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CONTENT

EDITORIAL

Vasyuta Galina Georgiyevna JURISPRUDENCE (LEGAL THEORY): A FRESH APPROACH TO LEGAL THEORY (DOI: <http://dx.doi.org/10.14420/en.2013.6.1>)

LEGAL PROBLEMS IN THE PREVENTION OF CORRUPTION

Davydova Marina Leonidovna, Akhmetova Nailya Akhmetovna PROBLEMS OF METHODOLOGY AND METHODS OF ANTI-CORRUPTION EDUCATION IN RUSSIAN LAW SCHOOLS (DOI: <http://dx.doi.org/10.14420/en.2013.6.2>)

COMPARATIVE LAW RESEARCH

Novikova Alevtina Yevgenyevna, Markhgeim Marina Vasilyevna MITIGATION OF HUMAN RIGHTS RISKS: CONSTITUTIONS OF FEDERAL STATES IN EUROPE (DOI: <http://dx.doi.org/10.14420/en.2013.6.3>)

Markhgeim Marina Vasilyevna, Moskalenko Stanislav Aleksandrovich CONSTITUTIONAL ENTRENCHMENT OF THE PRINCIPLE OF THE EQUALITY OF RIGHTS AND FREEDOMS FOR MEN AND WOMEN: ANALYSES OF FOREIGN PRACTICES (DOI: <http://dx.doi.org/10.14420/en.2013.6.4>)

PSYCHOLOGY OF PROFESSIONAL ACTIVITIES. LEGAL CULTURE

Ovsyanikova Yelena Alekseyevna, Savelyeva Irina Vladimirovna, Dolzhenko Natalya Igorevna PSYCHOLOGICAL CULTURE OF PERSONALITY AS A FACTOR IN THE PREVENTION OF PROFESSIONAL DEFORMATION (DOI: <http://dx.doi.org/10.14420/en.2013.6.5>)

Zubenko Vladimir Mikhaylovich LEGAL EDUCATION OF STAFF OF CLOSED FOSTERING INSTITUTIONS FOR MINORS AND THE FUNCTIONS OF THE MODERN STATE (DOI: <http://dx.doi.org/10.14420/en.2013.6.6>)

LAW-MAKING AND LAW-MAKING PROCESSES

Seredin Pavel Vadimovich LAW-MAKING OF LOCAL SELF-GOVERNING BODIES: PROCEDURE AND RESULTS (DOI: <http://dx.doi.org/10.14420/en.2013.6.7>)

Krasavin Aleksandr Vadimovich PROBLEMS OF LAW-MAKING IN THE AREA OF TECHNICAL REGULATION (DOI: <http://dx.doi.org/10.14420/en.2013.6.8>)

JURISPRUDENCE: PRESENTATION OF A TEXTBOOK

Boshno Svetlana Vladimirovna STATE (DOI: <http://dx.doi.org/10.14420/en.2013.6.9>)

EDITORIAL

JURISPRUDENCE (LEGAL THEORY): A FRESH APPROACH TO LEGAL THEORY

DOI: <http://dx.doi.org/10.14420/en.2013.6.1>

Our editor's office is publishing chapters of a textbook entitled "Jurisprudence" by Svetlana Vladimirovna Boshno, the Editor-in-Chief. We would like to share the purpose of that publication, as well as the reasons for its publication in this magazine, with you.

S.V. Boshno is a professor with a Doctor of Juridical Science. She has worked in the Russian supreme legislative body – the Federation Council – and in the Ministry of Justice of the Russian Federation. In addition, she has more than 20 years of teaching experience and is the author of more than 160 scholarly, academic and publicistic works. In the course of her work on the textbook "Jurisprudence," S.V. Boshno has, among other things, consulted competent authorities who understand the totality of the problems involved in the mutual juridical understanding of Russia, the USA, and Germany (Ch. Osakwe), and who have mastered the subtleties of the terminology and definitions in the field of comparative law (W.E. Butler), as well as specialists from the US Library of Congress Law Library (P. Rodik, P. Craig).

The textbook "Jurisprudence" is the result of cross-cultural analysis and is a search for interrelations and new possibilities for mutual cooperation between legal systems. It should be noted that legal theory is the national name of the basic legal science that is its methodological foundation, and jurisprudence is a traditional Anglo-American encyclopedic science that fulfills a role that is analogous to the role of legal theory in the Russian legal system. S.V. Boshno is attempting to implement the following provision:

"legal theory" = "jurisprudence",

which is a task that is extremely complicated and important. Such an approach is rather eclectic and it is a result of the author's firsthand experience in the transformation of Russian legal doctrine into a source of knowledge that is understandable to representatives of the Anglo-Saxon legal system. "Jurisprudence" by S.V. Boshno is an original publication that is designed for broad readership in

Russia, as well as in English-speaking countries.

The model of the theory of law and state that is accepted in Russia (as well as the model of the theory of state and law) requires a systemic reconsideration and adaptation in order to meet modern social needs and the objectives of legal education. The theory of law is a philosophic science that addresses one's outlook on the world. It is the basis of law and legislation throughout the entire world. The following fact is much more extraordinary. Reforms have radically affected all of the branches of Russian law, legislation and law enforcement, but their methodological basis – the underlying theory of law and state – was preserved practically unchanged. Naturally, this does not answer the needs of the modern age and it has, in no small degree, lost its prognostic and heuristic principles. S.V. Boshno proposes her own alternative to rethink the basic theoretical and judicial formation of national jurisprudential concepts. The Russian legal mentality is taken as the basis of "Jurisprudence"; however, at the same time, the conceptions of jurisprudence in the framework of other types of legal systems and types of legal conceptions are taken into account.

The textbook "Jurisprudence" by S.V. Boshno provides a solution for the basic educational problems that accompany national law theory during the process of training lawyers. The textbook considers foundational legal concepts such as the understanding of law, the origin of law, the characteristics of law, the system of law, systematization, lawmaking, law enforcement, analogies, and the sources and forms of law. Certain issues are given a more prominent place in "Jurisprudence" in comparison to their traditional representation: public and private law, common law, legal proceedings, as well as a number of other issues. The topical area of the publication has been extended due to problems such as liabilities, infliction of harm and unjustified enrichment, as types of juridical facts.

Some English-speaking readers have attempted to become familiar with the national law theory using translations of works by leading Soviet and Russian legal scholars (for example, works by D.A. Kerimov, L.S. Yavich, Yu.A. Tikhomirov etc., which have been published in English). The translations are united in that they contain Soviet or Russian legal constructions that have not been adapted for foreign readers. The complexity of translation is associated with the fact that there are many juridical phenomena in Russia and in other countries that have identical names or are described by similar words, but have different senses. For example, the usage of the term "code" differs: In Russia, a "code" is a large basic systematized law issued by the State; in the USA, the "CODE" is the code of laws, i.e., the totality of laws in force; and in British law dictionaries, a "code" is defined as an archaic term from Justinian times. In an additional example, in Russia, there are two terms: "legislative drafting" and "law-making"; however, American terminology does not include such a difference and limits itself to one collective term, i.e., "lawmaking". These and other subtleties of legal theory and practice are accessible only to legal specialists, and very often, they are not adequately reflected in translation. Therefore, the existing translations of works by national legal scholars generally reflect the construction of "State and law theory," but they

are not easily understandable or appropriate for readers who are abroad.

There also are works by foreign authors that are devoted to the national legal science, for example, "Russian Law" by W.E. Butler. However, for the most part, they are reviews of Russian legislation in various spheres: constitutional, criminal, family law and others; they do not represent an alternative to textbooks on jurisprudence. Rather, they are descriptions of Russian legal institutions and branches of law.

The textbook that is presented by S.V. Boshno adapts national law theory to the realia of Anglo-American legal culture and, accordingly, the order of exposition, the topical areas, and the style of exposition are substantially modified in it, making it accessible and understandable to national as well as foreign (English-speaking) readers. Therefore, the informative novelty of "Jurisprudence" in comparison to traditional textbooks that address legal theory should be mentioned.

Jurisprudence, as legal theory, is an introductory and basic aspect of legal science and is where the training of lawyers usually starts. It considers basic issues – the nature and essence of law, types of legal consciousness, etc. However, foreign textbooks on jurisprudence do not address a number of substantive subjects and issues that are essential elements of the Russian theory of law. For example, the problems of lawmaking, legal consciousness, legal order and course of law are not considered. In national textbooks and discussions that are relative to the subject of the theory of law and state, the issue of the practicability of the consideration of the state in courses that are aimed at training lawyers about basic concepts of law does not lose its significance. At the same time, the subject of the "state" is also an inseparable aspect of jurisprudence in its Anglo-American version, although the content of that subject differs substantially from the Russian standard.

The textbook "Jurisprudence" by S.V. Boshno is not a mechanical translation of a Russian textbook on the theory of law into English; rather, it is an exposition of the Russian point of view on jurisprudence that has been adapted for the understanding of both national and Anglo-American readers. "Jurisprudence" is an original comparative law exposition of jurisprudence as the basis of juridical thinking and mentality. The textbook "Jurisprudence," as envisioned by S.V. Boshno, contains five sections and comprises 35 chapters:

SECTION I. LEGAL SCIENCE (Chapter 1. Jurisprudence as a basis, theory and philosophy of law. Chapter 2. Jurisprudence as a science).

SECTION II. ESSENCE OF LAW (Chapter 3. Search for the beginnings and essence of law. Chapter 4. Origin and development of law. Chapter 5. Law in the system of social regulation. Chapter 6. Law schools on the essence, nature and intended purpose of law. Chapter 7. Essence of law. Chapter 8. Attributes of law).

SECTION III. EXTERNAL EXPRESSION OF LAW (Chapter 9. Sources and forms of law. Chapter 10. Test cases and judicial practice. Chapter 11. Customs in the system of sources of law. Chapter 12. Legislation. Laws and other state acts. Chapter 13. National and international law. Chapter 14. Codification. Chapter 15. Methods of legal regulation. Chapter 16. Norm. Normalization. Normativism. Chapter 17. System of law, system of legislation, and system of the sources of

law).

SECTION IV. LAW AND SOCIETY (Chapter 18. Legal relations. Chapter 19. Persons in law. Chapter 20. Objects of law. Chapter 21. Legal facts. Chapter 22. Violations of law. Chapter 23. Accordance to law. Chapter 24. Responsibility. Chapter 25. Law and personality. Chapter 26. State. Chapter 27. Private law. Chapter 28. Public law. Chapter 29. Legal proceedings. Chapter 30. Interpretation).

SECTION V. LEGAL SYSTEMS (Chapter 31. Legal map of the world. Chapter 32. Sources of law in different legal systems. Chapter 33. Comparative legal science. Chapter 34. Lawmaking and legislative proceedings. Chapter 35. Legal consciousness and legal culture).

“Jurisprudence” by S.V. Boshno is a systematic exposition of the civil law doctrine that is dominant in Europe and Russia, as well as in the states that survived the collapse of the Soviet Union. The publication of excerpts of “Jurisprudence” in our magazine is a practicable way to allow interested persons to become familiarized with difficult chapters in the textbook. We invite all of the interested readers of this magazine to engage in a discussion of it and we await your comments and suggestions. The inclusion of the textbook in our magazine will enable us improve it by the time of its “advent.” For foreign readers, the publication of excerpts of the textbook provides an opportunity to become acquainted with legal doctrine as presented by a Russian professor.

Galina Georgiyevna Vasyuta
Deputy Editor-in-Chief

THEORY OF LAW

PROBLEMS OF METHODOLOGY AND METHODS OF ANTI-CORRUPTION EDUCATION IN RUSSIAN LAW SCHOOLS

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Abstract.

The article considers, from the perspective of the authors' practical experience, the problems in methodology and method that arise when teaching the disciplines directed at developing an intolerance for corruption. The authors point to the need to have an organized system for teaching, emphasize the stereotypes that prevent effective anti-corruption education, and offer a concrete methodical technique for such an education.

Keywords:

corruption, anti-corruption education, methods of teaching in higher education, legal education, methods of teaching, methodology of teaching, teaching situation, legal consciousness, legal enlightenment, educational standard, education efficiency.

The state educational standard that is in effect in Russia, in full accordance with the UN Convention against Corruption¹, establishes the formation of an intolerant attitude toward corruption as one of the priorities of legal education. Achievement of that objective is hardly possible without the use of a combination of measures that includes, as a minimum, two aspects of influence: those that are organizational and those that are content-related.

The first aspect implies the need for a system for the organization of the educational process, including (1) the development and introduction of special courses that expose the social and legal sources of corruption and that provide an understanding of the tools that are available for its prevention; (2) the inclusion of content in traditional educational courses (of criminal, administrative, and municipal

¹ United Nations Convention against Corruption, adopted in New York on October 31, 2003 by Resolution 58/4 at 51st plenary meeting of 58th session of the UN General Assembly, ratified by the Federal law of March 08, 2006 No 40-FZ (Legislation Bulletin of the Russian Federation. – 2006. – No 26. – Art. 2780).

law, and procedural disciplines) that will allow a student to study aspects of the problem at issue; and (3) the introduction of an anti-corruption component in other educational subjects, so that the topic is a keynote of the entire professional education process.

A system of organization for the educational process implies a rational sequence of subjects in the framework of a plan of instruction. There are no hard rules, however; often, the order in which subjects are studied is subject to a number of external circumstances to which a teacher is forced to adjust. Nevertheless, the formation of a certain logic in the presentation of educational material is necessary in any case. For example, the plan of instruction that is carried out in the education of lawyers in Volgograd State University includes the discipline “Anti-corruption legislation” in the second term of the first course. This, undoubtedly, creates certain complications that are connected with the insufficient level of professional knowledge possessed by the students. Further, this is why it is necessary to concentrate attention on the teaching process, rather than on an analysis of current legislation (with which the students are also not well oriented). Rather, there must be a consideration of basic issues: the concept of corruption, the reasons for it, the basic tools for anti-corruption enforcement and international experience of their use. Notwithstanding certain complexities in the apprehension of that material, its acquisition during the first course provides an unconditional positive effect by introducing the general background for anti-corruption education. During the second course in the framework, which is the discipline of “Legal engineering”, merely mentioning the necessity for the examination of draft laws by anti-corruption experts is sufficient – its essence and meaning are already understandable to students. If the students retain the knowledge that they acquired during the first course, they will be able to practice performing that expert examination by drawing upon the knowledge that was gained in the first course. This allows them to not only save time, but to achieve a higher degree of efficiency in their learning with respect to both their recognition of the knowledge and the addition of new elements to it by recalling information that is already familiar to them.

It would be possible to organize the educational process in another way, i.e., if a special discipline devoted to corruption in the curriculum was moved to senior courses. In that case, it would be necessary to emphasize an analysis of industry-specific legislation, as well as the generalization and evaluation of legal knowledge that has been gained previously from the point of view of anti-corruption activities. In any case, the distinct interrelation of disciplines is important.

A system for the construction of the educational process is able to provide a higher degree of efficiency in anti-corruption education, although this cannot be guaranteed in the absence of adequate informative content.

In terms of its content, the most complicated issue is not simply the selection of issues that are worthy of consideration, but rather, a commitment to the negotiation of the stereotypes that are connected with the idea of corruption in the consciousness of students. Let us consider two such stereotypes as examples.

The first one is characteristic, to a greater extent, of young audiences and it implies a gap between the abstract notion of “corruption” and the concrete realities of their own lives. Students often do not see the connection between theoretical

constructions and legislative language, on the one side, and the facts of the surrounding reality, on the other. Their consciousness of the sober fact that many customary social relations are corrupt in nature provides not only understanding, but a subjective perception of the whole of the instructional material. Only such a perception will ensure the success of anti-corruption education. That is why the first methodological task is not simply an explanation of what constitutes corruption, but a demonstration of the fact that the aforesaid phenomenon concerns everyone in modern society.

The second stereotype is connected with the attitude that overcoming corruption is impossible and with the perception that it is a permanent phenomenon that is natural in society as a whole, and in Russian society, in particular, and that, for that reason, it is unconquerable. The more experienced the students are in their lives and in their professions, the stronger this stereotype is. If a person encounters the phenomena of corruption in the real world, he will incorporate them into his picture of the world, and thus, he will not be able to imagine that life can be organized differently. This stereotype is the most dangerous and intractable.

To affect it, it is necessary to conclusively establish two concepts. (1) Corruption is an unconditionally negative phenomenon. Sometimes it can be perceived (occasionally, unfortunately, quite reasonably) as something natural, customary, regular, or even convenient for the achievement of momentary objectives; however, this in no way justifies the moral turpitude and corrupt influence that corruption has on social, political and legal life. (2) Tools to fight against corruption exist. Many of them have been successfully evaluated in foreign countries, while others are being developed to address specific national needs. Their implementation is often connected with great complexity and requires a complex approach and political will; however, it is necessary for students to assimilate the major idea: It is possible to vanquish corruption in principle.

The last thesis deserves special emphasis. The issue of the potential to completely eradicate corruption comes within the range of philosophical and legal possibilities and it stands in the same row as a discussion of a final victory over criminality. It is certainly necessary to discuss the issue within the framework of the educational process. Furthermore, its discussion at various stages in the consideration of the problem can fulfill a variety of functions. Accordingly, an essay on the reasons for corruption and the possibilities of overcoming it that is assigned to students in the beginning of a corresponding educational course will allow instructors to evaluate the level of apprehension of that subject matter by the audience, to bring the stereotypes that are characteristic of it to light, and consequently, to set the tone for further dialogue. Furthermore, such work encourages students to gain an independent understanding of the problem, which involves them in further study of it. A final discussion of the same issue, which is held at the end of an educational course, can fulfill other goals. Such a discussion assumes a more qualified consideration that generalizes the knowledge that has been gained about corruption, including its origin and the tools that are available to overcome it. A student's own position can receive approval and can be finally formed in the process of that discussion.

We are of the opinion that the issue of the prospects in the fight against corruption in modern society is one of the key issues in anti-corruption education. An answer to this question is of great academic significance, and that is why extremes must be avoided in the consideration of it. So, excessive optimism in the evaluation of the prospects of anti-corruption activities will result in an inaccurate perception by students of anti-corruption measures that act automatically and that guarantee positive results. A later collision with reality will inevitably entail disillusionment and disappointment in all of the knowledge that has been gained. It is unlikely that a teacher's excessive optimism will contaminate a cynical audience, as it will be perceived as idealism and a lack of worldliness; this perception will also considerably devalue the information that is transmitted during the process of study.

