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## EDITORIAL

### **«THE ROLE OF «UPPER» HOUSES OF PARLIAMENTS IN THE SYSTEM OF BODIES OF STATE POWER: DOMESTIC AND FOREIGN EXPERIENCE» – ROUNDTABLE OF THE COUNCIL OF THE FEDERATION**

DOI: <http://dx.doi.org/10.14420/en.2014.2.1>

Topical issue of parliamentary activity is the process of forming chambers of the legislature. In the Russian Federation, the process of forming chambers of the highest representative body has changed several times, but the discussion about the most useful for the country a process of forming does not stop until the present time.

The Council of the Federation was elected, formed by positions of the heads of government of subjects of the Russian Federation, was appointed from a number of different categories of persons (deputies of the legislature, local government, with the residency requirement, and without it, and other requirements). Effective to date a model is set by the Federal Law of 07.02.2013 No 147-FZ.

It is these controversial issues in conjunction with the draft law on amending the Constitution of the Russian Federation a round table was devoted to, organized by the Council of the Federation Committee on the House Rules and Parliamentary Performance Management on April 7, 2014.

The participants of the debate discussed the global experience in forming chambers of the supreme legislative body and the possibility of changes in the Russian parliamentary legislation.

Members of the Council of the Federation, representatives of the Presidential Administration of the Russian Federation, the Government of the Russian Federation, scientific and expert community participated in the discussion.

Speakers highlighted the main methods for the formation of the upper houses of parliaments of the world, including genetic models (UK), lifetime appointment (Canada), professional criteria (Slovenia), and noted the importance of international experience.

The roundtable participants discussed the problem of forming the presidential quota as a part of the Council of the Federation. A group of deputies of the State

Duma prepared a relevant draft law of the Russian Federation on the amendment to the Constitution of the Russian Federation. Article 95 of the Constitution is proposed to present in the new edition, which will entitle the President of the Russian Federation to appoint members of the Council of the Federation – representatives of the Russian Federation, in addition to members of the Council of the Federation – representatives of state authorities of the subjects of the Russian Federation. The total number of representatives of the Russian Federation may not exceed 10 percent of the number of representatives of the subjects.

According to the draft, the President of the Russian Federation may not relieve from the duty appointed before its entry into the office a member of the Council of the Federation – the representative of the Russian Federation during the first term of the office, except for the cases stipulated by the federal law. New senators will have the same powers as the other currently existing members of the House – the representatives of the state authorities of the subjects of the Russian Federation.

This proposal is based on international experience. There are about 200 parliaments in the world, half of which is bicameral, and half of the bicameral parliaments has a presidential quota. Thus, the parliaments of 40 states currently have a presidential quota. The practice of appointing members of the upper house by the head of the state is very common, both in federal and unitary states for centuries.

Discussion was held at the round table. In the opinion of Oleg Eu. Panteleyev, a member of the Council of the Federation, First Deputy Chairman of the Council of the Federation Committee on the House Rules and Parliamentary Performance Management, appointment by the President of the Russian Federation of a part of the upper house of the federal parliament does not contradict the principle of separation between executive and legislative powers, as President by the Constitution is not included in the executive branch of the government. Moreover, according to the Constitution, the President ensures the coordinated functioning and interaction of public authorities, including, and, negotiates interests, and resolves disputes between the federal and regional authorities. Therefore, the presidential quota in the Council of the Federation may become a tool for implementing relevant constitutional powers of the head of the state. In addition, the suggested process will allow to delegate to the Council of the Federation leaders with great public and political experience. According to the parliamentarian, the implementation of this proposal will create additional conditions for achieving a balance of powers and legal interests of the Russian Federation and its subjects, which is one of the main objectives of the activity of the Council of the Federation as a constitutional body. A suggestion was made to consider the criteria to be met by the candidate of the presidential quota, to have a more detailed approach to the terms of the new members.

**Vladimir M. Platonov, Chairman of the Moscow City Duma**, analyzed the changes in the electoral legislation and noted the instability of the legal institution. However, he said with confidence that the electoral legislation was changed for the

better. The proof was in the absence of litigation during election campaigns.

He revealed some shortcomings of the existing process of forming the upper chamber from the number of deputies of legislative bodies of the subjects of RF. In connection with the legally binding obligation of non-overlapping mandates, giving the powers of a member of the Council of the Federation to the regional deputy leads to the need for new elections. It is inexpedient. (It should be noted, that there is a global experience in combining various elected and appointed positions. And it is not axiomatic that with the presence of the status of a member of parliament, a citizen should be denied the initial position – in our case – the deputy of the regional legislature – Ed.).

V.M. Platonov drew attention to the fact that in case of a change in Article 95 of the Constitution of the Russian Federation it could be improved the wording «representatives of the state authorities of the subjects of the Russian Federation». From his point of view, the most important thing is to ensure the continuity of the composition of the Chamber, which would correspond to the nature of the appearance of the upper chamber and its powers. According to him, the Council of the Federation exists for creation of stability in the country, in parliamentary activity.

But the most radical proposal is to change the participation of the Council of the Federation in the legislative process. It is proposed, on the basis of international experience, to establish that the Council of the Federation makes its own corrections to the law received from the State Duma and returns it to the State Duma for further refinement. And the law goes from house to house until a compromise is found.

**Yuri A. Tikhomirov, Doctor of Legal Sciences, Chief Scientist of the Institute of Legislation and Comparative Law under the Government of the Russian Federation**, devoted his speech to the following key aspects: the criteria for the formation of the presidential quota, monitoring of legislation and the need to stabilize election law.

In order to determine which process of forming the chamber is better, it is necessary to picture, what resources are available for the efficiency of its functioning. People with academic attitude to the world should work in the Council of the Federation. In large federal states, upper houses of parliaments are designed to accurately and completely reflect the specific nature of regions.

According to the professor, a certain quota makes sense, but from that standpoint that it provides stability and continuity of the work of the Council of the Federation. Y.A Tikhomirov indicated that for the improvement of the popularity of the Chamber people's artists, ministers who have proved to be effective, heads of regional legislatures and governors, who have extensive experience should work there.

**Alexey S. Avtonomov, chief research scientist at the Institute of State and Law, Russian Academy of Sciences, Director of the Center for Comparative Law of the Higher School of Economics, the editor-in-chief of «State and Law»** journal took the floor on issues of national representation in the context of bicameral.

Since the dawn of parliamentarism, in its modern sense, from the XVIII century, the question of representation of people occupied the minds of different nations. Parliament is a representative body, and therefore, the question arises: whom should it represent and how?

For federal states, it has a great significance a representation of territorial interests of the subjects of the Federation. That is why, as a rule, there are bicameral parliaments in federations. Exceptions are also very exotic – it is the Comoros, united or Federated States of Micronesia, Tanzania. And all the other federal states in varying degrees, have a second chamber. As for Germany, its parliamentary experience is called a hidden bicameralism (bicameral), as formally, under the Constitution, Bundesrat is not called House of Parliament and, in general, as such anywhere in the legislation more specifically as part of the parliament is not indicated. However, Bundesrat («federal council») can be at least partly attributed to the German Parliament by functions.

All the other large and small federations, such as Belgium, have bicameral parliaments, which are represented by regional as well as ethnic, and ethno-linguistic interests.

As A.S. Avtonomov noted, first of all, it should be determined, why we needed a second chamber, and only on this basis, to develop the process of forming it. In general, the evolution of forming the Council of the Federation was directed towards increasing the role of voters in the formation of the Council of the Federation, including as well in fact the two-stage procedure for electing, empowering members of the Council of the Federation. If we are talking about representation of people, the question arises on the impact of the status of parliament by presidential quota, whether this innovation would enhance the role of parliament as a representative body or not.

In some countries, appointed members of the upper chamber, enter the house in order to any group that somehow cannot be presented in view of elections, should receive a voice in parliament. Appointed parliamentarians are also present in quite the old parliaments, which in the process of their reform reject outdated forms of the formation of the upper house. At that A.S. Avtonomov noticed that to refer to foreign experience was not always effective, there were completely different conditions for the birth of the parliamentary system and the existence of parliaments. And because of this, we could hardly just say unequivocally that if there is so there, then we need it as well. We rightly criticize the lack of democracy in one country or another, why we are going to take an example in this regard.

**Benjamin E. Chirkin, chief researcher at the Institute of State and Law, Russian Academy of Sciences, Doctor of Legal Sciences,** noted that there were six ways of forming upper chambers of parliaments, many of which were totally unsuitable for us: assignability of upper chamber – as in Canada, the Lords – in the UK or in Germany. Apparently, indirect elections, such as in France, would not work for us either. But there was something, we could probably use.

In some countries (there are two) there is a corporate method of formation, when members of the upper house of the Parliament are formed from certain



social groups of population. One could hardly form the Upper House as a whole like this, as, for example, this is the case in Ireland or in Slovenia, but the questions of corporate representation in science are under discussion. And a certain part of the members of the upper chamber may be formed based on this principle.

The second point is the occurrence of the ex officio membership of the upper House of the former Presidents. In many countries, in Italy, in India, and in other countries, Presidents at the end of their term, become ex officio members of the upper House. This, as noted by Professor Chirkin, gave some stability, sustainability and the use of a huge experience of the highest official.

There are many countries where a presidential quota is provided. In Italy and in India quota includes individuals, who have made a significant contribution to the development of their homeland, praised it in different areas (representatives of science, culture, art). Number of presidential quota is different. Thus, in Italy it is only one sixtieth (5 persons from 315 members of the upper chamber).

V.E. Chirkin also proposed to clarify the wording, stating «no more than 10 percent of the constitutional number».

There was a suggestion on the improvement of the Constitution outside the recommendation made at the round table topics – in terms of improving the legislative process. There were controversial questions remained about the constitutional term «a law adopted by the State Duma», the name of the republics – the subjects of the Russian Federation – states in Art. 5 of the Constitution of the Russian Federation.

**Andrey V. Yatskin, plenipotentiary representative of the Russian Federation Government in the Council of the Federation**, stressed the importance of the question of electivity or of appointment of members of parliament. The origin of mandate gets special significance during professional activities of members of the Council of the Federation as part of international bodies and organizations. The status of representatives of the executive body of the region, who, in accordance with the old law on the process of forming the chamber, were individually appointed by the highest authority of the subject, was repeatedly open to question.

In the future, there can be problems with the designated members of the Council of the Federation, and it will again raise the issue of representation.

