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Dear readers,

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

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

The issue starts with the article by Professor of Kazan Federal University, Doctor of Legal Sciences *Alfiya Kayumova* “Overcoming conflicts of criminal jurisdiction of EU member states and the practice of applying the principle of mutual recognition of judicial decisions.” It is an extremely relevant topic in relation to today’s realities. It is important to note that Professor Kayumova analyses steps and documents of the process of implementing the internal security (the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, agreements and protocols) and also the latest tools for mutual recognition.

The issue is continued by the article of our colleague from Poland, Dr. hab. *Robert Jastrzębski*, Warsaw University, titled “Genesis of the *rebus sic stantibus* clause in the Polish civil law”. The author argues that the genesis of the clause was traced back to the sources and principles of the Roman law. Generally, the *rebus sic stantibus* clause was initially defined as follows: any legal relationship (or “everything” in general, as it was once said) may expire or change if such expiry or change is required under modified relationships. The article concludes that the decisions of the Polish Supreme Court had a material impact on the formation of the *rebus sic stantibus* clause. The most important of them was the judgement in the *Fliederbaum–Kuhnke* case, which was elaborated at length in the European legal writings of that time, particularly in countries that dealt with similar problems after the end of World War I.

I am very pleased to introduce the research of *Alexey Demichev*, Doctor of Legal Sciences of the Academy of the Ministry of Internal Affairs of the Russian Federation in Nizhny Novgorod, written in collaboration with *Vera Iliukhina*, Candidate of Legal Sciences of the Academy of the Federal Penitentiary Service of Russia: “Positivist classification of the principles of administrative proceedings in Russia and Armenia – a comparative legal analysis”. The authors analyze the Russian and Armenian codes of administrative proceedings and make a comparative review of them, highlight some of their problems and the difficulties of realizing these norms in practice, and suggest ways

to improve the codes. Constitutional principles of administrative proceedings, some of which are duplicated in codes while some are not, are also reviewed.

The “Commentaries” section contains interesting articles by two young researches from Moscow and Saratov on currently essential issues of inheritance law and interpretation of the term “wills” in Russia, which in the author’s opinion does not match real testamentary freedom (*Evgenii Petrov*) and the law of obligation in the implementation of civil law transactions involving the state with virtually unfavorable (indicating inefficiency, and even causing direct damage to the state) consequences, when the participants of such transactions are satisfied with the actual and legal *status quo* (*Vladimir Babakov*).

The practical section of the current issue “Conference Reviews” concludes with the material of our colleagues from Kazan on the event, which was held at Kazan University in the fall of 2018.

With best regards,
Editor-in-Chief
Damir Valeev

TABLE OF CONTENTS

Damir Valeev (Kazan, Russia)

Welcoming remark of the Editor-in-Chief3

ARTICLES:

Alfiya Kayumova (Kazan, Russia)

Overcoming conflicts of criminal jurisdiction of EU member states
and the practice of applying the principle of mutual recognition
of judicial decisions6

Robert Jastrzębski (Warsaw, Poland)

Genesis of the *rebus sic stantibus* clause
in the Polish civil law 24

Alexey Demichev (Nizhny Novgorod, Russia)

Vera Iliukhina (Ryazan, Russia)

Positivist classification of the principles of administrative proceedings
in Russia and Armenia – a comparative legal analysis..... 37

COMMENTARIES:

Evgenii Petrov (Moscow, Russia)

Interpretation of Wills in Russia. Call for Reform..... 51

Vladimir Babakov (Saratov, Russia)

Legal obligation, its place and role in the theory
of civil-law protection of state 58

CONFERENCE REVIEWS:

Zavdat Safin (Kazan, Russia)

Elena Luneva (Kazan, Russia)

Review of the International Scientific and Practical Conference
in memory of A.A. Ryabov “Important Issues of Protection
of Property Rights over Natural Resources: Interdisciplinary Approach”
(26-27 October, 2018, Kazan)..... 70

ARTICLES

ALFIYA KAYUMOVA

Professor of the Department
of International and European Law
of the Law Faculty, Kazan (Volga region)
Federal University,
Doctor of Legal Sciences

OVERCOMING CONFLICTS OF CRIMINAL JURISDICTION OF EU MEMBER STATES AND THE PRACTICE OF APPLYING THE PRINCIPLE OF MUTUAL RECOGNITION OF JUDICIAL DECISIONS

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Abstract: The article is devoted to the principle of mutual recognition of judicial decisions and overcoming conflicts of criminal jurisdiction of the EU member states. The union was created in 1977 and the states got together to overcome economic and other important issues of development. Moreover, the growth of terrorism clearly showed that the internal security of the EU member states should be ensured not only through measures taken at the national level. Certainly the existing diversity of legal systems of the EU countries, together with the European guarantees of freedom of movement, have inevitably led to a clash and conflict of criminal jurisdiction of the EU member states. The author analyses the steps and documents of the process of implementing the internal security (the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, agreements and protocols) and also the latest tools for mutual recognition.

Keywords: criminal jurisdiction, European Union, member states of the EU, principle, principle of mutual recognition, judicial decision.

Article 82 of the Treaty on the Functioning of the European Union, as amended in Lisbon, states that “judicial cooperation in criminal matters in the Union shall be based

on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States.”¹ At the same time, at the pan-European, supranational level measures are being taken to achieve: a) the establishment of rules and procedures to ensure the recognition throughout the Union of any form of sentences and court decisions; and b) the prevention and resolution of conflicts of jurisdiction between member states. Accordingly, it follows that at the present stage of development of the all-European criminal policy, these two areas are a priority.

Overcoming conflicts of criminal jurisdiction of EU states.

Creating by EU states a space of freedom, security and justice, with the inclusion of Schengen achievements based on the 1997 Treaty of Amsterdam, implied the abolition of border controls at internal borders and the pursuit of a common policy on asylum, immigration and the fight against transnational crime. At the same time, as noted by Z.A. Askerov and N.A. Safarov, “the growth of serious crime, and especially terrorism, clearly showed that the internal security of the EU member states cannot be ensured only through measures taken at the national level.”² Indeed, it is easy to imagine a situation where, against the background of growing migration flows, several states at once, on the basis of their domestic legislation, claim criminal jurisdiction in connection with the crime, and show a reasonable interest in the suspect.

Under these conditions, it is obvious that the existing diversity of legal systems of the EU countries, together with the European guarantees of freedom of movement, inevitably led to a clash and conflict of criminal jurisdiction of the EU member states.

Meanwhile, parallel prosecution in countries that have the common ambitious goal of building a common space of freedom, security and justice is extremely undesirable for several reasons. First, it contradicts the very idea of good neighborly relations of the EU states, enshrined in the basic treaties of the European Union. Secondly, this situation is clearly not in the interests of the victims, since it creates an atmosphere of uncertainty in the outcome of the case. Finally, this situation undermines one of the fundamental tenets of criminal justice – *ne bis in idem*, according to which no one can be tried twice for the same crime.

It should be noted here that a clear regulation of the content and application of the principle of *ne bis in idem* in the law of the European Union at that time could help in solving the problem of competition of the criminal jurisdiction of states. Of course, we cannot say that this principle was not known to the European law – as a justification of legal certainty and legality of court decisions, it is enshrined in international legal standards for the protection of human rights, some Council of Europe conventions (as a case for

¹ Treaty on the Functioning of the European Union. EU right, <http://eulaw.ru/treaties/tfeu>

² Askerov Z.A., Safarov N.A. The principle of mutual recognition of judicial decisions as the fundamental basis of the system of criminal law cooperation of the member states of the European Union, News of universities. Jurisprudence. 2011, no 4, www.center-bereg.ru/o1914.html

refusing to issue or provide legal assistance), is contained in the legislation of most states. Chapter 3 (arts. 55-58) of the Convention on the Application of the Schengen Agreement of 1990 (CISA)¹ is devoted to it, and it is believed that, unlike the traditional approach to the *ne bis in idem* as a principle of national law, it was the Schengen agreements that for the first time allowed to consider it in the context of transnational *ne bis in idem*, as an individual right *erga omnes*².

At the same time, after the integration of CISA into the primary law of the European Union, the question of the scope of the principle as applied to the space of freedom, security and justice remained unresolved.

In addition, the existence of a principal does not in itself prevent or resolve a conflict of jurisdiction. In terms of the legitimacy of the various jurisdictions of jurisdiction (territoriality, personal active or passive citizenship), the principle of *ne bis in idem* does not determine the priority of one or the other, therefore the privileged position will be on the side of the state that first decides to initiate criminal proceedings.

Some works dealing with conflicts of criminal jurisdiction of EU states indicate that it could be resolved with the help of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, namely Article 30, paragraph 1, which states: “Any Contracting State which, before the institution or in the course of proceedings for an offence which it considers to be neither of a political nature nor a purely military one, is aware of proceedings pending in another Contracting State against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State.” However, it is more than forty years since the adoption of the Convention, it was signed by 17 member states of the organization, and it entered into force in only 11 countries.³

Given these circumstances, as well as the fact that international law is incomplete in terms of settling competition of jurisdictions, by the beginning of the third millennium, there was an urgent need for EU countries to supplement the existing mechanisms of international cooperation in this area with supranational tools at the European Union level.

In 2004, the Hague Programme for strengthening freedom, security and justice (p.3.3)⁴ stated that in order to increase the efficiency of criminal prosecutions, while guaranteeing the proper administration of justice, states should consider the law on

¹ Convention on the Application of the Schengen Agreement of June 14, 1985 between the Governments of the States of the Economic Union of Benelux, the Federal Republic of Germany and the French Republic on the gradual abolition of inspections at common borders (Schengen, June 19, 1990), <http://base.garant.ru/2563295/11/>

² Vervaele J.A.E. The transnational *ne bis in idem* principle in the EU: Mutual recognition and equivalent protection of human rights, *Utrecht Law Review*. 2005, vol. 1(2), p. 107.

³ Panayides P. Conflicts of jurisdiction in criminal proceedings : analysis and possible improvements to the EU legal framework, *Revue internationale de droit penal*. 2006/1, vol. 77, p. 113–119.

⁴ The Hague Programme: ten priorities for the next five years, <http://europa.eu/scadplus/leg/en/S22006.htm>

conflicts of jurisdiction, to complete a comprehensive program of measures to implement the principle of mutual recognition of judicial decisions in criminal matters.

A year later, in 2005, the European Commission presented the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings.¹

In its Green Paper, the Commission explains the need to use the principle of subsidiarity in resolving conflicts of criminal jurisdiction at Union level.

First, the general measures of the EU can significantly ease the position of the accused, reducing the burden of material costs for a lawyer, limiting the use of coercive measures to his person and property, reducing the level of moral and psychological discomfort. Secondly, the Union's general approach will help strengthen and complement the cornerstone principle of mutual recognition of court decisions. Thirdly, the measures taken at the European level regarding the resolution of conflicts of jurisdiction will increase the effectiveness of criminal prosecution and litigation. Such measures should include: the organization of appropriate information exchange so that the competent national authorities are aware of the relevant procedures and decisions on the jurisdiction of each other; and the provision of the opportunity to refrain from initiating criminal prosecution or to terminate it on the grounds that criminal proceedings have already been initiated in another member State.

The procedure itself for settling the conflict of jurisdiction, as proposed by the Commission, should include three steps:

Step 1: A state that is going to or has already initiated a criminal case in connection with the offence should identify and inform the competent authorities in other affected Member States about the possibility of initiating criminal prosecution. The informed authorities of these countries will have a fixed period of time during which they can express their interest in criminal prosecution. If no interest has been expressed, the first state could continue the investigation.

Step 2: When two or more Member States have declared their legitimate interest in criminal prosecution, the second stage will include the duty to enter into discussions on preferential jurisdiction.

Step 3: Settlement of disputes or mediation. This phase aims to assist Member States in resolving real conflicts of jurisdiction through a dialogue with the participation of the mediator at EU level. This dispute resolution mechanism should be quick and flexible, and can be initiated on the request of any interested State or after a certain period of time. An obvious candidate for the role of mediator at this stage is Eurojust.

In case of failure to resolve the competition of jurisdiction in the first three stages, the Commission did not exclude the possibility of reviewing the dispute at a level other than Eurojust, a subsidiary body with additional competence and the possibility of making a binding decision for the parties. This is a possible or additional step envisaged in the document.

¹ Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings {SEC(2005) 1767}, COM(2005) 696 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0696>

The Commission's Green Book formed the basis for the 2009 Framework Decision 2009/948 / JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.¹ The document states that the objective of this Framework decision is "to promote a closer cooperation between the competent authorities of two or more member States conducting criminal proceedings." (Clause 1, Article 1).

Such cooperation aims to:

- prevent of the situation when the same person is subject to parallel criminal proceedings in different participating States, which constitutes an infringement of the principle of *ne bis in idem*;

- avoid the adverse consequences arising from such a parallel criminal process.

To achieve this task, the Framework Decision regulates in detail:

- a) the procedure for establishing contact between the competent authorities of the Member States, in order to confirm the existence of parallel criminal cases in relation to the facts related to the same person; b) organization of information exchange and direct consultations between the competent authorities of two or more Member States exercising parallel jurisdiction over the facts related to the same person in order to reach consensus on any effective solution aimed at avoiding negative consequences.

Each State determines in its structure the competent authority responsible for organizing communication and direct consultations with another participant, in the event that there are reasonable grounds to believe that parallel criminal prosecution is underway (Article 5). The minimum information provided in the order of exchange must contain (Article 8):

- the contact details of the competent authority;
- a description of the facts and circumstances that are the subject of the criminal proceedings concerned;
- all relevant details about the identity of the suspected or the accused person and the victims, if applicable;
- the stage that has been reached in the criminal proceedings;
- information about provisional detention or custody of the suspected or accused person.

In the event when the States fail to reach consensus on the acceptability of the jurisdiction of one of the parties in the consultation process, they can use Eurojust as a mediator for the negotiations (Article 12).

The document also notes that the Framework Decision is without prejudice the proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, as well as any other similar agreements concluded between the Member States.

The doctrinal assessment of the Framework Decision looks ambiguous: some experts note that the EU has become "the most advanced international organization in the area

¹ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, Official Journal of the European Union L 328/42, 15.12.2009, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0696>

of settling the competition of jurisdictions”¹, and other authors argue that it does not contain solutions that can be universal and applicable in all EU countries².

The fact is that based on the provisions of the Framework Decision, the competent authorities of the State, informed about the proceedings in another State, must refrain from initiating or stop criminal prosecution, which is not always possible under domestic law. In some cases, the principle of legality, obliging the competent authorities to initiate criminal proceedings in relation to the crime committed, is contained in the constitutions of the States. Probably this is why, out of 28 Member States of the European Union, so far only 15 countries have implemented this act into their domestic legislation.

In 2014, the European Commission published a report on the implementation of provisions of the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings³.

The Commission expressed concern that a significant number of EU countries still do not apply the framework decision, thus depriving themselves of an important tool for resolving conflicts of jurisdiction, and called on all countries that have not yet done so to take immediate steps to implement it in full volume⁴.

The principle of the mutual recognition of court decisions, which is a “process by which a decision taken by a judicial body of one State of the European Union is recognized and, if necessary, executed by another EU State, as if the decision was taken by the judicial authority of the latter State”⁵. The mutual recognition of court decisions is called «the cornerstone of judicial cooperation in civil and criminal matters within the Union.”⁶

Indeed, this principle essentially changes the philosophy of judicial cooperation. Traditionally, the interaction of States in the criminal law field (in the form of legal assistance or extradition and transfer of prisoners) has been carried out on the basis of international treaties or within the framework of international organizations, for example, the Council of Europe. If assistance is needed, one of the parties to the contract addresses the other using special procedures and requests. Accordingly, the other party

¹ Prosecutorial Guidelines for Cases of Concurrent Jurisdiction, Making the Decision «Which Jurisdiction Should Prosecute?», International Association of Prosecutors, www.iap-association.org

² Zinn A. Overcoming conflicts of criminal jurisdiction in the European Union: the present and the future, Eurasian advocacy, 2013, no 6 (7), <http://cyberleninka.ru/article/n/preodolenie-konfliktov-ugolovnoy-yurisdiksi-i-v-evropeyskom-soyuz-nastoyasche-i-budushee>

³ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, COM/2014/0313 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0313>

⁴ Jurisdiction in criminal proceedings: prevention and settlement of conflicts. Summaries of EU legislation, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ajl0021>

⁵ Recognition of decisions between EU countries, http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm

⁶ Elsen C. From Maastricht to the Hague: the Politics of Judicial and Police Cooperation, Era Forum, 2007, no 8, p. 13–26.

decides to what extent the received request complies with the provisions of the contract, whether there are reasons for refusing to execute the proceedings, etc. This mechanism is often complex, slow and takes a lot of time.

This form of cooperation for the States of the European Union has ceased to correspond to the level of integration changes and exhausted itself in the situation of open borders. Z. Ascerov and N. Safarov emphasise that “despite the benefits of broad European cooperation in the fight against crime, protracted and heavy legal procedures applied at the level of the Council of Europe could not be considered as the most acceptable framework of interaction between the EU Member States.”¹

The idea of “mutual recognition” based on the prospects for creating a single legal space of the European Union, including in the field of criminal justice, radically changed the classic contract form and organization form of cooperation in the field of mutual legal assistance between States. This is confirmed by the statement at 2004 Brussels EU Summit. According to the statement, even if EU Member States represent different legal or judicial systems and traditions, they are able to form a “genuine European justice space”².

The European Union entered the third millennium under the slogan «to a free circulation of people shall correspond a free circulation of judicial decisions.»³

Initially, the principle of mutual recognition was known and applied to ensure the free movement of goods and product standards in the common market⁴. Gradually, it moved to the field of criminal proceedings. At the European Council meeting in Cardiff, 1998, the need to improve the effectiveness of legal cooperation in the context of combating transnational crime was emphasised and a request was made to the Council of the EU to determine the scope for expanding the mechanism of mutual recognition of court decisions of the Member States⁵.

In October 1999, in Tampere, it was proclaimed that “enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil

¹ Askerov Z.A., Safarov N.A. The principle of mutual recognition of judicial decisions as the fundamental basis of the system of criminal law cooperation of the Members States of the European Union, News of universities. Jurisprudence, 2011, no 4, www.center-bereg.ru/o1914.html

² Brussels European Council 4/5 November 2004, Presidency Conclusions, Council of European Union, 14292/1/04 REV 1, Brussels, 8 December 2004, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf

³ Recognition of decisions between EU countries, http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm

⁴ Vermeulen G. Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union, EU and International Crime Control: Topical Issues, ed. by M. Cools, B. de Ruyver and Others. Antwerpen: Maklu, 2010, p. 47.

⁵ Asp P. Mutual Recognition and the Development of Criminal Law Cooperation Within the EU, *Harmonization of Criminal Law in Europe*, ed. by E.J. Husabo, A. Strandbakken, p. 23.

and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities¹.”

In order to implement the task of introducing the mechanism of mutual recognition of court decisions, on February 12, 2001, a programme of measures was adopted aimed at implementing the principle of mutual recognition of court decisions in criminal matters². Later, the principle was reaffirmed in the Hague Programme on Strengthening the Area of Freedom, Security and Justice³, and was enshrined in the Lisbon Treaty.

Thus, in the primary law of the EU, the principle of mutual recognition of court decisions is governed by Articles 82-83 of the Treaty on the Functioning of the European Union. According to Article 83, the Council and the European Parliament establish minimum rules through directives (until 2009 – framework solutions) to facilitate mutual recognition of court decisions. Taking into account the differences between legal systems and traditions of Member States these rules concern the following issues:

- the mutual admissibility of evidence between Member States;
- the rights of persons in criminal proceedings;
- the rights of victims of crime;
- other special aspects of the criminal process that the Council will preliminarily determine by decision.

The principle of mutual recognition is not absolute which allows the Member State to suspend the legislative procedure in the Council when, in its opinion, the draft directive can harm the fundamental aspects of its criminal justice system (Art.83 p.3).

It is thought that the principle of mutual recognition was originally developed as an alternative to the harmonization of criminal legislation. Relying on mutual recognition, the Member States could avoid a difficult process of harmonizing their national criminal laws⁴. At the same time, it is obvious that without the harmonization of the legal order, the introduction of this instrument de facto would be difficult. In the context of mutual recognition, harmonization seems necessary at three levels:

- reconciliation of offenses to abolish of the requirement of double criminalization;
- determining the scope of the mutual recognition tool;
- harmonization of procedural rules governing the recognition and execution of a court decision⁵.

¹ Tampere European Council 15 and 16 October 1999. Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm#b

² Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. 2001/C 12//02, Official Journal 12/10, 15.1.2001.

³ The Hague Programme: ten priorities for the next five years, <http://europa.eu/scadplus/leg/en/ S22006.htm>

⁴ Ligeti K. Mutual recognition of financial penalties in the European Union, *Revue internationale de droit penal*, 2006/1, vol. 77, <https://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-145.htm>

⁵ Mitsilegas V. *EU Criminal Law*. Oxford and Portland, Oregon, 2009, p. 101.

