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Dear readers,

I am delighted to welcome you to the third regular issue of Kazan University Law Review 2018.

This issue of the journal presents articles on current topics of theory and practice of Russian law.

The opening article by Alexei Ispolinov, Head of International Law Department, Lomonosov Moscow State University (Moscow, Russia) is about consequences of the delay in the accession to ECHR, an important theme of human rights protection. The article aims to recall the history of the drafting process of the Draft of the Accession Agreement as well as to provide some explanations of the arguments presented by the CJEU in the Opinion 2/13.

The issue is continued by the article of Professor Larisa Schennikova, Honored Worker of Higher Professional Education of the Russian Federation (Kuban, Russia). The author focuses on the institute of forfeiture in Russian civil law and analyzes the development of civil legislation on forfeits in Russia. The author highlights the need for taking concrete measures to improve the civil legislation.

It is a pleasure to present studies of our colleagues from Volgograd State University (Volgograd, Russia): Vagip Abdrashitov, Doctor of Legal Sciences, with the article “Theoretical approaches to formation of presumption of innocence doctrine”, and Julia Gavrilova, Candidate of Legal Sciences, and Dmitry Gavrilov, Candidate of Legal Sciences, with the article “Cultural universals as the basis of the interaction of legal systems in the modern world.”

It is always important to show to scientific community the research results of colleagues from Kazan University and our journal follows this rule. To present Kazan legal tradition is also one of the missions of our journal. This issue contains articles by Ainur Gilmullin on problems and prospects of legal system and legal doctrine in Russia.

Closing out, the practical part of the issue Conference Reviews contains a descriptive work by students and lecturers from Kazan and Perm, who review the XIII annual student model trial "All-Russian judicial debate”.

With best regards,
Editor-in-Chief
Damir Valeev
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ALEXEI ISPOLINOV
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CONSEQUENCES OF THE DELAY:
THE PERSPECTIVE OF A NON-EU MEMBER STATE

DOI: 10.30729/2541-8823-2018-3-3-5-15

Abstract: The following contribution deals with one of the most controversial aspects of human rights protection in the EU, specifically, the question of whether the EU should accede to the European Convention on Human Rights (ECHR or the Convention). The purpose of this article is to recall the history of the drafting process of the Draft of the Accession Agreement (DDA) as well as to provide some explanations of the arguments presented by the CJEU in the Opinion 2/13. The author also hopes to shed some light on the position of the Russian Federation as a non–EU state towards further development of the accession issue. Several submissions have already been made. First and foremost, the DDA has been torpedoed by the Court of Justice of the European Union (CJEU) for several valid reasons. Secondly, any further attempts to accommodate the DDA in line with the concerns of the CJEU would be counter-productive as it could lead to de jure segregation of the Council of Europe member states undermining the legitimacy and authority of the European Court of Human Rights (ECtHR). Thirdly, active stance of the ECtHR towards the EU will find support from the non-EU states.

The Opinion 2/13 of the CJEU has caused feelings of disbelief, disappointment and even dismay among European academia. Most commentators willingly blamed the CJEU for “formalistic and sometimes uncooperative attitude in defense of its own powers vis-à-

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vis the European Court of Human Rights”, describing the Opinion as a “giant step back” or even as a “clear and present danger to human rights protection”. The article explores the history of the drafting process of the DDA and its basic characteristics, examines the CJEU’s position stated in the Opinion 2/13 and discusses possible alternatives in the post-Opinion era.

The structure of the article is as follows. Section 1 examines the drafting process of the DDA as well as the surrounding political and legal situation. Section 2 argues that the main arguments against the DDA used by the CJEU in its Opinion originate from the specifics of EU legal order. Sections 3 explores different scenarios of the development of relations between the ECtHR and the CJEU. It also presupposes that recent jurisprudence of the ECtHR regarding Bosphorus presumption might be interpreted as modification of the ECtHR’s attitude in relation to the EU. Section 4 concludes.

Keywords: delay consequences, non-EU member states, legislation, European Convention on Human Rights, the Court of Justice of the European Union.

Section 1.

To start with, some commentators wonder if it is true that the Opinion reflects the fears of the CJEU to lose its powers. In the opinion of the present author, an absolute majority of the scholars look at the Opinion from the human rights law perspective, which in its own turn based on the assumption that the EU accession to the Convention will strengthen human rights protection in Europe per se. In the author’s view, the CJEU does not share this attitude, and comprehension of logics of the CJEU requires certain level of knowledge of the specifics of the EU law as interpreted by the CJEU. It is a well-known fact that according to the Lisbon Treaty the European Union “shall accede” to the Convention. However, it is a conditional obligation, since the DDA shall meet the requirements stipulated in the Protocol No. 8 to the TEU. Specifically, the accession shall preserve specific characteristics of the Union and EU law and shall not affect the competences of the Union or the powers of its institutions. The Lisbon Treaty also implicitly presumes that the CJEU should be a final arbiter judging whether these conditions have been met in the DAA. Despite the opinion that primary intention of the Member States as Masters of the Treaties had been the EU accession to the Convention, the Lisbon Treaty left unresolved one principal question. What shall be a priority in the accession process: the accession itself or preservation of the specific EU legal order? It seems that for the Commission as well as for the Member States the prime target was the accession, but not for the Court. For anyone familiar with the doctrines and

3 Peers S. The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection, http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeuand-eus-accession-to-echr.html
jurisprudence of the CJEU it was clear from the very beginning that the final answer to this question should be given by the CJEU and, obviously, the Court would be facing a complex dilemma. The CJEU had hinted at this in its Discussion document explicitly saying that the conditions of the accession are “stated in a protocol which is annexed to the Treaties and therefore has the same value as them.” Nevertheless, a public perception of these provisions of the Lisbon Treaty was that the accession was almost a fait accompli and required just some legal framing. Such concentration on the obligation of the EU to accede combined with certain ignorance or underestimation of legal complexity of the tasks stipulated in Protocol 8 resulted in high prior expectations which turned out to be a great disappointment (or “nightmare”, according to S. Peers) after the Opinion.

The DAA, negotiated and approved by the Steering Committee, appeared to be a lengthy and complicated document and seemed like a desperate (and to certain extent failed) attempt to solve the problem of Protocol 8. The key provisions of the DDA regarding co-respondent mechanism and prior involvement of the CJEU left a mixed impression as being exclusively based on the presumption of voluntary cooperation and not covering a whole range of potential problems. Some EU policies also include non-EU states, which are yet obliged to fully and unconditionally implement applicable provisions of the EU law. For instance, three EFTA States (Iceland, Liechtenstein, and Norway) are also members of the European Economic Area and shall implement the EU common market provisions. Four non-EU countries (Switzerland, Iceland, Liechtenstein, and Norway) are parties to the Schengen Agreement and the Dublin system (take as an example the ECtHR case of Tarakhel v Switzerland). The DDA provisions will not be applicable in this case leaving the concerns of prior involvement of the CJEU unresolved. Nevertheless, in the wake of expected approval of the DDA, the critics’ voices remained largely unnoticed.

Section 2.

According to the prevailing opinion, the CJEU presented restrictive conditions for the EU accession to the extent that it looks practically impossible. Moreover, there is a number of explanatory articles containing a detailed analysis of the arguments of

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3 ECHR, Tarakhel v. Switzerland, Appl. no. 29217/12, of 4 Nov. 2014


5 Odermatt J. A Giant Step Backwards? Opinion 2/13 on the EU’s Accession to the European Convention on Human Rights
the Court. Some commentators believe that the Opinion is “fundamentally flawed” and academia split in an attempt to find a plausible answer to one crucial question – why did the Court do it that way? One could argue that the CJEU acted like a “selfish court” fearing to lose its own exclusivity and competence. The present author believes that the arguments of the Court require more balanced approach. The author would also agree with P. Eeckhout on that the Opinion 2/13 shows a profound disagreement between the CJEU and the EU Member States as the originators of the Lisbon Treaty regarding desirability of the EU accession. One could suggest that the Court believes that EU system of judicial protection of human rights is more efficient than the one under the European Convention and the accession would hinder the process of judicial federalization of the EU. The reason for that is the existence of modern, comprehensive and legally binding Bill of Rights in the form of the EU Charter of fundamental rights and freedoms. Furthermore, the jurisdiction of the CJEU was expanded from December 1, 2014 covering now all highly sensitive human rights matters of the EU Area of Freedom, Security, and Justice (AFSJ) such as asylum, migration, extradition, arrest warrant, etc. As a result, the Court has already lost any practical interest and need in a use of the Convention as a source of inspiration, as it had been the case before the Lisbon era. Moreover, the CJEU, yet avoiding to confirm it openly, makes all efforts to distance the Charter from the Convention and to lessen the influence of the Convention on the EU legal order.

The position of the CJEU in the Opinion 2/13 is clear: the preservation of the autonomy of the EU legal order is an absolute priority in this case (S. Douglass-Scott even pointed out that the word ‘autonomy’ is used in the document 17 times). However, the Opinion 2/13 is not an isolated incident, but a logical result of the development of the CJEU’s jurisprudence.

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2 Peers S. The EU’s Accession to the ECHR: The Dream Becomes a Nightmare, op. cit, p. 213.


4 Eeckhout P. op. cit., p. 35

5 The recent jurisprudence of the CJEU shows that the Court already tried to minimize the effects of Article 52(3) of the Charter, which requires the consistency between the Charter and the ECHR. In held that “the Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union”. See CJEU C-294/16 JZ v. v Prokuratura Rejonowa Łódź – Śródmieście, Judgment of 28 July 2016, para. 50.

6 Douglas-Scott S. op. cit., p. 36.
doctrine of autonomy of the EU legal order. In the context of the present article it would be naive to undertake a comprehensive analysis of all objections of the Court. It is worth to mention that the CJEU and the ECtHR are two fundamentally different courts with two distinct legal orders. On the one hand, the ECtHR is an international court which supervises performance of the states’ obligations under the Convention. The ECtHR also has an exclusive competence to interpret the provisions of the Convention. On the other hand, the CJEU is a supranational court authorized to review validity of the acts of the EU institutions and actions of the EU Member States as well as to ensure unity and effectiveness of the EU law. According to the CJEU case law, the EU is an autonomous legal order where the EU law has priority over national law of the Member States and international agreements including the Charter of the United Nations (see Kadi-1 case) and the CJEU enjoys an interpretation monopoly. Following this logic, both the ECHR and the DDA in case of the successful accession of the EU to the Convention will become a part of the EU legal order and will be placed below EU primary law, which now includes the EU Charter of fundamental rights. D. Spielmann, former President of the ECHR, admitted that in this construction “protection of fundamental rights is pursued to the extent and only to the extent that it does not undermine the unity and effectiveness of EU law”.

Without any doubt, bold and sometimes unpredictable jurisprudence of the ECtHR in interpretation and application of the Convention, which will be below the EU Charter and founding treaties after the accession, raised significant concerns in Luxembourg. One could suggest that the main reason behind the Opinion 2/13 is practical impossibility to reconcile different ambitions and missions of the ECtHR and the CJEU. The ECtHR considers the European Union to be an intergovernmental association of 28 sovereign states, while for the CJEU the EU is an emerging quasi federation. Moreover, the CJEU’s main priority here is “judicial federalization” of Europe and the Court’s position itself (according to its former President Skouris) as a “Supreme Court of the European Union.”

The existence of different missions of these courts explains their dramatically different attitudes regarding two sensitive issues: the European Arrest Warrant and the EU Dublin system dealing with asylum seekers and illegal migrants. Cooperation of the EU Member States in these fields is based on the principle of mutual trust, which is one of the principles of the EU legal order. According to this principle, the authorities of the EU Member States are precluded from checking an actual level of observance of rights and freedoms in other Member States in a specific extradition case in question (like in any federation). At the same time, it goes contrary to the established ECtHR case law concerning extradition where it represents international law approach requiring the executing judge to perform such checking.

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1 Spielmann D. The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbors after the Opinion 2/13,

2 Besselink L. The CJEU as the European “Supreme Court”: Setting Aside Citizens’ Rights for EU Law Supremacy, Verfassungsblog (2014),
Speaking about lack of practical reasons for the CJEU to refer to the Convention, it should suffice to mention a well-known story of how and when the CJEU started to refer to the Convention and to the case law of the ECtHR to strengthen legitimacy and authority of its human rights jurisprudence.¹ The situation changed dramatically after an entry of the Lisbon Treaty into force in 2009 when the EU Charter of fundamental rights and freedoms became legally binding and had been elevated on the level of the EU primary law. The CJEU almost immediately started to use the Charter at the expense of reference to the Convention. L. Glas and J. Krommendijk called such tendency an “increasing Charter centrism of the CJEU”², which could be confirmed by the following statistics. In 2009–2012, the CJEU referred to the provisions of the EU Charter in 122 judgments, substantially analyzing one or more of its provisions in 27 judgments. In these 27 cases, the ECtHR case law was explicitly referred to in 10 cases, and in the remaining 95 cases the reference was only in passing. The CJEU referred to the Convention in 18 of these 122 cases.³ As one author aptly pointed out, the growing Charter jurisprudence of the CJEU might lessen the need to turn to Strasbourg system even further and create an impression among the EU institutions and Members States that accession is already not necessary in the light of high level of fundamental rights protection within the European legal order.⁴

Section 3.

Speaking about the perspectives after the Opinion 2/13, the present author is more skeptical than before⁵ regarding this issue and is ready to admit that the accession will never happen. Any attempts of the EU Member States to continue the accession process ignoring the Opinion or overruling it by making changes to Protocol 8 (as suggested by L. Busselink, who advocated the idea of so-called “notwithstanding protocol”) will undoubtfully fail. The reason for that would be the “joint decision trap” where all maneuvers to bypass or circumvent the Court would require unanimity between all EU Members States.

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⁵ In the article published in Russian in 2012, the present author has already assessed the chances for accession as 50–50: Ispolinov A. Accession of the European Union to Convention for the Protection of Human Rights and Fundamental Freedoms: Pressing Need or Attempt to Reconcile the non-compatible, Russian justice, 2012, no. p.