**Svetlana V. Boshno, Doctor of Legal Sciences, Professor, Head of Political Science and Law Department of the Russian Presidential Academy of National Economy and Public Administration** delivered a speech on problems of comparative legal expertise of parliamentarism and the principles of lawmaking. The doctrine of comparative legal science, according to S.V. Boshno, indicated that we should not take the experience of others, we had consider how it would impact our domestic political landscape. The above fully applies to the problem of formation of houses of the legislative body.

An important problem is the combination of stability and variability of the legislation. Those states where the legislation is focused on tradition, are proud of it, because the legislation is a very specific tool for which people have to tune.

But this takes time. It should allow the people for whom it is intended, the time to learn to live with it. They should get to know it, they should get used to it, have to get used to observe it. If the law is changed before it has given its fruit, it is a very strange symptom. Even if we simply divide five processes of formation by 20 years, it is already too frequent changes. Several months have passed since the entry into force of the new process of formation. During this time, we did not get the Council of the Federation, which would firstly be formed by the new order. The new model has not yet shown its effectiveness or shortcomings. Only based on this experience, we could go to the next step. In fact, the new model appears when the former has not yet manifested itself, not compromised, not exhausted, we are actually talking about it still know nothing.

S.V. Boshno noted that it was possible to consider non-traditional solution to the problem of forming the Council of the Federation on the basis of international practice. If to delete the phrase in the Constitution that the Council of the Federation includes representatives of state power of subjects, then one could get quite a common model, which will have the following wording: by two representatives from the subject of the Federation. And the world knows such models.

Yet the most important thing is the idea of representation. Indeed, there are bodies formed directly and indirectly. But indirectly several times, or multiple delegation, leads to what is already quite not clear who represents whom. Multiple delegation turn the probability into 100 percent of certainty of the communication gap between parliamentarians and their primary voters.

Very promising is the idea of professional representation in the formation of houses of the legislature. So, in the Parliament of Slovenia, 18 of 40 members are chosen on a professional basis. The idea of professionalization of the members of legislature goes on topics of lobbying, the internal structure of the parliament, the fight against corruption. On the one hand, members of the Council of the Federation represent the subject of the Federation in legislature, but they position themselves in the office as a profession or business from which they have come to the parliament. For example, a member of the Council of the Federation is an entrepreneur, he joins the Committee on Entrepreneurship, and it turns out that he already appears to have two representatives: one – his professional representation, the second – as a member of the subject of the Federation.

Overall, the discussion was lively and engaged. The subject matter of formation of parliament in a domestic and world practice requires constant study. Connection of efforts of legislators, experts and the public creates prerequisites for the coordination of interests even at the early stages of creation of law.

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Council of the Federation Committee on the House Rules and Parliamentary  
Performance Management  
**Svetlana V. Boshno**, editor-in-chief

## PHILOSOPHY OF LAW

### ON THE PHILOSOPHICAL AND LEGAL MEANINGS OF THE RIGHT OF A PEOPLE TO BE THEMSELVES

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**Abstract.**

In the present article the author makes an assumption that the wording of the preamble of the Constitution of the Russian Federation of 1993 that the multinational people of Russian «is united by a common fate on their land» is not just a decorative declaration, but has a profound philosophical, cultural, historical and legal grounds. This formula reflects the specific tradition, cultural identity and the «independence» of the Russian law and Russian statehood, the path of becoming of which at times diverge from the western, European one. This discrepancy can be explained in terms of philosophical debate between realists and nominalists, which, in part, is being continued by J. Rawls and J. Habermas. This debate, in author's opinion, can bring clarity to the understanding of modern concepts of human rights, the idea of socio-historical basis of limitation of rights. This aspect is particularly important, bearing in mind the unfolding conflict of matching of so-called liberal European and traditional Russian legal values.

**Keywords:**

preamble to the Constitution, the people, ethnicity, Law, statehood, traditions, cultural identity, nomenalizm and realism, self-determination, liberalism, minority rights, collectivism.

L1. The eighty four words of which the preamble to the Russian Constitution consists include some fervent, politically impassioned words. In fact, the Constitution begins with the first statement that we, the multinational people of the Russian Federation, are united by a common fate on our land.

Of course, we could suggest that the writers of the text of the Constitution demonstrated a tendency towards simple rhetoric in the preamble. However, legal experts take the position that every word in such important texts as the texts of fundamental laws embodies attributes of legal concepts. These legal concepts are often a specification of philosophical concepts. Such, in our view, is the concept of a «common fate», in the way it characterizes the people who created the constitution.

The concept of a «common fate» was not developed further in the doctrine of constitutional law. However, recent dramatic political events place it at the epicentre of legal and philosophical discussion.

The common fate on our land for a thousand years, the multitude of peoples living together, some of whom have disappeared and been assimilated, has resulted in both genetic and social unity, with a common spirit. This commonality has a will, which is realized in the political form of the Russian state, the birth of which can be associated with the Rurikid Dynasty, or, in Nikolai Trubetskoy's concept, with the empire of Genghis Khan.

The notion of common fate reflects not only genetic relationships, but also common cultural and societal relationships. Common fate as an objective given is seen in the way in which the current generation of Russians follows in the path of a specific cultural tradition that has developed over many centuries. Understanding this, we can comprehend the ontological, legal status of the Constitution in a different manner: it is not simply a codification of the most important legal principles, many of which were adopted and adapted from the laws of other countries. Simultaneously, viewed through the prism of a «common fate» and the responsibilities between generations, the Constitution is also a unique codification of our relationships with the past. The German legal philosopher Josef Isensee formulated this idea of the need to consider the historical process, a unique idea of historicism in the doctrine of constitutional law. A new constitution is always only partially new, since, unavoidably, it must embrace some elements of the past. «Here lies the boundary of political possibility», writes Isensee, «beyond which not a single creator of a constitution can escape from any postulates on the sovereignty of power. He is only able to give new outlines to certain aspects of the life of a people, but he cannot transform that life entirely, because a people cannot be separated from their history and the tide of life cannot be stemmed for even an instant.

This theory, which connects the present Constitution to the past, allows us to obtain an unvarnished picture of the state corresponding to the constitution. Constitutional law is not only the result of the codification of fundamental legal norms, it is also essentially a codification of their relationships with the past, which give these norms their meaning, content, form, and validity»<sup>1</sup>.

Taken in its philosophical sense, the concept of a «common fate» is the reality of a non-universalized existence of a community of people who consider themselves one nation. This is the idea of unity, which forms the foundation for the principle of federalism (it is no accident that Part 3, Article 5 of the Constitution of the Russian Federation declares that the federal structure of the Russian Federation is based on its state integrity).

Common fate as an attribute, a feature of a society of people also requires the energy to resist those forces which demand that the people of this society subordinate themselves to a level of universalization that exceeds the reasonable minimum of commonality. Here, it is very important not to allow extremes.

According to the preamble of the Constitution, we, the multinational people of Russia, recognize ourselves as part of the world community. But this refers specifically to the world community, not individual parts of it. A correct understanding of the idea

1 Constitutional Law of Germany. – M., 1994, Vol. 1. – P. 12.

of common fate from the viewpoint of ideology must help us to avoid the extremes of nationalism, which is always based on the cult of selectiveness and exclusiveness, and which is always dangerously expansive. These negative aspects of nationalism are clearly visible in Fichte's address to the German nation, in which he competes with the supporters of French nationalism. For the idea of common fate to be useful as part of an ideology of patriotism, it must always be purged of everything excessive, such as claims to special abilities, to messianic ideas, and to other ever-present myths about the exclusivity of one nationality or another.

Common fate primarily gives rise to cultural identity, one of the manifestations of which is tradition or mores – the traditions of patriotism, solidarity, support of the family, etc. It is clearly possible to acknowledge the ontological nature of the traditions of the Russian state. In that case, an entire programme for research arises: can these traditions be viewed as a value exceeding the Constitution; what are the strengths and weaknesses of the traditions of national identity; is it possible to construct a system (gradations) of such traditions; is it possible to assess the repressive force inherent in any of these traditions so that we can learn to control it, just as man has learned to control the braking of a car (from which the braking force has not completely disappeared).

2. As a strictly legal concept, the notion of «common fate» is relative to the natural collective right to identity, distinctiveness, and preservation of the cultural traditions of all peoples of the Russian Federation. In the community of world nations, Russia has the right to cultural relativism. Manifestations of this constitutional right can be seen in public discussions about modern society. When a decision is made to establish a limited quota on the screenings of American films in Russian cinemas, this is also a realization of the right of the people to a non-universalized objective reality.

The idea of a common fate means that constitutional law must confront a totally new issue: the reality of the constitutional rights of future generations of Russians. Is it possible to recognize a future generation of the Russian people as having rights under the law? This is far from an idle question; in particular, the rates at which oil and gas are pumped out of the ground and the state of the country's environment depend on the answer to it. But the most important thing is that the Constitution of Russia confers a number of important cultural rights on future generations. In particular, the state must concern itself with preserving a historical and cultural legacy and caring for historical and cultural monuments on behalf of future generations (Article 44 of the Constitution of the Russian Federation). Despite the fact that Russian is the official language throughout the territory of the Russian Federation, the republics have the right to establish their own official languages. The Russian Federation guarantees all its peoples the right to maintain their national language, creating conditions for its study and development.

Thus, the idea of a «common fate» embodies the idea of identity and freedom. Hermann Lübbe wrote that it is not only this freedom which makes individuals equal to one another. Freedom may differ in the world – it is a unique manifestation of the legal principle of equal rights. The requirement that we acknowledge such a right in international law is fully legitimate, since we are dealing with the freedom of our reality

in the contingent historical identity<sup>1</sup>.

Of course, the traditions of national identity differ from those traditions that are the subject area of ethnography, although these and others have historical roots and can only be objectified in the collective understanding of people. Mores is closer to the concept of archetypes of consciousness introduced into scientific use by Carl Jung.

As a society undergoes the process of modernization, old traditions collide with new norms, most often from a borrowed culture.

If the old traditions are engrained in the society, then a mechanism for reconciling them with modern norms must be found. The type of culture where modernization, especially in the economic, scientific, and technical spheres, can occur without discarding old traditions has arisen not only in Russia, but also in many other nations<sup>2</sup>.

The concept of 'common fate on our land' is entwined with a system of ideas intended for finding a reasonable balance between the values of ancient traditions and the values of modernization.

3. As a legal concept, the right of a people to be themselves can be characterized from the viewpoint of its content, i.e., legal possibilities, and guarantees. As a legal concept, this right of peoples is the foundation for the formation of a given system of world order.

The content of this right is contained in the concept of fairness. In particular, from the idea of fairness, we can extract the authority of each people to insist on equality in asserting their rights for identity on an equal basis with other peoples.

