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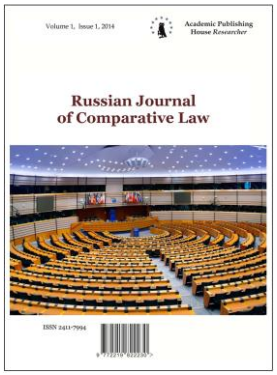

Articles and Statements

American Restatements of Law: Nature, Concept and Axiological Value

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Abstract

One of the most important secondary sources in American legal system is a restatement of law. The nature of this source of law, its significance, contents and application are not studied well in Russian legal doctrine. The understanding of the place and role of the restatement of law in the legal system of the United States allows to comprehend in-depths the essence of American law taking into account the practice of application of legal provisions on the territory of the United States (including the international law provisions).

The article analyses the nature, substance, role and place of the restatement of law in the American legal system and considers the Restatement of Foreign Relations Law of the United States (Third), its role and significance in more detail.

Keywords: US legal system, common law, sources of law, secondary sources of American law, Restatements of the law, digests, codification, American Law Institute – ALI, Restatement Foreign Relations Law of the United States (Third), «black letters», international law, Louis Henkin.

1. Introduction

Whenever I studied the leading American textbooks and treatises on the international law (International Law, 2010; International Law, 1995; International Law: Cases and Materials, 2009; Teacher's Manual to International Law, 2009; McCaffrey, 2006) or asked my colleagues from the Columbia University for the best source of information with respect to the American concept of international law, I invariably received a persistent recommendation, "For a modern, accurate and correct understanding of the American concepts of the international law, you should look at the Restatement of the Foreign Relations Law of the United States (Third)."

They claimed that the Restatement was the quintessence of international law as perceived and interpreted in the US, noting that in the US, courts apply international law by relying not only on statutes and case law, but also on restatements of law. This seemed rather unusual to me as a Russian lawyer and I decided to get deeper understanding of this source of law. This paper will discuss and explain the origins, definition, the nature and concept of restatements and will used Restatement of the Foreign Relations Law of the United States (Third) as illustration.

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2. Material and methods

This research is based on the following materials: documents of the American Law Institute, in particular, Restatements of the Law and Restatement of the Foreign Relations Law of the United States (Third) (1987); American definition and explanatory dictionaries, including legal dictionaries; American case law; American and Russian books concerning US legal system and American approach to international law.

To examine the issue comprehensively, we used a broad spectrum of general methods. In particular, we used the method of text analysis to study theoretical papers, we used a comparative method to compare Russian and American legal systems, to analyze case law and legal provisions we used the formal legal method.

3. Discussion

The term *restatement of law* was coined by the American Law Institute (ALI) to describe one of the products and forms of its work.

The translation of this term into Russian requires special attention. In various English-Russian dictionaries the word "*Restatement*" is translated as repeated application (confirmation), new wording, review, collection of provisions, narrative of legal provisions (vocabularies on web-sites). This term was translated in our scientific and academic texts differently with an attempt to get the meaning of it properly, e.g., code of provisions, code of legal provisions special law, restated narrative of law, etc. (Biriukov, Galushko, 2018: 201; Kochemasov, 2016: 128; Zweigert, Koetz, 2011, 254; Skakun, 2008: 242; Kokh et al., 2011: 361; Lezhe, 2009: 147). However, none of these translations into Russian fully convey the nature and meaning of this term, hence we believe we should abandon any attempts at literal translation and use the same name as in the American law, that is, "*restatement of law*".

Restatements are generally accepted collections of opinions of legal practitioners (attorneys), acting judges, legal scholars (teaching at America's leading universities) in a specific area of law or on a particular institute of the US common law, carrying normative value. These summaries are derived from primary legal sources, such as statutes, case law, as well as legal doctrines, general principles of law, judicial pronouncements and common law that judges rely on in their practice. Apart from these sources, in drafting new restatements, the ALI recommends using foreign law (where an analogy is possible), other secondary sources of the US law (Akchurin, 2016b), and past restatements (Capturing the Voice of the American Law Institute, 2004).

Similarly to the majority of secondary sources of the US law (Alekseev, 1998: 155; Biriukov, 2017), restatements cannot be binding, yet they are *persuasive and authoritative*; that is, they carry weight and relevance for most practicing lawyers, although they are not formally mandatory in their day-to-day professional work. As secondary sources of law, restatements essentially reflect the generally accepted opinion of the American legal community. Admittedly, they do not amend statutes or case law, but are a distillation, in one document, of the essential common law rules on relevant issues already existing in the American legal system and/or the legal systems of states taken together.

Occasionally, scholars opine that restatements are merely doctrinal in nature; but whenever a relevant rule is not to be found in the primary legal sources, courts refer to them, as amply demonstrated by the Annual Supplement of the ALI to each version of a restatement, setting out the cases where this or that restatement rule was invoked (Case Citations to the Restatement, 2014). Thus, restatements are widely used by law enforcement authorities and judges in decision-making where the law is unclear or lacking (Capturing the Voice of the American Law Institute, 2004), since they accumulate common law rules (legal positions) and are, accordingly, highly useful for finding a specific precedent.

It would not be entirely correct, however, to confine the functions of restatements to law enforcement, as they can just as well be used in law-making. They also facilitate understanding of the complex US common law and help clarify the meaning and legal position of a court on each of the restated rules. Notably, the recent versions of restatements sometimes contain legal novelties and proposals for updating legal rules and regulations, and although they are not binding, states sometimes use them to adopt legislative acts incorporating such rules into their legal systems. The ALI's new proposals respond to the pressing legal issues, challenges and lacunae that have not as yet been resolved in the primary sources or case law. Thus, restatements are, among other things, aimed at introducing to both the professional legal community and the public at large the

trends, avenues and prospects of development of the American law, the finest legal ideas and up-to-date legal doctrine.

Being what they are, restatements foster a deeper understanding of the American law, since they contain a rather comprehensive doctrinal overview and discussion of common law rules and primary legal sources as applied by courts. It is also significant that they are familiar to American legal practice, since enactment of new legal rules in primary sources of law in the US (Petrova, 2004) is a complex process, and the American law itself largely relies on the practice of application of primary sources of law (judgments), which is what the restatements rest on.

A restatement's legal nature, it appears, finds no analogy in the Russian legislation, not only because the Russian law lacks a common law element, but also because of this source is unique. Thus, while putting together legal rules from different sources and finally uniting them in a single document, a restatement nonetheless does not become a code in the civil-law system's understanding and is not legally binding. In the US, it is customary to distinguish the following types of systematization of law: unification of legal rules and acts in a chronological order, uniting them into a system, and their consolidation (Bobotov, 1973: 120). The term "codification" is, indeed, used, and means "The collection and systematic arrangement, usually by subject, of the laws of a state or country, or the statutory provisions, rules, and regulations that govern a specific area or subject of law or practice." (West's Encyclopedia of American Law, 1998: 470). Since when a restatement is being written its authors do not just use statutes, but also resort to other sources of law, and the wording of the rules found in a restatement might not textually coincide with that found in other legal sources, it seems that one cannot call a restatement a proper codifiction. Nor can it be called an incorporation, given that in a restatement, rules are revised, rather than merely collected (by topic or period).

René David wrote that a restatement of law is "a kind of systematic Digest in which one only finds the judicial decisions on point" (René, Spinosi, 1998: 405). However, Justinian's special constitution *Deo auctore* of December 15, 530 commanded Tribonian to start compiling the Digests with the following phrase: "We order you to collect and separate the books of ancient wiseman relating to Roman law, to whom holy princeps provided the power of drafting and interpreting the laws, so that the materials so collected do not contain any repetition or contradiction to the maximum extent possible but so that one book is created out of them all which is sufficient instead of them." (Kofanov, 2002: 13). In other words, Tribonian was to oversee an effort of analysis and systematization of the binding teachings of famous Roman lawyers, since they could contradict each other. The other reason was that the ordinary judges and officials lacked access to certain treatises and it was necessary to make them accesible. The compilers, as the Digests' authors later came to be called, were to endeavor to accumulate and systematize the whole legacy of prominent Roman lawyers, as well as all Roman laws (from the Law of the Twelve Tables up to senate decrees (*senatus consultum*) and Imperial Constitutions); further, they were to release the new systematization of outdated norms. Therefore, we cannot claim that in preparing Restatements, American lawyers fully copied the form or the idea of Justinian's Digests.

Without doubt, the concept of compiling a document similar to the Digests underlay the drafting of restatements by the ALI, since many provisions of the US common law are rooted in the Roman law. But American lawyers certainly inventively transformed and adapted that idea to the new conditions, so it attained a new meaning and a new form.

One could compare restatements to theoretical and practical commentaries to a law or a code; *e.g.*, to the Russian Criminal Code. But even then, differences would remain: unlike commentaries, authored by groups or individual scholars, restatements are drafted collectively by the best lawyers from all US states and adopted following multiple rounds of discussion. Commentaries are written on a law already in effect and may not change it, as a prescription enacted by a competent state authority, while restatements represent a form of collective law-making by persons not vested with the power to legislate. Moreover, an American judge may invoke a restatement rule when rendering a judgment in certain circumstances; on the contrary, commentaries to a regulation cannot be used by a judge in decision-making process. Furthermore, commentaries are merely an exercise in construction of the existing rules and cannot contain novel proposals for the improvement of the rules of law, while restatements may, among other things, have new rules proposed by their drafters. Finally, commentaries cannot serve as the foundation for the legal rules adopted by the constituent parts of a federation (states), unlike restatements, etc.

Therefore, restatements as such constitute new sources of law, no analogy to which existed before they emerged. That said, American legal dictionaries do not provide a detailed definition of what a restatement is. Thus, the authoritative Black's Law Dictionary, in effect, fails to define the term and merely explains its structure and scope (Black's Law Dictionary, 2014: 1339). Merriam-Wester's Dictionary of Law also refers to it being the product of work of the ALI and proceeds to list the types of restatements (Merriam-Webster's Dictionary of Law, 2011: 426). Webster's Law Dictionary limits itself to saying that a restatement summarizes common law based on judgments, and provides a list of types of restatements (Webster's New World Law Dictionary, 2010). West's Encyclopedia of American Law provides the following definition: "a series of volumes regarded as an authoritative work of legal scholarship prepared by the authors, scholars, and members of the judiciary who comprise the American Law Institute (ALI), which presents a survey of a general area of the law and the changes that have occurred therein" (West's Encyclopedia of American Law, 1998: 336). Gale Encyclopedia of American Law also refers to "a series of volumes regarded as an authoritative work of legal scholarship prepared by the authors, scholars, and members of the judiciary who comprise the American Law Institute (ALI), which presents a survey of a general area of the law and the changes that have occurred therein." (Gale Encyclopedia of American Law, 2004: 194). Online legal dictionaries also does not define the term, merely describing its structure and supplying a list of restatements.

All restatements are created by the ALI, which is a private non-for-profit legal organization, in order to explain and interpret the ever-increasing bulk of complex precedents clearly, precisely and concisely (Capturing the Voice of the American Law Institute, 2004; Akchurin, 2015a: 203-205).

The procedure for creating a Restatement, established in the ALI's by-laws, is as follows: first, the ALI Council appoints a Reporter placed directly in charge of organizing the Committee's and its members' work, overseeing it and rendering assistance, where needed. After the Committee produces a draft, the Council may recommend it for all-member discussion or revision by the Committee. Publication of the document requires consent from *all* ALI members (Bylaws in American Law Institute, 1993: 50-58).

At the outset, the ALI, in first report of Council of 35 in 1923 set out the general approaches and principles for drafting the key forms (resulting documents) of the Institute's work.

The first requirement was their uniformity; that is, although the work was conducted by different experts, they all had to follow the same form: "The questions of form are of the first importance" for restatements, "should be the separation by typographical or other device of the statement of the principles of law and the analysis of the legal problems involved"; there should be a "statement of the present condition of the law and reasons in support of the principles as stated." (Frank, 1998: 10-11). American lawyers call the first and foremost part of a restatement paragraph "black letters", emphasizing its text in bold; this part contains the key terms, approaches and legal principles envisaged in the restatement.

For example, the first paragraph of the Restatement of the Foreign Relations Law of the United States, contains the following black-letter provision: "The foreign relations law of the United States, as dealt with in this Restatement, consists of

(a) international law as it applies to the United States; and

(b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences" (Restatement of the Foreign Relations Law of the United States (Third): 7). The "black-letters" are followed by the authors' comments who clarifies that those sources include the "the United States Constitution, United States statutes, rules, decisions of courts, and actions of federal regulatory agencies. Law of States of the United States may also have "substantial significance for the foreign relations of the United States or other substantial international consequences, subject to the limitations imposed by the United States Constitution and the supremacy of federal law" and

(c): "Scope of this Restatement." – as defined in the commentary – "does not set forth all the foreign relations law of the United States as defined in this section; it deals only with selected areas of particular importance, but these may give guidance for analogous or related issues." (Restatement of the Foreign Relations Law of the United States (Third): 7-8).

The *reporters' comments* set out specific legal rules and judgments related to the practical application of the legal rules and institutes in question, the theoretical explanation of the conclusions, the history of a legal rule or approach featured in the text, this time in a simpler and

smaller font. In the above example, the reporters' notes cover the issues of how foreign relations are governed by (1) the US Congress, (2) the US President, (3) the principle of separation of powers, (4) the courts, (5) states; as well as (6) the interrelation between foreign relations and individual rights; and, finally (7) a comparison against the preceding restatement.

All these issues are abundant with references to statutes and other primary sources of law; moreover, one can find examples from the case law the Restatement is built on (Restatement of the Foreign Relations Law of the United States (Third): 8-18). This is the general structure of each paragraph (part) of any restatement. The number of such paragraphs (parts) is defined by the committee creating a restatement.

The second mandatory requirement is that restatements must not be hardline, but must rather follow the flexibility of common law. By their nature, restatements are framework common law acts based on systematic, competent doctrinal and practical interpretations and commentaries. This allows them to be used by states in law-making and by courts in their practice.

Moreover, Restatements must be "analytical, critical and constructive" all at the same time, harmonious and coordinated, details must be clear-cut, and "each subject [must be seen] clearly and as a whole" (Capturing the Voice of the American Law Institute, 2004: 5).

Throughout the years of existence of this organization, it has produced the following restatements in 17 areas of regulation:

- Agency (Second);
- Apportionment of Liability (Third);
- Conflict of Laws (Second);
- Contracts (Second);
- Foreign Relations (Third);
- Judgments (Second);
- Law Governing Lawyers (Third);
- Products Liability (Third);
- Property (Third);
- Prudent Investor Rule (Third);
- Restitution (First);
- Security (First);
- Suretyship and Guaranty (Third);
- Torts (Second);
- Trusts (Second);
- Unfair Competition (Third);
- Wills and Donative Transfers (Third).

Restatements have been drafted for quite a long time and were released in three revisions (series): First Restatement – from 1923 through 1944; Second Restatement from 1957 through 1981; Third Restatement (Series) – from 1986 to the present day. Now, the ALI is drafting the Fourth Restatement Series. Each new revision updates the older one by adding up-to-date analysis, new sources, terms and judgments. Each new series usually introduces a new restatement: thus, for instance, in 1952, the ALI started preparing the Restatement on the Foreign Relations Law (international law) of the US.

The ALI is currently working on 20 projects at the same time: in each case, it is drafting a specific legal product, be it a new restatement or an update of an old one, new principles of law, a new model code or a revision of an existing one (ALI).

Restatement of the Foreign Relations Law of the United States (Third) (1987) occupies a special place among restatements. It also belongs to secondary sources of law, hence it plays a subsidiary role in the US legal system. The principal object of that Restatement is to supplement the primary sources of law (here, customary international law, treaties, general principles of law, judicial decisions and writings), by elaborating their meaning, interpreting, and analyzing international legal rules in line with the American doctrine.

Restatement of the Foreign Relations Law of the United States (Third) (1987) illustrates the approach of the American legal community, represented by the ALI, responding to the new challenges of the time and readily supplying recommendations not only on the US common law,

but also in other key areas of legal regulation. This Restatement helps to coordinate and unify the application of international legal rules by the US states represented by their law enforcement agencies, by creating a uniform legal framework to that end.

The creation of the Restatement of the Foreign Relations Law of the United States (Third) (1987) reflected the need for uniform understanding and application by all state agencies, and especially the law enforcement authorities of the US, of the international law in its territory.

The committee that drafted that Restatement was headed by the Columbia University Professor Louis Henkin (November 11, 1917 – October 14, 2010), a distinguished American international lawyer specializing in public domestic and international legal relations, founder of the Center for the Study of Human Rights (1978) and the Human Rights Institute (1998). The group that ran the project also included other famous American international lawyers who had worked in the UN and at the US Department of State: New-York University Professor Andreas Lowenfeld, Georgetown University Professor Louis B. Sohn, Harvard University Professor Detlev F. Vagts. 28 professors of other American universities, attorneys specializing in the international law and international relations, as well as 6 professors and specialists in international law and international relations, judges of international courts from Uruguay, France, the Netherlands, the UK, and Switzerland took part in the drafting of the Third Restatement. The document took from 1979 to 1987 to complete. Other ALI members regularly participated in the discussions of the project at the annual meetings on the Restatement. The resulting version was a revised (new) edition of the Restatement of the Foreign Relations Law of the United States (1965).

The Introduction to the Restatement of the Foreign Relations Law of the United States (Third) (1987) states that it rests not only on the international legal rules, but also on the rules of the domestic US law that make an integral part of the US foreign relations law: the US Constitution, the rules adopted by the US legislature, executive and judiciary, to the extent they relate to applying the international law in the US territory (Restatement of the Foreign Relations Law of the United States (Third) (1987).

Restatement of the Foreign Relations Law of the United States (Third) (1987) comprises two volumes; 9 parts; 907 sections; an index of cases mentioned or discussed in the drafting of the Restatement; indices of all statutes, international treaties, authors and their publications referred to during its drafting; a table comparing the 1965 and the 1987 versions of the Restatement; an index of terms used and other reference tools (Restatement of the Foreign Relations Law of the United States (Third), 1987).

The 1987 Restatement of the Foreign Relations Law of the US has had a profound effect on the application and enforcement of law in the US related to the use and implementation of the international law in the US territory, in particular, as regards the work of the US Department of State (Hollis, 2012), and the courts. To understand the significance of this document, one can simply look into the practice of the US highest judicial body – the Supreme Court. The most famous cases where its members have used that Restatement, are: Sanchez-Llamas, Sosa, Empagram, Hartford Fire, Saudi Arabia v. Nelson, Dames & Moore, Sabbatino etc. (Sanchez-Llamas v. Oregon; Sosa v. Alvarez-Machain; F. Hoffman-La Roche Ltd. v. Empagran; Hartford Fire Insurance Co. v. California; Saudi Arabia v. Nelson; Dames & Moore v. Regan; Banco Nacional de Cuba v. Sabbatino).

4. Results

The legal nature of restatements is characterized by a set of unique features.

1. Restatements in the US are drafted and published exclusively and privately by the American Law Institute (ALI), while the state takes no part in them whatsoever.

2. The lawyers participating in the drafting of a restatement are not tasked with abolishing or amending any rules; this is well beyond their competence.

3. Whenever a restatement is drafted, the ALI primarily summarizes the statutory law, the judicial and other legal practice and common law rules, rather than solely the opinions of prominent scholars and the existing legislation.

4. A restatement is not a binding act to be followed by judges or other officials; rather, it is a secondary, subsidiary source that supplements and facilitates decision-making in a case, and in no way setting forth rules.

5. A restatement may contain new ideas and proposals to improve the legislation, but it may not formulate new binding legal rules.

6. Since case law constantly changes, the ALI annually issues a supplement to the relevant restatement, summarizing such new practice (Case Citations, 2014).

7. A restatement is relatively flexible and may respond to the new developments of practice: right now, the fourth edition of the restatements is in works, that is being updated for the present-day changes in politics and law not only in the US, but in the international community as a whole.

8. The US is a federation, and restatements assist its constitutive states to a certain extent in systematizing their own legislation, serving as a model document a state can use for reference in adopting its own legislative act on the restated issue.

9. A restatement is the product of collective conventional mind of the best US legal professionals (judges, attorneys, scholars) who have reached a consensus in adopting the document, which once again underscores its relevance and value for the American legal system. Another important note to make is that it is, of course, impossible to claim that a restatement is a source of the international law, but since it has a conventional normative (contractual) character, one can boldly call it a secondary source of the US domestic law, a coordinated doctrinal instrument of the American legal elite.

5. Conclusion

It is inadvisable to use any term other than “restatement” for this source of law, since there is no adequate, appropriate and accurate translation that would convey its full meaning.

Restatements in the US are an established and important secondary legal source used both in the adoption of new legal acts in states by their legislatures, and in the practice by legal theorists and practitioners, and in law enforcement (as in the case of the 1987 Third Restatement of the Foreign Relations Law of the United States) by politicians and state officials (of the US Department of State, among others). It should be noted that the 1987 Restatement of the Foreign Relations Law of the United States (Third) combines both the legal aspects of the international law, and those that deal with foreign relations (as follows the document’s name and content) that the US takes into account, that is, also the substantive issues related to the perception and implementation of foreign relations by the American State.

Given how important restatements are for the US domestic law, their legal nature requires deeper research and comprehension, since the American courts often, for instance when dealing with cases involving foreign parties or subject matters, rely on the recommendations and rules of the restatements, and in particular, the 1987 Restatement of the Foreign Relations Law of the United States (Third).

A restatement, as a legal instrument (tool or means), first emerged in the US along with the movement towards unification and harmonization of law, given that the US had both a federal and state legal systems; for bringing together and coordinating their legal rules, since the US common law applies rules adopted directly by the states.

All restatements are aimed at solving the issue of fragmentation and lack of doctrinal unity in the American common law system, by way of eliminating uncertainty, conflicts and excessive common law prescriptions, and by systematizing (codifying) them.

Irrespective of type, all Restatements have the same well-established form with specific and clearly prescribed characteristics.

New versions of restatements and new restatements are drafted where the ALI, based on a wide discussion within the American legal community, concludes that this or that restatement needs updating or preparing. With time, certain new rules have begun to be proposed for restatements, including, for example, advice on using the innovative rules of foreign laws.

Restatements also constitute a certain way of dealing with the issue of lacunae in the American legislation, since they are based on the practice of applying the law, allowing quicker identification of issues that require clearer legal regulations.

One should not forget that restatements, being, by form, secondary sources of law, are far from playing a subordinate role in the American legal system.

Therefore, studying the restatements helps to form a deeper understanding of the US common law and the existing legislation, since they contain, *inter alia*, examples of how courts apply legal rules, as well as certain advice on better implementation of the primary sources of law.

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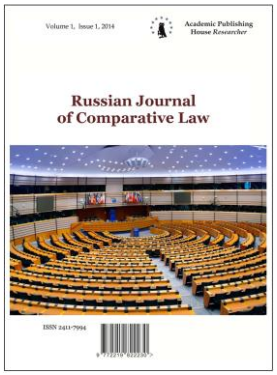

Character, Method and Causes of Globalization of Law

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Abstract

The aim of this paper is to determine the character, method and causes of the globalization of law, that is, the contemporary phenomenon of the increasing harmonization of national legislations at a global level, primarily with international law, as well as with each other. In doing so, we have used the method of text analysis, formal-legal method, comparative method and statistical methods. The subject of our research is the relation between the general social process of globalization and the phenomenon of global harmonization of national legislations, in other words, the creation of the law proceeding from the harmonization of legal institutes, solutions and entire legal systems from international law or one country or culture, or to another country or culture, which is, in the legal theory, called "globalization of law". We have found that the character of the process of globalization of law should be positioned amongst the extreme views of the prominent authors in this field, and that the legal reception, primarily from international law, is the prevailing method of global harmonization of law. Also, the causes of the social process of globalization are simultaneously the causes of harmonization of national legislations at a global level. According to the type of factors, all causes of globalization of law are classified as objective and subjective. Furthermore, the characteristics of four groups of objective factors – technological, economic, political and cultural - have been presented, as well as significant examples. In addition to this, the characteristics of the group of subjective causes and the most significant factors of this group have been presented.

Keywords: Globalization, harmonization, international law, reception, UN.

1. Introduction

Modern civilization is characterized by the intense social process of globalization, which is reflected in the rapid development of new technologies and turbulent changes in economics, politics and culture. At the same time, with intensification of integrative changes of the modern world, namely, with the emergence of the «era of globalization», one may notice that there is an intensive harmonization of national legal systems at a global level. The debate on this issue is becoming more and more intense, considering, inter alia, the character, method and causes of the phenomenon of global harmonization of law, which have become some of the basic prerequisites for the proper understanding of legal development in the contemporary world.