According to Kimmo Nuotio, harmonization is a flexible concept that has different meanings. Probably the most typical meaning of harmonization is reducing differences between legal systems, through general policies and the introduction of common standards. Kimmo Nuotio also believes that Member States express attitude towards each other within the framework of the pan-European order through the recognition mechanism. In practice, this recognition means the internationalization of each other's rights as binding and directly applicable¹.

The Tampere concept of mutual recognition is a new legal phenomenon, in the sense that the recognition and enforcement of judgments pronounced by a competent authority of the EU Member State do not require the assessment of legitimacy by the authorities of another State. This assumes a priori that the criminal process in a foreign state is consistent with the principle of the rule of law, as it is understood and applied in the executing State².

Meanwhile, the automatic recognition of a foreign court's decision as equivalent to a decision of its own judicial structures requires from the participants of the Union a high degree of trust, the existence of which is highly questioned in the works of European skeptics³. According to Valsamis Mitsilegas, the measures introduced are inextricably linked to the exercise of state power, coupled with a lack of trust between the criminal justice systems of the Member States and the absence of any serious attempts to establish common understanding at the EU level⁴, caused concern among European countries.

In the Communication on the mutual recognition of court decisions in criminal cases and the strengthening of mutual trust between Member States⁵, submitted by the Commission in 2005 regarding the implementation of the Programme for the implementation of the principle, a special attention was paid to confidence-building measures.

The Commission stressed that building mutual trust is key to the successful implementation of the Programme. This applies both to legislative measures to ensure a high degree of protection of human rights, as well as related practical steps aimed at familiarizing practicing lawyers with the common European judicial culture.

¹ Nuotio K. On the Significance of Criminal Law Justice for Europe, *Europe in Search of 'Meaning and Purpose'*, Publications of Faculty of Law. Helsinki, 2004, pp. 173, 210.

² Vermeulen G. Approximation and Mutual recognition of Procedural safeguards of Suspects and Defendants in Criminal proceedings throughout the European Union, *EU and International Crime Control: Topical Issues*, ed. by M. Cools, B. de Ruyver and others. Antwerpen: Maklu, 2010, p. 47.

³ Peers S. Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong, *Common Market Law Review*. 2004, vol. 41, no 1, p. 5–36.

⁴ Mitsilegas V. Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance, Security versus Freedom: a Challenge for Europe's Future. Ashgate Publishing, 2006, p. 280.

⁵ Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States{SEC(2005)641}, COM(2005) 195 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0195>

Regarding building confidence through legislative measures, the Commission paid special attention to further convergence of substantive criminal law (questions of composition and sanctions), as well as harmonization of the criminal procedure law of States in terms of compliance with high standards of ensuring personal rights: presumption of innocence, prosecution in absentia, and general standards for evidence.

As regards the strengthening of mutual trust by practical flank measures, the Commission would like to strengthen monitoring mechanisms in order to correctly assess the practical needs of the justice system and identify potential barriers to the introduction of new tools. A special role is assigned to the European judicial network, which facilitates contacts at all levels of the judicial system of the Member States.

The idea of mutual recognition based on trust implies confidence in national justice systems¹ based on the rule of law and guarantees of human rights. On the one hand, this suggests that the legal protection of persons in the EU Member States is more or less equivalent, and on the other, there are exceptions. Therefore, some researchers argue that mutual recognition should not be unconditional. Some of them, for example, propose to combine its limits with the system of protection of human rights within the Council of Europe, in particular, the mechanism of the European Court of Human Rights. In the event of any violation of the basic rights granted to individuals, all States of the Union will be liable to the ECHR.

Therefore, in the context of enhancing the cooperation of Member States in criminal matters, it is recommended to strengthen the protection of fundamental rights in the ECHR. Otherwise, they predict a potential danger that the principle of mutual recognition may lead to a narrowing of international standards for the protection of human rights².

Other researchers write that differences in national legal systems of EU Member States should not affect the mechanism for the mutual recognition of judicial decisions. The meaning of the principle is limited to the recognition of official documents issued by the State. For example, several years ago, John Vervel noted that “mutual trust is associated with international or transnational comity. The executive authorities do not ask questions about the legal quality of the request or requirement of the issuing Member State. Legality and legitimacy are presupposed to exist ipso iure and are thereby removed from judicial control in another State.”³ A. Klip states: “Mutual recognition implies the existing differences, it allows them to coexist, but perceives them regardless of cooperation, which means

¹ Many researchers note that the highest degree of trust, in particular during the execution of the European arrest warrant, is observed in the Nordic countries. See Strandbakken A. The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant, *Eucrim* 3–4/2007, p. 139–140; Toltila K. The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?, *NJEL* (2011) 4, p.368.

² Smeulers A. The position of the individual in international criminal cooperation, *European Evidence Warrant: Transnational Judicial Inquires in the EU*. J.A.E. Vervaele (eds.). Intersentia, Antwerp, 2005, p. 92–102.

³ John A.E. Vervaele, European Criminal Law and General Principles of Union Law, *Research Papers in Law* 5/2005, College of Europe, European Legal Studies, p. 5–6, www.coleurop.be/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2005_Vervaele.pdf

unilaterally introducing a European legal standard for issuing a warrant, order or license. The executing State may use another definition of crime or imputation requirement. The body that has the right to make a decision or collect evidence may have a different status in this State. However, these differences should not stand in the way of recognition.”¹

One way or another, many researchers believe that unconditional execution of requests in the context of mutual recognition may jeopardize basic human rights. It is noted that “the application of the principle can be very problematic at the supranational level for all EU Member States, which form a wide variety of national judicial systems. For this reason, special attention should be focused on procedural safeguards for persons in criminal proceedings.”²

For the practical implementation of the concept of mutual recognition of court decisions, it is necessary to consistently implement a number of legal measures covering various stages of the criminal process. For this purpose, standard acts are introduced within the European Union, giving the right to conduct individual proceedings – the European Warrants. Among there the following:

- European Arrest Warrant;
- Freezing Order;
- European Evidence Warrant;
- European Investigation Order.

In addition, through the framework decisions and directives of the Council of the EU, a procedure for the mutual recognition of sentences and rulings related to various penalties, detention, transfer of prisoners and others is introduced.

As it is known, the first legal instrument that was introduced in accordance with the principle of mutual recognition was the European Arrest Warrant (EAW). The introduction of this tool was made possible by the adoption by the EU Council of the Framework Decision 2002/584 / JHA on the European arrest warrant and the surrender procedures between Member States of 13 June 2002³, which in fact opened a new era in the criminal law of the European Union.

The European arrest warrant is a court decision issued by a Member State for the purpose of detaining and transferring a wanted person to another State to carry out a criminal prosecution or to execute a sentence or security measure related to imprisonment. The purpose of the document is to simplify the mechanism for the extradition of persons who have committed particularly serious crimes on the territory of the EU Member States.

The framework decision states that the goal, set for the Union is to create a single space of freedom, security and justice, entails the abolition of extradition between

¹ Klip A. *European Criminal Law*, Ius Communitatis II, Intersentia, Antwerp, 2009, p. 318–324; Craig P., de Búrca G. *EU Law, Text, Cases, and Materials*. 5th ed. OUP, Oxford, 2011, p. 332–333.

² Banach-Gutierrez J.B. Globalized criminal justice in the European Union context: how theory meets practice, *New Journal of European Criminal Law*, 2013, vol. 4, issue 1–2, p. 154–159, http://www.njecl.eu/pdf_file/ITS/NJECL_04_01_0154.pdf

³ *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)*, Official Journal L 190, 18/07/2002. P. 0001–0020.

Member States and instead the establishment of a system of transfer of persons between judicial bodies. From the moment the introduction of the European arrest warrant within the EU the long, often politicized and not always effective enough procedure of extradition is being cancelled.

A single arrest warrant has replaced the extradition of criminals, enshrined in previous agreements in the area in question, that is a classic cooperative relationship has been replaced by the system of free movement of criminal judgments (including both final decisions and decisions taken before sentence). Now in case the judicial body of a Member State requires the transfer of a person, their decision must be recognized and performed automatically throughout the Union. According to paragraph 1 of Article 31 of Framework Decision in relations between the EU States from January 1, 2004, the following European conventions have ceased to operate: On Extradition 1957 and additional protocols; On the simplification and modernisation of methods of transmitting extradition requests 1989; On simplified extradition procedure between the Member States of the EU 1995; On extradition between Member States 1996, and in part the European Convention on the suppression of terrorism 1977 where it relates to extradition, as well as Convention on the Application of the Schengen Agreement 1990.

In December 2001, the EU Member States approved a list of 32 extradition offenses, punishable by imprisonment for at least three years, and for which the European arrest warrant can be applied¹. Among them there are: terrorism; human trafficking; illicit trafficking of narcotic drugs and psychotropic substances; corruption; arms trade; fraud; counterfeiting; cybercrime; racism and xenophobia; laundering of proceeds of crime; crimes within the jurisdiction of the International Criminal Court and many others. At the same time, the EU Council may at any time decide to supplement the list contained in the document with other categories of crimes.

Non-execution of the European arrest warrant is permitted in exceptional cases provided for in Articles 3 and 4 of the Framework Decision. At the same time, all grounds for refusal are conditionally divided into mandatory and optional². Amnesty, age restrictions, and adherence to the *non bis in idem* principle are the mandatory grounds. The use of optional grounds involves the study and evaluation of the relevant circumstances, followed by an alternative.

The person's citizenship of the issuing party can no longer be the grounds for refusal – what matters for the execution of the European order is not the national citizenship, but the Union citizenship. The judiciary (in accordance with Article 6 of the Framework Decision, the States themselves determine the circle of competent authorities authorized to issue and execute the European arrest warrant: these can be the courts, the bodies of the preliminary investigation or the prosecutor's office) may challenge the procedural

¹ Milinchuk V.V. New international cooperation in the field of criminal procedure: the concept of transnational justice, *State and law*, 2004, no 1, p. 90.

² Plachta M. European Arrest Warrant: Revolution in Extradition, *International Criminal Law Review*, 2003, vol. 11, no 2, p.186–187.

aspects of the extradition request, however, they cannot call into question the grounds for arrest contained in the warrant¹. In addition, the principle of double criminalization of a crime under the law of the issuing Member State and the executing State, as the main requirement for extradition, has been abolished (paragraph 2 of Article 2).

Of particular importance are the provisions of the Framework Decision concerning the decision on extradition in the presence of conflicts of criminal jurisdiction. The judicial authority shall take into account all the circumstances of the case, including: the relative severeness of the crimes and the place of their commission, the dates when the European arrest warrants are issued, the purpose of issuing a warrant, and the court performing the warrant may request the opinion of Eurojust.

P.N. Biryukov notes that the introduction of the European order procedure gave rise to many procedural difficulties, including non-compliance with rules regarding the standard order form, poor translation quality, failure to meet the deadline for the transfer of the original decision, sending requests through the Schengen Information System and other problems including those ones with the conflict of jurisdictions of the States and the competing queries².

The Framework Decision on the introduction of the European arrest warrant entered into force in most EU countries since January 1, 2004, and since April 2005, it has been in effect on the territory of all EU Members³. According to the press service of the European Commission, as a result of the introduction of the “Eurowarrant”, the duration of the extradition process of suspected criminals was reduced on average in the EU to 45 days, and in cases where the detainee does not object to extradition, to 18 days.

Despite the exceptional importance of introducing a single European arrest warrant to strengthen law and order in the European Union, the procedures for making the necessary changes to the national legislation of the Member States were not always introduced smoothly and seamlessly as they affected the constitutional norms of the States concerning the non-issuance of their own citizens. Apart from that the mechanism for implementing the European order is still being corrected and modernized, allowing the State authorities to avoid its execution⁴.

Meanwhile, since the Framework Decision entered into force, the number of annually issued single orders has increased several times, the growth of the total number of orders is in part already inflationary – The European Commission notes that this tool should

¹ H. Grabbe. Internal Security of the European Union: Laying a New Foundation, *Europe after September 11, 2001*. Moscow, 2002, p. 106.

² Biryukov P.N. On the problems of applying in the EU the “Structural Solution on the European arrest warrant”, *International legal readings*, ed. P.N. Biryukov. Voronezh, 2006, vol. 5. p. 143–145.

³ The last of the EU Member States to complete all the necessary procedures for the introduction of the Eurowarrant was Italy in April 2005.

⁴ Shamsutdinova R.R. *The space of freedom, security and justice of the European Union: the formation, development and main forms of cooperation of the Member States*: Diss. ... Cand. legal sciences. Kazan: Kazan State University, 2009, p. 9.

be used only when it comes to really serious offenses. To achieve this judicial authorities in Member States issuing the European Arrest Warrant shall use the proportionality test taking into account the seriousness of the crime, the penalties and the costs associated with the execution of the warrant¹.

In addition, one of the problems with the application of the European Arrest Warrant is the inadequate provision of a fair trial and violation of other procedural rights of suspects and the accused of committing a crime. The European Commission announced this in its Report on the implementation of the Framework Decision on the European arrest warrant issued in 2011².

To ensure fair trial guarantees, the Commission recommended setting minimum standards for the protection of the rights of suspects and the accused at the EU level, ensuring:

1. the right to interpretation and translation during criminal proceedings;
2. the right of the suspect to be informed of his rights;
3. the right to legal aid and access to a lawyer;
4. the detainee's right to communicate with family members, employers or consular services;
5. presumption of innocence³.

Each of these measures will be applied in relation to detainees, helping to ensure respect for their fundamental rights.

Further work to ensure the proper functioning of the European warrant, in the opinion of the Commission, is closely related to the development of confidence-building measures between Member States and the introduction of new tools that promote the full use of opportunities of the European arrest warrant.

In general, based on the official information provided by the European Commission, measures taken in the context of the implementation of the principle of mutual recognition in the field of criminal justice can be divided into several main areas:

- transfer of convicted persons to serve the sentence in the State

¹ European Arrest Warrant, http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm

² Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2011) 175 final], <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0175>

³ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal L 280 of 26.10.2010, p. 1–7. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Official Journal L 142 of 1.6.2012, p. 1–10. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Official Journal L 294 of 6.11.2013, p. 1–12.

- citizenship;
- extradition for criminal prosecution or implementation of
- the sentence;
- conducting investigative measures and collecting evidence;
- conducting confiscations and arrests of property, financial penalties.

In order to regulate all these procedural issues, the Council of the EU, together with the European Parliament, adopted numerous framework decisions and directives¹. These are: Framework Decision of July 22, 2003 on the execution of orders freezing property or evidence, the purpose of which is to prevent destroying, changing or relocating the property or evidence²; Framework Decision of December 18, 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters³, the main purpose of which is to simplify and speed up the process of collecting and transferring evidence in criminal cases with the transboundary element, as well as the harmonization of evidence transfer rules in the European Union⁴; Framework Decision of November 27, 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union⁵, the main purpose of which was to establish rules according to which each Member State would recognize the power of the sentence and execute punishments in order to assist the social rehabilitation of convicted persons⁶; Framework Decision of November 27, 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions⁷; Framework Decision Council of October 23, 2009 on the application, between Member States of the European Union, of the

¹ The author left outside the study a review of the content of EU legal acts regulating certain legal proceedings in the aspect of mutual recognition.

² Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Official Journal of the European Union L 196/45.

³ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, Official Journal of the European Union L 350/72.

⁴ Biryukov P.N. European Evidence Order, *Russian Law Journal*, 2010, no 1, p. 34–40.

⁵ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Official Journal of the European Union, L 327.

⁶ Panyushkina O.V. On the mutual recognition of sentences with a view to the execution of sentences between the Member States of the European Union, *Bulletin of Voronezh State University, Series "Law"*, 2010, no 1, p. 525.

⁷ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Official Journal of the European Union L 337/102.

principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention¹.

One of the latest tools for mutual recognition has become the European investigation order introduced under the Directive of April 3, 2014 on the introduction of the European investigation order in criminal matters², the purpose of which is to conduct separate investigative actions and evidence collection in the issuing State.

Thus, supranational instruments for resolving conflicts of criminal jurisdiction by the Member States of the European Union, by introducing the principle of mutual recognition of judicial decisions, conceptually changed the traditional views on the possibility of organized cooperation of States in the field of criminal justice. It can be stated that the principle of mutual recognition of court decisions is firmly entrenched in the field of joint criminal law policy and judicial cooperation between the States of the European Union. Moreover, while at the first stage of its implementation the States were adapting to its mechanism for a rather long period, over time more and more often they began to come up with initiatives themselves to introduce one or another new form of criminal procedure, which indicates the continuous improvement of the launched process. It seems that the mechanisms existing in the European Union in this area may, within certain limits, serve as a model for other international organizations aimed at strengthening integration processes.

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¹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, *Official Journal of the European Union*, L 294.

² Directive 2014/41/EU of the European Parliament and the Council regarding the European Investigation Order in criminal matters. URL: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209288%202010%20ADD%201>

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Information about the author

Alfiya Kayumova (Kazan, Russia) – Professor of the Department of International and European Law of the Law Faculty, Kazan (Volga region) Federal University, Doctor of Legal Sciences (18 Kremlyovskaya St., Kazan, 420008; e-mail: internationallaw@bk.ru).

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ROBERT JASTRZĘBSKI

Dr. hab., Faculty of Law
and Administration,
University of Warsaw

**GENESIS
OF THE *REBUS SIC STANTIBUS* CLAUSE
IN THE POLISH CIVIL LAW**

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Abstract: The article is centred around the genesis of the *rebus sic stantibus* clause in the Polish civil law. The beginnings of the clause should be traced back to the post-WWI period, when Poland was in the process of restoring its independence, and to the monetary inflation that accompanied that process. The regulation of the *rebus sic stantibus* clause was also materially impacted by the decisions of Polish courts, particularly by the judgement of the Polish Supreme Court of 25 February 1922 in the Fliederbaum–Kuhnke that turned out to have an international reach. As a result, the Regulation of the President of the Polish Republic of 14 May 1914 on the Revaluation of Private and Legal Liabilities, also referred to as *Lex Zoll*, was issued in connection with the monetary reform. After that, the work on the draft of the *rebus sic stantibus* clause was commenced by the Codification Commission of the Republic of Poland. Ultimately, the clause was incorporated into Article 269 of the Polish Code of Obligations of 1933, and it was practically applied shortly after the end of World War II. The *rebus sic stantibus* clause was not provided for in the Polish Civil Code of 1964 until its 1990 amendment. The reintroduction of the *rebus sic stantibus* clause to the Polish civil law was the result of Poland's inflationary monetary policy adopted in 1980s.

Key words: *rebus sic stantibus* clause, indexation, nominalism, *Lex Zoll*, Polish Code of Obligations of 1933

1. Introduction

The definition of the *rebus sic stantibus* clause was formed in the Middle Ages and it was connected with the work of glossarists at Italian universities.¹ The genesis of the clause was traced back to the sources and principles of the Roman law. Generally, the *rebus sic stantibus* clause was initially defined as follows: *any legal relationship (or "everything" in general, as it was once said) may expire or change if such expiry or change is required under modified relationships.*² Thereby, the clause constituted a departure from the mandatory performance of obligations in the case of circumstances that were beyond debtor's or creditor's control. As the impact of new conditions of obligation performance was not attributable to the parties to the contractual relationship of obligation, it therefore constituted *vis maior* (force majeure).

The Middle Ages were characterised by the so-called currency debasing by monarchs enjoying coinage rights. This complied with the *monetae sunt regales* principle. Sovereigns would change the value of money by altering the precious metal content in the new monetary unit.³ This phenomenon was known in entire Europe. Such currency issue activity allowed monarchs to circulate larger amounts of money, and it consequently increased their financial abilities. As a result of such monetary practice, liabilities incurred in a given monetary unit could be repaid in a new one. Obviously, minor fluctuations in the purchasing power of money were, and they still are, considered a typical result of the changing economic situation. However, when such fluctuations are sharp and they exceed the agreed limits, a financial obligation should be modified respectively.⁴ This problem is connected with two principles regarding the performance of financial obligations, i.e. with the principle of nominalism and indexation. What is important, the very changes in the purchasing power of money during WWI were the basis for the incorporation of the *rebus sic stantibus* clause into the Polish civil law.

The *rebus sic stantibus* clause was under lawyers' severe criticism, particularly in the 18th century, as there was a general understanding that it could be abused and that it could violate the safety of legal transactions. On the other hand, the principle of *pacta sunt servanda* was adopted, which implied that, regardless of the changed circumstances of agreement conclusion, the agreement needed to be performed. In the 19th century,

¹ Cf. R. Jastrzębski, *Geneza i znaczenie klauzuli rebus sic stantibus w polskim prawie prywatnym* [Genesis and meaning of the *rebus sic stantibus* clause in the Polish private law], (in:) "Studia z Dziejów Państwa i Prawa Polskiego", tom XIII [Studies on the History of the Polish State and Law, Volume XIII], Kraków-Lublin-Łódź 2010.

² K. Przybyłowski, *Clausula rebus sic stantibus*, (in:) *Encyklopedia Podręczna Prawa Prywatnego* [Encyclopaedia of Private Law], ed. H. Konica, Warsaw 1930–35, p. 125.