When developing the legal concept of the right of a people to be themselves, it is preferable to focus on the philosophical tradition of nominalism, rather than the tradition of realism. As is known, the argument between these two philosophical traditions is essentially the selection of a moral world outlook, which has always occurred, is occurring, and will occur. We will note that realists, i.e. the proponents of the tradition of realism, have gained epistemological and metaphysical primacy, and the ontological superiority of the common and ideal over the private, empirical, and diverse. The proponents of the tradition of nominalism are inclined to declare that the world of facts, the empirical world, is the only true reality. Realism and nominalism are two different schools of academic thought encountered in all types of knowledge. For example, as the proponents of the realistic tradition reason, if they need to evaluate a president, judge, or professor, they want to see in them first of all an ideal president, judge, or professor created by their imagination, a certain archetype, which generally is not found in reality. But when they encounter a president, judge, or professor who has, like any empirical man, his virtues and deficiencies, when they discover that a president, judge, or professor is not the ideal figure their imagination created, they are disenchanted. This phenomenon is expressed by the Turkish proverb: «I thought a pasha was a pasha, but it turns out that a pasha is a man»! A nominalistic thinker generally is not taken in by ideal concepts. Such people generally understand people

1 *Lübbe Hermann*, The Right to be Different. On the Philosophy of Regionalism // Political Philosophy in Germany. – M., 2005.

2 *Stepin V.S.* The Value of Law and the Problem of Building a New Society in Russia // Legal Philosophy at the Beginning of the 21st Century. – M., 2010. – P. 18.

better and do not commit mistakes of self-delusion. The enthusiasm for traditions of realism and abstract concepts in the very sensitive sphere of civilizational differences between peoples leads to tragic consequences. John Rawls and his concept of a rationally thinking society of peoples, which he used in his book *The Law of Peoples*, offers an example of this. For Rawls, a rationally thinking society of peoples consists of liberal societies and hierarchical societies.

He defines the idealistic concept of a liberal society as a society with law and order, permeated with the concept of common wellbeing, guaranteeing that human rights are observed in society. It is not considered at all here that the idealization of the rights of certain minorities, such as the proponents of homosexual love, carries serious risks of a creating a schism in a society. Recall how in Mark Twain's *The Prince and the Pauper*, the latter used the government seal to crack nuts. Using this comparison, I would like to show that, in unskilled (or, conversely, devious) hands, the extremely abstract category of human rights can have a destructive force.

The attraction to the realistic tradition of thought is dangerous in that a bias towards other civilizations and cultures, and even explicit snobbery, is programmed into it. The Western tradition of individualism is viewed as obviously the most perfect, as an axiom that requires no proof, despite the fact that in the majority of countries in the world there is a tradition of viewing individuals as members of a society, community, and labour collective.

The freedom of self-determination and self-expression, as defined constitutionally, cannot be extended so broadly as to ignore the constitutionally recognized and valuable preferences of the democratic majority that are the foundation for the organization of society and thus to raise doubt as to the historical and cultural self-definition of a nation, its development under conditions of civil peace and agreement on the basis of an understanding of the historical, cultural, and other national traditions, as well as responsibility to future generations.

Enchantment with realism to the detriment of nominalism leads to inertial thinking. Without any great proof, John Rawls suggests that the culmination of the development of civilizations is the development of a world system where the sovereignty of the state must be limited using human rights, the standards for which are created in one workshop, in one part of the world, which is clearly always right, because it is the repository of reason. However, if the human rights concepts of any nation contradict these standards, then that nation must be counted as one which is in need of forced correction.

Regrettably, John Rawls distorts the ideas of Kant, who wrote that the first political responsibility of a man is his responsibility to abandon his natural state and subordinate himself to the standards of rational and fair law. I do not think that Kant would be pleased to learn that, if human rights in one society are not esteemed in accordance with unified standards that do not account for differences in civilizations, then the liberal avant-garde of the community of liberal nations has the right to start bombing such a nation.

On the subject of John Rawls' book, a discussion arose between Rawls and Jürgen Habermas. In his address to the World Congress of Philosophy in Istanbul, Jürgen Habermas showed that he does not follow in Rawls' tradition of realist thought.



He stated that, unless we are dealing with genocide or crimes against humanity, defence of the integrity of forms of life and the usual way of life of a community of people organized into a nation takes precedence over abstract principles of fairness on a global scale.

The framework of my address does not enable me to go into the details of my argument. I will limit myself to the conclusion that the tradition of realism conceals the risks of hazardous cognitive situations in those cases where theory is the foundation for policy, i.e. the course of actions taken by nations. A cognitive situation, an orientation towards the abstract concepts of a liberal society, a hierarchical society, is certainly not harmless.

Rawls proves, using the abstract concept of justice, the right of civilized nations to wage «just wars». Jürgen Habermas is right in stating that the criteria for assessing whether a law is just or not cannot be translated into the language of law, and the use of such criteria by nations cannot be verified by international courts.

Furthermore, there is too much relativism there: who can determine on a supra-governmental level whether Western legal values deserve universal acceptance?

Thus, the right of a people to be themselves is the right to have a historical memory, which is a part of a historical legacy, and the right to have a national spirit, which, in the case of the Russian people, is the spirit of the undefeated, and ultimately the right to the identity of a civilization.

4. There has been a debate for many years in jurisprudence on the nature of constitutional courts – is such a court less a court, and more a qualitatively new authority? I think that if we assess the procedure for decision making in constitutional courts and in courts of law, we must acknowledge that the former differ substantially from ordinary courts, which rule on cases using simple legal syllogism. It is sufficient for ordinary courts to evaluate the factual circumstances of a dispute which arises, to seek a legal norm in the law that applies to this dispute, and to draw a legal conclusion. Everything is more difficult in constitutional courts. In addition to the positive constitutional law contained in the texts of constitutions, in order to make decisions, it is also necessary to master a much more complex methodology – the methodology of the philosophy of law.

Only this philosophy can help to find a balance between universal legal values and those legal values which traditionally separate the majority of a nation and which are not in any way evidence of its conservatism. To be different does not mean to be conservative, since there are no generally accepted criteria in this sphere. The European Court of Human Rights' claims that its court system is based on the «sovereignty of universal morals and law» and that the sovereignty of nations in this connection should be significantly limited is viewed with scepticism in Russia. It is possible that, after the Second World War, after the adoption of the Universal Declaration of Human Rights, man actually became more *homo universalis* (Latin), but the manifestation of this concept in the spirit of realism does not cancel out the differences in civilizations in the spirit of nominalism. Samuel Huntington wrote about this in his prophetic paper on the clash of civilizations. We can discard Marxism, but this does not mean that Russians are becoming Westerners.



That is why we strive for our own understanding of our own constitutional values, and this is part of the right of a people to be themselves. We cannot accept the Western formulas that are proposed to us regarding the neutrality of the government on the problem of propaganda of homosexual love. The freedom to preach homosexual love is associated in our society with the public indecency discussed by the multinational Russian people. A pro-gay demonstration may end in beatings and disorder. We cannot accept such recommendations on the total liberation (liberalization) and propaganda of human instincts aimed at disrupting the moral authority of the Russian Orthodox Church.

Our opponents in the West must know that their purely Western legal values are causing a schism in Russian society. However, the social value of constitutional law is to reasonably combine the rights of minorities with the principle according to which the exercising of the rights and freedoms of men and women cannot be allowed to violate the rights and freedoms of other people.

In Russia, there is a strong historical tradition of tolerance between the many peoples populating its territory. Careful respect for national cultures is a tradition of the Russian state. We did not have a unification of cultures in the sense that it occurred in Europe during the era when nation states were created, when many ethnicities and ethnic cultures disappeared. In Russia, ethnic enclaves have always been preserved, but the price for this was a contradictory combination of cultural patterns and traditions.

Of course, this circumstance makes our path to perfect superiority of law longer and more winding. Our opponents in the West need to understand this. They still adhere to the battle cry, «Be realists: demand the impossible».

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## **EVOLUTION OF LEGAL CONSCIOUSNESS FROM ANTIQUITY TO MODERN AGE (THESES TO THE HISTORY OF LEGAL PHILOSOPHY)**

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### **Abstract.**

This article presents evolution and correlation of basic legal notions. Polysemy of the notion of justice (*ius*) is shown, including its concurrence with the notion of law (*lex*). Down to the Modern Age the notion *ius* was an expression of justness. As a freedom, and in addition a primary one with respect to law, *ius* is understood only starting from the 17th century. The start of differentiation of justice (law) and morals was made as early as in Aristotle's writings. A minimum of morality becomes stable with secular law (*jus*) already in medieval philosophy.

### **Keywords:**

justice, law, public justice, justness, equality, legal order, freedom, legality and morality.

Specifics of philosophic discourse in the area of legal consciousness consists to a considerable extent in a constant reproduction, construction (interpretation), comment and setting to modern tune (modernization or «renovation») of classic texts, consolidation of various approaches or, vice versa, absolutization of some ideas articulated earlier. Formation of modern Russian paradigm of legal consciousness in that sense is not an exception.

1. Analysis of antique sources shows that the Greek philosophy lacked a notion of justice in a meaning close to a modern one. In the Plato's system of objective idealism an analog of natural law is an «idea» (*eidos*). An «idea» can be characterized not only as an essence of thing, but as its law, too. It is a canon which is primary in relation to corporeal world, polis and individual, a measure of proper conduct, a law which is not invented by an individual, but is discovered by him. «Justice» (*dikaion*) and justness (*dikaiosyne*) consist in abiding by law, that is reason. In Aristotle's ethics «justice» is also a result of application of law (of polis, and in case of necessity – of natural one) and for that reason cannot precede it. Written (private) law is preceded not by natural justice, but by natural (general) law.

2. «Justice» (public justice) found by translators in Aristotle's texts is the result

of a judge's activities for restoration of the golden mean transgressed by the parties (correct balance between «profit» of a law breaker and «loss» of an injured person) on the basis of laws of a polis (for that reason it is «legalized») and natural laws (in that sense it is «natural»). «The good» («truth») is also «justice», not by force of law, but as correction of lawful (based on a polis laws) public justice on the basis of natural law, as well as all circumstances of case and personalities of the parties. In the Roman jurisprudence a similar treatment of legal consciousness is expressed in a formula: «Law is the art of the good and the just».

3. In the Roman law the notion *ius* (justice) was from the moment of its emergence used for designation of one of the sources (forms) of law, and with the development of jurisprudence, also as a general term denoting the aggregate of sources of law (acts, *senatoconsulta*, decrees of magistrates, customs etc.). The said «synonymy» of the notions justice and law was preserved in the Middle Ages and in the Modern Age.