The opposite extreme, which acknowledges the essential invincibility of corruption and, consequently, the ineffectiveness of all the measures aimed at fighting it, is no less dangerous. Such pessimism reduces the motivation for further study by depriving it of any meaning in the eyes of students. As a methodical aspect, a suggestion of the potential efficiency of the considered measures to work against corruption is a necessary basis for anti-corruption education.

The following metaphor helps us to substantiate a more balanced position in a dialogue with students. Corruption is like the dust that accumulates in any room if you do not sweep it up. It is unreasonable to hope that, if those who throw garbage on a floor are punished and order is reestablished, that cleanness would thereby be preserved forever. At the same time, if cleaning is carried out more thoroughly and regularly, dust will appear in the corners less frequently. Simply for that reason, no state can consider corruption to be completely defeated; rather, the necessity for each state to keep its political and legal life clean continues incessantly. However, although some countries only need to maintain their cleanliness, others need a full-scale cleaning or even a thorough overhaul.

Some pressing issues include the age at which one ought to start anti-corruption education, as well as the concrete methodic tools that are needed to improve its quality.

Previously, we have discussed the trend of including elements of anti-corruption education not only at the university level, but also in the preschool and school educational milieu, as well¹. Such an ambitious educational program, if it is implemented, will require a substantial variety in the types of assignments. Accordingly, at the preschool and preparatory school level, a task may be assigned that is designed to help students to determine the legitimate/illegitimate nature of certain actions, and thus, to understand the essence of corruption as a whole (games, conversations, discussions).

Strictly speaking, the efficiency of measures that are directed at starting conversations about corruption as early as possible is disputable. Children lack

¹ *Akhmetova N.A., Guzenko V.N.* Basics of anti-corruption education in the modern training process // News of the Volgograd State Technical University. Series "New education systems and technologies of studying in the university". – 2013. – Issue 10. – No 13 (116). – P. 16–18.

experiences of their own that are connected to that phenomenon. References to family experiences make sense only if children have their parents' support. Unfortunately, in discussions of the everyday manifestations of corruption that could be understandable to a child, that support is not at all guaranteed, because Russian society, on the average, regards such manifestations as tolerable. Further, the show-me attitude of parents that may arise in response to what has been said by a pedagogue is experienced in a child's consciousness as a conflict of interest that is absolutely unnecessary at that age.

It is much more productive to discuss corruption topics with senior high school students who are equipped, to some degree, with legal knowledge and who possess a more comprehensive understanding of the outside world. They are included in anti-corruption education through school subjects, as well as through participation in socially important creative and civil actions. At that stage, it is possible to use more complex assignments, which should undoubtedly include elements of games: for example, the analysis of documents, the preparation of questions for an interview or a press conference, the creation of protest poster or video clip, etc.

The best base for the formation of an outlook on the world, including one regarding anti-corruption, is the educational arena of the university. The university is the optimal place where a qualified pedagogue can engage in a conversation with a student in such a way as to create in him a categorical rejection of every manifestation of corruption. Naturally, the nature of this teaching is problematic, in that it must exclude the possibility of simply providing information about the problem of corruption. Concrete methodic tools must be directed toward lowering the degree of abstraction in the educational material and toward tying it to the firsthand experiences of students. For first-year students, such an experience could be, for example, the Unified State Exam. First, everyone must pass through that trial upon completion of school, which is why students have common impressions and emotions regarding it. Second, the USE is a stressful situation that leaves vivid impressions. All cases of injustice or violations that students encounter during the examination are perceived by them very sharply. A discussion of the corruption phenomenon and of the possible actions that could be taken against it will be viewed emotionally, with great interest and a high level of understanding and engagement in the problem.

Quite another approach is necessary in working with an adult audience, for instance, in the framework of training workshops or in the advanced education of public officers. In that context, there is no question of the formation of an outlook on the world – whether it is bad or good, it already has been formed. As a rule, in such an audience, the level of knowledge about the problem of corruption is rather high. To make anti-corruption education useful for that category of the audience, tasks that are more concrete must be established:

- 1) provide information that is new to that audience (it may be information about the most recent changes to the applicable legislation or about foreign and international experiences of in their actions against corruption);

- 2) offer students opportunities to use the knowledge that they have (for example, in the framework of an assignment involving a case that models a concrete corruption situation); and

3) provide students with the opportunity to discuss existing problems and to express and substantiate their positions (for example, to estimate the efficiency of concrete measures that have been taken against corruption, to bring to light defects in the applicable legislation, or to make proposals about the prospects of a particular novelty).

These recommendations are of an utterly general nature. On the one side, they need adaptation based upon the concrete audience and the individual pedagogical style of the teacher². On the other side, there are many pedagogic tools in addition to those that have been discussed that would enable teachers to make the material that is being studied more vivid and understandable, that would draw on the creativity of students, that would more effectively structure the information and that would increase its level of persuasiveness. Nevertheless, it is important to be aware of the special aspects that distinguish anti-corruption education from the teaching process of the majority of courses in law³. An essential complexity is connected with the fact that “corruption at the mundane level becomes an element of a person’s life”⁴, and for that reason, it ceases to be perceived by him as something that is extremely dangerous. As a result, anti-corruption education requires systematic, purposeful action that addresses students’ outlooks on the world with the goal of correcting the false stereotypes that are part of their consciousness. Only on that basis is it possible to inculcate an attitude that is intolerant of corruption, which is the major condition that is necessary to overcome it.

Bibliography

1. *Akhmetova N.A., Guzenko V.N.* Basics of anti-corruption education in the modern education process // News of the Volgograd State Technical University. Series “New education systems and technologies of studying in the university”. – 2013. – Issue 10. – № 13 (116). – P. 16–18.
2. *Davydova M.L.* Training for a legal profession in Russia and the USA: revisiting universal foundations // Law and modern states. – 2013. – № 2. – P. 28–35.
3. *Davydova M.L., Shanin A.A.* Realization of personally-oriented cooperation of teacher and student // News of the Volgograd State Technical University. Series “New education systems and technologies of studying in the university”. – 2013. –

¹ For example, taking into account the efficiency of anti-corruption events that have been realized in recent years in the system of arbitration courts (for additional information, see: *O.L. Seryogina.* Development of science and technology as a factor promoting changes in modern law systems // Law and modern states. – 2013. – № 3. – P. 13–15; *A.A. Solovyov, Yu.M. Filippov.* Effectuation of justice by arbitration courts in RF // Law and modern states. – 2013. – № 3. – P. 60–63); good material for discussion about the prospects of the judiciary system is provided by the abolishment of the Supreme Arbitration Court, which occurred at the end of 2013 – beginning of 2014.

² *Davydova M.L., Shanin A.A.* Realization of personally-oriented cooperation of teacher and student // News of the Volgograd State Technical University. Series “New education systems and technologies of studying in the university”. – 2013. – Issue 10. – № 13 (116). – P. 39–40.

³ *Davydova M.L.* Training for a legal profession in Russia and the USA: revisiting universal foundations // Law and modern states. – 2013. – № 2. – P. 28–35.

⁴ Legal countermeasures against corruption: research and practice aid / exec. ed. N.A.Vlasenko. – M., 2012. – P. 9.

Issue 10. – № 13 (116). – P. 39–40.

4. United Nations Convention against Corruption.

5. Legal countermeasures against corruption: research and practice aid / exec. ed. N.A.Vlasenko. – M., 2012.

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7. *Solovyov A.A., Filippov Yu.M.* Effectuation of justice by arbitration courts in RF // Law and modern states. – 2013. – № 3. – P. 57–63.

COMPARATIVE LEGAL STUDIES

MITIGATION OF HUMAN RIGHTS RISKS: CONSTITUTIONS OF FEDERAL STATES IN EUROPE

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Abstract.

The article presents the authors' analysis of the constitutions of federal states in Europe (Austria, Belgium, Bosnia and Herzegovina, Germany and Switzerland) for the purpose of describing the norms in those constitutions that are directed at the mitigation of human rights risks. The results obtained in the analysis are systematically compared, and recommendations are given for how the constitutional parameters in the study can be perfected.

Keywords:

human rights, obligation, guarantees, ensuring, judicial protection, ombudsman, human rights commissioner, constitution, human rights risks, Austria, Belgium, Bosnia and Herzegovina, Germany, Switzerland, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The development of civilization, including the development of constitutional parameters, leads to increases in the types of risks that are immanent to conditions that involve uncertainty. These increased risks apply fully to the category that encompasses human rights risks. We associate a constitution with the solution that will lead to their mitigation: first, with the basic concepts of it, such as the axiological preferences of a person, as well as his rights and freedoms in a state; the imperatives of the state's duties and its guarantees of the protection of the person, his rights and his freedoms; the judicial form of the protection of rights; and the establishment of specialized human rights structures. Based on those parameters, let us consider the constitutions of five of the federated states of Europe – Austria, Belgium, Bosnia and Herzegovina, Germany, and Switzerland.

Axiological preferences of a person, his rights and his freedoms

The Constitution of the Republic of Austria¹ does not contain regulations that establish the rights and freedoms of a person as the supreme value, nor does it contain regulations regarding the honor and dignity of the personality. We posit that axiological determinations of this kind must be attributes of the constitutive acts of democratic states. As a certain corrective measure, one can consider the provisions of Art. 9, according to which the “generally recognized rules of international law act as a component part of federal law”.

The Constitution of Belgium² also lacks an axiological articulation of a person's rights and freedoms. Nevertheless, in the context of provisions that address the impermissibility of discrimination in Belgian society, it is explained that the state recognizes certain rights and freedoms for Belgians (Art. 11). The question is legal, but does it address the recognition of the rights and freedoms of foreign citizens and stateless persons? Legally – not at all.

The Constitution of Bosnia and Herzegovina³ (Art. 2) specifies that the state provides the highest possible level of internationally recognized human rights and basic freedoms. The rights and freedoms that were established in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950⁴ and the protocols to it, have direct force in Bosnia and Herzegovina. They prevail over all other rules of law. We are of the opinion that this approach constitutes an express indication of an axiological preference in favor of the rights and freedoms of a person.

The Fundamental Law of the Federal Republic of Germany⁵ (Art. 1 of Section “Basic rights”) establishes that the rights of a person are indefeasible and inalienable and are the basis of every human community, of peace and of justice in the world.

In the Constitution of Switzerland⁶ (Art. 7 of Part 2 “Basic rights, civic rights and social goals” of Chapter 1 “Basic rights”), it is established that the dignity of a person is entitled to respect and protection. There is no further mention in that act of the position of state in relation to human rights, that is, with respect to their safeguard, protection, or associated guarantees.

Imperatives regarding state responsibility and guarantees of the protection of a person, his rights and his freedoms

The Constitution of Austria bypasses the issues of the responsibilities and guarantees of the state that are directed toward the protection of a person's rights and freedoms. Guarantees of the unhampered implementation of political safeguards

¹ Constitution of the Republic of Austria of November 10, 1920 // Constitutional law of foreign countries. URL: <http://mykpzs.ru/konstituciya-avstrijskoj-respubliki-1920-rus/>.

² The Constitution of Belgium of February 17, 1994 // Constitutions of countries of Europe. In 3 volumes. V. 1 / under the gen. edit. of L.A. Okunkov. – M.: Norma, 2001. – P. 331–381.

³ The Constitution of Bosnia and Herzegovina of December 14, 1995 // Constitutional law of foreign countries. URL: <http://mykpzs.ru/konstituciya-bosnii-i-gercegoviny-1995/>.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4, 1950) // Legislation Bulletin of RF. – 2001. – № 2. – Art. 163.

⁵ The Fundamental Law of the Federal Republic of Germany of May 23, 1949 with further alterations and amendments up to October 20, 1997 // Constitutions of countries of Europe. In 3 volumes. V. 1 / under the gen. edit. of L.A. Okunkov. – M.: Norma, 2001. – P. 565–637.

⁶ The Union Constitution of Swiss Confederation of April 18, 1999 // Constitutions of countries of Europe. In 3 volumes. V. 1 / under the gen. edit. of L.A. Okunkov. – M.: Norma, 2001. – P. 531–581.

are directly addressed only to officers of public institutions (Art. 7). We are of the opinion that the aforementioned rule does not represent the denial of guarantees of such rights to citizens. However, that conclusion is more empirical than legal.

The Constitution of Belgium (Art. 23) establishes that everyone has the right to live a life corresponding with human dignity, and with this end in view, the law guarantees economic, social and cultural rights, taking into account the corresponding responsibilities. We are of the opinion that the coupling of such guarantees with rights of a secondary rank is quite legal.

The Constitution of Bosnia and Herzegovina (Art. 2) specifies that the state provides the highest level of internationally recognized human rights and basic freedoms. This provision allows us to speak about state guarantees of the rights and freedoms of persons and citizens.

The Fundamental Law of the Federal Republic of Germany (Art. 1) establishes that it is the responsibility of the state's power to respect and protect human dignity. It specifies that certain basic rights are obligatory for the legislative, executive and judicial branches as directly applicable law. The rule that addresses the respect and protection of human dignity is universal from the standpoint of human rights potential, because it uses the term "protection", which separates that responsibility from the others and underlines its primary importance.

The Constitution of Switzerland (Art. 2) establishes the protection of the rights and freedoms of the people of Switzerland. On one side, it is possible to qualify the use of the word "people" as the nation, i.e., the people as a whole, and, accordingly, the rights and freedoms of the people as a community, rather than each personality in the community, separately. Nevertheless, we understand that this provision can be interpreted as a guarantee of the protection of the rights and freedoms of each person residing or sojourning in the territory of that country.

Judicial form of the protection of rights

The Constitution of Austria and the Fundamental Law of Germany do not contain provisions that address the judicial form of the protection of human rights. In this regard, the Constitution of Austria contains rules devoted only to administrative courts and the Constitutional court; this does not prevent people from going to court for the protection of their rights in accordance with sectoral legislation.

Art. 103 of the Constitution of Germany establishes the right to a court hearing. In addition, doctrinal literature and the judicial practice of the Constitutional Court of Germany acknowledge, for example, claims to judicial protection, i.e., to judicial protection of a right. As is ascertained by, among other things, the practice of the aforesaid court, a claim to judicial protection of a right implies that "everyone has the right to address his case to an independent court which must, with all attention to factual and legal circumstances, solve that case and provide fulfillment of the taken decision"¹.

The Constitution of Belgium includes a rule that addresses the judicial protection

¹ *Abolonin V.O.* Abuse of the right of suit in civil process of Germany: monography. – M.: Wolters Kluwer, 2009. – P. 45–46.

of the rights and freedoms of a person and a citizen (Art. 13). In accordance with it, no one can be deprived, against his will, of safeguards for the rights established by the law. Such a formulation constitutes a “double” guarantee that safeguards the right to judicial protection: First, there is a direct guarantee of the right of judicial protection itself, and second, there is a guarantee that the aforementioned right cannot be deprived in any situation, except by the decision of the person himself, which establishes it as an absolute right.

An analysis of the constitutional rules of the Federation of Bosnia and Herzegovina has shown that the right of judicial protection is not directly formulated in its constitution. However, according to Art. 2, “Human rights and basic freedoms”, the “rights and freedoms fixed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and protocols to it have direct application in Bosnia and Herzegovina”. This means that the right to judicial protection and the guarantees of its enjoyment (Art. 5–7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) are present in the aforesaid state.

The Constitution of Switzerland, in Art. 29 “General procedural guarantees” and Art. 30 “Judicial proceedings”, specifies the right of every person to free justice and free legal assistance, and to a competent, independent and unbiased court that has been established by law, as well as other rights. They correspond more with the procedural rights that are derived from the right of judicial protection.

Establishment of specialized human rights structures

Let us examine the establishment of structures that are exemplified by institutions that are analogous to ombudsmen. The analysis that has been conducted of the constitutions of a focal group of states has shown that, even in the absence of an ombudsman institution, this function is present in all of them.

The Constitution of Austria contains a rule that allows one to speak of the constitutional establishment of the institution of a commissioner for human rights. Accordingly, Art. 148a, which is located in 7 Section “Popular protection of rights”, defines that every person can address the commission for the popular protection of rights with complaints that allege defaults in the execution of the federal administration, including the activity of the Federation that is the subject of private law relations, in cases in which those defaults affect his interests and to which he has no recourse to any means of appeal. Art. 148j contains a reference to federal legislation that concerns this institution. A federal law that established a People’s defender was adopted in Austria in 1982¹. At the present time, not one, but three ombudsmen function in Austria².

In Bosnia and Herzegovina, for the first time, the basis for the work and functioning of an ombudsman was established by Appendices IV and VI of the Master Framework Agreement on Peace in Bosnia and Herzegovina on December 14, 1995. It began to function in 1996. That institution, along with the Human Rights

¹ The Austrian Ombudsman Board: Legal Bases // VOLKSANWALTSCHAFT. URL: <http://volksanwaltschaft.gv.at/en/the-austrian-ombudsman-board/legal-bases>.

² The history of foundation of the Ombudsman institution // Kyrgyz Respublikasynyn Akykatchysynyn (Ombudsmenin) sayty. URL: <http://www.ombudsman.kg/kg/about-us/history.html>.

Chamber, constituted a commission on human rights. The first law in Bosnia and Herzegovina that addressed a commissioner for human rights was adopted in 2000; a new law was subsequently adopted in 2002 and has repeatedly been amended. At the present time, the ombudsman in that state acts as an independent national protection mechanism for the basic rights and freedoms of a person¹.

In Germany, the institution of ombudsman was established earlier than in the other states that have been examined – in 1956; however, the form in which it currently functions was created in March 2001 on the recommendation of the Federal Parliament of Germany².

To summarize the study that has been undertaken, we note that, as a whole, the constitutions of the federations of Europe contain provisions that are directed at the mitigation of human rights risks. Nevertheless, most of the constitutions lack important provisions, such as the recognition of a person's rights and freedoms as a supreme value, and state guarantees of those rights, including the right to judicial protection. However, we are of the opinion that the level of the development of the states that have been studied and the level of the observation of a person's and citizen's rights and freedoms is a testimony to the fact that the omission of the proposed indicators at a constitutional level does not belittle the results that have been achieved in the sphere of human rights.

Bibliography

1. *Abolonin V.O.* Abuse of the right of suit in civil process of Germany: monography. – Moscow: Wolters Kluwer, 2009.

2. The history of foundation of the Ombudsman institution // Kyrgyz Respublikasynyn Akykatchysynyn (Ombudsmeninin) sayty. URL: <http://www.ombudsman.kg/kg/about-us/history.html>.