³ Cf. K. Przybyłowski, *Klauzula „rebus sic stantibus” w rozwoju historycznym* [The *rebus sic stantibus* clause in historical development], Lvov 1926; A. Stelmachowski, *Nominalizm pieniężny a waloryzacja* [Monetary nominalism and indexation], "Studia Cywilistyczne", tom VI [Civil Law Studies, Volume VI], 1965, p. 282 et seq.

⁴ A. Stelmachowski, *Nominalizm pieniężny a...* [Monetary nominalism and...], p. 294.

such an opinion was expressed, e.g. in great civil law codifications taking place at that time (particularly in the Napoleonic Code of 1804, the Civil Code of Austria of 1811, or the Civil Code of the German Empire of 1896), which did not regulate the *rebus sic stantibus* clause at all.¹ The clause was also overlooked in the Digest (Set) of Laws of the Russian Empire of 1832. Noteworthy is the fact that in Poland these regulations became effective after the restoration of independence in 1918.

2. The *rebus sic stantibus* clause in the Polish state *in statu nascendi*

World War I had a material impact on the wording of economic and legal terms alike. This was noted by Szymon Rundstein, who in 1918 observed that legal terms and structures that had been withdrawn from use were re-introduced to legal practice; in his observations Rundstein also stated that nobody expected that the war would bring back to life the already forgotten – and criticised – *rebus sic stantibus* clause.² Of course, the said clause was not revived in all countries; e.g. in France, the principle of monetary nominalism dominated, despite inflation.³ Kazimierz Przybyłowski justified the revival of the *rebus sic stantibus* clause by the departure from liberal and individualistic concepts in favour of the extension of the scope of the free judicial assessment.⁴ The outbreak of the world war was considered to be an event of force majeure, in which fires, droughts, or political revolts (e.g. wars and revolutions) were included. Therefore, different countries would issue regulations of a moratory nature that aimed at the suspension of the term of obligation performance by debtors.⁵

At the beginning, it should be stressed that the introduction of the *rebus sic stantibus* clause to the Polish private law was connected with the situation in the monetary market that resulted in hyperinflation of the Polish mark, and with the stance of the judicature of that time. In the first case, the countries actively participating in the war, i.e. the German, Austro-Hungarian and Russian Empires, implemented an inflation policy to cover the expenses incurred in relation to the warfare. In practice this meant currency overissue. What is important is that the currencies of the aforementioned countries

¹ Cf. K. Przybyłowski, *Klauzula „rebus sic stantibus” w rozwoju...* [The *rebus sic stantibus* clause in historical development], p. 61 et seq.

² Sz. Rundstein, *Niemожność wykonania zobowiązań a wojna* [Inability to perform obligations and war], “Themis Polska” [Themis Poland] 1918, p. 6.

³ Cf. J. Wasilkowski, *Zagadnienie waloryzacji zobowiązań prywatno-prawnych w orzecznictwie francuskim* [Valorisation of private and legal obligations in French jurisprudence], Warsaw 1926/27, pp. 42–43. Also: J. Wasilkowski, *Contribution à l'étude du problème de la valorisation dans le domaine du droit privé*, Warsaw 1927.

⁴ Cf. K. Przybyłowski, *Clausula rebus sic stantibus* (in:) *Encyklopedia...* [Encyclopaedia...] p. 127.

⁵ In more detail in: R. Jastrzębski, *Lex Zoll. Zarys prawno-ekonomiczno-historyczny* [Lex Zoll. Legal, economic and historical outline], Warsaw 2016, p. 24 et seq.

were circulated in Poland. The end of the war was characterised by “currency upheavals” that were connected with the necessity to carry out monetary reforms and to repay the financial obligations incurred in then applicable legal tenders.

Therefore, courts faced a serious dilemma concerning the repayment of financial obligations in the nominal amount, regardless of the changed purchasing power of the legal tender. In the Polish territory, this was connected with the “mortgage clearing” phenomenon, consisting in the repayment of financial obligations by debtors in the nominal amount. Currency unification performed in Poland, as a result of which the Polish mark was recognised as a sole legal tender, did not change the situation.¹ It is worth mentioning that as a result of expenses incurred by Poland (particularly war expenses), the Polish mark became “paper currency” of unspecified value.² As a result, Polish courts faced a material problem of both legal and ethical nature, as the laws of the occupants (i.e. Austria, Germany and Russia) generally supported the principle of *pacta sunt servanda*. In judicial practice this meant applying to liabilities of dependents (e.g. children, disabled persons, pensioners) and to mortgage-backed loans, in particular, the widely understood principles of equity,³ as considering the repayment of financial obligations in the nominal amount to be effective, with no consideration of the changed purchasing power of money, was met with numerous public protests.

In Europe, the decision of the Polish Supreme Court of 25 February 1922 in the Fliederbaum–Kuhnke⁴ case regarding the repayment of pre-war mortgage debts turned out to be critical. In the statement of grounds to the decision, the Supreme Court ruled that the payment of a mortgage-backed loan should not be made in the nominal amount or even in the gold standard. According to the court, in the latter case, this could put debtors at the brink of financial ruin. Therefore, the amount of the cash consideration should oscillate between the aforementioned amounts, and it was to be defined at the court’s discretion. A gloss to the statement made by Fryderyk Zoll, in which he suggested that indexation of financial obligations should be made particularly on the basis of the legal title, played an important role in the future of indexation of financial obligations. The decision of the Polish Supreme Court was met with widespread acclaim also in other countries, mainly those where inflation was present (particularly in Germany and Austria). In Germany, in their judgements, courts would still defend the principles of nominalism, even though

¹ Cf. Z. Karpiński, *Ustroje pieniężne w Polsce od roku 1917* [Monetary systems in Poland before 1917], Warsaw 1968, pp. 37–43; Z. Landau, J. Tomaszewski, *Gospodarka Polski Międzywojennej 1918-1939. Tom I. W dobie inflacji (1918-1923)* [Economy of Interwar Poland 1918–1939. Volume I. In the Inflation Era (1918–1923)], Warsaw 1967, pp. 276–292.

² Cf. E. Taylor, *Inflacja Polska* [Polish Inflation], Poznań 1926, pp. 22–23; S. Głąbiński, *Teoria Ekonomiki Narodowej* [Theory of National Economy], Lvov 1927, p. 310.

³ In more detail in: R. Jastrzębski, *Między nominalizmem a waloryzacją – judykatura in statu nascendi II Rzeczypospolitej* [Between nominalism and indexation – jurisprudence of the Second Polish Republic *in statu nascendi*], “Czasopismo Prawno-Historyczne” [The Legal and Historical Journal] 2011, Volume LXIII, issue 1.

⁴ C 186/21, “Orzecznictwo Sądów Polskich” 1921–22, poz. 461, z glosą F. Zolla [Polish jurisprudence 1921–1922, Item. 461, with a gloss by F. Zoll].

currency depreciation constituted a great social problem. Therefore, the decision of the Polish Supreme Court was met with respect and acclaim by German lawyers, who looked forward to similar judgements being passed by German courts. Peter Oertmann had an interesting comment on this topic. In his work on indexation, he concluded that with the decision of 25 February 1922, young Republic of Poland put German courts – which still defended the Mark ist Mark principle – to shame. Moreover, based on the said decision of the Polish Supreme Court, the future judgement of the Court of the German Reich of 28 November 1923 was passed.¹

The decision of the Supreme Court in the Fliederbaum–Kuhnke case had an impact on Polish legal regulations, and the matter of indexation of financial obligations became one of the elements of a monetary reform carried out by Władysław Grabski in 1920s. The preparation of a relevant legal regulation was entrusted to a special commission chaired by Fryderyk Zoll.² The commission's work resulted in the drafting of the Regulation of the President of the Polish Republic of 14 May 1914 on the Revaluation of Private and Legal Liabilities³ that was issued on the basis of the Act on the Treasury Mending and Monetary Reform of 11 January 1924.⁴ The Regulation, commonly referred to as *Lex Zoll* governed, in general, the matter of indexation of depreciated financial obligations; whereby the courts' discretion was considered to be of great importance in the definition of indexation limits.⁵

3. The *rebus sic stantibus* clause in the Code of Obligations of 1933

Polish experience as regards hyperinflation of the Polish mark in particular had a significant impact on the codification of the Polish law of obligations, on which the Codification Commission of the Republic of Poland worked.⁶ The Commission's activities were mainly influenced by the work of Ernest Till, K. Przybyśławski and Ludwik Domański.⁷

¹ Cf. F. Zoll, B. Helczyński, *Regulation of the President of the Polish Republic of 14 May 1914 on the Revaluation of Private and Legal Liabilities together with Supplementary Regulations on Revaluation of any and all Private, Public and Legal Liabilities*, Kraków 1925, pp. 19–20.

² In more detail in: R. Jastrzębski, *Lex Zoll. Zarys...[Outline...]*, Warsaw 2016, p. 62 et seq.

³ Journal of Laws, No. 42, Item 441.

⁴ Journal of Laws, No. 4, Item 28.

⁵ In more detail in: R. Jastrzębski, *Lex Zoll...*, Warsaw 2016, p. 115 et seq.

⁶ Cf. L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919-1939* [Civil law in the work of the Codification Commission of the Republic of Poland between 1919 and 1939], Wrocław 2000.

⁷ In more detail in: E. Till, *Polskie prawo zobowiązań. (Część ogólna). Projekt wstępny z motywami* [Polish law of obligations (General part). Bill with motives], Lvov 1923, p. 38–39; *Projekt prawa o zobowiązaniach w opracowaniu koreferenta projektu adwokata Ludwika Domańskiego* [Bill of the law on obligations as compiled by the co-speaker for the project, Ludwik Domański, advocate], „Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja Prawa Cywilnego” [Codification Commission of the Republic of Poland. Civil Law Section], Warsaw 1927, Volume I, issue 1, p. 79.

In June 1933, the Codification Commission Board passed a final bill of the Code of Obligations that was handed over to the Minister of Justice. The Code of Obligations was issued in the form of the Regulation of the President of the Republic of Poland of 27 October 1933.¹ The *rebus sic stantibus* clause was regulated in Article 269 of the Code under one clause being Section V: Expiry or modification of obligations in the case of an event of force majeure, that reads as follows:

Should, as a result of an event of force majeure including a war, epidemic, total crop failure or other natural disasters, the performance be connected with grave difficulties or should it put one of the parties at a risk of incurring a substantial loss, which the parties could not have forecast at the time of agreement conclusion, a court may, if it finds it necessary under the principle of good faith, define how the performance should be made, indicate the amount thereof, or even terminate the agreement, upon having previously considered the interests of both parties.

The legal structure thus incorporated into the Code of Obligations that included the *rebus sic stantibus* clause allowed courts to adequately modify the performance or even to terminate the agreement based on the principles of good faith and the interests of the parties to the agreement.² What is important, it did not consider financial obligations. It is worth mentioning that the matter of the decreased purchasing power of money was nevertheless one of the topics on which the Codification Commission had worked. However, the Commission had withdrawn from drafting a separate regulation on the depreciation of the monetary unit, mainly due to Poland's monetary prestige. At the same time, it was stressed that in the event of such a disastrous situation, courts should, *per analogiam*, apply the provisions of Article 269 of the Code of Obligations.³

As a result of the Great Depression of 1930s, trade and industry organisations⁴ of that time, which contrary to agricultural organisations had not been granted any allowance as regards the repayment of liabilities,⁵ strived for the application of Article 269 of the Polish

¹ Journal of Laws, No. 82, Item 598.

² In more detail in: L. Domański, *Instytucje Kodeksu Zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna* [Institutions of the Code of Obligations. Theoretical and practical comment. General part], Warsaw 1936, pp. 903–911; R. Longchamps de Berier, *Zobowiązania* [Liabilities], Lvov 1939, pp. 404–410; J. Korzonek, I. Rosenblüth, *Kodeks Zobowiązań. Komentarz* [Code of Obligations. Comment], Kraków 1934, pp. 581–585; A. Brzozowski, *Wpływ zmiany okoliczności na zobowiązania w prawie polskim (Na tle prawa niektórych państw obcych)* [Impact of changed circumstances on liabilities in the Polish law (Against the laws of selected countries)], Warsaw 1992, p. 132 et seq.

³ Cf. L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej...* [Civil law in...], p. 445; L. Domański, *Instytucje Kodeksu Zobowiązań. Komentarz...* [Institutions of the Code of Obligations...], pp. 75–77, 909–910.

⁴ Cf. I. Rosenblüth, *Wpływ moratorium rolniczego na zobowiązania kupiectwa* [Impact of the agricultural moratorium on trade liabilities], „Głos Prawa” [The Law Voice] 1935, no. 11–12; J. Bibring, *Deflacja i jej wpływ na wykonanie zobowiązań prywatno-prawnych* [Deflation and its impact on the performance of private and legal obligations], „Przegląd Sądowy” [The Court Review], 1934, no. 6.

⁵ In more detail in: R. Jastrzębski, *Wpływ siły nabywczej pieniądza na wykonanie zobowiązań prywatno-prawnych w II Rzeczypospolitej* [Impact of the purchasing power of money on the performance of private and legal obligations in Second Polish Republic] Warsaw 2009, p. 271 et seq.

Code of Obligations. However, courts were generally of the opinion that Article 269 of the Code of Obligations concerned deep and extraordinary changes in the economic life only, which were treated on a par with a war or a natural disaster.¹ The outbreak of World War II was such an event. Therefore, the *rebus sic stantibus* clause was applied after the end of WWII, which corresponded to the economic and political situation of the Polish state *in statu nascendi*. However, it should be mentioned that WWII damage was greater and, just like after WWI, debtors started making debt repayments in depreciated currency, which was accompanied by the “mortgage clearing” phenomenon.

Therefore, decisions of Polish courts generally supported indexation, with the concurrent application of provisions of Article 269 of the Polish Code of Obligations. The post-WWII judgements of the Polish Supreme Court were of particular importance; in its judgement of 3 December 1945, the Supreme Court stated that the devaluation of the so-called Krakow zloty was a general economic disaster which, being the outcome of the war, fell under the definition of the event of force majeure referred to in Article 269 of the Polish Code of Obligations.² In its other judgement, the Supreme Court stressed that principles set forth in Article 269 of the Polish Code of Obligations should be applied with reference to any obligations/liabilities if the principles of equity and good faith so required. This resulted from the fact that the majority of Polish courts backed indexation of financial liabilities. However, the changed socio-political situation, which in practice meant a change in Poland's political system after WWII, affected the application of the *rebus sic stantibus* clause. Therefore, in October 1948, the Ministry of Justice issued a recommendation as per which cases heard by courts and concerning pre-war private and legal obligations were suspended until the issuance of relevant statutory regulations³.

Then, a Decree of 27 July 1949 on incurring new debts and defining the amount of unredeemed debts was issued, which is in force to this day.⁴ The Decree is nominalistic and it was issued on the basis of new economic and social assumptions of the Polish People's Republic.⁵ However, it did not rescind Article 269 of the Polish Code of Obligations, and the said Code remained in force until the Act of 23 April 1964 (i.e. the Civil Code) came into effect.⁶ When the work on the Civil Code was underway, many postulated the

¹ Cf. Jurisprudence of the Supreme Court of: 11 January 1938, C II 1717/37, “Jurisprudence. Collection of Judicial Reviews. Civil Law Section” 1938, Item 278; 24 November 1937, C III 2082/37, “Collection of the Supreme Court's Decisions. Judgements of the Civil Law Chamber” 1938, Item 409.

² Decision of the Supreme Court of 3 November 1945, C III 575/45, “Collection of the Supreme Court's Decisions. Judgements of the Civil Law Chamber” 1947, Item 10.

³ Weekly Newsletter of the Ministry of Justice of 15 November 1948, No. 58; Notary Review, 1948, Volume II, pp. 556–557.

⁴ Journal of Laws, No. 45, Item 332.

⁵ In more detail in: P. Zieliński, T. L. Michałowski, *O zaciąganiu i określaniu wysokości zobowiązań pieniężnych. Wstęp – Przepisy Prawne – Komentarz* [On incurring financial obligations and defining their amount. Introduction – Laws – Comment], Warsaw 1950; L. Domański, *Zobowiązania pieniężne w świetle dekretu z 27 lipca 1949 r.* [Financial obligations in the light of the Decree of 27 July 1949], „Przegląd Notarialny” [The Notary Review] 1949, Volume II.

⁶ Journal of Laws No. 16, Item 93.

incorporation of the *rebus sic stantibus* clause into the new civil code based on Article 269 of the Code of Obligations. Among them were, e.g. Witold Czachórski, but his motion was rejected by the Codification Commission at the time of the third reading of the bill; one of the major opponents of the incorporation of the *rebus sic stantibus* clause into the Civil Code was Jan Wasilkowski, who supported the principle of nominalism, as regards the performance of financial obligations.¹

4. Modern regulations concerning the *rebus sic stantibus* clause in the Polish law

Following the 1964 entry into force of the Polish Civil Code, Poland suffered an economic crisis in the 1980s, as a result of which the purchasing power of the Polish monetary unit (Polish zloty) dropped, with which the performance of financial obligations (particularly in connection with the liability for damages, estate distribution, dissolution of co-ownership) was connected. Therefore, many called for the reintroduction of the *rebus sic stantibus* based on Article 269 of the Polish Code of Obligations;² e.g. in 1985, the Civil and Agricultural Team of the Legislation Council to the Prime Minister considered such reintroduction of the *rebus sic stantibus* clause to be necessary. This matter was examined by the Commission for the reformation of the civil law.³ As a result, Articles 357¹ and 358¹(3) of the Civil Code were drafted; they were introduced to the Polish civil law system in connection with the 1990 amendment to the Civil Code.⁴ In their contemporary wording, the said Articles read as follows:

Article 357¹: *If, because of an extraordinary change in the relationship, the performance would entail grave difficulties or would put one of the parties at a risk of incurring a substantial*

¹ Cf. *Discussion Materials to the Bill of the Civil Code of the Polish People's Republic*, Warsaw 1955, p. 178; J. Skąpski, *Wpływ zmiany stosunków na zobowiązania. Klauzula „rebus sic stantibus”* [Impact of changed relationships on obligations. The *rebus sic stantibus* clause], (in:) *Studia z prawa zobowiązań* [Studies on the law of obligations] ed. Z. Radwański, Warsaw–Poznań 1979.

² Cf. K. Zagrobelny, *Klauzula rebus sic stantibus w prawie cywilnym* [The *rebus sic stantibus* clause in the civil law], “Nowe Prawo” [The New Law] 1984, no. 1; A. Dyoniak, *Spadek wartości pieniądza a majątkowe stosunki rodzinne* [Decreased value of money and family property relationships], “Nowe Prawo” [The New Law] 1985, no. 5; B. Kordasiewicz, *Zjawisko inflacji a prawo spadkowe* [Inflation and the inheritance law], “Nowe Prawo” [The New Law] 1985, no. 5; A. Oleszko, *Zasada nominalizmu w prawie cywilnym* [Principle of nominalism in the civil law], “Palestra” [The Bar] 1986, no. 12; E. Łętowska, *Zjawisko inflacji a prawo cywilne* [Inflation and the civil law], “Nowe Prawo” [The New Law] 1985, no. 5; A. Nowicka, *Nominalizm a inflacja: w oczekiwaniu zmian legislacyjnych* [Nominalism and inflation: Awaiting legislation changes], “Państwo i Prawo” [The State and the Law] 1989, issue 9; Z. Gawlik, *W sprawie klauzuli rebus sic stantibus w kodeksie cywilnym* [On the *rebus sic stantibus* in the civil law], “Państwo i Prawo” [The State and the Law] 1990, issue 3.

³ Cf. *Ocena stanu prawa cywilnego i rolnego* [Assessment of the condition of the civil and agricultural law], “Nowe Prawo” [The New Law] 1985, no. 10; Z. Radwański, *Kierunki reformy prawa cywilnego* [Civil law reform directions], “Państwo i Prawo” [The State and the Law] 1987, issue 4.

⁴ The Act of 28 July 1990 on amending the Civil Code (Journal of Laws No. 55, Item 321); amendment: the Act of 23 August 1996 on amending the Civil Code (Journal of Laws No. 114, Item 542).

loss, which the parties did not take into consideration at the time of agreement conclusion, the court may define how the performance should be made, indicate the amount thereof, or even terminate the agreement, upon having previously considered the interests of the parties. When terminating the agreement, the court may (if necessary) decide on the settlements between the parties following the principles set forth in the foregoing.

Article 358¹(3): Should there be a material change in the purchasing power of money after the obligation has arisen, the court may – having previously considered the interest of the parties and in keeping with the principles of community life – change the amount of the financial obligation or the manner of its performance, even if they have been set forth in the agreement.

The regulations quoted *in extenso* refer to an extraordinary change in the relationship; the first of the Articles cited constitutes a departure from the principle of *pacta sunt servanda*, whereas the latter – from the principle of monetary nominalism.¹ Compared to the Code of Obligations, the latter Article is a novelty as the pre-war Code, in its final version, did not contain a similar regulation.