With this research, we wanted to determine the character, that is, the essence of global harmonization of the law, its primary method, as well as to answer the question of why there is intensive harmonization of law, i.e. what the causes of this phenomenon are in the modern world.

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Thus, the subject of our research is the phenomenon of harmonization of law, that is, the creation and development of law due to the harmonization of legal institutes, solutions and entire regulations of one state or culture, with international law or national law of another state, or culture, in the conditions of the pronounced process of globalization.

2. Materials and methods

To examine the problem comprehensively, we used appropriate methods for researching each of the different aspects of the chosen subject: we used the method of text analysis to study theoretical papers; to compare different legal systems we used a comparative method; for the analysis of regulations, we applied the formal legal method, and for data processing we used statistical methods. When it comes to the materials and sources, both national and international regulations have been used, together with other international acts, as well as newspaper articles, relevant scientific works and official databases.

3. Discussion

3.1. Character of the process of globalization of law

The notion of «globalization», as well as the related terms «globalism» and «mondialism», appeared in academic discussions at the end of the 1980s and early 1990s, to denote the phenomenon of growing integrative changes in the contemporary world. Soon the debate about globalization sparked off, and this concept became the primary problem of social sciences. However, not only is disagreement of the theoreticians strongly expressed about the very essence of this phenomenon, but it is also expressed about its causes, with each of these issues being characterized by the sharp polarization of attitudes.

In such a heterogeneous discourse, it is difficult to establish an adequate classification, but the most acceptable division of the authors is to: «sceptics» who deny the existence of globalization as a social phenomenon (Hirst, Thompson, 1999; Drache, 1999), "globalists", or "hyper globalists" who promote the inevitability of global integration (Thomas, 2000; Ohmae, 1999); "anti-globalists" who criticize the existing globalization and advocate a different form of world integration (Chomsky, 1999; Boggs, 1999); and "transformationalists" who try to reconcile extreme views and point to the complexity of this phenomenon (Giddens, 1999; Beck, 1992).

Considering the necessity to overcome one-sided interpretations of the process of globalization and its causes, we are at the standpoint that the changes of the modern world towards globalization may be observed as a global social process with subjective elements. Thereby, the process of globalization, as a general social process, inevitably includes the process of globalization of law, since law is a normative system i.e. social product. Therefore, the processes of globalization in all social areas generates the process of transformation of the modern legal system established in the developed countries in the 19th century, with clear distinction between international law and national legal system (Snyder, 2002: 3-4).

In the field of international law, the process of globalization has resulted in the constant development of this branch of law, especially since the end of the Second World War, consequently the development has become extremely intense precisely since the beginning of the last decade of the 20th century. The development is reflected both in public international law and in private international law, both globally and regionally, in quantitative and qualitative terms. Namely, during above mentioned period there was a rapid increase in the number of adopted international legal documents (resolutions, conventions, decisions, etc.), primarily in the UN, but also on the initiative of other global and regional governmental and non-governmental organizations. Additionally, two new courts, the International War Crimes Tribunal (for the former Yugoslavia and Rwanda) and the International Criminal Court were established in that period, and the number of international arbitrations has also considerably increased. First, a qualitative shift lays in the fact that, unlike the traditional system of international law, in which the subjects were exclusively internationally recognized countries, the jurisdiction of international law is gradually expanded directly to individuals. Also, one can notice the trend towards increasing importance of the "soft law".

On the other hand, under the influence of integrative changes in the process of globalization the area of national law is experiencing a transformation in the direction of rising internationalization, that is harmonization of national legislations at the international level, both

global and regional. The harmonization of national legislations at the international level, i.e. the transposition of international law into a national legal system, can be achieved by direct transposition of international conventions (monistic system) or by adopting national regulations that are in accordance with some international legal instruments (dualist system). Direct adoption of a conventions into the legal system (for example, human rights conventions) does not require the adoption of a national regulation on the same issue, but in this case, it is necessary to harmonize many national regulations from different areas with the international conventions.

The process of approximation of international law, on the one hand, and national laws, on the other hand, also reflects the phenomenon of harmonization of law. Namely, in the period of modern national states, there was a clear distinction between international law and the internal law of national states. Therefore, the harmonization of the law was carried out in parallel, but independent ways. International conventions have been adopted by internationally recognized sovereign countries by its own decisions. Such conventions, by their direct application, or by special laws, have been incorporated into the recipient country. In the case of legal harmonization, the law has been transferred from the national legislation of one state to the national legislation of the other state, either in segments, or in certain legal norms, or solutions, or as a whole (*en bloc*). However, in the period of intense globalization, when a clear boundary between international law and national law is lost, legal harmonization occurs in a way which has the elements of harmonization of the international law and alignment through the acquisition of the national laws, as well. This problem can be analysed best in the case of the adoption of EU legislation by non-member states or candidate countries for EU membership, whether it's a European country, or even non-European one, which adopts a legal solution, because of its quality.

Namely, by its method of creation (based on international agreements) the European Union law is a supranational international law of member states, however, by transformation of the organization into a kind of political entity, with introduction of the parliament, representatives, executive bodies, and other state institutions, as well as with defined territory, the elements of national legislation appear, so the EU law increasingly takes on its own identity. Therefore, the reception of this law, primarily by non-member countries, cannot be clearly characterized as the reception of international law, nor as a reception of foreign national law.

This is the case with many other international governmental and non-governmental organizations that initiate the legal reception at the global level. Namely, within the international law there is an increase in adoption of recommendations, guidelines and law models (*soft law)* that still produce the reception of national legislation from the countries that have previously aligned their legislation with these principles towards those countries that will do so later. In this way, a legal norm that emerged from the international level is "nationalized" in some of national legislations of the countries that have been promptly complied with international law (most often these are the most developed countries, which have stable countries' institutions and a built-in legislative apparatus). Moreover, other countries, which are late in the process of harmonization with given international principles (mostly developing countries), have adopted ready-made, harmonized legal norms by the reception.

Since international law takes on an increasing importance for the functioning of the contemporary national states within the international community, so the legal harmonization is increasingly based on international law, unlike in the times of colonial conquest and the creation of modern nation states with their own legal system and adoption of national law of other countries. This is precisely the basic distinction between the earlier and the modern way of harmonizing the law.

The debate focusing on the notion and character of globalization in social theory, primarily in economic field, but also in public, where a wide range of different attitudes is evident, has also been transferred to legal theory, and in terms of globalization of law there is no consensus among theoreticians.

For attitudes that emphasise significant changes in the traditionally understood modern world legal system, both internationally and nationally, Banakar's view is rather characteristic. Namely, this author believes that the globalization of law, facilitated by market expansion and the progress of transport and communications technologies, raises awareness of the need to strengthen a new legal infrastructure, specific in its potential to overcome national and cultural borders. Thus, this author believes that the function of law in the current transformation of the modern world

should not be viewed only in the context of satisfying the needs of economic subjects, as it is often the case in legal theory, but much wider, considering all social areas (Banakar, 1998: 326).

On the other hand, in the legal theory, there are authors who stress that the role of sovereign states in the functioning of the traditional international system, even in the field of law, is still irreplaceable. Thus, Jarrod Wiener presents thesis that the harmonization of law at the global level strengthens the states, because these are the methods by which the countries only respond to transnational impulses that come from the outside, and therefore adapt to the newly emerging situation. Since the globalization of the economy puts before the states the imperative of inclusion in the common market, the harmonization of law of national states is the widest in this area. Nevertheless, Wiener notices that equalization of laws comes in other areas, as well. However, according to this author, full legal harmonization at the global level is an undesirable, retrograde process of returning to pre-modern universal law, which would lead to the creation of the Empire of Law (Wiener, 1999: 190).

The above-mentioned globalist as well as anti-globalist attitudes may be characterized as extreme. Yet, for a proper understanding of the transformation of law in the process of globalization, this process should be understood comprehensively, that is, we should consider the undoubtedly growing integration process reflected in both international law and in national legislations. On the other hand, one should accept the reality that sovereign national states are still subjects of international law and holders of the legal system in their state territory, and in that sense, they are subjects of globalization of law. Therefore, the national legal systems are beyond doubt under the influence of the general process of globalization, but this does not mean that their legal personality or states' sovereignty is decreasing, but the harmonization of national legal systems comes primarily through prominent international legal instruments, either "hard" or "soft" law, in different social areas.

3.2. Legal reception as a method of harmonization of law

Theoretically, the distinction can be drawn between the concepts of unification of law and harmonization of law, although unification, as well as harmonization, is the result of the reception of law. Therefore, in both cases, the reception as a method is used, and the difference is in the scope of reception, so that unification is complete, whereas harmonization is not the complete reception of a foreign law, but the import of those legal institutes whose presence eliminates the essential differences between foreign and domestic law. Furthermore, the harmonization of law is the first stage in the unification of law, that is, it is a process, in which it is very difficult, almost impossible, to determine the boundary within which the harmonization ends, and the unification of law begins (Petrovic, 1999: 7-8).

The reception of law, as a way of harmonizing law, means the transfer of certain legal rules, solutions and institutions from one legal system or international law into another legal system, or culture, or the transfer of the entire legal system from one culture to another. This phenomenon is also referred to in the legal literature as the terms "legal transplantation", "legal acculturation" and others. Examples of legal reception are from the very beginnings of legal history, but this legal phenomenon was drawn attention to by Alan Watson in the mid-seventies of the last century (Watson, 1974, 1993). Later, the debate developed among legal theorists especially after the fall of the Berlin Wall, that is, with the beginning of accelerated transformation of the legal systems of the countries of the former Eastern Bloc and the gradual formation of the European Union.

In contemporary legal theory, there are two different approaches to the nature of the legal reception, which is reduced to the understanding of the relationship of law and society. The advocates of the theory of convergence pledge the law develops independently of the society, in which it occurs (Watson, 1974, 1993; Markesinis, 1997; Sacco, 1991). On the other hand, theorists who favour sociological approach to this issue are at the point of view that law is the "mirror of the nation", that is, law is rooted in the society to such extent that the reception of law is essentially impossible (Kahn-Freund, 1974; Legrand, 1997, 1996). To avoid the extreme attitudes that inevitably lead to theoretical reductionism, in this paper we support the view of authors who have integral approach on this issue, while recognizing the importance of sociological factors for the reception of law, which at the same time does not exclude the possibility of subjective intervention (Twining, 2000; Teubner, 1998).

It is the observation of the legal reception as a method of harmonization of law in a social context, whereby both complex objective and subjective causes are distinguished, along with simultaneous analysis of existing theoretical concepts - that can lead to the adequate theoretical explanation. Thus, harmonization of law in the process of globalization can be defined as a way of creating law by legal reception from international law or foreign national legal systems (Dabovic, 2008: 166-167).

3.3. The causes of globalization of law

In this article we have divided all the causes of harmonization of law in the process of globalization into objective and subjective. Thereby, it is very difficult to distinguish between objective and subjective causes, because these are dynamic processes of overlapping, interrelations and transition of the causes, from one country to another. Namely, the differences between objective and subjective causes are not at the same time the differences between material and spiritual creations, since objective causes can be both material and spiritual creations, while, on the other hand, subjective causes are only spiritual creations (either rational or irrational). Therefore, we will take subjective causes to represent conscious human creativity, and the objective causes as overall social situation in which this creativity is taking place (Stankovic, 1998: 11-16).

3.3.1. Objective causes of globalization of law

As stated above, the current transformation of law is an integral part of globalization as the process of social transformation, so that the causes of the globalization process are, simultaneously, the objective causes of the globalization of law. Therefore, the most important technological, economic, political and cultural factors of globalization are the indirect objective causes of the harmonization of law in the process of globalization. These factors of the globalization of law operates in close interdependence, so that it is impossible to delimit them.

In addition, these causes also lead to the creation of the appropriate legal instruments of international law (either "hard" or "soft" law), which lead to a back response, so the process of globalization is being accelerated. Under the direct influence of these legal instruments the law develops in the direction of global harmonization.

3.3.1.1. Development of new technologies as the cause of globalization of law

New technologies, primarily IT and biotechnology, provide unprecedented social progress, reflected in the compression of time and space, but also in the improvement of people's health, knowledge dissemination, economic growth and more direct participation of citizens in their communities, and are among the primary factors of acceleration the process of globalization. However, technological progress has its own drawbacks - each technology carries certain risks that can negatively affect the development of society. Given that new technologies are being used considerably, these risks are increasing, and with the globalization of new technologies these risks become a global issue. With the development of new technologies that take on a global character, there is a necessity to regulate this new aspect of social dimension – both positive and negative – for which regulations must be adapted.

Information technologies, especially the Internet, are encountered with the problem of legal regulation of a network that is not subject to national jurisdictions. Namely, electronic commerce is the most prominent example of the complexity of this problem. Also, since biotechnology is directly relevant to the life and health of people across the globe, there is awareness of the need to be adequately regulated. Therefore, these technologies that have an immanently global character overcome the possibilities of partial solutions of national legislations and require the broad international harmonization of laws which besides international conventions, is mostly achieved by the harmonization of national legislations.

With the expansion of the Internet, that is, with the rise in the number of its users and presentations, as well as with the increasingly complex relationships that occur within the virtual community, there has been an ever-growing need for legal regulation of these relations. However, there are two different legislative approaches to this issue in the world: on the one hand, the United States advocate "self-regulation", that is to leave this field out of national legislations, by which, the Internet users will gradually, through practice, make their own specific rules, whether they constitute an independent system, or complement the national regulations. On the other hand, the

European Union, and most other countries, advocate the promotion of relations via the Internet under national legislation. Advocates of this approach believe that the Internet is just another means of communication, such as a letter, telephone and fax, and that there is no reason to change the established way of regulating disputes in this field by national legislations and public international law.

Although, the differences between the European and American approaches in regulating relations between the Internet users are distinct, the harmonization of national regulations at a global level in this area, however, comes through international organizations, that is, through their international legal instruments, or soft laws, such as guidelines, recommendations, models of laws, etc., or binding, that is conventions and agreements (hard law). Thus, the very necessity of harmonizing national regulations, arising from the international character of the Internet as immanently global media, in any typical area (electronic commerce, privacy, cybercrime, etc.) represents an objective cause of global harmonization of law, while the competent international organizations mediate in this process by their legal instruments.

The data suggest that electronic commerce in the world has been developing more rapidly as a result of which there is a need for legal certainty. It is this rapid development of e-commerce, with the explosive increase in the number of Internet users in the world, as well as the increase in the number of presentations and their content, that is the basic objective cause which has led to the initiative for harmonizing national legislation in the electronic business areas. In this regard, the most important institutions are UNCITRAL, the World Trade Organization and the OECD. Namely, these organizations, by their legal instruments, mostly non-binding, initiate the harmonization of national regulations in this field (The Convention on the Use of Electronic Communications in International Agreements (2005), the Model of Electronic Exchange Bills Act (2017), the Model of Electronic Signatures Law (2001) and the Model Law on Electronic Commerce (1999)).

In the field of biotechnology, many countries, especially the developed ones, have rapidly worked on the legal regulations, due to their importance, that is, the fundamental issues they deal with, such as the humans' life and health. Thus, in accordance with several international legal acts, national regulations on human cloning ban have already been adopted in 70 countries (Haley, 31 July 2015).

Globally, use of GMO is regulated by the Cartagena Protocol on Biosafety, which was adopted by the Convention on Biological Diversity, signed by 166 countries (till 2018). The aim of this Protocol is to provide an adequate level of protection in the field of transport, traffic and use of GMOs that may have undesirable effects on biosafety and human health. Also, with the same convention in 2010, the Nagoya-Kuala Lumpur Supplementary Protocol on the determination of damages caused using GMOs was adopted.

3.3.1.2. Global economic integration as the cause of globalization of law

The economic factors of the process of globalization, as well as the process of globalization of law are the most prominent in the fields of finance, trade, production, as well as regional economic integration and the businesses of transnational companies. In finance, the Bretton Woods institutions, as the most important global financial organizations, out of 44 founding member states (in 1944), expanded their membership to almost all countries of the world (189 members in 2017). The economic power of these institutions is reflected in their approval of financial assistance, structural adjustment (International Monetary Fund - IMF) to the member countries, as well as the investment projects (World Bank - WB). Furthermore, they have built an institutionalized system of conditions that must be met for a country to receive credits from these funds. In addition to economic conditions, this system indirectly includes political conditions, which leads to the unification at the global level, of both economic policies and political principles, that is, the appropriate regulations.

In international trade, the process of globalization is characterized by the intense growth of world trade in relation to world production, which has appeared during the entire period of the Second World War aftermath. Namely, after the war years, international trade has started to grow again, and in the last few decades the expansion of trade has been faster than ever before. Moreover, at the global level, the sum of exports and imports is higher by 50% than production, while at the beginning of the 20th century it was below 10%. Over the past few

decades, transport and communication costs have been reduced worldwide, and the international trade agreements have become increasingly common, especially among developing countries. In fact, trade between developing countries has more than tripled between 1980 and 2011 (International trade, WTO).

Modern production of goods and the provision of services, influenced by the development of new technologies are characterized by the reorganization of the organizational structure into networks that spread across the globe. Export, which is the basic element of the production strategy of these networks, is one of the drivers of the global economy.

Also, understanding the globalization process of the world economy is not possible without the knowledge of the strategy pursued by transnational companies (TNC). The proof of the economic power of the TNC are the data indicating that the world's largest TNC (General Electric) has assets abroad worth about 500 billion USD of total assets which are worth about 700 billion USD, while among the 100 largest TNCs, 17 have 90 percent of their assets abroad, and the three largest TNC in the oil production, make about 73 percent of their sales abroad (Economist online, 10 July 2012).

Regional economic integration is gaining increasing economic importance, since it is precisely the regional connection of national markets that represents the stage of development of economic integration towards the establishment of the world market. Namely, since the beginning of the 1990s, the number of regional free trade agreements has been steadily increasing from 70 to around 300 agreements in 2010 (WTO, 2011: 6). In addition, more and more regional trade agreements have lately gone beyond regional frameworks, whereby regional trade integration concludes agreements that are not aimed at abolishing customs duties, but at giving preferential status. The largest regional trade agreements in terms of internal traffic are in Europe (EU and EAEU), North America (NAFTA) and the East Asian region (ASEAN).

Exponential growth in global financial transactions, trade, manufacturing, transnational companies and regional economic integration as causes of the economic globalization are institutionalized in the form of international legal instruments of international organizations, of which most significant ones are: The World Trade Organization, the International Monetary Fund and the World Bank. These organizations and their international legal instruments, according to Joseph Stiglitz, "help to establish the rules of the game", that is, they play the role of mediators in relation to economic causes and the harmonization of national laws at a global level.

3.3.1.3. Globalization of politics – growing interdependence of political communities and democratization as causes of globalization of law

The process of globalization in the field of politics characterizes, above all, the growing interdependence of political communities, as well as the expansion of democratic order. These two interdependent processes, with other accompanying phenomena, constitute the essence of the transformation of the international political system established by Westphalian Peace more than three centuries ago. However, the process of globalization of politics is multidimensional and contradictory, as are the processes in other social areas.

The process of growing integration of political communities manifests itself as a progressive weakening of the states' sovereignty, where the sovereignty is transferred to the international level with the increase in the number of international organizations. Namely, in 1909, there were only 213 international organizations (governmental and non-governmental), while their number increased to around 5,000 by 1989. Thereby, about 75,750 international organizations are estimated to work around the world today (Union *of International Organizations, 2018)*. Since the rise in the number of international organizations is the result of increased integration of the modern world and the desire to institutionalize the need for greater international integration, international organizations become a generator of further integration, that is, one of the accelerators of the process of globalization.

In the last few decades, in addition to the establishment of numerous new governmental and non-governmental international organizations, their individual importance has grown, above all the United Nations, with its increasingly complex and numerous bodies. Nevertheless, in this field, the European Union has made the biggest step forward, changing from the economic community to the union with the beginning of the state formation. Since it has become an unassailable political

authority in Europe, the EU also has a political influence on countries that have the ambition to join this union.

Namely, since its unpretentious establishment in the middle of the last century and led by the integration processes at the European level in the economic field, this organization has territorially expanded, along with the extension of competencies, with the tendency to cover almost all countries of Europe, as well as all their social areas. Thereby, the EU is a political authority for countries in the region that have not yet become members but have this ambition. As the integration of Member States is formally based on the legal harmonization, primarily in the field of economics, this leads to the legal harmonization in this field in almost all of Europe. Also, the EU has an active role globally, as the initiator of international acts, which contributes to global convergence of law.

The framework for the harmonization of EU law is defined in Article 3.6. of the Treaty on EU (Consolidated version), which states that the Union pursue its objectives in proportion to its responsibilities. The scope of EU competencies is limited by the principle of assignment, while the use of jurisdiction is based on the principles of subsidiarity and proportionality. Under the principle of subsidiarity, the Union will undertake activities only in those cases where the activities cannot be successfully implemented by the Member States. In addition, the application of this principle by the organs of the Union is regulated by a special protocol. In accordance with the principle of proportionality, the content and form of the activities of the organs of the Union must not exceed what is necessary for the fulfilment of the prescribed objectives in the Agreements.

The division of legal instruments of the Union, that leads to the legal harmonization, to primary and secondary regulations, has been officially established. The Founding EU Treaties together with amendments and protocols, as well as Union agreements with the new members are considered the primary law, while unilateral acts and agreements are secondary. Unilateral acts consist of Regulations, Directives, Decisions and other atypical acts (Communications, Recommendations, etc.), while agreements can be international, between member states, or between EU institutions. Besides this, additional sources of EU law are: Case studies of the EU Court of Justice; international law; and general legal principles.

Also, the World Trade Organization sets the conditions for accession, first and foremost structural and economic, but also, indirectly, political, especially in terms of respect for human rights. In addition, the Bretton Woods institutions influence the macroeconomic policies of developing countries through "conditionality" policies, which limits sovereignty of developing countries in choosing their own economic program. In the last decade, conditionality policy has been extended to include the requirements for "good governance", respect for human rights and liberal-democratic mechanisms of the political accountability and efficient public administration. The fulfilment of these conditions is insisted on by a group of the developed countries which, with regard to the decision-making system, control the Bretton Woods institutions.

In the last two decades of the twentieth century, there has been intense democratization in the world, or the expansion of democratic order. Namely, in this period, 81 countries – 29 in Sub-Saharan Africa, 23 in Europe, 14 in South America, 10 in Asia, and 5 in Arab countries – have accepted a multiparty political system based on democratic elections. Thus, at the beginning of the Third Millennium, 140 countries out of nearly 200 countries, elected their own government in democratic elections (Human Development Report, 2002; 63).

The expansion of democratic order, that is, the protection of human rights, is implemented to a large extent by international human rights' conventions which due to their large number of signatories practically establish the harmonization of national legislations in this field on a global level. Certainly, the most important international legal act in the field is the Universal Declaration of Human Rights, adopted by the United Nations Assembly, as Resolution 217, in 1948, which laid the foundations of a modern human rights' system. With many members (193), this Convention has established standards in the field of human rights that are almost universally accepted in the world.

In addition, by 2017, the International Covenant on Civil and Political Rights, which was offered for accession in 1966, was signed and ratified by 170 countries. Also, the Convention on Elimination of All Forms of Racial Discrimination was ratified by 179 and the Convention on Elimination of Discrimination against Women was ratified by 189 countries, while the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by 163 countries and the Convention on the Rights of the Child by 196 countries.

In addition to the international conventions in the field of human rights, international humanitarian organizations in this area, such as Amnesty International, Human Rights Watch, CARE, Transparency International, Reporters Without Borders etc., largely contribute to the harmonization of regulations on human rights at a global level. By their acts, these organizations influence the countries in which they operate to adopt regulations in accordance with the international standards, and they ensure that the existing regulations are applied adequately.

3.3.1.4. Cultural globalization - establishing a humanistic system of values as dominant in the context of global harmonization of law

In the debate on globalization, the cultural aspect of this phenomenon is not so much present as economy, politics or technology, which, still, does not mean that it is less important. On the contrary, the cultural aspect is much subtler and more concealed than the others, but it is precisely the very essence of the process of global integration, that is, the integrative thread which, in addition to the technological, economic and political factors, truly connects countries and individuals from different parts of the planet. In this regard, cultural aspect is characterised by the connection actualised at the level of individual consciousness as well as phenomenological level.

Namely, the cultural transformation of the modern world is characterized by two contradictory processes. First, the process of strengthening of cosmopolitan culture and, at the same time, cultural fragmentation to the level of ethnic communities. Second, the process of dissemination of cultural patterns from the developed countries to the developing countries, which at the same time have the character of humanistic values and mass culture.