3. Collection of dictionaries on VseSlova.ru. URL: <http://www.vseslova.ru/index.php?dictionary=abramov&word=obespechenie>.

4. Convention for the Protection of Human Rights and Fundamental Freedoms (Concluded in Rome on November 04, 1950) // Legislation Bulletin of the Russian Federation. – 2001. – № 2. – Art. 163.

5. Constitution of the Republic of Austria of November 10, 1920 // Constitutional law of foreign countries. URL: <http://mykpzs.ru/konstituciya-avstrijskoj-respubliki-1920-rus/>.

6. Constitution of Belgium of February 17, 1994. // Constitutions of countries of Europe. In 3 volumes. V. 1 / under the gen. edit. of L.A. Okunkov. – Moscow: Rulea, 2001. – P. 331–381.

7. Constitution of Bosnia and Herzegovina of December 14, 1995 // Constitutional law of foreign countries. URL: <http://mykpzs.ru/konstituciya-bosnii-i-gercegoviny-1995/>.

¹ Relevant Legislation // The Institution of Human Rights Ombudsman of Bosnia and Herzegovina. URL: <http://www.ombudsmen.gov.ba/Default.aspx?id=14&lang=EN>.

² Mandate // Deutsches Institut für Menschenrechte. URL: <http://www.institut-fuer-menschenrechte.de/en/about-us/mandate.html>.

8. *Ozhegov S.I., Shvedova N.Yu.* Defining dictionary of the Russian language. – Moscow: AZ, 1996.

9. The Fundamental Law of the Federal Republic of Germany of May 23, 1949 with further alterations and amendments up to October 20, 1997 // Constitutions of countries of Europe. In 3 volumes. V. 1 / under the gen. edit. of L.A. Okunkov. – M.: Rulea, 2001. – P. 565–637.

10. The Union Constitution of Swiss Confederation of April 18, 1999 // Constitutions of countries of Europe. In 3 volumes. V. 1 / under the gen. edit. of L.A. Okunkov. – Moscow: Rulea, 2001.– P. 531–581.

11. Mandate // Deutsches Institut für Menschenrechte. URL: <http://www.institut-fuer-menschenrechte.de/en/about-us/mandate.html>.

12. Relevant Legislation // The Institution of Human Rights Ombudsman of Bosnia and Herzegovina. URL: <http://www.ombudsmen.gov.ba/Default.aspx?id=14&lang=EN>.

13. The Austrian Ombudsman Board: Legal Bases // VOLKSANWALTSCHAFT. URL: <http://volksanwaltschaft.gv.at/en/the-austrian-ombudsman-board/legal-bases>.

CONSTITUTIONAL ENTRENCHMENT OF THE PRINCIPLE OF THE EQUALITY OF RIGHTS AND FREEDOMS FOR MEN AND WOMEN: ANALYSIS OF FOREIGN PRACTICES

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Abstract.

The authors have studied equality of men and women as a constitutional principle in 24 countries of the world, including CIS. Not all the states supporting the principle have entrenched it precisely in constitutional acts. The USA, for example, has no corresponding constitutional norm. The authors studied the location of norms on the rights and obligations of men and women in constitutional texts, and came to the conclusion that in some states the principle is set out as a general legal principle, while in others it appears only as a principle for family and conjugal relationships. The authors substantiate their conclusion on the necessity for constitutional guarantees of gender equality in states with a democratic political regime. An important conclusion of the article is a classification of possible ways to entrench the rights of men and women in a constitution: the standard, non-image, fragmentary and lateral methods.

Keywords:

equality of men and women, constitutional principle, equal rights, legal relations in the family, equal access, enforcement of rights and freedoms, democratic political regime, democratic demands, gender policy, discrimination, constitutional legislation, constitutional law of foreign countries.

The modern legislation of all civilized countries, as well as international human rights law, establish the equal rights of men and women in all spheres of their lives and the prohibition of discrimination against women as one of their obligatory democratic demands; those who are noncompliant are subject to penalties, including criminal ones¹.

¹ *Bondar N.S.* Citizen and public power: Constitutional provision of rights and freedoms in local self-government. – M.: "Gorodets", 2004. – P. 167.

In addition, it should be emphasized that, even today, the equality between men and women is not explicitly constitutionally established and developed in all countries. Accordingly, the USA has very extensive legislation that forbids discrimination against women, but a proposed amendment to the constitution that would have established equality in the rights of men and women did not go into effect because it was not ratified in time by most states¹.

An analysis of the existing constitutional status of the establishment of the equality of the rights of men and women in 24 states in the world appears to be timely; the analysis examines federative states (Austria, Belgium, Brazil, Germany, Canada), unitary states (Albania, Hungary, Greece, Spain, Netherlands, Poland, France, Sweden) and the CIS countries.

An analysis of the constitutions of the federative states has shown that Austria, Belgium and Brazil lack provisions regarding the equal rights of men and women. One can evaluate this in the context of general principles of equality before the law. Thus, in Austria (Art. 7) those general principles are addressed to all citizens, in Belgium (Art. 10), they are addressed to Belgians, and in Brazil (§1 Art. 141), they are addressed to everyone.

In Germany and Canada, provisions regarding the equal rights of men and women are included accordingly in chapter/sections entitled "Basis rights" and "Right to equality", which are dedicated to rights and freedoms. In particular, P. 2 Art. 3 of the FRG Constitution states: "Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for men and women and take steps to eliminate disadvantages that now exist".

The constitutional acts of Canada (Art. 28) include a guarantee of equal rights, not to men and women, but to "persons of both sexes", independent of any other provisions.

In three out of eight of the constitutions of unitary states that were examined, there also is an approach that reflects the equality of the rights of men and women in the context of the general principle of the equality of everyone before the law; in Albania, the principle is addressed to everyone (P. 1 Art. 18), as it is in Spain (Art. 14). Furthermore, discrimination is impermissible in the Netherlands, in which the Art. 1 of the Constitution establishes that "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted".

In the remaining five constitutions of the unitary states, provisions regarding the equal rights of men and women are present in the Preamble (France), in the basics of the state system (Sweden) and/or in a section/chapter that is dedicated to rights and freedoms (Hungary, Greece, Poland, Sweden).

A content analysis of their constitutional rules shows that these states have, in their own way, addressed the principle of the equality of the rights of men and

¹ *Avtonomov A.P.* Human rights, law enforcing and human rights activities. – M.: Foundation "Liberal mission", New Literary Review, 2009. – P. 57

women. The Preamble of the Constitution of France of 1946 states that “The law guarantees women equal rights to those of men in all spheres”; P. 1 Art. 66 of the Constitution of Hungary emphasizes that such equality is extended “to all civil, political, economic, social and cultural rights”; P. 1 Art. 32 of the Constitution of Poland establishes the equality of the rights of men and women in family, political, social and economic life, with a specification in P. 2 of that Article that women and men have “equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honors and decorations”; Art. 2 of the Constitution of Sweden establishes that “Society must ensure equal rights to men and women”, and Art. 16 specifies that “A law or other order cannot contain an unfavorable attitude to any citizen on the basis of sex, provided that the order is not induced by an aspiration to ensure the equality of men and women or does not involve military duty or a corresponding service duty”.

The third group of states that were examined with respect to their constitutional establishment of the principle of the equality of the rights of men and women were the CIS countries¹, which emerged as a result of the collapse of the USSR in December of 1991. Their sovereign development and the formation of their legal systems were mediated by the union’s system of political and legal coordinates. Precisely for that reason, it is interesting to analyze the characteristic processes of constitutional individualization, in particular, as it is exemplified by the formalization of the principle of the equality of men and women. In that sense, the Russian Federation, with its constitutional provision in P. 3 Art. 19, which states “Men and women shall enjoy equal rights and freedoms and equal opportunities to exercise them”, was chosen as a yardstick because it textually reproduces the provision of the Convention on the Elimination of All Forms of Discrimination against Women of 1979, which was ratified by the Soviet Union in 1990 and whose obligations came to Russia by way of succession.

An analysis of the constitutions of the CIS countries reveals that a number of them establish the equality of the rights of men and women not directly, but indirectly, through the principle of the equality of everyone before the law and the principle of the impermissibility of discrimination. Accordingly, in Armenia, those principles are addressed to a person and a citizen (Art. 16); in addition, women and men “are entitled to equal rights as to marriage, during marriage and divorce” (P. 2 Art. 35). Analogous constitutional formulations are used in Byelorussia (Art. 22, Art. 32). In Moldavia, the principle of the equality of everyone before the law and before the authorities is established (Art. 16), and the equality of the rights of men and women is defined as the basis of the family (P. 2 Art. 42). Kazakhstan also establishes the principle of the equality of everyone before the law and the courts, as well as the principle of the impermissibility of discrimination (P. 1 and

¹ See: Agreement on creation of the Commonwealth of Independent States (Minsk, December 8, 1991) // Information Herald of the Council of Heads of States and the Council of Heads of Governments of the CIS “Commonwealth”. – 1992. – № 1. – P. 6.

2 Art. 14).

In the other states of the CIS, provisions regarding the equality of the rights of men and women are specifically included in sections/chapters dedicated to rights and freedoms (“Basic rights, freedoms and obligations” in Azerbaijan¹, “Basic rights and freedoms” in Kirghizia², “Rights, freedoms, basic obligations of a person and citizen” in Tajikistan³, “Rights, freedoms and obligations of a person and citizen” in Turkmenistan⁴, and in Ukraine⁵) or to their guarantees (“Guarantees of rights and freedoms of a person” in Uzbekistan⁶). In those constitutions, as a rule, an article with a corresponding name is separately dedicated to the right of equality.

A further analysis of the constitutions of the CIS countries allowed us to separate them into three groups. The first group includes constituent acts with a standard formulation regarding the equal rights of men and women and equal opportunities for their implementation. This constitutional version is implemented in Kirghizia (P. 4 Art. 16) and in Ukraine (P. 3 Art. 24). In addition, the latter specifies that the equality of the rights of men and women is ensured by the entitlement of women to opportunities equal to those available to men in socio-political and cultural activities, in education and professional training, and in their work and the remuneration for it; special measures for the protection of the labor and health of women, and the establishment of pension privileges; arrangements regarding the conditions for concurrent work and maternity; and legal safeguards and material and moral support for maternity and childhood, including the entitlement of pregnant women and mothers to paid leave and other privileges. Let us note that these guarantees correspond with those that were contained in the constitutions that existed during the Soviet period.

The second group includes constituent acts that establish the equal rights of men and women, but do not include a statement establishing equality of opportunity. This is characteristic of Azerbaijan (P. II Art. 25); Tajikistan (P. 2 Art. 17); and Uzbekistan (Art. 46 of Constitution). In Turkmenistan, the constitutional formulation of the principle of the equality of men and women is even more limited and is reduced to the equality of civil rights (Art. 20).

To summarize the study that was undertaken, let us note that the constitutional establishment of the principle of the equality of men and women

¹ Constitution of the Azerbaijan Republic of November 12, 1995 (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spininform.ru/show_doc.fwx?rgn=2618.

² Constitution of Kirghizia of June 27, 2010 // Russian Uniting Union of Compatriots in Kyrgyzstan. URL: http://russkg.ru/index.php?option=com_content&view=article&id=95:-27-2010-&catid=27:2010-08-20-08-52-42&Itemid=30.

³ Constitution of the Republic of Tajikistan of November 6, 1994 r. (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spininform.ru/show_doc.fwx?rgn=2213.

⁴ Constitution of Turkmenistan of 2008 // Information and law system. Legislation of the CIS countries. URL: http://base.spininform.ru/show_doc.fwx?rgn=2376.

⁵ Constitution of Ukraine of June, 1996 (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spininform.ru/show_doc.fwx?rgn=8689.

⁶ Constitution of the Republic of Uzbekistan of December 8, 1992 (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spininform.ru/show_doc.fwx?rgn=818.

must be immanent in any legal state in which a democratic political regime is established. In our opinion, such an establishment positively influences the implementation of the principle of the equality of men and women.

An analysis of the constitutions of three focal groups of states has shown that a standard (Kirghizia; Germany and Canada; Hungary, Greece, Poland, France, Sweden) version of the establishment of the principle of the equality of the rights and freedoms of men and women is characteristic of them. The most widespread version, nevertheless, was discovered to be the indirect version (Armenia, Byelorussia, Kazakhstan, Moldavia; Austria, Belgium, Brazil; Albania, Spain, Netherlands), in which the states have established the principles of the equality of everyone before the law and the impermissibility of discrimination for any reason. Fragmentary (Azerbaijan, Tajikistan, Uzbekistan) and lateral (Ukraine) versions of the constitutional establishment of the principle of the equality of the rights and freedoms of men and women have been implemented only in the CIS countries.

References

1. *Avtonomov A.P.* Human rights, law enforcing and human rights activities. – Moscow.: Foundation “Liberal mission”, New Literary Review, 2009.
2. *Bondar N.S.* Citizen and public power: Constitutional provision of rights and freedoms in local self-government. – M.: “Gorodets”, 2004.
3. Constitution of the Azerbaijan Republic of November 12, 1995 (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spinform.ru/show_doc.fwx?rgn=2618.
4. Constitution of Kirghizia of June 27, 2010 // Russian Uniting Union of Compatriots in Kyrgyzstan. URL: http://russkg.ru/index.php?option=com_content&view=article&id=95:-27-2010-&catid=27:2010-08-20-08-52-42&Itemid=30.
5. Constitution of the Republic of Tajikistan of November 6, 1994 r. (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spinform.ru/show_doc.fwx?rgn=2213.
6. Constitution of Turkmenistan of 2008 // Information and law system. Legislation of the CIS countries. URL: http://base.spinform.ru/show_doc.fwx?rgn=2376.
7. Constitution of the Republic of Uzbekistan of December 8, 1992 (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spinform.ru/show_doc.fwx?rgn=818.
8. Constitution of Ukraine of June, 1996 (with further alterations) // Information and law system. Legislation of the CIS countries. URL: http://base.spinform.ru/show_doc.fwx?rgn=8689.
9. Agreement on creation of the Commonwealth of Independent States (Minsk, December 8, 1991) // Information Herald of the Council of Heads of States and the Council of Heads of Governments of the CIS “Commonwealth”. – 1992. – № 1.

PSYCHOLOGY OF PROFESSIONAL ACTIVITIES. LEGAL CULTURE

PSYCHOLOGICAL CULTURE OF PERSONALITY AS A FACTOR IN THE PREVENTION OF PROFESSIONAL DEFORMATION

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Abstract. The article presents issues about the psychological culture of members of professions of the “person to person” type, and preventive measures against professional defamation of members of the legal profession using the harmonization or optimization of their psychological culture.

Keywords: personality development, culture, psychological culture, professional culture, defamation, professional defamation, professional destruction, professional degradation.

The present stage of the development of a society is characterized by the fact that adults devote a major part of their lives to professional activity. The principle of the unity of consciousness, activity and the individual confirms the fact that professional activity, on the one hand, contributes to the formation of professionally important qualities in a person, and, on the other hand, carries a great potential for individual violations.

Any professional activity in the “person to person” system has a significant impact on the formation of the professional identity. The conditions of this activity create a specific inner world for the individual, a system of relationships, peculiarities of reaction to particular events, demeanour, mode of dress, etc.

Certain activities, particularly law enforcement, pedagogical, psychological, medical and other activities, have the specific feature that professional problems often occur in situations that have an unpredictable outcome, situations that involve increased responsibility on professionals to make decisions and a need to communicate with various people, situations that are influenced by mental and physical pressure, and situations that require decisive action and an ability to take risks, etc. These features of activities have a significant impact on the personal characteristics of individuals, and can lead to the development of professional deformation of personality. In the most general form the result of the development this phenomenon can be such behavioural manifestations that entail unsolicited criticism by other people and do not coincide with professional ethics. Thus, the phenomenon of this deformation is potentially present in any professional activity¹.

There are currently several points of view on this problem. They all boil down to the fact that professional deformation develops as a result of the professional and individual characteristics of the person.

In many works of national psychologists (A.K. Markova, S.A. Druzhilov, E.A. Klimov, N.S. Pryazhnikov, E.Y. Prazhnikova, A.F. Shikun, etc.), terms such as “professional destruction” and “professional degradation” are used (with a similar or identical meaning) alongside “professional deformation”. However, the terms “degradation” and “destruction” etymologically in at least reflect the essence of the changes in the structure of activity, and they have a clearly negative connotation². Because the definition of “professional deformation” has a wide scope, the phrase may include all sides of the physical and mental human organization that are influenced by the profession, where the influence itself has a distinctly negative nature³.

It is interesting to note that there is no term “psychological deformation” in foreign psychology. The term “burnout”, coined by an American psychologist Herbert Freudenberger in 1974, defined a state of physical exhaustion with a sense of uselessness in humans⁴.

There is a concept in the domestic literature that is close to “asthenia” or “fatigue”. It is assumed that the development of fatigue and muscular weakness is preceded by a more or less lengthy period of strong mental stress and work in exhausting conditions⁵.

On the basis of the aforementioned definitions, professional deformation

¹ Prevention of professional deformation of the individual staff members of the Department of Interior: textbook, edited by Burykin V.M. M.: Ministry of Internal Affairs of Russia, GUK IMC, 2004. - P. 104.

² *Nozhenkina O.S.* The role of reflection in overcoming professional deformation of a teacher. - Smolensk, 2012. - P. 54.

³ *Gellershtein S.T.* Psychological Technique/History of Soviet Psychology of Labour: texts (20-30 years of the 20th century), edited by V.P. Zinchenko, V.M. Munipov, O.G. Noskov, M., Moscow University Publisher, 1983. - P. 213-222.

⁴ *Orel V.E.* Burnout phenomenon in international psychology: empirical research and perspectives // Psychological Journal. 2001. - Vol. 22. - No. 1. - P. 90-101.

⁵ *Bolshakova T.V.* Personality determinants and organizational factors of mental burnout among health care workers: The author's abstract. Doctoral dissertation in Psychology of Science: 19.00.03. - Yaroslavl, 2004.

can be viewed as a negative influence of the profession on the psychological and physiological characteristics of a person that hinders behaviour in the everyday “non-professional sphere”¹.

Personal background characteristics that affect the progress of this phenomenon, even when they developed prior to the person beginning the professional activity, play a certain role in the progress of professional deformation.

The position in this paper was based on research undertaken with representatives of professions of the “person to person” type who had various lengths of work experience. The subjects of the research were divided into three groups: those with up to 5 years of work experience, those who been working for between 5.5 and 10 years, and employees with over 10 years of work experience.