5. Summary

The regulation of the *rebus sic stantibus* clause in the Polish civil law is connected with the economic crisis suffered after World War I, which in practice was the outcome of the inflationary monetary policy of the occupants (i.e. the German, Austro-Hungarian and Russian Empires) participating in World War I, as well as of the inflationary monetary policy adopted later on by the Polish state. The decisions of the Polish Supreme Court had a material impact on the formation of the *rebus sic stantibus* clause. The most important of them was the judgement in the *Fliederbaum–Kuhnke* case, which was elaborated at length in the European legal writings of that time, particularly in countries that dealt with similar problems after the end of World War I. This resulted in the issue of the Regulation of the President of the Polish Republic of 14 May 1914 on the Revaluation of Private and Legal Liabilities, also referred to as *Lex Zoll*. However, it should be stressed that the Regulation was temporary and thus did not constitute a *rebus sic stantibus* regulation.

Ultimately, as a result of the activity of the Codification Commission of the Polish Republic, the *rebus sic stantibus* clause was regulated under Article 269 of the Polish Code of Obligations of 1933. In that way, after World War I, Polish legal regulations departed from the principle of *pacta sunt servanda* that dominated in European codifications. Besides, the Polish regulation of the *rebus sic stantibus* clause in the Code of Obligations of 1933 aroused interest of European civil law scholars, and the translation of and the discussion

¹ Cf. W. Robaczyński, *Kilka uwag na temat relacji między art. 357¹ a 358¹ § 3 k.c.* [Selected remarks on the relationship between Articles 357¹ and 358¹(3) of the Civil Code], "Rejent" 1996, No. 11; A. Brzozowski, *Wpływ zmiany okoliczności na zobowiązania (klauzula rebus sic stantibus; waloryzacja świadczeń pieniężnych)* [Impact of the changed circumstances on liabilities (the *rebus sic stantibus* clause; indexation of financial liabilities)], "Studia Prawa Prywatnego" [The Studies on the Private Law] 2008, issue 1.

on the content of the said Code was an example of that interest.¹ Scholars from France and neighbouring countries (e.g. Henri Capitant or Henri Felix Mazeaud) expressed their opinion on the clause included in the Code. Polish scholars considered the regulation incorporated into Article 269 of the Code of Obligations to be one of novel concepts of the civil law of that time that was closely related to the Polish experiences at the beginning of 1920s. They particularly stressed the unique character of the regulation compared to the private law regulations of other countries, e.g. Germany, Austria or France.²

In fact, the regulation included in the Code of Obligations was practically applied shortly after World War II; however, given the changed political and economic situation, monetary nominalism was introduced as the applicable principle. The Polish Civil Code of 1964 did not contain the *rebus sic stantibus* clause, which was connected with the legal system of then socialist Poland. The statutory regulation of the *rebus sic stantibus* was reintroduced to the Polish legislation in 1990s,³ and just like in the interwar period, it was connected with Poland's inflationary monetary policy.

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¹ Cf. *Code des obligations de la République de Pologne*, Paris 1935; *Readings on the Polish Code of Obligations in Lyon and Paris*, "Przegląd Prawa i Administracji" [The Law and Administration Review] 1935, p. 311; Z. Nagórski, *Codification of the Civil Law in Poland (1918–1939)*, (in: *Studies in Polish and Comparative Law*, London 1945.

² Cf. E. Waśkowski, *Nowe idee w kodeksie zobowiązań* [New ideas in the Code of Obligations], "Głos Prawa" [The Voice of Law] 1934, No. 6; M. Lewy, *Nadużycie prawa według orzecznictwa francuskiego i prawa polskiego* [Abuse of law according to the French and Polish jurisprudence], Warsaw 1938, pp. 110–111; E. Altstaedter, *Wytyczne zasady kodeksu zobowiązań*, [Guiding principles of the Code of Obligations] "Nowa Palestra" [The New Bar] 1934, No. 5.

³ Cf. R. Jastrzębski, *Wpływ siły nabywczej pieniądza na wykonanie zobowiązań...* [Impact of the purchasing power of money...], Warsaw 2009, p. 421–425.

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Information about the author

Robert Jastrzębski (Warsaw, Poland) – Dr. hab., Faculty of Law and Administration, University of Warsaw (Krakowskie Przedmieście 26/28, 00-927, Warsaw, Poland; e-mail: r.jastrzebski@wpia.uw.edu.pl).

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ALEXEY DEMICHEV

Professor of the Department of Civil Law and Procedure of the Academy of the Ministry of Internal Affairs of the Russian Federation in Nizhny Novgorod, Honorary Worker of Higher Professional Education of the Russian Federation, Doctor of Legal Sciences, Candidate of Historic Sciences

VERA ILIUKHINA

Associate Professor of the Department of Theory of State and Law, International and European law of the Academy of the Federal Penitentiary Service of Russia, Candidate of Legal Sciences

**POSITIVIST CLASSIFICATION
OF THE PRINCIPLES OF ADMINISTRATIVE PROCEEDINGS
IN RUSSIA AND ARMENIA – A COMPARATIVE LEGAL ANALYSIS**

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Abstract: Comparative research is one of the promising areas of development of modern jurisprudence. Russian and Armenian law have common roots, with their shared historical background as members of the continental (Roman-German) legal family. The authors of the present paper compare the principles of administrative proceedings in Russia and Armenia and propose a positivist classification of the relevant principles. The authors analyze the Russian and Armenian codes of administrative proceedings and make a comparative review of them, highlight some of their problems and the difficulties of realizing these norms in practice, and suggest ways to improve the codes. The constitutional principles of administrative proceedings, some of which are duplicated in codes while some are not, are also reviewed. It is hardly worth mentioning that the extraction of constitutional principles from a particular branch of law is always difficult

as the legislators of Russia and Armenia are not guided by the concept of “principle” in the drafting their respective Constitutions.

Keywords: positivism, comparativism, classification, principles, administrative proceedings, Russia, Armenia

Comparative legal studies have significant potential both theoretically and practically. This is equally true for comparative studies on legal principles and their issues. Taking this into account, the article seeks to compare the principles of administrative proceedings in Russia and Armenia.

The choice of Russian and Armenian law as the subject of comparison is determined the following reasons:

1. first, the Russian and Armenian legal systems share common roots, as they both belong to the continental (Roman-German) legal family and they were both formerly members of the Soviet law family within the framework of a single state – the USSR, and
2. secondly, the Russian Federation and the Republic of Armenia are now independent states with their own legal systems. This allows to conduct comparative legal research not only out of pure interest, but also to achieve mutual sharing of the respective national experiences of different states.

It should be noted that the importance of the category of “principles of law” was well understood already in Ancient Rome. Roman lawyers formulated the maxim “*principium est potissima pars cuiusque rei*”, which reflects clearly the place of principles, both in legal theory and practice. Although the concept of “principles of law” is widely used by lawyers, it is not of a normative, but a doctrinal character. In turn, this leads to the fact that legal scientists interpret the concept differently, and offer lists of principles that are different in structure and composition.

In modern Russian and Armenian legal literature, the interest in the principles of law as a theoretical-methodological construction and the phenomenon of objective reality goes back to the times of the Russian Empire and the USSR. Currently, even the course books on the theory of state and law pay attention to the principles of law.¹ There is a huge amount of research on the principles of law, which sets forth various approaches to their understanding.²

¹ См., напр., Ներսեսյանց Վ.Ս. Իրավունքի և պետության տեսություն. Երևան, 2001 (Нерсесянц В.С. Теория права и государства. Ереван, 2001); Теория государства и права / Под ред. Р.А. Ромашова. СПб.: Издательство Р.А. Асланова «Юридический центр Пресс», 2005; Սաֆարյան Գ.Գ. Պետության և իրավունքի պատմության և տեսության խնդիրներ: Երևան, 2010 (Сафарян Г.Г. Проблемы истории и теории государства и права. Ереван, 2010); Общая теория государства и права. В 3-х т. Т. 2. Право. 4-е изд., перераб. и доп. М.: Норма: НИЦ ИНФРА-М, 2013.

² E.g. Tirsikh M.G., Chernyak L.Yu. The place of the principles of law in the system of Russian law, *Academic Law Journal*, 2009, no. 2 (36), p. 4-10; Ershov V.V. The Essence of the Principles of Law, *Journal of Siberian Federal University. Humanities & Social Sciences*, no. 12 (2018, 11), p. 2089-2103.

Before turning to the comparative analysis of the principles of administrative proceedings in Russia and Armenia, we shall make two reservations:

1) The authors of this article adhere to a positivist understanding of the essence of the principles of law. Under this approach, only regulatory guidelines, basic underlying ideas of a particular branch of law or legal regulation in general, which the legislator directly calls “principles” or regards them as such in the regulatory acts, are considered as principles of law. All other provisions that are formulated by legal scientists based on the interpretation and analysis of regulatory legal acts, other sources of law, legal practice and realities in general, which are sometimes called principles of law, being however not normative but doctrinal in nature, remain to be in the sphere of legal awareness, i.e. outside of the field of law. They can be called doctrinal principles of law. Examples of such doctrinal principles are the principle of objective truth, the principle of procedural economy and others.¹ We should note that the positivist approach to the study of the principles of law has been already used in some works on the principles of various branches of law:² for example, in works on the principles of the Russian administrative proceedings.³ However, in our opinion, this issue requires further study. In addition, to date, there have been no specific studies of the principles of administrative proceedings in Armenia or comparative works on this topic.

2) In this article, the concept of “principles of administrative court procedure” are equated with that of “principles of administrative procedural law”.

¹ As for administrative procedural law per se, the principle of individual and collegial consideration of cases can provide an example of the doctrinal principle (see: *Kommentarij k Kodeksu administrativnogo sudoproizvodstva RF* [Commentary on the Code of Administrative Judicial Proceedings of the Russian Federation], edited by A.A. Muravyev, Moscow, 2015, SPS “Consultant Plus” Publ.; Tomchik S.Yu. *Zakonodatel’noe regulirovanie principov administrativnogo sudoproizvodstva* [Legislative Regulation of the Principles of Administrative Judicial Proceedings], *Rossijskij zhurnal pravovyh issledovanij* [Russian Journal of Legal Studies], 2016, no. 2 (7), p. 141-142). Indeed, Article 29 of the Code of Administrative Proceedings of the Russian Federation deals with the individual and collegial consideration of cases, however, this article is included in Chapter 3 “Composition of the Court. Challenges”, and not in Chapter 1 “Basic Provisions”, which indicates that the legislator does not include this provision as one of the main provisions of the administrative proceedings, i.e. its principles.

² See, for example, A. Demichev. *Pozitivistskaya klassifikaciya principov grazhdanskogo processualnogo prava Rossijskoj Federacii* [Positivist classification of the principles of civil procedural law of the Russian Federation], *Arbitrazhnyj i grazhdanskij process* [Arbitration and civil procedure], 2005, no. 7, p. 5-10; Ilyukhina V.A., Demichev A.A. *Principy semejnogo prava Rossijskoj Federacii i Respubliki Armeniya (sravnitelno-pravovoj analiz)* [Principles of family law of the Russian Federation and the Republic of Armenia (comparative legal analysis)], *Semejnoe i zhilishchnoe parvo* [Family and housing law], 2016, no. 4, p. 7-11; Ilyukhina V.A. *Principy ugovnogo sudoproizvodstva Rossijskoj Federacii i Respubliki Armenii (sravnitel’no-pravovoj analiz)* [Principles of criminal proceedings of the Russian Federation and the Republic of Armenia (comparative legal analysis)], *Ugovnoe sudoproizvodstvo* [Criminal proceedings], 2018, no. 2, p. 43-48.

³ See S.A. Mayorova *Principy administrativnogo sudoproizvodstva* [Principles of administrative legal proceedings], *Law science and practice: Bulletin of Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia*, 2016, no. 1 (33), p. 136-138; Tomchik S.Yu. *Zakonodatel’noe regulirovanie principov administrativnogo sudoproizvodstva* [Legislative regulation of the principles of administrative legal proceedings], *Rossijskij zhurnal pravovyh issledovanij* [Russian Journal of Legal Research], 2016, no 2 (7), p. 140-143.

We have previously noted that Russia and Armenia within the USSR were part of the Soviet legal family. Now with full confidence both of these states can be attributed to the continental legal family, where the main source of law is a regulatory legal act. Accordingly, the sources for comparing the principles of administrative court proceedings of the Republic of Armenia and the Russian Federation are the Code of Administrative Court Procedure of the Republic of Armenia of December 28, 2013 No. ZR-139 (hereinafter CACP RA) and the Code of Administrative Court Procedure of the Russian Federation of March 8, 2015 No. 21-FZ (hereinafter CACP RF). Other sources in which the principles of administrative procedural law are enshrined (as well as a number of other branches) are the Constitution of the Russian Federation of December 12, 1993 and the Constitution of the Republic of Armenia of July 5, 1995. These regulatory legal acts in their states have the highest legal force and direct action. Accordingly, the basic, fundamental ideas enshrined in them should be considered as principles of law, regardless of whether they are duplicated or not in other normative acts.

Based on the positivist approach to the classification of the principles of law, the principles of administrative legal proceedings in Russia and Armenia can be divided into three groups:

- 1) constitutional principles of administrative proceedings, not duplicated in administrative procedural legislation;
- 2) constitutional principles of administrative proceedings duplicated in administrative procedural legislation;
- 3) sectoral principles of administrative legal proceedings, reflected in the CACP RF and CACP RA.

One should note that the principles of administrative court proceedings are clearly outlined in the Codes of Administrative Court Procedure of both the Russian Federation and Republic of Armenia. At the same time the Russian and Armenian legislators went different ways to consolidate them.

In the CACP of the Russian Federation the principles of administrative proceedings are listed in a separate Article 6 which is called “Principles of administrative proceedings”. It lists seven principles. However, the legislator considered it necessary to disclose the content of the principles of administrative legal proceedings in a number of subsequent articles of the CACP of the Russian Federation. And it shows that the list of principles contained in Art. 6 the CACP of the Russian Federation is not exhaustive.

S.A. Mayorova quite convincingly advanced an argument that the CACP of the Russian Federation enshrined not seven, but nine principles of administrative legal proceedings. There is also a principle of the language of administrative proceedings (Art. 12) and a principle of binding judicial acts (Art. 16).¹

¹ See: Mayorova S.A. *Principy administrativnogo sudoproizvodstva* [Principles of administrative legal proceedings] // *Yuridicheskaya nauka i praktika: Vestnik Nizhegorodskoj akademii MVD Rossii = Law science and practice: Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia*. 2016. № 1 (33). P. 137-138.

S.Yu. Tomchik also points out two contradictions in the CACP of the Russian Federation: “1) the lack of principles of the language of legal proceedings and the binding nature of court decisions in the list of Art. 6 CAP of the Russian Federation; 2) the separation of the principle of binding court decisions from the rest of the principles of administrative court procedure in Art. 15 ‘Regulatory legal acts used in the resolution of administrative cases’”¹.

In general, the construction of consolidating the principles of administrative legal proceedings enshrined in the CACP of the Russian Federation seems to be unsuccessful. Highlighting a separate article listing the relevant principles, the legislator decided to disclose their content in subsequent articles, adding two principles not listed in the previously given list. If we proceed from the idea of consolidating the principles of administrative court proceedings in one article then it makes sense to reveal their contents in the same place. Consequently, we cannot agree with the opinion of S.A. Mayorova that “from the point of view of the legislative technique, the consolidation of the principles of administrative court procedure in the CACP of the Russian Federation as a whole seems to be quite successful”².

In our opinion, the construction of consolidating the principles of administrative legal proceedings used in CACP of the Republic of Armenia is more preferable. This document contains a separate chapter, chapter 2, which is called “The Principles of Administrative Justice”. In Articles 5-9 of this chapter, the legislator does not simply list the five principles, but also explains their content. Chapter 2 also devotes a separate article to each of the principles. Thus there are no grounds for discussions about whether there are other provisions in the CACP of the Republic of Armenia which can be the principles of administrative proceedings.

In our opinion, the common flaw of both the CACP of the Russian Federation and the CACP of the Republic of Armenia is that the legislator uses the word «principle» only in the titles of Article 6 of the CACP of the Russian Federation and Chapter 2 of the CACP of the Republic of Armenia. In some cases, this would remove doubts about the identification of a particular provision as a principle of administrative proceedings.

We should note that the main task of this article does not include the analysis of the content of the principles themselves (including comparative ones). The purpose of this work is a classification of the principles of administrative proceedings in Russia and Armenia.

Below is a comparative table of the principles of administrative legal proceedings in Armenia and Russia compiled by the authors of the article.

¹ Tomchik S.Yu. *Zakonodatel'noe regulirovanie principov administrativnogo sudoproizvodstva* [Legislative regulation of the principles of administrative legal proceedings] // *Rossijskij zhurnal pravovyh issledovanij = Russian Journal of Legal Research*. 2016. № 2 (7). P. 141.

² Mayorova S.A. *Principy administrativnogo sudoproizvodstva* [Principles of administrative legal proceedings] // *Yuridicheskaya nauka i praktika: Vestnik Nizhegorodskoj akademii MVD Rossii = Law science and practice: Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia*. 2016. № 1 (33). P. 137.

Principles of administrative proceedings	
The Republic of Armenia	The Russian Federation
I. Constitutional principles of administrative legal proceedings, not duplicated in CACP of the Republic of Armenia and the CACP of the Russian Federation	
The principle of administering justice only by the court (Article 91 of the Constitution of the Republic of Armenia).	The principle of the administration of justice only by the court (Article 124 of the Constitution of the Russian Federation).
The principle of ensuring the right to legal assistance (Articles 18, 20 of the Constitution of the Republic of Armenia).	The principle of ensuring the right to receive qualified legal assistance (Article 48 of the Constitution of the Russian Federation).
The principle of respect for the dignity of the individual (Article 14 of the Constitution of the Republic of Armenia).	The principle of respect for the dignity of the individual (Part 1 of Article 21 of the Constitution of the Russian Federation).
The principle of legality (Article 47 of the Constitution of the Republic of Armenia)	
The principle of a fair trial (Article 19 of the Constitution of the Republic of Armenia).	
The principle of conducting proceedings within a reasonable time (Art. 19 of the Constitution of the Republic of Armenia).	
The principle of independence and impartiality of the court (Article 19 of the Constitution of the Republic of Armenia).	
The principle of equality of all before the law (Article 14.1 of the Constitution of the Republic of Armenia).	
	The principle of protection of rights and freedoms by all means not prohibited by law (Part 2 of Article 45 of the Constitution of the Russian Federation).

II. Constitutional principles of administrative legal proceedings duplicated and/or specified in CACP of the Republic of Armenia and CACP of the Russian Federation	
The principle of the language of administrative proceedings (Article 9 of the CACP RA, Article 12 of the Constitution of the Republic of Armenia).	The principle of the language of administrative proceedings (Article 12 of the CACP RF, Article 69 of the Constitution of the Russian Federation).
The principle of publicity of judicial proceedings (Article 8 of the CACP RF, Article 19 of the Constitution of the Republic of Armenia).	The principle of publicity and openness of judicial proceedings (Clause 5 of Article 6; Article 11 of the CACP RF; Parts 1, 2 of Article 123 of the Constitution of the Russian Federation).
	The principle of equality before law and the court (Clause 2 of Article 6, Article 8 of the CACP RF; Part 1 of Article 19 of the Constitution of the Russian Federation).
	The principle of legality and fairness in the consideration and resolution of administrative cases (Clause 3 of Article 6, Article 9 of the CACP RF; Article 15 of the Constitution of the Russian Federation).
	The principle of independence of judges (Clause 1 of Article 6, Article 7 of the CACP RF; Article 120 of the Constitution of the Russian Federation).
	The principle of competition and equality of the parties (Clause 7 of Article 6, Article 14 of the CACP RF; Part 3 of Article 123 of the Constitution of the Russian Federation).
III. Sectoral principles of administrative legal proceedings, reflected in the CACP of the Republic of Armenia and the CACP of the Russian Federation	
The principle of establishing the factual circumstances ex officio (Article 5 of the CACP of the Republic of Armenia)	

The principle of implementation of administrative legal proceedings on the basis of equality of the parties (Article 6 of the CACP of the Republic of Armenia)	
The principle of oral proceedings (Article 7 of the CACP of the Republic of Armenia).	
	The principle of the implementation of administrative proceedings within a reasonable time and the execution of judicial acts in administrative cases within a reasonable time (Clause 4 of Article 6, Article 10 of the CACP of the Russian Federation).
	The principle of the immediacy of the trial (Clause 6 of Article. 6, Article. 13 of the CACP of the Russian Federation).
	The principle of binding judicial acts (Article 16 the CACP of the Russian Federation).

I. Constitutional principles of administrative proceedings, not duplicated in the CACP of the Republic of Armenia and CACP of the Russian Federation.

Since the legislators of Russia and Armenia do not use the concept of «principle» as the basic, guiding idea underlying a specific branch of law or the entire legal regulation as a whole, the identifying of constitutional principles of a particular branch of law is always problematic. Accordingly, there arises the problem of interpretation and the question whether that or the other provision normatively enshrined in the Constitution can be considered a principle of law. Below the authors of this work offer their own vision of the constitutional principles of administrative legal proceedings, not claiming of course to be in possession of ultimate truth. Note that the names of all principles are notional.