According to one survey conducted in the period 2001-2016 on the identification of people with citizens of the world, on the sample of 20,000 inhabitants from 18 countries, the identification of the people with the citizens of the world increased to an average of 56 percent in 2016. However, a double trend was identified. Namely, in developing countries, as well as in countries with emerging economies, there has been an increase in the identification with the world's citizens, especially in Nigeria (73 %), China (71 %), Peru (70 %) and India (67 %). On the other hand, in the developed countries there is a reverse process, i.e. a declining trend, so in Germany the identification with the citizens of the world in 2016 dropped to only 30 % (Grimley, 2016).

Also, some theorists find that, in addition to the process of increase in identification with the global level, the simultaneous contradictory process of cultural individualization of ethnic communities is taking place, so both sides of this phenomenon must be considered. Thus, Robertson (Roland Robertson) has a balanced view of this issue, believing that global and local culture are complementary (he uses the term "glocalization", a coined word for this interaction), that is, the global culture should be understood as a contradictory phenomenon which is at the same time a source, but also a threat to local cultures (Robertson, 1992).

Also, Benjamin Barber believes that two contradictory processes of the cultural transformation of the modern world are occurring: the disintegration of national states to the level of ethnic communities, whereby the core of every conflicts lies in cultural differences and the integrative process of globalization moved by the economic and ecological forces and embodied in the symbols of the consumer society of the West (Barber, 1992).

The expansion of international cultural patterns from the most developed countries of the West to the rest of the world is, apart from strengthening the cosmopolitan culture, one of the basic cultural processes of transformation of the modern world. First, economic globalization, that is, the establishment of the world market, as well as the development of telecommunications, have been contributing to this process. Namely, in the world market, dominated by the companies and the products from the most developed countries, as well as in the media, in which western pop culture prevails, alongside with the products, the English language, appropriate lifestyle, and the system of values have been disseminated.

When it comes to the question of the character of the value system that is being transferred from developed countries to developing countries, there is no consensus among theorists. Thus, some authors consider that in the last decades of XX and the beginning of XXI century in the most developed countries, the process of transformation of the dominant value system in the direction of strengthening humanistic values is taking place. Namely, these theorists consider that the values such as life, as the basic human value, health and the protection of the environment are of an increasing importance in the current post-industrial stage of development, instead of the material

wealth that was one of the basic values on which Western society rested in the period of industrialism (Brzezinsky, 1970).

In contrary, P. H. Ray and R. S. Anderson, who when analysing the value systems of the social strata in the United States, during the 1990s, noticed the existence of three basic social classes with specific value systems: "traditionalists" - characterized by attachment to the traditional values of small cities from the interior USA; "Modernist" - characterized by the materialistic system of values, i.e. orientation towards consumption, success and new technologies; while "cultural creators" prefer humanistic values, ecology and the global community. These authors found that, at the time, about 50 million inhabitants in the United States, and about 80 million people in Western Europe shared humanistic social values. However, the media and political life were dominated by "modernists" who promote their materialistic system of values. The authors found that in the mid-1970s, there were less than 4 percent of "cultural creators" in the United States, which was a remarkable growth, compering to 20 percent in just two decades, with a tendency to accelerate this process. They estimated that by 2020 cultural creatives would reach more than half of total population in USA (Ray, Anderson, 2000).

Transformation of the counter-cultural value system into the dominant one, which is in progress in the developed societies, can be seen in all spheres of social life, primarily in the field of economic marketing. Moreover, given the emergence of a new post-industrial stage in the development of developed societies, one may notice that the market mechanism remained the same as in the previous, industrial period (it can be said to be even more perfect), so that the new social form has characteristics of the consumer society too. However, there has been a change in the types of products that are now referred to as socially prestigious: so, the characteristics of products that promote healthy life are now highlighted, environmental conservation, global togetherness (such as: organic foods, less-fuel-consumption cars, recycled packaging, GMO-free, etc.), which implies that they are now the most acceptable social values.

3.3.2. Subjective causes of globalization of law

As stated above, it is difficult to determine the difference between objective and subjective causes in the process of creation of law by legal reception from international law or other national legal systems. Although in the process of globalization the influence of objective factors, i.e. global processes in the fields of technology, economy, politics and culture is evident, this does not mean that the harmonisation of law is determined only by objective factors. Furthermore, subjective factors, which involve all conscious actions that social groups or individuals carry out within the framework of the legally prescribed procedure, or outside of it, with consent, more or less freely, setting goals, including the activities led by irrational motives (emotion, subconscious, etc.), affect the final shaping of every legal phenomenon, as well as global harmonization of law (e.g. Bilderberg Group, Trilateral Commission, Queen of the UK, „Five families“ in USA, etc.).

As distinctively subjective causes of harmonization of law in the process of globalization, we can isolate the "project of globalization", that is, the deliberately directed actions of social groups and individuals in the direction of spreading globalization, as well as legal and technical assistance provided to developing countries by developed countries, Additionally, in the process of globalization of law one of the main subjective causes is legal profession, which in the process of globalization is experiencing a transformation in the direction of increasing integration internationally (through the dissemination of foreign language skills, the use of the Internet for obtaining information and communication with colleagues abroad, attending international seminars, conferences and training, etc.).

Unlike the objective causes, which influence the harmonization of law in the process of globalization, mainly indirectly, through legal institutes, the subjective causes may have an influence on the globalization of law directly by determining the reception of concrete legal acts. In this process of globalization, the interactions of subjective and objective causes come to prominence, so that subjective causes are determined by objective causes, that is, objective causes direct the operation of subjective causes.

4. Results

This article contributes to the current debate in the legal theory on the basic characteristics of the increasingly prominent process of harmonization of national legislations at the global level,

which is marked by the term "globalization of law". The discussion of the essential questions about the character, method and causes of the globalization of law, with formal legal, theoretical and empirical data, enables a better understanding not only of this phenomenon, but also of the development of contemporary law.

5. Conclusion

The current process of harmonization of national legislations at the global level, which is specified in the legal theory as "globalization of law", is an immanent part of the general social process of globalization. The character of the process of globalization of law regarding the loss of the sovereignty of national states in this process can be positioned between the extreme attitudes of globalists and anti-globalists. Moreover, it is determined that the sovereignty of the states has gradually been decreased, but that their sovereignty in essential issues has still not called into question. In addition, the basic method of global harmonization of law is the legal reception mainly of international legal instruments, either "hard" or "soft" law. Since globalization of law is an immanent part of the social process of globalization, the objective and subjective causes of the social process of globalization are at the same time the causes of globalization of law. The objective causes, that is, technological, economic, political and cultural facts, affect global harmonization of law principally through international legal instruments. On the other hand, the subjective causes, among which are the most prominent the "globalization project", the legal-technical assistance and the legal profession, influence the global harmonization of law mainly directly.

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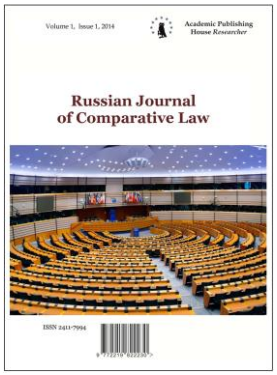

Pan-American International Law: Latin American and USA Perspective

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Abstract

The article gives a historical overview of the development of the idea of Pan-American law from two perspectives: one of the United States, and other of the Latin American countries. The dialectical struggle between anti-imperialist and imperialist aspects within the Monroe doctrine is revealed. Calvo-Drago doctrine is overviewed, noting its progressive character and essential compliance with the original meaning of the Monroe doctrine. International effect of the Drago docrine is compared to that of Calvo doctrine, as well as US successful efforts to deprive it of its original meaning is mentioned. Perspectives for the future development of both doctrines is outlined.

Keywords: pan-Americanism, Monroe doctrine, Calvo-Drago doctrine, Latin America, imperialism, hegemony, intervention, national debt, Western Hemisphere.

"There are two opposing concepts: the Panamericanism of Jefferson, Clay and Monroe, paving the way for the subordination of Latin American countries created at the end of the 19th century, and the Latin Americanism of Bolivar, San Martin and Morelos, reflecting the struggle of our peoples for full independence".

A. Aguilar-Monteverde

1. Introduction

The history of the proclamation of the doctrine is closely linked to the War of Independence of the Spanish colonies in Latin America (1810-1826), led by Simon Bolivar. Bolivar sought to strengthen the sovereignty of the young republics within the Latin American Union without US participation. James Monroe's principle of "America for Americans" later served as the cornerstone of Pan-Americanism. In advocating the theory of the "American system", the statesmen of the United States did not at all resort to unselfish sympathy for the national liberation movement of the peoples of Latin America or the existence of "common interests" with them, but were guided primarily by their own interests.

The concept of the "American system" has an offensive, expansionist bend at its very roots and has turned into an instrument of space conquest in the Western Hemisphere and the transformation of this space into an American continental empire.

The doctrine of pan-Americanism, which called for a united American course, became a convenient form of counteraction to the policy of the European powers and one of the instruments

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of the struggle of the United States against its competitors in Latin America, and above all against its main rival at the end of the 19th century – England.

2. Materials and methods

As argued above in this study, the Monroe Doctrine became a theoretical and moral-political justification for US participation of the expansion to Latin America. In the United States, the principles of Pan-Americanism were represented in the Monroe Doctrine from 1823 and the "America for Americans" slogan derived from it, which were aimed against the interference of European powers into the affairs of countries of the New World. The Monroe Doctrine was created to expand the sphere of influence of the US to both Americas and to occupy territories formerly owned by Spain. It was also determined by the fear of colonization of Latin America by more powerful European countries.

The independence of Latin America was conquered primarily by Latin Americans themselves, but the further path to freedom and real independence proved to be long and incredibly difficult to achieve. The approaches and principal attitudes of Bolivar and the US ruling elite to the creation of the Latin American Union were of a different nature. The roots of the contradictions between the US and Latin America were originally laid in the very essence of the South American liberation movement. Bolivar believed that the peoples of Latin America after the conquest of independence in their state building must proceed from the specific conditions and characteristics of their countries.

3. Discussion

3.1. Pan-American International Law: general characteristics

The first step towards Pan-American international law was the proclamation of the Monroe doctrine by the US government back in 1823. The doctrine was aimed at preventing the European monarchies from interfering into the decolonization process in South America. But, as the course of history showed, the protection from European imperialism did not protect Latin American countries from the imperialism of the US itself. In order to counter the imperialist nature of the Monroe doctrine, Latin American countries developed their own version of Pan-American International law, namely the Calvo doctrine, later developed into Drago doctrine. This project would limit the imperialist behavior of the US towards Latin American countries. In this article we follow the historical process of the creation and development of these two perspectives on Pan-American international law.

In the context of Pan-Americanism, U.S. hemispheric hegemony entailed the use of police power and interventionism in Central America and the Caribbean, and more importantly, a cooperative approach towards the ABC countries (Argentina, Brazil, Chile) and Uruguay based on hemispheric intellectual exchanges and the assistance and mediation of South American jurists and politicians who, like Alvarez, Drago, and Brum, occupied important positions in the fields of law and government. They sought to moderate U.S. interventionism and unilateralism in the Americas by advocating a redefinition of U.S. hemispheric hegemony and the Monroe Doctrine along the lines of Pan-Americanism, multilateralism, and non-intervention, promoting a continental language of American international law. As an informal empire, the United States was not concerned with territorial control, so these exchanges and assistance became central features of hegemony in this Pan- American period.

The turn of the century was a moment when U.S. and Latin American international lawyers, politicians, and intellectuals promoted a sustained continent-wide debate over the meaning and scope of the Monroe Doctrine at the very time when the United States was attempting to redefine and legitimize the hemispheric hegemony that would later allow it to become a world power. As I will show throughout this article, its meaning and scope shifted in four different dimensions:

1) from a principle of intervention to one of non-intervention;
2) from a unilateral to a multilateral doctrine;
3) from a political to an international law principle;
4) from a national to a hemispheric principle (Scarfi, 2014).

3.2. Pan-Americanism of the USA: the Monroe doctrine

The Monroe Doctrine and Pan-Americanism epitomize different aspects of the complex history of U.S.–Latin American relations. The Monroe Doctrine has traditionally symbolized the

long-standing attachment of the United States to unilateralism and a nostalgic aspiration to isolation from global geopolitics, coupled with paternalism in the Americas.

The proclamation by the United States of the Monroe Doctrine in 1823, which excluded the intervention of European powers to the New World, to some extent helped their southern neighbours to avoid the restoration of Spanish colonialism. When the United States itself became an imperialist power, all colonies were already divided between other countries, so it was late, just like Germany. Therefore, the Monroe Doctrine served it as a convenient basis for expansion by subjugating its southern neighbours to its control, imposing bonded loans and unequal treaties.

The Monroe Doctrine was expressed during President Monroe's seventh annual message to Congress, December 2, 1823:

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the results have been so far very different from what was then anticipated. Of events in that quarter of the globe, with which we have so much intercourse and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers (Monroe, 1823).

The Monroe Doctrine became a theoretical and moral-political justification for US participation of the expansion to Latin America. In the United States, the principles of Pan-Americanism were represented in the Monroe Doctrine from 1823 and the “America for Americans” slogan derived from it, which were aimed against the interference of European powers into the affairs of countries of the New World. The Monroe Doctrine was created to expand the sphere of influence of the US to both Americas and to occupy territories formerly owned by Spain. It was also determined by the fear of colonization of Latin America by more powerful European countries.

These ideas are grounded in much earlier thinking, such as the "Farewell Address" of George Washington, in which he spoke against close political association with European states, and in the first inaugural address of Tomas Jefferson. The idea of an exceptional status for the United States and for the Western Hemisphere had been launched before Monroe's address to Congress.

The Monroe Doctrine meant little at the time of its proclamation in 1823, when the Americans lacked the army and navy to enforce it. The Latin American republics kept their Independence with British, rather than American, help. The doctrine became much more important later in the nineteenth century, when the United States began to intervene militarily in the Caribbean and Central America.

The principles of James Monroe contain two conceptual provisions that determined the new US foreign policy: first, non-interference of American states in the internal affairs of Europe; and second, non-interference of European states in the internal affairs of America; "America for Americans" is categorically stated in the presidential address to the Congress, and goes as following: "As regards the governments of countries that proclaimed and retained their independence and those whose independence, after careful study and on the basis of the principles of justice, we recognized, we can not consider any intervention by the European powers with the aim of oppressing these countries or establishing any control over them other than an unfriendly manifestation in relation to the United States" (Monroe, 1823).

Such a slogan expressing one of the principles of James Monroe, is at first glance quite democratic in nature. The United States declared its determination to discourage any attempt by European states to question the independence of the American countries by colonization. Monroe unequivocally warned that the US will not tolerate any interference of Europeans into the affairs in the Western Hemisphere. Why? Because any attempt to military intervention into the affairs of the former colonies would be the violation of the vital interests of the United States, according to Monroe.

At the same time, the president's message did not contain any statements about the US refusal from the aggressive policy in the American continent. Moreover, it linked the growth of power and prosperity of the United States with the possibility of joining new territories and increasing the number of its states at the expense of Latin American countries. The most ardent expansionists already at that time dreamed of establishing the hegemony of the United States within the Western hemisphere.

As can be seen from the text of Monroe's message, the doctrine articulated by him clearly and categorically stated that the United States is no longer going to put up with the further expansion of European powers in the Western Hemisphere. And the US itself refused to pursue an expansionist policy with regard to the peoples who have freed themselves from the colonial yoke. But on this issue, the message contained very vaguely formulated statements about the "rights and interests of the United States", which in fact asserted the right of the US to act in the Western Hemisphere in the way they consider to be profitable for themselves.

The United States in the near future should be completely freed from the need for colonization and the subsequent involvement into the domestic policy of any European state, the Monroe Doctrine said. Moreover, from that moment the United States had to maintain complete neutrality in all European wars. For example, in the event of war in Spain or Italy, the United States could not take the side of any of the rivals.

Few people believed that America would be able to withstand neutrality. Especially it was clear from the principles of Monroe that the country reserved for itself the full right to interfere into the internal affairs of absolutely all countries south of the United States.

In this situation the Monroe principle of non-colonization imposed a ban on interference into "American affairs" by third countries, to establish US dominance in the Western Hemisphere. Subsequently, the "non-colonization principle" became an instrument for the creation of colonial territories by the United States itself. Already immediately after 1823, the "principle of non-colonization" was used by US ruling circles to justify their systematic intervention in the affairs of Latin American states through the imposition of bonded contracts.

The idea of a division of the world into European and American systems has become one of the central principles of Monroe's message: "... we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety" (Monroe,1823). Such an attempt on the part of the European powers, according to the presidential message, was impossible, "without endangering our peace and happiness" (Monroe, 1823).

Unlike Europe, where great powers challenged one another, the United States was the sole leader on the American continent, and only external - European – powers represented a threat to them. The rest of the American countries were theoretically interested in the same thing as the US (regardless of European colonialism), but their level of sovereignty was much weaker.

Two other important paragraphs of the presidential message (§ 48 and § 49) later known as the "Monroe Doctrine", were finally a result of the discussion of the responses to the proposals of the British Minister of Foreign Affairs J. Canning on joint activities of US and England in the Spanish-American question in connection with rumours about the threat of intervention of the Holy Alliance (August 1823), as well as messages from Teil about Russia's refusal to accept the representative of Colombia and the principles of the policy of the allied powers in Europe. Decisions of the government on these questions were supposed, according to J.Q. Adams, to constitute a single "combined policy system" (Bolkhovitinov, 1959: 6).

In general, the contents of the Monroe Doctrine turned out to be quite elusive. It was supplemented by all the variety of theory and practice of the country's foreign policy. Already at the time of the proclamation of the doctrine in each specific case, for example in respect of Cuba, England, Russia or the countries of South America, various parts of this very convenient "combined policy system" were used. The vague nature of the wording and the very form of the doctrine proclaimed in the form of the president's message to Congress and not even formalized as an ordinary legislative act allowed the government of the United States in every concrete case to adapt the doctrine to the rapidly changing historical situation and for a very long time to use it in ever new conditions.

Thus, the Monroe Doctrine put forward the principle of dividing the world into European and American systems of state structure, proclaimed the concept of US non-interference in the internal affairs of the European countries and, accordingly, the non-interference of European powers in the

internal affairs of countries of the Western Hemisphere. Declaring their neutrality in relation to the struggle of the Spanish colonies for independence, the US simultaneously warned the European metropolitan countries that any attempt to interfere in the affairs of their former colonies in America would be regarded as a violation of the vital interests of the United States.

The Monroe Doctrine was used not only as an ideological justification to determine the choice of priorities and the direction of US behaviour towards European powers and neighbours on the continent, but also as a historical justification for its legitimacy. On this basis the course of American foreign policy thought, so called "monroeism", was formed, which maintained its leading positions until the outbreak of the First World War.

Designed to counter an immediate threat to American interests, Monroe's position did not instantly become a national doctrine. In fact, it largely disappeared from the American political consciousness for a couple decades, until events in the 1840's revived it. The efforts of Britain and France to involve themselves in the annexation of Texas, Britain's disputes in Oregon and potential involvement in California, led to a revival, which President Polk put into words in a speech on December 2, 1845, the 22nd anniversary of the original.

In the other words for the first time officially the doctrine of Monroe was openly referenced by James Polk in December 1845 during his first presidential message to Congress. Polk reiterated the statement in terms of the prevailing spirit of Manifest Destiny and applied it to British and Spanish ambitions in the Yucatan. In order to prevent Europe from interfering into the conflict between the United States and Mexico, the eleventh President of the United States (1845-1849) based on the "non-colonization principle" accused France and England of wanting to prevent California from joining the United States and create a European satellite on its territory that in no way correlated with the American concept and was unacceptable.

It was during the presidency of James Knox Polk that the US finally turned into a great power. For the first time since the Louisiana purchase the country's territory increased significantly. Under the slogan of the Monroe Doctrine the territories of the future states of the USA - Texas, New Mexico and California were annexed in 1846-1848, in addition, the territory of the State of Oregon was obtained from the United Kingdom. Thus, the US gained access to the Pacific Ocean and was finally entrenched in the American continent as the only full-fledged master.

In the period of the administration of the country by D. N. Polk, the theory of "natural boundaries" assumed great importance in the expansionist ideology of the ruling circles of the United States. In its broadest sense, this theory reveals an unquestionable connection with the principles of the Monroe Doctrine, and especially with ideas that later became known as "Manifest destiny" ("explicit predestination" or "predestination of fate").

The emergence of "Manifest destiny" is usually attributed to the mid 40's of the 19th century. The essence of the "explicit predestination" concept is the assumption that fate predetermined the domination of the United States throughout the continent. Supporters of this slogan believed that the annexation of territories adjacent to the United States is inevitable and is only the fulfilment of the mission entrusted to the American nation by providence.

In the 1850's the principle came to represent not just partisan but national dogma. It was in this period that the word "doctrine" came to be applied to it. In 1861, the United States warned Spain to avoid involvement in the Dominican Republic and was brushed off, but after the triumph of federal armies in 1865 and the failure of Spain's military efforts in the Dominican Republic, Spain beat a retreat in 1865.

The Monroe Doctrine was also invoked by the United States against the involvement of France in the affairs of Mexico. The French had installed Archduke Maximilian of Austria as head of a puppet government in Mexico. Again the United States declared a violation of the Monroe doctrine. The French eventually abandoned Maximilian, who was executed by the Mexicans.

Gradually, the Monroe Doctrine was used for purposes that Monroe himself would not have foreseen. It was cited as a reason that the European powers could not build a canal across Panama and, further, that if any such canal were ever built, it would necessarily be under the control of the United States.

In 1895, Grover Cleveland attempted to invoke the Monroe Doctrine to compel the British to accept arbitration in a border dispute between Venezuela and British Guiana, and went to far as to threaten to create a commission for this purpose if the British did not agree. Eventually the arbitration took place by mutual consent, but the British, through their foreign secretary Lord

Salisbury, made it clear that they rejected the idea that the Monroe Doctrine was a legitimate part of international law.

Theodore Roosevelt was never shy about asserting American interests, so it's not surprising that he devised what became known as the Roosevelt Corollary to the Monroe Doctrine. In it, Roosevelt acknowledged that at times, chaos in a small country could necessarily lead to the intervention of a great power, and that in the Western Hemisphere, that great power would always be the United States.

The first application of the Roosevelt Corollary was in the Dominican Republic, where the United States compelled that country to give the United States control over its customs, in order to stabilize its finances. This mild application was succeeded by military intervention in Nicaragua and Haiti, as well as the Dominican Republic.

At the end of the 19th century, the United States, relying on the Monroe Doctrine, entered into a battle for world power against the British Empire, the undisputed "ruler of the seas". The doctrine of naval domination of America in the Pacific and Atlantic Ocean was developed and put into practice, especially after the construction of the Panama Canal. In the early 1900's, the Monroe Doctrine proved it's power. President Theodore Roosevelt aggressively enforced it during the Venezuela Border Dispute and in securing the independence of Cuba from abusive Spanish rule.

The logic of the apologists of the Monroe Doctrine leads to the idea that all countries must agree with the role of the US as an absolutely necessary world leader, which, while defending its own national interests, simultaneously works for common good.

The Monroe Doctrine and the Platt Amendment, reflecting Washington's foreign policy line, signify a system for building up US international relations with Latin America and the European states as a whole (the Monroe Doctrine) and Cuba in particular (the Platt amendment). In fact, the "Platt amendment" is a stage in the development of the doctrine of President Monroe, put forward by the latter in 1823. Speaking of the "Platt Amendment", it should be pointed out that the US Congress approved it in the framework of the Army Appropriation Act. Thus, on March 2, 1901, in accordance with this amendment, the United States obtained the right to purchase or lease any section of the Cuban territory for the deployment of its military bases and warehouses.

"Bayonet diplomacy" allowed Washington to turn Cuba into its protectorate, while playing a farce with granting it formal independence. A few days after the adoption of the "Platt amendment," L.Wood frankly wrote to T. Roosevelt, now the US vice-president: "Obviously, by the Platt amendment we left very little or no independence for Cuba. The next question is the practical implementation of annexation. With this you need to wait a little. The control we have over Cuba, which soon will no doubt become ours, will help us in the near future to keep the whole world trade of sugar in our hands. I believe that Cuba is the most desired acquisition for the United States. The island will gradually become Americanized, and the hour will come when we will get one of the richest and long-awaited possessions of the world." (Humanismo, 1959: 38-39)

The "Platt Amendment" was abolished in 1934 as part of the "good neighbour" policy declared by US President Franklin Roosevelt regarding Latin American countries. Only in 1940, Jose Manuel Cortina and other members of the Cuban Constitutional Convention removed the "Platt amendment" from the new Cuban constitution. Despite the fact that the "Platt amendment" was abolished, this in no way abolished the established domination of political and economic interests of Washington in Cuba. The formal cancellation of the amendment somewhat lowered the degree of tension in Cuban society and the degree of negative attitude towards the United States. However, the cancellation of the amendment coincided with the entry into the presidency of F. Batista, a man whose loyalty to Washington was not to be doubted.