The research carried out by us showed that the preconditions for the development of professional deformation lie in the motives for the choice of a profession, and that the expectations at the stage of entering independent professional life become a triggering mechanism. The professional reality is very different from the views that have been formed in the graduate of a professional educational institution. Therefore, during a person’s professional career, a transformation of his or her motives from a desire to benefit people to the possibility of being able to supervise others’ work occurs.

The reasons for deformation, in the opinion of researchers into this problem, lie in the underdevelopment of both the general and the professional culture. The level of education, level and character of labour motivation, orientations and attitudes, particular stress responses, features of character and temperament, level of empathic abilities, style of relationships within a team, level of intellectual development, properties of the nervous system, level of development of capacities, etc., have been referred to as personal variables in the phenomenon of professional maladjustment². Thus, the nature and dynamics of the deformation depend on the specific features of the individual³.

On the basis of the inclusion of the aforementioned personal characteristics of the individual into the components of his psychological culture, we can deduce that an underdevelopment of the psychological culture of a specialist is one of the reasons for professional deformation.

Considered as a way to harmonize the inner world (“I”) of the individual with the outside world, where “I” is a backbone constructor, a psychological culture is, on the one hand, the way to build the image “I” as a subject of professional activity, and, on the other hand, a way to establish harmonious relations with others while preserving one’s own individuality.

Regarding professional activity, this means not only knowledge of professionally important qualities, but also acceptance of oneself in the profession,

¹ *Nozhenkina O.S.* (note 2). - P. 61.

² *Beznosov S.P.* Professional deformation of an individual. - St.Petersburg: Speech, 2004.

³ *Druzhilov S.A.* Professional deformation and destruction as consequences of the distortion of the psychological patterns of occupation and activities. *Journal of Applied Psychology*. - 2004. - No. 2. - P. 57.

identification of oneself with a professional activity, positive focus on interpersonal communication, creativity, constructive business management, etc.

As noted by O. V. Puzikova, when considering the content of the psychological culture, a problem of psycho-cultural aspirations arises. The high degree of development of certain qualities may not always be interpreted as a positive trend. Thus, in Ms Puzikova's opinion, too high level of reflection can result in the person keeping track of every step and losing spontaneity in his or her behaviour, and excessive self-regulation may lead to soul-searching and low self-esteem. The question is one of the optimal balance of the components of the psychological culture¹. These qualities become obstacles to the harmonious development of the individual, and can lead to personal and professional deformation.

Professional deformation initially begins to emerge in the identity, and is then reflected in professional activity and the immediate environment through behaviour.

Analysis of the condition of the psychological culture of law enforcement officials allows us to talk about signs of professional deformation in all three groups in our research. Employees who have worked for more than ten years are most subject to professional deformation. However, the first manifestations of professional deformation are observed after five years of work in law enforcement. Men are more susceptible to deformation. The first signs of professional deformation in women are noticeable after eight years of work experience.

These signs include the following: an accusatory bias, a lack of desire, and a lack of awareness of how to express "negative" aspirations and emotions (for example, aggression, etc) in a way that is culturally acceptable to other people. In addition, we identified that the aspiration to manage "moods, desires and actions flexibly" and to "keep the development of mental and physical strength in good condition" were practically never found in employees. This is especially clearly seen in those we interviewed whose work experience was longer than ten years.

A focus on self-control and self-discipline is more noticeable in employees whose work experience is between 5.5 and 10 years, regardless of the level of their psychological culture.

This is confirmed by comparing the scoring indicators for the aspirations: "to be engaged in self-education on a regular basis", "to respond quickly to a poor condition, and find ways to improve it", and "independently to overcome bad habits and develop positive ones".

A similar attitude is also detected from an analysis of the scoring indicators for the aspiration "to respond quickly to feeling bad and find ways to improve a condition". It should be noted, however, that the indicators for this aspiration depend on the length of service and the gender of the employees. Women who have worked for less than eight years are more inclined to want to change their emotional state.

¹ Puzikova O.V. Psychological culture as a factor of self-actualization of individuals (for example, teachers): Doctoral dissertation in Psychology of Science: 19.00.03. Khabarovsk, - 2003. - P. 41.

However, high levels of self-control over the emotions and behaviour, communicative competence, steadiness, a low level of aggression and conflict, etc., are, in the view of most scholars, qualities that are indicators of professional suitability for legal activity and that can also lead to the emergence of signs of professional deformation.

For the prevention of professional deformation, the objective should not be to “cure” professional deformation, but to avoid creating the foundations for the development of mental states or contributing to the development of professional deformation, by teaching employees to overcome heavy loads without unbalancing the psyche and destroying the body.

In order to implement professional tasks effectively, it is essential to bring the psychological culture into a condition, objectified in models of activities and behaviour, in which harmoniously functioning components can lead to the success of professional activity, i.e. into an optimal state.

The development of a psychological culture and the achievement of this specific state imply the existence of special conditions. The experience of practical work on the training of specialists and the research carried out by various authors show that the psychological conditions that contribute to the successful development of the psychological culture of a future professional are the following: a developed need for personal self-actualization, an ability to embrace another person's emotional state, a focus on self-realization in the profession, and emotional reflexivity towards another who is the object of the professional activity.

Thus, the development and realization of programmes for the formation of a psychological culture based on the psychological conditions identified is the essential element for high quality training for professional activities.

With regard to what is mentioned above, the assessment, forecasting and development of a psychological culture as a factor of professional deformation prevention are among the priorities of human resource management and vocational and psychological training for those who give psychological support in occupations of the “person to person” type.

References

1. *Beznosov S.P.* Professional deformation of an individual. - St. Petersburg: Speech, 2004.
2. *Bolshakova T.V.* Personality determinants and organizational factors of mental burnout among health care workers: The author's abstract. Doctoral dissertation in Psychology of Science: 19.00.03. - Yaroslavl, 2004.
3. *Gellershtein S.T.* Psychological Technique/History of Soviet Psychology of Labour: texts (20-30 years of the 20th century) / edited by V.P. Zinchenko, V.M. Munipov, O.G. Noskov - M.: Moscow University Publisher, 1983.
4. *Druzhilov S.A.* Professional deformation and destruction as consequences of the distortion of the psychological patterns of occupation and activities // Journal of Applied Psychology. - 2004. - No. 2.
5. *Nozhenkina O.S.* The role of reflection in overcoming professional

deformation of a teacher. - Smolensk, 2012.

6. *Orel V.E.* Burnout phenomenon in international psychology: Empirical research and perspectives // *Psychological Journal*. - 2001. - Vol. 22. - No. 1.

7. Prevention of professional deformation of the individual staff members of the Department of Interior: Textbook, edited by V.M. Burykin M.: Ministry of Internal Affairs of Russia, GUK IMC, 2004.

8. *Puzikova O.V.* Psychological culture as a factor of self-actualization of individuals (for example, teachers): Doctoral dissertation in Psychology of Science: 19.00.03. - Khabarovsk, 2003.

LEGAL EDUCATION OF STAFF OF CLOSED FOSTERING INSTITUTIONS FOR MINORS AND THE FUNCTIONS OF THE MODERN STATE

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Abstract. The author analyses the role of legal education of the staff of closed fostering institutions in the enforcement of minors' rights, in conjunction with the functions of the modern state; draws attention to the problem of damage to the legal consciousness of staff of detention facilities for minors; and considers the fundamental principles of international acts concerning legal enlightenment in the field of human rights.

Keywords: legal enlightenment, human rights, closed fostering institutions for young offenders, legal consciousness of personnel of detention facilities, legal consciousness deformation, international acts.

The legal status and the guarantees of the fundamental (constitutional) rights of minors in closed fostering institutions (detention facilities and closed correction institutions for juvenile offenders) relate to the functions of the state. The functions of the state are understood as the main purposes of its activity. The functions of the state contribute to the realization of constitutional provisions, which are the basis for the successful development of the state and society.

Typically, there are four main internal functions of the modern state: the economic, social, political and ideological (sometimes also referred to as law enforcement or using other terms) functions¹.

Regarding the ideological function, the Russian Constitution sets the principle of ideological diversity (ideological pluralism). No ideology may establish itself as the ideology of the state or as an obligatory ideology (Art. 13). At the same time, it would seem appropriate that "a modern democratic state supports (including financially) advanced ideological trends, culture, expressing the universal human values, stimulates their development and fights against misanthropic ideas,

¹ See, e.g., *Chirkin V.E.* Political studies: A tutorial. - M: Urist, 2000. - P. 100.

prohibiting their promotion by law and punishing for violations thereof¹. In the modern world, human values are the following: human rights, a culture of peace and democracy, and other socially important values.

The constitutional requirement that no ideology may be established as obligatory is absolute for the governmental regulation of relationships in civil society. However, the ideology of natural and inalienable human rights requires the recognition, respect and protection of human rights by the state. As individual authors emphasize, “the recognition of the ideology of human rights is a requirement that must be offered to public servants. Hence, the immanent constitutional limitation of citizens’ equal access to public service follows: in the ideal, those who deny the ideology of human rights should not have access to public service”². It is thought that this requirement applies equally to the civil service of the state and the law enforcement services (including the services of the penal system).

It appears that the existence of ideological functions deserves support in the context of human rights as a supreme value, raising awareness for human rights, education in the legal culture.

V. S. Nersesyants highlights a human rights function among other functions, defined as “activities of the state in the protection of rights and freedoms of an individual and citizen, manifestation of law and order in all spheres of public and political life”³. Within the framework of human rights, the author underlines that “consistent observance of guarantees provided by the state in the area of human rights and freedoms is essential. Guarantees relate primarily to human rights and freedoms of an individual in accordance with universally recognized principles and norms of international law”.

At one time, I.A. Ilyin noted that “the only true way to all reforms is progressive education of sense of justice”⁴.

The legal culture is an important prerequisite and a means of strengthening the rule of law and order in a society⁵. A.F. Cherdantsev understands legal culture in its broadest sense to mean everything created by mankind in the legal field: law, legal science, the sense of justice, legal practice. Legal culture is characterized by the condition of legal science, the level of development of legislation and legal order, and the level of professional activity of law enforcement bodies and legal professionals. In the narrow sense, legal culture is the level of knowledge of the law of members of a society and their respect for the law, or its high prestige in a society⁶. Legal nihilism is the antithesis of legal culture, i.e. the undervaluation, or even negative valuation, of the role of the law, disrespect for the law, or scornful

¹ *ibid*, P. 101.

² The Constitution of the Russian Federation: the problematic comments. Editor in chief Chetvernin V.A. M.: Center for Constitutional Studies, MPSF, 1997. - P. 69.

³ *Nersesyants V.S. General theory of law and state: A textbook for law schools and faculties.* - M.: NORMA-INFRA-M Publishing Group, 1999. - P. 260.

⁴ *Ilyin I.A. Collected Works Vol. 4.* - M., 1994. - P. 107.

⁵ *Cherdantsev A.F. Theory of state and law: Textbook for high schools.* - M., 1999. - P. 340.

⁶ *Ibid*, P. 340-341.

attitudes to the law, and feeds various kinds of violations.

The fight against legal nihilism is a part of the problem of development and progress in Russia of a civil society and a lawful state¹.

The sense of justice of employees of internal affairs bodies was studied by considering various categories of civil servants and public officials, including law enforcement officials. It has been emphasized that, "the adequate analysis of legal awareness of staff of internal affairs bodies is necessary, because they are endowed with considerable powers the excessive use or abuse of which affects the rights of citizens"². This conclusion also directly applies to employees of closed correction institutions for minors.

An in-depth study of the provisions of the Constitution of the Russian Federation and other legal normative acts related to the rights and freedoms of citizens should be the cornerstone of the professional training of employees of internal affairs bodies³.

As noted in the literature, in the training system of the Interior Ministry the education of employees of internal affairs bodies has a targeted impact on their consciousness, feelings and will, in order to form professionally significant moral-psychological qualities, habits and standards of conduct, complying with the requirements of the service⁴. This emphasizes the fact that the objects of the education are adults to whom the state has entrusted responsibility for the execution and enforcement of the law. This indicates that the main areas for educational work lie in legal, moral and aesthetic education. It has been noted that legal education is the process of developing sustainable legal ideas and principles of lawfulness. Thus, the purpose of the legal education of employees is realized through the formation of a deep respect for the rule of law, laws and legitimacy⁵.

This also applies to employees of penitentiary institutions, which, in addition, include closed correction institutions for juvenile offenders.

Individual researchers in 1993 fairly pointed out that the methods of preventing and correcting professional deformation of employees of penitentiary institutions were "poorly studied and insufficiently identified". Thus, educational work among personnel of institutions is one of the means of eliminating professional deformation⁶.

¹ *Rassolova M.M., Luchina V.O., Ėbzeeva B.S.*, Theory of state and law: Textbook for high schools. - M., 2000. - P. 412.

² *Lazarev V.V., Lipen S.V.* Theory of state and law: Textbook for high schools. - M.: Spark, 2000. - P. 322.

³ *Fastov A.G.* Strengthening of the rule of law in the activities of the internal affairs authorities as a guarantee of the observance of human rights // Human rights in Russia: problems of guarantees at the present stage: documents of inter-university conference. Responsible Editors Anisimov P.V., etc. - Volgograd, 1999. - P. 127.

⁴ *Karavaev A.F., Kil'mashkina T.N.* Introduction to pedagogy of internal affairs bodies: Tutorial. - Omsk, 2002. - P. 3.

⁵ *Ibid.*, - P. 29, 47.

⁶ *Novikov B.D.* Psychological peculiarities of occurrence of professional deformation of employees of correctional labor institutions: The author's abstract. Doctoral dissertation in Psychology. - Tver, 1993. - P.3.

“A concept of education of workers of the penal system” was approved by the order of the Director of the Federal Penal Service (FPS) of Russia in 2005; and “Fundamentals of organization of educational work with employees of FPS” was approved in 2006¹. These documents indicate that “education of employees of the penitentiary system is targeted and planned activity of the state and society, public and other organizations as well as government bodies and officials of the Federal Penal Service of Russia on the formation and development of the personality of employees in accordance with the requirements for the creation of a modern penal system, preparedness of workers to perform service tasks in the interest of law and order”².

It is supposed (presumed) that employees and officials of penitentiary institutions, including closed correction institutions for minors, are people with a developed legal consciousness. These people must comply with the principles of legality and humanity in their activities in respect of minors, should cultivate (create) respect for human rights, should promote the legal and moral consciousness of minors, and should develop a sense of responsibility in the minors for their behaviour. This, in turn, should contribute to the prevention of juvenile delinquency, both while in training in correction institutions and after release.

In the international documents concerning legal education about human rights, education in the spirit of respect for human rights has a major value. What are the main documents related to this?

The Code of Conduct for law enforcement officials, adopted by the General Assembly of the United Nations, has an essential place³. The Code is accompanied by Article-by-Article commentaries addressed to the governments of the state-members of the United Nations. Thus, Article 7 of the Code states: “Governments cannot expect citizens to comply with the rule of law, if they are unable or unwilling to enforce the legitimacy of their own officials and within their own institutions.” This has an important moral and legal significance.

The International Covenant on Economic, Social and Cultural Rights establishes that the states that have signed and ratified the Covenant, “agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms ...” (paragraph 1 of Article 13).

In accordance with the Convention on the Rights of the Child⁴ of the United Nations, the state-members “shall undertake, by appropriate and active means, to widely inform adults as well as children about the principles and provisions of the Convention” (Article 42).

¹ *Lebedev G.P.* To educate individually (about individual education issues of the employees of PCS // Penal Correction System: law, economy, management). - 2006. - No. 6. - P. 21, 22.

² *Ibid.* - P. 21.

³ Code of conduct for law enforcement officials. International protection of the rights and freedoms of the individual: collection of documents. - M., 1990. - P. 319-325.

⁴ Here “the child” means a child aged between 14 to 18 years.

The World Plan of Action on Human Rights Education and Democracy¹ (adopted by the International Congress on Education for Human Rights and Democracy, 1993) provides that “education will focus on specific groups, including, in particular, employees of police and prisons; judges, lawyers and other people working in the field of justice”.

The Plan of Action for a Decade of Education in the Field of Human Rights of the United Nations Organization, 1995-2004 (an official UN document, circulated at the 49th session of the General Assembly) stipulates that “particular attention is paid to the training of police and prison employees, lawyers, judges, teachers and curriculum developers... representatives of non-governmental organizations, media, government officials, parliamentarians and representatives of other groups capable to provide direct influence on the realization of human rights” (paragraph 24)².

Recommendation 1346 (1997) on Education in the Field of Human Rights Protection (adopted by the Parliamentary Assembly of the Council of Europe on September 26, 1997) contains a proposal “to include the subject of human rights in the program of training of personnel directly communicating with citizens (police, prison administration personnel)” (paragraph 10)³.

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms⁴ (adopted by Resolution 53/144 of the UN General Assembly as of December 9, 1998) imposes on the state “the responsibility to encourage and facilitate teaching of human rights and fundamental freedoms at all levels of education, and to ensure that all those responsible for training of lawyers, law enforcement officers, military personnel, government employees, include in their curricula appropriate elements of human rights teaching” (Article 15).

It should be noted that the Typical Code of Ethics and Professional Conduct for Public Servants of the Russian Federation and Municipal Employees, approved by the decision of the Presidium of the Presidential Council of the Russian Federation on Anti-Corruption as of December 23, 2010, contains, in particular, the following provision: “public officials, aware of the responsibility to the state, society and citizens, are required to proceed from the fact that recognition, observance and protection of human and civil rights, and freedoms define the basic sense and a content of the activity...”. In addition, compliance with the provisions of the Typical Code is “one of the criteria for evaluating the quality of their professional activity and professional conduct”.

It must also be noted that the Foundations of the State Policy of the Russian Federation in the Sphere of Development of Legal Literacy and Legal Awareness

¹ Education and legal education in the field of human rights: Compilation of documents. General Editor Mironov O.O.- M., 2004.- P. 41-42.

² Ibid - P. 47, 51.

³ Ibid - P. 93.

⁴ See: Collection of International Agreements. Vol. I (first part). - Geneva, 2002. - P. 547.

of Citizens, adopted by the President of the Russian Federation on May 4, 2011, contains a special section "on measures of the state policy to enhance the legal awareness of persons holding the state and municipal positions, the state and municipal employees, employees of law enforcement bodies". This is an essential factor in addressing the problems mentioned above.

Legal education for employees of closed correction institutions for minors is a complex problem, the solution of which should involve institutions of the civil society and the state.