In our opinion, the Constitution of the Russian Federation enshrines four principles of administrative proceedings, not duplicated in the administrative procedural legislation, namely:

- 1) the principle of the administration of justice only by the court (Article 124 of the Constitution of the Russian Federation);
- 2) the principle of ensuring the right to receive qualified legal assistance (Article 48 of the Constitution of the Russian Federation);
- 3) the principle of respect for the dignity of the individual (Part 1 of Article 21 of the Constitution of the Russian Federation);

4) the principle of protection of rights and freedoms by all means not prohibited by law (Part 2 of Article 45 of the Constitution of the Russian Federation).

In the Armenian Constitution, we find twice as many principles of administrative proceedings, i.e. eight:

1) the principle of administering justice only by the court (Article 91 of the CACP of the Republic of Armenia);

2) the principle of ensuring the right to legal assistance (Article 18, 20 of the CACP of the Republic of Armenia);

3) the principle of respect for the dignity of the individual (Article 14 of the CACP of the Republic of Armenia);

4) the principle of legality (Article 47 of the CACP of the Republic of Armenia);

5) the principle of a fair trial (Article 19 of the CACP of the Republic of Armenia);

6) the principle of conducting proceedings within a reasonable time (Article 19 of the Constitution of Armenia);

7) the principle of independence and impartiality of the court (Article 19 of the Constitution of Armenia);

8) the principle of equality of all before the law (Article 14.1 of the CACP of the Republic of Armenia).

As we see, in both states the first three of the named principles coincide. In addition, one principle fixed in Russia is absent in the legislation of Armenia – the principle of protection of rights and freedoms by all means not prohibited by law.

The principles of the first group in Armenia include four more principles: the principle of legality, the principle of fair trial, the principle of conducting proceedings within a reasonable time, the principle of independence and impartiality of the court, the principle of equality of all before the law (the first three of them appear in one article of the CACP of the Republic of Armenia). They have analogues in the Constitution of the Russian Federation, but at the same time they are duplicated in the CACP of the Russian Federation. For this reason, they are included in the second group of principles of administrative legal proceedings. Thus, it is not about the absence of these principles in the legislation of Russia, but only about the different level of their consolidation.

II. Constitutional principles of administrative proceedings, duplicated and/or specified in CACP RA and CACP RF.

In Russia, this group includes seven principles:

1) the principle of the language of administrative proceedings (Article 12 of the CACP RF, Article 69 of the Constitution of the Russian Federation);

2) the principle of publicity and openness of judicial proceedings (Clause 5, Article 6, Article 11 of the CACP RF; Parts 1, 2 of Article 123 of the Constitution of the Russian Federation);

3) the principle of equality before law and the court (Clause 2 of Article 6, Article 8 of the CACP RF; Part 1 of Article 19 of the Constitution of the Russian Federation);

4) the principle of legality and fairness in the consideration and resolution of administrative cases (Clause 3 of Article 6, article 9 of the CACP RF; Article 15 of the Constitution of the Russian Federation);

5) the principle of independence of judges (Clause 1 of Article 6, Article 7 of the CACP RF; article 120 of the Constitution of the Russian Federation);

6) the principle of competition and equality of the parties (Clause 7 of Article 6, Article 14 of the CACP RF; Part 3 of Article 123 of the Constitution of the Russian Federation);

7) the principle of publicity of the proceedings (Article 16 of the RA Criminal Procedure Code, Article 19 of the RA Constitution).

In Armenia, this group is represented by only two principles:

1) the principle of the language of administrative proceedings (Article 9 of the CACP RA; Article 12 of the Constitution of the Republic of Armenia);

2) the principle of publicity of judicial proceedings (Article 8 of the CACP RA; Article 19 of the RA Constitution).

Both of these principles are similar to the first two Russian principles of the second group. One should mention the difference in the formulations of the second principles: the principle of publicity and openness of judicial proceedings (in Russia) and the principle of publicity of judicial proceedings (in Armenia). However, the comparative analysis of the relevant constitutional norms of the Russian Federation and the Republic of Armenia, – Article 11 of the CACP RF and Article 8 of the CACP RA – leads to the conclusion that the legislators of the two states by using slightly different formulations and concepts describe the same phenomena of legal reality.

One should also point out (this was already discussed earlier) that the second group of principles in Russia includes the principle of equality before law and the court. In Armenia, a similar principle is fixed only at the constitutional level. Also the Russian single principle of legality and justice in the consideration and resolution of administrative cases is similar to two different principles of administrative justice of Armenia, fixed only at the constitutional level: the principle of legality and the principle of fair trial.

III. Sectoral principles of administrative legal proceedings, reflected in the CACP RA and CACP RF.

Both in Russia, and in Armenia, this group includes three principles. And within the framework of this group, none of them coincides.

In Russia, there are three sectoral principles of administrative proceedings:

1) the principle of the implementation of administrative proceedings within a reasonable time and the execution of judicial acts in administrative cases within a reasonable time (Clause 4 of Article 6, Article 10 of the CACP RF). In the legislation of Armenia, as we noted earlier, the principle of conducting proceedings within a reasonable timeframe is enshrined only at the constitutional level (Article 19 of the Constitution of Armenia) and is not duplicated in the sectoral legislation;

2) the principle of immediacy of the trial (Clause 6 of Article 6, Article. 13 of the CACP RF). In the legislation of Armenia this principle is absent;

3) the principle of binding judicial acts (Article 16 of the CACP RF). There are similar norms in the Armenian legislation, however, they are not clearly formulated as a principle of administrative legal proceedings.

The following principles of administrative court procedure can be distinguished in the CACP RA:

1) the principle of establishing the factual circumstances *ex officio* (Article 5 of the CACP RA). By consolidating this principle, the Armenian legislator focuses on the active role of the court in administrative proceedings. The court is obliged to establish the factual circumstances *ex officio*. At the same time, the court is “not bound by evidence, petitions, suggestions, explanations and objections submitted by participants in the administrative process, and on its own initiative takes equal measures to acquire the necessary and accessible information about the real facts necessary to resolve a particular case”. The court also has a wide range of powers upon request from the parties to provide all the evidence necessary to clarify and assess the actual circumstances of the case, clarify fuzzy claims, etc. Unfortunately, the Russian legislation does not have a similar principle of administrative legal proceedings. Only Part 2 of Article 14 of the CACP of the Russian Federation states that the court in administrative proceedings is granted with the authority to identify and collect evidence on its own initiative “for the full and complete establishment of all the actual circumstances of the administrative case.” We believe that in this situation it is advisable to borrow the Armenian experience and enshrine in Article 6 of the CACP of the Russian Federation the principle of the court’s active role in administrative proceedings (the principle of establishing the factual circumstances *ex officio*) with its subsequent clarification in the CACP of the Russian Federation, since it substantially corresponds to the essence of administrative proceedings;

2) the principle of implementation of administrative proceedings on the basis of equality of the parties (Article 6 of the CACP RA). The states that “the court is obliged to provide the parties with equal opportunities throughout the entire course of the proceedings, including allowing each party to present its position on the case in full.” Thus, it can be said that it is substantively similar to the principle of competition and equality of the parties, enshrined in Clause 7 of Article 6, Article 14 of the CACP RF and Part 3 of Article 123 of the Constitution of the Russian Federation. However, in Russian legislation, this principle is clarified to a greater extent;

3) the principle of oral proceedings (Article 7 of the CACP RA). The specified article establishes the rule that cases are tried in court orally, and in cases established by the CACP RA, the proceedings are conducted (may be conducted) in a written form. There is no similar norm specifically as a sectoral principle in the legislation of Russia, however, Article 140 of the CACP RF “Oral proceedings” contains similar rules.

Summing up the comparative study of the principles of administrative proceedings in Russia and Armenia, we draw the following conclusions:

1. The principles of administrative proceedings in Russia and Armenia can be classified from the position of a positivistic approach, which is facilitated by fixing them in the chapters with the appropriate name in CACP RF and CACP RA. All principles of administrative proceedings in Russia and Armenia can be divided into three groups: 1) constitutional principles, not duplicated in administrative procedural legislation; 2) constitutional principles duplicated in administrative procedural legislation; 3) sectoral principles, which are reflected in the Codes of Administrative Court Procedure of Russia and Armenia.

2. In total, in the Russian Federation and in the Republic of Armenia, we can distinguish thirteen normatively fixed principles of administrative court procedure. The constitutional principles of administrative proceedings in Russia, not duplicated in the CACP RF, include four principles, and in Armenia, not duplicated in the CACP RA, there are eight; constitutional principles, duplicated in the administrative procedural legislation: six principles in Russia, two principles in Armenia; sectoral principles of administrative proceedings: three principles in Russia and three principles in Armenia.

3. Regardless of the level of consolidation of the total number of principles of administrative proceedings in Russia and Armenia, nine principles fully coincide. Another Russian principle (legality and justice in the consideration and resolution of administrative cases) corresponds to two different Armenian principles (the principle of legality and the principle of a fair trial). In addition, in the Russian Federation there are three principles that have no direct analogues in the administrative procedural legislation of the Republic of Armenia: the principle of protecting rights and freedoms by any means not prohibited by law; the principle of immediacy of the trial and the principle of binding judicial acts. The Armenian administrative procedural legislation, in turn, has two principles that have no analogues in the legislation of Russia: the principle of determining the factual circumstances *ex officio* and the principle of oral proceedings.

4. Based on a comparative legal analysis of the principles of administrative proceedings in Russia and Armenia, a number of practical recommendations can be made to improve the normative consolidation of the principles of law of both states.

Firstly, the construction of fixing the principles of administrative legal proceedings in a separate chapter of the Code of Administrative Court Procedure (CACP RA) seems to be more preferable than doing so in a separate article with their subsequent clarification in other articles (CAP RF). We realize that in the framework of improving the CACP of the Russian Federation, the legislator is unlikely to introduce the additional chapter “Principles of administrative legal proceedings”, therefore we suggest improving the existing structure as follows. We consider it expedient to supplement Article 6 with Clause 8 “8) the principle of the language of administrative proceedings” and Clause 9 “9) the principle of binding judicial acts”, because currently there is a regulatory inconsistency, expressed in the fact that in Article 6 of the CACP of the Russian Federation seven principles of administrative legal proceedings are named, and among the subsequent articles, explaining their content, two more principles are fixed.

Secondly, despite the fact that the Constitutions have a direct effect, taking into account the specifics of the mentality and legal awareness of Russia and Armenia, within which the Fundamental Law is more perceived as a declarative document, it is advisable to duplicate all the constitutional principles of administrative court procedure in sectoral codes.

Thirdly, in order to avoid discrepancies in the identification of normatively fixed provisions, it is expedient to use the word “principle” in the titles of the relevant articles of the CACP RF and CACP RA just as principles of administrative legal proceedings. For example, Article 7 of the CACP RF should not be called “Independence of Judges”, but “Principle of Independence of Judges”, Article 8 – not “Equality of all before the law and the court”, but “Principle of equality of all before the law and the court”, etc.

Fourth, the legislator of Russia, based on the Armenian experience, should consider the possibility of normative consolidation in the CACP of the Russian Federation of the principle of the active role of the court in administrative proceedings and the principle of oral proceedings, and the Armenian legislator, based on the Russian experience, should fix the principle of the immediacy of the trial and the principle of binding judicial acts.

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Information about the authors

Alexey Demichev (Nizhny Novgorod, Russia) – Professor of the Department of Civil Law and Procedure of the Academy of the Ministry of Internal Affairs of the Russian Federation in Nizhny Novgorod, Honorary Worker of Higher Professional Education of the Russian Federation, Doctor of Legal Sciences, Candidate of Historic Sciences (Ankudinovskoe shosse 3, Nizhny Novgorod, 603081; e-mail: aadem@bk.ru);

Vera Iliukhina (Ryazan, Russia) – Associate Professor of the Department of Theory of State and Law, International and European Law of the Academy of the Federal Penitentiary Service of Russia, Candidate of Legal Sciences (Sennaya 1, Ryazan, 390000; e-mail: eva3011@bk.ru).

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COMMENTARIES

EVGENII PETROV

Associate Professor of Private Law
Research Centre on behalf of S.S.
Alekshev, Candidate of Legal Sciences

INTERPRETATION OF WILLS IN RUSSIA. CALL FOR REFORM

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Abstract: The article describes the current rules and case law on drawing up wills in Russia. The author argues that the literal approach and the lack of stop-gap rules are hardly compatible with succession law policy. Due to the problem of correct interpretation of a will, we cannot talk about real testamentary freedom. The situations with wills are usually complicated because the authors are absent. As for interpretation of wills, the contemporary landscape shows that most of European countries prefer intentional approach: when the interpreter would take into account the indirect extrinsic evidence. Speaking of Russian approach, the priority is given to the literal interpretation: the methodological recommendations on drawing up the rights of inheritance clarify that in order to understand the literal meaning of words and phrases in the will, their plain meaning should be determined, and when interpreting the legal terms, their meaning set forth by the legislator in the corresponding legal instrument shall be used. On the base of comparative research and empirical experience “new” intentional approach is proposed.

Key words: construction, will, testator, intention, interpretation, stop-gap rules.

Article 1132 of the Civil Code provides:

When the will is being interpreted by a notary, executor or court, the literal sense of words and phrases contained therein shall be taken into account.

In case of ambiguity of the literal sense of any provision of the will, it shall be determined by comparison of such provision with other provisions and the general idea of the will. In such case, the implied intent of the testator shall be implemented to the fullest possible extent.

(a) Competing approaches. In the absence of the correct interpretation of a will, there is no real testamentary freedom. The dispute between different approaches to interpretation of a will through its literal sense or its intent is as old as the hills. The best known example in respect of succession is *Causa Curiana*¹. This competition has remained in the modern laws. Both approaches are aimed to determine the meaning of the text. The situation with the will is complicated because the author who could have clarified it has long since died. The first approach provides for doing this strictly based on the literal sense of the wording. The advantage of this approach is its simplicity and, therefore, inexpensiveness. A testator should take care themselves of understanding it properly. The literalists assert that if an interpreter does not have confidence in the plain meaning, the risk of coming to improper conclusion is comparatively the same. The second approach allows the court in case of ambiguity (if it is clear, it does not need interpretation) to distinguish the true intent of the particular but not abstract testator who is not to be an expert in semantics and legal niceties, and recognizes the priority of such true intent over the literal sense of the wording.

The contemporary landscape shows that most of European countries prefer intentional approach.² In common law countries after *Perrin v Morgan* [1943], the so-called “arm chair doctrine” is used for interpretation of wills. Reviewing the will from the point of view of the testator, the interpreter, in case of finding any ambiguity, shall take into account the indirect extrinsic evidence. Such evidence includes testator’s business occupation, domicile, native language, and other personal peculiarities on the date of execution of the will. Since 1983, in England the direct extrinsic evidence such as the testator’s correspondence and diaries, and the testimony of the solicitor who prepared the draft can be used in accordance with Section 21 of Administration of Justice Act 1982 (latent ambiguity, equivocation). However, the informal documents and oral evidence shall not substitute or amend testamentary dispositions.³ The Civil law countries use a similar to “arm-chair doctrine” method to find out testator’s intention (for example, Article 133 of the German Civil Code). Moreover, intentional approach contains supplementary

¹ The will said, “If I give birth to a son and he dies before coming of age I wish Curius to be my successor.” No son was born. Quintus Mucius Scaevola proved that in such case, according to the wording of the will, Curius had no rights and the estate to be transferred to the legal successors. Lucius Licinius Crassus referred to the intent of the testator and advocated for the inheritance right of Curius.

² See The Max Planck Encyclopedia of European Private Law, 2012. Ed. by J. Basedow, K.J. Hopt, R. Zimmermann, and A. Stier, Vol. 2, p.1775-1776 (author – S. Herler).

³ Regarding England see R. Kerridge, Parry & Kerridge, *The Law of Succession*, 13th. ed., 2016, p. 268. A correction of technical errors when wrong wording was included (or proper wording was missed) in process of drafting is called rectification. In *Marley v Rawlings* (2014) rectification allowed to retain a will signed by Mr Rawling which was actually a will of his wife.

interpretation techniques to reconcile ambiguity. Such measures comprise “stop-gap rules”, i.e. a prompt, for the interpreters that, for example, suggest how to proceed when several persons come within the definition of the “only heir” or when a person appointed as testamentary heir dies before the opening of succession (the similar rule was provided in Article 95 of the Draft Civil Code of Russian Empire), maxims of drawing up, i.e. principles for judges, which shall be applied in insoluble situations preventing invalidation of the will due to uncertainty.¹

(b) Russian approach: priority of the literal interpretation.

An Article devoted specifically to the rules for interpretation of a will first appeared in the Russian law. That is not to say that the issue regarding interpretation of a will was not relevant in the period of the Soviet Union. Obviously, the hegemony of open public wills prevented any possible disputes. Experienced notaries converted the intents of a testator into clear legal wordings, excluded the equivocal language and so on. However, even in those times there was much concern about interpretation of a will, for instance, when the will was changed by the execution of a new one. After the complication of individual property environment, the appearance of private and emergency wills, and the increase in the number of cases when the wills were executed abroad, the rules for interpretation become more urgent.

The article under consideration forms a combination of Article 431 of the Russian Civil Code that provides for the contract interpretation procedure and Article 1167 of the Community of Independent States Model Civil Code that provides for the use of the literal sense of words and phrases when interpreting the wills or, in case of any ambiguities, for the comparison of the will provisions. In other words, the Russian Civil Code gives priority to the literal interpretation similar to the contract interpretation procedure. Neither the notary nor court may distance from the doctrine of the literal interpretation of will wordings or replace such wordings with the reconstructed true intention of the testator considered by them as the most probable.

Thus, when interpreting a will, the interpreter who may be a notary, executor or court (final interpreter) shall proceed from the literal sense of words and phrases. Hence, the methodological recommendations approved by the Federal Notary Chamber on drawing up of the rights of inheritance clarify that in order to understand the literal sense (meaning) of the will words and phrases, their plain meanings should be determined; when interpreting the legal terms, their meanings set forth by the legislator in the corresponding legal instrument shall be used (Art. 33).

Drawing up a will and the commencement of succession may not coincide in time or in place. The literal sense of the will words and phrases shall be determined with the consideration for the date and place of the will issue (for the purpose of interpretation, a will begins to “tell” at the date of its execution). Thus, the phrase “I leave everything

¹ See, for example, Max Rheinstein and Marry Ann Glendon, *The Law of Decedents' Estate*, 1971, p. 466-476.

to my wife” shall be interpreted in favor of the person who was the spouse at the date of the will issue. It might also refer to the lack of stop-gap provisions in Russian succession law. What does the wording “spouse” mean: condition or simple identification? Testator living in Germany distributes the estate among his/her children assuming that any of the early deceased children will be substituted with his/her issues. Even if the last habitual residence of such testator was Russia, our opinion is that the will shall be interpreted using a “prompt” which was likely to be considered by the testator as an extension of the will’s text (search of context within literal approach).¹

That might be the end of the interpreter’s efforts. The Russian law does not mention any indirect or direct extrinsic evidence.² The above mentioned methodological recommendations clarify that the law does not entitle the notaries to use other documents such as testator’s letters and diaries, etc., in addition to the will, for determination of the true intention of the testator. According to the example popular in Germany, if testator leaves to his/her friend a library the heir will receive some books but not the collection of wines regardless of the fact that testator always used the term ‘library’ in that meaning.³

Is such decision consistent? The key feature that distinguishes the interpretation of a will from the interpretation of a contract is the absence of other party who may rely on the words but not on the thoughts. Therefore, the rules for contract interpretation are usually more stringent. In contrast, the article 1132 sets forth stricter rules for the wills. Hence, the case law gives the examples of the literal interpretation of the wills against actual intention. Paragraph 79 of Resolution of Plenum of the Supreme Court of the Russian Federation no. 9 dated May 29, 2012 allows testators to make the wills with regard to buildings without determination of the fate of the land where they are located. Many aged testators act in this way, especially, when the land at the date of making of a will is still owned by the public entity assuming that the building and the land would transfer to the heir as a whole. According to the case law, the lack of arrangement regarding the title to land in a will results in adding the land (usually privatized after making a will) to the list of intestate (Decision of Division for Civil Cases of the Supreme Court of the Russian Federation No.18-KG17-116 dated 01/08/2017). Without discussing the issues related to the unity of a land and a building, it should be

¹ In Russia, there are no conflict-of-law rules devoted specifically to the issues of drawing up wills. In England, a will is interpreted in accordance with the law of the country of testator’s domicile at the date of execution a will unless the contrary testator’s intention appears. See for example John G. Ross Martyn, Jane Evans-Gordon, Alexander Learmonth, Charlotte Ford, Thomas Fletcher, Theobald on wills, 18 Edition. Thomson Reuters. 2016, p.33, 39.

² There has been a continuity in the Soviet succession law approach. For example, see B.S.Antimonov, K.A.Grave, Soviet succession law, 1955, p.186-187. The authors have defined the rule of exclusion of any extrinsic evidence. The jurisprudence of the Senate before the Revolution allowed studying of the testator’s letters.