Thus, from gaining formal independence from Spain and until coming to power of the revolutionary Castro, all the foreign and domestic policies of the island were somehow controlled by Washington based on the "Platt amendment", which became the apogee of the development of the Monroe Doctrine.

At the Fifth Pan American Conference (Santiago, 1923), representatives of some Latin American countries raised the question of the nature and interpretation of the Monroe Doctrine. In response, US Ambassador Fletcher directly and unequivocally stated that the doctrine is not subject to discussion, since it represents a "unilateral matter of US national policy".

At the insistence of President Woodrow Wilson, the Monroe doctrine, as the first geopolitical concept of American foreign policy, was included into the first universal international legal

instrument – the Charter of the League of Nations (Article 21). The provision of this article fixed a legal opportunity for the United States not to fulfil its international obligations. Article 21 deals with treaties involving the United States on arbitration proceedings and agreements that are limited to known areas that ensure peace. From this provision, the conclusion suggests that any violation by the United States of international obligations, if they do not contradict the Monroe Doctrine, can not cause international legal responsibility.

During the time of Truman, the Monroe doctrine was modified to fit new ambitions of ruling classes, as the United States gained power and became an economic superpower by the results of the Second World War (1939-1945). But its essence remained the same: interference in the internal affairs of states with the aim of countering the communist threat, since the interests of the United States allegedly suffered from the fall of the democratic regimes. In new realities monarchical threat to USA was replaced by communist threat; the latter, just as the former, required US to interfere into domestic policies of Latin American countries and keep them under control.

When the Cuban revolution established a socialist government with ties to the Soviet Union, after an attempt to establish fruitful relations with the United States, it was suggested that the spirit of the Monroe Doctrine should be called again, this time to prevent the further spread of Soviet communism in Latin America.

Already in 1980 the debate over the new spirit of the Monroe Doctrine was part of the Iran-Contra affair following the Khomeini Islamic Revolution. In the same years, the Carter and Reagan administrations dragged their country into a civil war in El Salvador, citing the Monroe Doctrine as an excuse. The Monroe Doctrine was also officially mentioned during the US invasion of Guatemala and Grenada.

In short, the "classic" technology of coups d'etat, accompanied by open military support for the insurgents, has been repeatedly tested by the United States within the framework of the famous "Monroe Doctrine" during the entire 20th century. And the 21st century is no exception. The flexible character of the doctrine's wording, not burdened with legislative fixing, allows the US government in every particular case to adapt the Monroe doctrine to a changing historical situation.

Over the years, the Monroe Doctrine became an object, not of deep appreciation, but of great dislike in Latin America. The countries of Latin America found that they had much more reason to fear intervention by the United States than by any European power. This was particularaly evident in the Pan American Conference of 1928. In that year, the United States issued the Clark Memorandum, which definitely repudiated the Roosevelt Corollary. In 1933, Secretary of State Cordell Hull signed a protocol that bound the United States not to intervene in the affairs of any other country in the hemisphere.

The Monroe Doctrine is the cornerstone of the idea of Pan-Americanism, viewed from US perspective. The doctrine of Pan-Americanism, which called for a united American course, became a convenient form of counteraction to the policy of the European powers and one of the instruments of the struggle of the United States against its competitors in Latin America, and above all against its main rival during 19th century – England.

Though after 1889 Pan-Americanism was a U.S.-led policy, it conveyed a commitment to a set of values that were consistent with continental cooperation, and which consequently held consider-able appeal for Latin American states from the turn of the century until the late 1930s. But this is to state the case far too starkly. In the 1890 s, when the U.S. modern policy of Pan-Americanism was originally formulated, the Monroe Doctrine was revived and even reinvented. In other words, it may be said to have been Pan-Americanized (Scarfi, 2014).

The thoughts expressed by Ed. Everett, one of the editors of the "North American Review", quite fully and openly characterizes North American sentiments with regard to their southern neighbours. He summed up: "We have no relation to South America; we have no well-founded sympathy for it. We come from different races, we speak different languages, we are brought up on different legal norms, we profess different kinds of religion." His more interesting conclusion was that: "South America will become to North America, as we are strongly inclined to believe, what Asia and Africa are towards Europe" (Tusinov, 2013: 149), thereby dotting all the "i"s.

The doctrine of Olney (1895), just like the doctrine of Theodore Roosevelt (1904) a little later, also contributed to the idea of Pan-Americanism, according to which all countries of America were united by a single destiny for the embodiment of the great principles of national independence and

people's sovereignty. The basis of pan-Americanism was a desire of the Latin American countries to unite against the colonial yoke of Spain, which had grown stronger since the beginning of the 19th century.

From 1898, the United States embarked on an expansionist and interventionist policy toward Latin America until the 1930-s with the rise of the so-called Good Neighbor Policy, which led to the expressed commitment of the United States, in the context of the Seventh Pan-American Conference (1933) and the Inter-American Conference for the Maintenance of Peace (1936), to stop intervening in the Americas.

Long before the 1930-s, a series of reinterpretations of the Monroe Doctrine arose, proposing it as a hemispheric and multilateral principle primarily in South America. U.S. reaction toward these initiatives was ambivalent, because U.S. international lawyers, politicians, and intellectuals supported a wide range of interpretations of the Monroe Doctrine. Indeed, for the most part U.S. politicians and jurists sought to retain a right to enforce the Monroe Doctrine unilaterally in the Americas and thus resisted the Pan-Americanization of the doctrine until 1933, but at the same time they tended to promote Pan-Americanism. Nevertheless, these hemispheric redefinitions of the doctrine allowed the United States to begin a progressive but still difficult and slow transition from interventionism to multilateral Pan-Americanism (Scarfi, 2014).

Under the banner of Pan-Americanism, all-American conferences began to be held to develop the foundations of continental politics. The idea of convening such conferences was put forward as early as 1826 at the Panamanian Congress of the Latin American States, after that American republics started to be regularly convened from 1889 to 1948, which began to be called the International Conferences of American States or Pan American Conferences.

In the early twentieth century, the "pan-Americanization" of the Monroe Doctrine was reflected and formalized in a special memorandum by the US State Department called "Lansing Memorandum." It was described as "Pan-Americanization of the Monroe Doctrine". The first draft of this "Pan-American Pact" was read out in 1914 by US President V. Wilson and its most important provisions were theses "on mutual guarantees of political independence under the republican form of government and mutual guarantees of territorial integrity". In fact, the US received a "legitimate" right to intervene in case of any socio-political transformation in Latin America, which Washington could qualify as a threat to the republican system.

The proclamation of a unilateral declaration, which does not bind its author with any obligations and preserves for him the possibility of interpreting it, depending on the prevailing situation, gave the United States a priori advantage in all occasions.

Since the beginning of the 20th century, the ideas of Pan-Americanism have been overtaken in Latin America by an acute critique in connection with many acts of military aggression from the US (it encircled the territory of Cuba in the years 1899-1902, in 1916-1924 it occupied the Dominican Republic, in 1915-1934 – Haiti).

At the same time, the Latin American states gradually turned into US protectorates, devoid of any material sovereignty, preserving only its external, symbolic attributes. Senator Lodge in March 1895 stated in an article published in the “Forum” magazine that in "... the future from the Rio Grande to the Arctic Ocean there should be a single flag and one country". (Lodge, 1895).

To be fair, it should be noted that the US foreign policy towards Latin American countries was differentiated, flexible, varying its tactics and forms with time. This was due to the need to resolve disagreements with European rivals, as well as taking into account the independent behaviour of some of the southern neighbours. At the same time, in respect to South America, the United States asserted the role of the hegemon, and in respect of the countries of Central America (the Caribbean) it tried to subordinate them directly, imposing on them forms of traditional colonial rule, primarily the protectorate. In all cases, the goal was political stability, which ensured the preservation and dynamic consolidation of US economic positions in the region.

3.3. Latin American perspective: Calvo and Drago Doctrines

In the last quarter of the 19th century the idea of developing "Latin American international law" gained a large number of supporters. It was about the common all-American international law designed to equip the states of the region with international legal protection against foreign intervention and create an arbitration mechanism for the peaceful settlement of disputes between them without the participation of the United States. A major contribution to the formation of international Latin American law was the well-known "Calvo doctrine", the main provisions of

which were formulated in 1885 by Carlos Calvo (1824-1906), Argentinean historian and diplomat. Although he was originally from Argentina, he spent almost his entire life outside his homeland, first as consul in Montevideo, and then from 1860 a diplomatic representative at various European courts, including Russian (accredited in 1889); he participated in many international congresses, including the foundation of the Institute of International Law in 1884. It is rightly believed that today the doctrine of Calvo is a part of the Latin American legal tradition.

Simon Bolivar, taking the oath as President of Great Colombia, began to prepare the Panamanian Congress of representatives of the newly independent states. Liberator expressed this idea as early as 1815 in the program statement "Letter from Jamaica." Bolivar sought to strengthen the sovereignty of the young republics within the Latin American Union without US participation. Thus, he rejected in practice the continental policy of the "northern neighbour" embodied soon in the "Monroe Doctrine". The true attitude of Bolivar to the "Monroe Doctrine" is clearly evident from the analysis of his foreign policy strategy, imbued with the desire to rally all the Latin American peoples around Colombia, and not around the US. By the way, under "American nations" Bolivar usually understood only the Spanish America.

The United States felt its solidarity with Latin America in all that concerned the independence of the nations of the New World. The Latin States recognized the community of interests that existed between them, and, feeling that they were members of one great family of nations, desired to establish a political unity, a confederation, which would furnish them protection from the dangers of European intervention, show them the course to take in their new life, aid them in arriving at the best solution of their special problems, bind them together through mutual interests, and obviate the conflicts that might arise between them. At the same time, the United States, while coming forward naturally, to make common cause with these nations to prevent their oppression by Europe, soon began to develop a policy of hegemony on the American continent.

In the second period, from the middle to the last third of the nineteenth century, the domestic and foreign relations of the Latin American States underwent a great change. The idea of confederation weakened with the disappearance of the fear of re-conquest, but the sentiment of a new solidarity persisted, and the attention of these nations was directed to the formation of closer relations amongst themselves and with Europe. The policy of hegemony of the United States in its evolution also presented new phases, meeting the new necessities of the American continent.

At the time of its announcement, the doctrine was very positively received in Latin America. The opposition to the policy of colonization carried out by the European powers was historically progressive. But at the same time, the Monroe Doctrine clearly revealed the expansionist aspirations of the US ruling circles. Under the guise of protecting the countries of America from European intervention, the US has appropriated itself the right to control the relations of all other American states with the countries of Europe.

The independence of Latin America was conquered primarily by Latin Americans themselves, but the further path to freedom and real independence proved to be long and incredibly difficult to achieve. The approaches and principal attitudes of Bolivar and the US ruling elite to the creation of the Latin American Union were of a different nature. The roots of the contradictions between the US and Latin America were originally laid in the very essence of the South American liberation movement. Bolivar believed that the peoples of Latin America after the conquest of independence in their state building must proceed from the specific conditions and characteristics of their countries.

The true attitude of Bolivar to the "Monroe Doctrine" is clearly evident from the analysis of his foreign policy strategy, imbued with the desire to strengthen the sovereignty of the young independent states and to unite them within the framework of the Latin American Union without the participation of the United States. Thus, he rejected in practice the continental policy of the "northern neighbor" embodied in the "Monroe Doctrine".

In 1824-1826, the US rejected the proposals of a number of Latin American countries – namely, Colombia, Brazil and Argentina – to sign bilateral alliance agreements that would guarantee them US support in case of an external threat.

Throughout the 19th century Latin American countries have repeatedly appealed to the United States to jointly oppose the intervention of European powers into their affairs. Colombia requested US assistance in 1824, Venezuela in 1846 and five times in the eighties, Peru and Ecuador in 1846, Nicaragua in 1848 and 1849, Mexico in 1862, etc. However, US state leaders did

not respond to these appeals. They did not have a real counteraction to such aggressive acts of the European powers as the capture of the Falkland Islands by England in 1833; the transformation of Honduras into an English colony in 1835.It was similar case with many other acts of aggression from European powers.

The ruling circles of the US colluded with the European powers over the division of spheres of influence in Latin America, signed agreements, bypassing certain countries of Latin America and obviously violating their sovereign interests. As an example, in 1850 the United States government signed the so-called "Clayton-Bulwer Treaty" with England, which was the first Anglo-American compromise agreement on the issue of the inter-oceanic routes through the lands of Central America. It satisfied the claims of the American bourgeoisie to an equal participation with the British in any enterprise connected with the construction of the projected canal, and was a clear violation of the sovereignty of the state of Nicaragua, whose territory was regarded as an object of the policy of foreign powers.

The Calvo doctrine was received enthusiastically in the region, and many of its countries sought to incorporate these principles into their constitutions, in terms of contracts with foreign firms, in treaties signed among themselves, as well as with other states. Some of Calvo's principles were even reflected in the German-Mexican treaty of 1882, in the Spanish-Peruvian treaty of 1898, the peace, friendship, arbitration and trade treaty signed in 1906 by Costa Rica, El Salvador, Guatemala and Honduras and others.

By the end of the 19th century, the countries of Latin America, based on the Calvo doctrine, defended the view that states are required to treat foreigners in the same way as local citizens, but nothing more. The damage caused by the actions of states that were not discriminatory did not constitute a violation of international law.

As a lawyer, Calvo fully understood the legal consequences of the enslaving policy pursued first by European countries, and then by the United States. He set forth these problems in his treatise on international law in 1863. His doctrine was born out of a sense of imbalance in diplomatic protection, which Calvo considered a violation by stronger states of the sovereign rights of weaker states. Nevertheless, its fundamental conceptual foundations were further developed in the "Drago Doctrine" (1902), named after the Minister of Foreign Affairs of Argentina, who developed the principle of inadmissibility of diplomatic or armed intervention by states to recover international debts.

The following legal provisions served as the basis of the Latin American doctrine: foreign firms should not enjoy preferential treatment; claims against aliens in the country of investment should be subject to review in national courts of the same country, and not in international arbitration courts; diplomatic protection can be exercised by the alien's nationality state only in cases of direct violation of international law. These legal norms are enshrined in many Latin American constitutions and treaties with foreign investors.

Arnulf Becker Lorca proposes the following periodization of international law's trajectory in Latin America:

first, international law as an instrument in the process of nation building (1810s–1880s);

second, international law as part of the discursive creation of Latin America as well as a language for contesting its definition (1880s–1950s);

third, a period of professional radicalization and fragmentation (1950s–1970s); and

fourth, a period of professional depoliticization and irrelevance of international law as a discourse for thinking the region (1970s–2000s) (Lorca, 2006: 284).

Lorca shows that international law played an important role from the 1880s to the 1950s in laying down one of the languages through which Latin Americans have discussed and contested their identity, politics, and place in the international world. On the one hand, the periods in which the international legal tradition has been harnessed to support, as well as to contest, divergent ideals about Latin America correspond to the moments of disciplinary relevance and disputation. On the other hand, the appeasement and translation of disciplinary contentions into doctrinal and institutional settlements signaled the shift in significance from international law toward other discourses, making the international legal tradition less appealing for imaging Latin America (Lorca, 2006).

In the third period, beginning with the last third of the nineteenth century, the foreign policy of the various countries followed a new course. This policy, which was characterized by a desire for

peace, aimed to strengthen a triple bond of interests, which, far from being mutually exclusive, support and complete each other, with Europe, with the United States, and amongst themselves. This triple bond gave to the community of American states and to the world community of nations their present characteristics (Alvarez, 1909).

As it was mentioned above, Monroe Doctrine became a theoretical and ethical-political foundation of the US expansion in Latin America (Malkov, 2004). Taking into consideration the epoch of imperialism, pan Americanism of the late 19th century developed the Monroe Doctrine and the ideas of the founding fathers concerning the leading role of the US in the affairs in the Western Hemisphere .

The principle of inadmissibility of diplomatic or armed intervention by states to recover international debts was proclaimed for the first time by Argentine lawyer and diplomat Carlos Calvo in 1868. The Calvo Doctrine was later developed in 1902 into Drago doctrine. Both Calvo and Drago wanted to provide Latin American countries with a legal and internationally acknowledged tool to prevent such interventions.

It is rightly believed that today the doctrine of Calvo is a part of the Latin American legal tradition. He is the author of several works, such as «Theory and practice of international law in Europe and America» (Derecho internacional, 1863); 15-volume collection of Latin American diplomatic documents of 1862-1867; 5-volume «Historical annals of Latin American war of independence», 1864-1875).

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At Calvo's opininon, the principle of legal equality of all nations makes any diplomatic intercessions absolutely inadmissible, as well as military intervention to collect debts. Calvo's principles were included into several treaties between Latin American and European countries (Italo-Paraguayan treaty of 1893, Franco-Mexican-Nicaraguan treaty of 1894 and so on).

Calvo's Doctrine is based on one basic statement: foreigners should not be granted any special right or priviledge, i.e. they are not provided with national treatment. Foreign firms should not enjoy preferential treatment; claims against aliens in the country of investment should be subject to review in national courts of the same country, and not in international arbitration courts; diplomatic protection can be exercised by the alien's nationality state only in cases of direct violation of international law. These legal norms are enshrined in many Latin American constitutions and treaties with foreign investors.

A classical statement of the Calvo Doctrine is found in Art. 27 Mexican Constitution (1927), which provided that: only Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of lands, water and their appurtenance, or to obtain concessions for working mines or for the utilization of waters or mineral fuel in the Republic of Mexico. The Nation may grant the same rights to aliens, provided they agree before the Ministry of Justice to consider themselves as Mexicans in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto, under penalty, in case of non compliance, of forfeiture to the Nation of property so acquired (Juillard, 2007).

The Calvo Doctrine has surfaced in connection with the reappraisal by developing countries of their investment relations with developed countries (Investments, Bilateral Treaties; Investments, International Protection). For instance, the Charter of Economic Rights and Duties of States (1974) contains provisions which seem to be inspired by the Calvo Doctrine. The notion that aliens should receive no better treatment than nationals, and the notion that disputes between aliens and States should be resolved by local courts applying local law, which both appear in Art. 2 Charter of Economic Rights and Duties of States, seem to echo the Calvo Doctrine, more than one century after it was first formulated. In that connection, one might venture to say that the tenets of the Calvo Doctrine have worked their way into the tenets of the New International Economic Order (NIEO) of the 1970s (Juillard, 2007).

It is quite paradoxical that those who, in the old days, championed the Calvo Doctrine as a tool intended to fight the excesses of diplomatic protection may now have come to a more benevolent view towards that mechanism. This is explicable: inherent in the mechanism of

diplomatic protection is the rule of exhaustion of local remedies; and exhaustion of domestic remedies means submission of the disputes to local authorities. Thus, diplomatic protection may nowadays seem less abhorrent to the champions of the Calvo Doctrine than it used to be.

Criticizing the international minimal standard, Calvo put forward the so-called national standard, which is based on the principles of territorial sovereignty of countries:

1) principle of equality of residents and non-residents;

2) principle of regulation of legal status of non-residents and their property by domestic law;

3) principle of non-interference by other countries, particularly those, that foreign investors are citizens of, in the settling of disputes between foreign investors and national governments concerning the legal status of the residents and their property;

4) principle of non-obligation of government to compensate the damage to the property of foreign investors, which was caused by the civil war.

Calvo's Doctrine does not oppose the principles of international standard in respect of nationalization of foreign property. All those norms are present in laws of Latin American countries. But, according to the doctrine, abovementioned principles are of national law nature, not international. Therefore all disputes should be settled in in national courts in accordance with domestic law (Farkhutdinov, 2017). Any other approach would mean "establishing a dangerous privilege of abuse of force for mighty countries in prejudice of weaker countries and establishment of inequality between local and foreign citizens" (Tarasov, 1972: 394).

At the turn of the century, the idea of developing "international Latin American law" gained wide support. It was supposed to arm the countries of the region with tools for international legal defense from foreign interventions and creation of arbitrary mechanism that would peacefully settle arguments between them without US involvement. With this aim a special congress was called by Argentine and Uruguay in Montevideo in 1888. Seven Latin American countries were involved in the work of congress. In accordance with accepted recommendations, in Rio de Janeiro in 1906 a commission of lawyers started to prepare a codex of private and public international law of countries of Western Hemisphere. The work of commission was interrupted by World War I.

Among the challenges, launched at US, the note by minister of foreign affairs of Argentina L.M. Drago is the most famous. It was at the time of Venezuela crisis of 1902-1903, when he articulated his doctrine, which developed the Calvo doctrine. In 1903 he rejected the right to play the role of "international policeman", declaring that all conflicts between Latin American and other countries should be passed to international arbitrary court in Hague. In slightly modified version the Drago doctrine was approved in 1907 at the international conference at Hague. Argentines opposition to the growing coercive pressure of the USA had only particular success. However, United Sates were forced to take Argentinian challenge into consideration and diversify the methods of political influence in the region.

Although Drago's doctrine was more limited, compared to Calvo's doctrine, because it dealt only with government debts and allowed diplomatic interference, nevertheless almost all Latin American countries supported it. Only Brazilian media kept talking about Argentina's lack of right to talk with Washington on behalf of collective interests, and Brazilian diplomacy rejected the Drago's doctrine.

The doctrine of Luis Drago approved the Latin American principle of international law, developing Calvo's doctrine and filling the gaps of Monroe's doctrine. In his note Drago said: «State debt can not be a cause of military intervention, even more so of occupation of territories of American states by European power». The document states that foreign countries have no right to exert diplomatic or military sanctions on debtor-countries seeking to collect debt or interest. However, Washington practically avoided Drago's answer. On the one hand, it caused a strong anti-American reaction in Argentine, on the other hand, Buenos-Aires earned sympathy of many Latin American countries for not recognizing the Monroe doctrine. The doctrine was supported by the participants of 3rd Inter-American conference, held in 1906 in Rio de Janeiro.

Drago's doctrine is of more narrow character, than Calvo's doctrine, for it mentions only collection of debts, created by emission of state loans, and rejects military intervention of foreign governments. The government emitting the obligation, Drago notes, does not establish any contractual relations with its creditor-capitalists, who by this obligations on an open market at their own risk. Therefore the sovereign power of government allows it to determine the payout time

of its debt and even stop payments. In the last case foreign holders of obligations should only apply to direct negotiations with debtor-governments.

Drago's doctrine, formally directed against European powers, was aimed also at USA, who repeatedly resorted to military interventions of countries of the Carribean. This doctrine was supported by Latin American countries, but USA succeeded to make alterations in it, such as that military intervention was possible in case of non-obedience of debtor-country to the decision of the arbitrary. Drago considered his doctrine to be the development of Monroe doctrine, saying that «…collection of debts with military force includes the occupation of territory, which presupposes the suppression and subjugation of governments. Such situation…directly contradicts the Monroe doctrine» (Hershey, 1907: 30).

In contrast with Calvo's doctrine, the doctrine of Drago got certain legal formalization as international law, dealing with not only American countries, but all countries-members of 2nd Hague conference. But still, it actually was not used in international diplomatic practice.

It was not only the growth of economic and political might of the USA that helped it to achieve suitable decisions, but also the position of some of the Latin American countries, specifically Brazil. Rio de Janeiro supported the Washington's international policy and was an active supporter of strengthening of continental solidarity under the aegis of USA, whereas in other Latin American countries the policy of "big stick" caused the growth of anti-American sentiments. For example, at the 4th Pan-American conference Brazilian delegation brought with it a project of resolution on official recognition of the Monroe doctrine as a "permanent factor of international peace on the American continent", on expressing "hearty thanks for a noble and unselfish act, which had great positive effects for the whole New World". But already at the stage of preliminary consultations representatives of other countries expressed negative attitude towards Brazilian initiative, so that the proposal was not discussed during the conference.

As it was mentioned earlier, at the 2nd Hague conference the Drago doctrine was accepted in such a distorted form that Drago's principle was essentially denied. Perverted articulation allowed the use of military force to collect government debt in cases, when debtor-government denies the decision of arbitrary. 44 states voted, 39 of them "for", 5 – "against"; Argentina, Bolivia, Columbia, Dominican Republic, Greece, Guatemala and Peru signed the convention with some stipulations.

Convention calls for the refusal of use of military force to demand and obtain contract debts, "exacted by the government of one country from the government of another country". Deviation of this obligation are possible:

1) when the debtor-country rejects or leaves without response the proposal of arbitration;

2) when it accepts such arbitration but makes the submission bonds impossible;

3) if after the arbitration it refuses to carry out the judgment awarded (Labin, 2008: 187-191).

But in any case the adoption of the convention was a huge move forward in the field of legal defense of international investment and integration processes.