References

1. *Chirkin V.E.* Political studies: A tutorial. M.: Urist, 2000.
2. *Cherdantsev A.F.* Theory of state and law: Textbook for high schools. M., 1999.
3. *Fastov A.G.* Strengthening of the rule of law in the activity of the internal affairs authorities as a guarantee of the observance of human rights // Human rights in Russia: problems of guarantees at the present stage: documents of inter-university conference. Responsible Editor Anisimov P.V. and others. Volgograd, 1999.
4. *Ilyin I.A.* Collected Works. Vol. 4. M., 1994.
5. *Karavaev A.F., Kil'mashkina T.N.* Introduction to pedagogy of internal affairs bodies: Tutorial. Omsk, 2002.
6. Code of conduct for law enforcement officials. International protection of the rights and freedoms of the individual: Collection of documents. M., 1990.
7. The Constitution of the Russian Federation: Comments on the problem. Editor in chief Chetvernin V.A. M.: Center for Constitutional Studies, MPSF, 1997.
8. *Lazarev V.V., Lipen S.V.* Theory of state and law: Textbook for high schools. M.: Spark, 2000.
9. *Lebedev G.P.* To educate individually (about individual education issues of the employees of PCS // Penal Correction System: law, economy, management). 2006. No. 6.
10. *Nersesyants V.S.* General theory of law and state: A textbook for law schools and faculties. M.: NORMA-INFRA-M Publishing Group, 1999.
11. *Novikov B.D.* Psychological peculiarities of occurrence of professional deformation of employees of correctional labour institutions: The author's abstract. Doctoral dissertation in Psychology. Tver, 1993.
12. Education and legal education in the field of human rights: Compilation of documents. General Editor Mironov O.O. M., 2004.
13. Collection of International Agreements. Vol. I (first part). Geneva, 2002.
14. *Rassolova M.M., Luchina V.O., Ėbzeeva B.S.* Theory of state and law: Textbook for high schools. M., 2000.

LAW-MAKING AND LAW-MAKING PROCESSES

COMPARISON OF METHODS OF ANTI-CORRUPTION EXPERT EXAMINATION ESTABLISHED BY THE RF GOVERNMENT AND ADOPTED BY THE RF CONSTITUENT ENTITIES

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Abstract.

The article describes the law-making activities of local self-governing bodies, analyses the laws regulating the local self-government system, and studies the nature of the power authorities of population and their direct as well as their indirect expression. The notions of popular sovereignty and democracy are discussed, and the point of view that the population does not have independent competence for direct decisions on issues of a power-wielding nature is contested. It is pointed out that not only local self-governing bodies, but also the population of a municipal area, have a right to make rules, or the capability to attach a general binding character to their commands as a primary way of realizing their powers directly, using the mechanism of a referendum or a citizens' meeting.

Keywords:

law-making, local legal act, local self-government, popular sovereignty, municipal formation, territorial public group, referendum, citizens meeting.

A local self-government body exercises its law-making authority by issuing acts. A legal act is directly linked with procedure, as the legitimacy of the adopted document depends on compliance with the relevant procedure. The adoption order for any act has a number of significant procedural features that differ depending on which law-making authority adopts the act: the population, the executive bodies and the representative authority.

The population of the municipality as a source of legal acts and a law-

maker

The population of the municipality is a composite subject, and cannot be reduced to the mechanical sum of the citizens living in the territory. Contemporary authors, when exploring local self-government and its legal features, use the concept of "regional public group" or "regional group", having a similar or identical meaning to "population of municipality", which is the term used by the legislation¹.

A regional public group is a special form of the organization of a population, and is based on territorial affiliation regardless of age and nationality. It is based on clusters of individuals and legal entities that have a territorial-public and public-legal nature, and its main characteristics are voluntary adherence to the group and special forms of public legal compulsion for members of the group who act in violation of the rules established by the group.

In the literature as well as in the legislation of a number of constituent states of the Russian Federation, the term "local community" is used. The defining characteristics of a territorial public group and a local (territorial) community are the affiliation with the place of residence and, thus, affiliation with the municipality, and the relationship (interaction) between citizens and the local community, as well as among the citizens of the local community, concerning issues of the realization or participation in the realization of local self-government².

As A.A. Uvarov notes: "One of the main elements of the system of local self-government is a local population endowed with power executive authority. In the system of local self-government, the population should be understood as not just a group of people living in a particular area, but the local community, united in accordance with the objectives of their livelihood within the territory where the local self-government is exercised"³.

The characteristics of a local community are the following: population (community); location (territory); social interaction; and sense of community (psychological identification with the community)⁴. The basis of the concept of the local community as a territorial group is the consideration of the community as a territorial corporation (a legal entity in public law), based on the citizens as members united by the fact of their cohabitation⁵.

The legal fact of a citizen entering the territorial public group of the municipality is recorded by the registration of the citizen at his or her place of permanent or temporary residence. However, "the registration or its absence cannot serve as a

¹ Chirkin V.E. Public authority. M.: Urist, 2005. P. 25, etc.

² Babichev I.V. Territorial public employees of the municipality and local communities: Legal issues of institutionalization // Constitutional and Municipal Law. 2007. No. 19; Gorozhanin V. The notion and peculiarities of the legal status of the subjects of the local self-government in the Russian Federation // Municipal Law. 1998. No. 4. P. 10-11; Kuryachaya M.M. Local community as the foundation of an association of citizens // Constitutional and Municipal Law. 2007. No. 4.

³ Uvarov A.A. System of local self-government // Constitutional and Municipal Law. 2002. No 2. P. 12.

⁴ Filippov Yu.V., Avdeyeva T.T. Foundations for the development of the local economy.-M.: Delo, 2000. P. 44-45.

⁵ Bondar N.S. Citizen and public authorities: Constitutional guarantee of rights and freedoms in the local self-government: Tutorial. M.: Publishing House of Gorodets, 2004. P. 121.

restriction or condition for the realization of the rights and freedoms of citizens"¹. The registration of voters or participants in a referendum is established on the basis of the information submitted by the bodies engaged in the registration of Russian citizens at their place of residence and place of stay.

The Constitution of the Russian Federation (Part 2, Article 3) identifies the following forms of the execution of power by the people: 1) direct power; and 2) power mediated through the bodies of state power and local self-government. The supreme direct expression of the people's power is in referendums and free elections. However, the Fundamental Law allows the existence of other forms of direct democracy at the municipal level (Part 2, Article 130), such as, for example, gatherings of citizens; such a gathering is an alternative to the creation of a representative body of the municipality, and for settlements with a small population is the most expedient and least expensive form of municipal power. The procedure for the execution of democracy is governed by the Federal Law of October 6, 2003, No. 131-FZ, "On general principles of organization of local self-government in the Russian Federation" (hereinafter "the Law on local self-government")².

The literature expresses the view that citizens cannot have any power in principle, because this would mean there was a dualism of power between the people and the state authorities.

According to the supporters of this view, the notions of popular sovereignty and democracy are only a legal fiction, since, in reality, the citizens cannot exercise power on their own. They can only take part in the formation and execution of power. At the same time, people are sometimes treated as the "social source of all competences"³.

It is impossible to agree that the people (the population) have no independent competence to make direct decisions on questions of power character. It is known that the main method by which the powers of the state and the local authorities are implemented in order to achieve a target is the setting of a norm, i.e. the conferring of an obligatory nature on a decree. According to the legislation, it is not only bodies of local self-government that possess such capacity at a municipal level, but also the population of the municipality, using the mechanism of a referendum or a meeting of citizens for this purpose.

Legal acts adopted by local referendum (or by a meeting of citizens) become a part of the system of municipal legal acts and have legal force equivalent to that of the charter of the municipality. They are acts of the highest legal force in the

¹ The Federal Law of June 25, 1993 No. 5242-1 "About the right of citizens of the Russian Federation to freedom of movement and choice of place of residence within the Russian Federation" // Bulletin SND and the Armed Forces of the Russian Federation. 1993. No. 32. Art. 3; Resolution of the Government of the Russian Federation dated July 17, 1995 No. 713 // Code of laws of the Russian Federation. 1995. No. 30. Art. 2939; Article 16 of the Federal Law of June 12, 2002 No. 67-FZ "About basic guarantees of electoral rights and the right of citizens to vote in referendum of the Russian Federation" // Code of laws of the Russian Federation. 2002. No. 24. Art. 2253.

² The Federal Law of October 6, 2003 No. 131-FZ "On general principles of organization of local self-government in the Russian Federation" // Code of laws of the Russian Federation. 2003. No. 40. Art. 3822.

³ The Constitution of the Russian Federation: A problematic comment. Edited by Chetvernin V.A. M.: Center for Constitutional Studies, MPSF, 1997. p. 72; Tikhomirov Yu.A. Theory of competence. M: Urin-formcentr, 2001 P. 52, 60-62.

system of municipal legal acts, have a direct effect and are applied in the entire territory of the municipality. Other municipal legal acts must not conflict with them.

Through acts of direct democracy the citizens themselves exercise legal regulation without intermediaries, i.e. they have legal effect on the system of public relationships, using permissions and the imposition of prohibitions. The ability to make public-power decisions can be considered to be a distinguishing feature of any power, including direct democracy. Acts of direct law-making are aimed at achieving a certain legal effect (to establish, implement or abolish the rule of law, to change of the scope of laws, to create or terminate specific legal relationships, etc.).

A meeting of citizens is held to address issues of local importance only in settlements where there are not more than 100 people eligible to vote.

A meeting exercises the powers of the local representative body, including those that are within its exclusive competence. Thus, a meeting of citizens allows the direct solution of local issues by the population.

If the legislator has envisaged that a decision taken at a local referendum does not require approval by any governmental authority, government official or local self-governmental authority, then no such approval is required for a decision taken at a meeting of citizens. It is also not envisaged that a legal act adopted by a meeting of citizens needs to be submitted to the head of the municipality for signing and promulgation.

It must be assumed that a local referendum, being a form of direct democracy, should not replace the work of local self-government bodies. A decision in a referendum should be taken after a comprehensive analysis of the problems under consideration at the municipal level and should take into account the complexity and cost of the procedures involved.

A meeting of citizens, exercising the powers of the representative body of local self-government, is the most popular form for the direct solution of local issues by the population of a small community, and therefore a clear and correct stipulation of the procedures for citizens' meetings and their decision-making in the charter of the settlement is a very important factor in the implementation of the citizens' constitutional right to direct law-making.

It is necessary to agree with V. N. Rudenko that the acceptance of decisions made directly by the public requires not only a clear understanding of the tasks, determination and political will, but also, importantly, specific personal responsibility for the decision maker. Therefore, in the modern system of the organization of power and management, when the legislator has to choose who should make decisions on most public law issues, preference is given to the officials of representative and other authorities¹. People cannot bear personal responsibility for the consequences of made decisions. Such responsibility may only be a historical responsibility towards future generations², but this is not conducive to an efficient solution of the challenges of today.

There is a certain mistrust of the institution of direct law-making because of its use by political structures in order to lobby for their own interests, and the

¹ *Rudenko V.N.* Direct democracy: Models of governance, constitutional and legal institutions. Ekaterinburg: UrLI (the Ministry of Internal Affairs of Russia), 2003 - P.116.

² *Mamut L.S.* People in the legal state. - M.: Norma, 1999. Chapter 4.

conversion of direct democracy¹ into populist democracy. This factor alone is not conclusive evidence against the institution of direct law-making, but it gives one more argument in favour of moderation, balance and thoughtfulness in the development and adoption of legislation regulating the issues to be submitted to referendums and meetings of citizens.

Thus, direct municipal law-making to some extent represents a compromise between the municipal authorities and civil society, between professionalism and social emotion.

Law-making by representative bodies of self-government and the acts of these bodies

The implementation of local self-government is impossible without bodies to which the population, in accordance with the law, delegates the right to decide matters directly related to the provision of people's livelihoods. The existence of elected officials is a required condition for the organizational effectiveness of local self-government, and is indispensable to the implementation of the interests and needs of the residents of the municipality².

There are two types of local self-government bodies: elected bodies, which are formed in accordance with federal and local laws and municipal charters; and other bodies, which are only formed in accordance with municipal charters. The law has introduced the concept of "an elected official of a local self-government"; this may be the head of the municipality, who leads the activity undertaken by the local self-government in the territory of the municipality, or another elected official.

The representative body of the municipality is a body formed in accordance with the procedure established by the law and the charter of the municipality, and is empowered with powerful authority to address local issues. It aims to represent the interests of the population, to reflect these interests in the decisions it makes, and to ensure the implementation of the powers of the municipality and the rights of citizens to exercise local self-government. Representative bodies of municipalities are not included in the system of bodies of public authorities³.

The law also stipulates various options for the employment of the head of the municipality. In accordance with the charter of the municipality, the head of the municipality may be elected during the municipal elections and lead the local administration, may be a member of the representative body with a casting vote and exercise the powers of its chairman, or may be elected by the members of the representative body and lead the representative body. The head of the municipality cannot simultaneously exercise the powers of the chairman of the representative body and the powers of the head of the local administration. This restriction does not apply to the bodies of local self-government of a rural settlement, where there is provision for the formation of an executive and administrative body chaired by the head of the municipality, and the head of the municipality also exercises the powers of the chairman of the representative body of the settlement.

There are six organizational methods for forming the local self-government

¹ *Rudenko V.N.* Russian populism: Origins, meaning, fate. Ekaterinburg: UrLI (the Ministry of Internal Affairs of Russia), 1993.

² *Kazachenkova O. V.* Peculiarities of the legal status of bodies of the local self-governments: Legislative and enforcement issues // *Administrative and Municipal Law*. 2012. No 8. - P. 31.

³ *Kolushin E.I.* Municipal law of Russia. - M.: Norma, 2008. - P. 133-134.

structure¹, and these differ in their forms for the elections of the heads of the municipality, the local administration and the representative body. There are also options for appointing the head of the local administration by a contest, combining the powers of the head of the local administration and the chairman of the representative body of the municipality, etc.

Establishing a number of deputies for a representative body is extremely important for the municipality, although this question has not always been given due attention in the legislation and practice for local self-government. The number of members of a representative body was not previously directly regulated by the legislation on local self-government. As a result, deputy bodies began to be formed in states of the Russian Federation without uniform criteria². The Law on local self-government regulated the matter in more detail and, in particular, set a minimum number of members for representative bodies of municipalities.

Functionally, the representative bodies are designed to perform what is primarily a norm-making function³, i.e. to adopt regulations on matters within their competence as permitted by the federal laws, the laws of the relevant state of the Russian Federation, and the charter of the municipality. Such regulations would establish, for example, the official symbols of the municipality, the law-making procedure for implementing citizens' decisions, and the organization and conduct of public hearings.

The work of a representative body includes, among other things, the organization of the oversight of the implementation of its decisions and the activities of other bodies of local self-government, as well as the holding of public hearings to discuss draft municipal legal acts on local issues that require the participation of the residents of the municipality.

The procedure and results of the law-making of executive bodies of local self-government

The law establishes a mandatory presence of the local administration (the executive-administrative body of the municipality) in the structure of the bodies of local self-government⁴. However, the Constitutional Court of the Russian Federation has acknowledged that the creation of executive bodies of local self-government is at the discretion of local communities and cannot be established by the law of the state of the Federation as a mandatory requirement. Thus, a provision requiring the formation of an executive body along with a representative one was declared unconstitutional⁵. This decision formally demonstrates consistency with the principle of the independence of the population in decisions on matters of local importance, but at the same time reinforces the lack of balance in the local self-government structure.

The legal literature states that the legal position of the executive-

¹ Municipal law of Russia / Edited by Kostukov A.N. - M.: UNITI-DANA, 2007. - P. 181-185.

² *Pravdin D.G.* Legal regulation of interaction between representative and executive-administrative bodies in the municipality in the Russian Federation. Edited by Komkovaya G.N. - M.: DMK Press, 2012.

³ For more details see Aleshkova N.P. Constitutional and legal foundations of the municipal law-making in the Russian Federation. Ekaterinburg: Ural State Law Academy, 2012.

⁴ *Ignatov V.T., Butov V.I.* Local self-government in Russia and its reformation: History and modernity. Rostov-na-Donu: Publisher SKAGS, 2004. - P. 70.

⁵ The Decision of the Constitutional Court of the Russian Federation of February 1, 1996 No. 3-p "On the case about the verification of constitutionality of some provisions of the Charter i.e. the Supreme Law of Chita oblast" // Code of laws of the Russian Federation. 1996. No. 7. Art. 700.

administrative body of local self-government is influenced not only by the legislative and other normative and legal regulations, but also by the method by which the local administration is formed, and the system of relationships with other bodies of the municipality¹.

The organization of the activities of the local administration is carried out in accordance with the requirements of the Constitution of the Russian Federation, the federal laws, the constitutions (charters) and laws of the state of the Russian Federation, the provisions of the municipal charter, the legal acts adopted at local referendums (meetings) of citizens, and the regulations and other legal acts of the representative body of the municipality, based on the regulations of the local administration. The regulations of the local administration, as well as the regulations of the representative body of the municipality, are not part of the system of municipal legal acts, and are approved by a decree or order of the head of the local administration, and sometimes by a decision of the representative body of the municipality.

From the viewpoint of the publication of municipal legal acts, a federal legislator has determined that the acts of the head of the local administration, i.e. decrees and orders, and not the acts of the local administration, should be made public. Other officials of local self-government (e.g., deputies head of the local administration, or the leaders of the structural units of the local administration, etc.) issue instructions and orders on matters within their competence as laid down by the charter of the municipality. Thus, if the charter of the municipality does not stipulate that it is possible for other officials to issue independent municipal legal acts, then these acts cannot be issued by them, i.e. these officials do not have their own law-making competence.

However, deputy heads of the local administration can have not only the right to issue their own municipal legal acts (that is, decrees or orders of the deputy head of the local administration), but also the right to sign the municipal legal acts of the local administration if the power to do so has been delegated to them by the head of the local administration².

Article 74 of the Law on local self-government stipulates that it is possible for a normative legal act to be issued by the head of the municipality or the head of the local administration. The law establishes that the head of the municipality or local administration may be impeached for publishing a normative legal act that contradicts the Constitution, the law or the charter.