⁷ Alter K. The European Court’s Political Power: Selected Essays, p. 152.
As for the attempts to make further changes in the DDA to meet all the requirements of the CJEU, in practice it would mean a legalized carving out status of the EU in the supervision mechanism of the ECHR despite the calls for “innovative legal thinking” and even “legal ingenuity” to find mutually acceptable solutions.1 We may join S. Douglass-Scott in her opinion that the accession in compliance with the CJEU’s judgement would not provide effective external control of the EU’s actions.2

From the perspective of non-EU countries the accession will mean a de jure segregation of all states of the Council of Europe into 2 groups. The first group will include the EU Member States with the Charter of Rights and the CJEU (in coalition with national courts) offering a more effective system of protection of human rights. The other group will be represented by non-EU member states (either candidates to the EU or countries which will never become the EU members (like Russia and Turkey). It may look as a sort of re-affirmation on the level of international treaties of the concerns of some authors who already criticized the Bosphorus presumption as the most vivid example of the existing double standards in the protection of human rights in Europe.3

Such segregation of the member states of the Council of Europe may seem as a ghetto for non-EU countries and the ECtHR as a court dealing with its inhabitants. For the ECtHR such scenario would mean its gradual marginalization, as its duty would be to do menial preliminary work for the CJEU and to perform the function of the “purgatory” for the countries willing to join the EU. In the opinion of the present author, it will have devastating and detrimental effect on the reputation and effectiveness of the European system of the protection of human rights in general and for ECtHR in particular. The unavoidable existence of double standards of the protection of human rights will undermine the ECtHR's credibility and legitimacy.

The risks of such scenario are obvious and it is clear that non-EU member states of the Council of Europe will not be eager to voluntary contribute in its implementation in practice. It is worth to recall that in the process of approval of the final version of the DDA, Russia has already made a statement unequivocally showing the limits of its consent for a special regime envisaged for the EU under the DDA.4 Some commentators also agree that the consent of non-EU member states to another round of discussions and further concessions towards the EU will become an issue.5

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2 Douglas-Scott S. op.cit., p. 43.
4 Appendix VI, Second negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on human rights.
5 Douglas-Scott S, op.cit., p. 42.
What could be done to prevent such “ghetto” scenario, which is for obvious reasons unacceptable for Russia? Firstly, it is time to admit that the accession on the terms stipulated by the CJEU is inadmissible. The author would also like to refer to Steve Peers, who pointed out that it has unfortunately become necessary to oppose the EU’s accession, instead of supporting it.¹

Secondly, the ECtHR is equipped well enough and ready to perform indirect super-vision of all EU acts even without the accession and shall re-configure its attitude towards the EU formulated in the well-known Bosphorus presumption and even admit joint responsibility of the EU Member States for the acts of EU institutions.² The ECtHR should more thoroughly review actions of the EU Member States thus performing indirect review of the EU law (80% of national law of EU Member States is literal implementation of the EU law³).

Some commentators have already debated the future of the Bosphorus presumption and different scenarios of the ECtHR’s future after the Opinion 2/13.⁴ Under the first scenario the ECtHR would apply the doctrine as if nothing ever happened. According to the second scenario, the ECtHR could decide to abandon the Bosphorus doctrine completely. Third and the most realistic scenario presupposes that ECtHR will apply the doctrine in a stricter way. The recent judgment of the ECtHR revealed that the Court preferred the last option. In the Avotiņš⁵ case the ECtHR found out that protection of human rights in the EU had been manifestly deficient in the field of the EU law dealing with a mutual recognition of the civil court’s awards, even though the ECtHR concluded that the presumption could not be rebutted. Obviously, via this judgment the ECHR intended to influence the CJEU to soften its strict application of the principle of mutual trust in certain areas. The same situation occurred after the ECtHR’s judgment in M.S.S. case⁶, when the CJEU had to adapt its own position to its further asylum jurisprudence. The CJEU’s recent case law shows that such pressure, even in indirect form, could be successful. For instance, in its judgment in joined cases Aranyosi and Căldăraru of 5 April 2016⁷, the CJEU agreed that the executing national judge can postpone the execution of European arrest warrant and request supplementary

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¹ Peers S. The EU’s Accession to the ECHR: The Dream Becomes a Nightmare, p. 222.
² In the DSR Senator Lines GmbH case from 2004, the applicant lodged a complaint before the ECHR alleging an infringement of Article 6 of the ECHR by directed against all EU Member States for the decision of the EU Commission to impose a fine for the violation of the competition rules. Unfortunately, the case was announced inadmissible as the applicant lost a status of victim winning the annulment case in the Court of First Instance. As a result the ECHR missed a chance to announce Member States’ responsibility for a Community act.
⁴ Glas L. & Krommendijk J. op.cit., p. 578.
⁵ ECHR, Avotiņš v. Latvia, Application No 17502/07, Merits and Just Satisfaction, 26 May 2016.
information, if there are systemic problems with regard to conditions of detention in the issuing Member State. There is no doubt that the CJEU has come to such conclusions having in mind ECtHR’s pilot judgment against two EU member states (Hungary and Bulgaria), where the ECtHR found systemic problems within Bulgarian prison system and different detention facilities in Hungary.¹

From another angle, the Opinion 2/13 could be considered as a challenge for the ECtHR. If the ECtHR is willing to accept this challenge, it would be wise to reconsider its relationships with constitutional courts of the Council of Europe and the ones of the EU Member States. All of them by their nature are the ECtHR’s allies and the most obvious victims of the expansionist policy of the CJEU since the beginning of the European integration.² Now these courts are struggling for their own place in the evolving European constitutional order and their joint efforts may influence the position of the CJEU. The saga of the EU Data Retention Directive provides a colorful example. Initially the EU Directive requiring the telecom companies to secure the storage of all calls and messages of the customers for a certain period³ has been unsuccessfully challenged before the CJEU by two EU member states.⁴ However, only after the revolt of several constitutional courts, which made inapplicable the implementation of domestic legislation, the Directive had been entirely annulled by the CJEU as violating the EU Charter’s provisions.⁵

Section 4.

To conclude, the present author would like to emphasize once again that the accession of the EU to the Convention is not in agenda for the near future and, in fact, could never happen. The CJEU’s actual need in the European Convention seems to be less obvious year by year. The raise of power of coalition of the CJEU and national courts of the EU Member States could result in gradual minimization of involvement of the ECtHR in the EU human rights issues.

In case of resumption of the DDA negotiation process to meet all the requirements of the CJEU, it is necessary to stress that the accession shall not be done by any means at

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¹ ECHR, Neshkov and others v. Bulgaria (applications nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13), Grand Chamber judgment, 27.01.2015, Varga and others v. Hungary (application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13), Chamber judgment of 10.03.2015.

² Some authors described the constitutional courts of the EU member states as “the institutions whose authority has been challenged most since 1957” or “Most Disparaged Branch” in the EU Constitutional”, see M. Dicosola, C. Fasone & I. Spigno, Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis, German Law Journal, 2015, vol. 16, no. 6, p. 1317–1318.


expense of authority, legitimacy and reputation of the ECtHR. The author believes that the Russian Federation will support a more stringent attitude of the ECtHR towards the EU. At the same time, Russia expects and welcomes active involvement of the ECtHR in strengthening human rights dimension in the Eurasian Economic Union through review of the acts of its member states parties of the Convention (Russia and Armenia).

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THEORETICAL FOUNDATIONS OF THE INSTITUTE OF FORFEITURE IN CIVIL LAW, THEIR SIGNIFICANCE FOR LAWMAKING AND LAW ENFORCEMENT

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Abstract: The author focuses on the institute of forfeiture in Russian civil law. The article analyzes the development of civil legislation on forfeits in Russia. A comparative legal analysis of the civil legislation of foreign countries is carried out. The author formulates the idea of the tradition of civil legal regulation of forfeit in our country, considering it as the most important instrument for ensuring the fulfillment of obligations. The article argues that it is necessary to take concrete measures to improve the civil legislation aimed at distinguishing the forfeit as a way of ensuring the performance of obligations and the forfeit as previously estimated losses that act as a measure of civil liability. The author proves that the improvement of civil legislation on forfeit and the enforcement activities based on it will strengthen the contractual discipline, ensuring the progressive and effective development of economic relations regulated by civil law.

Keywords: civil law, civil legislation, obligation, liability, contract, ways of ensure obligations, forfeit, damages.

General characteristic of the institution of forfeiture in modern Russian civil law

There is a well-known parable about the merciless debtor\(^1\). The parable tells of a slave who asked the king to defer his debt. The king showed mercy and freed the slave from paying the debt, but the slave was unmerciful towards his own debtors. As a result, the

\(^1\) The Gospel of Matthew 18: 23–35.
king handed the slave over to the tortures until the former debt was paid in full. The idea of a parable is expressed by the rule: if you cannot or do not want to forgive debts yourself, fulfill the obligation you have taken on diligently, otherwise you will suffer torture. I think this short edifying story should be remembered by both potential debtors and creditors entering into contractual relations, and the legislator adopting civil law norms, that regulate these relations. This publication is devoted to the institute that is very important for the establishment of order and stability in the civil turnover. The institute was called a forfeiture in the distant past.

At first glance, the civil law regulation of forfeiture in Russia is not bad at all. A whole paragraph of the codified civil law is devoted to this (para. 2, ch. 23 of the Civil Code). A separate article (Art. 330 of the Civil Code) contains the concept of this institute. In the hierarchy of methods ensuring the fulfillment of obligations, the legislator put the forfeiture in first place, one might say, an honorable place. The articles on forfeiture were subjected to amendment in the process of recent modernization. This indicates that the legislator understands the significance of these norms. The articles of the Civil Code on forfeiture were the subject of consideration by the Constitutional Court of the Russian Federation as well. Forfeiture is invariably an object of interest also for the highest judicial instance, i.e. the Supreme Court of the Russian Federation: for example, Decision of the Plenum of the Supreme Court of the Russian Federation of March 24, 2016, No. 7 «On the application by courts of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations».

Against the backdrop of such publications, Karapetov’s words sound like the words of a boy from the famous fairy tale about a naked king. A.G. Karapetov says that the

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institution of forfeiture is not a way of securing obligations, although it is placed in the chapter on ensuring the fulfillment of obligations by the legislator and is named as a part of the system. The letter of law did not correspond to the real state of affairs.

What was the cause of this substitution? Who made a mistake: the legislator in their approaches and definitions or the law-enforcer who found it more convenient to direct the development of forfeiture in a different way? In any case, the civil law science is obliged to build the basis of every institution of the studied branch. For this reason, there is a need to clarify the theoretical foundations of the institution of forfeiture in order to determine the prospects for its further development.

The origins of the institute and traditions of the civil law regulation formed in the Russian pre-revolutionary civil law

Let us begin our analysis with the origin of both the term itself and the legislative approaches to its normative consolidation. According to the philologists, the Russian word неустойка meaning forfeit» came from Old Church Slavonic. Стоять meant standing ground, keeping your word and fulfilling your promise. The person who “broke” the promise and thus violated someone else’s right, had to pay a certain amount, called неустойка (on principle: if you did not stand, then pay). Thus, the failure, fault or faux pas associated with the undertaken obligation generated a disadvantage, which manifested itself in a certain monetary penalty. The consequences in the form of a forfeit were suffered by the counterparty, who executed the concluded contract improperly. Thus the forfeit Has become connected with non-performance, malfunction, non-observance, as well as with creating the incentives for this negativity to be avoided.

As a legal institution, forfeiture arose in Roman private law. According to D.D. Grimm, Roman lawyers understood the forfeit as a contract, under which one party was obliged to pay a forfeit to another one or to be subjected to another property disadvantage in case of failure to perform or to perform untimely the obligation. Since those times, the forfeit was distinguished by a special purpose, which consisted of placing pressure on the debtor. The reason for concluding an agreement on forfeit was the very need to place such a pressure. D.D. Grimm stressed that only the “essential promise” which the debtor was able to fulfill was provided by the forfeit,. Nevertheless, the debtor needed an incentive to ensure that the actions constituting the subject of the obligation were taken and taken in a timely manner. At the same time, in the dogma of Roman law, there was another possibility or “opportunity” of understanding the forfeit: it had the purpose to determine in advance the amount of the probable loss from non-performance or incomplete execution of the

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1 Ozhegov S.I., Shvedova N.Yu. Tolkovyj slovar’ 80000 slow i frazeologicheskikh vyrazhenij [Explanatory dictionary of 80,000 words and phraseological expressions], Russian Academy of Sciences. Moscow, 1994, p. 407.

main obligation. Thus, in those distant times, the dogma of Roman law defined two ways of legislative application of the term “forfeit”.

Which way did Russia choose? What choice was made and fixed in the Code of Laws of the Russian Empire by the Russian legislator? In 15 articles of Volume X of the Civil Laws, the forfeit was clearly defined as a way of ensuring the fulfillment of obligations. Article 1554 stated that the contract «can be strengthened and provided by a penalty». Article 1574 stressed that the law can also determine the forfeit for a malfunction, including obligations with the treasury and loan obligations between private individuals. The “faulty” state contractor or supplier had to pay half a percent a month (Article 1576), and the private borrower payed three percent of all unpaid capital. Article 1585 clarified that the forfeit specified in the contract is recovered in the amount that is assigned, regardless of the penalties for failure to fulfill the contract itself. The provisions of Article 1583 contained a reservation that the condition of charging a forfeit cannot be ranked as an excessive interest. So there formed a peculiar tradition of civil law regulation of forfeit in our history. The forfeit was recognized as cumulative act and the rules about it were pronouncedly punitive in character with regard to the debtor. Pre-revolutionary civil legislation did not provide any grounds for reducing the forfeit. The Senate consistently followed the letter of civil law on forfeit and did not allow to reduce its size. There was a rumour that M.M. Speransky and his commission made a mistake, and the cumulative forfeit was an accident. Allegedly, the norms on forfeit were borrowed from Austrian law, and therefore should be understood «in the Austrian way»1. But all these conversations were an empty talk, since the norms on cumulative forfeit were introduced into civil law on purpose. In pre-revolutionary Russia the norms worked and worked very efficiently, strengthening the contractual discipline and instilling a culture of compliance with contracts. As a general rule, the contracts were executed, which allowed to produce 12 wagons a day, steam locomotive in 2 days, a steamer and thousands of kilometers of railways in 2 weeks.

K.P. Pobedonostsev highly appreciated the value of forfeit in his works. The scientist wrote: «It instils a certain kind of fear of malfunction in the party, which has to meet obligations, and hope for the benefit in case of non-fulfillment in the other party”2. Due to the forfeit, the debtor is afraid and the creditor hopes to gain. Thus, the design itself creates an incentive and therefore guarantees the proper performance of the obligation assumed by the debtor.