At the one hand, the Drago-Porter's convention is wider than Drago's doctrine in that it is not restricted by territorial scope of Western Hemisphere. On the other hand, it is more narrow, because it allows the use of military force at certain conditions. Drago-Porter's convention was ratified by Russia, USA, Britain, Germany, Austro-Hungary, Denmark, Netherlands, Mexico, Salvador, Nicaragua (1909), China, Haiti, France, Norway (1910), Guatemala, Portugal, Panama (1911).

According to the Calvo doctrine, international legal usage demands that government grants foreigners the same rights as its own citizens. The law of many Latin American countries confirms the right of foreign investors to national regime in accordance with international law. However such laws could not protect the foreign property from being nationalized in the course of economic reforms in Latin American countries, agrarian reforms in Mexico being an exception.

At the view-point of the theory and practice of international law, government has the right to control the inflow of foreign investments on its territory, as well as the activity of foreign investors at the country of investment. Problems arising with this issue are a subject of argument between countries. Discussing the case of Mavrommatis (Greece vs. The United Kingdom) in 1924 at the Permanent Court of International Justice it was noted, that from the point of view of international law diplomatic protection is a right of state, not a company or individual.

But for obvious reasons this doctrine did not gain universal support. As it was mentioned earlier, at the end of 19th century Latin American countries defended the point of view that in

accordance with international law states should treat foreigner just like they treat their own citizens. Damage, caused by non-discriminatory action of state, are not a deviation of international law. The following legal provisions served as the basis of the Latin American doctrine: foreign firms should not enjoy preferential treatment; claims against aliens in the country of investment should be subject to review in national courts of the same country, and not in international arbitration courts; diplomatic protection can be exercised by the alien's nationality state only in cases of direct violation of international law. These legal norms are enshrined in many Latin American constitutions and treaties with foreign investors.

After more than a hundred years Calvo's doctrine was declared "dead', especially after the liberalization of world economy in 1990-s. However, some recent Latin American court decisions concerning international investments in favor of recipient-countries confirm the revival of its principles (Shan, 2007: 631-634). That is why today we can say that Calvo's doctrine has a future.

4. Results

At the beginning of the twentieth century, the Pan-Americanization of the Monroe Doctrine began, which still uses a plentiful demagogic phraseology about common American unity. The Pan-Americanism doctrine, or in this case "monroeism", calling for a single American course on the continent, has become a convenient form of counteraction to the policy of Europeans. The majority of Hispanics are strongly opposed to the Monroe Doctrine. "Bolivarianism", in contrast to "monroism," still assumes the genuine desire of Latin Americans to have a common destiny and interests. "Amendment of the Plate" of the US Congress of 1901, which made Cuba an American protectorate, can be called the apogee of the development of the Monroe Doctrine at that time.

In the third stage (1914-1945) the Monroe doctrine underwent a transformation in the external political concepts of Presidents Woodrow Wilson (1912-1920) and Franklin Roosevelt (1933-1945), and in 1919 the Monroe Doctrine was fixed in the Versailles Peace Treaty fixing the results of the First World War, and in 1920 in Article 21 of the Charter of the League of the Nation. Of course, the first world organization-the League of Nations, which embodied the "universal interests of mankind" - was to be dominated by the United States. The teaching of James Monroe, which arose for regional foreign policy in Latin America, during this period gave a powerful impetus to the establishment of world domination.

5. Conclusion

As the article shows, the process of creation of Pan-American International law is full of contradictions. The Monroe doctrine, being progressive at the time of its appearance, very soon degraded to its opposite. Initially designed to protect the whole American continent from imperialism, after short time it itself became a tool of imperialism at the hands of the US elites. As we have shown in this article, Latin American countries tried to counter this imperialist interpretation of the Monroe doctrine by proclaiming the Calvo and Drago doctrines, which they considered to be the correction of the misused Monroe doctrine. Their initiative gained only partial success, which in the 20th century resulted in alienation of Latin America from the US, growth of anti-American sentiments and leftist ideas in the region. These tendencies lead to the formation of so-called "bolivarianism" movement in modern Latin America, which has socialist and anti-American nature, therefore strengthening the contradiction between Latin America and the US. As we have shown in this article, the roots of such condition lie in the 19th century, when the Monroe and Calvo-Drago doctrines were developed.

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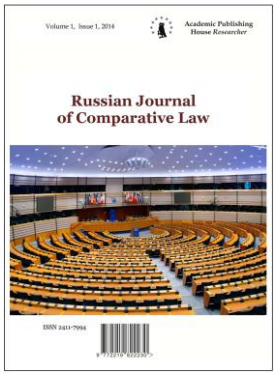

On the Issue of Parallel Creation in Russia and Other Countries

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Abstract

Attitude to parallel creation and its results, i.e. concurrent works, differs among various jurisdictions: from non-recognition (e.g. Italy) to recognition under certain conditions (e.g. Spain, Germany, United Kingdom, United States).

The predominant view on the subject in Russian legal doctrine is the decisive non-recognition of the very possibility of parallel creation in copyright law; however, there are isolated opinions that run contrary to this well-established scholarly tenet, as well as legal practice which does not recognize concurrent works in the Russian Federation.

In the context of a general relaxation of criteria for the copyrightability of authors' works, individual court rulings, and attitudes of some Russian scholars, the prospects of granting official recognition to parallel creation and the copyrightability of concurrent works should be viewed as adverse – mainly because of the contradictions between this kind of approach to protectability and the concept of exclusive copyright which arises at the moment when a work is created, and serves to protect unique works that cannot be replicated independently.

Keywords: intellectual property, copyright, trans-border disputes, parallel creation, concurrent works, protectability, copyrightability, photographic work, work of design, musical work.

1. Introduction

A number of contemporary scholars have noted that harmonization processes in European copyright law as well as the US legal practice have resulted in a perceptible tendency toward assessing the copyrightability of works depending on whether or not they are the "products of intellectual activities" of their authors. This approach in many cases supplants the one that had been universally acknowledged until very recently; the latter defines a copyrightable work based on a different criterion: as one that is a "creative product" (Bently, Sherman, 2004: 970). In Russian legal system, changes are also occurring in the evaluation the copyrightability of works: in accordance with the Resolution of the Plenary Sessions of the Supreme Arbitrage Court and the Supreme Court, a copyrightable product "...shall only be the product that has been developed by creative effort" (Postanovlenie Plenumov, 2009). The tendency toward a simplified approach to assessing the protectability of copyright works leads to a general relaxation of requirements to originality of the works and in certain countries results in the national copyright protection of works with a low degree of creativity and concurrent works (Lutkova, 2016: 5-16).

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2. Material and methods

This research is based on the material as follows:

- international treaties in the domain of copyright protection;
- legal enactments and documents of court practice of other countries (Germany, Italy, United Kingdom, United States) pertinent to trans-border copyright relationships;
- Russian legal enactments and documents of court practice pertinent to trans-border copyright relationships.

The research is based on the entire spectrum of general methodology relevant to private law subjects. Along with that, this paper uses specific scholarly methods, such as the formal legal method and the comparative law method.

3. Discussion

The concepts of "parallel creation" and "concurrent works" that are used in the legal practice of different countries have been neither mentioned in law enactments nor substantially defined. In a most generic sense, which is hardly ever being discussed or disputed, either in the doctrine or in practice, parallel creation is deemed to be the process of intellectual activity that is being pursued individually and separately by more than one person and that leads each of these persons to the creation of independent works which are substantially similar to each other or even identical. These substantially similar or identical works are called concurrent works.

The attitude to parallel creation and, accordingly, to its results (concurrent works) differs among European jurisdictions. In Italian legal doctrine, concurrent works are predominantly not recognized as copyrightable. This stance is based on the reasoning as follows: *firstly,* the protection of concurrent works would bring chaos into the system of copyright law, as the author of the first work would then have to demonstrate the proofs of not only the identity of the concurrent work with his own, but also the malicious intent of the concurrent author; *secondly,* the copyrightability of concurrent works would indirectly lead to an extended duration of copyright compared to one that is currently mandated by law (Kashanin, 2007: 75).

In some European jurisdictions (Germany, Spain), the possibility of parallel creation is recognized, and concurrent works are considered copyrightable. For example, in Spanish legal doctrine and practice, a work shall be considered concurrent and granted copyright protection in the event that it is be possible to prove that there has been no illicit borrowing, which means conscious copying of the substance from the original work or imitation of the original author's style (De Miguel Asensio, 2012: 983). In Germany, a concurrent work shall also be copyrightable; however, it shall only enjoy protection in the event that the author of the concurrent work has avoided copyright infringement not only intentionally (direct copying), but also accidentally, as a result of an unconscious desire to imitate the original work (inadvertent copying). Thus, German law will only grant protection to a work in the event that it is established that the author has been unable to get previously familiar with the original work – and has created his work independently from the author of the original. In the meantime, this approach is being criticized by representatives of the German doctrine as being in conflict with copyright exclusivity (Kashanin, 2007: 83).

Disputes concerning the competition between the original and concurrent works oftentimes occur in the legal practice of the United Kingdom and the United States. A "copying doctrine" has been developed in these countries in order to establish the copyrightability of a concurrent work. The copying doctrine helps ascertain whether the concurrent work has been developed in course of a creative process or is an illicit use of someone else's intellectual property. If the court finds that the concurrent work has resulted from the illicit use of the original work (full or partial copy), the right of the original author shall be deemed infringed, and the concurrent work shall be considered unprotectable. Conversely, if the court concludes that no copying has occurred, the concurrent work shall be deemed protectable. The criteria for establishing the fact of copying vary across different kinds of disputed works; these peculiarities are to be found in American and British court enactments (Biriukov, Galushko, 2018).

A ruling by the UK Intellectual Property Enterprise Court in re *Bodo Sperlein Ltd v Sabichi Ltd & Anor*, 2015 (Bodo Sperlein, 2015) can be a good example of this. The *Sabichi* company (defendant), a manufacturer of porcelain dishes, had copied design from another porcelain manufacturer, a company named *Bodo Sperlein* (plaintiff). The design is a rather abstract pattern

which consists of red twigs with round berries and no leaves. The defendant's line of defense was based on the fact that the simple pattern consisting of twigs and berries had been designed independently from *Bodo Sperlein*. The winning plaintiff based his case for the restitution of his infringed copyright on the fact that his *Red Berry* limited collection of dishes had been very successful on the market for the two preceding years, which meant that the defendant had undoubtedly been familiar with that pattern and therefore had little difficulty copying it, aspiring to attain the plaintiff's success.

The court's ruling is quite interesting in that it describes the legal actions that, according to the judge, are required for establishing the fact of illicit copying of a work such as pattern design. Thus, the ruling indicates that in the absence of direct proof of copying, the plaintiff has to establish and produce to the court another proof that makes the fact of copying obvious based on the similarity between the work of the plaintiff and that of the defendant. In many cases (this dispute is one of such cases), the fact of copying becomes apparent first and foremost on the basis of comparative analysis of the defendant's work and the publicly accessible design of the plaintiff (Bodo Sperlein Ltd., 2015).

Apart from that, the ruling emphasizes that the more convincingly the situation reminds of copying that follows from the similarity between the original work and the one in dispute, the more convincing should be the proof in favor of independent creative process aimed at the development of the concurrent work. The proof of creating the disputed design should normally be supported by an independent designer (expert). The independent designer should advise the court on what particularly has been done by each of the two parties in dispute and in which sequence. He or she will also indicate one or more projects derived from the projects of the plaintiff / defendant which were accessible on the date of supposed copying and which could reasonably serve as inspiration for the concurrent author. Otherwise, the expert may establish that the concurrent designer did not have access to any information concerning the design which, according to the plaintiff, has been copied (Bodo Sperlein Ltd., 2015).

Apart from that, the rulings of the UK and US courts may contain references to some other activities that need to be performed when dealing with protectability disputes:

- examine three possible hypotheses concerning possible signs of the concurrent author's involvement in the illicit copying of the original: "conscious copying", "sub-conscious copying", or "indirect copying";

- in the event that any of these forms of copying of the original is established, it should be defined how substantial is the part that has been illicitly copied from the original work.

Thus, in November 2014 the UK Intellectual Property Enterprise Court carried a ruling in re *John Kaldor Fabricmaker UK Ltd v Lee Ann Fashions Ltd*, 2014 (John Kaldor, 2014). In 2012, the plaintiff supplied fabric for dresses with a certain pattern to the defendant in accordance with a contract between them; however, the project did not materialize, and the fabric remained unused. In the meantime, the designer Lee Ann won a contract with another manufacturer of clothes, a company named *Marks & Spencer*, on behalf of which it developed a fabric design on her own. A year later, dresses made from this fabric were put on sale, and the plaintiff thought that the design (pattern) of that fabric follows (with minor changes) the design of the fabric that had been sent out by the plaintiff to the designer Lee Ann in 2012 for the project that was never carried out. The defendant told the court that she had not remembered the pattern on the plaintiff's fabric and developed the design in dispute completely on her own. The court ruled in favor of the designer Lee Ann, as it did not find sufficiently convincing evidence of the fact that the original and concurrent designs are so similar that it might be possible to establish any form of copying – conscious, sub-conscious, or indirect. As it was ruled that Lee Ann had not copied the design, the question of whether the copied part had been substantial, was withdrawn.

The resolution of disputes on concurrent photographs in the UK and US courts also has its own specific features. It would be interesting to examine the dispute between the *Temple Island Collection Ltd* company, a manufacturer of souvenirs, and the *New English Teas* company on copyright infringement concerning the use of a picture of a red bus on the grey background of a London embankment. The photograph of the bus moving along the Westminster Bridge against the backdrop of the Parliament building and Big Ben was taken in 2005 by Justin Fielder, Managing director at *Temple Island Collection Ltd*. The photograph was later digitally edited. In 2010, the plaintiff noticed a picture showing a red bus moving along the same Westminster Bridge

towards the House of Parliament on the grey background – on a tea box that the defendant used for packing his brand product (English tea); that picture was bearing a strong resemblance to his own photograph. Although the photographs did not look identical, the plaintiff stated that his copyright to his picture made in 2005 had been infringed.

Upon hearing the dispute in re *Temple Island Collection Ltd v New English Teas Ltd & Anor* (Temple Island, 2011), the England and Wales Patents County Court (Russell, Cohn, 2012) ruled in favor of the plaintiff, using both the arguments similar to those mentioned above from the rulings of another British intellectual property court and its own arguments. Thus, the court ruling defines the composition of a photograph as the source of originality which depends on the camera angle plus both the elements brought in intentionally by the photographer and those that deliberately occurred in a certain place at a certain moment – and therefore became part of the picture. The resulting composition is a combination of all these factors; each of them will appear specific in different cases and at different times. However, in the long run, the composition of the image may also be the result of mastery and effort (or intellectual creation) of the photographer, something that is protected by copyright in a photograph (see Item 27 of the Ruling).

The court established a causal relationship between the details of the plaintiff's work and the defendant's work and concluded that these details had been copied. The ruling emphasizes that in this instance of an obvious similarity between the original and concurrent works, as well as apparent accessibility of the plaintiff's work to the defendant, the burden of proof should lie with the defendant. However, the defendant failed to present any convincing evidence that the elements of his work had not been borrowed from the plaintiff's work, or that their idea had not been influenced by the plaintiff's work (see Item 55 of the Ruling).

The court has also noted in its ruling that the defendant had been referring to an incomplete likeness between the elements of the original and disputed photographs and, in particular, directed the court's attention to the comparison of the general composition of both pictures: The River Thames was absent from the disputed picture, and the two pictures were dissimilar both horizontally and vertically. However, the court ruled that these differences fail to refute the fact of copying, as the works bear an obvious similarity: it is by no mere coincidence that both works depict Big Ben and the House of Parliament in grey colors, a red bus moving along the bridge from the right to the left, and empty white sky. The court saw the cause of this similarity in the of the plaintiff's work being copied by the defendant (see Item 56 of the Ruling).

This ruling with regard to the pictures of a red bus on a London bridge is debatable, and it has been widely criticized by legal practitioners; however, it has been really carried and become a precedent.

Another peculiarity regarding concurrent photographs is presented in the ruling of the United States Court of Appeals for the Ninth Circuit on a 2003 dispute in re *Ets-Hokin v. SKYY Spirits Inc.* (Ets-Hokin, 2003), which reaffirmed an earlier ruling by a lower court. Commercial photographer Joshua Ets-Hokin sued the *SKYY Spirits Inc.* company when another photographer created a picture of a product manufactured by that company (a bottle of vodka), which was bearing a substantial resemblance to a commercial photograph of the same product that the plaintiff had taken a few years prior to that. The court did not uphold his claim as it decided that the resemblance between the pictures taken by different photographers was inevitable. The court ruled that there are not so many ways of photographing a bottle of vodka, and the copyright should not prevent the *Skyy* company from creating other commercial works on the basis of its own products. Nevertheless, the originality of the concurrent photograph had been achieved, according to the judges, by placing the shades around the objects at different angles compared to the original photograph.

Similar criteria of protectability are used by American judges in resolving disputes on concurrent musical works. However, in this case the criteria are more abstract by nature, as the author of the new musical work has obviously had access to previously performed musical works, a fact that needs to be taken into consideration. In this case, two elements must coincide for the fact of copyright infringement with regard to the original musical work to be established: "(a) a sufficient degree of objective similarity between the original work and the alleged infringement; and (b) some causal connection between the plaintiff's and the defendant's work" (Day, 1963). For establishing the non-protectability of the concurrent work, the court must prove that it has been entirely or substantially copied from the original work. If the court concludes that the work

has been created by the concurrent author on his own, independently from the original work, this will constitute no copyright infringement (Day, 1963).

Thus, the appellate court judge in re *Francis Day & Hunter Ltd v Bron* ruled that the sufficient degree of similarity between musical works implies "that an ordinary reasonably experienced listener might think that perhaps one had come from the other" and that the "proof of similarity between the alleged infringing work and the original, coupled with the proof of access to the original, did not raise any irrebuttable presumption of copying, but at most raised a prima facie case for the defendant to answer" (Day, 1963).

Disputes on the copyrightability of concurrent musical works are widespread in the USA; however, one could hardly expect occasional full similarity between the original musical work and the concurrent one in this domain of copyright works, as the degree of creativity in musical works is qu high. Disputes mostly arise in relation to significant or partial similarity, as well as sampling (remaking) (Giannini, 1990: 510; Campbell, 1993; Grand Upright Music, 1991).

In Russian law, there are no special regulations that would govern parallel creation and concurrent works.

Most scholars in Russian legal doctrine do not recognize the very possibility of parallel creation in copyright law and, accordingly, the protectability of concurrent works. Thus, the classification of intellectual property types suggested by professor Dozortsev is based on the key component for each type: form or content, which defines the possibility of a concurrent work to be created by another author unrelated to the original author. The researcher has concluded (based on an audiovisual work) that it is almost absolutely impossible to legitimately create concurrent works which are being protected on the basis of their form – in contrast to the works which are being protected on the basis of their content: the latter can be re-created as a result of parallel creation, because their protection is based on their essence (Dozortsev, 2003: 42-43).

A similar approach is shared by the majority of Russian scholars (Gavrilov, Gorodov, Grishayev, Kashanin, Morgunova and others) who insist that copyrighted works are unique and therefore cannot be produced anew as a result of the parallel creation of different persons. They rightfully note that no "copyright collisions" between the works of different authors can take place; if they ever happen, this means that either some material has been borrowed illicitly, or both works are non-original and/or non-unique, which causes similarity between them; therefore, such works cannot be protected by copyright law (Gavrilov, 2010: 20; Gavrilov, Gorodov, Grishaev, 2009; Morgunova, Pogulyaev, Korchagina, 2010).

Russian court enactments also demonstrate an unequivocal trend toward the non-recognition of parallel creation as a possible way of creating a work. The term of "parallel creation" is only mentioned in judicial rulings in the negative form, as an indication that a product of intellectual activity is neither unique nor original, which means such a work cannot be copyrighted (Opredelenie, 2005). "Parallel creation" is also mentioned in the materials of forensic practice as a form of intellectual activity that oftentimes leads journalists, columnists, commentators, and other professionals to the creation of non-original reports of events or facts that are purely informative by nature, i.e. devoid of originality and therefore non-copyrightable (Opredelenie, 20/03/2012).

The Vyborg Rayon Court of the City of Saint Petersburg ruled on March 12, 2012, in re No. 2-177/2012; the ruling was confirmed by the decision of the Belgorod Oblast Court of 2012 (Opredelenie, 20/06/2012): No Alex Alen was suing Daria V. Petukhova and claiming her own recognition as the author of a visual art work (creative make-up) as well as protection of her copyright; the defendant contended that the disputed item was a concurrent work which had been developed as a result of her own individual (parallel) creation without resorting to the original make-up made by the plaintiff or any other works of the latter. The defendant insisted that "each make-up is an independent work based on elements of common use" (Opredelenie, 20/06/2012). However, neither the text of the ruling delivered by the Rayon Court nor that of the definition carried by the Oblast Court touch upon the topics of parallel creation and concurrent works, therefore it is impossible to determine the attitude of the judges toward the issue. The court defined the actions of the defendant as "the reproduction (copying) of a visual art work (make-up performed by the plaintiff), because the basic elements used in the above-mentioned make-ups are confusingly similar" (Opredelenie, 20/06/2012).

At the same time, there are isolated opinions in Russian doctrine that run contrary to the well-established scholarly tenet as well as the legal practice which does not recognize concurrent works in the Russian Federation.

As early as during the "Soviet" period of legal doctrine, the adherents of the idea of recognizing parallel creation insisted: "It is totally obvious that, as our society develops, the number of works is growing dramatically. This, in turn, leads to the fact that entirely dissimilar works should even theoretically become increasingly more rare" (Ionas, 1972: 21).

Modern scholars who adhere to the theory of the possibility of legitimate parallel creation (Ionas, Labzin, Metov, Sviridova), admit that "the creative activities of two independent authors may yield identical results" (Labzin, 2007); they emphasize that "although the probability of this happening is extremely low, it should not be ruled out completely" (Sviridova, 2014: 74). The advocates of this idea specify that the possibility of parallel creation does not concern works with a traditionally high degree of creativity. Thus, one cannot write any of Fyodor Dostoyevsky's novels or compose Sergey Prokofiev's music in parallel to their authors. However, they maintain that copyright law does not rule out the protection of simpler and more replicable works that are also products of creative process, although their artistic value is not so significant. For example, a photograph of a famous architectural structure such as the Moscow Kremlin or the Eiffel Tower has most probably already been taken by someone at some moment in time virtually from any standpoint.

There is also a statement to be found in the modern Russian legal doctrine that holds that Russian copyright law objectively covers both the works with low replication probability and high degree of creativity – and those with high replication probability and low degree of creativity. The latter include computer software, databases, catalogues, reference books, maps, photographs, works of design, architectural projects, work titles, commercial slogans etc. (Metov, 2015: 181).

It appears that if we accept the possibility of protecting the results of parallel creation, we need to develop the criteria that define legitimately created parallel works as well as the criteria that draw the line between legitimately created works and plagiarism. The scholars that adhere to the idea of parallel creation do not offer any such criteria, apart from one arguable exception. It is being suggested to compare the original work and the concurrent one by using the concepts of identity and confusing similarity that have been developed for industrial property law: the identity of two items means full resemblance of their elements; confusing similarity denotes mutual association of the items in general, including unprotected elements, despite certain differences (Prikaz, 2009). In addition to that, a special role of experts in assessing the "similarity" between the original and disputed works and, accordingly, in resolving the issue of possible copyright infringement is being emphasized. Obviously, these suggested mechanisms are not sufficient, and in the event that parallel creation is officially recognized, a particular algorithm will be required for resolving the disputes concerning the protectability of concurrent works. Probably, Russian scholars expect to draw upon the experience of other countries when it is necessary; however, this paper shows that this experience varies in different countries and at different times.

4. Results

The issue of recognizing parallel creation and copyrightability of concurrent works is closely related to and follows from the problem of recognizing the protectability of works with a low degree of creativity. In the modern copyright law of many European countries and the United States, the recognition of protectability of works with a low degree of creativity and, accordingly, the practice of copyrighting concurrent works is a sustainable trend which largely serves the interests of commercial relationships. The trend toward recognizing the copyrightability of works with a low degree of creativity can also be observed in Russian doctrine, and even more so in the legal practice – even in spite of the fact that many types of works which are recognized as copyrightable according to Civil Code, traditionally belong to the category of works with a low degree of creativity (computer software, geographical maps, photographic works etc.).

One positive aspect of such trend for the Russian Federation could consist in a potential harmonization of Russian law with European and American law regarding the classification of copyrighted works, a fact that could facilitate the regulation of trans-border copyright relationships. However, this conclusion can only be made with a great degree of suggestion and exaggeration due to the fact that the extent of harmonization in this sphere is unpredictable and

may eventually turn out to be quite low in view of the initially substantial difference between the fundamentals of copyright law in different countries (Biriukov, 2017).

