological surveys of different segments of consumers confirming the sale of both watches and clothing under the disputed designation to a certain circle of consumers with a high level of income, consumers may have an idea of the possible attribution of these goods to the same place of origin and manufacturer".

In this case, the registration of the disputed trademark, identical to a well-known trademark in respect of goods of another class of the International Classification of Goods and Services, may be aimed at obtaining an unjustified advantage by exploiting the established goodwill of a well-known global brand and may create a risk of misleading the consumer about the goods or their manufacturer.

Thus, the registration under another class of the International Classification of Goods and Services of the disputed VACHERON CONSTANTIN trademark constitutes an act of unfair competition contrary to fair practices in industry and trade matters, prohibited by Article 10-bis of the Paris Convention for the Protection of Industrial Property and Article 10 of the Civil Code".

The registration of a trademark that bears a distant resemblance to a popular trademark with a competitive advantage may also be considered an act of unfair competition and an abuse of right.

The risk of confusion between a trademark that bears a distant resemblance to a well-known trademark is increased by the popularity of the latter, and thus the possibility of obtaining commercial advantages and benefits, which is what the person interested in registering a similar trademark expects or admits.

A typical example is the decision of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 2050/13 dated 18.06.2013, which did not agree with the conclusions of the appellate and cassation jurisdictions to allow ROSHEN to register the combined trademark with the word element "Lastochka-Pevunya" in connection with the lack of graphic and visual similarity with the previously registered Rot Front combined mark with the verbal elements "Lastochka", "Lastochki".

While agreeing with the propriety of comparing trademarks in terms of their graphic and visual similarity, the Presidium of the Federal Antimonopoly Service nevertheless pointed out that, "it is sufficient to be dangerous rather than actually confusing the trademarks in the eyes of the consumer for trademark similarity to be recognized". Rot Front trademarks in relation to confectionery products have a significant distinctiveness, some of the most popular candies in Russia are marked with them. The distinctiveness is enhanced by the presence of a group of trademarks with the specified verbal and pictorial elements, as well as by the length of use of these marks in the Russian market.

Thus, ROSHEN's application for registration in its name of the above combined designation in respect of homogeneous goods is aimed at improperly obtaining commercial benefits and advantages at the expense of the well-known products of Rot Front.

The use as a registered trademark of other designations with a distinctive function belonging to others may also be indicative of unfair competition or an abuse of rights. In particular, Article 10-bis of the Convention for the Protection of Industrial Property (Paris, March 20, 1883) obliges states to prevent any use of geographical indications, which constitutes an act of unfair competition. The Convention also establishes the obligation of States-parties to refuse to register a trademark or to invalidate a registration already made if the trademark contains a false geographical indication that is likely to mislead the public as to the true place of origin of the goods.

It is an abuse of right or an act of unfair competition to use the name of a non-commercial organisation, a domain name, as well as objects of cultural heritage in a trademark. We would like to pay special attention to the objects of cultural heritage, which are widely used in trademarks (e.g. such elements of folklore as Baba Yaga, Ded Moroz, etc.). To what extent is their use in a trademark legitimate?

On the one part, §6 (3) of Article 1259 of the Civil Code of the Russian Federation states that works of folk art (folklore) that do not have specific authors do not constitute objects of copyright and, consequently, are not subject to protec-

tion as objects of intellectual property rights. Thus, the legislator gives everyone the opportunity to freely use objects of folklore. On the other part, the creation of intellectual property, in particular trademarks, on their basis should not restrict the rights of others to use the same objects of popular creativity. In order to ensure a balance of interests and to avoid abuse of right, I believe that the object of folk art can be used in a trademark only as a non-protected element.

The above examples of unfair competition and abuse of the exclusive right to a trademark do not exhaust all the possible special elements constituting this act. There are many of them and each of them is based on the bad faith of the participants in civil legal relations. That is why it is so important to understand the essence of unfairness of participants of civil legal relations in order to qualify acts as abuse of right and unfair competition.

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