G.F. Shershenevich wrote about high domestic value and wide application of the forfeit in all kinds of transactions of that time. In his «Civil Law Course,» he defined the forfeit as a sub-enforcement means, which constitutes an additional condition for payment by the debtor of a certain amount in the event of a performance failure. G.F. Shershenevich stressed that the security effect of the forfeit is that the debtor fears complications

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1 Pergament M.Ya. Dogovornaya neustojka i interest v rimskom i sovremenom grazhdanskom prave [Contractual forfeit and interest in Roman and modern civil law]. Odessa, 1899, p. 255.
by increasing the content of the action that constitutes the subject of the obligation. Practicing lawyers of the time also wrote about the importance of the institution of forfeit as a security factor in civil circulation. In the special publication that explained civil laws for the population in the accessible form, Judge V.I. Farmakovskiy stressed that the “fear of forfeit” provides for the necessary actions of the debtor, which he must perform at the agreed time and in strict accordance with the meaning of the concluded contract. V.I. Farmakovskiy asked, «why cannot the forfeit be ranked as an excessive interest», as it was written in Article 1583? And the answer is, as the author claimed, that the party can fully protect itself from paying the forfeit by the exact execution of the contract. 

Institution of forfeiture in the foreign civil law

Pre-revolutionary civil lawyers realized that the view on the forfeiture could be different and wrote about it in their writings. Thus, K.P. Pobedonostsev noted the “different” purpose of the forfeit in the European legislation, where «the main purpose of the forfeit is to obtain compensation for the damage suffered by the party due to non-performance, and therefore the claims under the contract are not compatible with the forfeit.” The second possible designation of the forfeit was also described by G.F. Shershenevich: when the forfeit «transforms the previous obligatory relation into a new, alternative one in view of which the debtor can either perform the agreed actions or pay a certain amount of money.

Indeed, if we turn to paragraph 340 of the German civil code, we can see the opportunity for a creditor to claim a contractual penalty instead of requiring to execute the contract. Article 1229 of the French Civil Code states that the terms about the forfeit are the means of compensation for losses that the creditor incurs as a result of non-fulfillment of the primary obligation. The Austrian Civil Code in paragraph 1336 understands the contractual penalty as a contractual term on reimbursement, providing the possibility for the parties to agree in case of non-performance or improper performance on payment of a certain amount of money or provision of another type of property.

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2 Farmakovskiy V.I. Zakony o grazhdanskikh dogovorakh i obyazatel’stvakh ... [Laws on civil contracts and obligations, clearly outlined and explained, with the indication of errors that are being made in concluding, interpreting and executing of contracts and with samples of all kinds of contracts attached]. Vyatka, 1877, pp. 5–9.
3 See Pobedonostsev K.P. P. 281.
4 See Shershenevich G.F. P. 382.
6 https://www.legifrance.gouv.fr/affichCode.do;jsessionid=84A67BD7D5313A3729CA9D9C20080985.tplgfr27s_2?idSectionTA=LEGISCTA000032009927&cidTexte=LEGITEXT000006070721&dateTexte=20180902.
Some specific traditions concerning the forfeit were established in the English law. Thus, since the 16th century, within the scope of the equity law and, accordingly, for reasons of equity, the contractual penalties were outlawed. This approach was gradually integrated into common law. Therefore, even in order to assess the damages beforehand, the forfeiture was initially avoided. In England, the theoretical basis of the forfeit, proceeding from the principle of equity, got firmly rooted in the judicial practice that denied a possible forfeit application. Subsequently, under the influence of the principle of freedom of contract, a forfeit was introduced in order to give the parties an opportunity to negotiate the amount of expected losses in advance. The parties of the contract were required to prove to the court that the amount established by the contract was not intended to stimulate the debtor to perform their duty through fear, but was solely an attempt to agree on the amount of losses that were expected by the parties.

A very specific basis for the forfeiture was formed in the countries of the Muslim legal family. The theoretical basis of the law there was determined by the requirements of Islamic law (Sharia). This complex phenomenon was being formed for centuries and always had a strong influence on legal thought and legislation. The idea of a forfeit, especially of an excessive one, contradicted the religious ban on the increase in wealth on someone’s capital. From the standpoint of Muslim holy scripture, it is unfair to earn interest from debts and to have any earnings that are not based upon hard work and diligence, to receive usurious interest and set some uncertain financial conditions. According to these points of view, a forfeit in a group of countries of the Muslim legal family could only be understood as a reasonable compensation for the losses incurred.¹

That is how differently the understanding of the concept of forfeit was being formed in different countries. And in every specific case with a particular country, there can be found a certain theoretical justification for the concept embodied in the law.

Trends in the development of the forfeiture in modern Russian civil law and law enforcement practice

The forfeit, having formed within the conditions of the Russian pre-revolutionary law, entails a national idea of contractual penalty as a way to ensure the fulfillment of an obligation. Indeed, it is possible to encourage the debtor to fulfill duly their obligations in different ways. One way is to earmark the property, which will be used for that purpose (deposit, withholding), another way is to bring the third party to the fulfillment of obligations, who will guarantee the commission of the requested action (suretyship). And there also is a third way – a forfeit, which was put in first place by Art. 329 of the Civil Code of the Russian Federation. This way provides the debtor with an incentive to perform duly their obligations in order to avoid an additional burden of property losses.

¹ Litarenko N.V. Ispolnenie dogovornykh usloviy o neustojke v stranakh blizhnego Vostoka [The execution of contractual conditions on forfeit in Middle Eastern countries], Aktual’nye problemy rossijskogo grazhdanskogo prava [Important issues of Russian civil law]. 2017, no. 4 (77), April, pp. 173–181.
How did it happen that in today’s conditions an important instrument of civil law regulation, such a significant incentive to fulfill your obligations duly has turned into a different civil law instrument, i.e. a measure of civil liability? We can track the process of this transformation looking through various editions of the norms of the Civil Code, which were adopted by the Russian legislator as the economic and political development of our country was taking place. Thus, the Civil Code of the RSFSR of 1922, paragraph 2 of Art. 141 determined the forfeit as a creditable one ("it provides for the recovery of the established forfeit and, in addition, compensation for damages in the part not covered by the forfeit" – translator’s note). Simultaneously Art. 142 prescribes the right of the court to reduce the forfeit at the debtor’s request. The Civil Code of the RSFSR of 1964 in paragraph 3 of Art. 187 confirmed that the right to demand a contractual penalty occurs only in cases where the debtor is responsible for non-fulfillment or improper fulfillment of obligations. A special norm (Article 190 «Reduction of the forfeit») was already devoted to the reduction of the forfeit with sufficiently detailed regulation. The process of the forfeit transformation from being an ensuring measure into a measure of civil liability was completed by the existing Civil Code, where the provisions of Art. 333 were modernized among others.

This understanding of the forfeit as of a measure of civil liability is also evidenced by acts of the highest judicial instances. It suffices to recall a resolution of a plenary session of the Supreme Court of the Russian Federation from March 24, 2016, specifically devoted to the application of the provisions of the Civil Code of the Russian Federation on liability for breach of obligations. Subparagraphs 60-81 of the resolution state that the forfeit is only a measure of contractual liability. At the same time, special attention is paid to the procedure and rules of reducing the forfeit by court. While in the pre-revolutionary period of our history the courts could not even think of reducing the size of either legal or contractual penalties, today the processes of reducing the forfeit are no longer an exceptional phenomenon. Owing to the interpretation firstly given by the Supreme Arbitration Court of the Russian Federation in the Resolution of the Plenum of December 22, 2011 «On some issues of the application of Art. 333 of the Civil Code of the Russian Federation», and afterwards by the Supreme Court of the Russian Federation in the Resolution of the Plenum of March 24, 2016 No. 7 (paragraph 78), the rules on reducing the forfeit by the court started to be actively applied also to the forfeit determined by law. The size of legal forfeit in courts is being reduced rather significantly – in 9, 18 and even 42 times, according to the existing examples.

To show the content of the up-to-date judicial practice, I would like to focus my attention on a case held by the arbitration courts of the Urals District. The gist of the case was the following: on June 24, 2014 in accordance with the results of an electronic auction,
«Invatorg» company concluded a contract with a government agency – Perm regional branch of the Russian Social Insurance Fund – for the supply of adult diapers. According to clause 5.1 of the contract, the goods (the socially important ones, I would emphasize) intended for sick people and those that are in need, should be delivered according to the lists within 20 calendar days from receiving those lists. The final delivery date was set for October 31, 2014. The total value of the contract was rather large, about 20 million rubles. In case the supplier violates the established terms, there was the forfeit established by the parties: not less than 0.01 of the refinancing rate of the Central Bank of the Russian Federation (on the date of the payment due) from the amount of the unfulfilled obligation.

The agreed time frame for the delivery of adults diapers was disregarded. Consequently, the creditor via the authorized state institution applied to the court for recovery of the forfeit in the amount of 987 583, 19 rubles. The amount was calculated in accordance with clause 6.5 of the above contract. What was the courts’ reaction to this claim? The courts, which at first was the Arbitration Court of the Perm District (Resolution of 01.10.2015 Case No. A50-13557/2015), and later the Seventeenth Court of Appeal, composed of judges N.M. Savelieva, E.V. Vasilyeva, V.G. Golubtsova (the resolution of 18.12.2015) felt «truly sorry» for the debtor, i.e. the commercial company, and reduced the forfeit 3 times. It is interesting to read the argumentation of the courts concerning the decision to reduce the size of the forfeit set by the contract. The courts referred to the fact that «there is no evidence proving that the customer has suffered any loss”, while «the penalty percentage is rather high and disproportionate in comparison to the consequences of the breached obligation». It seems that while awarding the judgement, the judges simply forgot that the subject of the above obligation were the diapers for adults supported by special state funding, and people who were acutely in need for the diapers did not receive them on time. How even to calculate the consequences of violation of this specific obligation and moreover to assert confidently that the penalty percentage for those consequences is disproportionate? As a matter of fact, «Invatorg» company must have understood while participating in the auction, that it was about to get involved in a very important social enterprise financed by the Social Insurance Fund. The representatives of this company while signing the contract were aware of the figures that determine the amount of the contractual penalty for violation of delivery dates. The company was very keen to make some money on the contract, but refused to pay for the non-fulfilment of its obligations to provide diapers for sick people. The judges seemingly did not understand that specific situation, having reduced the penalty percentage significantly, considering it as an ordinary measure of civil liability and totally forgetting about the preventive role and educational significance of each and every legal judgement.¹

Meanwhile even in far away and conservative England today the judicial practice shows some signs of seeing the forfeit as a purely ensuring measure that allows parties to achieve the aims of the forming contract relations. The judgement on the case of ParkingEye

Limited v Beavis of November, 4th, 2015, issued by the Supreme Court of the UK was called as “mini-revolution” in Russian civil law literature. I will briefly summarize the case.

At the car park of a retail part, the entrance signs stated that a person can park a car for free for no more than two hours, and in case of parking for a longer time, a person would have to pay 85 pounds of the parking charge. The plaintiff exceeded the limit by one hour and received a parking ticket for 85 pounds. The car-owner did not agree, stating that this sum of money was an illegal forfeit. Lords Neuberger, Sumption и Carnwath who viewed this case, did not consider, as it was done before, whether the sum of 85 pounds was an attempt of the parties to calculate possible losses in advance. They saw that the economic goal of this payment was to create the incentive to attract to the car park only the retail store customers and at the same time to diminish the desire of all other drivers to park there. Therefore, the goal of the set fine, lords stated, was absolutely not compensatory, but only a stimulating one which the judges found reasonable. As a result of their judgement, a new doctrine of English forfeit has been established. The Supreme Court stated, that the forfeit, even a supercompensatory one, has a right to exist if it aims at stimulation and prevention. It is essential for the court to see its importance from the economic point of view. The judgement of the UK Supreme Court, as A.G.Karapetov fairly notices, demonstrates a careful, thoughtful and detailed analysis of all circumstances of the case, conducted from the position of finding the economic nature and function of this particular forfeit. In Russian case law, unfortunately, such tendencies cannot be found. In many cases of contract relations between businessmen (and the above mentioned examples of judicial practice confirm it), one can only rely on the forfeit in case of the contract breach, because there are no other incentives to maintain the contract discipline. But the active practice of Russian courts of lowering the forfeit without the “careful, thoughtful and detailed analysis” deprives the participants in civil commerce of the necessary stimulus to keep the contract discipline, which after all stimulates the gradual development of the property relations, based on commodity-money form.

We can speak about the performance of contracts, looking at the statistic data in the report of the President of Russian Supreme Court V.I. Lebedev at the annual judges’ meeting on 20 February, 2017. One third of all claims viewed by Russian commercial courts is cases connected with non-fulfilment of contract obligations. Thus, in 2017 according to statistics, 595,000 contracts between professional participants of civil circulation were not fulfilled. The data of common jurisdiction courts shows similar figures: one third of all cases (14,8 million suits) is connected with non-fulfilment of contracts by individuals. What can these figures reveal? It is obvious that civil circulation as a system of economic relations based on civil law contracts can lose its structure and the needed under the

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1 Karapetov A.G. Minirevolyutsiya v pravovom rezhime dogovornoj neustojki v Anglii, i perspektivy uтоcheniya analogichnogo rezhima v Rossi (Mini-revolution in legal regulation of the contractual forfeit in England, and perspectives to elaborate on this regulation in Russia), https://zakon.ru/blog/2016/1/31/minirevolyuciya_v_pravovom_rezhime_dogovornoj_neustojki_v_anglii_i_perspektivy_utochneniya_analogich.
influence of such tendencies and become unbalanced. Such developments should not be
acceptable and the role of the institute of forfeiture in the process of strengthening the
contract discipline, without a doubt, should be restored.

**System of measures used to improve the civil legal regulation
of forfeiture in the Russian Federation**

What consistent steps can be taken to resolve the urgent problems connected with
the application of forfeiture in the context of Russian civil legislation improvement? Firstly,
it is necessary to delimit two concepts, united today under one term «forfeit» in the
norms of the Civil Code, namely a forfeit as a way to ensure the obligations being met
and a forfeit as a measure of civil liability. The term «forfeit» historically belongs to one
of the ways in civil law to ensure the fulfillment of obligations. Therefore, the term must
be restored to its original meaning and functional features. The measure of civil liability
on the other hand can be named differently, i.e. as predetermined (estimated) losses.
Thus, all the rules concerning liability will extend to this concept, which has a well-
deﬁned place in the civil law regulation. And the second paragraph of Article 330 of the
Civil Code of the Russian Federation should be removed from this rule, since it defines
the forfeit as a way to guarantee the fulfillment of obligations.