³ Häcker B. What’s in a will? Examining the modern approach towards the interpretation and rectification of testamentary instruments, *Current Issues in Succession Law*, ed. by B. Häcker, Ch. Mitchell, p. 147.

pointed out that such approach means interpretation of the will against the intention of the decedent. There are other examples as well. It is likely that a legacy containing such wording as “pay one million rubles to my creditor Ivanov” will be executed even if by the date of opening inheritance the debt is paid.¹ Due to interpretation restricted to the text legacy providing for the use of dwelling premises made in favor of the designated person, this will hardly allow the legatee to settle in his/her house.

On the other hand, the position adopted by the legislator, that when interpreting a will it is not important to know what a testator wanted to say but it is important what he/she has said based on the lexical meaning of the words and phrases², makes the interpretation much easier, facilitates the resolution of the disputes arisen and prevents many possible errors pertaining to determination of the testator’s true intent.

(c) Comprehensive interpretation. The second sentence of Article 1132 of the Russian Civil Code comes into action when the literal sense of the words and phrases does not result in understanding by the interpreter of the sense of a testamentary arrangement (due to presence of alternatives or overall ambiguity). In such case, similar to contract interpretation, the ambiguous arrangement shall be compared with other provisions of the will and with the general idea of a will (search of intention within the will).

Further, the legislator removes the procedure provided for contract interpretation. When the above described comprehensive interpretation does not enable to clear up an ambiguity or inconsistency of a will, the interpreter’s right to use extrinsic evidence (peculiarities of life, documents and views of testator) is not mentioned in Art. 1132 of the Russian Civil Code as opposed to Art. 431 of the Russian Civil Code.

What is the point of such difference between these two articles which are almost identical in other respects? This may mean that the legislator insists, that the interpreter should not find out about the testator and see, as it is said, with his/her eyes even when a will contains ambiguities or inconsistencies that cannot be resolved through the literal or comprehensive interpretation.

But how does the Russian law propose to proceed in the event of interpretive impasse when an ambiguity or inconsistency cannot be resolved through the literal or comprehensive interpretation (“I bequeath to my niece Anna”, when the testator has two nieces Annas but he/she did not know about the existence of the second niece due to the family situation)? Shall the court in such event just declare such will null and void or acknowledge the both nieces’ right to inherit? Both solutions are hardly reasonable.

¹ It again reveals scarceness of succession law originally considered for primitive estate and testamentary dispositions. Let us assume that initially a testator bequeathed all his/her property to two his/her sons, and, after that, such testator gifted a half of the house owned by him/her to one of the sons. The other son claims for interpretations of the will in such a manner as to give him personally the other half of the house. The Russian court will dismiss his claim regardless of any extrinsic evidence because the plain meaning of words and phrases ensures unambiguousness of the testamentary arrangements.

² Abramov M.S. Interpretation and Execution of a will, *Succession Law*, 2011, no. 2, SPS KonsultantPlus Publ.

Therefore, it would be logical in the current situation, at least, to allow the court to recognize ambiguity and determine the true intent of the testator and interpret the debatable provisions of a will with consideration for extrinsic evidence when the text contains equivocation or illegible words. Apart from that if the literal meaning is clear but undoubtedly absurd and there are no doubts that the testator meant something different, it would be logical to apply the absurdity doctrine and to allow the interpreter to back out of the literal meaning of words and phrases. This is required by the principle of “*favor testament*”. Let us assume that the property was bequeathed to “issues”, but the deceased had only stepchildren.

Conclusion.

In our opinion literal interpretation of a will is against the testamentary freedom because such approach often leads to intestate succession due to the uncertainty of disposition or to devolution of the estate according to somebody’s other will but not the will of deceased.

1. Due to the growth of estate and relational diversifications, Russian succession law needs more stop-gap rules and other ancillary instruments for correct interpretation.

2. The testator and, even notary, are not final experts in language and legal meaning. It must be permitted to claim for ambiguity of a particular wording in a will upon the external evidence.

3. A huge gap between the execution a will and the commencement of inheritance is a tricky thing. Testator bequeathed a “money” further convert one into other financial asset (bonds, etc.) supposing his will covers it. There is no other party of the will, it is not a contract. Russian law does not know differentiation between special and absolute legacies. Hence the approach to drawing up a will should estimate a layman’s perception of their previous testament.

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Information about the author

Evgenii Petrov (Moscow, Russia) – Associate Professor of Private Law Research Centre on behalf of S.S. Alekseev, Candidate of Legal Sciences (house 8 building 2, Ilyinka St., Moscow, 103132; e-mail: info@privlaw.ru).

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VLADIMIR BABAKOV

Professor of the Department of Civil Law
of Saratov State Law Academy, Candidate
of Legal Sciences, Associate Professor

LEGAL OBLIGATION, ITS PLACE AND ROLE IN THE THEORY OF CIVIL-LAW PROTECTION OF STATE

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Abstract: The article is devoted to legal obligation and its influence as a legal institute. Any legal obligation becomes a substantive duty only when it is supported by the possibility and necessity of ensuring it through execution. The author presents different positions of scholars in the doctrine. The article outlines the mechanism of civil law protection of the state as a legal structure in civil legal relations; it indicates the specifics of the mechanism under consideration, its essentially complex nature; it talks about government officials minimizing the risks and the cost on the part of the state. The provisions of the Civil Code of the Russian Federation are shown as well. The analysis allows us to consider the theory of civil law protection of the state as a single system of specific elements and to argue that the current state of the mechanism for exercising civil liability of the state with certain attempts to reform it requires clarification.

Keywords: obligation, civil law, protection, state, theory.

At one time, Aristotle introduced into ontology the principle of development and the categories of act and potency¹, opposing them to each other. Non-realization of a potentially deterministic act means a break of the causal connection of phenomena, an anomaly of the logical chain of development. This logic is fully applicable to the law, confirming the correctness of the conclusion that any legal obligation becomes a substantive duty only when it is supported by the possibility and necessity of ensuring it

¹ Latin. *actus et potentia* – scholastic translation of Greek ενεργεια και δυναμις – reality and possibility (Aristotle. Collection of works in 4 vols. Vol. 1: Metaphysics. Book 11 (Θ). Moscow, 1975).

through execution. It is the separation of these two states (disregard or misunderstanding) from their ontological unity that is the reason for the traditional dispute regarding the content of a legal relationship¹, whereas in the state of *potentia* relationship its content constitutes rights and duties in the form of a legal norm, and in the state of *actio* – in a dynamic form in the process of their implementation with “nodal points” in the form of the so-called “legal states”², fixing the commission of legally significant actions (concluding an agreement of intent, signing the supply agreement, the adoption of additions / amendments to the minutes of the leasing contract, and so on).

For this reason, the point of view of N.A. Dmitrik is unacceptable: while criticizing the interpretational model of the mechanism of exercising subjective civil rights by N.I. Mirosnikova, he withdraws the legal norm (as a legal means for the subject of law itself) from the elemental composition of the mechanism of exercising subjective rights.

The mechanism of civil law protection of the state as a legal structure³, as a certain set of structural and functional unity of legal means, methods, algorithms of possible and / or mandatory actions of participants in civil legal relations and government officials aimed at minimizing the risks and the cost on the part of the state with the participation of the latter in civilian circulation, can function successfully only under the condition that the basic determinant is the necessity of legal “self-limitation” of the state. This means that within the framework of civil turnover in accordance with the Civil Code of the Russian Federation with a clear regulatory certainty of the state’s legal personality, the imperativeness of the latter’s decrees in the legal field along the entire vertical of power should be damped by both the obligatory mutual correlation of legal rights and obligations of parties of civil legal relations⁴, and the corresponding responsibility that meets the requirements of the fundamental principle of law – the equivalence. At the same time, it is important to note that the consistent implementation of the principles of operation of this mechanism ensures even more reliable protection of all participants in civil legal relations.

¹ See the editorial note stating the authors’ different opinions on “paragraph 3. Subjects and objects of civil legal relations” regarding the set of elements of civil legal relations and their interrelations”: Civil Law: course book in 3 vols. Vol. 1, ed. by N.D. Egorov, I.V. Eliseev, et al., chief editors A. P. Sergeev, Yu. K. Tolstoy. Moscow: Velbi, Prospekt Publ., 2006, p. 101.

² E. A. Sukhanov in this connection speaks about the civil law regime: *Russian civil law: course book, in 2 volumes*, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 1. General part. Real right. Inheritance right. Intellectual property rights (date of access: 09/01/2019).

³ The substantive characteristic of the corresponding concept, including model, logical structuredness, conventionality, and law-enforcement potential, is given in the following work: Baranov V. M. *Legal technique: a course of lectures*. Nizhny Novgorod: Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia, 2015, p. 363–375.

⁴ Obviously, the priority of a number of (subjective) civil rights belonging to the state cannot be questioned due to the conditionality and focus of the latter specifically on meeting public, socially significant interests (disposing of state property in privatization transactions, conclusion of state contracts, production sharing agreements, concession agreements, the withdrawal of land for state needs, the preemptive right to acquire agricultural land, etc.).

Another sign indicating the specifics of the mechanism under consideration is its essentially complex nature, which takes it beyond the framework of exclusively civil law regulation (which is not the object of this study). This is due to the need to eliminate the lacunae that occur in the implementation of civil law transactions involving the state with virtually unprofitable (indicating inefficiency, and even causing direct damage to the state) consequences when participants in such transactions are satisfied with the actual and legal status quo, and the corresponding mechanisms of evaluation, inspection, and control over such transactions are either absent or, for one reason or another, do not work¹.

The structure itself, the elemental composition and the stage-procedural implementation of the mechanism under consideration are aimed at eliminating dysfunctionality in civil law relations (in civil circulation) with the participation of the state.

The theory of public administration rightly notes that “in view of the excessive enthusiasm in accepting various conceptions, strategies and doctrines, the number of which in recent years has exceeded any reasonable bounds, it has been forgotten that we need to develop effective mechanisms to ensure efficiency, stability and resilience to failures, errors and other defects in public administration, which is characterized by relatively high defectiveness in a number of areas – significant dysfunctions of systemic and fundamental nature.”² At the same time, the state faces the risks of “dissatisfaction of legal requirements, interests and expectations of all interested parties, in particular, of the state itself”³, and “the most damaging risks in public administration are associated with the existence of corruption factors and possible manifestations of corruption”⁴.

It is obvious that the mechanism for the implementation of state power, which is transitioning to an increasingly wider use of the administrative and legal procedures (the so-called “administrative regulations”⁵), requires constant improvement of their regulatory control in order to avoid the opposite, inhibiting, deterrent effect when

¹ This refers to additional mechanisms for analyzing and verifying the existing and newly developed legislation and other regulatory documents with respect to corruption, as well as initiating the relevant procedures by higher financial and control authorities, tax, customs, antimonopoly and other services, the Accounts Chamber, prosecutors and others. As for the examples of such lacunae, we can point to the permission of Federal Border Agency (liquidated by the Decree of the President of the Russian Federation in February 2016) to independently purchase land plots or the decision to open duty free shops at border crossings, which ultimately resulted in fraudulent schemes and embezzlement of budget funds. A recent example is the large-scale abuse and theft in the field of restoration of cultural heritage objects through the Ministry of Culture of the Russian Federation detected in 2016.

² Ponkin I. V. *The theory of deviantology of public administration: uncertainty, risks, defects, dysfunctions and failures in public administration*, IGSU RANEPa under the President of the Russian Federation. Moscow: Buki-Vedi Publ., 2016, pp. 63, 187.

³ *Ibid.*, p. 47–48. See also: Hubbard R., Paquet G. *The black hole of public administration*. Ottawa: University of Ottawa Press, 2010.

⁴ Tikhomirov Yu. A. Risk in the focus of legal regulation, *Risk in the sphere of public and private law: a collective monograph*, ed. by Yu. A. Tikhomirova, M. A. Lapina; Financial University under the Government of the Russian Federation. Moscow: Ot i do Publ., 2014, p. 11.

⁵ See, for example: Yatskin, A. V. *Legal regulation of the administrative reform in modern Russia: dissertation ...* Cand. Legal Sciences. Moscow, 2007.

the latter become administrative barriers¹ unjustifiably, on the one hand, extending the limits of discretion of officials of public authorities, and on the other, limiting the freedom to exercise and the rights and interests of private entrepreneurs².

This is all the more significant since the professional activities of state and municipal servants need constant public control due to the subjective characteristics of each person endowed with the necessary powers (this is where the specifics are important – the specifics of transforming a legal prescription into the conscious-willed imperative of a positive action of the subject of law aimed at achieving the most effective result among the options normally available). “The nontransparent, and therefore irresponsible, power is ineffective”³.

Let us add to this a much earlier statement that with regards to non-transparency, the management of state property, as primarily one of the areas of public administration, is by no means a sphere of “detailed and systematic application of law”⁴.

The basic principles of civil law require the participants in civil legal relations to act in good faith in the establishment, implementation and protection of civil rights and in the performance of civil duties (par. 3 of Art. 1 of the Civil Code of the Russian Federation), as well as they prohibit taking advantage of their illegal or unfair behavior (par. 4 of Art. 1 of the Civil Code). The requirements of good faith, rationality and fairness of actions, prevention of abuse of law and violation of the moral principles of society are contained in par. 2 of Art. 6, par. 5, Art. 9, Art. 10, Art. 1064 of the Civil Code of the Russian Federation and in a number of other articles.

Speaking about these requirements, along with the requirements of national orientation, high professionalism, as well as others, imposed on public servants, I. V. Ponkin notes: “It is presumed that mistakes in public administration are innocent behavior of public services who made such mistakes. To a certain extent, one can even conditionally talk about the “right to make mistakes”. But even if one recognizes such a claim, it should

¹ See Decree of the President of the Russian Federation of 15.05.2008 no. 797 “On urgent measures to eliminate administrative restrictions in the conduct of entrepreneurial activity”, Collection of Legislation of the Russian Federation, 2008. no. 20, art. 2293. “In contrast to the barriers caused by structural and strategic circumstances, the barriers operating in the field of regulation appear as a result of acts issued or carried out by government executive bodies, local governments, non-state or professional self-regulating bodies, to which governments delegated the regulatory authority. They include administrative barriers to entry to the market, stipulating exclusive rights, the introduction of certificates, licenses and other authorization procedures required to start conducting business operations and actions (Article III, Chapter 7 of the Model Competition Code, 2010, United Nations Conference on Trade and Development. Model Act on Competition (2010), at http://www.unctad.org/en/docs/tdrbpconf7L7_en.pdf.

² See, in particular: Efremov, M. O. *Administrative procedures as a form of realization of the competence of public authorities in relations with individuals*, dissertation ... Cand. Legal Sciences. Moscow, 2005, p. 19.

³ Khabrieva T. Ya. Administrative procedures and administrative barriers: in search of an optimal correlation model, *Administrative procedures and control in the light of European experience*, ed. by T.Ya. Khabrieva and J. Marku, Moscow: Statute Publ., 2011, p. 115.

⁴ Wilson W. The Study of Administration, *American Political Science Quarterly*. 1887. Vol. 2, no. 2, p. 212.

be significantly limited – both by the scale of the actual or expected (possible) negative consequences of an error, and by the number of such events (errors) per unit of time and per segment or government body, per official”¹.

A large-scale example of the dysfunctional role of pseudo-legal decisions, deliberately implemented nevertheless in a strictly ideological pattern², was the so-called mortgage auctions held in Russia during the reforms of the 1990s.

The variety of legal facts that entail the need to use the mechanism of civil law protection of the state is quite obvious and may be a consequence of both lawful and illegal actions (inaction) of authorities, the commission of which should entail the onset of civil liability of the respective subjects.

Article 46 of the Constitution of the Russian Federation guarantees the right to judicial protection to everyone without any restrictions, and in accordance with Article 53 of the Constitution everyone has the right to compensation by the state for harm caused by illegal actions (or inaction) of state authorities or their representatives.

S. F. Afanasyev in his work “The illusiveness of accessibility of justice with regards to claims for damages compensated by the state under par. 2, Article 1070 of the Civil Code of the Russian Federation” gives convincing examples when the courts of general jurisdiction, using the provision of par. 1, part 1 of Art. 134 of the Civil Procedure Code of the Russian Federation as a procedural tool (namely, the institution of jurisdiction) “too harshly”, virtually eliminates the very right to legal access to justice. Claims for damages compensated by the state in the manner of par. 2 of Art. 1070 of the Civil Code of the Russian Federation “are not generally accepted by the courts for consideration”, if they are about compensation for damages caused by the administration of justice, in the absence of a sentence stating the guilt of the particular judge³.

According to par. 1, part 1, Article 134 of the Civil Procedure Code of the Russian Federation, the court refuses to accept the claim, if it “is not a subject for consideration in civil proceedings, since the application is considered in a different judicial procedure”.

¹ I. V. Ponkin. *The theory of deviantology of public administration* ... p. 64, 196. He also cited the phrase attributed to Joseph Fouche, Napoleon's Police Minister: “C'est pire qu'un crime, c'est une faute” – “It was worse than a crime; it was a blunder.”

² In connection with this, V. M. Baranov, citing the work of V. A. Tumanov, correctly notes the adoption of such regulatory decisions, which even in an abstract legal, externally ideologically neutral form are essentially the realization of a certain ideological attitude, and “at the same time, the ideological influence turns out to be hidden behind the legal technique” (See V. Baranov. *Essays on rule-making techniques. Selected Works*. Nizhny Novgorod: Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia, 2015, p. 376; See also Tumanov V. A. *Ideology and law: some aspects of the interaction*, V. A. Tumanov. *Selected works*, Moscow, 2010, p. 339).

³ See: S.F. Afanasyev. The illusiveness of accessibility of justice with regards to claims for damages compensated by the state under clause 2, Art. 1070 of the Civil Code of the Russian Federation, *Russian judge*, 2014, no. 11, p. 40–44. See also A. Kovler. Russia in the European Court: 2012 – the year of the “great breakthrough” // *Russian justice*. 2013. no. 3, p. 16. We should point out that the wording of par. 1. of Art. 11 of the Civil Code of the Russian Federation “Judicial Protection of Civil Rights” includes a point on the protection of rights “in accordance with the jurisdiction of cases established by procedural legislation”.

The legislator, however, did not clearly define the “different judicial procedure” here, and individual courts (judges), voluntarily or involuntarily creating a situation of competition in the system of judicial bodies¹, as well as, apparently being guided by the spirit of corporate community, casuistically sharing the concepts of justice and legal proceedings, began to make decisions on claims under par. 2 of Art. 1070 of the Civil Code of the Russian Federation on compensation for damages caused by the administration of justice, using, for example, the following wording: “currently the grounds and procedure for damages compensated by the state ... have not been regulated in legislation.”²

And this is despite the fact that, on the one hand, “the absence of a national legislative framework should not serve as a basis for refusing to work on the case”³, and “the existence and extent of any damage are the subject of precisely those proceedings that the applicant unsuccessfully tried to initiate. Thus, the objection of the authorities of the Russian Federation is devoid of substance ... and is subject to rejection”⁴. On the other hand, the grounds for the state to compensate for damages that have arisen during the implementation of civil proceedings due to unlawful actions (inaction) of the court (judge) may arise even if the judge’s fault is established in the framework of the civil proceedings⁵ and “in the absence of national legal regulation (the legislation on the grounds and procedure for state compensation for damages caused by illegal actions (inaction) of the court (judge)), the norms of the Constitution of the Russian Federation should be directly applied and thereby there should be accepted all necessary actions to implement the decisions of the Constitutional Court of the Russian Federation ...”⁶. Hence

¹ See Vershinin A.P. *Choice of the method of protection of civil rights*. St Petersburg, 2000, p. 209; Zhuikov V.M. *Judicial Reform: Problems of Access to Justice*. Moscow, 2006, p. 46; Development of procedural legislation: the fifth anniversary of the actions of the Arbitration Procedure Code of the Russian Federation, the Civil Procedure Code of the Russian Federation and the Federal Law of the Russian Federation “On Arbitration Courts in the Russian Federation”. Voronezh, 2008; Online interviews with V. D. Zorkin, Chairman of the Constitutional Court of the Russian Federation: “The Preliminary Results of the Activities of the Constitutional Court of the Russian Federation on the Threshold of the 15th Anniversary”, SPS Consultant Plus Publ.

² See Appeal determination of Volgograd Regional Court of 05.06.2013 on case no. 33-5894 / 13, SPS ConsultantPlus Publ. See also Determination of the Supreme Court of the Russian Federation of June 01, 2010 on case no. 67-G10-10; Appeal determination of the Lipetsk Regional Court of July 3, 2013 on case no. 33-1646a / 2013, etc., SPS ConsultantPlus Publ.

³ Resolution of the European Court of Human Rights, December 13, 2011 “Vasilyev and Kovtun v. Russia” // SPS “ConsultantPlus” Publ.

⁴ Resolution of the European Court of Human Rights, September, 16, 2010 “Chernichkin v. Russia”, SPS “ConsultantPlus” Publ.

⁵ Resolution of the Constitutional Court of the Russian Federation no. 1-P of January 25, 2001 “On the case of verifying the constitutionality of the provision of par. 2. of Art. 1070 of the Civil Code of the Russian Federation in connection with complaints from citizens I. V. Bogdanov, A. B. Zernova, S. I. Kalyanova and N. V. Trukhanov”, SPS “ConsultantPlus” Publ. (date of access: 09/18/2016).