There is a debate about the possibility of municipal legal acts being published by the head of the municipality on his or her own behalf. The powers of the head of a municipality depend on his or her position in the system of bodies of local self-government – whether, for example, the head of the municipality performs the duties of the chairman of the representative body, or the duties of the head of the local administration. This provision is worded imperatively, and because of this a broad interpretation seems impossible. In addition, it deals with municipal legal acts in general, and not just with regulations. In this way, the head of the

¹ For more details see *Kolesnikov A.V.* The legal status of the executive bodies of the local self-government. Saratov: Saratov State. Academy of Law, 2004; *Korosteleva M.V.* Executive bodies in the system of the local self-government. Volgograd: Publisher VAGS, 2004.

² *Baranov P.M.* About problems of the powers of the bodies and officials of the local government on the adoption of regulatory legal acts // Constitutional and Municipal Law. 2011. No 2. - P. 54.

municipality is deprived of his or her own powers in the field of municipal law-making.

At the same time, the head of the municipality is vested with his or her "own powers to address local issues". However, the implementation of this power without the ability to issue legal acts (or even acts of a regulatory nature) mediating its enforcement is practically impossible.

Problems arise with the definition of the competence of other local self-government officials in municipal law-making. The structure of the local government reflects the opinion of the head on the most efficient way to organize the work of the body headed by him, and can often undergo significant changes during a reform procedure or a change of management. To establish the structure of the local administration in the charter, which is fundamental and should be the most stable municipal legal act, is not rational. However, if the charter does not regulate the structure of the local government, then the powers of the officials of the local administration cannot be stipulated in it.

Bibliography

1. *Aleshkova N.P.* Constitutional and legal foundations of the municipal law-making in the Russian Federation: Monograph. Ekaterinburg: Ural State Law Academy, 2012.
2. *Babichev I.V.* Territorial public employees of the municipality and local communities: Legal issues of institutionalization // Constitutional and Municipal Law. 2007. No. 19.
3. *Baranov P.M.* About problems of the powers of the bodies and officials of the local government on the adoption of regulatory legal acts. Constitutional and Municipal Law. 2011. No. 2.
4. *Bondar N.S.* Citizen and public authorities: Constitutional guarantee of rights and freedoms in the local self-government: Textbook. M.: Gorodets, 2004.
5. *Chirkin V.E.* Public authority. Moscow: Urist, 2005
6. *Gorozhanin V.* The notion and peculiarities of the legal status of the subjects of the local self-government in the Russian Federation // Municipal Law. 1998. No. 4.
7. *Ignatov V.T., Butov V.I.* Local self-government in Russia and its reformation: History and modernity. Rostov-na-Donu: Publisher SKAGS, 2004.
8. *Kazachenkova O. V.* Peculiarities of the legal status of bodies of the local self-governments: Legislative and enforcement issues // Administrative and Municipal Law. 2012. No. 8.
9. *Kolesnikov A.V.* The legal status of the executive bodies of the local self-government. Saratov: Saratov State Academy of Law, 2004.
10. *Kolushin E.I.* Municipal law of Russia. M.: Norma, 2008.
11. The Constitution of the Russian Federation: Comments on problem. Edited by Chetvernin V.A. M.: Center for Constitutional Studies, MPSF, 1997.
12. *Korosteleva M.V.* Executive bodies in the system of the local self-government. Volgograd: Publisher VAGS, 2004.
13. *Kuryachaya M.M.* Local community as the foundation of an association of citizens // Constitutional and Municipal Law. 2007. No. 4.
14. *Mamut L.S.* People in a State of Law. M.: Norma, 1999.
15. Municipal law of Russia. Edited by Kostukov A.N. M.: UNITI-DANA,

2007.

16. The Decision of the Constitutional Court of the Russian Federation of February 1, 1996 No. 3-p "On the case about the verification of constitutionality of some provisions of the Charter i.e. the Supreme Law of Chita oblast" // Code of laws of the Russian Federation. 1996. No. 7. Art. 700.

17. Resolution of the Government of the Russian Federation dated July 17, 1995 No. 713. Code of laws of the Russian Federation. 1995. No. 30. Art. 2939.

18. *Pravdin D.G.* Legal regulation of interaction between representative and executive-administrative bodies in the municipality in the Russian Federation. Edited by Komkovaya G.N. M.: DMK Press, 2012.

19. *Rudenko V.N.* Direct democracy: Models of governance, constitutional and legal institutions. Ekaterinburg: UrLI (the Ministry of Internal Affairs of Russia), 2003.

20. *Rudenko V.N.* Russian populism: Origins, meaning, fate. Ekaterinburg: UrLI (the Ministry of Internal Affairs of Russia), 1993.

21. *Tikhomirov Yu.A.* Theory of competence. M.: Urinformcentr, 2001.

22. *Uvarov A.A.* System of local self-government // Constitutional and Municipal Law. 2002. No 2.

23. The Federal Law of October 6, 2003 No. 131-FZ "On general principles of organization of local self-government in the Russian Federation" // Code of laws of the Russian Federation. 2003. No. 40. Art. 3822.

24. The Federal Law of June 25, 1993 No. 5242-1 "On the right of citizens of the Russian Federation to freedom of movement and choice of place of residence within the Russian Federation" // Bulletin SND and the Armed Forces of the Russian Federation. 1993. No. 32. Art. 3.

25. The Federal Law of June 12, 2002 No. 67-FZ "On basic guarantees of electoral rights and the right of citizens to vote in referendum of the Russian Federation" // Code of laws of the Russian Federation. 2002. No. 24. Art. 2253.

PROBLEMS OF LAW-MAKING IN THE AREA OF TECHNICAL REGULATION

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Abstract.

The article states that the lack of conformity between the systems of norm setting, standardization, certification, control and inspection and modern demands and market relations is one of the key factors hindering the development of the economy of the Russian Federation. On the basis of an analysis of the national system of technical rate setting, including its merits and demerits, the author considers the problems and prospects of a reform of the system of setting statutory requirements, an evaluation of conformity and confirmation of conformity, and the formation of a legal basis for a general national legal regime of technical regulation (stipulated by the adoption in 2003 of Federal Law No 184-FZ "On Technical Regulation"). The problems are reflected in the application of the technical regulations and directives of other countries and of international, foreign and provisional national standards in the reform of the technical regulation system of Russia. The success of the reform of the technical regulation system, in the author's opinion, must be ensured by the application of achievements of national jurisprudence, and by the development of a socio-technical law.

Keywords:

technical regulation, technical regulation system, system of technical rate setting, technical barriers in trade, international standardization, technical rate setting and standardization, socio-technical law, economy of Russia, global economic space.

In recent years, due to the globalization of economic relationships, there has been active modernization of legislation in the field of technical regulations and conformity assessment. As a result of this activity, at the beginning of the 21st century the international community has developed a system of technical regulation, which is based on the WTO Agreement on Technical Barriers to Trade and international standards.

Russia's entry into the market and its integration into the world economy caused an urgent need for the early establishment in the country of a national system of technical regulation, harmonized with the requirements of the

international documents in this field. The President and the Prime Minister of the Russian Federation repeatedly spoke about significance of this problem, pointing to the paramount importance and priority of work aimed at bringing the system of technical regulation into a condition corresponding to the needs of society and the interests of the state¹.

Today, one can admit that one of the key factors hampering economic development in the Russian Federation is the discrepancy between the systems of regulation, standardization, certification, control and supervision and contemporary needs and market relationships. Russia's economy has actually entered the market, but the system of technical regulation is still the same system that was formed in the era of the planned economy, total control, economic deficit and lack of competition.

The national system of state technical regulation evolved from the 1930s and, at the time of the collapse of the USSR, the Russian Federation had one of the best systems in the world for technical regulation – mandatory requirements were secured by departmental regulations and normative technical documents. However, the main drawback was the lack of an enforcement mechanism in market conditions.

Global changes in industry began in 2003 with the Federal Law No. 184-FZ “On technical regulation”, which marked the beginning of a new phase of existence of technical and legal norms and laid the “grounds of the legal foundation of technical regulation”². It was necessary to make a radical change to the approaches to and evaluation of technical regulation, to determine the place of technical regulation in the overall mechanism of legal regulation. The law had to lay the foundations for a radical reform of the whole system of establishing mandatory requirements and assessing and confirming conformity, as well forming the legal basis for a general national and legal regime for technical regulation.

The law established a reform period of seven years, during which, first, a methodological framework for technical regulation was to be formed, and, second, law-makers were to prepare and adopt by-laws to ensure compliance with the requirements of this law.

Unfortunately, neither the first nor the second aim was properly realized. The root cause of all the difficulties and problems encountered in the reform of the system of technical regulation was the methodological unpreparedness, and the failure to provide the necessary fundamental research.

It should be noted that, in international legal practice, the term “technical regulation” in its literal wording is almost never used. In the norm-setting practices of international organizations and the national legislation of different countries terms such as “technical barriers to trade”, “international standardization” or “standardization”, or “technical regulation and standardization” are used more

¹ Meeting of the Commission on modernization and technological development of economy of Russia. President of Russia. URL: <http://state.kremlin.ru/commission/20/news/6674>.

² *Tereshchenko L.K., Tikhomirov Yu.A., Khabrieva T.Y.* The legal concept of technical regulation // Journal of Russian Law. 2006. No. 9. P. 3.

often as synonyms for the term “technical regulation”. Most domestic lawyers are convinced that all these terms have the same meaning and that they describe the legal regime that creates favourable conditions for the development of international trade by regulating the relationships arising in connection with the adoption of technical regulations, standards and conformity assessment procedures¹.

Despite some statements made by senior officials about emerging success stories associated with the introduction of a growing number of technical regulations, the reform of technical regulation in Russia has made no obvious progress. To date there is no mutual understanding between lawyers, officials and technical experts on many critical issues in the industry under reform.

Today it is extremely important to find the agreed positions of all interested parties on major issues of methodological significance in reforming and building a new system of technical regulation.

Turning to the history of the development of the system of state regulation, we recall that the Decree of the People's Commissars of the USSR of June 15, 1932 No. 928 was considered necessary for the pan-Union Committee on Standardization to move from the development of a large number of small standards to the main technical and production problems of the national economy. In order to strengthen departmental work on standardization, committees on standardization were created by Commissariat Committees. This situation continued until the adoption of the Decree of the USSR Council of Ministers on April 21, 1988, No. 489, “On restructuring activities and organizational structure of the USSR State Committee on Standards”, in accordance with which industry normative technical documents were abolished, and another, two-tier, system of specifications and technical documentation, which included state (republic) standards and technical specifications, was established.

The core of the two-tier system of normative and technical documentation system adopted in 1988 comprised three categories of standards (state, republic, and industry) that were mandatory for the relevant enterprises, as they were approved by government bodies. Enterprises could also set requirements for their products only when such requirements had not been established by higher authorities. The system for monitoring compliance with the requirements that were established, based on the principles of centralized state control over the implementation of and compliance with the standards, conformed to this regulatory documentation system.

As a result, the legal and regulatory framework for technical regulation that existed in Russia at the end of the twentieth century did not meet the requirements of scientific and technical progress and represented a “fragmented set of regulations, because it was evolved over the years on the basis of inconsistent rulemaking of ministries and departments”². Therefore, there was a need to

¹ *Ioyrysh A.I., Terentyev V.G., Choporniyak A.B.*, Reform of technical regulation in international law aspect // State and Law. 2007. No. 6. - P. 31.

² *Nesterov A.V.* On technical regulation in Russia // State and Law. 2009. No. 8. - P. 93.

organize and create a unified system of technical regulation in Russia.

At the current time, there are different views on the meaning of the term “system of technical regulation”, and this term is the backbone of this field of legislation. In the law “On Technical Regulation”, there is no such concept as the system of technical regulation, and this allows the various experts to interpret it in their own way, despite the fact that the introduction of a new term is exclusively the prerogative of lawmakers. The lack of a clear understanding of basic concepts, the considerable efforts of opponents of reform, the complexity of the tasks, and other factors mean that “a lot of methodological and technical errors that must be corrected” still remain in the legislation on technical regulation¹.

Many of those working in the field of technical regulation believe that drastic measures are needed to change the course of reform. Unfortunately, the measures proposed by the latest amendments to the legislation on technical regulation cannot be described as drastic. If they were aimed at the application of the requirements of technical regulations and directives of other countries, as well as international, foreign and preliminary national standards, they could, in principle, be useful, but they are not useful in today's environment. The reform is stagnating; the coming of the regulations into force does not have any real impact on business or the consumer. Initially, it is necessary to improve the quality of the regulations and to establish a procedure for the introduction of such documents, and only then can the bar of technical regulations and standards be raised to the international level.

It is essential to provide a set of measures to ensure the effective implementation of those regulations that have already been adopted. All activities necessary for their entry into force must be performed, responsibility must be established and a mechanism for the monitoring and supervision of their observance must be worked out. Only these actions will allow respect for technical regulations to return, and this is a necessary platform for further action.

Besides, every technical regulation should be objectively necessary to address safety issues. Each one should be developed on the basis of the results of the record and analysis of actual cases of harm done to people or the economy from the use of specific products.

When determining the need for this or that technical regulation one must also consider that its introduction in practice is always a burden on businesses. It is necessary to carry out activities for the implementation of the requirements established by the regulation, to change designs, to replace technical documentation, to improve the organization of production and technology, to train specialists, etc. All this requires intellectual and material costs, and these costs are often considerable. Naturally, the costs can be justified only if the regulation reflects the interests of both producers and consumers, i.e. if it improves quality from the government's point of view.

High quality technical regulations and high quality procedures for their

¹ Nesterov A.V. About the theory and practice of regulation // State and Law. 2008. No. 1. - P. 91-95.

entry into force should be the main goal today for the implementation of reform to technical regulation¹.

However, an analysis of the technical regulations that have been adopted allows us to identify numerous deviations from the requirements of FZ (Federal Law) "On Technical Regulation", such as:

- overcrowding with data on design solutions and execution;
- ignoring methodologies of assessing the risk of damage and identifying objects of technical regulation in setting minimum essential requirements;
- infringing the principle of the need to establish an exhaustive list of products and processes for which requirements are established;
- lack of adequate methods of conformity assessment for numerous norms, etc.

All this is aggravated by a low level of legislative technique in drafting technical regulations. The regulations, as a rule, do not deal with such areas of legislative activity as establishing the rights of those who are subject to the law and determining their legal status; distributing rights and responsibilities; and securing the uniqueness of interpretation of requirements. In general, the formulation of the final and transitional provisions, including the designation of the order and timing of the introduction of the regulations and the list of the existing rules that are to be abolished, is unsatisfactory².

In addition, in technical regulations there are many violations in the selection and formation of concepts and terms, and contradictions and ambiguities in how the regulations are interpreted. Even well-established and common terms are interpreted in different regulations in different ways.

Many experts in the field of technical regulation believe that, during the reform process, the person, as an object of relationships and rules, is given insufficient attention. After all, in principle, all regulatory requirements are addressed to human beings and their activities. Therefore, according to the Committee for Technical Regulation, Standardization and Conformity Assessment of the Russian Union of Industrialists and Entrepreneurs (RSPP), human activities and not industry should be the areas of technical regulation.

As international experience shows, the qualitative development of technical regulations cannot be achieved without a real consensus of all stakeholders and, to begin with, government, business and consumers must agree on decisions about the form of requirements for regulations and the form of assessments for conformity³. The leading foreign countries have developed corresponding approaches to the formation of the mechanisms of technical regulation. We have no such experience.

No less difficult a problem arises when choosing the forms of conformity assessment. The constitutional duty of the state is the protection of society, citizens,

¹ *Versan V.G.*, Technical regulations. Better fewer but better. // Standardization. 2010. No. 3. P. 23-26.

² *Lotsmanov A.N.* Technical law: About the system causes of the crisis features in the Russian technical reforms // Journal of Russian Law. 2008. No 8. P. 15-16.

³ *Versan V.G.* (note 6). P. 23-26.

the property of physical and legal persons, animals, plants and the environment from dangerous products. Businesses, in turn, make strong complaints about unreasonable barriers that limit the access of products to the market. Therefore, the mechanism of technical regulation must ensure, on the one hand, the safety of the life and health of the citizens, and, on the other, the free movement of goods within the country. It is necessary to find a balance between these two conflicting objectives.

The position of the majority of specialists in the sphere of technical regulation is to ensure today that the equilibrium point in the abovementioned balance for the measures taken should shift towards safety. The main problem in the formation of safety requirements and the assessment of compliance with the technical regulations is to find a consensus-based balance between what is the most appropriate, in terms of the solutions to our social and economic problems, and what can be done by most companies. This should be the main task for the developer of technical regulations, and this is what he has to justify at all stages in the process of his consideration, prior to the adoption by the legislator. Naturally, whether or not this balance is achieved should be the object of analysis for expert commissions on technical regulation and experts called by the legislator.

Finding the aforementioned balance largely depends on preparing a list of national standards and/or sets of rules that ensure compliance with regulatory requirements, and a list of national standards that contain rules and methods for research (tests) and measurement. These will create an objective basis for the formation of regulatory requirements.

Technical regulations adopted in the form of federal laws or decrees of the government of the Russian Federation would be established as standards, and this would imply the possibility of using them in litigation as a legal instrument. In order to achieve this, each statutory regulation must be accompanied by a conformity assessment. This condition is not always observed during the development of regulations, which reduces their legal quality.

It should also be taken into account that, unlike the methods of applying legal norms, the conformity assessment methods in technical regulations may include a number of technical procedures that are complicated to perform. However, for any legislation that is associated with normative instructions, the possibility of legal liability requires compliance with the important principle of the Federal Law "On Technical Regulation" that requires "unity of rules and methods of research (tests) and measurements during procedures of the mandatory conformity assessment and the unity of application of technical regulations, regardless of species or features of transactions" (Article 3).

In essence, this is about the principle of uniformity in the assessment of conformity, which is no less important than the principle of uniformity of measurements. The problem is important, but in the course of reform, unfortunately, it has not even been discussed. Thus, it is also necessary to take into account the fact that an established norm should be verifiable, that is, its feasibility should be proved in an empirically tested way.

Thus, the reform of such a key element of the system of technical regulation as conformity assessment does not meet a number of important methodological principles of the theory of law. This fact is exacerbated by the known backlog in our country of a variety, at the methodological level, of ways and areas of conformity assessment. The backlog, in the opinion of many of those working in the field of technical regulation, is quite significant and it is impossible to eliminate it by natural evolution within a reasonable time. There is a need for a hard technological approach¹. Instead of this approach, there is fragmented work with individual tasks, and often with pseudo tasks that look quite natural in terms of building a new system of technical regulation but do not show proper coherence in the development of the individual elements of the system.