Secondly, the introduction of distinctive features of the forfeit and estimated losses
allows to avoid the rules which determine the forfeit and the losses ratio. As a security
measure, the forfeit should not be linked and compared to the losses. Currently, both
the parties to the contractual relationship, and the court dealing with their dispute about
the forfeit amount, are talking about losses. And the losses in such cases is an absolutely
speculative concept. No one really knows about the real state of affairs with the losses,
and is not obliged to delve into the details. The debtor, not having full information about
the amount of real losses of the creditor, can only speculate what losses normally occur
in such situations. The creditor, refuting the debtor, is not obliged to prove his losses.
The creditor is also reasoning absolutely speculatively about the consequences of such
violations of the obligation for those who act in comparable circumstances reasonably
and circumspectly, taking into account the changes of the average indicators for the
market, interest rates on loans, market prices for certain goods, and exchange rates.
Thus, it is not even about losses when the court determines the amount of the forfeit. As
a result, the amount set by the parties, and called a forfeit, is not even a measure of civil
liability. The forfeit in itself – according to the tradition of Russian civil law regulation –
should be cumulative. It cannot be subject to adjustment in view of the losses that arose
or could have arisen when the obligation was improperly executed by the debtor.

Thirdly, the legislator should pay special attention to the cases of the so-called legitimate
forfeit. Its role cannot be overestimated for civil law relations, in which compliance
with the contractual discipline and order is especially important. This includes electric
power engineering, protection of consumer rights, share participation in construction,
contracts and supplies for state and municipal needs, and transportation. The scope of these relations, which are especially important for the economy of the country, must be determined in advance and finely delineated. And such a very effective and stabilizing measure as a legitimate forfeit should be aimed at ensuring the stability of the arising contractual relations. The level of regulation must be, unequivocally, legislative, excluding the use of other legal acts, for example, decisions of the Government of the Russian Federation. The amount of the legitimate forfeit can be fixed directly in the norms of the Civil Code of the Russian Federation. This raises the importance of this method of ensuring the fulfillment of obligations and it will provide an opportunity to justifiably determine in advance the size of these penalties, thereby making their application effective. Taking into account the role of the legitimate forfeit for ensuring the effectiveness of civil circulation and specifying the amount in the codified civil law, the court can no longer be given the right to adjust their size. The current judicial practice to reduce the size of legal penalties indicates their absolute inefficiency. Thus, for example, by the judgement of the Arbitration Courts of the North Caucasus District – the Arbitration Court of Rostov Region (decision from 23.05.2017) and the Fifteenth Arbitration Appeal Court (decision by 06.11.2017) – a legitimate forfeit for delay in the delivery of cargo in the amount of two million, calculated by the creditor (represented by the JSC «Uralelectromed» under the rules of art. 97 of the Railway transport Charter), was reduced to 170,664.53 rub. The courts explained their approach by the fact that in case of a number of wagons the delay in the delivery of goods occurred on route for reasons beyond the control of the carrier. Therefore, there are no grounds for charging penalties. This example once again proves that the forfeit, especially the legitimate one, should be regarded as a purely security instrument, and cases on reducing the size of the legitimate forfeit should be excluded from the court practice.

Fourthly, it seems that the law should recognize not only the monetary forfeit, but also the pecuniary (goods, commodity) penalty. It should be recalled that Art. 141 of the Civil Code of the RSFSR of 1922 recognized by the forfeit not only a sum of money, but also a property value, which one counterparty is obliged to deliver to another one in the event of non-fulfillment or improper performance of the obligation. Later in the history of civil law regulation, a non-monetary penalty was excluded from the general concept, and courts, relying on the law, virtually excluded the possibility of its application in practice. The Supreme Court of the Russian Federation, by its decision No. 7 from 24.03.2016, allowed the possibility of applying a pecuniary forfeit, referring to the fact that the list of ways to ensure the fulfillment of obligations is not exhaustive. It seems that from the point of view of the systemic nature of civil law regulation, the pecuniary forfeit should be considered as a type of forfeit, but it should not form an independent concept that ensures the fulfillment of obligations.

Fifthly, as the contractual practice shows, today, the participants of civil circulation are actively creating specific consequences of violation of their obligations. For example,

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there is an automatic price correction of the contract, which is not in favor of the offender, appropriation of the prepayment by the creditor, or deprivation of discounts. A.G. Karapetov qualifies this practice as a means of «camouflaging» the forfeit, believing that using these «simple» methods of contractual technic, the parties are trying to exclude the application of the legal regime of the forfeit, which, according to the author, provides a certain balance of interests of the parties. It seems to me that there is a lack of such balance in the current judicial practice on reduction of the forfeit today. And if the reduction of the forfeit becomes an exceptional measure, all the above-mentioned «camouflage» techniques will be able to take a completely independent place in the system of measures ensuring the fulfillment of the obligation.

Sixthly, the question of the possibility of ensuring a non-property claim by the forfeit when no property losses are possible for the parties requires an answer at the legislative level. For example, it can be the obligation not to disclose information or to act conscientiously to achieve a goal. Today, practitioners answer negatively to the question of such possibility, considering the forfeit to be only a way to recover losses. But we respond positively to this question, having accepted a different concept of the forfeit as a way to ensure the fulfillment of an obligation that serves its goals. In order to avoid further questions, the legislator must specifically provide for a non-pecuniary obligation to be ensured by the forfeit.

Seventhly, as it seems, the court can be given the right to change the amount of the contractual penalty in exceptional cases, in which case the forfeit could be reduced as well as increased. I should note that in France, according to FCC regulations, initially it was impossible to modify the conditions of the forfeit by the parties of the contract. But in 1975 the law from July 09 No. 75-597 introduced the amendments to the main codified civil law of this country, which allowed the court to reduce the forfeit, if it is clearly excessive, as well as increase the forfeit, if it is extremely low. It seems that a similar role for the courts should be provided by the current legislation in our country. At the same time, different criteria must be established for the court to resolve this issue, criteria which will differ from those currently in force in Art. 333 of the Civil Code of the Russian Federation. Today, courts in order to make a judgement on the issue of reducing the forfeit determine how it corresponds to the consequences of breaching the obligation. Thus, one way or the other, the link to possible or actual losses incurred is being established. Having recognized the forfeit as a measure to ensure only the fulfilment of obligations, one should refuse this criterion. The “unreasonable benefit” criterion, established for the entrepreneurial relations, also appears to be unsuccessful (paragraph 20). Rightfully, this criterion in the civil law literature is called a gutta-percha one, which means that it does not help the courts to make judgement on reducing the forfeit in their

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practice. What should be the grounds for having the possibility to change the amount of the contractual forfeit? It seems that the main goal for addressing this issue in court should be the implementation of the social function of civil law and principles of good faith, reasonableness and justice. Awarding a judgement to change the amount of the forfeit to be recovered, the courts must act very cautiously in order not to encourage the dishonest debtor and, just as important, not to encourage the unfair conduct of other participants in the civil circulation. As a result, the court will be entrusted with a very important mission related to maintaining the effectiveness of the forfeit as a way to ensure the fulfillment of obligations. In order to work out the ways of improving the current civil legislation of the Russian Federation, it is possible to take advantage of the idea set in Art. 94, book 6 of the Civil Code of the Netherlands. It is provided in this norm that the forfeit may be reduced if fairness clearly requires that. In the Civil Code of the Russian Federation this idea can be expressed in the provision requiring the court to rely not only on fairness, but also on conscientiousness and reasonableness when making a judgement whether to change the forfeit or not. Thus, in the disposition of Art. 333 of the Civil Code of the Russian Federation, this rule may look like the following: a forfeit may be increased or reduced by the court, if good faith, reasonableness and justice clearly require that. In addition, the law should set limits for both reducing and increasing the size of the forfeit. For example, in the Civil Code of Mongolia (paragraph 6 of Article 180 of the Civil Code) it is provided that the total amount of the forfeit cannot exceed 50% of the debt amount. It seems that the bar for reducing the size of the forfeit can also be legislatively established. For example, no more than 50% of the amount specified in the contract. A similar limit can be set to increase the size of the forfeit. Why is it important? The fact is that in the existing court practice, the size of the contractual forfeit can be reduced even by 97.4%, which ultimately encourages dishonesty of the debtor and the unfair behavior of potential participants of civil circulation.

Summing up some results, I should note that the institution, which was called forfeiture in distant past has unique features and large potential for solving the most important task of civil law regulation. It guarantees and stimulates, intimidates and excites being a very effective civil law tool. And these large potential opportunities must be initially used by the legislator, and subsequently by the law enforcer, in order to satisfy civil obligations in a befitting way. Here I will remind of the parable I began my work with. The king was right when he forced his debtor to endure the tortures in the end, so that he could fulfill his obligations properly. So civil law should, it simply must, use all the tools developed through the centuries to make the civil circulation disciplined and organized, which ultimately will ensure the progress of society and the well-being of the people.
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Abstract: In article discusses the main theoretical approaches and issues of formation a legal doctrine of presumption of innocence at the current stage of development of the Russian Federation state and law. It is important to emphasize that the author presents his point of view on solving this issue through a consistent analysis of the constitutional concept of the presumption of innocence, its general theoretical status and sectoral regulations. The author of this scientific research deliberately focuses on the analysis of the positions of the Russian scholars of the Soviet and post-Soviet period on understanding, consolidation, implementation, renewal and further improvement of the principles of presumption of innocence during undertaking the administrative, legal and judicial reforms in the country. Moreover, the author compares a number of provisions of the current sectoral legislation in the context of implementing the provisions of the principle of presumption of innocence. As a result of the research, the author makes some conclusions of a practical nature, proposes a number of mechanisms for resolving discussion issues related to the implementation of the principles of the presumption of innocence and ways to formulate the legal doctrine of the presumption of innocence in the modern Russian state and the world as a whole.

Keywords: doctrine, legal doctrine, presumption, legal presumption, presumption of innocence, principle of law, the principle of innocence, doctrinal presumption of innocence.

Studying the formation of doctrinal presumption of innocence, it should be pointed out that the doctrine has come a long way from the logical and philosophical device
expressed as an assumption to the legal rule, and then from principle of law to the formation of a full-fledged doctrinal presumption of innocence, formed due to the basic ideas and views on the presumption of innocence.

It can be argued that the presumption of innocence as an assumption of a legal nature is a simple pure presumption, i.e. assumption in the sense of provision, statement which is considered to be true up to a certain point, until its all-around study and full approval or, vice-versa, complete refutation. Further, the presumption of innocence was transformed into a legal position, rule, specific regulatory legal provision regarding the nature of the relations between the individual and the state in the context of proving guilt (a significant period of the genesis of the presumption of innocence), and later the person’s innocence. In the end, the presumption of innocence took the form of a legal principle which requires to ensure unconditionally the interests of the individual whose innocence is questioned by the competent authorities of the state (to a lesser extent as it expressed in the Constitution of the Russian Federation and to a greater extent as it expressed in the Code of Criminal Procedure). Let us examine the development of the main approaches to the formation of the doctrinal presumption of innocence.

Presumption of innocence was subjected to comprehensive study after its full official recognition by experts in specialist fields, nevertheless only theoretical scholars could fully analyze the basic concepts and their content aspects. Translated from Latin, the word «principle» means «foundation», «beginning» and thence it follows that the legal principles are the inspiring foundations of law, which constitute the main and decisive elements in its content.

Here are the opinions of the doctrinal scholars on this issue. O. S. Ioffe includes the legal principles along with norms, institutions and branches in the system of law. D.A. Kerimov introduces the legal actions, regulations and principles in his definition of law. N.V. Vitruk attributes the legal principles to the criteria for dividing law and legislation into branches of law along with the subject and method.

Meanwhile, R.L. Ivanov points out that the legal principles are based on public interests and needs, and the main role in identifying such needs belongs precisely to legal

practice⁴. Later, the practitioners⁵, who were representatives of the law enforcement sphere, expressed their views on the formation of the doctrine of the presumption of innocence. In each of their phrase, thought or argument, a gown of the Doctor of Sciences shows through.⁶

It was in the form of provisions of legal practice formulated in the legal position (rulings) of the Plenum of the Supreme Court of the USSR that for the first time the Soviet law included such principles of law as the principle of presumption of innocence and the interpretation of all doubts of prosecution in favor of the defendant⁷. Later these ideas were fixed in the position of the Plenum of the Supreme Court of the Russian Federation and in the decisions of the Constitutional Court of the Russian Federation.

Undoubtedly, it should be noted that the emergence, formation and further development of each separate legal principle as a scientific idea or the guiding principle of legal practice is a rather lengthy and really complex process and the legislative consolidation is often only its final stage. Moreover, the doctrinal development, scientific polemics and discussions, the theoretical and practical verification of the conformity of a particular principle to social relations not only do not cease after the legislative consolidation, but also receive a new boost for development and an impetus for modernization and renewal. In this regard, it should be noted that the presumption of innocence, set in the form of a principle, unlike other types of legal principles, does not have a «static essence» characteristic of them. The presumption of innocence is not based on definitions of greater or lesser probability, nor on considerations of a statistical nature and quantitative criteria for its understanding and application⁸, which significantly expands the concept of the presumption of innocence, developing its doctrine, filling it with new content and meaning.

One should bear in mind that the presumption of innocence is a pure presumption in a general sense, i.e. assumption in the sense of provision or statement⁹ which is considered to be true until a certain point, until its all-around study and full approval or, vice-versa, complete refutation⁷. All the above allows us to conclude that the presumption of innocence is an ordinary legal presumption, but at the same time it is different from the others.