⁶ Determination of the Constitutional Court of 27.05.2004 no. 210-0 “On refusal to accept a complaint from citizen A.S. Chernichkin for violation of his constitutional rights”, SPS “ConsultantPlus” Publ. (date of access: 09/18/2016).

the requirements of par. 1, part 1 of Article 134 of the Civil Procedure Code of the Russian Federation, according to which the court refuses to accept the claim if it is not a subject to consideration in civil proceedings, because the claim is being considered in a different judicial procedure, cannot be an obstacle to accept such claims by the judge.

The theory of implementation and protection of civil rights in stages links the consolidation of a certain set of legal facts (legal definitions necessary to apply the relevant rule of law) to the stage of formation of the subjective right preceding directly the establishing of the right as a stage of consciously-willed use of the subjective right by its holder (in reality it is one stage as a rule). The other stages are procedural realization of the right, protection of the violated right and the actual implementation of it.

The mechanism of implementation and protection of civil rights itself is not considered as a rigid structure, as it allows and even requires a certain adaptation and mobile configuration, taking into account the specifics of the tasks to be solved and the required goals.

At the same time, for the mechanism of civil law protection of the state as a locally specified system, the obligatory, and in essence, constitutive stages are the following:

- A) pre-implementation (regulatory determination);
- B) the protection of violated or disputed civil rights in court and the implementation of subjective rights *de jure* (judicial act);
- C) provision (the implementation of subjective rights *de facto*)¹.

The stage of implementation of the law is considered as a state of the subjective right at a certain point in time, characterised by a set of certain interdependent qualitative characteristics, and the structure of the mechanism for exercising civil law protection of the state is formed by the unity of successive stages in their procedural implementation, up to the legal and actual realization of the right. Moreover, each element of the defense mechanism must be formed in such a way that it not only realizes its internal goal and justifies its essence, but also creates all the conditions for the advancement and the implementation of the next stage².

The pre-implementation stage (normative determination) of the mechanism for exercising civil law protection of the state implies the existence of the relevant requirements directly in the rule of law, which involves guaranteeing the possibility of judicial protection of the counterparty's rights and the creation of a mechanism (civil law and procedural) ensuring consideration of the claim with the obligatory participation of the official, the action (inaction) of whom caused the damage.

¹ Within the framework of the latter, various ways of exercising subjective rights are possible – voluntary execution, realization of their right by the claimant themselves (for example, by sending an executive document to the bank where the debtor's funds are held, using the mechanisms of the law on enforcement proceedings through the ECHR, etc.) .

² See Vavilin E.V. *Principles of civil law. The mechanism of implementation and protection of civil rights*, pp. 160–178; Vavilin E.V. The development of Russian legislation in the implementation and protection of civil rights, *Civil Law*, 2009, no 1; Vavilin E.V. *The mechanism of the exercise of civil rights and duties*, p. 9.

The variety of forms of state participation in civil matters, not to mention the power-political nature of the state itself and its functions such as establishing the legal basis for a single market mechanism, is due to a number of factors of the economic nature per se. The state is the largest owner of land resources, water bodies and subsoil; it has exclusive rights in relation to the continental shelf or objects excluded from civilian circulation; it may act as the lessor of the property in its possession, the customer and the buyer under government contracts; as a heir of the escheated property or treasure containing items of cultural significance; as a founder of legal entities, etc.¹.

The specificity of participation and legal regulation in such civil relations, which is unfortunately not always consistent or placed within the same conceptual framework, one way or another connected with the pre-implementation stage of the mechanism under consideration and designed to provide the necessary guarantees to the parties, is determined by the relevant regulatory legal acts². A number of provisions of these documents determine the necessary procedural regulation in the implementation of the contractual relations of the parties and the procedure for damages. In particular, on the grounds of acquisition and termination of property rights or the specifics of certain types of obligations (social contracts, state and municipal contracts, loans, etc.), the specifics of the legal status of enterprises and institutions established by the state.

For example, the ownership of subjects of the Russian Federation and municipalities may be terminated as a result of redemption by tenants – small or medium-sized businesses – in accordance with Federal Law no. 159-FZ of July 22, 2008 “On specific features of the alienation of real estate owned by the state or municipality and leased by small and medium-sized businesses and on amendments to certain legislative acts of the Russian Federation.”

In accordance with the Federal Law of 01.12.2007 no. 317-FZ “On the State Atomic Energy Corporation “Rosatom”³, the rules established by this corporation apply to the entire relevant industry (see par. 1 of Article 4, par. 3 of Article 6 and a number of other provisions of the law).

The formation of a subjective right as a stage of the mechanism of civil law protection of the state is characterized by the fact that at this moment the creation of a completed

¹ See par. 1.2 of the Law of the Russian Federation of 21.02.1992 no. 2395-1 “On Subsoil”, *Rossiyskaya gazeta*, 1992, May 5; 2013, December 30; Federal Law of 30.11.1995 no. 187-83 “On the Continental Shelf of the Russian Federation”, *Collection of Legislation of the Russian Federation*, 1995, no. 49, Art. 4694; *Rossiyskaya gazeta*, 2014, 5 February; par. 1, Art. 16 of the Land Code of the Russian Federation of 10.25.2001, no. 136-FZ, *Collection of Legislation of the Russian Federation*, 2001, no. 44, Art. 4147; *Rossiyskaya gazeta*, 2013, December 30; par. 1, Art. 8 of the Water Code of the Russian Federation of 03.06.2006, no. 74-FZ, *Collection of Legislation of the Russian Federation*, 2006, no. 23, Art. 2381; *Rossiyskaya gazeta*, 2013, December 30.

² See the Federal Law of 18.07.2011 no. 223 FZ “On the procurement of goods, works, services by certain types of legal entities”; Federal Law of 05.04. 2013 no. 44-FZ “On the contract system in the field of procurement of goods, works, services for state and municipal needs”; a number of norms of the Budget Code of the Russian Federation and other regulations.

³ *Collection of Legislation of the Russian Federation*. No. 49, art. 6078.

composition of legal definitions takes place. For subsequent stages, the correct fixation of the actual circumstances of the legal relations of the parties (documenting them) will be decisive.

The practice shows a significantly increased civil turnover with a certain instability of the current legislation and high volume of law-making of the subjects of the Federation, not meeting sometimes the requirements of federal legislation. It shows conflict or even direct competition of certain norms, a large array of normative and sub-normative acts (regulations, instructions, guidelines clarifications, etc.) and the accumulated judicial practice on various categories of cases. Under these circumstances, the task of forming the actual composition of legal disputes that meets the requirements of legality and validity of the judgment, is often associated with certain complications, leading to the instability of judgments.

In case of violation of the requirement of proper proof of evidence, the adverse consequences of the unproved statement of the party about the factual circumstances of the case are assigned to that party or another person participating in the case who could and should have provided themselves with reliable evidence in accordance with the law or their interests.

For this reason, state and local governmental bodies, as well as legal entities established by them, in order to confirm, protect and defend their rights arising from entering into contracts, changing their terms, terminating contracts, making other transactions, registering property rights, completing cash transactions, registration of organizations or citizens as entrepreneurs, when imposing and collecting fines, writing off funds in an indisputable manner, performing other legally significant actions, should take timely measures to document the performed actions / refusal to perform them in the form established by the requirements of the law, standards, approved samples, business practices, etc.

In general, understanding the position of A. A. Volos, according to which the protection at this stage does not play a decisive role¹, we should note that with regard to the state, a correct understanding and fixation of the circumstances proving the fact of causing damage to the state and / or its counterparties is very important. In this area, it is possible to create formalized lists that allow both parties to the legal relationship and the court to correctly qualify them².

¹ See: Volos A.A. Protection of the weak party of the obligation on different stages of the action of the mechanism of realization of civil rights and fulfilling obligations. *Competition law*, 2014, no. 4, p. 39-42.

² It should be noted that the practice of such an approach has long existed in the administrative law. As an example, the Letter of the Federal Customs Service of the Russian Federation of January 10, 2008 no. 01-11 / 217 "Guidelines on qualification of violations of currency legislation" (together with the "Guidelines on qualification of administrative offenses under Article 15.25 of the Code of Administrative Offenses of the Russian Federation"), which also consider the situations of the presence / absence of an administrative offense in the actions of the resident importer, taking into account the illegal actions by the bodies or officials of a foreign state as well. This document demonstrates a useful approach for the formation of a mechanism of exercising subjective right where it can also be successfully used in

With regard to the stage of establishing the right, understood as the realization by the subject of his or her own right, as well as its recognition by other persons, the remark that some of the subjects do not have sufficient information about whether they have certain rights, and therefore they become a weak party of the obligation¹, applies to the participation of the state in civil law relations. Here it transforms into the situation when the subjects having the authority to represent the interests of the state in civil law relations and the information about the violation of right if the state (taking a bad deal or wilful non-fulfilment of responsibilities), are inactive for various reasons (corruption factors, unwillingness to act, etc.), the outcome of which is damage to state property.

In the process of procedural realization of the right, the subject performs legally significant actions aimed at obtaining a benefit. These procedures are often spelled out in legislation, regulations, are directly reflected in the materials of judicial practice.

In view of the above, it is legitimate to conclude that the current state of the mechanism for exercising civil liability of the state with certain attempts to reform it and the emergence of new rules governing the management of state and municipal property requires a greater degree of specificity.

The study allows us to consider the created theory of civil law protection of the state as a single system of the elements mentioned above, highlighting a legal obligation as a system-forming element of the guaranteed implementation of such protection.

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determining the effectiveness of an official's legal relations with the counterparty, which resulted in causing damage to state property. It proposes the following measures: a) at the stage of pre-contract preparation: clarification of the reliability and business reputation of the counterparty; b) at the stage of concluding a contract: entering into the contract a method of ensuring the fulfillment of obligations depending on the reliability and business reputation of the partner (bank guarantee, penalty, surety, pledge, deposit, etc.); the use of such forms of settlement under the contract, which exclude the risk of the counterparty's failure to fulfill obligations under the contract; development of a mechanism for resolving possible disputes, with a clear indication of the timing of pre-trial remedies for violated rights and an indication of which judicial body will consider the dispute that has arisen; use of commercial risks insurance; c) after non-fulfillment or improper fulfillment by the counterparty of its obligations: stating the complaint; submitting a claim to judicial authorities after the response to the complaint or the expiration of the response period demanding to recover the amount due from the counterparty, etc. (See Letter of the Federal Customs Service of the Russian Federation of January 10, 2008 no. 01-11 / 217 "Guidelines on qualification of violations of currency legislation" (along with the "Guidelines on qualification of administrative offenses under Article 15.25 of the Code of Administrative Offenses of the Russian Federation"), *Customs Herald*, 2008, no. 3).

¹ See Volos A.A. *Idem*. P. 39-42.

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Information about the author

Vladimir Babakov (Saratov, Russia) – Professor of the Department of Civil Law of Saratov State Law Academy, Candidate of Legal Sciences, Associate Professor (office 521, part 5, building 1 Vol’skaya St., Saratov, 410056; e-mail: k_civil@ssla.ru).

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CONFERENCE REVIEWS

ZAVDAT SAFIN

Professor, Head of the Department
of Environmental Law, Labor Law
and Civil Procedure,
Kazan (Volga region) Federal University,
Doctor of Legal Sciences

ELENA LUNEVA

Associate Professor of the Department
of Environmental Law, Labor Law
and Civil Procedure, Kazan
(Volga region) Federal University,
Candidate of Legal Sciences

REVIEW OF THE INTERNATIONAL SCIENTIFIC AND PRACTICAL CONFERENCE IN MEMORY OF A.A. RYABOV "IMPORTANT ISSUES OF PROTECTION OF PROPERTY RIGHTS OVER NATURAL RESOURCES: INTERDISCIPLINARY APPROACH" (26-27 OCTOBER, 2018, KAZAN)

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Abstract: The review presents the results of the International Scientific and Practical Conference in memory of A.A. Ryabov, Doctor of Legal Sciences, Professor, Honored Lawyer of the Republic of Tatarstan, Corresponding Member of the Academy of Sciences of the Republic of Tatarstan "Important Issues of Protection of Property Rights on Natural Resources: Interdisciplinary Approach". There are listed the main writings, achievements and results of scientific and pedagogical activities of the outstanding environmental lawyer who is famous both in Russia and abroad. The outlined chronology of the International Scientific and Practical Conference includes the ceremony of unveiling the commemorative plaque in honor of A.A. Ryabov. The Conference was international, interdisciplinary and proved to have the practical focus. The statistics shows the number of actual participants, that reveals the scale of the conference. The participants of the conference arrived at

the following conclusions: 1. Efficient protection of the property rights over natural resources requires joint collaboration of law and other disciplines alongside with the judicial practice. 2. One of the key elements of the property rights over natural resources is the subject of law, which owns the natural resources. Most natural resources must remain in public ownership. It would provide reliability in natural resource management, since natural resources are national heritage. 3. Infringement of property rights over natural resources leads to environmental problems, the consequences of which have supranational significance. 4. Rational environmental management is a positive element of the protection of property rights over natural resources. Effective natural resources management provides the best environment protection. 5. It is essential to harmonize the legislation of different countries in the sphere of protection and management of cross-boundary natural systems and natural sites, as well as prevention and elimination of cross-boundary pollution. The influence of the conference is significant not only for the Law Faculty, but for Kazan Federal University as a whole. The conference provided an opportunity to widen the scientific relations between the participants and the representatives of scientific community from Switzerland, Kyrgyzstan, Republic of Belarus and different subjects of the Russian Federation that are involved in interdisciplinary issues of protection of property rights over natural resources. The event has strengthened collaboration with public authorities and judicial authorities, law enforcement bodies of the Russian Federation and the Republic of Tatarstan, public and private organizations.

Key words: A.A. Ryabov, ecological law, property rights, natural resources, natural objects, legal liability, rational environmental management

The International Scientific and Practical Conference in memory of **A.A. Ryabov (1935-2017)**, Doctor of Legal Sciences, Professor, Honored Lawyer of the Republic of Tatarstan, Corresponding Member of the Academy of Sciences of the Republic of Tatarstan **“Important Issues of Protection of Property Rights over Natural Resources: Interdisciplinary Approach”** (hereafter, the Conference) took place in Kazan (Volga region) Federal University (hereafter, KFU) on 26 October 2018.

The Conference is ought to commemorate the honor of our professor and colleague, whose achievements are widely known both in Russia and abroad. Alexander Andreevich Ryabov was an outstanding scholar and author of books on environmental and land law. His research mainly focused on property rights over natural resources, environmental management, protection of rights of the government and nature users. His scientific interests covered ecological, legal and economic aspects of property, protection of water and biological resources, environmental protection, ecological future of our country and other interdisciplinary topics.

A.A. Ryabov received his Doctorate from Lomonosov Moscow State University in 1984. His thesis “Protection of Governmental Property Rights over Natural Resources

in the USSR” was one of the first interdisciplinary ones covering both civil and environmental law. Over the period between 1982 and 1992 he worked as Head of the Department of Civil Law and Litigation, while between 1987 and 1992 he successfully reconciled this job with the position of Dean of the Law Faculty at Kazan Federal University. He taught Environmental Law and was a member of the Examining Council at Kazan Federal University.

A.A. Ryabov is a co-author of the Commentary on the Republic of Tatarstan Law “Waste Products Resulting from Production and Consumption”. He developed a training manual on environmental law, published five monographs, including “Provision and Withdrawal of Land under Soviet Law” (1972), “Liability for Violation of Legislation on Land Use” (1981), “Protection of State Ownership over Natural Resources in the USSR” (1982), as well as over seventy pieces of scientific writing. He co-authored the course book „Natural Resource Law and Legal Protection of the Environment“ (1988), which was well known in the USSR and abroad. A.A. Ryabov actively participated in the preparation of Tatar Encyclopedic Dictionary for publication and in the work of the Constitutional Commission preparing the draft of Constitution of the Republic of Tatarstan.

Taking into consideration the enormous contribution of A.A. Rjabov to the development of not only environmental law, but of the Law Faculty of Kazan University as a whole, it was decided to unveil a commemorative plaque in honor of **Alexander Andreevich Ryabov** on October 26, 2018 within the framework of the Conference. At the opening ceremony there were present **Riiaz Gataullovich Minzaripov**, First Vice-Rector of KFU, Doctor of Sociology, Professor, Head of the Department of Sociology; **Asgat Ahmetovich Safarov**, Head of the Office of the President in the Republic of Tatarstan, graduated from the Law Faculty of KFU; **Andrei Aleksandrovich Ryabov**, son of Alexander Andreevich Rjabov, graduated from the Law Faculty of Kazan Federal University, Advisor of the Minister of Internal Affairs of the Republic of Tatarstan, Colonel of the Police; **Liliia Talgatovna Bakulina**, Dean of the Law Faculty of Kazan Federal University, Candidate of Legal Sciences, Associate Professor; **Ildar Abdulhakovich Tarhanov**, Scientific Director of the Law Faculty of Kazan Federal University, Doctor of Legal Sciences, Professor, Honored Lawyer of the Russian Federation; **Zavdat Faizrakhmanovich Safin**, Doctor of Legal Sciences, Professor, Head of the Department of Environmental, Labor Law and Civil Process of the Law Faculty of Kazan Federal University, Honored Lawyer of the Republic of Tatarstan. The opening ceremony was also attended by many other participants of the Conference, among whom were the leading lawyers from Moscow, St. Petersburg, Sevastopol, Volgograd, Izhevsk, Yoshkar-Ola, Kemerovo, Saransk, Saratov, Ufa, Cheboksary, as well as employees, graduate students and students of the Law Faculty of KFU. The commemorative plaque was erected near the Department of Environmental, Labor Law and Civil Process, where A.A. Rjabov worked in his last days (lecture hall 240 of KFU Mail Building) [1].

The official part of the Conference was held in Board of Trustees Hall of KFU. **Zavdat Faizrakhmanovich Safin**, Head of the Department of Environmental, Labor Law and

Civil Process of the Law Faculty of KFU, and **Gennadii Aleksandrovich Volkov**, Doctor of Legal Sciences, Professor of the Department of Environmental and Land Law of the Law Faculty of Lomonosov Moscow State University, moderated the Conference.

The Conference started with the welcome address from **Liliia Talgatovna Bakulina**, the Dean of the Faculty of Law of KFU; **Ildar Abdulhakovich Tarhanov**, Scientific Director of the Law Faculty of KFU; **Larisa Iurevna Gluhova**, Head of the State Legal Department of the President in the Republic of Tatarstan, Honored Lawyer of the Republic of Tatarstan; **Zavdat Faizrahmanovich Safin**, Head of the Department of Environmental, Labor Law and Civil Process of the Law Faculty of KFU; **Gennadii Aleksandrovich Volkov**, Professor of the Department of Environmental and Land Law of the Law Faculty of Lomonosov Moscow State University.

The participants of the Conference were shown a short movie about the life and scientific research of Alexander Andreevich Rjabov. The film was followed by the following presentations: “*Creative Heritage of Professor A.A. Rjabov in Protection of the State Ownership of Natural Resources and Legal Liability for Land Violations*” (by **Elmira Faatovna Nigmatullina**, Candidate of Legal Studies, Associate Professor of the Department of Environmental, Labor Law and Civil Process of the Law Faculty of KFU) and “*Relationship Between the Concepts of “Defense” and “Protection” in Law According to the Scientific Works of Professor A.A. Rjabov*” (by **Roza Iosifovna Sitdikova**, Doctor of Legal Studies, Professor of the Department of Entrepreneurial and Energy Law of the Law Faculty of KFU).