The reason for the lack of quality of technical regulations is that, in some cases, the bodies of state power ignore the views of those who are developing the regulations and the experts involved in the discussions. In accordance with the Law "On Technical Regulation", expert committees for technical regulation conduct official reviews of draft technical regulations. A comparative analysis of their findings and the regulations that are adopted shows that fundamental changes are made to the regulations after the expert reviews, without consultation with the experts, and in some cases without consultation with the developers, meaning that expert opinion does not count. There is no constructive approach to recording the comments of interested parties in the public discussion process for draft technical regulations². Scientists note³ that among the participants at discussions there is an absence of familiarity and skill in holding discussions. There is no search for truth, but a showdown, and the rejection of different perspectives. However, once the discussion is strengthened not by arguments, but by the power of the authorities, the consensus breaks down and, as a consequence, decisions on the content of technical regulations reflect neither balanced or national interests nor the interests of all the parties concerned. This can all be seen in the technical regulations that have been adopted.

The existing legislative rules related to technical regulation issues are not always consistent. This leads to a legal conflict in formulating the specific rules of technical regulations, because the developer of the regulation refers not to the standards of the Federal Law "On Technical Regulation", but to other legislative acts that are in conflict with the standards of the Federal Law. This situation is aggravated by the fact that responsibility for failure to comply with standards of technical regulations is not fully stipulated in the current legislation.

There is currently no specialized professional executive body responsible for organizing national activities for technical regulation. The situation today is that several technical regulations can be applied to the same product. This totally contradicts the fundamental idea of the technical regulation, that it concentrates

¹ *Lotsmanov A.N.* (note 7). P. 17.

² *Versan V.G., Krakov, I.Z., Aronov A.V.* Crisis and current problems of technical regulation // *Industrial Policy in the Russian Federation*. 2009. No 9. - P. 23.

³ *Versan V.G.* (note 6). - P. 23-26.

all safety requirements in a single regulatory document¹. This situation can lead to serious systemic consequences. In order for a supplier of products to enter the market, he will now need to carry out conformity assessment under different certification bodies (according to the stipulated regulations) and comply with different requirements. In addition, state control (supervision) over the observance of the technical regulations will be implemented by different agencies, in accordance with the stipulated regulations, without proper coordination, because coordination is not specified by the regulations. Therefore, instead of the administrative barriers being reduced, new ones have been created. A possible way out of this situation is associated with the formation of a single coordinating centre, which would be responsible for all the problems of technical regulations, and a single accreditation body. This would allow certification bodies capable of carrying out the conformity assessment on all requirements related to a specific product to be accredited and would thus avoid unnecessary pressure on business.

Some experts in the field of technical regulation believe that a holistic view should be taken of what should be the result of the reform, which should be the European model, adapted to Russian conditions. This would be expedient, they say, because Russia has announced its intention to build a common economic space with the European Union. However, the expert analysis on technical regulation conducted by the Committee of the RSPP shows very significant differences between the European model and the system that is now being built in the course of reform. It may be noted that there are fundamental differences because the Europeans, in shaping the regulatory space, walk away from the objects of protection (human beings or the environment) towards the sources of danger (the techno-sphere), and for us, in contrast, the creation of the regulatory space moves from the sources of danger to the objects of protection. In practical terms this threatens to lead to countless repetitions, contradictions and inconsistencies².

There are serious shortcomings in the organization and administration of technical regulations. From the standpoint of the actual introduction of the rules, the presence of the rules without a whole complex of accompanying documents does not make sense. In addition to the list of national standards and sets of codes that must be attached to technical regulations, it is also necessary promptly to form an infrastructure for performing works on mandatory conformation.

Regarding the problem of providing quality in technical regulations, it should be noted that the quality of technical regulations in Kazakhstan and Belarus and of European directives, so far as legal characteristics are concerned, does not exceed that of similar Russian documents. European directives are really of a high standard and have been tested over time. But that is not the case. The main problem of their use is that technical regulations and directives reflect the national interests of the country and are determined by the level of scientific and

¹ *Versan V.G., Krakov I.Z., Aronov A.V. (note 10).*- P. 23.

² *Lotsmanov A.N. (note 7).* - P. 17.

technological development in the country, and the material and technical support available. Whether the technical regulations will respond to our interests is a question that requires deep analysis. All this is relevant to the implementation of the proposals on the use of international and foreign standards.

The main aim here is to ensure that the implementation will help to promote the interests of domestic enterprises and the whole of Russia at the international level. However, it should be taken into account that by implementing these standards we will simplify the flow of imported products into our market and may put our industry in a difficult position. Foreign manufacturers will be able to deliver goods directly to us, regardless of whether those goods reflect our needs and of whether our enterprises are producing similar products and may go bankrupt. Taking into account the fact that the competitiveness of the majority of our products today tends to be low, the consequences for businesses and the economy as a whole may be negative.

Thus, at the present time, there is an extremely worrying situation, related to the fact that the old model of legal regulation has been destroyed and a new one has not been built. As a result of the unquestioned legal policy and state control, certification and accreditation appear to be derived from the common administrative system.

Technical conditions have lost their legitimacy, while a new type of regulatory document relating to standards for organizations has not yet been properly formed. Departmental norm-setting has stopped functioning, and the subjects (objects) of licensing have been drastically reduced, but the scope of mandatory requirements is not yet determined.

Taken together, these facts create an imbalance in the legal space. In addition, as shown by studies conducted by the Committee of the RSPP on technical regulation, against the background of the numerous defects in the regulatory framework, there is a sharp weakening of management impact on the economy. Under the conditions of the total weakness of the regulatory base, Russia's entry into the world economy on a parity basis is impossible, regardless of any tricks in the management system¹.

In order to find a successful solution to the abovementioned problems, there must be precise coordination between different agencies, using the experience of training and the introduction of technical regulations by specialists in this field, continuous monitoring and fast-paced actions to adjust the progress of reform.

Such work may be qualitatively and professionally performed by a duly empowered specialist body; to a certain extent this would eliminate the inconsistency and lack of coordination in the field of technical regulation in various branches of government.

The general conclusion from the above is that any efforts to reform the system of technical regulation without targeting a specific model (project, paradigm) will be extremely inefficient. One of the most common causes of deficiencies and

¹ *Lotsmanov A.N.* (note 7). P. 18.

difficulties in the course of the reform is an ignorance of the obvious fact that, together with the transition to the new system of technical regulation, an essentially new branch of law – namely, socio-technical law – must be formed. Therefore, the success of the reform cannot be secured without the involvement of a rich arsenal of theoretical and practical achievements of domestic jurisprudence. First of all, there must be a formation of norms and principles and a system of basic concepts in the new area of law that is being created. Ignoring this fact is one of the most important causes of problems in the reform of the system of technical regulation.

But, as is well-known, a journey of a thousand miles begins with a single step! Despite all the problems at this time in the field of technical regulations, there are positive signs as well. And today, it would be desirable to believe that, during the drafting of the technical regulations of the Customs Union and the technical regulations of the Eurasian Economic Community (EurAsEC), the rich experience accumulated over the ten years that has been spent reforming the system of technical regulations will allow the same mistakes to be avoided.

Bibliography

1. *Versan V.G.*, Technical regulations. Better Fewer, But Better // Standardization. 2010. No. 3. P. 23-26.
2. *Versan V.G., Krakov I.Z., Aronov A.V.* Crisis and current problems of technical regulation // Industrial Policy in the Russian Federation. 2009. No. 9. P.19.
3. Meeting of the Commission on modernization and technological development of economy of Russia. President of Russia. URL: <http://state.kremlin.ru/commission/20/news/6674>.
4. *Ioyrysh A.I., Terentyev V.G., Chopornyak A.B.* Reform of technical regulation from the international law aspect // State and Law. 2007. No 6. P. 31.
5. *Lotsmanov A.N.* Technical law: About the system causes of the crisis features in the Russian technical reforms // Journal of Russian Law. 2008. No 8. P. 15-16.
6. *Nesterov A.V.* About the theory and practice of regulation // State and Law. 2008. No. 1. P. 91-95.
7. *Nesterov A.V.* On technical regulation in Russia // State and Law. 2009. No. 8. p. 93.
8. *Tereshchenko L.K., Tikhomirov Yu.A., Khabrieva T.Y.* The legal concept of technical regulation // Journal of Russian Law. 2006. No. 9. P. 3.

JURISPRUDENCE: PRESENTATION OF A TEXTBOOK

STATE

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Abstract.

The essence of a state is the expression of a society's political organization. There are many approaches to the essence of a state: the elite theory, the technocratic theory, the pluralism theory and others. These are distinguished by their correlation between state and society as well as by their view on the origin of the state. Each of the essential attributes of a state is of great importance: sovereignty, territory, enforcement of monopolies, taxes and levies, law-making, structural organization and others. The functions of a state express the main constant areas of activity, and are internal and external, permanent and temporary, economic and social. The form of a state includes the form of the government, the state structure and the political regime.

Keywords:

state, attributes of state, essence of state, sovereignty, elite theory, technocratic theory, pluralism theory, people's sovereignty, nation sovereignty, territory of state, functions of state, economic function of state, social function of state, external functions of state, internal functions of state, ecological function of state.

1. The nature and essence of state

Many legal phenomena are difficult to understand and apply without also understanding the state and its institutions. This explains the need to know the nature of the state, i.e., identify the basis for its functioning and development, its social values and purpose. Moreover, it is important that we understand the state in the unity of all its diverse and contradictory properties, sides, and forms of existence as an independent institution. Disclosure of the essence of the state presupposes the analysis of the state as a political organisation of the society.

The essence of the state is that it should be considered as a definite association, whose members are integrated into a coherent whole by public power structures and relationships. In the state as a political organisation of a special kind, the will of all members of a society is consolidated together and acts

as the will of a single state.

Politico-philosophical and legal thought developed many approaches to the essence of the state. The difference between these ideas becomes apparent when resolving the following fundamental issues: 1) the correlation between state and society; and 2) the artificial or organic, natural origin of the state.

The best-known approaches to the essence of the state are the following: theory of pluralism, technocratic theory, the theory of elites, and the legal approach.

M. Duverger, R. Dahrendorf and other researchers devised **pluralism theory**. According to this theory, society is a collection of strata - groups of people united by age, gender, occupation and other socially significant properties. Strata may form political alliances to solve a problem or lobby for a particular interest. Such a union is necessary because an individual is not able to independently influence the state power. Stratified interests may influence the state; due to of the diversity of interests of organisations (pluralism) their objectives are carried out in public policy. This form of interaction between society and the state is called pluralistic democracy.

Technocratic theory was formed and devised in works by T. Veblen, D. Durkheim, and others. The basis of this theory was the views of A. Saint-Simon: that destruction would threaten civilisation without technicians. Moreover, the disappearance of politicians would not affect the existing socio-economic order.

According to this theory technocrats are persons professionally involved in management. The source of their power is the experience and expertise of management sciences. Bureaucrats, unlike technocrats, have power only in connection with their membership in the state apparatus. Thus, technocratic management activity is necessary for society in order to achieve optimal targeted development.

Elite theory (V. Pareto, G. Mosca, G. Sartori) represents functioning of the state through a power struggle of political elites. Elites includes: 1) successful people; and 2) persons exercising public authority. Elites are composed of a thin layer of people having power, money, and social status. The winning elitist group is able to conduct their interests in the state policy.

Legal approach (G. Jellinek, A. Esmen, H. Kelsen) treats the state as a social formation and legal institution. The legal nature of the state is shown in the functioning of state institutions, publications and applications of the law. The state is regarded as a legal entity, which expresses the interests of the people. Existence of the state as a political organisation is due primarily to the fact that it is a special organisation of political power.

Political power has concentrated force that transforms it into an effective factor of social existence. Such forces are various state institutions, institutionalising power and giving constant functioning and binding characteristics to it. These institutions are state authorities with their specialised structures in the form of the army, the secret police, prisons, courts, and rules of law. In other words, the main feature of political power is rooted in its inseparable connection to the state. This distinguishes it from other kinds of power.

Political power, in fact, materialises in the state and legal institutions and becomes the state power. This is why these two concepts are substantially identical.

Political (state) power differs from the social power in that the first expresses

the needs, interests and a will of not simply different groups in society, but such social groups that occupy a dominant position. Expression of the interests of the dominant social group gives power, and with it, the state becomes political by nature. Politics is primarily a sphere of relations between social groups.

The essence of the state as a political organisation is particularly evident in its comparison with a civil society, which includes public relations outside the state: economic, social, ideological, moral, religious, cultural, family and others. Civil society is the real social basis of the state. The state and civil society do not merge and are not identified.

Thus, the state and civil society are the unity of form and content, where the form is represented by a political state, and the content - by a civil society.

An important characteristic of the state is that it represents itself **as a structural organisation**. This is reflected in the existence in the state of the special apparatus in the face of people with public authority and who are professionally engaged in performing functions of management and governance, the protection of economic, and social and political structure of society, including through coercion. It is this characteristic of the state as an organization of public authority that makes it a special political organisation. The state is not the only instrument of practicing political power. Along with the state, there are other, non-governmental, effective means of enforcing power. Among them are political parties and movements, trade unions, and labour groups. The state differs from them as it is a structured system of special state bodies exercising its numerous internal and external functions.

Thus, the essence of the state expresses its social nature and purpose. The essence of the state is changed with the development of society, influenced by the political regime, and the form of governance. Modern democratic states see their mission in warranty of rights of citizens as part of the general world order.

In the history of socio-political and legal thought, there are several trends of understanding of the social purpose of the state. One is the theory of liberty rights of an individual and obligations of the state to ensure freedom from someone else's perspective (A. Smith, S. Mill, B. Constant, G. Locke). In this theory, the main idea is the availability of economic and personal freedom; the negative effect is profound inequalities of citizens.

According to the theory developed by Jean-Jacques Rousseau, all, including those in power, whose mission it is to ensure equality, must be subordinated to the principle of equality. This trend was devised in works by P. Novgorodtsev who believed that it was necessary to develop the principle of equality towards equalisation of social conditions of life.

With the development of society, an approach that focuses on strengthening the social purpose of the state, which is expressed in the smoothing of injustice, inequality dominates. The state should carry out its activities in the area of defence of human rights. The social purpose of the state consists of the redistribution of income between segments of society through the system of taxes, the state budget, special social programs, the need for public funding of scientific research and cultural projects.

2. Features of the State

The state is a complicated instrument of the political-legal organisation of

a society. Attempts to define the concept of “state” have long been known, and continue today. The concept of “state” was preceded by such definitions as a country, the empire, the policy, and the republic. Actually the concept of “state” has been used since the XVI Century. In different contexts, the state was understood as a community, union, mechanism, machine, and as the apparatus. To more completely understand the concept of the state, we should consider the main features of the state.

The state is a highly developed form of an organisation of people living together in a certain area. It is a special organisation of political power, with apparatuses in place, carrying out, in respect to the population living in a certain area, the power based on the law and supported by the coercive force.

The state has a monopoly on **coercive power** against the people. No other organisation of society has the right to use force without the sanction of the state.

The state controls the **enactment of laws and regulations**, which are mandatory for all citizens of the state. The state has a monopoly on one type of a form of law - a normative legal act.

Collection of taxes and duties is carried out for the maintenance of the state apparatus, and the formation of the national budget. Obligatory fees are generally a binding attribute of state power. Taxes and fees are the financial base of the state power. Taxes are mandatory payments collected from individuals and legal entities; their size and kind depends on the type of state, and its political and economic nature. The calculation and payment of taxes are established by the legislation. Taxes and fees must have an economic basis and cannot be arbitrary. Taxes and fees are inadmissible, meaning citizens are prevented from exercising their constitutional rights (Clause 3 of Article 3 of the Tax Code of the RF, Part One).

The state is a **structural organisation**, which is reflected in the presence of its special apparatus in the face of people who have public authority and are professionally engaged in performing functions of management and governance, protection of economic, social and political structure of society, including through coercion.

The principal characteristic of the state serves its existence as a **territorial organisation**, the division of the population on a territorial basis, and territorial integrity of the state.

The features of the state should be separated from its **symbolism**: name, flag, and coat of arms. Each state is sovereign in establishing its name (proper name of the state), flag and emblem, and in establishing their content and external appearance. International law protects the integrity of the symbols of the state as its honour and dignity. Encroachment on the emblem and flag of the state makes one guilty of an offense. Thus, in the Russian Federation there are federal constitutional laws on state symbols: “On the State Flag of the Russian Federation,” “On the State Emblem of the Russian Federation,” and “On the State Anthem of the Russian Federation.”

3. State Sovereignty

The sovereignty of state power means its supremacy and independence from any other authority, the right and opportunity to carry out domestic and foreign policy on behalf of the whole society inside and outside the country.

State sovereignty is manifested in the general validity of the decisions of

state power to everyone who is present in its territory. The legal manifestation of sovereignty is that the state has the exclusive right to publish the regulations. State sovereignty is also evident in the publication of enabling regulations that reflect the exceptional nature of state power, and its entitlement to coercion against citizens. The apparatus of coercion that belong to the state guarantees decisions of state authorities.

There are several distinct types of sovereignty, including national, and people's. **People's sovereignty** is the right of the people to independently decide all questions of its political-state and social development. People have the right to directly participate in determining the main directions of domestic and foreign policy. People's sovereignty includes the right to control activities of the state and its bodies. The idea of people's sovereignty is often enshrined in constitutional acts. Thus, in accordance with Article 2 of the Constitution of the Russian Federation, a bearer of sovereignty and the only source of power in the Russian Federation shall be its multinational people. The people exercise their power directly and through bodies of state power and local self-government.

Sovereignty of the nation means full power in determining its status, and ability and authority to self-govern. The sovereignty of a nation is its right to secede from the state and create its own state.

4. Territory of the state

The territory of the state is the space within which the state has full power. This includes land territory (land, mineral resources), water areas (rivers, lakes, artificial reservoirs, marine territorial and territorial waters around the territory of the state), the air territory (the airspace over the territory of the land and water), as well as objects equated with territories of the state (ships, aircraft, spaceships and stations operating under the flag of the state and some other facilities owned by the state). In accordance with Article 67 of the Constitution of the Russian Federation, a territory of the Russian Federation includes the territories of its subjects, internal waters and territorial sea, and the airspace above them.

The Russian Federation has sovereign rights and exercises jurisdiction on the continental shelf and in the exclusive economic zone of the Russian Federation in the manner established by federal law and provisions of the international law. The borders between the subjects of the Russian Federation may be changed by their mutual consent.