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2. For example, V.D. Zorkin, V.A. Tumanov, M.V. Baglai, N.V. Vitruk, B.S. Ebzeev etc.
4. Ibid. – p. 76.
6. See Babaev V.K. *Prezumpthii v sovetskom prave* [Presumptions in Soviet Law], p. 14
7. See Pan’ko K.K. *Prezumpsii v ugolovnom prave kak prijem zakonotvorchestva* [Presumptions in the criminal law as a lawmaking device], p. 66.
We hold the opinion that in the framework of the evidentiary process (mainly in the civil, administrative and criminal processes) there are mainly three basic presumptions: the presumption of knowledge of the law, the presumption of the justice of the law (the presumption of the truth and validity of the decision or verdict is directly connected with it) and the presumption of innocence. All of them are rebuttable presumptions. In each case, the relevant subject of procedural activity can prove that in their case the provision established by the presumption without evidence is not applied, it is a different provision, that is to refute the presumption. Thus, according to the presumption of knowledge of the law, it is considered that after the publication of the law and from the time it came into force, those participants in the evidential process to whom the law applies are aware of what it prescribes, permits or prohibits, and cannot plead ignorance.

For example, the accused in committing an official crime in affixing a postscript or leaving the state property entrusted to them without security, as a result of which significant values were found to be absent (e.g. stolen or lost), cannot plead ignorance of the law prohibiting adding postscripts or obliging officials to protect state property. And that is a basic presumption. However, there can be situations when the circumstances have developed the way that the accused did not really know (being sick or away on a long trip, etc.) about the new provision of the law supplementing, amending the existing law or canceling it. In this case, the presumed knowledge of the law could be refuted. The same goes for the presumption of the justice of the law and the related presumption of the decision that came into legal force (verdict, ruling). The latter presumption proceeds from the fact that in the overwhelming majority of cases such procedural acts are indeed true and remain valid. In this regard, if during the case proceedings a circumstance is established by a decision that has entered into legal force in another case, it can be deemed established in the present case. However, this decision can be reviewed by way of judicial supervision or by resuming the case in view of newly discovered circumstances, so this presumption is rebuttable. In these cases, the fact is presumed because of the overwhelming majority of cases, the generalization of the facts and practices of studying reality confirms exactly what is being presumed.

Studying the formation of the doctrine of the presumption of innocence, we are faced with the fact that it differs sharply from the rest of the presumptions in all branches of law. According to the presumption of innocence, a person is presumed innocent until their guilt is proven with full certainty and the court does not convict this person of committing an unlawful act by the procedural act.

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2 See Babaev V.K. Prezumptii v sovetskom prave [Presumptions in Soviet Law], p. 14
Meanwhile, this happens not because the person is innocent in the majority of cases, or the criminal and administrative cases result in termination or acquittal. In reality the situation is different: the number of convictions that have entered into legal force considerably exceeds the number of acquittals.¹

The content and purpose of the presumption of innocence is not in this, but in the remarkable, democratic and humanistic provision that is stipulated in Art. 49 of the Constitution of the Russian Federation: everyone accused of committing a crime shall be considered innocent until his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force, whatever the officials who conduct proceedings on this matter think of it.²

The long way of forming and developing the presumption of innocence demonstrated that other presumptions are designed to reduce the process of proof and to accept certain facts without proving them. The presumption of innocence, on the contrary, requires every fact, every circumstance relating to the charge (prosecution) to be proved with complete certainty and absolute confidence. As already noted, it serves as a guarantee against unfounded accusation, prosecution, conviction, censure and at the same time this is a necessary condition, an effective means of finding, establishing in each case the objective, material truth.³

Thus, the presumption of innocence, unlike other presumptions, does not at all simplify or facilitate the process of proving the case, does not reduce it, does not absolve the investigation and the court from proving the facts relevant to the case, does not allow such facts to be recognized as established without evidence. Moreover, requires all relevant facts to be proven.

The presumptions we mentioned earlier – the presumption of knowledge of the law and the presumption of the veracity of the verdict (decision) that came into legal force – are rebuttable presumptions. They proceed from the fact that citizens, as a rule, know the duties assigned to them by law, and only procedural acts of the court that are legal and justified enter into legal force.

Thus, if in any particular case it is found that the citizen did not really know the law relevant to this case or the procedural act of the court that entered into legal force was erroneous, the citizen is released from responsibility for the violation of the law in the procedure established by law, while the act is canceled. In both cases the presumption

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¹ Motovilovker Y.O. O prezumptsi nevinovnosti i priznanii vinivnym ne inache kak po prigovoru suda [The presumption of innocence and conviction only under a court sentence], Problemy pravovogo statusa lichnosti v ugolovnom protsesse [Issues of the legal status of a person in a criminal trial], Saratov, 1981, p. 58.

² See: Babaev V.K. Prezumpthii v sovetskom prave [Presumptions in Soviet Law]; Pan’ko K.K. Prezumpsii v ugolovnom prave kak prijem zakonotvorchestva [Presumptions in the criminal law as a lawmaking device].

³ Rad’ko T.N. Juridicheskaya ovtetstvennost’ kak obshchaya forma realizatsii sotsial’nykh funktsij prava [Legal responsibility as a general form of realization of the social functions of law], Juridicheskaya ovtetstvennost’ v sovetskom obshchestve [Legal responsibility in the Soviet society], Volgograd, 1974, p. 18.
of knowledge of the law or the presumption of the veracity of the act that has entered into legal force is refuted.\(^1\)

A different situation arises with the presumption of innocence. By no means it presumes that the accused are normally innocent and the guilt is merely an exception to the rule. For the very reason the quantitative approach is not applicable here since every case has its own special features, everyone who is prosecuted with a criminal, administrative or other offence is individual and above all other a free and independent human being, the future of whom depends on this case and it is exactly why the law establishes effective legal remedies against unjustified limitation or infringement of rights and legitimate interests of the accused.\(^2\) All aforesaid guarantees are integrated into the principle of the presumption of innocence. Thereby the investigation and prosecution authorities or court certainly do not dismiss the presumption of innocence during the investigation and adjudication of the case, but on the contrary observe it. They seek the truth avidly, scrutinize all circumstances of the case, and by doing so they guarantee and protect the right to judicial protection of each particular citizen.\(^3\) In this respect, we should stress the importance of the doctrinal interpretation of a presumption of innocence for all legal subjects: the presumption of innocence is simultaneously a law, a principle and a legal guarantee for the implementation of the law, therefore all subjects of legal relations ought to abide strictly and scrupulously by the presumption of innocence.

Thus, the presumption of innocence is a principle in the form of presumption, which states that no one is to be found guilty for committing an unlawful act until his or her guilt has been proven in conformity with the law, within terms determinedly the law, and has been established by the procedural court act which has come into force.

The legal literature also raises the question of the relation between the presumption of innocence and the presumption of good faith. The latter is an old civil law principle, known to Roman law (praesumptio boni viri). Such presumption relates to the substantive civil law and civil litigation, and means that from the outset the participants of legal relations are seen to be acting in good faith, unless proven otherwise.

In some cases, the presumption of good faith turns into presuming guilt of the counterparty to a contract, who does not fulfil the obligations, or guilt of the perpetrator of the damage in tortious act, but in criminal procedure literature the view was repeatedly expressed that such presumption is a kind of the presumption of good faith.\(^4\)

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1. See Pan’ko K.K. Prezumpsii v ugrolovnom prave kak prijem zakonotvorchestva [Presumptions in the criminal law as a lawmaking device], p. 66
2. See: Zor’kin V.D. Konstitutsionnyj Sud Rossii v yevropeyskom pravovom pole [The Constitutional Court of Russia in the European legal terrain].
3. Medvedev D.A. Nastupivshij god stanet perelomnym v bor‘be s krizisom [The coming year will be a turning point in fighting the crisis], Gorodskie vesti [City news], no. 3, 15.01.2009, p. 4.
It seems there are no reasonable grounds to derive one presumption from another and to build the “presumption hierarchy”. However, because it is the substantive civil law and civil litigation, that became the cradle of the administrative law, criminal law and criminal procedure law, it is safe to say that the presumption of innocence is a type of the presumption of good faith and going hand in hand with the right to judicial protection.

Under articles 46 and 48 of the Constitution of the Russian Federation, everyone shall be guaranteed judicial protection of their rights and freedoms and everyone shall be guaranteed the right to a qualified legal assistance. The presumption of innocence is a basis, guiding idea, the summary of those legal guarantees of the right to judicial protection. Consequently, it would seem that the right to judicial protection and the presumption of innocence are connected. The right to judicial protection can be fully ensured and implemented only when the principle of the presumption of innocence is implemented strictly and thoroughly, so the violation of the right to judicial protection always means the violation of the presumption of innocence in some sort. Conversely, when the presumption of innocence has been violated, the right to judicial protection has also been violated.

Thus, the presumption of innocence is both a guarantee for fair and humane treatment of the person as a good and law-abiding citizen till the moment the court finds them guilty of an offence and a principle, applied to all branches of law, according to which no one shall be held guilty until proven guilty in proceedings providing the right to judicial protection. This definition of the principle of the presumption of innocence makes it much easier to determine the place of this principle among others legal principles. To our opinion, the principles of modern Russian law are so numerous and varied that this question requires an accurate classification. It is widely accepted to divide principles into general, cross-sectoral and sectoral legal principles. Such division is founded on the basic theoretical and practical idea, because it focuses attention on the profound connections of principles and theirs sectoral orientation.

Most scholars agree that common legal principles are fundamental ideas, starting points of the development process and the functioning of all legal propositions, legal institutes and branches of law. Opinions differ, however, as to what the specific list of common legal principles should be. The principle of the presumption of innocence, applied in all branches of law, is the specific legal provision establishing the idea of a legitimate,
fair and humane treatment of the person as a good and law-abiding citizen, who is facing criminal prosecution for committing an offence but not yet found guilty by the authorities under the procedure determined by the law. Such an interpretation of the principle of the presumption of innocence places it on par with justice, humanism\(^1\) and others legal principles, meaning in its widest sense a dialectically developing system of views on society and a human being, filled with profound respect for their freedoms, dignity and rights. The ideas of justice and humanism along with the presumption of innocence are built into the very fabric of the relations of modern democratic society and the state, its legislation, law enactment and enforcement\(^2\). However, it appears that the principle of humanism does not fully represent all aspects of the presumption of innocence in the relations between state, society and individual. It is reasonable to suppose that the principle of the liability for fault is reflecting the ideas of the presumption of innocence the most accurate and fair way\(^3\). It is one of moral and ethical constructs, humanistic ideas limiting the abuse of power by appropriate the authorities and officials investigating the cases of law violation. The principle of the liability for fault has been constitutionally entrenched (art. 49 of the Constitution of the Russian Federation) and requires the law enforcement institutions to provide “…proof of criminal charges while guaranteeing the right to judicial protection”\(^4\). The above mentioned principle defines the content and guarantees for the implementation of the presumption of innocence: the accused shall not be obliged to prove their innocence; any doubts about the guilt shall be interpreted in favour of the accused. The principle of the liability for fault expresses the essence of the presumption of innocence ensuring the legality and humanism in activities of the law enforcement agencies in relation to the person.

At the same time, the principle of the liability for fault enshrined in article 49 of the Constitution of the Russian Federation highlights the exclusively criminal law nature and sectorial law orientation of the presumption of innocence. It seems that this statement is not entirely true, because the presumption of innocence is built into the very fabric of all branches of law and acts equally as a result of its own internal procedural mechanism.

Moreover, summing up all of the aforesaid doctrinal approaches and taking into account that the presumption of innocence is a type of the presumption of good faith, the former must be improved both in form and in content in order to create a universal legal formula. The presumption of innocence itself should have its own worthy place among the general principles of law due to its universal obligatory character. In this case,

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\(^1\) See Teoriya gosudarstva i prava: kurs lektsij [Theory of state and law: lecture course], p. 124.

\(^2\) See Zor’kin V.D. Konstitutsionnyj Sud Rossii v yevropeyskom pravovom pole [The Constitutional Court of the Russia in the European legal terrain].

\(^3\) Alekseev S.S. Problemy teorii prava [Problems of the theory of law], vol. 1, p. 109.

the presumption of innocence as a general principle of law represents a guiding idea manifesting the content of the general presumption of good faith of an individual.

Thus, general legal principle of the presumption of innocence in branches of law on the formal legal level is a specialized system of rules manifesting itself as a special legal rule. The presumption of innocence, which derives from the basic legal principle of the presumption of good faith of a person, in actual fact materializes in a lawful conduct. So if having committed an offence a person gets the status of a lawbreaker, therefore the presumption of innocence transforms into the presumption of possible guilt here (for example, there are some prohibitions and restrictions for a public servant accused of corruption). In case the person is found guilty and has been subjected to legal liability, the presumption of innocence transforms into the presumption of guilt. Any restrictive measures are restriction on the presumption of innocence.

In support of verity of the above indicated point of view, we would like to quote an esteemed scholar, Professor N.I. Matuzov, who believes that “the two universally received principles such as the presumption of innocence and the principle “everything not forbidden by law is allowed” are typical for a civil law-based society”. According to the first principle – everyone shall be considered honest, law-abiding and innocent until proven otherwise in accordance with the law, and the burden of proof is on the one who accuses, not on the accused. The second principle means that a free person can take any actions which are not contrary to the law or morality”. This thesis is an eloquent evidence of the general legal nature of the principle of the presumption of innocence, its important content and significance for law and for society.

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CULTURAL UNIVERSALS AS THE BASIS OF THE INTERACTION OF LEGAL SYSTEMS IN THE MODERN WORLD

Abstract: The article analyzes the functional aspects of legal systems and forms of their interaction in the modern world. The questions of the diversity of legal systems in the modern world, specifics of their genesis and functioning, and the criteria of their differentiation have been discussed in the legal literature for a long time. However, the search for universal grounds of unity or for parameters of similarity reveals significant difficulties from the standpoint of law enforcement, the terminology used, and the paths and directions of their development. In the article, the authors use general scientific methods (analysis, synthesis, induction, deduction, modeling) and specialized methods (formal-legal, comparative-legal, historical and typological). The value of the constructive interaction of legal systems is increased in the era of global socio-economic, scientific-technical and ecological problems. It can acquire different forms: acculturation, reception, assimilation, implementation, etc. The effective achievement of goals pursued by representatives of different legal systems requires a common semantic basis of interaction, which are cultural universals. They have an invariant component arising from the bio-socio-cultural human's nature and defining the limits of the knowledge of law in the
form of conceptual ideas of philosophy, religion, morality, psychology, etc. Their variable component reflects the concrete-historical, ethnonational, collective and other features of the conceptualization of law itself. The article will be useful for a wide circle of specialists in the humanities and legal sciences, post-graduates, teachers and practitioners. It is designed to draw attention to the fundamental importance of cultural universals for a constructive dialogue between different legal systems in the modern world.