4. Dualism of justice (*ius*) and law (*lex*) appears in the Ancient Rome in connection with plurality of sources of law and aspiration to substantiate presence of objective laws of justness and «the just» by nature or the right of nature. In the creative work of Cicero: *ius* is understood as a) righteous and just by nature and b) the aggregate of commands of law of nature determining the just. The rules of genuine virtue, objective rules of justness are established by natural law (*lex naturale*) and are called natural justice (*ius naturale*) or justice of nature (*ius naturae*). *Ius naturale*, therefore, unites all rules of natural law together (in the same way that *ius civile* unites written laws, *senatoconsulta* and other sources).

5. Duality (understanding of *ius* simultaneously as the existing and as the due) is preserved in the Middle Ages. Augustine, starting out from Cicero, determines justice (*ius*) as an aggregate of regulatory commands, corresponding with justness (*iustitia*). Aquinas defines justice (*ius*) according to Aristotle, as a real equality (a medium of thing or action). But that equality, in the spirit of the Roman legal consciousness, possesses an obligatory force (is of regulatory nature). *Ius* in «*Summa Theologiæ*» means simultaneously just by nature as well as its law. As in the Roman jurisprudence, *ius* (justice) and *lex* (law) coexist parallelly. All kinds of justice (*ius naturale*, *ius positivum*, *ius gentium*) imply actualization of principle of medium, finding equality in relations between people. At that method of adjustment only for *ius naturale* is in the nature of things itself, and for *ius positivum* and *ius gentium* human agreements and institutions which, however cannot contradict *ius naturale*, have constituent significance.

All order of universe pre-exists in God's mind in the form of Eternal Law. A law according to Aquinas is a formal expression of the essence of divine world order. Law is not justice itself, but foundation of justice, its image. Justness is directed by law and consists in subordination to law. When the question is about the Eternal and natural laws, there cannot be any variant readings between law and justice. A question as to what is primary – justice (legal, just) or law, arises only in respect to human justice: natural justice comes out to be primary, but it in its turn is based on law – Eternal and divine. Here the appearance of «justice» is intended to ensure a

formal, as Aquinas calls it, aspect of justness, and to show secondary nature of any human law, its derivation from divine and natural laws and natural justice based on them.

6. Dikaiozyne is a universal ethical notion (usually translated with term «justness») – in Plato's philosophy was understood as geometric equality (genuine and best), or «by lot» (imperfect, but necessary for preservation of social peace). The result of Aristotle's analysis of dikaiozyne (justness) was separation within it of private justness (justice), which is directly manifested as equality (toison) in relations connected with distribution of various benefits constituting a primary subject-matter of jurisprudence. Latin equivalents are *ius* and its «technical» analog *aequitas*, which comes down to a principle of equality of all before the law and the law equal to all. In such a manner, Graeco-Roman philosophy and jurisprudence distinguish between general ethical and legal aspects of justness (justice) and assignment for justice (in the strict sense) of the field of property relations and other relations connected with them.

7. In the Modern Age justice (in concise form) is preserved by Hugo Grotius just as one of three senses of law (law is what does not contradict justice). As in Ancient Rome, it is reduced to a set of commands of nature requiring observance of treaties and provision to everyone one's due. A sense of distributive justice is sinking. A field of justice is limited with its «directional» part, an essence of which is reduced to observing treaties, rendering to others what they already possess, performing duties imposed on us in relation with them. Thomas Hobbes reduces commutative (directional) justice to technical equality of civil circulation agents. At that he does not limit relations of counteractants with obligatory following a principle of medium: equal subjects have a right of making free use of property and performing assumed obligations.

8. In the Greek culture justice was directly connected with lawfulness – «what is lawful, is just» (formal aspect) and equality (substantial aspect). The Roman jurisprudence also proceeded from the premise that a decision differentiating the just from the unjust is a law (*lex*) or natural law (*lexnaturale*) at the heart of it is the principle of equality. That, in point of fact, makes unnecessary separation, alongside with justice, of equality as one more, self-consistent attribute of law.

From now forth justice progressively becomes a strictly legal category, sinking in the general ethical scale. It is also rigidly tied to law – natural and positive, and, eventually, comes down to legal equality which issue from natural equality. Justice (moral virtue) is treated as subordination to state laws (*etatism*), which can be corrected by turning to natural laws and public opinion laws (*moderate liberalism*).

9. A notion of justice in a subjective sense (justice as freedom or «power over oneself» and power over others), which was separated by Grotius, marked a beginning of a new stage of legal consciousness (a foundation of such understanding was laid already in the Roman law). Freedom (an attribute of personality) described in legal categories, evolves into «justice». Hobbes, and then Locke, already univocally defined justice (*ius*) as primordial freedom, and law (*lex*) as obligation, limitation of freedom. *Ius* in substance takes a double meaning: a) freedom in natural state is

not a legal category, prerequisite of justice in a proper sense; 6) limited freedom accomplished outright thanks to a natural and volitionally established law coming to its aid. Analogous position in that issue is taken by Spinoza who reduces freedom (justice) to an individuum's might, and its implementability – to a balance of forces of individuum and state.

10. The foundations of differentiation of the spheres of legality and morality were laid in as early as the Classical philosophy. The great Plato's utopia still presumed a complete unity of spheres of morals and legality. A law as a finite external formal expression of an idea (having passed through reason), already expresses a maximum of moral demands. A sphere of legality coincides with a sphere of morality. Aristotle for the first time in the framework of united ethics shows distinctions between two groups of laws, which in a later literature will be divided in moral laws and legal ones. A subject of the first ones is extreme forms of virtue and vice, a rule is a natural law, a regulation method is moral sanctions and incentives, in an absence of coercion. The second ones embrace only part of moral relations, are governed by polis law and, as one of types of natural law, are based on coercion. Human virtue is expressed in a conscious and purposeful commitment of corresponding acts. Otherwise an individuum can be considered to be law-abiding, but not virtuous (it reminds us about a later division of spheres of morality and legality). A medium in Aristotle's ethics is not a bleak following a middle way, equally distant from vice as well as from virtue. In Aristotle's understanding, a medium is a summit from a point of view of the highest good and perfection, because a medium is the only correct, therefore, the best variant of behavior. That is just the variant of behavior which can be prescribed by legal law.

Cicero also distinguishes a supreme morality (limit of the good) and practical morals (a «middle» responsibility). A «limit of the good» is of theoretical and unconditional nature – it fits in with a «perfect» obligation accessible to sages. A «middle» responsibility is of practical nature and is addressed to all the people. Cicero is interested in just practical morals which compose a sphere of a legal law.

A distinct limitation of purpose and task of a secular law by a moral minimum necessary for worldly life is observable as early as in Augustine's works. A limitation of law should be overcome owing to God's grace. Placing a priority on internal motivation of an act, Augustine in doing so formulates a principle of differentiation of spheres of legality and morality. Thomas Aquinas also distinguishes between sphere of morality and sphere of justness (legal sphere) which is represented in human laws. Out of two parts of the Divine Law, the Old Law (Old Testament) is also directed primarily at achievement of earthly objectives (temporary benefits) and preparation for a higher objective.

In Modern Age Grotius, and after him other thinkers, too, extend the line for recognition in demands of justice (law) of obligatory minimum of morality necessary for a life in society. A maximum of demands is preserved in Christian ethics. Spinoza, as distinct from his contemporaries, introducing a notion of a «natural divine law», tries to desacralize moral maximum. He frees not a person from morals, but morals from religiosity.

Etatist (Hobbes) and liberal (Locke) versions of ius naturalism differ among other things in the fact that in the first case justice and morals are derivatives from state and its laws, and in the second one – society is recognized to be autonomous in definition of virtue and vice. Rousseau does not divide society and state in the spirit of liberalism. Nevertheless, he calls morals, customs, public opinion the most important of all kinds of laws, which contradicts an idea of unity of society and state and subordination of everyone to a common will.

11. Correlation of justice and law ceases to be a major problem of science in the middle of 18<sup>th</sup> century in connection with a crisis of ius naturalism and searches of new foundations of justice. Despite natural law phraseology, Montesquieu establishes his theory on the historico-legal and sociological ground. «Justice» is used as an umbrella term for designation of body of laws. Rousseau, as contrasted with Montesquieu, demands an axiological and normative approach to politics and justice. The philosopher invokes natural justice (law) for substantiation of political justice (law) deduced from «common will». Eventually the place of nature is occupied by politically organized society, and a natural law is substituted with that established by will. Organic interpretation of state allows Rousseau to ontologize common will. Reunion of power and a people within the confines of direct democracy becomes a ground for absolutization of state. Law (expression of common will) is declared a criterion of justness (equality, mutuality of rights and obligations), its guarantor and source.

12. Identification of justice (ius) with freedom is characteristic only for a certain period of development of legal consciousness. Radical revolution in key notions of natural-law theory was made by Hobbes. The classical and medieval philosophies started with natural law, and justice was interpreted, in the first place, in a meaning close, if not identical, to justness (just), and Hobbes puts to the foreground justice (jus) in the meaning of freedom. An idea of freedom in a natural state is a logical substantiation of real freedom. Only in a civil state, owing to a positive law, freedom is really put into practice. An existence of justice (ius) is possible only owing to law, and within the limits of law. Rousseau writes about the same, but from a perspective of democratic etatism – only thanks to law which a person has established on one's own and for oneself, one gets real freedom – as a personality and as a member of socium.

13. Solution of a question of correlation of justice and law by modern legal science in favor of justice (priority of justice, its understanding as freedom), is a reflection of a certain period of development of legal consciousness (natural-law paradigm of the Modern Age), and cannot be considered universal, based on the aggregate of political and legal doctrines of the past.

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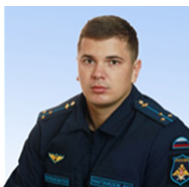
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## DEVELOPMENT OF THE LEGAL SYSTEM

### PRIVATE REGULATORY LEGAL ACTS IN THE RUSSIAN FEDERATION

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**Abstract.**

Regulatory legal acts possess certain characteristics, the presence of which determines their qualities. Historically the development of forms of law in the world followed various tracks, which led to appearance of several legal systems. That is why the notion and the meaning of regulatory legal acts in them does not always coincide. This article presents a notion of private regulatory legal acts and an issue of their presence in the Russian legal system. In that context a notion of regulatory legal act and its characteristics are studied.

**Keywords:**

regulatory legal act, private regulatory legal act, public regulatory legal act, normalization, servitude, private servitude, public servitude, juridical person, government corporations, public companies, the Bank of Russia.