Potentially adverse consequences of this trend toward the relaxation of requirements to copyrightability in the Russian Federation and the recognition of parallel creation appear to be far more significant.

5. Conclusion

In summary, it should be noted that if we are taking into account not the existing trend but rather the real possibility of parallel creation and concurrent works being recognized officially, this fact should be assessed as adverse. It hardly seems possible to effectively protect the original work and the concurrent one with the mechanisms of copyright law because, in contrast to the industrial property law, the authorship of a person with regard to a particular work rules out the possibility of authorship of another person with regard to the same (or identical) work. At present, Russian doctrine rightfully does not recognize the possibility of parallel works (and parallel creativity as the process of creating them) for the reason that these results of intellectual activities run contrary to the concept of exclusive copyright which arises from the very moment when a work is created and serves to protect unique items that cannot be replicated independently.

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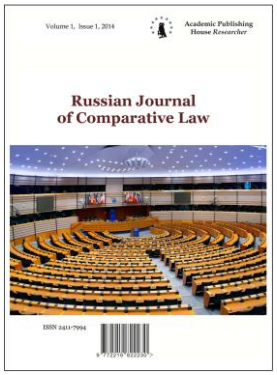

Law in Recovery of Agricultural Land to Develop Socio-Economic for National and Public Interest of Vietnam Nowadays: Reality and Petition for Changes

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Abstract

The research focuses on analyzing the content of Land Law 2013 about recovery of agricultural land to develop socio-economic for national and public interest of Vietnam, which includes: Firstly, cases of agricultural land recovery by the State to develop socio-economic for national and public interest; secondly, the competence of state agency in decision of land recovery to develop socio-economic for national and public interest; thirdly, procedures applied for agricultural land recovery to develop socio-economic for national and public interest; fourthly, compensation upon land and land-attached assets for people whose agricultural land is recovered. Besides, this research also elucidates limitations raised from reality of executing these law provisions, then petition for modification with a view to completing Land Law 2013 following the direction of ensuring more and more interests for people whose agricultural land is recovered.

Keywords: recovery of agricultural land; cases of recovery agricultural land; competence to recover land; procedures for agricultural land recovery; compensation upon land recovery by the State.

1. Introduction

Recovery of agricultural land is a special content in Land Law of Vietnam which has been stipulated throughout Land Law 1987 (Land Law, 1987), Land Law 1993 (Land Law, 1993), Land Law 2003 (Land Law, 2003) and now Land Law 2013 (Land Law, 2013).

Due to the swiftly development of the economics and society in Vietnam this times (World Bank, 2017), recovering a large number of agricultural land in serving the benefit of community, industrial development and service is unavoidable. Simultaneously, this is also the important base which contributes in founding the premise for the socio-economic development of Vietnam following the process of industrialization and modernization (Ministry of Natural Resources and Environment, 2012). However, the weakness in Land Law 2003's provisions of recovering land has lead to several negatives such as: mass number of land recovery but land has not been used which soon creates uncultivated land situation; inappropriate land compensation; insufficiency of land recovery publicity; ... which makes complaint and proceedings situations more complex along with a huge numbers and length (Duc Le Van, 2011). Besides, in a more serious level, many opposed cases using violence have appeared by people whose land was recovered. A typical case was the enforcing land recovery of Mr. Doan Van Vuon in Tien Lang district, Hai Phong city (Nghia Pham Duy, 2012), which affects negatively to the stability and development of the country's socio-

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economic. In Land Law 2013, the provisions about agricultural land recovery have been modified following the direction of narrowing down the situations of land recovered by the State, better procedures for land recovery and land, ensuring benefit of people whose land was recovered with compensation of land as well as property damages after the recovery by the State. Though, in implementing reality, those provisions in Land Law 2013 have showed limitations which require modification and addition. These issues will be fully stated in the article.

2. Document and study method

2.1. The research is executed on the current and former provisions of Vietnamese Law about agricultural land recovery. It is also executed by referring some public research such as: *"Mechanism of land recovery by the State and voluntary land transfer in Vietnam"* (World Bank, 2011), *"Case of Doan Van Vuon – a perspective from the press and communication in Vietnam"* (Nghia Pham Duy, 2012) *"Effects of land recovery to land capitalization in Vietnam"* (Thanh Nguyen Quang, 2017), "*The Legal Nature of Land Use Rights in Vietnam"* (Luan Thanh Nguyen, Ngoc Thi Ha, 2018).

2.2. The research is completed by simultaneously using different research techniques such as analysis, general, dialectical materialism, interpretation, comparison, history, to dissect and comment those problems relating to agricultural land recovery in Vietnam.

3. Discussion

The State recovers land means the State decides to recover land use rights from a person that is granted land use rights by the State, or from a land user that violates the land law. This is one of the rights of the State as the national representative in land which is stipulated in Article 54.2 Constitution 2013 and và Article 13.4 Land Law 2013. However, the State is only able to use the right in the cases and procedures prescribed by Land Law 2013.

First of all, the cases of land recovery for socio-economic development in the national or public interest have been stipulated in Article 62 Land Law 2013 as follows:

- Implementation of projects of national importance which are approved in principle by the National Assembly for which land must be recovered;
- Implementation of projects which are approved or decided by the Prime Minister, including:

+ Projects on construction of industrial parks, export processing zones, hi-tech zones, economic zones, new urban centers; investment projects funded with official development assistance (ODA) capital;

+ Projects for construction of national technical infrastructure including transport, irrigation, water supply and drainage, electricity and communication facilities; oil and gasoline pipelines and depots; national reserve warehouses; facilities for waste collection and treatment;

- Implementation of projects which are approved by provincial-level People's Councils for which land must be recovered, including:

+ Projects on construction of offices of state agencies, political and socio-political organizations; ranked historical-cultural relics and scenic spots, parks, squares, statutes, monuments, and local public non-business facilities;

+ Projects on construction of local technical infrastructure including transport, irrigation, water supply and drainage, electricity, communication and urban lighting works; facilities for waste collection and treatment;

+ Projects on construction of common activities of the communities; projects on resettlement, dormitories for students, social houses, and public-duty houses; construction of religious institutions, public culture, sports and entertainment and recreation centers; markets; graveyards, cemeteries, funeral service centers and cremation centers;

+ Projects on construction of new urban centers and rural residential areas; on improvement of urban areas and rural residential areas; industrial clusters; concentrated zones for production and processing of agricultural, forestry, aquaculture and seafood products; and projects on development of protection forests or special-use forests;

+ Mining projects that are licensed by competent agencies, except mining of minerals for use as common construction materials, peat, and minerals in scattered and small mining areas, and salvage mining.

Besides, in order to recover agricultural land to develop socio-economic for national benefit, we need to base on the annual district-level land use plans which are approved by competent state agencies and the land use schedule of the projects.

In comparison to Land Law 2003, Land Law 2013 has clearly stipulated and narrowed the scope of the cases which recovers agricultural land to develop socio-economic for the benefit of nation and community. Consciously, the cases: the State recovering agricultural land for national defense or security purpose and socio-economic development in the national or public interest (stipulated in Land Law 2013) are necessary events that in need of land recovery for the general interest of the country. Another noticeable point is that Land Law 2013 only assigns for the State stipulating more cases of land recovery due to violations of land law land recovery (Article 64) and land recovery due to termination of land use in accordance with law, voluntary return of land or risks of threatening human life (Article 65). The specific cases of land recovery for socio-economic development in the national or public interest is only stipulated by the National Assembly in Land Law 2013. This has shown the attempt in narrowing scope of land recovery cases by the State, preventing the arbitrariness in stipulating more land recovery cases while former land recovery for economic development objective had been abused to recover land in a mass and easy way (Thao Nguyen Phuong, 2013).

Apart from the mentioned cases above, utilization of agricultural land in executing projects, business production in accordance with the land use master plans and plans approved by competent state agencies is implemented following concept of voluntary land transfer without intervention from the State in order to bring about the equality between people whose land is recovered and investor (World Bank, 2011). Therefore, the investors may receive the transfer of, or lease, land use rights, or receive land use rights contributed as capital and encourage investors to rent land use right, receive land use rights contributed as capital from economics organization, households, individuals with a view to executing projects, business production plan. A problem may occur is that people whose land is recovered and investors do not come to any agreement due to the reason of land owners tending to push up the price, which makes the voluntary land transfer mechanism hard to be effective (Truong Luu, 2016). In fact, since Land Law 2013 became effective, agricultural land recovery still took place more popular than voluntary land transfer, specifically: According to figures summary of 34 provinces, municipalities which sent reports to Ministry of Resources and Environment 2014, regions had executed 2.194 constructions, projects with the total amount of land compensation, land clearance was 7.882 ha while agricultural land accounted for 6.810 ha (Ministry of Natural resources and Environment, 2015). In the next time, it's necessary to boost the implementation of voluntary land transfer in replacement to land recovery by the State to execute projects, business productions because this is the best solution to balance the economics advantage between people whose land is recovered and investors. From that we can thoroughly solve the contradictions, conflicts arose during these times and reach the target of building a socialist-oriented market economy.

Second of all is the competence to recover agricultural land in developing economic, society for national and public interest.

The competence to recover land in general and agricultural land in particular is belonged to official government agency. Basically, the competence to recover land is stipulated in Land Law 2013 as well as Land Law 2003, specifically:

(i) Provincial-level People's Committee may decide on land recovery in the following cases: Recovery of land from organizations, religious institutions, overseas Vietnamese, foreign organizations with diplomatic functions, and foreign-invested enterprises, recovery of agricultural land which is part of the public land funds of communes, wards or townships;

(ii) District-level People's Committees may decide on land recovery in the case of recovery of land from households, individuals and communities.

However, Land Law 2013 already had the simplicity about the competence to recover land more than Land Law 2003 in the case of land recovery region included the subject who belongs to land recovery competence of provincial-level People's Committee and district-level People's Committees. As the provision in Land Law 2003 and Article 31.2 Decree 181/2004/NĐ-CP of the State about Land Law implementation (Decree 43/2014/ND-CP, Art.31.2), provincial-level People's Committee determines to recover all the land area in this case, then bases on the decision of recovering all land area by district-level People's Committees to recover the particular land area

toward to each household, individual. This is obviously more verbose and complex than provision of Land Law 2013 which is provincial-level People's Committee deciding to recover land or granting power to district-level People's Committees to recover land.

Third of all is about procedures for land recovery for socio-economic development in the national or public interest.

Procedures for land recovery are stipulated in Land Law 2013 as follows:

Firstly, the making and implementation of plans for land recovery, investigation, survey, measurement and inventory are prescribed as orders:

- The People's Committee having competence to recover land shall issue a notice of land recovery. Competent state agencies must inform to individual, household whose agricultural land is recovered at least 90 days before having the decision on land recovery. The notice of land recovery must be sent to every land user whose land is recovered, publicized in the meetings with people in the recovered area and through the mass media, posted up at offices of the commune-level People's Committee and at common public places of the residential areas of which land is recovered;
- The commune-level People's Committee shall coordinate with the organization in charge of compensation and ground clearance to implement plans for land recovery, investigation, survey, measurement and inventory;
- Land users shall coordinate with the organization in charge of compensation and ground clearance in conducting investigation, survey and measurement of land area and other land-attached assets to develop plans for compensation, support;
- In case the land users in the recovered area do not cooperate with the organization in charge of compensation and ground clearance for investigation, survey, measurement and inventory, the commune-level People's Committee and Vietnam Fatherland Front in the locality and the organization in charge of compensation and ground clearance shall mobilize and persuade the land users to cooperate.

If the land users still do not cooperate with the organization in charge of compensation and ground clearance within 10 days after the mobilization and persuasion, the chairperson of the district-level People's Committee shall issue a decision on compulsory inventory. Land users whose land is to be recovered shall comply with that decision. In case the land users do not comply with the decision, the chairperson of the district-level People's Committee shall issue a decision on enforcement of the decision on compulsory inventory and organize the enforcement. The enforcement is conducted in a public, democratic, objective, orderly, safe and lawful manner. The times of starting the enforcement fall in working hours. Simultaneously, the enforcement of a decision on compulsory inventory may be conducted when all the following requirements are met:

+) Land users whose land is to be recovered do not comply with the decision on compulsory inventory after the mobilization and persuasion by the commune-level People's Committee, Vietnam Fatherland Front and the organization in charge of compensation and ground clearance.

+) The decision on enforcement of the compulsory inventory decision is posted up publicly at the office of the commune-level People's Committee and at common public places of the residential area of which land is recovered.

+) The decision on enforcement of the compulsory inventory decision has taken effect.

+) The person who is to be coerced has received the effective decision on enforcement. In case the person who is to be coerced refuses to receive the decision on enforcement or is absent when the decision on enforcement is delivered, the commune-level People's Committee shall make a written record of delivery.

The order and procedures for executing the decision on enforcement of compulsory inventory are prescribed as follows:

+) The organization assigned to conduct the enforcement shall mobilize, persuade and organize dialogues with, the coerced people;

+) In case the coerced person complies with the decision on enforcement, the organization assigned to conduct enforcement shall make a written record to acknowledge the compliance, and conduct investigation, survey, measurement or inventory.

+) In case the coerced person fails to comply with the decision on enforcement, the organization assigned to conduct the enforcement shall execute the decision on enforcement.

Secondly, execution of compensation, support to people whose agricultural land is recovered.

The organization in charge of compensation and ground clearance shall make the plan for compensation, support and coordinate with the commune-level People's Committee in the locality to conduct consultations on the plans for compensation, support and resettlement in the forms of meetings with land users living in the recovered area, posting up the plan for compensation, support and resettlement at offices of the commune-level People's Committee and at common public places of the residential areas of which land is recovered. The consultation results must be recorded in minutes which are certified by representatives of the commune-level People's Committee and Vietnam Fatherland Front, and land users whose land is recovered. Simultaneously, the organization in charge of compensation and ground clearance shall make a written summarization of opinions which clearly specifies the numbers of opinions for, against and other opinions regarding the plans for compensation and support. Coordinating with the commune-level People's Committee in the locality in organizing dialogues with those who have objections on the plans for compensation, support and improve the plans for compensation, support for submission to competent agencies. Competent agencies shall appraise the plans for compensation, support and resettlement before submitting them to the competent People's Committee for decision on land recovery and a decision on approval of the plans for compensation, support and resettlement in the same day.

After that, the organization in charge of compensation and ground clearance shall coordinate with the commune-level People's Committee to publicize and post up the decision on approval of the plans for compensation, support and at the commune-level People's Committee offices and at common public places of the residential areas of which land is recovered. The organization shall send the decision on compensation, support to each person whose land is recovered and that decision will clearly show the level of compensation and support, time and place of payment for compensation or support, time to arrange resettlement land and time to hand over the recovered land to the organization in charge of compensation and ground clearance. The organization in charge of compensation and ground clearance shall implement activities in accordance with the approved plans for compensation, support and resettlement.

The compensation and support upon land recovery by the State to people whose land is recovered includes:

- Compensation for land and remaining investment costs on land when the State recovers agricultural land from households and individuals

Agricultural land compensation means the State returns the value of agricultural land use rights for the recovered agricultural land area to individuals, households in the country. Compensation for agricultural land investment costs include costs for ground fill-up and leveling and other directly related costs that can be proved to have been invested in the land and have not been retrieved by the time the State recovers the land. Compensation is applied to individuals, households who meet the requirement for compensation as prescribed by law. Households and individuals using land which is not leased land with annual rental payment, having a certificate of land use rights, or a certificate or being eligible to be granted a certificate under this Law but not being granted that certificate yet.

The compensation is executed by allocating land which has the same usage objective with the recovered land. If there is no land for compensation, money compensation will take place following the particular land price of that kind of recovered land approved by provincial-level People's Committees in the time of land recovery decision.

Compensation for land and remaining investment costs on land when the State recovers agricultural land from households and individuals is stipulated as follows:

+) Agricultural land area to be compensated includes the area within the allocation quotas for agricultural land without collects money and the area received in the form of inheritance;

+) Agricultural land area exceeding the allocation quotas for agricultural land without collects money is ineligible for compensation for land but is eligible for the remaining investment costs on land;

+) The area of agricultural land by receiving or transferring land use right which exceeds the quotas before Land Law 2013 taking effect by inheritance, being given, lease of land use rights from others as prescribed in Law and meets the requirements for compensation will be compensated, supported following the real area of land being recovered by the State. If land user does not have certificate of land use rights or meet the requirements to be granted certificate of land use rights

and other land-attached assets can only be compensated towards the land area in agricultural land allocation quotas. To the agricultural land area which exceeds the agricultural land allocation quotas, it will not be compensated with land but to be considered in support.

+) For agricultural land which was used before July 1,2004, of which land users are households and individuals directly engaged in agricultural production but have not been granted a certificate or not being eligible to be granted a certificate of land use rights and ownership of houses and other land-attached assets under this Law, the compensation must be made for the land area which is actually used and does not exceed the agricultural land allocation quota.

- Principles of compensation for damage to assets and damage incurred due to production upon land recovery by the State.

If land-attached assets are damaged upon land recovery by the State, lawful owners of those assets are entitled to compensation as follows:

+) For annual crops, the compensation must be equal to the output value of the harvest. The output value of the harvest is the highest yield of the harvests in the preceding 3 years of the local main crop and the average price at the time of land recovery.

+) For perennial crops, the compensation must be equal to the current value of the planting area calculated in local prices at the time of the land recovery, excluding the value of land use rights.

+) For plants which have not been harvested yet but can be brought to another location, the transportation cost and the actual damage due to the transportation and re-planting must be compensated.

+) For planted forests funded by the state budget and for natural forests allocated to organizations, households and individuals for planting, management, growing or protection, the value of the actual damage must be compensated. The compensation amount must be divided to those who manage, grow and protect the forests in accordance with the law on forest protection and development.

+ For aquatic livestock which are due to be harvested at the time of land recovery, no compensation must be made.

+) For aquatic livestock which are not due to be harvested at the time of land recovery, the actual damage due to the early harvest must be compensated. In case the aquatic livestock can be brought to another location, the transportation cost and the damage caused by the transportation must be compensated. The specific compensation amount must be determined by provincial-level People's Committees.

- Support upon land recovery by the State.

It means the State provides assistance to those whose land is recovered, in order to stabilize their livelihood, production and development.

+) Support for stabilizing livelihood and production: Support for stabilizing livelihood by money of 30 kilograms rice in 1 month following the average price in the time supported by locals; Support for production such as tree seed, animal breed for agricultural production, services of encouraging agriculture, forestry, services of plant protection, veterinary, cultivating technique,...

+) Support for training, occupation change and job seeking for cases of recovery of agricultural land from households and individuals directly engaged in agricultural. If a person who is supported in occupation change and job seeking in labor age has demand to be educated in job, he/she will be accepted in job training center; supported in job seeking and bonus credit capital borrowing to develop production, business.

Thirdly is enforcement of agricultural land recovery.

In case the land users fail to comply with the decision even after the mobilization and persuasion, the chairperson of the district-level People's Committee shall issue a decision on enforcement of land recovery and organize the enforcement. Besides, the enforcement must be in accordance with stipulations as enforcement of compulsory inventory and it can only be executed when it meets these requirements:

+) The person whose land is to be recovered fails to comply with the land recovery decision after the mobilization and persuasion by the commune-level People's Committee and Vietnam Fatherland Front in the locality and the organization in charge of compensation and ground clearance.

+) The decision on enforcement of the land recovery decision is posted up at the office of the commune-level People's Committee and at common public places of the residential area of which land is recovered.

+) The decision on enforcement of the land recovery decision has taken effect

+) The person who is to be coerced has received the effective decision on enforcement. In case the person who is to be coerced refuses to receive the decision on enforcement or is absent when the decision on enforcement is delivered, the commune-level People's Committee shall make a written record of delivery.

The chairperson of the district-level People's Committee issues the decision on enforcement of the land recovery decision, and organizes the execution of the decision. Order of implementing enforcement on land recovery as follows:

+) Before executing the enforcement, the chairperson of the district-level People's Committee shall decide to establish an enforcement board.

+) The enforcement board shall mobilize, persuade, and conduct dialogues with, the coerced persons. If the coerced persons comply, the enforcement board shall prepare a written record to acknowledge the compliance. The land must be handed over within 30 days from the date of making the minutes. In case the coerced person fails to comply with the decision on enforcement, the enforcement board shall execute the enforcement;

+) The enforcement board has the power to ask coerced persons and related people to leave the coerced areas and to move their properties out of the land areas by themselves. If these people fail to comply, the enforcement board shall move the coerced persons, related people and their properties out of the areas. In case the coerced person refuses to receive their properties, the enforcement board shall make a written record, preserve the properties in accordance with law, and notify the properties' owners to get the properties back.

In general, Land Law 2013 has a movement in compared to Land Law 2003 when the procedures of land recovery in developing socio-economic for national and public interest are stipulated in a clear and particular way in order to avoid arbitrariness when executing land recovery procedures of competent authorities. At the same time, land recovery procedures in Land Law 2013 had emphasized the communication and voluntary in returning land of people whose land is recovered, enforcement can only be taken place when the mobilization and persuasion to those people are not effective.

Even though, when the State recover agricultural land in reality to develop socio-economic for national and public interest, it's enforcement method that mostly takes place (Hoang Do, 2016; Dai Quang, 2017; Dung Hoang, 2018; Nguyen Khoi, 2018). The basic reason that leads to this situation is that the land price for compensation prescribed by the State when agricultural land recovery happens is still very low in comparison with other types of land and land price on the market. Specially in the construction plan of building new urban area, new rural inhabitant, urban decoration, rural inhabitant when agricultural land recovery happens, people whose land is recovered will be compensated with low price, however when investors finishes the plans or even just allots portion to sell land, the area of recovered land is still the same but the price is very high. This difference price can be up to thousands time. *Example:* The land area in the plan: New urban area in North East, zone 1, Phan Rang – Thap Cham city is identified as agricultural land which had been executed enforcement of land recovery. Currently, investors have not completed compensation procedures and infrastructure technique but they are actively allotting land portion to sell with the price of 10.000.000đ/m2 (approximately 430 USD) while they only compensates for people whose land is recovered with the price of 60.000đ/m2 (approximately 2.6 USD) (Binh Thai, 2017) and many other plans (Le Hoang Hoa, 2017; Bang Nhiet, 2018). It's clearly that people whose land is recovered are disadvantaged in economics benefit so that the way they are not willing to hand in land is quite understandable. Besides, the low price of compensation will advantage investors so that arises the avoidance in agreement with agricultural land users to have land for plan execution and combination with government agencies through negative methods such as bribe in executing land recovery.

The price of land for compensation when land is recovered by the State prescribing in Land Law 2013 is the result of modification in Land Law 2003 on the following contents:

First of all, it has been added with Article 112 stipulating about land price valuation:

(i) based on the lawful land use purpose at the time of land valuation;

(ii) based on the land use term;

(iii) being suitable with the popular market price of transferred land with the same land use purpose, or winning price in auctions of land use rights in case of organizing auctions of land use rights, or the income earned from land use;

(iv) at a time, the adjacent land parcels with the same land use purpose, profitability and income earned from land use have the same price. The Government shall prescribe land valuation methods such as direct comparison method, the subtraction method, the income-based method, the surplus-based method, the method using land price coefficient (Decree 43/2014/ND-CP, Art.4, 5).

Second of all, it has been added with stipulation in Article 113 about land price frames. The Government shall promulgate land price frames once every 5 years for each type of land and for each region. During the implementation of land price frames, if the popular price in the market increases 20 % or more over the maximum price or reduces 20 % or more below the minimum price prescribed in land price frames, the Government shall adjust land price frames accordingly.

Third of all, it has been modified about the provision in building land price tables, Article 114 Land Law 2013: *"Based on the principles, methods of land valuation and land price frames, provincial-level People's Committees shall develop and submit the land price tables to the People's Councils of the same level for review before promulgation. Land price tables shall be developed once every 5 years and publicized on January 1 of the beginning year of the period"*. Moreover, when building the projects prescribing about cases of adjusting land price tables, two projects are raised: (i) adjusting when market price has particular change in a particular point of time (changing over 20 % compared to land price table and changing time exceeds 60 days); (ii) adjusting in a particular time (05 years). Obviously, the first project follows the happening of market more than the second one which has been chosen (Thuy Hoang Thi Bien, 2013).

In general, the way of valuating land in Land Law 2013 though has much more improvement, however, it has not tightly followed the fluctuation of market. The reason lies in agricultural land market still operating in a feeble speed and having no organization so that it can hardly gather the trustful information about land price, excepts for having stipulated price from land price table of provincial-level People's Committees (Chau Chan Thi Minh, 2011). Hence, it is necessary to have an adjustment, modification of provisions in Land Law 2013 about land price following the direction that it equals the land price on the market to become the base for compensation to people whose agricultural land is recovered.