**Keywords:** cultural universals, the legal systems, the meaning of law, globalism, regionalism, formation, civilization.

The analysis of the Russian legal system shows that there are many unique and peculiar legal systems in the modern world. The criteria for their classification are aimed only at highlighting the similarities and differences of their features. However some legal systems may have similarities in one respect, while other legal systems may differ according to this criterion. Nonetheless, their constant characteristics rarely draw attention, with the exception of special cross-cultural studies. This concept is known as cultural universals in philosophy studies. As far as we know, it has not yet been applied to the study of legal cultures and legal systems in the Russian law.

The theoretical significance of this approach is that any differentiation of phenomena implies some primary unity. The concept of the legal system is static in the knowledge of the actual legal system, but the dynamic of this phenomenon will always «elude», being not fully reflected in the concept. For this reason, researchers use typology as an ideal model of historically developing legal systems and they have to find not only similar semantic features, but also universal bases.

The modern world is characterized by complexity, nonlinearity of development and by the presence of global problems, in particular, the nuclear threat, environmental crisis, terrorism, drugs, cybercrime, etc. The practical significance of cultural universals is the creation of sound conditions for a constructive dialogue between different legal systems on this issue. The value aspects of regulation are clearly fixed for all comprehensive concepts of life, dignity, property, power, security, etc., in the fields of public and private law of many countries.

There are two principal views on the question of cultural universals. The first view is presented by the works of G.P. Murdock and his followers in the foreign literature. They have singled out about 100 cultural universals that are typical for all societies throughout human history. The main feature of this approach is that it emphasizes the relationship between culture and the biological needs of people, even though they are expressed in the external social form. G.P. Murdock lists such universals as “marriage”, “community”, “nuclear family”, “blood and cognition relations”, “sexual taboos”, “the gender division of labor”, etc.¹ G.P. Murdock does not deny the social character of culture, as it is expressed

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¹ Murdock G.P. *Social’naja struktura* [Social structure], transl. and comment. by A.V. Korotaev. Moscow, 2003, pp. 20, 26, 27, 106, 122, 378 et. al.
“in group habits which are shared by all people of a certain social group and persist for a long time”. However, G.P. Murdock insists that “the culture with necessity and always provides the satisfaction of basic biological needs and secondary needs arising on their basis”, i.e. social needs, “... the fact that culture brings satisfaction, should manifest itself in all cultures, because the basic human motives are the same everywhere and require similar forms of satisfaction”.¹

The second view has been articulated by V.S. Stepin in the domestic literature. “The limiting bases of each historically specific culture are a system-forming factor. They are represented by ideological universals (categories of culture), which create a holistic generalized image of the human world in their interaction”.² He highlights two blocks of cultural universals linking the subject-object and subject-subject aspects of the human being. One block contains categories describing the most general, attributive characteristics of objects that can be a subject of human cognition (nature, society, symbols): “space”, “time”, “movement”, “quantity”, “quality”, “measure”, etc. These are in fact philosophical categories. Another block of universals are categories reflecting the experience of including the individual into the process of social interaction (communication): “good”, “evil”, “love”, “faith”, “hope”, i.e. specific forms of social consciousness.

According to the opinion of Russian cultural experts, culture is a set of over-biological programs and technologies of joint human vital activity, forming the world of artificial meanings, values and cultural-symbolic “codes”, with the help of which the experience of people’s life is accumulated and transferred from generation to generation. A.J. Flier writes: “While describing the basic parameters of culture, one should take into account the fact that humanity, being as a single biological kind, has never been a unitary social group … Many local cultures really existed on the Earth in history and they exist now. Some of these cultures are similar in their genetic characteristics, others differ as much as the natural and historical conditions of nations’ life are different. “No one’s” culture or culture in general does not exist”.³

In our view the development of the legal system is always caused by the biological, as well as social and cultural factors, because the human’s nature is bio-social-cultural, i.e. unitary, but three-dimensional. But the rigid differentiation of these parameters distances the legal systems that need a common understanding. For this reason, we offer cultural universals. They have an invariant component defining the limits of the knowledge of law in the form of conceptual ideas of philosophy, religion, morality, psychology, etc. Their variable component reflects the concrete-historical, ethnonational, collective and other features of the conceptualization of the law itself.

² Stepin V.S. *Filosofiya i universalii kul’tury* [Philosophy and universals of culture]. St Petersburg, 2000, p. 11.
The human, the world and nature are closely associated with the realization of the idea of the divine purpose, which is religious. However, we consider the relation “Human – World – Nature” per se as a primary philosophical relation. Christianity introduces a creational model of the world. A human was created in the image and likeness of God. But the human's nature is contradictory: it reflects on the one hand the divine essence and on the other hand the natural, sinful quality. How to overcome the imperfection of the natural elements of the human? Christianity does not deny the self-improvement of the individual, but the main emphasis is made on the deliverance and exaltation over nature. The man must conquer nature and the position of the perfect living being allows him to come closer to the knowledge of God with regard to other beings. The man is a God ordering the world of nature, a “microcosm”, but not a God of the universe, not a “macrocosm”. This is a key idea as it laid the foundation for the idea of nature's transformation and determined a leading role of the individual in the social, political and juridical projects of modern Europe. This approach is called “formation”. Its founder K. Marx wrote: “In general terms, the Asian, antique, feudal and modern, bourgeois modes of production can be defined as progressive epochs of economic and social formation”\(^1\). Therefore the growth of material production and the progress of human rights became the features of the European legal system for many centuries, and these provisions have been implemented in its own way in each of its components: either in Roman law or in Common law.

Unlike Christianity, Islam follows the emanation model of the world. The human is the image of God, but not the likeness of God, so the human cannot have all the attributes of God. God is the absolute fullness of being, from which the less perfect forms of being arise: humans, animals and plant nature. Consequently, “the human is already an organic part of the natural integrity and he should not be conquering it”\(^2\). But the human inherits the instincts and habits from an animal. The spiritual and moral perfection, science and faith help a person to rise to the essence of God, but not to fall down to the level of an animal.

Here we see a different civilizational understanding of the meaning of human history. It involves not the consecutive change of one social system by another but the moderate legal regulation of people's relations, “painted” in moral tones and religious shades. Islam shows that the law can be expressed not only in its own “legal form of industrial relations”, but also in the cultural and civilizational traits of ethnic groups that are missing or poorly represented among other nations. These features vary and can repeat cyclically.

The second cultural universal is a pair of concepts of “Human – God”, which represents a religious conceptual idea. In our opinion, it acts as the main characteristic


influencing the hierarchical structure of the sources of law in various legal systems, as
a rule, by decreasing the absoluteness of the divine principle and increasing the freedom
and significance of human activity. Here we talk about the sources of law from the
genetic point of view, i.e. about the origin of legal systems, but not from a functional
viewpoint, i.e. not about the current state of these sources, unless otherwise specified.

The law itself is always a determining factor of the life of society in the European law.
The law is what takes place outside the limits of human thinking, is an external formalized
education that orders the life of people and it is provided more by the public power and
force rather than by the authority of social institutions. However, the history of Europe
testifies to a different value of human and divine in relation to the law. The “divine”
esSENce of the human law was evident in the fact that the law had to be reasonable and
fair, but it was not always in the foreground in the period of Antiquity. It became crucial
in the Middle Ages. The human law, i.e. the positive law, had to conform to the divine
one. The secularization began and with the advent of modern times the human law
transformed into an abstract and self-sufficient law, not requiring divine sanctification.
Market, liberalism, democracy are the specific historical content of the cultural universal
“Human-God”, which is expressed in the modern European legal system.

M.N. Marchenko describes this process as the similarities and differences between
Roman Law and Common Law. The sources of Roman Law are arranged in the following
sequence, reflecting their importance for the human practice: statute, tradition, precedent,
and doctrine. The sources of Common law are arranged differently: precedent, statute,
delegated legislation, tradition, legal doctrine, and “judicial reason”.

Another view is observed in Islamic law. Historically, Islamic law is based on
a religious foundation, over which the fiqh ethical rules and practical norms are arranged
as “segments”, but only a few of them can be very conditionally seen as “legal”. This
synergetic system of the norms of religion, morality and “law” is usually defined as
shariAla, although this concept often includes adat – the traditions and customs of the
local community that was under the power of caliphate.

L.R. Syukiyaynen distinguishes four most ancient sources of Islamic law, or four
“roots of fiqh”: Koran, Sunnah, ijma, and qiyas. Koran is a sacred book of the muslims
which contains the eternal and unchanging truths, transmitted by Allah via the prophet
Muhammad to Muslims “at all times”, and Sunnah contains the oral sayings (hadiths)
of the prophet on various issues of Muslim life. But if Koran and Sunnah are the
manifestation of the divine laws, then ijma and qiyas are an expression of human laws.
Qiyas has arisen as the rational proposition by analogy from the need for adapting
Koran and Sunnah to the changing social relations, because in the sacred sources many
issues were not resolved either being formulated as multivalued or in the form of general
provisions, without details. The unanimous rational opinion of the scholars – ijma –

1 See: Marchenko M.N. Pravovye sistemy sovremennoi mira: uchebnik [The legal systems of the modern
has appeared in order to avoid the ambiguous interpretation and arbitrary application of qiyas in these issues. What appeared first, ijma or qiyas, is debatable.

The question of the essence of Islamic law continues to be relevant. For example L.P. Rasskazov and M.R. Kangezov believe that Islamic law in a broad sense is shariah, while law in the European sense (statutes, decrees, etc.) is an addition to the shariah. A.S. Stradanchenkov thinks that modern Islamic law is, first of all, codified legislation, but the norms of the shariah act as an informal element of the legislative culture.

Along with this there are also accessory sources of Islamic law, which have expanded the sphere of human understanding of Islamic “mononorms” on the basis of rational justification and logic. They did not interrupt the evolution of already existing islamic legal doctrine even in the era of taqlid (a return to a strictly dogmatic authoritative interpretation of shariah). These included: 1) the propositions of sahabah, i.e. Muhammad’s associates, who knew his opinion or will on different life’s situations; 2) decision by the discretion (istihsan); 3) proposition about the interests (maslahah mursalah), etc.

A similar situation also takes place in the Jewish law in which the structure of the sources of law reproduces the transition from the divine to human nature. The oldest source of Jewish law that we see as an analogue of Koran is Pentateuch (Torah). The interpretation and commenting of the Torah are fixed with the help of rabbinic tradition in the Talmud (oral Torah). The oral tradition of Jewish sages in the course of time was partially being reflected in the Mishnah, which is analogous to Sunnah.

We see a halacha in place of qiyas, i.e. more specific rule of behavior, not contained directly in the Torah, but derived from the Torah for the purpose of its concretization and updating. Finally, there is a complex regulator in Jewish law – Midrash – that can be confirming or generating, combining the techniques of interpretation, discretion and bridging gaps. However, Jewish law served as a source of the formation of the Ancient Roman and European law. Therefore its similarity with European law is that the positive, i.e. human, laws were recognized on a par with the divine laws.

Unlike European, Islamic and Jewish law, based on monotheistic religions, Hindu, African and Far Eastern (Chinese and Japanese) law is characterized by religious

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2 Rasskazov L.P. & Kangezov M.R., Musul’manskoe pravo kak raznovidnost’ religioznogo prava [Islamic law as a variety of religious law], Obshhestvo i pravo [Society and Law]. 2010, no. 1, p. 25.

3 Stradanchenkov A.S. Filosofsko-kul’turologicheskij analiz musul’manskogo zakonodatel’stva kak elementa kultury vostoka [Philosophical and cultural analysis of islamic legislation as an element of the Oriental culture], Bijulleten’ Moskovskogo gosudarstvennogo universiteta kul’tury i iskusstv [Bulletin of Moscow State University of Culture and Arts]. 2012, no, 2, p. 41.

pluralism. Hinduism is a system of religious, ideological and socio-philosophical views connected with faith in one or many Gods and with denial of the existence of God. The idea of God is “dissolved” in the nature, as in the pantheism in Africa and Far East. Here law is a secondary concept: the relations between people have been regulated by customs and traditions (in Hinduism), rites and rituals (in African law) or morals and manners (in China and Japan) from ancient times. This caused many comparativists to talk about “customary and traditional law” referring to these cultures.

The ancient Hinduism formulated the norms of decent or charitable conduct called \textit{dharma}, which were compiled in special collections \textit{sastra}, i.e. \textit{dharmasastra}. They differed from \textit{arthasastra} which including \textit{artha} – the norms of behavior of politicians engaged in management and merchants. Moreover the Hindu society was strictly divided into castes, so these norms were a reflection and binding to such social stratification.

R. David and K. Geoffre-Spinozi offer the following classification of the sources of Hindu law: «1) \textit{dharmasastra} – permanent and unchanging divine truths; 2) \textit{nibandhazy} – comments to dharmasastra, designed for interpretation, concretization and elimination of collisions between them; 3) \textit{customs} – a set of situational rules of human behavior that have changed over time; 4) decision in conscience and fairness in the case of gap. The legislation and judicial practice are not included on this list and refer to \textit{artha}¹.

The subsequent Muslim (16\textsuperscript{th} century) and English dominance (17\textsuperscript{th} – 18\textsuperscript{th} centuries) contributed to the deformation and assimilation of Hindu law. But it does not lose its considerable religious specificity in the sphere of the “personal status” of Hindus – marriage, family property, inheritance, legal capacity, even in the modern period of anglicized national (territorial) law of India.

African law was more mythological than Hindu law. It introduced a concept of unearthly natural forces – the remains and spirit of ancestors, protecting a social order from violations instead of God. The common element in a variety of African customs (\textit{fomba}) is a fear of violating the custom and infuriating ancestors. It follows that African law is a collective law that resolves a social conflict on the basis of consensus, reconciliation of the individual with the group, cohesion and uniting of the community before natural elements. But unlike Hindu law, African law was static and perceived nature and society as immutable substances, caused isolation and backwardness of the way of life on the continent.

The expansion of Christianity and Islam in Africa before the 19th century, as well as the European colonization, mainly in the 19th century, led to the acculturation. As a result, two large groups of African states appeared. Some are subjects of historical influence of France (Algeria, Morocco, Tunisia) and Belgium (Congo), and others – of England (Ghana, Nigeria, Kenya, South Africa). There is a noticeable tendency of penetration of the European law of metropolises into criminal, administrative, civil, commercial, i.e. public law in these states, and the usual rules of the local African law or less often Islamic law apply to private law issues: marriage, inheritance, land law, etc.