1. It makes sense to construe historical evolution of a regulatory legal act as one of aspects of legal history as a whole. One can distinguish two tendencies of development of justice and law – European and Eastern ones. At that the East in this case is a civilizational notion, not a geographical one. I'm referring to countries which (excluding Sub-Saharan Africa) pertain to non-European, Oriental civilization<sup>1</sup>. Within the confines of each of them there are their own varieties of supremacy of justice (and law): in Europe – Anglo-Saxon and Romano-Germanic ones, in the East – Hindu, Islamic etc.

The doctrine and structure of justice was formed for the first time in the antique Rome. Having emerged, it had a noticeable bearing on development of apprehension of laws in the countries of Europe. European doctrine presupposes formal entrenchment of law in the system of legal sources and presence of politico-

<sup>1</sup> See: Vasilyev L.S. History of religions of the East. – M., 1983.

legal safeguards of supremacy of law. At that supremacy of law is characteristic for countries with civil system of law.

Plurality of legal sources is the most brightly manifested as reflection of increasingly larger role and volume of regulatory development activities of bodies of executive power in such countries as the Great Britain and the USA.

In England decrees, orders, rules, instructions, ordinances, circulars, notifications pertain to regulatory acts. Plurality of legal sources is typical for the USA, as well. The variety of kinds of regulatory acts issued by bodies of executive power is supplemented with uncertainty of their correlation, regulation of uniform issues by heterogeneous regulatory acts.

Consequently, it should be noted here that in the Anglo-Saxon system any forms (sources) of law take regulatory form. In civil legal system, vice versa, plurality of legal sources is not accepted, law is the basic legal form.

In the USA public and private regulatory acts (bills) are distinguished. At that public (social) bills are understood to mean standard (within the meaning of civil legal system) draft laws presupposing affirmation of general, universal rules of conduct concerning social interest and needs of a whole people. Private bills act as legislative (legal) acts relating to activities of particular (private) persons – natural as well as legal, actually acting as enactments for individual application<sup>1</sup>.

In the countries with civil legal system one can separate regulatory and non-regulatory acts which are separated according to common (general legal) or individualized regulatory orientation. That gradation has an important juridical property – it generates a certain legal binding sense<sup>2</sup>.

At that at the present time the Russian Federation lacks a statutorily prescribed notion of a regulatory legal act. However in judicial practice<sup>3</sup> the use of the notion established in Resolution of the State Duma of 11.11.1996 No 781-II GD<sup>4</sup> gained a foothold.

In accordance with the Resolution, a regulatory legal act is a written official document accepted (published) in a certain form by a rule-making body within its competence and directed at establishment, alteration or cancellation of legal norms. So a presence in legal adjudgements of a legal act of rules of law (legal norms) is a ground for its reference to regulatory legal acts<sup>5</sup>. So for recognition of one or another legal document as a regulatory legal act it is necessary to expose that its constitutive provisions are by their legal content a legal norm: are characterized with general regulatory orientation, binding properties and

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2 Yurtayeva Ye.A. Normalization of legislation: modern modulations in the Russian law-making // Russian law magazine. – 2012. – No 11. – P. 28-39.

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4 See, for example: Decree of Presidium of the RF Supreme Arbitration Court of 14.11.2006 No 11253/06 «On reversal of the decision of the RF Supreme Arbitration Court of 31.05.2006 No 3894/06 and on termination of proceedings in case of contestation of provisions of 19<sup>th</sup> paragraph and second sentence of 20<sup>th</sup> paragraph of the letter of the RF Federal Tax Service of 13.01.2006 No MM-6-03/18@».

5 Boshno S.V. Regulatory legal act: development of attributes in law enforcement practice // Arbitration and civil procedure. – 2009. – No 4, 5, 6.

competent enactment.

Consequently, non-regulatory act shall be understood as a rule to mean an individually specified legal act adopted on organizational/management issues, for example, an order issued by an anti-monopoly authority, notification of a Federal Treasury body etc. A notion «decision» should be interpreted broadly, not only as a single document, for example, order of a judicial bailiff-executor, but also as other kinds of non-normative legal documents, such as information letters, methodological recommendations, explanations, resolutions in documents and others<sup>1</sup>.

2. Agencies of state power, as distinguished from theory, concede adoption of private regulatory legal acts. For example, the rule on public servitude<sup>2</sup>. According to the Article 23 of the Land Code of the Russian Federation, servitude can be public or private.

At that public servitude is established by law or other regulatory legal act of the Russian Federation, regulatory legal act of constituent entity of the Russian Federation, regulatory legal act of a body of local self-government on the condition that it is necessary for serving the interests of the state, local self-government or local population, without seizure of land plots. That is servitude is established in regard to specific land plot, impose on it certain limitations. It is obvious that such an act regulates legal relations with a private person.

An unusual legislative practice is creation of legal persons by way of adoption about them of a special Federal law (Bank of Russia, state corporations, state-owned companies).

Their main feature is that they are created in a narrow field and for the most part for performance of certain state powers. At that they are created on the ground of a Federal law<sup>3</sup>.

On the one part, specified acts just determine legal status of legal persons. On the other, they determine rights and responsibilities of a particular legal person. Some authors<sup>4</sup> try to justify such regulation with the aid of division of legal persons into private and public ones, which contradicts to legislation in power.

Consequently, one can say that in modern Russian legal system private regulatory legal acts exist. Causes of their appearance are lying in considerable increase of number of regulatory acts. As a result there takes place a combination of rules of private and public law. At that the authors mix up dualism of law (its division in private and public one), and adoption of acts, some of which are

1 Arbitral Procedural Code of the Russian Federation. Article-by-article scientific practical commentary / V.A. Baranov, O.V. Belousov, A.N. Beresnev et al.; under gen. ed. of V.A. Gureev; sci. ed. V.V. Guschin. – M.: Library of «Rossiyskaya Gazeta», 2013. – Issue III-IV.

2 *Semenikhin V.V.* Land tax. 3<sup>rd</sup> ed. – M.: GrossMedia, ROSBUKH, 2013. – P. 99.

3 See, for example: Federal law of 10.07.2002 No 86-FZ «About the Central Bank of the Russian Federation (Bank of Russia)»; Federal law of 21.07.2007 No 185-FZ «About the Support Fund for the Reform of the Housing and Utilities Sector»; Federal law of 17.07.2009 No 145-FZ «About the state-owned company «Russian Highways» and about introduction of alterations in some legislative acts of the Russian Federation».

4 *Sergeev V.V.* About legal persons of public law // Banking law. – 2013. – No 2. – P. 3-15.

regulatory, contain rules of law, and others are not regulatory, are specified, and regulate rights and responsibilities of private persons. In accordance with classic division, public law contains norms intended to guarantee generally significant (public) interests, i.e. interests of society, state on the whole, and private law includes norms protecting interests of private persons and regulates relations between private persons. For that reason such division has no bearing on division of regulatory legal acts into regulatory and non-regulatory, public and private.

The undertaken study carries the following inference. Though theory and practice of statutory regulation in the Russian Federation excludes division of regulatory legal acts into private and public ones, actually the law-maker has long ago passed the limits of classical concept of a regulatory legal act. It is much easier and quicker for the state bodies to adopt a regulatory legal act on a necessary issue, than to go into details about the nature it will have and its consequences. For that reason many theoreticians as well get a wish to justify such actions. In the countries with Anglo-Saxon legal system the adoption of similar acts has long ago become a legislative tradition. In Russia a similar practice was introduced by the operative bodies of power. Consequently, law making should not be instantaneous and conformist. The adoption of new statutory regulations should be preceded by procedures of legal monitoring of operative rules, other modern legal technologies for assessment of legal practice. Besides, the Russian law needs perfection, search and consolidation of legal notions in the current legislation.

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## UNCONSTITUTIONALITY OF THE LEGISLATION ON TAX DEDUCTIONS WITH REGARD TO SUBDIVISION OF LAND LOTS

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### **Abstract.**

The article examines the legislation that regulates tax deductions in the field of operations with real estate. Legal conditions for granting tax deductions are framed by combination of tax legislation (Subparagraph 1, Para 1 of Article 220 of the Tax Code of the Russian Federation, hereinafter referred to as the RF Tax Code) and land legislation (Article 11.4 of the Land Code of the Russian Federation, hereinafter referred to as the RF Land Code), as well as by regulations on registering operations with real estate (Para 5, Article 12 of the Federal Law No 122-FZ). As a whole, the said regulations do not establish a uniformed approach concerning subdivision and settling the commencement date of the term of limitation for exercising the right to receive tax deductions. The author considers collision of the two juridical dates: the date of origin of land ownership and the date of issuing the land lot certificate in case of the land subdivision on the initiative of the owner. It resulted from ambiguities inherent in the legislation. Due to the stated collision there emerge contradictory legal practices with ensuing infringement of civil rights. On the basis of the presented research, the author offers to declare Subparagraph 1, Para 1 of Article 220 of the RF Tax Code unconstitutional.

### **Keywords:**

Tax Code, Land Code, registration of deeds, tax deductions, subdivision, legislation ambiguity, proprietary rights, registration of rights to real estate, Constitutional Court, Ministry of Finance of the Russian Federation, practice of law enforcement.

The legal problem consists in an ambiguity in the legislation that establishes tax deductions in case of selling the land lot, which had been subdivided by its owner. Besides, the owner had his lot in possession for more than three years, and divided the lot during this period. It is not certain, which date is to be determined as the date when the three year period starts: shall it be the date of acquisition the main lot or the date of receiving the title documents that warrant the property rights to the subdivided (newly formed) land lots.

Para 4 of Article 11.4 of the RF Land Code specifies that in case of subdivision the owner acquires proprietary rights to all the lots formed as a result of subdivision. The given regulation does not provide for settling the definite and valid date when

there arise proprietary rights to the lots formed by subdivision; consequently, there are no grounds for uniform understanding and application of related norms of civil and tax law. For example, Subparagraph 1, Para 1 of Article 220 of the RF Tax Code specifies tax deductions for taxpayers on the income, received from sale of the land lot, which taxpayer has had in his possession for more than three years. However, Article 11.4 of the RF Land Code in combination with Articles 218, 219 and 223 of the Civil Code of the Russian Federation (hereinafter referred to as the RF Civil Code) does not allow to fix unambiguously the moment when proprietary rights arise, that is when the three year period starts. Thus the mode of settling the date of proprietary rights presents an ambiguous limitation here.

The stated ambiguity of the Tax Code causes violation of the constitutional rights specified by Articles 18, 19, 35, 57 of the RF Constitution. The law ambiguity makes itself evident in the fact that in their legal practices different agencies apply the norm prescribed by Subparagraph 1, Para 1 of Article 220 of the RF Tax Code in different ways.