4. Results

From the analyzed contents above, this research has construed and clarified the matter and practical execution of currently law provisions about agricultural land recovery to develop socio-economic for national and public interest of Vietnam which are cases of agricultural land recovery; procedures of agricultural land recovery; compensation in land for people whose land is recovered, from that base to propose the petitions for completing these provisions of Land Law 2013 more and more.

5. Conclusion

Overall, though provisions about cases of land recovery in Land Law 2013 have been much more narrowed in comparison to Land Law 2003, it is still now allowing many subjects who have competence to recover land as well as many other cases of land recovery, especially recovering for economic development. About the utilization of land recovery mechanism to execute the projects serving the economic development, a well-known argument used by farmers in land dispute happened during 10 years of implementing Land Law 2003 is that: If the state recovers land to construct public facilities, schools, hospitals, cemeteries,..., people will be willing to follow the recovery decision and receive money for compensation as in price frames of the State. However, if the State recovers land for businesses to construct urban area, apartment block, people shall be compensated following the agreed price with the business. The State can only stand as an intermediary negotiation but not to use its power to force or damage people. Obviously this argument just should be considered as a general provision of Land Law and can be built with some particular exceptions. However, when we see back in land disputes during these happened times, it is essential to have a modification of stipulations about foundations for land recovery of Land Law 2013, which

follows the direction of limiting then stopping land recovery for projects of economic development – the main cause that leads to several disputes about land between people and the State.

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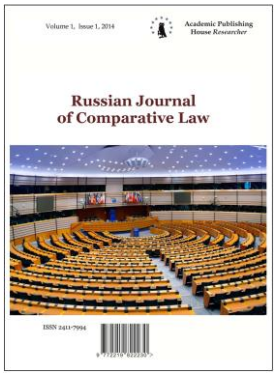

Legislation on Protection of Consumer Rights in Vietnam: History of Establishment and Development

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Abstract

In this article, the author focuses on analyzing the process of formation of the regime of consumer rights protection and the development of this legal regime in the Vietnamese legal system. Consumer rights protection is becoming a matter of primary concern of the Party and the State of Vietnam to ensure the legitimate rights and interests of consumers, promote the economy, stabilize and improve the quality living of people and in accordance with the provisions of international law. The article also outlines the legal basis for protecting consumers' rights, consumers' rights and obligations, security mechanisms, and forms of dispute resolution between traders and consumers; current status of implementing the law on protection of consumer rights in Vietnam today.

Keywords: protection of consumers' rights, consumers, the law on the protection of consumer' rights, quality of goods and services, unfair competition, fake goods and poor quality goods, Consumer Protection Association.

1. Introduction

In the current social development period and in the context of Vietnam becoming a member of WTO and participating in free trade areas today, protection of consumer rights becomes an urgent need and is the first concern of the whole society to improve living standards as well as protect legitimate rights and interests of consumers.

Protection of consumer rights in Vietnam has really been concerned since the State implemented the "Doi Moi", shifting from a centrally planned economy to a socialist-oriented market economy. For the purpose set by the Party and the State when implementing the policy of "Doi Moi" to make "rich people, strong countries, social justice, democracy and civilization" the Vietnamese legal system has focused and recorded receive consumer protection as an independent legal regime, especially the Ordinance on protection of consumer rights launched in 1999, marking the importance of this regime in the legal system when Vietnam is integrating into the international economy. In 2010, the Law on the protection of consumer rights was officially passed by the National Assembly, affirming the political system's efforts to ensure the legitimate interests of consumers in general, and more than 95 million people in Vietnam in particular. Ensuring the legitimate rights and interests of consumers based on the principle of protecting basic rights of people and citizens recorded in the Vietnamese Constitution in 2013 is the driving force for developing the economy in a sustainable way and helping harmonize the relationship between

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manufacturing enterprises providing goods and services and consumers, stabilizing society and improving the quality of life of people.

The article analyzes the process of forming this legal regime as well as its development in the legal system and the implementation of the law on the protection of consumer rights.

2. Materials and methods

The article is studied based on legal documents relating to the protection of consumers' rights such as Ordinance on protection of consumer rights 1999; Law on protection of consumer rights 2010; Competition law 2014; Law of goods and service quality in 2007; Commercial Law 2005; Food safety Law 2010; Criminal Code 2015; Law on handling administrative violations 2012; Price Law 2012. In addition, there are guiding decrees related to the protection of consumer rights such as Decision No. 02/2012/QD-TTg dated January 13, 2012, of the Prime Minister, promulgating the List of goods. , essential services must register form contracts, general transaction conditions; Decree № 08/2013/ND-CP dated January 10, 2013, on sanctioning administrative violations for acts of producing and trading fake goods; Decree № 185/2013/ND-CP dated November 15, 2013, regulating administrative sanctions in commercial activities, production, and trading of fake goods, prohibited goods and protection of consumer rights...

The article uses methods of general scientific research such as methods of analysis, synthesis, the method of comparing laws, dialectical materialism methods, historical methods.

3. Discussion

Vietnam has experienced a prolonged war against France and the United States, and with a centrally planned subsidized economic model, the issue of protecting consumer rights has not been really focused. Before the years of innovation, this issue was quite fuzzy in the perception of people, businesses, manufacturers as well as legislators. Only from the beginning of the "Doi Moi" policy, protection of consumer rights has become a legal regime recognized in the Ordinance on the protection of consumer rights. The Standing Committee of the National Assembly issued the Ordinance № 13/1999/PL-UBTVQH10 to protect the legitimate rights and interests of consumers; enhance the effectiveness of state management, enhance the responsibility of organizations and individuals producing and trading goods and services in protecting consumers' rights (Ordinance 13/1999/PL-UBTVQH10). However, the protection of consumers' rights and the operation of the protection of consumers'rights, have revealed many weaknesses and inappropriate: from raising awareness about protecting consumers' rights for the whole society (for the business community, related agencies - organizations and for consumers themselves); issues such as sustainable consumption, "green" consumption (environmental protection), anti-counterfeiting etc., until new phenomena arise in the process of international economic integration such as advertising and promotional acts dishonest trade, nefarious multi-level business, online fraud/net etc... All of which requires new perspectives and new approaches to enhance the effectiveness of the protection of consumer rights (Loan Dinh Thi My, 2008).

Along with the introduction of the Ordinance on the protection of consumer rights, a series of other legal documents were born and there were regulations on the protection of consumer rights. This is an important legal corridor for the authorities to implement the state management of consumer protection while also expressing the State's growing concern for this issue. For example, in Part 3 of the Vietnamese Civil Code 2015, there are regulations on civil obligations and civil contracts with provisions relating to consumer protection (Civil Code, 2015, Part. 3).

On November 21, 2007, the Product and Goods Quality Law was passed, in which consumers' rights and obligations are defined in Section 3, Chapter II. Especially, under Article 17 of this Law, consumers have the right to;

(i) be provided with truthful information on the level of safety, quality, instructions for transport, storage, preserve and use of products and goods;

(ii) be provided with information on the warranty of goods, the possibility of causing unsafe goods and how to prevent when receiving warning information from producers and importers;

(iii) ask sellers to repair, refund or exchange new goods, receive goods with disabilities;

(iv) be compensated for damage according to the provisions of Section 2, Chapter V of this Law and other relevant law provisions;

(v) request organizations and individuals producing and trading goods to perform their responsibilities to protect consumers' rights in accordance with the law on protection of consumer rights;

(vi) request organizations on protection of consumers' rights help protect their legal rights according to the law on protection of consumers' rights (Product and Goods Quality Law, 2007, Art.17).

In 2004, the Competition Law was enacted, creating an important legal corridor to protect consumer rights. This law stipulates acts of restraint of competition and unfair competition, abuse of dominant position in the market, abuse of the monopoly position of producers and enterprises in the trading of goods and services, causing risks to negatively impact consumers. According to the Competition Law: "Enterprises are free to compete within the legal framework. The state protects the right to legal competition in business. The competition must be carried out on the principle of honesty, not infringing upon the interests of the State, public interests, legitimate rights and interests of enterprises and consumers and must comply with the provisions of this Law" (Competition Law, 2004, Art. 4).

Commercial Law in 2005 also had specific provisions for protecting consumer rights through regulations on promotion and commercial advertising. In order to protect consumers' rights, Decree № 37/2006/ND-CP regulates promotional goods and services; goods and services used for sale promotion; legal rights and obligations of traders conducting promotions; prohibited acts in promotional activities; principles to implement promotions. Decree № 37/2006/ND-CP regulates the content of commercial advertising products for some special goods and services as follows: Commercial advertising for goods that are nutritional products for children must comply with the provisions of the law on business and use of nutritional products for children (Decree 37/2006/ND-CP, Art. 23). Commercial advertising for goods and services related to pharmaceuticals, vaccines, medical biologicals, medical equipment, instruments, therapeutic methods, medicines, and functional foods must be followed comply with the provisions of medical law. Commercial advertising for goods and services related to veterinary drugs, plant protection drugs, fertilizers, animal feeds, animal breeds and plant varieties must comply with relevant law provisions. and may not contain the following contents: affirmation of safety, non-toxic but not certified by a competent state authority; confirms the effectiveness and features of veterinary drugs, pesticides, fertilizers, animal feed, plant varieties but does not have a scientific basis; Use of speech, writing or images violating the process and methods of safe use of veterinary drugs and plant protection drugs. Apart from non-standard goods, technical regulations on goods quality, traders are only allowed to advertise commercial goods for goods subject to the application of corresponding technical standards after such goods are issued with a technical standard conformity certificate issued by a competent state management agency or published with quality standards (Art.24, 25, 26 Decree № 37/2006/ND-CP).

The Enterprise Law in 2005, amended and supplemented in 2014, also created a more equal competition environment between different types of enterprises, from which the quality of services and goods was improved, the cost Be lowered and consumers have more choices to suit their needs. Because an enterprise wants to grow strongly and sustainably, it is necessary to have the trust of consumers and must meet the needs they desire.

In addition, consumer rights are also protected by many provisions in other legal documents such as: Criminal Code 2015, Law on food safety 2010, Law on handling administrative violations 2012; Law on plant protection and quarantine 2013; Price Law 2012; and the legal documents guiding the protection of consumer rights: Decree № 08/2013/ND-CP dated January 10, 2013 on sanctioning administrative violations for acts of producing and trading fake goods; Decree № 185/2013/ND-CP dated November 15, 2013 regulating administrative sanctions in commercial activities, production and trading of counterfeit and banned goods and protection of consumers' rights; Decision № 02/2012/QD-TTG dated January 13, 2012 of the Prime Minister promulgating the list of essential goods and services required to register contracts according to form and general trading conditions; ... The above legal documents have created the more legal basis for the protection of consumers' interests in general.

Especially, the Law on the protection of consumer rights was officially adopted by the National Assembly in 2010, which adjusted relationships between consumers and traders. This Law regulates consumers' rights and obligations; responsibilities of organizations and individuals trading in goods and services for consumers; responsibilities of social organizations in participating in protecting consumers' rights; resolving disputes between consumers and organizations and individuals trading in goods and services; the state management responsibility for the protection of consumers' rights (Law on the protection of consumers' rights, 2010, Art. 1).

The trading relationship between traders and consumers is purely a civil legal relationship, this is not a commercial legal relationship because there is no purpose of buying and reselling to profit. However, consumers need to be protected in a more practical way in addition to the provisions of traditional civil law, so that a new field of law is formed - that is the law on protection of consumer rights. Protection of consumers' rights is a common responsibility of the State and society. The rights of consumers are respected and protected in accordance with the law. The protection of consumer rights must be implemented in a timely, fair, transparent and lawful manner. Activities of protecting consumers' rights must not infringe upon the interests of the State, rights and legal interests of organizations and individuals trading in goods and services and other organizations and individuals. The State always creates favorable conditions to protect consumers, mobilize all resources to increase investment in infrastructure, develop human resources for agencies and organizations to implement the protection of consumers' rights, regularly strengthen counseling, support, propaganda, dissemination and knowledge guidance for consumers.

According to the Law on protection of consumer rights in 1992 (amended and supplemented in 2018) of the Russian Federation, consumers are citizens who intend order or purchase goods (works, services) and use those goods just for personal, family, and other living needs, and not related to conduct of business activities (Law on the protection of consumers' rights of the Russian Federation, 1992).

According to Clause 1, Article 3 of the Law on the protection of consumer rights 2010 of Vietnam, consumers are the people who buy and use goods and services for consumption and living purposes of individuals, families, and organizations. Also in this law, consumers have 8 basic rights (Vietnamese Consumer Protection Law, 2010, Art. 8), including:

- To be assured of the safety of life, health, property, other legal rights, and interests when they participate in transactions and use of goods and services provided by organizations and individuals trading in goods and services;
- To be provided with accurate and complete information about organizations and individuals trading in goods and services, contents of goods and service transactions, source and origin of goods; to be provided with invoices, documents, transaction-related documents and other necessary information on goods and services that consumers have purchased and used.
- Select goods and services, organizations and individuals trading in goods and services according to their needs and practical conditions; decide to participate or not participate in the transaction and the agreed contents when participating in transactions with organizations and individuals trading in goods and services.
- Have the right to comment on organizations and individuals trading in goods and services on prices, quality of goods, services, service styles, transaction methods and other content related to transactions between consumers and organizations and individuals trading in goods and services.
- Participate in developing and implementing policies and laws on the protection of consumer' rights.
- Request for compensation when goods and services are not in accordance with standards, technical regulations, quality, quantity, features, utilities, prices or other contents that organizations and individuals trading in goods and services have announced, listed, advertised or committed.
- Complaints, denunciations, lawsuits or requests for social organizations to institute lawsuits to protect their rights according to the provisions of this Law and other relevant law provisions.
- To be consulted, supported, guided knowledge about the consumption of goods and services.

In addition, the Law also provides for the protection of consumer information. Consumers have ensured the safety and confidentiality of their information when participating in transactions and use of goods and services, except when required by competent state agencies (Vietnamese Consumer Protection Law, 2010, Art. 6).

This law also stipulates consumers' obligations whereby consumers must check goods before receiving them, must choose goods and services with the clear origin and do not harm the environment/health and not contrary to fine traditions. Consumers must notify state agencies and organizations when discovering goods and services that do not guarantee safety, harm or threaten consumers' health and property; acts of infringing upon the rights and interests of consumers. (Vietnamese Consumer Protection Law, 2010, Art. 9).

Decree 99/2011/ND-CP dated October 27, 2011, also specified the provisions of the Law on consumer rights protection 2010 regarding consumer rights protection in dealing with individuals doing business independently and frequently without having to register for business; contract with consumers and general trading conditions; solving requirements of protecting consumers' rights; social organizations engaged in protecting consumers' rights; organizing reconciliation of disputes between consumers and business organizations and individuals (Decree 99/2011/ND-CP).

In recognition of the importance of consumers and the protection of their legitimate rights and interests, on July 10, 2015, the Prime Minister made a decision on 1035/QD-TTg taking March 15 every year as Vietnamese Consumer Rights Day.

Vietnamese Consumer Rights Day is held annually to:

(i) affirm the role, position and importance of protecting consumers' rights with stable and sustainable development of society and country;

(ii) propaganda, education and dissemination of laws and policies to protect consumers' rights, thereby creating a basis to mobilize and focus the interest, response and participation of the whole society to the protection of consumers' rights;

(iii) contribute to building a healthy consumer environment for both consumers and organizations and individuals trading in goods and services; keep stable and create a driving force for development, innovation and creativity for the national economy;

(iv) enhance responsibility, encourage cooperation and coordination between state management agencies and social organizations to protect consumer's rights, rights of organizations and individuals trading goods and services in carrying out activities to protect consumers' rights (Decision 1035/QD-TTg).

On August 18, 2017, implementing Decree No. 98/ND-CP of the Government regulating the functions, tasks, powers and organizational structure of the Ministry of Industry and Trade, the Bureau of Competition and Consumer Protection is established on the basis of separation from the Vietnam Competition Authority (previously) with the function of state management of competition and consumer protection. This separation aims to unify the function and name of the bureau in the management of competition and consumer protection, in accordance with the domestic reality as well as international trends.

In 1999, the Ordinance on the protection of consumer rights and in 2010, Law on the protection of consumer rights, passed by the National Assembly, created a legal corridor and demonstrated the determination of the political system in the careers protecting the rights of more than 95 million Vietnamese consumers. After more than 7 years of effective Law on protection of consumer rights 2010, consumer rights protection in our country has achieved many achievements, greatly reducing damage to consumers. However, that result has not met expectations. In response to the new request, at the request of the Vietnam Standards and Consumer Protection Association, the consent of the Ministry of Industry and Trade and the Ministry of Science and Technology, on October 31, 2018, the Ministry of Home Affairs issued a Decision intended to allow the establishment of the Vietnam Consumer Protection Association on the basis of separation from the Vietnam Standards and Consumer Protection Association. The association consists of 61 local associations and member organizations spread throughout the provinces and cities in the country. The principle and purpose of the association is "a social organization of voluntarily established organizations and individuals with the aim of gathering and uniting members, participating in protecting consumers' interests according to laws, contributing to the economic and social development of the country". At the same time, contributing to mobilizing not only members of the

association but also the masses and genuine businesses throughout the country to participate in protecting the legitimate interests of consumers.

However, in reality, the legal rights and interests of consumers have not been guaranteed. Many cases of consumer rights violations not only affect the interests of one or a few consumers but also affect the consumer community as well as the whole society. Can lead some typical cases such as:

On October 17, 2017, buyers found 1 in 60 silk scarves bought from KhaiSilk store at 113 Hang Gai that had both the "Made in Vietnam" label and the "Made in China" label. October 25, 2017, Mr. Hoang Khai acknowledged that he sells silk scarves originating from China with the press. It can be said that after Mr. Hoang Khai voiced his acknowledgment, attaching high-quality Vietnamese goods to products from China made those who bought KhaiSilk's silk scarves disappointed and bewildered by the quality of Vietnamese goods. The case became more serious when the inspection team of the Ministry of Industry and Trade assessed the quality of textile and garment products for some models of Khai Duc Co., Ltd., which owns the KhaiSilk brand, and the product did not have silk components as announced on the label of ingredients in raw materials are 100 % silk.

The case of Khaisilk Group's silk scarves products was "stripped" by consumers about the unclear origin of goods, the representative of the Group admitted that 50 % of Khaisilk's silk scarves products were imported from China. Thus, Khaisilk Group violates the Law on the protection of consumer rights when infringing upon the right to supply information of origin and goods origin to consumers.

This is not the first time that consumer rights have been violated, but there are many other products. Such as food and beverage group is a group of goods accounted for the proportion of violations of consumer rights up to 19.69 %; household electronics 13.05 %; daily consumer goods 12.88% (Thuy Linh, 2018).

Meanwhile, consumers still hesitate to rely on legal protection agencies. Indifference in protecting one's own rights shows that the Law on Protection of Consumer Rights has not been given adequate attention (Huong My, 2017).

In May 2016, the Ministry of Health Inspectorate requested to recall 3 lots of products of URC Vietnam Co., Ltd. due to the lead content exceeding the permitted level, in particular, there is a lot of lemon green tea C2 (Production date: February 4, 2016, Expiry date: February 4, 2017). The results showed that only 1,200 C2 barrels and Red Dragon energy drink (also of URC) were recovered by the manufacturer. About 40,000 lead-contaminated C2 and Red Dragon boxes are sold out. And, URC Vietnam Co., Ltd. was fined nearly 6 billion VND by the Ministry of Health.

By the end of June 2016, the Vietnam Competition Authority (Ministry of Industry and Trade) continued to issue notices, revoking 2 more C2 and Red Dragon shipments of strawberry flavor with lead content exceeding the permitted level of URC.

According to experts, lead is a heavy metal, if used with high content, it can cause chronic or acute poisoning depending on the degree of lead tolerance of each person. If the lead content is 0.05 mg/l, the user will not be poisoned because lead is excreted by the urine, sweat. When crossing the threshold many times, the risk of health damage is very large, especially for children. In particular, in the case of acute lead poisoning (because lead is difficult to dispose of when entering the body, the lead will follow the blood to organs: liver, kidney, brain, bone marrow, nerves...) (Quang Binh, 2018).

Another case that violates consumers' rights is the case of the "Con Cung" Products Joint Stock Company (end of May 2018) showing signs of cutting goods labels and replacing them with Con Cung's label. The Con Cung side and customers have a record of resolving complaints with the content of the recall of the defective products being sold at the store, recalling the faulty products purchased. But by mid-July, the Market Management Branch at Ho Chi Minh City recently collaborated with the Vietnam Market Management Department to check goods, documents and origins of products on sale at 3 Con Cung shops in Ho Chi Minh City. Market Management Branch seized more than 5,000 products of Con Cung because "there are signs of violation of trademark, origin with a value of nearly 500 million VND".

The incident was pushed to "climax" at the press conference against smuggling results, commercial fraud and counterfeit goods in the first 6 months of 2018 in Hanoi, according to which Con Cung supermarket chain has 7 signs of violation (Nguyen Hai, Thuy Duong, 2018).

From the above cases, it can be seen that the legal rights and interests of consumers, despite being protected by law, but businesses and manufacturers of goods and services still have violations of the law on the protection of consumers' rights, affecting the lives, health and consumer confidence.

4. Results

The Law on the protection of consumer rights contains a mechanism and form of dispute resolution between consumers and traders, however, in fact, consumers themselves are still afraid, they have not really received the right way to protect their rights. Consumers tend to ignore when buying fake goods, poor quality goods, especially for goods and services with small value. This proves that consumers are still not fully aware of their rights and are not really aggressive to protect their legitimate rights in accordance with the law on the protection of consumers' rights.

Besides genuine businesses, there are still many businesses doing poor quality goods and services, trading in counterfeit goods, smuggling, counterfeiting labels, exchanging origins to trick consumers in order to profit, illicit business. This has greatly influenced consumers' psychology because they are direct recipients of using non-quality goods and services, and are at risk of being affected to their health and lives.

Admittedly, although the law on the protection of consumers' rights is increasingly being concerned by both the State, the business community and the whole society, state management on the protection of consumers' rights has not been executed in a righteous way, not yet strict and show shortcomings and inadequacies. The most typical example is the case of consumer rights violations of "Con Cung" Company. During the implementation of the inspection activities, the civil servants leading the Market Management Department are Mr. Nguyen Trong Tin - Deputy Director and Mr. Tran Hung – Deputy Director have signs of violating the provisions of law and of Ministry of Industry and Trade on speech, affecting state management activities, causing bad effects, misunderstandings, incorrect understanding of the nature of events in public opinion as well as affecting economic activities business (To Uyen, 2018).

5. Conclusion

Over nearly 30 years since the Ordinance on consumer rights protection has been established up to now (1999-2019), the law on consumer protection is gradually being improved and consistent with the socio-economic conditions and the trend of international economic integration of Vietnam, especially when Vietnam is promoting integration into regional and world economic organizations such as WTO, ASEAN, ASEM, APEC. Therefore, to overcome the shortcomings that exist and maximum protect legitimate rights and interests of consumers, Vietnamese law needs to improve both legal provisions as well as ensure proper enforcement of regulations on consumer rights protection:

- Continue to improve the legal provisions on obligations and specific responsibilities for each subject related to the implementation of the task of protecting consumers' rights. Protecting consumers' rights must become one of the strategic objectives to develop the economy in a sustainable way.

- Regulating sanctions to handle violations of the law on the protection of consumers' rights in detail and be sufficiently deterrent for individuals, organizations, and enterprises trading in goods and services, causing damage to consumers. Regulating the responsibilities of violating individuals and organizations in the process of state management of the protection of consumers' rights.

- Strengthening the expansion of international cooperation on the protection of consumers' rights, training of human resources and the application of modern science and technology in protecting consumers' rights.

- Raising consumers awareness through the dissemination and education of laws on the protection of consumers' rights, creating favorable conditions for people to participate in protecting consumers' rights.

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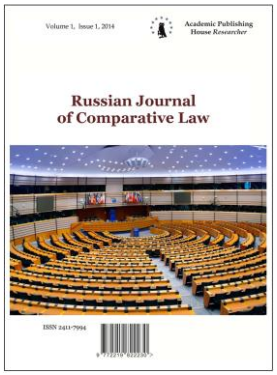

The Features of Club`s Strict Liability for Using of Fireworks by Spectators Based on the Example of CAS Decisions: CAS 2013/A/3139, CAS 2013/A/3324 & 3369, CAS 2014/A/3944

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Abstract

In the article, the authors refer to the practice of the Court of Arbitration for Sport (CAS) in cases of bringing clubs to disciplinary responsibility for the use of pyrotechnics by fans. Such disputes in the disciplinary practice of UEFA and CAS have features related both to the way the fan commits an offense and to the assessment of the seriousness of the act and respect for the principle of proportionality of the sanction. Resort to the decisions of the Court of Arbitration for Sport helps to get answers to these and some other questions of clubs responsibility for the use of pyrotechnics by fans. With the actual status of CAS in the field of sports law, it means bringing legal certainty to the regulation of the UEFA Disciplinary Regulations.