Y.A. Tikhomirov notes in this regard: “But still we should note the slow and contradictory use of the ideas of democracy and market in view of the conservatism of the consciousness and way of life of the population. They… so far rather destroy the social and natural environment of Africa, the worldview, psychology and culture of its peoples… Nevertheless, the impact of the norms of African interstate associations and institutions, as well as of general norms of international law, is more significant, and the general trend of many African countries is a gradual formation of the common territorial law”.

Chinese and Japanese law also fill the cultural universal “Human – God” with the ethno-national meaning. The Chinese legal culture of the “donor” decisively influenced the Japanese legal culture of the “recipient”. The Chinese worldview is based on the pantheistic idea of universal harmony and social peace, and unlike the African idea it was not mythological, but naturalistic. There are natural laws known as the Great Way dao, while the norms of “right” corporate behavior li, and in Japan they were called giri, correspond to them in the social world. All of them were in essence similar to the Hindu dharma, Islamic shariah and Jewish galacha, but they had their own characteristics. The moral and ethical self-regulators of behavior, which underlie Confucianism, always fought and won over the norms of the “written” laws that formed the footing of legalism in China.

For example, the concept fa or xin is the diametrical opposite of the li rules in China, of which fa means the law in a broad sense, and xin is only a punishment, associated with criminal law. The criminal law was called rizu in Japan. Despite this, as A. H. Saidov writes, “fa means only a punishment or reward even for legists… They regarded the positive law as a means of teaching, educating of people so that they can adhere to the principle of non-action”.

Modernization of the social system of China and Japan by “western standards” does not testify disappearance of the tradition at the present stage. It manifests itself in the form of widespread mediative procedures in resolving cases that give preference for compromise between the parties over procedures of the judicial satisfaction.

The third cultural universal is “Human – Society”. It is a complex universal, where several cardinal elements are distinguished. Firstly, it is “human – microsociety”, its nearest sphere of communication, for example, is the family. Secondly, “human – macrosocium” in which the human interacts with social institutions: the state, law, economy, power, etc. However, the foundations for these cultural phenomena are the universal moral categories of “good”, “well-being”, “evil”, “benefit”, “harm”, “interest”, etc., as well psychological regulators of “openness”, “emotional contact with others”, “isolation”, “restraint”, etc.

It is believed that the personal-confidential nature is inherent in marriage-family relations in the Russian mentality. The biological (reproduction), social (stability of social

1 Tikhomirov Y.A. Kurs sravnitel’nogo pravovedenija [The course in comparative law], Moscow, 1996, p. 134.
status, material security) and cultural attributes of a person close in meaning to moral
universals (love, friendship, mutual aid) are organically intertwined in the family. However,
for example, in German and Hindu law, there were other views on this account.

The marriage was a formal transaction of abstract subjects in German law, while
in Hindu law it is more a moral alliance of people on the principles of cooperation,
ad and support by the decision of parents. The civil code of Germany (BGB) in the
reduction of 1900 was based on the paternal and parental authority, and later on the
gender equality after the adoption of the FRG Constitution 1949. In India, in addition
to sex inequality there was a caste system before the adoption of Marriage Act 1955.
The property acquired during the marriage was first considered as a “husband’s capital”
and was shared between the spouses fairly in German law only after 1949. The family
and community always were proprietors in Hindu law, the property was ruled by the
husband, his father and brothers, but the woman acquired the personal property rights
on the salary, a part of the legacy of the deceased husband only in the 20th century.

The marriage was contracted and also terminated by the agreement of spouses in
German law, while the consent of the woman as a “gift to the husband” from her family
was not required in Hindu law from the ancient times, as well as the divorce was prohibited
and the polygamy was allowed. A radical change took place in the Hindu Marriage Act
1955: the marriage requires consent of the woman, the divorce is permitted in exceptional
cases, the polygamy is forbidden, etc. In these cases, we see a different semantic filling of
cultural universal “marriage”.

The morality regulates the relations between people within society. Every person
is naturally autonomous, but their way of life and behavior is also determined by
heteronomous (external) rules. Therefore, there is an inherent discrepancy or conflict
between the individual and society. The morality has always sought to bring them
together and minimize this conflict.

Two schools of thought interacted in the European ethics: the ethics of virtue that
arose in the era of antiquity, and the ethics of duty systematized by I. Kant. The ethics
of virtue is individual and is designed to motivate the person, their desire and volitional
efforts to achieve well-being. The ethics of duty is expressed as a universally valid
normative and regulatory system.

All this does not mean that there is an irreconcilable contradiction between the ethics of
virtues and the ethics of duty in Europe. In philosophical literature, there exists a reasoned
opinion that the ethics of virtue has remained within the limits of “morality”, and the
ethics of duty laid the moral foundation of the modern European law. R.G. Apresyan
correctly notes: “The concept of duty expresses the stimulating power of consciousness,
through which the human determines their position to different in content actions, aimed
at maintaining well-being. Wherein the commitment, diligence, responsibility as to some
extent mental, psychological, and behavioral mechanisms of duty are reasonably regarded
as virtues, and being traits of character are undoubtedly values”.

Apresyan R.G. K bazovomu opredeleniju morali [To the basic definition of morals], Filosofskij zhurnal
A.V. Smirnov believes that “unlike the European ethics, which is substantial, the Muslim ethics is always procedural, that is, it does strive to achieve any metaphysical goal, for example, the virtue, but it is important for the process of “doing good” (ihsan) itself, and the virtue is only one of the conditions of a moral and decent behavior”.

The convergence of the ethics of virtue and the ethics of duty meant legal protection of the basic moral values of the individual in European law. For example, F.M. Reshetnikov notes that the French institution of the death penalty evolved from the restriction of its application by the revolutionary Criminal Code of France 1791 to the expansion of its application by the “Napoleonic” Criminal Code 1810 and then to the abolition of the death penalty for political crimes in 1848. The protracted reform of Criminal law resulting from the adoption of the French Constitution 1958 led to the complete abolition of the death penalty in 1981, which corresponds to the Christian idea of a human life as the highest value. The system of criminal penalties looks in general like this in the current Criminal Code of France 1992: 1) life imprisonment; 2) imprisonment for a term; 3) fine; 4) deprivation of special rights.

F.M. Reshetnikov writes at the same time that “the reception of the Constitution and the Criminal Code of France took place without the direct colonization in the Islamic Republic of Iran in the 1920 and 1930s but before the people’s revolution in 1979. The new Constitution of the Islamic Republic of Iran 1979 became the basis for the reislamation of its legal system and established a rule on a mandatory compliance of all enacted laws with the shariah… The Council for the protection of the Constitution and Islamic norms (faqihs) reaches a conclusion on the compatibility of laws with Islamic norms… The types of criminal penalties are the following in the current Criminal Code of Iran 1988: 1) the death penalty; 2) corporal punishment; 3) imprisonment; 4) fine”.

“The death penalty is imposed for murder; drug-related offenses; political violence; other political crimes; “moral” crimes, such as adultery, prostitution, sodomy and repeated use of alcoholic beverages; robbery, apostasy. Wherein a person convicted of murder can be executed only with the consent of the nearest relative of the victim from among men who can choose ransom for blood (diya). But the death penalty, imposed for moral and property crimes, encroaching on the rights of God and the foundations of Koran, cannot be replaced by another sanction”.

“If we do not agree with the criminalization of religious misconduct (sins), cruel punishment or discrimination of women and non-Muslims in determining the amount of monetary compensation for a criminal offense in Islam, that we must admit that Islamic criminal law has similarities with Common law …at least in the situation of weak development of the common part of the branch and insufficient distinguishing of material, procedural and executive norms”.

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1 Smirnov A.V. Arhitektonika musul’manskoj etiki [Architectonics of Muslim Ethics], Ishrak: ezhegodnik islamskoj filosofii [Ishrak: Yearbook of Islamic Philosophy], no. 1, ed. by Ja. Eshots. Moscow, 2010, pp. 175, 176.
K. Zweigert and H. Ketz pointed out the general and specific features between legal systems and formulated a concept of “the style of legal thinking” by which they understood “an aggregate of ideological factors and doctrinal ideas about the legal system formed in the process of historical development and determining the specificity of certain legal institutes, sources of law and methods of their interpretation.”\(^1\) But in our opinion the most profound foundations of different styles of legal thinking are psychological regulators of “open/closed” rationality.

A typical example is the correlation between the English and French styles of legal thinking. The English thinking is aimed at open rationality following from knowing of the fact of narrow boundaries of the “island” geographical space where the English lawyer resides, i.e. the empirical fact. The truth lies for him in the experience of practice, in a precedent. The Frenchman lives within the framework of closed rationality. He knows that the boundaries of the continent, where he is staying, are extremely broad and cannot be perceived by feeling, but can be comprehended only in a speculative way, i.e. in the abstract notional formulas, generalized provisions of codes and laws.

However, the following is important from the standpoint of moral maxims. The Englishman always makes a decision based on the prevailing public opinion, and he tries to foresee the results and consequences of his actions through his openness to the world. Will it bring benefit or harm will be decided every next time. The French lawyer “self-legislates” in the spirit of I. Kant. The motive of the decision, which is thought out in advance and reasonably argued at the initial stage, is of primary importance for him. He knows the answer from the general principles of thinking, therefore he does not question it every time similar situations arise.

The questions about the nature of state power and the content of human rights are also equally important for understanding the semantic commonality of legal systems. Theoretically a state can be secular or theocratic. But the modern comparativistics notes that the constitutions of many countries of the world recognize a secular state in which religion and politics are divided. The religious life is a matter of concern for the spiritual leaders, and the questions of practical state management are decided by the political leaders. It is not necessary to amend the Constitution for these purposes. T. Khabrieva writes: «The constitutional reform can be carried out evolutionarily, firstly, through the concretization of constitutional norms in the current legislation, secondly, through the interpretation of Constitution by the bodies of constitutional justice, and thirdly, through the implementation of Constitution in ordinary judicial practice”.\(^2\)

For example, Art. 7 of the Constitution of the Italian Republic 1947 establishes that the state and the Catholic church are independent and sovereign in the sphere belonging to each of them.\(^3\)

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The preamble to the Constitution of India 1949 was also amended to constitute India into a Sovereign Socialist Secular Democratic Republic. Art. 36 of the Constitution of the People’s Republic of China 1982 and Art. 20 of the Constitution of Japan 1947 confirm the freedom of religion, but the texts of these Constitutions do not contain clauses about a secular state.

The Israeli state is unique among them. The Declaration of Independence of Israel 1948 is distinguished by a dichotomy: it simultaneously secures a freedom of religion for any person and the right to create a “Jewish state” as a national home for the entire Jewish people, living in different parts of the world. From the legal point of view Israel is not a theocratic state, but in actual fact this state is not completely separated from religion, since the religious norms operate in the sphere of marriage and family relations and the rabbinical courts resolve the family disputes.

It should be noted that there is an institute of the secular head of state – the president – even in Islamic states, where traditionally religion and politics closely depend on each other. For example, in Egypt where the power is repeatedly captured by military officials, the president is now a military field marshal Abdel Fattah el-Sisi. Nevertheless, Art. 2 of the newest Constitution of the Arab Republic of Egypt 2014 establishes that Islam is the religion of the state, and the Arabic language is the official language. The principles of Islamic shariah are the main source of legislation. Art. 3 of the Egyptian Constitution postulates that the principles of laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious issues and the election of spiritual leaders.

Talk we about the human rights in the modern world, we should note the “western” origin of this concept. However, this phenomenon is filled with particular civilizational features in every legal system. Along with the general tendencies of global world development, such attributes reflect a traditional spirit and the age-old way of life of different nations on the planet Earth. The human rights are one of the specific cultural universals that connect a human with the “microsocium” and “macrocosum” in the legal sphere. The goals pursued by the nations differ in understanding the significance of human rights.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 determines that the development and protection of human rights are necessary in order to achieve a greater unity between the members of the Council of Europe in the process of their integration. But it is important for the Europeans that the upholding

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human rights provides the ideals of the Enlightenment: freedom, justice and universal peace, democracy and the rule of law. The Muslim doctrine is based on the inseparability of human rights with their duties: moral duties towards society and the nearest human environment, as well as religious ones before God. For example, the Arab Charter of Human Rights and the Nation in the Arab World 2004 equally protects the human rights and the collective rights of the Arab nation, considering the Arab specificity and traditions, the elimination of the foreign financial dependence, participation in the protection of any part of the Arab world from external attacks, etc.

The African Charter of the Human Rights and the Rights of Nations 1981 is based on the same principles. It proceeds from the interdependence of the rights of nations, of individuals and their duties, it considers the historical traditions and values of African civilization, adapting them to the general international norms. The goal of the proclaimed Charter is a realization of the legitimate aspirations of the African nations to freedom and a guarantee of the right to development.

The American Convention of the Human Rights 1969 is distinguished, firstly, by the intention to strengthen the system of personal freedom and social justice in this hemisphere within the framework of democratic institutions and, secondly, by the recognition of broader norms in the field of economic and social rights.

Let us draw conclusions. The modern world is developing at the intersection of the formational and civilizational paradigms. On the one hand there are common standards of the most developed western countries of the planet, embodying the ideas of progress and formational evolution. On the other hand we must inevitably admit that there are unique features of the national, climate-geographic, spiritual, or historical development of each nation called its civilizational features. The absolutization of the “old” formational approach leads to globalism. The exaggeration of the civilizational approach generates regionalism.

We can also conclude that there should be something in common that connects legal systems of the modern world, giving them a sense of unity. These are cultural universals. We have discovered their basis or core: the biological, social and cultural components of the human nature, as well as the variable part that fills these components with different legal contents among different nations, civilizations and cultures. We have included

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a human, world, nature, god, society, family, power, state, human rights, etc., into the composition of main cultural universals. The list of these universals cannot be exhaustive. One can single out different types and subtypes of universals, for example, parents, children, democracy, authoritarianism, mode of life, celebration, play, ritual, art, etc.

The cultural universals do not simply combine formational and civilizational, global and regional elements in the study of legal systems. They allow to solve the issue of the correlation between tradition and modernization in legal development. As is known the legal tradition presupposes the preservation of the existing social order and the protection of those legal values that serve this order. The legal modernization aims at destroying traditional legal values and replacing them with new, more advanced and meeting the challenges of the time. But the paradox is that there is no hard line between these phenomena. The legal tradition is always capable of renewal, and legal modernization cannot be implemented without taking into account well-established traditions. Therefore the legal modernization cannot be “one for all”, instead there are many «modernizations».