Legal views and legal practices of the Russian Ministry of Finance are not certain; it is proved by the fact that there have been published several explanations on how to apply Subparagraph 1, Para 1 of Article 220 of the RF Tax Code, which interfere with each other.

The Ministry of Finance of the Russian Federation published the Letter dated 5 May, 2011 No 03-04-05/5-331 (Д) «About absence of grounds for paying the individual income tax by the physical person, who had owned 1/2 of the flat since 1993 and inherited the second half of the flat in 2007 after his wife's death, in case the given flat is sold in 2010».

The Letter was published as a reply to the following situation. Since 1993 the flat belonged to two owners. In connection with his wife's death in November 2007, the taxpayer came into inheritance with the 1/2 of the flat that had been his wife's share of the given flat. In 2010 the flat was sold.

The Ministry of Finance interprets the situation as follows: according to Para 1 of Article 244 of the RF Civil Code the property owned by two or several persons belongs to them on a common property basis. According to Article 235 of the RF Civil Code, changes in the composition of owners, including changes due to alienation of estate to one of the owners of common property, do not entail disposition of rights for the given property for the latter. Herewith, under Article 131 of the RF Civil Code changes in the composition of property owners are subject to state registration of deeds.

The legal position of the Russian Ministry of Finance is that the moment of origin of the proprietary rights shall be determined by the time of receiving the original state registration of proprietary rights to the given flat, but not the time of receiving a repeated ownership certificate for the same property. Hence, the bare fact that there is issued a different certificate (with a different date, number, for an object with a different flat area comparing with the first certificate issued for an object that is part of a whole) shall not be considered as grounds for commencing new proprietary rights, and the date of origin of proprietary rights shall be the date

of issuance of the original ownership certificate.

However, in the Letter dated 10 February, 2012 No 03-04-05/7-153 the Russian Ministry of Finance formulates a different legal position. The letter was published to give an assessment of the legal situation, when a taxpayer inherited a land lot in 2006, but registered his proprietary rights to it in 2007. In 2011 he divided the land lot, and he was planning to sell one of the newly formed lots.

In this case the position of the Russian Ministry of Finance is that the taxpayer had owned the said lot for less than three years. This interpretation is based on Article 11.4 of the RF Land Code, which states that subdivision results in forming several land lots, while the original land lot ceases to exist. At the same time the owner obtains proprietary rights for all the land lots that are formed by the subdivision.

On the ground of Article 219 of the RF Civil Code, the Ministry of Finance of the Russian Federation points out that proprietary rights for buildings, constructions and other objects of newly created estate property that are subject to state registration of deeds, arise from the date of such registration.

The legal position of the RF Ministry of Finance is also based on Para 9 of Article 12 of the Federal Law dated 21.07.1997 «About state registration of rights to estate property and operations with it», according to which in case of the division, apportionment of participatory share in specie and other legal operations with property, registration entity records are made in new sections of the Uniform State Register of Proprietary Rights and new dossiers of title documents are formed with new cadastral numbers.

In summary, the RF Ministry of Finance points out that since subdivision results in creating new property objects with new cadastral numbers, while the original land lot as an object of a right ceases to exist, the ownership period concerning land lots after such subdivision is considered to start on the date the lot is registered in the Uniform State Register of Right to Estate Property and Operations with it. Thus, the ownership period shall start on the date of issue of new ownership certificates.

Comparison of these two Letters of the federal agency of the executive branch demonstrates that this norm in regard to settling the commencement date of proprietary rights allows for ambiguous interpretations in law enforcement practices. When the subject matter is a flat, the date of original acquisition of right is considered to be the date for calculation of limitations, while date of issue of a repeated certificate has no legal effect. At the same time, in case with a land lot acquisitive prescription is determined by the date of issue of new ownership certificates. Hence, the Ministry of Finance of Russia has no clear idea about the date of origin of proprietary rights to estate property, and correspondingly, about the beginning date of the time period of acquisitive prescription.

It is unacceptable to apply Article 219 of the RF Civil Code in the situation under consideration, since the subject matter of the said Article is buildings, constructions and other newly created objects. They can be erected or constructed; earlier the object has not existed in nature.



Subdivision of land lots, as well as dividing other real estate objects, does not involve creating new objects. The original land lot and new land lots have always been just land; there is no creation per se. Creation also means that previously there has been no object, and, correspondingly, nobody has had proprietary rights to it. This is an investitive juridical fact – the object is created for the first time.

When we deal with subdivision, the original lot existed as an object of the physical world and was owned by somebody. That is why, when studying the question about the origin of proprietary rights, we should analyse if there occurred transfer of ownership from one person to another. This is precisely what the legislation states on this matter in Para 2, Article 218 of the RF Civil Code: title to assets can be bought from the owner by another person by virtue of the contract of sale, exchange, donation or another transaction with the purpose of assignment of assets. Legal effect depends on if it is transfer of ownership (Article 218 of the RF Civil Code) or creation of the right for the first time (Article 219 of the RF Civil Code).

According to Article 223 of the RF Civil Code, in case parties conclude an agreement the acquirer can exercise proprietary rights to the object from the date of registration, if the other is not stipulated by law. Thus, registration is important in cases of transfer of ownership to the acquirer, i.e. when the owner is changed.

Legal views of the Supreme Court of the Russian Federation are formulated in the Court Order dated 11 May, 2011 No 67-B11-2 of the Panel of Judges on administrative cases issued upon application of O.I. Tuboltsev about unenforceability and revocation of a decision of a tax body.

Having analysed the provisions of the RF Civil Code that regulate rights of owners, grounds for disposition of proprietary rights, Articles 2, 12 of the Federal Law No 122-FZ, norms on the property-related tax deduction specified by the RF Tax Code, the said collegiate Panel of Judges came to the conclusion that the alterations that the applicant made in his non-residential premises by dividing them into several premises with subsequent registering them as separate accounting entities cannot be taken as grounds for stating that the applicant had possessed the property, which was alienated in 2007 under the purchase and sale contract for less than three years.

The position of the said collegiate organ of the Supreme Court of the Russian Federation is based on Para 1, Article 131 and Article 235 of the RF Civil Code, according to which proprietary rights and other proprietary interests concerning real estate, creation, restriction or termination of such rights, as well as transfer of title, are subject to state registration in the Uniform State Register.

The procedures that specify the state registration of rights to estate property and operations with it are stipulated by the Federal Law dated 21 July, 1997 No 122-FZ «About the state registration of rights to estate property and operations with it». According to provisions of Para 1, Article 2 of the Law No. 122-FZ, the state registration is a juridical act made to confirm that the state acknowledges and validates the origin, abridgment (encumbrance on property), transfer or disposition of rights to estate property according to the Civil Code of the Russian

Federation.

By implication of the cited norm, such validation must comply with requirements of the RF Civil Code, contain no misrepresentations of the legal status of the property in regard to the given object, be based exclusively on presented documents, validate the proprietary right and its object-matter.

The owner has the right of possession, exploitation and disposal of his property in regard to which he has the right to accomplish any operations that are not contrary to law and other legal acts and do not infringe rights and protected by law interests of other persons, including the right to dispose of his property in other ways, which are not connected with its alienation or transfer in hand of other persons (Subparagraphs 1, 2 of Article 209 of the RF Civil Code).

Referring to Article 235 of the RF Civil Code, the Court points out that the legislation in force does not include as ground for termination of rights in regard to estate property cases when this property is divided into separate independent units and then registered in cadastral and technical registers.

According to Para 9, Article 12 of the Federal Law No 122-FZ, in case of division, apportionment of participatory share in specie and other legit operations with property, registration entity records are made in new sections of the Uniform State Register of Proprietary Rights and new dossiers of title documents are formed with new cadastral numbers.

These new sections of the Uniform State Register of Proprietary Rights and new dossiers of title documents contain reference to the sections and new dossiers, related to the real property objects, as a result of operations with which there were made entries into new sections of the Uniform State Register of Proprietary Rights and formed new dossiers of title documents.

Moreover, the Federal Law No 122-FZ does not oblige the owner of the estate property to register his proprietary right again, including his title to separate units of his property. Therefore, if the applicant registers his estate property objects that appeared as a result of dividing an originally unified object, it does not entail termination of proprietary rights to the disputed property, it being parts of property, proprietary rights for which had been registered in the due course of law.

Referring to Para 26, 27, 36, 67 of the Maintenance Rules for the Uniform State Register of Right to Estate Property and Operations with it that were adopted in execution of Para 5, Article 12 of the Federal Law No 122-FZ and ratified by the Government Regulation of the government of the Russian Federation dated 18 February, 1998 No 219, the Supreme Court of the Russian Federation came to the conclusion that in case of dividing the property object into several new objects, the related section of the said Register closes, since the original object ceases to exist as a cadastral records unit, but it does not affect the title to the property, which the applicant had owned in the form of parts of the unified property object.

Analysis of provisions of Para 67 of the said Rules in systemic combination with the forecited norms proves that such circumstances as alteration of the real property object does not entail termination or transfer of the original proprietary rights.

Thus, the fact that the applicant registered the real property objects, which came into being after division of unified premises, does not entail passage of title to the disputed property objects, being parts of the non-residential premises, proprietary rights to which had been registered in the due course of law.

Hence, the Supreme Court of the Russian Federation declares that issuing a new certificate per se without analysis of subjects and objects has no legal effect and cannot be unconditionally considered as grounds for calculating the limitation period in regard to proprietary rights. Unless there took place transfer of title from one person to another, or there was created a new property object, which exceeds the original one, then issuing a new certificate by itself is not the ground for determining the date of origin of the proprietary rights.

Ambiguity of the mentioned laws makes itself evident in the fact in the case examined above these laws were applied in a different way comparing with other cases from judicial practices of the same body, namely the Panel of Judges on administrative cases of the Supreme Court of the Russian Federation. The Court Order dated 19 October, 2011 presents the position of the RF Supreme Court Judge V.N. Pirozhkov, which is totally contradictory to the position of the Panel of Judges on administrative cases of the Supreme Court of the Russian Federation. It states that the proprietary rights are converted from proprietary rights to a unified object into proprietary rights to its parts.

However, the position of the said collegiate organ is based on the data recorded in the ownership certificates regarding parts of what used to be one object, i.e. the initial purchase and sale contract. Since the object still belongs to the same person, it can be declared that there has been no transfer of title. The Court Order of the collegiate Panel of Judges states: it is the property object as a unit of cadastral records that ceases to exist, but not the title to assets, when the applicant had owned the same assets in the form of parts of unified property.