Many presentations were devoted to the scientific contribution of A.A. Ryabov to the development of environmental and land law, including in the field of protection of property rights over natural resources. In addition, papers on various aspects of environmental protection and the rights over natural resources in modern society were given at the Conference. Among them were “*Legal Support of the Rights of the peoples of Russia over their Natural Resources*” by **Sergei Aleksandrovich Bogoliubov**, Doctor of Legal Sciences, Professor, Head of the Department of Environmental Legislation at the Institute of Legislation and Comparative Law under the Government of the Russian Federation, Honored Scientist of the Russian Federation; “*Permitted Use of Land as the Element of Property Right*” by **Gennadii Aleksandrovich Volkov**, Professor of the Department of Environmental and Land Law of the Law Faculty of Lomonosov Moscow State University; “*Private Ownership of Natural Resources and Public Interests: Issues of Balance*” by **Valentina Vladimirovna Ustiukova**, Doctor of Legal Sciences, Professor, Chief Research Officer, Acting Head of the of Environmental, Land and Agrarian Law Branch at the Institute of State and Law of the Russian Academy of Sciences; “*Cross-sectoral Regulation of Natural Resource Legal Relations*” by **Irina Olegovna Krasnova**, Doctor of Legal Sciences, Professor, Head of the Department of Land and Environmental Law at the Russian State University of Justice; “*Modern Urbanization and issues of Protection of Land Ownership*» by **Zavdat Faizrahmanovich Safin**, Head of the Department of Environmental, Labor Law and Civil Process of the Law Faculty of KFU;

“Priority of Public Interests on Specially Protected Natural Areas as Objects of National Heritage: Personal Experience of Judicial Protection” by **Tamara Vladimirovna Zlotnikova**, Doctor of Legal Sciences, Professor, Head of the Department of Land Law and Real Estate Registration at Humanities Faculty of Moscow State University of Geodesy and Cartography, Honored Ecologist of the Russian Federation, Chairman of the Presidium of the National Environmental Audit Chamber, Academician of the Russian University of Economics; *“Property Rights over Natural Resources and Designing the Legal Regimes of Environmental Management”* by **Vladislav Vasilevich Nikishin**, Doctor of Legal Sciences, Professor of the Department of Legal Environmental Protection at St. Petersburg State University; *“Legal Public Function of Land Ownership in the Russian Federation”* by **Mariya Ivanovna Vasilyeva**, Doctor of Legal Sciences, Professor of the Department of Land Law and Real Estate Registration at the Humanities Faculty of Moscow State University of Geodesy and Cartography; *“Environmental Law and Property Rights over Natural Resources”* by **Ravil Hasanovich Gizzatullin**, Doctor of Legal Sciences, Professor of the Department of Financial and Environmental Law at the Institute of Law of Bashkir State University; *“Role and Place of Ownership of Natural Resources in a Society of Sustainable Development”* by **Fanis Mansurovich Raianov**, Doctor of Legal Sciences, Professor, Chief Research Officer of the Department of Theory of State and Law in the Institute of Law of the Bashkir State University; *“Issues of Legal Regulation of Land Management at the Present Stage of Legislation Development”* by **Galina Anatolyevna Misnik**, Doctor of Legal Sciences, Professor of the Department of Land and Environmental Law at the Russian State University of Justice; *“Legal Land Management at the Current Stage of Development of Law”* by **Stanislav Andzheevich Lipski**, Doctor of Economics, Head of the Department of Land Law at the State University of Land Management; *“Monitoring of the Subsoil Condition in the System of Functions of the State – Subsoil Owner”* by **Roza Nailiyevna Salieva**, Doctor of Legal Sciences, Professor, Head of the Laboratory at the Institute of Ecology and Subsoil Use at the Academy of Sciences of the Republic of Tatarstan, Professor of the Department of Entrepreneurial and Energy Law at the Law Faculty of KFU; *“Approaches to Determining the Legal Regime of Forests on the Agricultural Lands”* by **Nikolai Valeryevich Kichigin**, Candidate of Legal Sciences, Leading Researcher at the Department of Environmental and Agrarian Legislation of the Institute of Legislation and Comparative Law under the Government of the Russian Federation; *“State Ownership of Land: Theoretical and Practical Issues”* by **Olga Aleksandrovna Romanova**, Candidate of Legal Sciences, Associate Professor, Deputy Head of the Department of Environmental and Natural Resources Law at Kutafin Moscow State Law University; *“The Value of the Forensic Environmental Expertise in the Settlement of Environmental Damage Disputes”* by **Alena Vladimirovna Kolodova**, Candidate of Legal Sciences, Associate Professor, Senior Researcher at St. Petersburg Research Center for Environmental Safety of the Russian Academy of Sciences; *“The Influence of Spatial Planning and Urban Zoning on the Land Property Rights”* by **Natalya Leonidovna Lisina**, Candidate of Legal Sciences, Associate Professor, Head of the Department of Labor,

Environmental Law and Civil Process of the Law Institute at Kemerovo State University; *“Effectiveness of Guarantees on Land Ownership”* by **Elena Yuryevna Chmykhalo**, Candidate of Legal Sciences, Associate Professor, Professor of the Department of Land and Environmental Law at Saratov State Law Academy; *“Restrictions of the Land Owners’ Rights in Land Reservation”* by **Anna Alekseevna Vorontsova**, Candidate of Legal Sciences, Associate Professor of the Department of Environmental and Land Law at the Faculty of Law of Lomonosov Moscow State University; *“Land Ownership Legislation in the Republic of Crimea and in the City of Federal Importance of Sevastopol”* by **Aleksey Anatolyevich Kozodubov**, Candidate of Legal Sciences, Associate Professor of Law Department at Sevastopol Institute of Economics and Humanities (Branch) of Vernadsky Crimean Federal University; *“Forest Management: Conflict of Public and Private Interests”* by **Tatyana Vladimirovna Rednikova**, Candidate of Legal Sciences, Research Officer of the Section of Environmental, Land and Agricultural Law at the Institute of State and Law of the Russian Academy of Sciences; *“Land Withdrawal as the Basis for the Termination of Land Rights»* by **Nadezhda Mihailovna Zaslavskaya**, Candidate of Legal Sciences, Associate Professor of the Department of Environmental and Land Law at the Faculty of Law of Lomonosov Moscow State University; *“Specific Features of Protection of Land Property Rights: Law Enforcement Aspects»* by **Oksana Igorevna Sharno**, Candidate of Legal Sciences, Associate Professor of the Department of Constitutional and Municipal Law at Volgograd State University, Lawyer of Volgograd Regional Bar Association; *“Features of Legal Regulation of the Subsoil Plots Allocated for Usage”* by **Nail Salimovich Mustakimov**, Candidate of Legal Sciences, Associate Professor, Head of the Department of Private Law in Russia and Foreign Countries at Mari State University; *“Preferential Rights of the Former Tenant over Contract Conclusion for Forest Plot Lease“* by **Anatoliy Leonidovich Bazhaikin**, Candidate of Legal Sciences, Associate Professor of the Department of Civil Law at the Institute of Law, Social Management and Security of Udmurt State University; *“Compensation for Land Ownership Restriction in the Establishment of Zones with Special Conditions of Land Use»* by **Olesia Aleksandrovna Zolotova**, Candidate of Law, Associate Professor of the Department of Business, Commercial and Labor Law of the Russian Academy of National Economy and Public Administration of the President of the Russian Federation; *“Criminal Law Issues of the Protection of Natural Resources Ownership»* by **Natalya Yuryevna Prikhodko**, Candidate of Legal Sciences, Associate Professor of the Department of Law at Russian State Agrarian University – Moscow Timiryazev Agricultural Academy; *“Property Rights of Municipal Land Ownership”* by **Zarina Kamilevna Kondratenko**, Candidate of Legal Sciences, Associate Professor, Acting Head of the Department of Civil Law and Process of Mari State University; *“On Land Ownership Protection: the Balance between Private and Public Interests”* by **Irina Nikolaevna Zhochkina**, Candidate of Legal Sciences, Associate Professor of the Department of Civil Law and Process of Ogarev Mordovia State University, Head of Legal, Personnel and Information-Analytical Support Department of the Office of Federal Service for Supervision of Natural Resource Usage in the Republic

of Mordovia; “*Ecological and Legal Issues of Waste Disposal Enterprises in Large Cities*” by **Mikhail Vyacheslavovich Ponomarev**, Research Officer of the Department of Environmental and Agrarian Legislation at the Institute of Law and Comparative Law under the Government of the Russian Federation; “*Industrial Province’ – Owner, Population and Environment (Kuznetsk Coal Basin)*” by **Timur Borisovich Nevzorov**, Candidate of Pedagogical Sciences, Associate Professor of the Department of Labor, Environmental Law and Civil Process at the Law Institute of Kemerovo State University; “*Topical Issues of Regional Natural Resource and Land Legislation (the Example of Chuvash Republic)*” by **Nadezhda Vladimirovna Aleksandrova**, Candidate of Legal Studies, Associate Professor of the Department of Civil Law Disciplines at Ulyanov Chuvash State University and **Nadezhda Vladislavovna Semenova**, Candidate of Biological Sciences, Associate Professor of the Department of Civil Disciplines at Ulyanov Chuvash State University; “*Specific Features of Protection of Owner’s Rights in Establishing and Collecting the Land Tax*” by **Evgeniy Vladimirovich Maryin**, Candidate of Legal Sciences, Associate Professor of the Department of Land Law and Real Estate Registration at the Humanities Faculty of Moscow State University of Geodesy and Cartography; “*New Mechanism of Modern Land Policy: Gratuitous Provision of Far Eastern Land Plots*” by **Tatyana Yuryevna Mashkova**, Deputy Dean of the Humanities Faculty, Senior Lecturer of the Department of Land Law and Real Estate Registration of Moscow State University of Geodesy and Cartography; “*Grounds for Acquisition and Termination of the Municipal Property Rights for Land Plots*” by **Ilya Borisovich Kondratenko**, Candidate of Pedagogical Sciences, Associate Professor of the Department of Theory and Methods of Professional Education at Mari State University.

Among the announced international participants of the conference, the ones who were able to come were the leading specialist of the Communication and Education Directorate of the Border Guard Corps of the Swiss Confederation, Master of history and Slavic studies **Rut Valterovna Vidmer** who gave a paper “*Problems of understanding the text of the normative act using the example of the protection of ownership over natural resources (linguistic aspect)*” and Acting Associate Professor of the Department of Civil, Labor and Environmental Law of Kyrgyz National University named after Jusup Balasagyn **Azamat Anvarbekovich Kadyrov** who presented a paper “*Modern situation and modernization of rights of ownership over water bodies in Kyrgyzstan*”.

The participation of **Azamat Anvarbekovich Kadyrov** in the conference is a consequence of the close friendship between his father **Anvarbek Kadyrovich Kadyrov** (1949-1996), Candidate of Legal Sciences, Associate Professor, Head of the Department of Civil Law and Procedure of the Law Faculty of Kyrgyz State National University, and Alexander Andreevich Ryabov. Professor Ryabov was the first official opponent at Anvarbek Kadyrov’s viva that took place in 1988 at Lomonosov Moscow State University. The topic of Anvarbek Kadyrov’s doctoral thesis was “*Legal protection of the environment in Kyzgzyz SSR*” (scientific speciality 12.00.06 – kolhoz, land, water, forest and mountain law; legal protection of environment).

In addition to legal scholars, the conference was attended by Doctor of Biological Sciences, Professor, Head of the Department of Environmental Engineering and Water Management at the Institute of Management, Economics and Finance of Kazan Federal University **Nafisa Mansurovna Mingazova**, together with her graduate students. Their papers showed the interdisciplinary interaction between environmental law and a number of the natural science disciplines.

The practical and scientific unit was represented by the following papers: *“Correlation of types of legal proceedings when resolving land disputes”* by **Azat Khamzovich Khisamov**, Candidate of Legal Sciences, Associate Professor, Chairman of the Cassation Panel of the Judicial Division for Civil Cases of the Supreme Court of the Republic of Tatarstan; *“Protection of rights in the field of land management: interdisciplinary approach”* by **Volkova Tatyana Vladimirovna**, Candidate of Law, Associate Professor of the Department of Land and Environmental Law of Saratov State Law Academy, Federal Judge of the Twelfth Arbitration Court of Appeal, member of the Advisory Board of the Chamber of Commerce of Saratov region, Honorary Expert of Kyrgyz National University named after Z.Balysagyn ; *“Protection of the state ownership of subsoil”* by **Ilsur Irekovich Gilmutdinov**, Tatarstan Environmental Interdistrict Prosecutor, Senior Counsellor of Justice; *“Execution of environmental legislation during the use of municipal and state-owned plots”* by **Nazim Nikolayevich Psardia**, Deputy Kazan Interdistrict Environmental Prosecutor, First Class Lawyer; *“Limits to exercising the land ownership rights”* by **Timur Irekovich Abdreev**, Candidate of Law, Assistant Prosecutor of the Moscow district of Kazan, Associate Professor of the Department of Criminal Procedure of the Academy of Social Education Head of the Department of Hydrogeology and Water Management of the Ministry of Ecology and Natural Resources of the Republic of Tatarstan **Tatyana Leonidovna Vasilyeva**.

The Law Faculty of KFU was also represented by the heads of departments, associate professors and other teachers. The most “inter-disciplinary” issues were covered in the papers *“Constitutional basis for the protection of ownership of environmental resources”* by **Yevgeny Batyrovich Sultanov**, Candidate of Legal sciences, Associate Professor, Head of the Department of Constitutional and Administrative Law at the Law Faculty of KFU, Honored Lawyer of the Republic of Tatarstan, and *“Issues of protection of the right for natural resources and natural objects: the business and legal aspects”* by **Andrei Valerievich Mikhaylov**, Candidate of Legal sciences, Associate Professor, Head of the Department of Business and Energy Law of the Law Faculty of KFU. No less significant and interdisciplinary were the following papers: *“The right of private ownership for the land plots and its limitations”* by **Zamira Asrarovna Akhmetyanova**, Candidate of Legal Sciences, Associate Professor of Civil Law at the Law Faculty of KFU; *“Features of taxation of natural resources in Russia”* by **Leysan Minnurovna Fayzrakhmanova**, Candidate of Legal Sciences, Associate Professor of the Department of Constitutional and Administrative Law at the Law Faculty of KFU; *“The system of legal means of protecting the ownership for natural resources”* by **Artur Zufarovich Zinnatullin**, Candidate of

Legal Sciences, Associate Professor of the Department of Environmental, Labor Law and Civil Process at the Law Faculty of KFU; “*Civil law remedies for protection of the possessory title and other property rights for natural objects and resources*” by **Sergey Marselevich Sagitov**, Candidate of Legal Sciences, Associate Professor of the Department of Environmental, Labor Law and Civil Process at the Law Faculty of KFU; “*Legal support for the environmental management by owners of natural resources*” by **Elena Viktorovna Luneva**, Candidate of Legal Sciences, Associate Professor of the Department of Environmental, Labor Law and Civil Process at the Law Faculty of KFU; “*Criminal law provision for rational use of aquatic biological resources*” by **Stanislav Igorevich Golubev**, Candidate of Legal Sciences, Associate Professor of Criminal Law at the Law Faculty of KFU; “*Normative-legal framework of labor protection in the field of the environmental safety*” by **Maxim Vladimirovich Vasilyev**, Candidate of Legal Sciences, Associate Professor of the Department of Environmental, Labor Law and Civil Process at the Law Faculty of KFU, “*Agrarian state policy in the field of entrepreneurship: environmental and legal aspect with regional specifics*” by **Gayaz Gabdelislamovich Fayzullin** (co-author), Candidate of Legal Sciences, Associate Professor at the Department of Humanities and Islamic Economics and Management of the Russian Islamic Institute; “*Features of the legal framework for the land plots in special economic zones*” by **Liliya Azatovna Sungatullina**, Candidate of Legal sciences, Senior Lecturer of the Department of Business and Energy Law at the Law Faculty of KFU, and other presentations.

In total, over 90 people took part in the Conference. Due to a great number of speakers, only 40 of the most eminent scholars were able to give a paper. The other participants took part in the discussion of the topics announced by the speakers. At present, a collection of conference materials is being actively prepared.

The vast scale of the Conference is evidenced by statistics on the actual participants: **21 doctors of sciences**, including 17 doctors of legal sciences, doctor of economic sciences, doctor of biological sciences, doctor of sociological sciences and doctor of pedagogical sciences; **45 candidates of sciences**, including 43 candidates of legal sciences and 2 candidates of pedagogical sciences; **7 participants with honorary titles**, including: Honored Scientist of the Russian Federation, Honored Lawyer of the Russian Federation, Honored Ecologist of the Russian Federation and 4 Honored Lawyers of the Republic of Tatarstan.

The representatives of 29 scientific and educational institutions of Russia and other countries took part in the Conference, including the Institute of State and Law of the Russian Academy of Sciences (Moscow, Russia – 2 persons), Institute of Legislation and Comparative Law under the Government of the Russian Federation (Moscow, Russia – 3 persons); Kyrgyz National University named after Zhusup Balasagyn (Bishkek, Kyrgyzstan – 1 person); Lomonosov Moscow State University (Moscow, Russia – 3 persons.); Kutafin Moscow State University of Law (Moscow, Russia 1 – person); Russian State University of Justice (Moscow, Russia – 2 persons), St. Petersburg State University (St. Petersburg, Russia – 3 persons) and others.

The Conference was attended by representatives of 15 state authorities, social-state and private organizations, including: the Communication and Education Directorate of the Border Guard Corps of the Swiss Confederation (Bern, Swiss Confederation), the State Legal Directorate of the President of the Republic of Tatarstan (Kazan, Russia), Supreme Court of the Republic of Tatarstan (Kazan, Russia), Twelfth Arbitration Court of Appeal (Saratov, Russia), Ministry of Internal Affairs of the Republic of Tatarstan (Kazan, Russia), Ministry of Ecology and Natural Resources of the Republic of Tatarstan (Kazan, Russia), Federal Service for Supervision of the Natural Resource Usage in the Republic of Mordovia (Saransk, Russia), Tatar Environmental Interdistrict Prosecutor's Office (Kazan, Russia), Kazan Environmental Interdistrict Prosecutor's Office (Kazan, Russia) and others.

The geography of the actual participants of the Conference covered European countries (Swiss Confederation) and Asian countries (Kyrgyzstan). The Russian Federation was represented by 3 cities of federal significance (Moscow – 24 persons, St. Petersburg – 4 persons, Sevastopol – 1 person), 6 republics (Republic of Tatarstan – 49 persons, Republic of Bashkortostan – 3 persons, Republic of Mari El – 4 persons, Udmurt Republic – 2 persons, Chuvash Republic – 2 persons, Republic of Mordovia – 1 person and 3 regions (Volgograd region – 1 person, Kemerovo region – 2 persons, Saratov region – 2 persons).

During the work of this scientific and practical conference, its participants discussed the issues of interdisciplinary approach to studying the ownership of natural resources and objects, the place and role of the institute of property rights in the system of natural resource and environmental legislation, the transformation of the institution of ownership of natural resources and objects using digital technologies, the legal support for the environmental management by owners of natural resources, the system of legal means of protecting the rights for natural resources, the current status and modernization of the ownership of the subsoil, water objects, land and forest areas and numerous other issues. The scientific discussions allowed the Conference participants to come to a variety of conclusions, which we will group into five main resolute decisions:

1. Efficient protection of the property rights over natural resources requires joint collaboration of law and other disciplines alongside with judicial practice.

2. One of the key elements of the property rights over natural resources is the subject of law, which owns natural resources. Most natural resources must remain in public ownership. It would provide reliability in natural resource management, since natural resources are the national heritage.

3. Infringement of property rights over natural resources leads to environmental problems. Consequences of such problems have supranational significance.

4. Rational environmental management is a positive element of protection of property rights over natural resources. Effective natural resources management provides the best environment protection.

5. It is essential to harmonize different country's legislation in the sphere of protection and management of cross-boundary natural areas and natural resources. In addition, prevention and elimination of cross-boundary pollution is also relevant.

It seems that this scientific and practical conference was an event that influenced the development of environmental law at the Law Faculty and the prestige of KFU as a whole. Scientific ties were strengthened through the representatives of the scientific communities of Switzerland, Kyrgyzstan, and the Republic of Belarus (via remote participation), regions of the Russian Federation dealing with interdisciplinary problems of protecting the right of ownership of natural resources and objects. The collaboration with state and judicial authorities, law enforcement agencies of the Russian Federation and the Republic of Tatarstan, public and private organizations as potential employers, which is of great importance for the graduates, has been strengthened.

Sincere thanks to Alexander Andreevich Ryabov for his invaluable contribution to the legal science and development of the Law Faculty of Kazan Federal University, as well as the graduates of the Law Faculty – Alexander Andreevich's son, Andrey Aleksandrovich Ryabov, and Asgat Akhmetovich Safarov – for their invaluable assistance in organizing and conducting the Conference. KFU, Law Faculty, Department of Environmental, Labor Law and Civil Process, professional and scientific community of environmental lawyers remember and honor their scholar, worker, colleague, friend, teacher, and the professional Alexander Andreevich Ryabov.

Information about the authors

Zavdat Safin (Kazan, Russia) – Professor, Head of the Department of Environmental Law, Labor Law and Civil Procedure, Kazan (Volga region) Federal University, Doctor of Legal Sciences (18 Kremlyovskaya St., Kazan, 420008; e-mail: zsafin@rambler.ru);

Elena Luneva (Kazan, Russia) – Associate Professor of the Department of Environmental Law, Labor Law and Civil Procedure, Kazan (Volga region) Federal University, Candidate of Legal Sciences (18 Kremlyovskaya St., Kazan, 420008; e-mail: vilisa_vilisa@mail.ru).

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if the student wants to get in-depth knowledge of the field of interest, he can choose elective disciplines related to the module;

if the student wants to diversify the learning process, he can replace part of the module's elective disciplines with disciplines of choice from other modules;

if a student wants to gain knowledge from various areas of law, his elective educational trajectory may consist only of disciplines for choosing different modules.

Under the Master of Law program, students will have the opportunity to study on an individual educational trajectory, based on their professional and scientific interests. This program will also be interesting for students without a legal background education, as they will be able to learn the basics of various branches of law.

Contacts of the admission committee:

rooms 114, 115 building 35, Kremlyovskaya St., Kazan, 420008, Russia

Contact phone: +7 (843) 292-73-40,

e-mail: priem@kpfu.ru,

<http://kpfu.ru/priem>

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