Keywords: the UEFA Disciplinary Regulations, strict liability of clubs, the disciplinary responsibility of clubs, fans' behavior, use of pyrotechnics by fans, Court of Arbitration for Sport (CAS), decisions of CAS, the proportionality of disciplinary sanctions.

1. Introduction

Sports (disciplinary) responsibility of clubs and national associations for the behavior of fans is a key tool used by UEFA and FIFA as the main regulators of European and world football, respectively, in order to force out unacceptable behavior beyond sports competitions. The currently relevant edition of the UEFA Disciplinary Regulations establishes responsibility for the use of pyrotechnics by fans in the provisions of paragraph “c” of part 2 of Art.16, extremely concisely determining the composition of the offense. Such an approach by UEFA is deliberate and aims at creating a comfortable discretionary horizon for the enforcement of the Control, Disciplinary and Ethical Commission, the Appeals Commission, and the Court of Arbitration for Sport (CAS). The latter, by virtue of its status, is, in fact, a rule-maker, in particular, by formulating the content and principles for applying the provisions of the UEFA regulations, including the Disciplinary Regulations.

In the open practice of CAS, there are only a few decisions about the responsibility of clubs for the behavior of fans using pyrotechnics. However, three of them (CAS 2013/A/3139, CAS 2013/A/3324 & 3369, CAS 2014/A/3944) are fundamental to both the institution of disciplinary responsibility and particular for resolving disputes arising from the use of pyrotechnic fans.

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The importance of these decisions is also indirectly recognized by UEFA, who placed them in a special open section on the official resource (UEFA, 2018).

The use of pyrotechnics by fans in comparison with other behavior unacceptable at matches under the auspices of UEFA (for example, demonstration of banners with racist content, or offensive chants) is characterized by the complexity of identifying fans due to the possibility of fast enough use and even remote launch of individual pyrotechnic products. An additional issue is the deliberate refusal of UEFA to define the concept of "fan" in the provisions of the Disciplinary Regulations. Along with the problems of qualification of offenses under paragraph "c" part 2 Art. 16 UEFA Disciplinary Regulations, a new assessment, and proportionality of the sanctions applied to the club due to the difficulty of determining the seriousness of the violation. Answers to all the questions listed by us are offered by the Court of Arbitration for Sport in decisions CAS 2013/A/3139, GAS 2013/A/3324 & 3369, CAS 2014/A/3944.

The authors will not make a comparison with the regulation in the Russian legislation of legal liability for the use of pyrotechnics since special studies are devoted to this issue (Medvedev, 2009). The lack of open access to the disciplinary practice of the jurisdictional bodies of the Russian Football Union (RFU) in similar cases prevents the analogy with the application of the relevant rules at the level of our National Association.

2. Material and methods

This study is based on the results of previously published works of the authors, as well as a few researchers of the problems of sports (disciplinary) responsibility of clubs for the behavior of fans (de Vlieger, 2013; Vasilyev, Kashaeva, 2017; Vasilyev, Khalatova, 2017; Guseinova, Vasilyev, 2017; Vasilyev, Izmalkova, Khalatova, 2018). At the same time, consideration of the composition of responsibility for the use of pyrotechnics by fans through the prism of key decisions of the Court of Arbitration for Sport for UEFA regulation was not previously studied for the listed authors.

In the process of conducting the study, the formally dogmatic method, the problem method, the legal modeling method, and the system method were used, which are not the first time the authors are involved in studying the sports (disciplinary) responsibility of the clubs.

3. Discussion

3.1. The extension of the club's strict liability to the behavior of supporters who are not at the stadium or in the surrounding area

According to the position of the club in CAS 2013/A/3139 Fenerbahce SK v. UEFA, the principle of strict liability under Art. 6 (responsibility) and paragraph "c" of part 2 Art. 11 (the lighting of fireworks or any other objects) of the UEFA Disciplinary Regulations (hereinafter – the Disciplinary Regulations, the Regulations, the Rules) should not be applied to supporters. We will immediately make a reservation that hereinafter we will indicate the numbering of articles in the editions of the UEFA Disciplinary Regulations relevant at the time of the violation. In the current edition, it is Art. 8 and paragraph "c" of part 2 of Art.16 regulations respectively.

The plot of the dispute is that during the competition match played behind closed doors parachute flares were launched from outside the stadium by supporters of Fenerbahce SK. Some fireworks landed inside the stadium, and one of them hit the field and caused the game to be interrupted for a minute, which was recorded in the reports of UEFA officials. According to the club, as the launch of parachute flares took place not "at a match" and not "around the stadium", the actions of the persons did not constitute an offense. Therefore, following the principle of *nulla poena sine lege*, the club cannot be held strictly liable for the behavior of the supporters. In addition, the club attracted a significant number of stewards and staff, as well as took measures at the stadium and in the surrounding area to ensure safety at a match. Taken together, these facts should release the club from liability for the supporters` misbehavior. In this case, the club mixed club's strict liability for misbehavior of supporters, provided for in part 1 of Art. 6 of the Regulations, and the fault-based liability of the host club for the organization and maintenance of order and security before, during and after the match, which is contained in part 2 of Art. 6 of the Regulations. But the concept of "at a match" in part 1 of Art.6 of the Disciplinary Regulations was presented as implying liability for any violation that occurred during the match. Therefore, the club is responsible for the behavior of supporters regardless of where the offense was committed, provided, as noted by UEFA, that the incident "occurs in the course of the match or is linked to the

match in question, the criteria in this respect applying to before, during and after the match". With this position, in general, agreed Court of Arbitration for Sport (hereinafter – CAS), which believes that the concept of "at a match" is not limited to strict liability of the club for misconduct of supporters only within the stadium: the concept of "at a match" includes any misconduct of supporters that could influence the smooth running of the match. Although the perpetrators launched fireworks from outside the stadium, some of the objects landed inside the stadium and had a direct negative impact on the course of the match, as the referee felt obliged to shortly interrupt the game. CAS said that landing fireworks into the stadium are inappropriate behavior provided for in paragraph "c" of part 2 of Art.11.

After assessing the facts in CAS 2013/A/3139 Fenerbahçe SK UEFA, we can talk about the application of part 1 of Art. 6 of the Disciplinary Regulations and responsibility for the behavior of supporters, but not about a violation of the organization, order, and safety at a match, covered by part 2 of Art.6 of the Rules. Therefore, as CAS pointed out, there is no need to consider for possible exemption the club from strict liability such arguments as the unpredictability of actions of perpetrators, difficulties in control due to its location, a distance of fireworks' launch. At the same time, the efforts of the club to organize the match in order to prevent any disturbances and measures to ensure safety at a match cannot be considered as an exemption from strict liability but can be taken into account in the determination of the proportionality of the sanction. We will consider next the issue of proportionality.

3.2. What is the content of the term "supporter" when deciding on a club's strict liability?

According to the club in CAS 2013/A/3139 Fenerbahce SK v. UEFA, the perpetrators were not supporters in the eyes of a "reasonable and objective observer" in the sense of provisions of the Disciplinary Regulations. According to the position of the club, those who launched the fireworks did not "support their team", but rather "intentionally tried to destabilize the entire Fenerbahce club" having committed their actions "from a long distance". Since UEFA, which bears the burden of proof on this issue, has not proved that these persons are supporters of the club, the latter cannot be held strictly liable for their use of fireworks.

Note that the concept of "supporter" in the UEFA regulation is an open concept, it was first confirmed by CAS, and therefore the club in CAS 2013/A/3139 Fenerbahce SK v. UEFA was mistaken in its understanding of the term "supporter", thinking that it is only the person present at the stadium. CAS, supporting an open concept of "supporter", pointed out that the status quo is the only way to guarantee the application of strict liability to clubs. This is done so that clubs know that the Disciplinary Regulations apply to, and they are responsible for, any individual whose behavior would lead a reasonable and objective observer to conclude that he or she was a supporter of that club. At the same time, the behavior of individuals, their location in the stadium or its vicinity are important criteria for determining which club they support. An open concept of "supporter" allows counteracting the behavior of people that can cause damage to the purposes and values of UEFA.

However, there were reports of UEFA officials, which indicated that perpetrators were affiliated with the Turkish club; the burden to rebut this statement, under Art. 45 of Regulations, rests upon the club. In this particular case, due to the presence of official reports, the general principle for disciplinary cases, according to which UEFA bears the burden of proof, does not apply. In particular, one report noted: "Fenerbahce fans outside the stadium launched a few fireworks with parachutes that came in the stadium. Fenerbahce reacted very immediately by sending a tweet to their fans saying: don't use fireworks – you are harming us. We only want to hear your voices (…)" (CAS 2013/A/3139: para. 45). The reports also contained video footage of a lot of people, obviously Fenerbahce supporters, in the near vicinity of the stadium watching the football match on a big television screen, watching the fireworks and celebrating a goal of the Club. CAS stressed precisely that at this match played behind closed doors there were no supporters of the second club or supporters of another competing club.

The club appealed to the inaccuracy of the reports of the officials, as they seemed to be based on assumptions and speculation: these persons were at the stadium and could not witness any facts related to the launch of fireworks outside the stadium. Despite this argument, CAS noted that the club did not take the opportunity to cross-check the official reports. Since no evidence against the information of the official reports was presented by the club, it allowed confirming the commission of illegal actions by the supporters of the Turkish club in the eyes of a «reasonable and objective observer» (Vasilyev, Khalatova, 2017).

According to the club's opinion in CAS 2013/A/3324 GNK Dinamo v. UEFA, the spectators responsible for launching fireworks could not be considered as supporters, being "anti-fans", whose presence at the match was not authorized by the Club (CAS 2013/A/3324 & 3369: para. 9.20). The latter reported to the host club about such persons and asked to take measures that they were not present at the match. It appears that these measures have not been taken or have been taken in a manner that has not achieved its purpose.

In this case, CAS referred to the CAS 2013/A/3139 Fenerbahce SK v. UEFA dispute we have already mentioned. The arbitration supported its position and stated that supporters were affiliated with the club in the eyes of a "reasonable and objective observer" (CAS 2013/A/3324 & 3369: para. 80). A UEFA delegate report indicated that the persons who launched fireworks were identified by him as supporters of the club ("DZ"). This conclusion was made because if you ask which club "DZ" fans want to win, the answer is obvious – the club, which is held accountable, but not the host club. It is one thing to protest against the style of club management, but quite another – against the club itself. The actual circumstances of the case were taken advantage by the club, which made an argument that bringing him to responsibility for fans` misbehavior in a situation of their confrontation with the club`s management would mean promoting the aims of these supporters. Either the club will satisfy the supporters' claims, or it will be constantly held liable for their behavior, which will be nothing more than forcing the club to follow the requirements. However, as CAS emphasized, such an argument of the club on the inadmissibility of responsibility in this particular case is not provided in any of the provisions of the Disciplinary Regulations, and therefore has no legal force and cannot be taken into account when making a decision. In addition, if we consider logically the position of the club, which is nevertheless *a priori* unacceptable, we can conclude that the worse the behavior of supporters, the less the club should be responsible for it.

To strengthen the position of the non-involvement of its supporters to the launch of fireworks in CAS 2013/A/3139 Fenerbahce SK v. UEFA the club announced the results of investigations conducted by the security service and the police, according to which illegal actions were committed by a group of young people, "completely unknown to the club and not related to it" (CAS 2013/A/3139: para. 74). This argument did not pass the arbitration test, as CAS drew attention to the dispute before the UEFA Appeals Body, during which the club showed a video of one of the home matches and pointed to some individuals present at the stadium as responsible for the pyrotechnics incident (CAS 2013/A/3139: para. 75). In addition, when considering the appeal, the club stated that these persons are well known as committing illegal actions at the stadium (CAS 2013/A/3139: para. 75). Furthermore, the police report testifies to the detention of individuals on the basis of video recordings and implementation of a ban on attendance at matches (CAS 2013/A/3139: para. 77). The video, provided with the reports of UEFA officials, allows seeing nine bans hung at the stadium, which were made by individuals responsible for launching pyrotechnics. Based on the content of the bans, it is impossible to make a clear conclusion about the authors` belonging to the club. However, the club did not provide any evidence that the bans were made to support another club, thus failed to rebut the report of the UEFA officials.

All listed facts are perfectly associated with the fact that the "blacklist", which contained all the information about fans who committed the violation, who were forbidden to visit matches and trainings of "their team" and also who have been obliged to visit the nearest police office at the beginning of the match of "their team" and within an hour after its termination. Nevertheless, that the ban from attending matches isn't an irrefutable presumption of affiliation of such persons with the club. But in this case, the club didn't provide evidence about the purpose of the phrase "their club" in relation to the fans of another club, while the burden of proof was on its side. Vice versa, as we noted earlier, when the dispute was considered at the UEFA appeals commission, the club paid attention to the ban from visiting home matches and training, applied to fans. We can conclude that the fans belong to this club.

Therefore, the club can't claim that the persons who have committed illegal acts are absolutely unknown to it. Such a change in the position taken by the club was quite justifiably rejected by CAS, which has come to a conclusion that from a position of "reasonable, objective observer" the Turkish club must bear responsibility for the actions of persons, who launched pyrotechnics on parachutes.

3.3. What is the CAS's assessment of the proportionality of the sanctions applied to the club, taking into account mitigating and aggravating circumstances?

In the case CAS 2013/A/3139 Fenerbahce SK v. UEFA the Turkish club disputed the proportionality of the sanctions applied by the UEFA control, disciplinary and ethical commission. According to the club's opinion "absolute disproportion in contrast to fundamental legal principles" (CAS 2013/A/3139: para. 27) is due to the commission's refusal to take into account a number of mitigating circumstances such as

(1) unpredictable use of pyrotechnics on parachutes;

(2) the persons who have made an act were unknown to club prior to an incident;

(3) the fans weren't located in the vicinity of the landing of pyrotechnics;

(4) the match was held without spectators and behind closed doors;

(5) the club conscientiously undertook all necessary arrangements for the organization and security of the match, in particular, attracted about 800 special employees outside and inside the stadium;

(7) pyrotechnics wasn't launched at the stadium or on the adjacent territory, but from a considerable distance (800-1000 meters);

(8) the club can't control the whole city, especially the dense urban development in the stadium area;

(9) the persons who committed the start are the criminals having intention on commission of violations;

(10) spectators aren't fans and aren't otherwise affiliated with the club;

(11) the club together with police officers immediately took action against persons who started pyrotechnics, and they were banned from visiting home games and training;

(12) only three pyrotechnic products landed in the stadium and didn't cause serious damage to the stadium and (or) holding the match, which was continued after a short minute break.

However, UEFA pointed out that some of the listed circumstances are in fact aggravating circumstances (CAS 2013/A/3139: para. 114).

The question of the proportionality of the sanctions was considered in cases CAS 2007/A/1217 (CAS 2007/A/1217: para. 12.4), CAS 2012/A/2762 (CAS 2012/A/2762: para. 122) in which the arbitration has noticed that "sanctions imposed by a disciplinary body, according to its own discretion based on a certain rule of regulation, can only be reviewed if they are obviously and are significantly disproportionate to the violation". Therefore, CAS has limited and narrow competence in deciding the issue of proportionality.

In case CAS 2013/A/3139 the arbitration has emphasized that the interruption of the football match played without an audience and behind closed doors caused by the start of the pyrotechnics which has landed on the stadium is a serious violation. This is sufficient evidence that the previous disciplinary sanctions applied by the UEFA Control, Disciplinary and Ethical Commission to the club for similar violations, related to the launch of pyrotechnics or its throwing from the stands, failed to achieve their goal and didn't act as a pretext for the unacceptable behavior of fans.

The similar conclusion has been drawn also in *CAS 2014/A/3944 Galatasaray Sportif Sinai A.S. v. UEFA*, in which arguing about the proportionality of the chosen by the control, disciplinary and ethical commission sanction, the arbitration noticed: numerous involvement of club to responsibility couldn't become earlier prevention for unacceptable behavior of the fans belonging to it. Therefore, the chosen sanction, including the holding a match without an audience and having a conditional character within five years, was confirmed by the CAS as fair and consistent with the principle of proportionality.

The facts that the match was interrupted for only one minute, and no serious damage was caused by the landing of pyrotechnics, can't be considered as mitigating circumstances due to numerous and comparable violations committed by fans of the club in the past. The only mitigating circumstance that can be taken into consideration was the use of special arrangements for the organization and security of the match, as well as the fact that the club together with the police demonstrated an immediate reaction and punished the fans in the form of a ban from visiting home matches. With regard to aggravating circumstances, CAS noted that in the present case it is that the match was conducted without spectators and behind closed doors, and the fans weren't in the place where the pyrotechnics landed on parachutes.

Argumenting (reasoning) the impossibility of prosecution for the use of pyrotechnics by fans, the club in case CAS 2013/A/3324 GNK Dinamo v UEFA pointed at problems with the organization of the match and security at the match, which are an obligation of "home" club (CAS 2013/A/3324

& 3369: para. 9.20): if the club which is responsible for the organization and an order at a match is made responsible for violations, it excludes responsibility of "guest" club for behavior of the fans belonging to him.

Really, a certain complexity as has reasonably emphasized CAS is connected with the application of Art.16 of Disciplinary Regulations. It is possible when the club-organizer is brought to responsibility for violation of an order of the organization and safety at a match (part 1), and the "guest" club, for example, for the use of pyrotechnics by fans (part 2). And in this situation, even if the latter can prove the absence of any fault in connection with the organization of the match, which can be carried out on the basis of the official UEFA official`s report, this club will continue to be responsible for the behavior of the fans covered by part 2 of Art.16 of Disciplinary Regulations. The club's argument that the imposition of strict liability in the considered case contradicts basic justice or public law and order, doesn't sustain the competition to the conclusions drawn by CAS in the previous decisions. So, in cases *CAS 2013/A/3139 Fenerbahce SK v. UEFA* (CAS 2013/A/3139: para. 91) and *CAS 2013/A/3094 Hungarian Football Federation v. FIFA* (CAS 2013/A/3094: paras. 85-90) arbitration considered that strict liability doesn't break the general legal principle of *nulla poena sine lege*. In turn, compliance with strict liability to public law and order is confirmed by the decision of the arbitration *CAS 2013/A/3258 Besiktas Jimnastik Kulilbu v. UEFA* (CAS 2013/A/3258: para. 133).

In case CAS 2014/A/3944 Galatasaray Sportif Sinai A.S. v. UEFA club claimed that the illegal behavior of its fans was the result of the improper organization of the match by the "home" club and the actions of its fans. The appellant, who was a "guest" club, didn't deny the principle of strict liability of football clubs but believed that the confirmed organizational failures and insufficient security measures should be considered as mitigating circumstances when choosing a sanction. In this case, according to the report of the UEFA delegate, more than 13 pyrotechnic products were used. These pyrotechnic products were carried to the stadium by the fans; this fact convincingly demonstrates the problems in organizing the match by the host party. However, the judge's decision to suspend the match twice because of the use of pyrotechnics wasn't justified. As the club believed, the illegal actions of the fans represent serious situations that threaten the safety of anyone present at the stadium and force the judge to stop the match. However, in the considered match only three pyrotechnic products have been thrown in the field before the first stop of a match, and one – before the second stop. None of these objects (products) caused damage or harm to anyone present at the match. The club doesn't dispute responsibility for the use of pyrotechnics by fans, but considers unreasonable the judge's decision to suspend the match, because it immediately transferred violation to the category of serious. That's how it was described in the report of the delegate of UEFA: "... there were so many abandoned objects and they represented such a danger that the judge had to interrupt the game" (CAS 2014/A/3944: para. 45). In addition, the club took all necessary actions to prevent the behavior of fans. As it has been noticed, "even if the appellant doesn't have the ability to control his supporters throughout Europe, this doesn't mean that he didn't try to make a maximum possible for prevention of undesirable incidents" (CAS 2014/A/3944: para. 45).

Despite the arguments of the club, the CAS supported the view of UEFA that pyrotechnic incidents represent serious violations of the Disciplinary Regulations. Under these circumstances, the judge's decision to suspend the match can't be called unreasonable.

4. Results

As it has been confirmed in the decisions of CAS CAS 2013/A/3139, CAS 2013/A/3324 & 3369, CAS 2014/A/3944 considered by us, according to the settled practice of jurisdictional bodies of UEFA, the fan of the club is a person whose conduct allows a "reasonable, objective observer" to draw a conclusion about this. The facts of supporting a particular team, location in the stadium are considered as an important evidence of fan affiliation. When considering cases about the responsibility of clubs for use of pyrotechnics by fans, such a conclusion takes on special significance: most pyrotechnic products don't require the presence of a person at the match and can be launched even from the limits of the territory adjacent to the stadium.

In the considered decisions, the Court of Arbitration for Sport established its own position that it isn't possible to bring the "home" club to justice for the behavior of the fans of the "guest" club in case of violations of the order of organization and security of the match. Otherwise, the

arbitration would call in question the principle of strict liability. At the same time, a "home" club can be held accountable for both insufficient organizations and for the behavior of the fans belonging to it. In the current version of the Disciplinary Regulations, the legal basis is the provisions of part 1 of Art. 16 and part 2 of Art.16 respectively (paragraph "c" of part 2 of Art. 16 regarding the use of pyrotechnics).

Due to the three disputes CAS 2013/A/3139, CAS 2013/A/3324, CAS 2014/A/3944, which were the subject of this study, the arbitration finally formed its consistent practice on the proportionality of sanctions applied by the disciplinary body. Sanction can be reviewed only if it is "obviously and significantly disproportionate to the violation". But in cases of strict liability of clubs for the use of pyrotechnics by fans, both the obviousness and the significance of the disproportion are almost ephemeral: by their nature, pyrotechnic products constitute a serious danger to the present persons and can influence holding a match. At the same time, such violations are quite common, that is the basis for a recurrence of responsibility of clubs. As a result, the Court of Arbitration for Sport is inclined to confirm a position of jurisdictional bodies of UEFA on proportionality issues in order to strictly encourage clubs to work with fans in the use of pyrotechnics.

Violation of the order of organization and security of the match by the "home" club isn't confirmed by CAS as a mitigating circumstance of the responsibility of the "guest" club for the use of pyrotechnics before, during and after the match by its fans. At the same time, the arbitration doesn't disprove a position of the jurisdictional bodies of UEFA which hypothetically call such circumstance as mitigating, but never applied it on the disputes on responsibility for use of pyrotechnics by fans. On the other hand, CAS expectedly confirmed the status of the mitigating circumstance for taking special arrangements for the organization and security of the match, in conjunction with an immediate reaction to the violation (by applying to the fans a ban from visiting home matches). In the latter case, this circumstance shouldn't be confused with the directly named in the provisions of part 3 of Art. 23 of the Disciplinary regulations immediate actions to stop the behavior of fans, covered by part 2 of Art. 16. Actually, the mitigating factor applied by the Court of Arbitration for Sport depends on the actual circumstances of each particular case, which is due to the position of the arbitration, which has repeatedly drawn attention to the "case-by-case basis" in disputes about strict liability. And it does not matter as a mitigating circumstance that pyrotechnics could be used by fans of the "guest" club outside the quota of its tickets.

The question of the aggravating nature of such circumstances as holding a match without spectators and behind closed doors; finding fans not in the place in which the pyrotechnics landed on parachutes, and their operation remotely; suspension of the match in the decisions of CAS that we considered is decided unequivocally. From the point of view of CAS is caused by intention in the behavior of fans: knowing about the match without spectators, they planned a special action to demonstrate pyrotechnics at the stadium, completely ignoring the possible negative consequences from landing in the stadium uncontrolled parachutes with pyrotechnics (including potential suspension of the match).

5. Conclusion

As a result of the study, conclusions were made about the peculiarities of bringing football clubs to strict liability for the use of pyrotechnics by fans. Qualification issues for launching pyrotechnics from outside the stadium, fan ownership, application of the principle of proportionality taking into account mitigating and aggravating circumstances received their justification in the decisions of arbitration considered by us CAS 2013/A/3139, CAS 2013/3324 & 3369, CAS 2014/A/3944. All conclusions by analogy apply to national associations in the case of matches held between national teams under the auspices of UEFA. In turn, CAS positions on cases of responsibility of clubs for the use of pyrotechnics create an appropriate legal basis for the consistent enforcement of the jurisdictional disciplinary bodies of UEFA and the Court of Arbitration for Sport.

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