Substantial controversy in the two Court Orders of the Supreme Court of the Russian Federation under examination (i.e., the Court Order of the Panel of Judges on administrative cases of the Supreme Court of the Russian Federation dated 11 May, 2011, and the Court Order of the Judge of the Supreme Court of the Russian Federation V.N. Pirozhkov dated 19 October, 2011 about refusal to transfer a supervisory complaint for consideration by the Panel of Judges on administrative cases of the Supreme Court of the Russian Federation) serves as an evidence of ambiguity inherent to Para 4, Article 11.4 of the RF Land Code, which creates conditions for violation of constitutional rights of citizens.

However, the position of the collegiate Panel of Judges appears to be more important and conclusive.

There are evidences of ambiguity in application of the mentioned law in practices of the Superior Commercial Court of the Russian Federation as well.

The Constitutional Court of the Russian Federation has had an extensive practice concerning constitutionality of Subparagraph 1, Para 1 of Article 220 of the RF Tax Code. Notwithstanding that the norm under examination has not undergone direct analysis with a view to assess its constitutionality, actual

constitutional practice clearly proves ambiguity of the given prescription of law.

The Decree of the Constitutional Court of the Russian Federation dated 28 March, 2000 No 5-П «With regard to the case about checking constitutionality of Subparagraph «к» of Para 1, Article 5 of the Russian Federation Law on Value-Added Tax in the context of the plaint filed by the closed joint-stock company «Confetti» and I.V. Savchenko» presents a legal regulation on the matter of clearness as applied to tax legislation.

Formal certainty of tax rules means they are precise enough to enable enforcement bodies to understand and apply them correctly. If the tax norm is loose, it can result in it being applied in an arbitrary and discriminatory way, which does not agree with the main principle of the constitutional state (Article 1, Part 1 of the Constitution of the Russian Federation). When state agencies and civil servants act towards taxpayers in such a way, it leads to violation of the principle of legal equality (Article 19 of the Constitution of Russia) and the ensuing requirement of equality in imposing taxes, which is specified in Para 1 of Article 3 of the RF Tax Code. That is why the tax, being specified by a faulty in terms of juridical methodology requirements norm, cannot be considered legally established in the sense of Article of the Constitution of Russia (Decrees of the Constitutional Court of the Russian Federation dated 8 October, 1997 and 11 November, 1997. The former Decree was issued in regard to the case that concerned checking constitutionality of the Law of St. Petersburg «On Rates of the Land Tax in St. Petersburg in 1995», the latter – of Article 11.1 of the Law of the Russian Federation «On the State Boundary of the Russian Federation»).

At the same time court practices must ensure constitutional interpretation of regulations subject to application.

There are more judicial acts of the Constitutional Court of the Russian Federation on the same matter: Decree of the Constitutional Court of the Russian Federation dated 17 June, 2010 No 904-O-O «About refusal to take under advisement Alexei Andreevich Shilov's appeal against violation of his constitutional rights by provisions of Para 1 of Article 20 and Subparagraph 2, Para 1 of Article 220 of the Tax Code of the Russian Federation»; Decrees of the Constitutional Court of the Russian Federation dated 21 March, 1997, No 5-П of the Tax Code of the Russian Federation and dated 28 March, 2000, No 5-П; Court Order of the Constitutional Court of the Russian Federation dated 9 November, 2010 No 1433-O-O «About refusal to take under advisement Mariya Yurievna Tolubaeva's appeal against violation of her constitutional rights by provisions of Subparagraph 1, Para 1 of Article 220 of the Tax Code of the Russian Federation»; Court Order of the Constitutional Court of the Russian Federation dated 26 May, 2011 No 610-O-O «About refusal to take under advisement Mikhail Yurievich Kolodin's appeal against violation of his constitutional rights by provisions of Para 6 of Article 19 of the Federal Law «About introduction of alterations in Part 1 and Part 2 of the Tax Code of the Russian Federation and several legislative acts of the Russian Federation»; Court Order of the Constitutional Court of the Russian Federation dated 2 November, 2006 No 444-o with regard to the appeal of the Commissioner

for Human Rights in the Russian Federation against violation of constitutional rights of Irina Aleksandrovna Astakhova by provisions of Subparagraph 1, Para 1 of Article 220 of the Tax Code of the Russian Federation, and other acts.

The Constitutional Court of the Russian Federation formulated the law provision, according to which in implementing the general rules specified by Subparagraph 1, Para 1 of Article 220 of the Tax Code of the Russian Federation in the system of valid legal regulations, law enforcement bodies should take into account the constitutive circumstances specified by the RF Civil Code and the Family Code of the Russian Federation (hereinafter the RF Family Code), for example, with regard to determination of the ground and the time of originating proprietary rights to the taxpayer's corresponding property. The said rules concern application of property-related tax deduction in order to determine the taxation base (as related to determining the period, during which the property alienated by the taxpayer had been owned by him).

Thus, the constitutional court of the Russian Federation formulated a legal regulation, stipulating that the tax deduction must correlate with the circumstances that have a constitutive effect rather than with title documents; for example, it must depend on the reason and time of originating the proprietary right to the respective property of the taxpayer.

In its Judicial Decision dated 2 November, 2006 No 444-O, the Constitutional Court of the Russian Federation presented the legal position, according to which realization of the general legal norms specified by Subparagraph 1, Para 1 of Article 220 of the RF Tax Code in the system of legal regulations in force implies taking into account the constitutive circumstances enlisted in the RF Civil Code and the RF Family Code. The said legal norms concern general rules of applying the property-related tax deduction for determining the taxation base (with regard to the period of determination, during which the taxpayer had been having a title to the alienated property). Among other things, the rules should be applied, when determining the ground and the time of originating the proprietary right to the respective property. Non-application of the rules would cause appearing ungrounded differences in imposition of taxes regarding physical persons (for example, regarding spouses in case of terminating the mode of their joint ownership after death of one of the spouses), and thereby it would cause impingement of their rights and legitimate interests in tax legal relations. Such impingement would violate the principle of equality of all citizens before law (Article 19, Part 1, Constitution of the Russian Federation) and the ensuing rule of equal and equitable taxation.

In the Decree dated 25 April, 1995 No 3-П «About the case of checking constitutionality of Part 1 and 2 of Article 54 of the Housing Code of Laws of the Russian Soviet Federative Socialist Republic in the context of complaint of L.N. Sitalova» the legal position on the given violation of constitutional rights was formulated in the following manner: «A possibility of arbitrary application of the law is to be viewed as an infringement to the principle of equality of all citizens before law and court, which is declared by the Constitution of the Russian Federation (Article 19, Part 1)».

In the same Decree the Constitutional Court of Russia phrased its position regarding legitimacy of citizens' complaints by stating that «citizens have a right to appeal to the Constitutional Court of Russia only when they suppose that a certain ambiguity is present in deciding, if the law applicable to their rights conforms to the Constitution of Russia».

Thus, the Constitutional Court of Russia in its acts repeatedly expressed its position, according to which an ambiguity in applying a legal norm indicates the necessity to give a clearer definition of such a norm in order to prevent from emerging a possibility of infringement of civil rights and freedoms.

An ambiguity in the matter of conformity of the tax rule to the Constitution of the Russian Federation lies in the fact that it allows for casual, non-uniform interpretations by various legal entities. Unconstitutionality of the law under examination lies in the fact that it allows to apply norms at their sole discretion, by reference to nonlegal categories.

Ambiguity of laws lies in the fact that law enforcement bodies interpret, understand and apply them in different ways. So, courts of general jurisdiction, arbitration courts and bodies of executive power have contradictory court practices regarding appliance of the law under analysis.

Hence, it should be recognized that the norm specified by Subparagraph 1, Para 1 of Article 220 of the RF Tax Code does not conform to the Constitution of the Russian Federation, and its interpretations in law enforment practice infringe rights and freedoms of citizens. It is necessary to restore citizens to their rights.

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## JURISPRUDENCE: PRESENTATION OF A TEXTBOOK

### CODIFICATION

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#### Abstract.

Codification is a type of systematization. Unlike other types of systematization, in codifying the new regulation combines the provisions of the earlier acts with update elements. Codification is an area of lawmaking. Codified acts have a specific structure, divided into general and special parts. Codified acts are divided into provisions, statutes, the model law framework, basics (basic principles), codes. Each variety of codified acts is used to settle certain kinds of social relations. The article discusses the historical path of codified acts that substantially have been transformed in the transition from the Soviet to the Russian law system. Codes are federal laws by status. A substantial portion of codes proclaims their power and dependence of other acts of the industry law from them.

#### Keywords:

systematization, codification, code, statute, regulations, model act, legislation, law making, legislative process, transport Charter, the Charter of a constituent entity of the Russian Federation.

#### 1. Codification concept

Codified acts traditionally occupy a central place in the legislation system. Their features and value are in several planes. On the one hand, they should serve as the foundation, the bases of legislation. Based on their norms current laws and regulations arise. On the other hand, codification is a specific type of lawmaking, respectively, the code is the result of this systematizing activities.

Codified form is used for an integral regulation of the area of law, comprehensive legislative regulation of public relations in a separate area. Codification reflects a higher measure of concentration of normative material in a particular area of public relations. The rules expressed in the codified Act secure the legal aspects of the industry, Law Institute, that gives special legal force to codified acts.



Codified acts take a central position in the industry or Law Institute. The codified act performs this role due to the fact it contains all or most of the relevant rules (the Criminal Code of the RF). For large areas of law, the code serves as the foundation, the basics of other acts that occur only on the basis of its authorization or instructions, for example, the Civil Code of the Russian Federation. This requires high quality from codes.

Current and codified legislation differ by their goals. Under the current lawmaking, the legislator aims to resolve urgent issues of political, economic and cultural life. The codification goal consists in ordering previously published regulations on all issues of a certain industry of the legislation. An important condition for codification is also preparedness of legislation for codification, certain degree of its elaboration. This means that the acts to be codified, must represent a certain developed group with features of an area of law.

Codified acts are created using specific rules of legislative technique. Codified acts consist of a large number of articles and have a complex internal structure. They are divided into chapters, sections and other structural elements.

Codification procedure is more capacious and prolonged than the normal law-making process. Works on codification include revision of the given area of the current legislation in order to identify rules that require cancellation or change. Thus, two processes are carried out at the same time: adoption of a new act and conformation of other acts in accordance with a new one. Due to compliance with specified conditions, the result of codification is lasting for a long period, ensuring the stability of public relations. As a rule, the period of validity of codification is about 30 years.

Thus, codified documents stand out in the system of normative legal acts on substantive and procedural grounds.

## 2. Types of codified acts.

Types of codified acts are quite diverse: provisions, statutes, the model law, basics (basic principles), codes.