As non-governmental organisations are able to bring people together by ideology, political aspirations, or occupation regardless of the boundaries of various states, the specific feature of the state organisation consists of the population of the certain territory with the subsequent division of this territory into administrative and territorial units. In other words, this feature consists of a strong limitation of the territory by the state. This territory is subject to the power, and rules of law of the state (i.e., its jurisdiction).

The state has the right to defend its territory, guided by the principles of integrity and inviolability.

Territorial structure of the state assumes division of the territory into administrative units (districts, regions, counties, territories, and other names). The purpose of this division is to ensure sound governance policy throughout the territory of the country.

5. Functions of the State

Functions of the state are activities of the state corresponding to the main objectives of a particular historical period, showing its essence and thereby giving it a certain socio-political characterisation.

Functions of the state are composed of the main directions of its activities that express the essence and social purpose, goals and objectives of the state to manage a society in its inherent forms and by inherent methods.

Since the main tasks of the state, due to the economic basis and social structure of society, do not depend on the subjective discretion of the state power, and thus far the main directions of activity of the state are permanent, they are objective. The basic direction of activity of the state is exercised throughout the historical period in conditions of which the main task is solved.

Thus, the function of the state is not arbitrary, but namely a basic, mainstream of its activity, without which the state, at the given historical stage or throughout its existence, cannot manage. Basic activity is a stable, developed objective activity of the state in this or that area: economy, politics, nature protection, etc. Most profound and sustainable in the state, its essence is objectively expressed in its functions, therefore, through them it is possible to know the state as such, its multilateral relations with a society. Carrying out its functions, the state thereby addresses the challenges for governance of the society, and its activities acquire a practical orientation. The functions of the state are managerial concepts. They specify purposes of the state governance at each historical stage of societal development. However, functions of the state are implemented in certain (mostly legal) forms and special methods featured for state power.

Classification of functions of the state can be conducted in a variety of ways (criteria).

Depending on the duration of their existence, functions are divided into **permanent** and **temporary**. Permanent functions are unchanged, while temporary functions reflect the modern needs of the state. For modern states, the fight against terrorism is a temporary function. The eradication of this destructive phenomenon will lead to the disappearance of the corresponding function of the state.

Depending upon spheres of application and implementation, functions of the state are divided into political, ideological, social and economic. Depending on the forms of realisation, functions can be lawmaking, law protection and law enforcement.

Classification of the functions of the state can also be carried out in the basis of the form of the state arrangement within which they are implemented. In a federal state these are functions of the federation and the subjects. In a unitary state these are functions carried out within the territory of a single state, only in an administrative-territorial plan, divided into regions. Division of functions to the internal and external ones is traditional. In this classification, the basis is a place or a territory in which activities of the state are implemented.

Internal functions are the main directions of various activities of the state, due to the need to address the challenges of its domestic tasks. A state carries out its tasks in the three spheres of public life: economics, politics, and spiritual (ideology, social psychology, culture, morality, etc.). In accordance with this, the following main internal functions of the state include: 1) protection of the constitutional system (political area); 2) regulation of property relations

and economic activities (economic area); and 3) formation of the ideological foundations of the state (the spiritual domain).

The internal functions also include the following: the protection of property rights; establishment and protection of law and order in society; protection of the rights and freedoms of citizens; ensuring democracy; cultural and educational work; environmental (ecological) activity; financial control; and other functions determined by the nature of the state and its form.

The external functions of the state represent the basic directions of the activity of the state and are directly related to decisions of tasks and objectives of the international field. These functions depend on the type of political regime, type of state, stages of its development, the developing situation in the world, and the nature of the relationship between states. Goals and objectives, as well as some of the functions of the state, depend crucially on its essence and type.

Modern Russian policy promotes and carries out the following external functions: integration of Russia into the world economy; maintaining world order; foreign economic cooperation and attraction of foreign investment; and joint decision with other states of global energy, economic, demographic and other contemporary challenges.

Economic function is manifested in state participation in economic processes, and the nature and level of its impact on the economy.

A state, by virtue of its status and position, inevitably participates in the economic life of society. It defines the main directions of activities of the whole through the establishment of common institutions, including legislation. A state forms tax and foreign economic policies, and defines the rights and responsibilities of all participants of economic relations. A state in legislation establishes forms of ownership and subsequently protects them.

Degree of state intervention in economic relations is significantly different depending on the type of state and political regime, and other factors. A distribution economy is combined with a centralised management state system. The state has the leading form of ownership, i.e., the state one. The economy has a planned character. A state distributes material and financial resources; it possesses monopoly power in economic relations.

A market economy assumes a variety of forms of property, freedom of entrepreneurship, absence of administrative and other barriers to the movement of goods, works and services. Participants in economic relations interact on the basis of fair competition and do not involve abuse of the law. The state defines the legal boundaries of participants of economic relations, and guarantees the legal order in the economy. The state has significant property and control levers, but in business relations it should operate equally with other economic entities.

The tax system is an essential factor of state participation in economic life.

Political function is manifested in the formation of public authorities, the state apparatus, and the distribution of powers between the bodies and institutions. The state exercises lawmaking. Through the publication of legal acts, the state authorities exercise their powers, and create the legal conditions for the implementation of public services.

Within the framework defined by the state, all other elements of the political system operate, i.e. political parties, local self-governments, and others.

The **cultural and educational function** of the state is shown in purposeful

activity on the formation of aesthetic and moral models, and systems of value for a society. The state has a number of specialised bodies, intended to promote public interest in the field of library and archives, theatres and cinemas, and the other arts. The state should create favourable conditions for the development of cultural institutions, and provide for the satisfaction of spiritual needs of the citizens.

The social function of the state is evident in the maintenance of a proper standard of living of the population, and citizens' interests in the social security sphere. The content of this function is diverse: the state protects labour and health; guarantees minimum wage; provides state support for families, motherhood, fatherhood and childhood, disabled persons and older persons; develops a system of social services; and establishes state pensions, etc.

The social function of the Russian state is enshrined in Article 7 of the Constitution of the Russian Federation, according to which the Russian Federation is the social state whose policy is aimed at creating conditions for a dignified life and free development of the individual. The Constitution provides that the Russian Federation secures the labour and health, a guaranteed minimum wage, provides state support for families, motherhood, fatherhood and childhood, the disabled and the elderly, the system of social services, state pensions, benefits and other social guarantees protection.

The social function of the state is aimed at alleviating and overcoming such phenomena as poverty, the income gap, inequality and unemployment. It should contribute to the stabilisation of the standard of living and a more equitable distribution of the burden of economic hardship among the various population groups.

In the statehood of a society, the continuity of functions is preserved, but at the same time, there is a mechanism to update them. Self-organisational, subjective and even random processes affect the emergence of new functions. Changes of state forms, including political regime, have an influence on exercising functions of the state. For example, in a democratic and liberal state the social function of the state is understood, and carried out completely differently.

General social contents of functions of the state is the least volatile and, therefore, the most stable, and are formed to address the key social, political, including geopolitical, economic and other challenges affecting the entire society on the long historical path of its life.

General key social functions provide existence, well-being, and sometimes the survival of society itself. It is in this sense that the state organisation of society is becoming of more social value. The earliest city-states took upon themselves valid, social functions, especially the function of providing a production economy (agriculture, cattle breeding, metallurgy, ceramics, etc.).

The general social content of functions, which persisted throughout the history of the statehood, gave a great national value to the state, although it sometimes acquired bizarre forms. In some cultures, the general social content included, for example, the maintenance of navigation, maritime commerce (island states), and protection and reproduction of fish resources (some northern and Pacific countries). In other nations, only the conservation of their linguistic identity became the general social content of activity of the state, regardless of what type of state it was or what forms of an arrangement existed and functioned.

Foundations of the existence of certain nations in specific conditions

of residing in a particular area, with certain geographical, climatic and other characteristics developed into “eternal questions,” and are the constant subject of the state activity. They filled general functions with specific content, which had to be implemented over the centuries, at any stage of the statehood in order to ensure the vitality and survival of this or that society or people.

General social functions include security, disaster management, and environmental disasters, implementation of social programs of health care support, social security of disabled individuals, and protection of citizens' rights and freedoms.

In the modern world, environmental situations get into planetary problems. In this context, the ecological function becomes a priority, a feature of which is that it cannot be fully implemented by the state on its own territory. Any significant environmental incident impacts many states and requires collaborative (including legal) action.

6. The Form of the State

The doctrine of the forms of the state has come a long way to reach its current development. Forms of the state were studied in ancient times. According to the philosophers of Greece, Rome and the Eastern countries, the issue of classification of state forms is one of the most important in science. The distinctive feature of the studies about forms of the state of that period is that philosophers generally did not see the differences between the essence and the form of the state; moreover, the very nature of the state power was considered a form of the state.

During the Middle Ages, in the studies about the form of the state, in one way or another, the divine source of political power was substantiated. In their political studies, the thinkers of the Enlightenment (Sh. Montesquieu, J. J. Rousseau, etc.) sought to explain forms of the state on the basis, not of the will of God, but of the activities of the human mind. Their theories exposed the injustice of power of tyrants, and developed forms of the state that were consistent with the principles of natural law.

Thus, Sh. Montesquieu divided forms of the state into a republic (the basis of power is virtue, equality), monarchy (the basis of the power is an honour), and aristocracy (the principle of power is moderation). He believed that forms of the state depended on the size, climate and other geographical environments. Sh. Montesquieu considered a constitutional monarchy of the English sample as ideal.

In turn, J. J. Rousseau believed that a sovereign power in the state belonged to the people, which could delegate execution of the power to various persons and bodies. He distinguished between political forms depending on who the people elected as the executive authority: if it was one person, then it was considered a monarchy; if it was a small number of people, it was aristocracy; if all individuals exercised power, it was democracy. J. J. Rousseau considered monarchy, aristocracy and democracy as simple and ideal forms of government i.e., such which existed as an exception. In reality, there is a mixture of these principles of governance.

Theories of forms of the state of the nineteenth century assumed that the main criterion in support of the “form of the state” was the legal status of the Supreme bodies of the state power. The principal question was who exercised

the state power, or in other words, who those people were who conquered the will of all persons living in the boundaries of the territory. Domestic jurisprudence suggested that the form of polity, as it was long recognised, could divide all states, into the monarchy and the republic, but their distinction was not in the number of the ruling individuals but rather in their legal status.

Lawyers of late nineteenth and early twentieth centuries also put forward the concept of the form of polity, which included the structure of the state, the organisation of its territory, and the relationship between members of the state, i.e., territorial, administrative, national, and other units. In this regard, the concept of the state form included: forms of governance (e.g., organisation of supreme, sovereign authority), and forms of government associations. Both of these concepts were used as identical to that of a state, although forms of governance were given a preference.

In the middle of the twentieth century, there was a widespread opinion that the form of government in the broadest sense includes the form of governance and the form of polity; in a narrow sense – only the form of governance.

The most contentious issue of the general concept of the state form is the problem of the political regime, since this element appeared much later than others (in the twentieth century), and not all experts recognise its presence. In the need to allocate the notion of the political regime in the general doctrine about the form of the state, facts from real life are convincing. Yet, in the historical past, there appeared such state forms; in order to understand the nature of which it was not enough to describe their form of governance or form of polity. Features, unique only to these forms, illustrated that they were not only monarchies, but mainly - that they had special ways of exercising monarchical power. The corresponding terms “despotism, tyranny” are used to describe a special regime of political power in the country.

The problem of the political regime became particularly relevant in connection with the victory of fascism in some states. All this demonstrated that under a republican form of governance, gross violations of human rights and democratic ideas are possible.

The form of the state in modern science is seen as a complex concept that includes a number of elements.

The form of the state should be understood as the organisation of the state power, covering a form of governance, and a form of polity and political regime.

The form of governance is a way of organising the state power and features a method of replacement of the head of the state and senior officials.

The order of replacement of a position of the head of the state provides two basic forms of governance: a monarchy and republic. Versions of these forms are defined by a parity of powers of the legislative and executive authority distributed between the head of the state, parliament and the government in the specific country, and the order of their formation following from here.

The political regime is a system of methods and ways of exercising the state power, a certain form of realisation of public dominion. Political regime inherently influences a particular period of life for a country; namely, the order of political relations, the degree of political freedom, and the image of governing. This functional feature of the state, as it reflects the actual exercise of those rights and obligations, are formally enshrined in legislation. The political regime reflects

the relationship between the state and society, and the state and the individual. This concept is important in both the narrowest and broadest sense of the word: it sets the methods of state management on the narrow end and provides a level of guaranteed democratic rights and political freedoms for the individual, a degree of compliance of the formal constitutional legal forms with political reality, and the nature of the relationship of the authorities to the legal framework of the state and public life on the broad end of the spectrum.

7. Unitary and Complex State

Polity is an internal division of the state, the legal status of its components, and their relationships with each other and with the central authorities. Polity is a political and territorial organisation of the state power.

There are two major types of polity: unitary (simple) and federal (complex). A **unitary** state is a single indivisible state, subdivided only on the administrative-territorial units, with no signs of statehood and does not include any public entities.

In a unitary state, common constitutional principles dominate, there is a system of central authority, and usually a single monetary system, one army, etc. Structural elements of the unitary state mandate that the state does not have their own legislation, judiciary, or citizenship. Nationwide governing bodies have full authority. Apparatuses of the state are the same for the whole country and the local authorities neither legally nor practically limit central authority.

Depending on the degree of centralisation, unitary states are divided into centralised and decentralised. In the bureaucratic centralised states, in the chapter of local bodies of the government, the officials are appointed by the centre to whom local self-government institutions are subordinated. The democratic form of centralisation supposes a greater degree of independence of elective local bodies of the state power concerning regional questions.

Federation is a form of the state or national polity, including state formations. A federal state connects the following state formations: territory, region, land, states, cantons, the federation having its own sovereignty, federal state authorities, federal constitution, the army, the system of federal legislation and the federal tax system.

Federations are often the result of a treaty between the states that were independent before entering into an alliance. Another method of formation of the Federation is annexation of territories to the state that retain the element of state sovereignty. Federation may also be the result of the desire for independence and expanding the powers of units of unitary states. Federation has sovereignty rather than its constituents. Subjects of the federal state do not have sovereignty.

Contractual and constitutional federations are known depending on the legal document in which the main principles of the interaction of the subjects of the Federation have been identified.

National-territorial federations are composed of subjects in the territory of which a population of certain ethnic groups live, united by features of culture, language, customs and traditions.

Administrative-territorial division of the federation means that subjects are formed exclusively on a territorial feature.

Mixed federation combines national-territorial and administrative-territorial division.

Depending on the relationship of the subjects of the federation with the

central power, **symmetrical** (equal rights of all subjects) and **asymmetric** (rights of subjects vary) federations are allocated. For example, in the Russian Federation, republics have powers that are not found in the other types of subjects (territories, regions, etc.): citizenship, the national language of the state, constitution.

Peculiarity of the federal state consists in the presence of two levels of the state power: national (federal) and the subjects of the federation. Powers are distributed between these levels and form subject matters of exclusive competence of the federation, subject matters under joint jurisdiction of the Federation and the subjects, and subject matters of competence of subjects of the federation.

Federations allow dual citizenship: federal and subjective. Subjects of the federation have legislation that must comply with the national legislation.

8. State and Law

The question of the correlation between law and state, on the primacy of the state over the law or vice versa is traditional for legal doctrine. The defining role of the law is based on the fact that it arose before the state. Indeed, there is a lot of evidence that law arose in the pre-state era, when mankind was in a primitive condition. Then the arisen state would try to take the law under control. However, it was not possible to do so in full as the customs, principles, doctrines, sense of justice, religious teachings and behaviors occur and shall terminate without the participation of the state. This interpretation does not disconnect the relationship between the state and the law, but gives the state the role of one of the other sources and proclaims it as guarantor of law. The connection between the law and the state is obviously only in lawmaking and enforcement. Lawmaking is understood as an activity of the state and its officials for the adoption, amendment and repeal of regulations. In law enforcement, the state demonstrates its imperious nature and opportunity to compel citizens to fulfill requirements. Indeed, regarding punishment and coercion, the state does not have competitors. It has exclusive possession of prisons, army, police, courts and other authorities.

Outside the public sphere, a significant part of the legal phenomena remains, in that the state protects against violations. Such an approach seems to be more tolerant and adequate to democratic values. Moreover, the Constitution of 1993 restated precisely the concept of "law and the state." Thus, Article 15 stipulates that the generally recognised principles and norms of international law and international treaties are part of the legal system of the Russian Federation, to be exact - the top part of the iceberg. However, these rules are not created by the Russian state or any state at all. It is the law in the highest sense of the word, as supranational human experience. Russia not only recognised that experience, but also pledged to limit the freedom of its own lawmaking with a framework of common human experience.

The law, and the legislation reflecting it, are the effective tools of the state power. The lawmaking function is one of the most important because it is the law that makes it possible to exercise other functions of the state. The legislative body of the state power is created directly for the enactment of laws. The executive branch is also engaged in lawmaking for example, the government issues resolutions. The legislation is a form of consolidation of the state power. Other forms of law, such as a custom, emerge without the participation of the state power. Activity of the state in relation to a custom refers to a prior authorisation (a recognition, acceptance).

References

1. *Arzamaskin N.N.* Form of the modern Russian state: evolution and legal framework. -Smolensk, 1997.
2. *Aron R.* Democracy and totalitarianism. - M., - 1993.
3. *Baganov A.A.* Functions of protection in a lawful state: problems of development by independent notaries // Moscow Journal of International Law, 1999. – No 3.
4. *Butenko A.P.* State: its yesterday's and today's interpretation // State and law, 1993. – No 7.
5. *Gukepshokov M.Kh.* Form of the State: the foundation and problems of classification. - Nalchik, 2001.
6. *Ellinek G.* The general doctrine about the state. – St. Petersburg, 1908.
7. *Ilyin V.I.* Monarchy and republic // Questions of philosophy. 1991. – No 4
8. *Lyubashin V.YA.* Concept of the state. – Rostov-on-Don, 1981.
9. *Osipyay B.A.* Reasons of a variety of forms of the state governance and an arrangement // The Modern right, 2009. – No 1.
10. Political problems of the theory of the state. - M., 1993.
11. *Rodionova O.V.* Social function of the state: legal essence and problems of subjects of its realization at the present stage // The State and the law. 2006. – No 8. P. 98–100.
12. *Sinyukov V.N.* Russian legal system: introduction in the general theory. – Saratov, 1994.
13. *Tikhomirov L.A.* Monarchic statehood.- M., 1992.

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