A) **Provision** is an act regulating the legal status of authorities, institutions, systems of similar organizations, agencies. These documents are featured by large volume, these are complicated structured acts.

Provisions take a significant place in the system of regulations. This form of normative legal acts is used for regulating the fundamental issues of public life. There are documents issued in the form of provisions that govern very narrowly special issues-allowances to the salary of a certain institution. The provision is adopted as a result of the codification, which is a type of systematization.

B) The law-making bodies use such form of codification as the **statute**. Difficulties in adopting these types of acts are caused by the fact that there is no unanimity as to the meaning and limits of the use of the term «charter». Many years of practice made the meaning excessively ambiguous. Of course, there are many multi-valued terms, however, a feature of the term «charter» is that that the various facets of its use are not comparable, they arise through different ways and have various areas of application. The term «Charter» is understood as a regulation, which determines: a) the legal status of state or municipal entity; b) legal status of an international organization; c) the legal status of specific legal persons, Charter-founding document); d) organization of a specific activity (military charters, transportation charters).

Charters are complex regulations governing the legal status of certain organs and organizations, or some form of public (municipal) or economic activity (TRR (Transportation Rules of Railways), IWWC (Inland Waterways Charter). Basic rules governing the legal status of a number of constituent entities of the Russian Federation, the structure, powers and organization of the activities of their Government are formulated in the form of the Charter as well.

Charters are a traditional form of domestic legislation. Some acts of union statutory lawmaking remain valid. For example, the Charter of Road Transport was adopted in 1969. It was amended and changed periodically, most recent was in April 1995. In the modern lawmaking practice there has been a tendency to improve status of such charters through their re-enactment as federal laws. Transportation Rules of Railways of RF, adopted in the form of a law in 1998, launched the beginning to this new law. In 2003, a federal law «Statutes of railway transport of the Russian Federation» replaced Transport Charter. Inland Waterway Charter acted from 1955 to 2001, when it was replaced by the Inland Water Transport Code of the Russian Federation.

Statutes as name of acts regulating certain activities are gradually superseded. For example, the Charter of Inland Waterway Transport of Union of the USSR 1955, actually lost effect in connection with enactment of the Inland Water Transport Code of the Russian Federation dated 03.07.2001, No 24-FZ.

Subjects of the Russian Federation-regions, oblasts, cities of Federal significance, autonomous districts and autonomous oblasts, have charters as by-laws, for example, the Charter of the city of Moscow. Republics, subjects of the Federation, adopt Constitutions. By-laws of the subjects of the Russian Federation with the name «Charter» are received extremely negatively, as they are formal proof of inequality of subjects – non-republics with republics. Indeed, the term «Constitution» is much more significant in comparison to the «Charter».

Thus, the modern legislator continues to enact statutes, but is moving towards the use of charters as a variety of laws. The transition definitely occurred on the example of the founding documents of the RF subjects. Statutes as acts on types of activities are in transition, but the trend is quite obvious.

C) **Model act** – is a sample document containing recommendations for the activities of public authorities, options for possible law-making decisions. Model acts are used for unification, to achieve maximum unity of legal systems of government entities that make up the federation. Model acts are used in confederations, international alliances and organizations in order to provide guidance to members and assist them in developing their own document.

Sample documents are not normative, they do not have imperious nature. They are of advisory, guiding character. Their systematizing role is obvious. The principal feature of model acts is that that they are not result of systematization but these documents perform systematizing role, as uniform regulations may be developed on the basis of model documents.

The scope of regulation of the model laws is varied. The documents are developed by different agencies and individuals, such as: scientists, scientific groups, government bodies, expert and analytical organizations, domestic and international institutions.

An example of the model act is «Model law on limited liability companies», adopted by the Inter-Parliamentary Assembly (IPA) CIS on November 2, 1996. In

constitutional law, the use of model laws is mastered in the area of legislation on constitutional (statutory) courts of subjects of the Russian Federation.

It seems that prospects of use of model acts are obvious for legislation of subjects of the Russian Federation. Depending on the centralistic tendencies, it may be possible the expansion of the scope of their use from subjects of joint jurisdiction up to the subjects of the constituent entities of the Federation. For the regional legislator a model act recommended by the federal authorities, could serve as a qualitative basis for its lawmaking. Implementation of this technique of lawmaking activity organization can only take place under conditions of reasonable combination of power at different levels.

**D) The bases of legislation, the basics, the fundamentals form** a special type of codified federal laws. These documents are classified as codified by their content, scope and sphere of regulation, focus for consolidating the existing rules and the simultaneous introduction of new regulations.

This legal structure was used by the Soviet state. Basic principles or foundations determined the general principles of regulation of certain relationships and the most important conditions for their application. In these codified forms, general, binding for the territory of the whole country, the legal provisions, on the basis of which and pursuant to which federal republics should issue their own codes, specifying the all-union laws, were consolidated.

In the history of the domestic law, basics laid the foundation for most areas of law, including civil. Today, this form is used for the implementation of the federal regulation of joint management issues.

Despite the fact that the current Russian Constitution has not included into a number of titles of acts a term «bases», such acts have not ceased its existence. Thus, Bases of Legislation on health care of the RF, on an Archival Fund of the Russian Federation, on notaries are in force. In the Russian Federation, the federal laws on the matters of joint competence perform the role of the bases of legislation. For example, federal law «On the State Service of the Russian Federation», «On General Principles of Organization of Local Self-Government in the Russian Federation». They are federal laws by its place in the hierarchy of legal acts, and they are bases by functional role.

Bases of the legislation is a federal act containing basic, most general rules on the subject of the joint jurisdiction of the Russian Federation and its subjects, which must evolve and be concretized in the regulations adopted by the subjects of the Russian Federation. They contain objectives, regulatory principles common to all subjects of the Federation, fundamental concepts.

The researchers noted that in the current legislation and law-making practice «status of bases, the possibility of their development in the federal or regional regulatory acts ... is not clearly developed». The modern theory of lawmaking suggests to treat them as the basic laws introducing «general principles and regimes of legal regulation that are then developed in particular laws». For the development of bases, codes are designed to perform direct regulatory control in certain areas of law. This model is interrupted, as in practice the issuance of federal code often abolishes validity of bases of the legislation on a similar issue, which is unacceptable. Indeed, such cancellations took place. For example, Foundations of the Forestry Legislation of the Russian Federation adopted in 1993, have been cancelled by the Forest Code of the Russian Federation 1997,

and it is not the only case. The reason for this law-making decision is related to the fact that the Constitution of the Russian Federation has radically changed the distribution of powers between the state in general and the subjects. It is in connection with the new order of the legal regulation of corresponding relationship that it had to sacrifice some of the bases.

In general, the legislator uses a model of bases of the legislation, but does not name them so. The federal legislator publishes federal laws on the matters of joint competence, which, according to their purpose and carried out functions are the bases of the legislation.

Despite the quite authoritative and lively discussions concerning the use of the Soviet lawmaking experience in implementing the «fundamentals» – «codes» system, the legislator shows no interest to them. Thereof, the destiny of modern bases is in the form of «federal laws without additional names».

### **3. Code.**

An essential form of codified acts is the code. In Latin the code means book. The code is a systematic set of rules and norms that uniformly and in details regulates the specific sphere of social relations. Code either completely absorbs all norms of the sector concerned (Criminal Code of the Russian Federation), or it contains the main volume, the most important part of such rules (Civil Code, Labor Code). The code contains principles, definitions, rules of direct regulation as well. It is of great importance in the area of the law, since it brings together all standards of its major institutions. In fact, it stands out as the industry formation document.

Codes can be subjected to classification for different reasons. For example, the codes are divided into sector and complex (sub-sector) ones. Depending on the subject of the legal regulation, there are Material Codes (Civil Code of RF, Labor Code of RF) and Procedure Codes (CCP RF – Code of Criminal Procedure of the RF, GP RF – General Prosecutor). Most of codes describe the necessary, desirable, acceptable behavior. With such positive approach, offences constitute a violation of the legal norms of positive content (LC RF – Labor Code, CC RF – Civil Code). Some codes are exclusively of repressive nature. They describe an invalid, unlawful demeanor and establish measures of legal responsibility (CC RF-Criminal Code of the RF, CAO RF – Code of Administrative Offences).

Of particular importance to the characteristics of the codes is stability, the well-formedness of social relations that are the subject of legal regulation of the Act. This feature has become acute due to the significant expansion of use of the code form by the legislator. The codes have emerged over the last decade with new subjects of regulations: Customs Code of the RF, Town Planning Code of the Russian Federation, Budget Code of the Russian Federation, Tax Code of the Russian Federation, part one and part two. These codes are changed often.

Codes of the USSR were characterized by stability. For example, the Code on Marriage and Family of the RSFSR changed 8 times from 1969 to 1995 years, with most of new laws introduced during the latest reforms after 1993.

Codes differ from other codified acts by a special position not only in the overall hierarchy of regulations, but also among the acts, equal by formal features. In modern constitutional model of Russia, codes are a type of federal laws. However, codes establish standards elevating them above laws that are not codes. This is achieved by including expressions in the first articles of the

code. Other regulations of the industry must comply with the code in force. This tendency was named a self-proclamation. Thus, article 5 of the Labor Code of the Russian Federation has established a provision that labor rights contained in other laws must conform to the present Code. Similar provisions are contained in the article 1.1 of the Code of Administrative Offences of the Russian Federation, in the article 3 of the Arbitration Procedural Code of the Russian Federation. However, there are exceptions; for example, the RSFSR Housing Code does not contain such a limitation.

The Constitutional Court of the Russian Federation has found that the Constitution of the Russian Federation does not define and cannot define a hierarchy of acts within one type, in this case – federal laws. No federal law by virtue of article 76 of the Constitution of the Russian Federation possesses substantially greater legal force in relation to another federal law. The decision was made in 2000, and the rules establishing priority significance of codes in the legislation system had not been cancelled.

It should be noted that the essence of the term «code» has undergone some changes after the transformation of the Soviet legal system into Russian one. Most of the industries in the Soviet law were regulated as follows: at the level of the USSR-bases of the legislation, at the level of the Republics-codes. The Soviet legal system did not know derogation from this rule. The stability of this tradition was confirmed by the fact that the intention to establish all-union Civil Code for 21 years did not give any result, this idea was abandoned. Traditions, including legal, barely are overcome even with existence of constitutional rules. The current Constitution of Russia did not leave place to the bases of the legislation and contains the Code of Terms (bases of the legislation). However, the practice has kept the codes, but abandoned the federal fundamentals.

Despite the need for a decision on codified acts, the federal legislator is in no hurry to solve it, and the law-making bodies of the RF subjects enjoy arisen uncertainty.

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