The cultural universals are necessary for maintaining a constant dialogue between legal systems on the basis of universal human values, understandable and assimilated by each nation, about which we wrote at the beginning of this article. We use common universal concepts instead of common standards, western or other. Thereby the cultural universals are the bearers of the meaning of law, which is given for different nations and in general for the entire civilization of the Earth in this era of historical development. V. Lazarev convincingly showed the exclusive meaning of the term “integrative perception of law” as exactly what will help, in our opinion, to understand the essence and general social features of legal systems most fully and deeply1.

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LEGAL SYSTEM AND LEGAL DOCTRINE OF THE RUSSIAN STATE:
PROBLEMS AND PROSPECTS

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Abstract: The article deals with the modern theoretical understanding of the legal system of the Russian state, reveals various doctrinal points of view and approaches (broad and narrow) in relation to its content and principles of classification. The main problems of understanding the content of the legal system of Russia are listed. The place, significance and role of the legal doctrine in the legal system of Russia are discussed in detail. The general theoretical characteristic of the legal doctrine is given, its functional and practical significance in the legal system is justified; its role as a source of law in historical retrospect is noted, and key features are revealed, in the context of its contemporary manifestation. The prospects for the development of the legal system of Russia, in particular, through universalization with other legal systems, are singled out separately, it is noted that it is the legal doctrine that can provide scientifically based and most effective support of these processes.

Keywords: legal doctrine, legal system, source of law, state, law, classification, legal understanding, practice, theory.

The modern legal system of Russia, despite its progressive development and historical transformation from one form to another, while renewing its content, structure and functionality, stays within the cultural, historical and socio-political processes. The gradual development of the legal culture, ideology, power structure, society, ultimately affected the directions of the modern legal doctrine. The reorganization that took place in the field of law and the legal system over the past two decades could not have occurred without the active participation and influence of the legal doctrine. The increasing role of the legal doctrine in the Russian legal practice is a characteristic feature of the
Russian legal practice, which, acting as a scientifically grounded criterion of efficiency, legitimacy, systemic approach and rationality, is becoming increasingly important for individual elements of the legal system of society and the state and contributes to the formation of appropriate benchmarks at all levels of the legal system.

First, within the framework of the declared topic, it is necessary to begin by examining the main doctrinal approaches and problems of understanding the legal system of the Russian state.

On the issue of understanding the legal system, in the legal literature there are various approaches (broad and narrow) and methods of studying this phenomenon. A broad approach, in addition to the entire system of legislation and the system of law (that is, the entire system of positive law), includes also theoretical and philosophical grounds in the legal system, such as: legal culture, legal practice, legal consciousness, legal education, moral guidelines, legal facts, etc.). The follower of this approach M.I. Baitin noted that the legal system is a set of internally organized and interconnected, socially homogeneous and aspiring to the common goals legal phenomena of a given society. Each phenomenon fulfills its specific role in legal regulation or going beyond it legal effect on public relations\(^1\). A wide approach to understanding the legal system is also applied by N.I. Matuzov, who defines the legal system as a broader reality, encompassing the whole set of internally coordinated, interrelated, socially homogeneous legal means (phenomena) through which the official (public) power exerts a regulatory and organizing and stabilizing influence on social relations and human behavior\(^2\). V.N. Sinyukov writes about the modern legal system of Russia as the most complex set of elements, structures, norms, ideological trends, psychological reactions, images, traditions of cultural, historical, socio-political, technical and legal specifications. In a broad sense, he notes, it is a whole legal world, having its own life organization, sources, archetypes, history and future\(^3\).

The well-known French comparative lawyer R. David\(^4\), when classifying various national legal systems, described legal systems of the same type as «legal families». Analysing them, i.e. the sources of law, the structure of existing law, terminology, legal principles, designs, methods, practices, etc., he proposed classifications of «legal families of the modern world»: a Romano-German legal family, a family of common law, a family of socialist systems of law, philosophical or religious systems.

In the Russian legal science, on the whole, the position on the classification of legal families in the modern world, proposed by R. David, dominates, in spite of the fact

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1 Baitin M.I. *Sushchnost’ prava (Sovremennoe normativnoe pravoponimanie na grani dvukh vekov)* [The essence of law (Modern normative legal understanding of law on the verge of two centuries)] Saratov: Saratov State Academy of Law Publ., 2001, p. 182.


4 David R. *Osnovnye pravovye systemy sovremennosti* [Basic legal systems of our time], Moscow, Progress Publ., 1967, p. 25.
that the above-mentioned analysis of criteria and classification of «legal families of the modern world» (Romano-German family, family of common law, family of socialist systems of law, philosophical or religious systems) are a general, superficial classification, which is rather vague. In many respects it is different from the law that is developing in modern world practice and methodology systems. Based on the mentioned above criteria of analysis and classification, any legal system and law, first of all, are analyzed and evaluated only from the point of view of their formal, external characteristics. Of course for the law it is crucial as without formally defined (universally binding) stipulations of the state the law cannot exist, but this is not enough. At the same time, the question of content or the essence of law is not being raised at all. The law is understood and presented as a system-centered model (as a positive law in which the interests of the state dominate the interests of an individual and citizen), without establishing: the essence and the meaning of law; relations of the state to the law; relations between authorities and society; relations of the government institutions and society to the principles of international law, enshrined in international pacts of natural rights and freedoms of an individual, etc. V.D. Zorkin, speaking at an international conference, stressed that «the state of the entire legal system of the country and therefore the entire system of social relations, regulated by law, depend directly on what type of legal thinking dominates in the legal science, what concept of law is the basis of the Constitution and the current legislation and what understanding of law the law enforcement officials adhere to in their activities”¹. Theoretical and methodological requirements to the law and legal system are ignored and do not constitute any theoretical elaboration. But in order to conduct research within the framework of a comparative legal method and accordingly before building any criteria for classifying and analyzing objects (similarities and differences), it is necessary and quite justified to begin with establishing an approach to legal understanding (the initial, substantive, conceptual classification), determining the legal nature of the legal systems that are being compared, as it is the law which the basis of a legal system. In this regard, we find the position of Academician V.S. Nersesyants to be valid and consistent. In relation to the topic in question, he noted that a comparative study of different objects (different regulatory systems) is a comparative law only on condition that the compared objects have a conceptual unity, i.e. represent different (in terms of their socio-historical development, national specifics, doctrinal development, legal and technical characteristics, terminological features, etc.) forms of manifestation of the same legal entity. Therefore, for any consistent scientific concept of the comparative law (and the corresponding classifications of the forms of law being studied), the general concept of law (the understanding of what is law, what is its specificity, how it differs from non-legal regulators, etc.) which underlies

the corresponding concept of comparative law study is of fundamental theoretical importance. One cannot but agree with V.V. Oksamytny, who proposed the following universal interpretation of the categories of the legal system: law, understanding of law, sources of law, legislation, legal institutions, the mechanism for exercising the law, the results of the operation of law.

A similar approach is followed by Yu.A. Tikhomirov, according to whom the legal system includes four groups of elements:

– understanding of law – legal views, legal awareness, legal culture, legal theories and concepts, as well as legal nihilism;
– law-making as a cognitive and procedurally designed way of preparing and adopting laws and other legal acts;
– legislation – a structured set of officially adopted and interrelated legal acts;
– enforcement – ways to implement legal acts and ensure legality.

In our opinion, the legal system is not just an abstract category, which is a set of all legal phenomena and concepts working automatically. It is the result of a social compromise and at the same time intellectual activity, the effectiveness of which directly depends on scientifically grounded, practical algorithms of the legal doctrine. Naturally, the legal doctrine is quite a complex element of the legal system, with its own reasons, laws of origin, stages of development and acting as a regulator of various social relations. The legal doctrine as a system of knowledge, teachings, concepts, principles, implemented by the scientific community in relation to state and legal phenomena of our existence, is a development direction not only for the legal science, but for the whole legal system of the state. By the doctrine, in particular, one should understand the philosophical, political, religious concept, theory, doctrine, system of views, guiding theoretical or political principles. At the same time, it is possible to divide doctrines into official ones created at the national or supranational level (expert opinions cited above), and scientific, created in universities and other professorial associations.

In Russia, the doctrine as a source of Russian law is not officially recognized, but in fact it is. In the scientific literature, on the question of whether the legal doctrine has the status of the source of law, completely opposite points of view are often expressed, and there is no common opinion on this issue in the Russian science.

From the point of view of historical analysts, the legal doctrine as a form (source) of law had a special significance in the legal system of the Ancient Roman state.

2 Oksamytny V.V. Pravovye system v komparativistkom izmereni [Legal systems in the comparative dimension: history and modernity], Byulleten' Bryanskogo gosudarstvennogo universiteta [Bulletin of Bryansk State University], 2012, no. 2, pp. 145–148.
greatest value of the legal doctrine as a form (source) of law was assigned to edicts of magisters and practical activities of Roman lawyers. It was the edicts of the magisters that were one of the forms of the legal formation of Roman law, which in the course of time acquired the importance of a program document. One of the main sources of Roman law during the period of the Empire were the writings of the most recognized Roman lawyers of the classical era. Thus, Octavian Augustus ruled that an authoritative explanation of the questions of law (Latin responsa) is given, as it were, on behalf of the emperor; Tiberius initiated the practice of empowering some of the most authoritative lawyers with the «right of answers» (Latin ius respondendi). The counsels of lawyers (responsa prudentium), who received this right, were mandatory for officials of the empire.¹ All this once again shows that the doctrinal recognition of law was inherent in the legal life of the Empire, and consequently, all subsequent states that perceived this legal system as well. The Roman-German legal family, giving considerable place to the legal doctrine, is an heir of Roman law, while the Anglo-Saxon legal system borrowed a number of institutions also from Roman law. O.A. Omelchenko noted: «Many features of the general legal tradition, many legal institutions and dogmatic categories of modern legal systems go back directly to the principles and structure of Roman law, were developed either on its basis or with its critical perception. Individual principles and dogmas that go back to Roman law continue to live in modern law – explicitly or implicitly, in a directly borrowed form or being refracted through their own national tradition.»² The Renaissance and the Enlightenment gave a whole galaxy of thinkers whose iconic representatives include Machiavelli, Boden, Bacon, Altusius, Grotius, Spinoza, Hobbes, Locke, Voltaire, Montesquieu and many other thinkers whose works were and still are of invaluable importance for the development and formation of the legal systems of our time.

Academician T.Ya. Khabrieva in her monograph on the parliamentary law of Russia noted that “the doctrine is also important for solving the problem of content of acts regulating parliamentary activity, for the optimal construction of the system of parliamentary law itself, for harmonizing its various parts and establishing their conformity to competence of the national parliamentarism. Building the concept of Russian parliamentarism on this basis will take on a form that corresponds to the current level of development of humanitarian knowledge and will undoubtedly find its consolidation in legal sources of parliamentary law”.³

According to pluralism of opinions concerning the legal doctrine, we can determine the positive qualities and characteristic differences of the legal doctrine. It is true that

¹ Skripilev E.A. Digesty Yustiniana – osnovnoy istochnik poznaniya rimskogo prava [Digests of Justinian – the main source of Roman law], Digesty Justiniana [Digests of Justinian], Nauka Publ., 1984, pp. 7–18.
the legal doctrine today is actively progressing and producing «fresh» ideas for the development and effective functioning of the legal system. Legal doctrine as a source of law in its modern meaning has the following key features:

- has a formal certainty (legal force), therefore is compulsory for all;
- the sphere of implementation is a legal policy, but in some legal orders it is realized through precedents;
- reinforced by legal traditions and law family;
- the legal doctrine should be filled with exclusively legal content, as the religious element can be present for example in the system of Muslim law;
- the legal doctrine must be stable and have certainty.

As a source of law in a functional sense the legal doctrine performs the following functions:

- affects the legal consciousness of the legislator;
- develops and contains legal terminological tools used in law-making and enforcement;
- promotes the implementation of effective legislative and law-enforcement activities;
- promotes optimization and efficiency of the entire legal system;
- contains scientifically grounded knowledge on the development of state and law institutions.

The legal doctrine saturates the legal system with legal terminological content, a set of ideas and views, and discloses the rules of legal logic. According to its formal, content and functional features, the legal doctrine can be attributed to ideological sources of law not only in historical retrospect, but also in relation to the practice of the functioning of law in modern Russian society and the state. This is expressed, firstly, in the fact that the legal doctrine, like legal sources, is formally defined; secondly, it is based on positive experience of practice, accurately and deeply reflects its rules of development; thirdly, the possibility and admissibility of its application are built on the respect and authority of the opinion of well-known and recognized legal scholars; fourthly, the implementation of the legal doctrine is carried out at various levels of the legal system, especially at the state level, including by translating it into regulatory legal acts.

In the legal literature there is also another opinion on the issue of understanding the legal doctrine. In the opinion of S.V. Baturin, the legal doctrine is «a system of ideas, views and provisions of a fundamental conceptual nature that are developed by the legal science, mediated to legal practice and therefore have a universally valid character for the legal system, because they are based on universally recognized principles and values,

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ahead of rules and trends of legal development of the country, are shared by authoritative opinion of legal scientists and, thus, formulate a certain type of legal understanding, in accordance with which the Russian legal system functions.”

According to E.O. Madaev’s opinion, the regulatory potential of the doctrine in the modern Russian legal system is realized through four main channels:

– by fixation the declarative norms which have the doctrinal origin, definitional norms and norms that are principles in the legislation;
– by issuing documents of a political and legal nature such as «doctrine» or “concept”;
– through acts of doctrinal and official interpretation of law, including, first of all, through documents of the highest judicial authorities;
– in law-enforcement practice in resolving legal conflicts, filling gaps in legislation, using the right of judicial (and other law enforcement) discretion granted by the legislator.

Such an understanding of the legal doctrine, as it seems, is typical for its broad interpretation. But we should pay attention to the fact that this author treats the doctrine not as a legal science in all its diversity, but only as a systemic and conceptual idea bearing the imprint of the type of legal understanding. In turn, this approach exaggerates the role of the legal doctrine too much, saying that the legal system operates on the basis of the legal doctrine. However, this is not entirely true: the legal system operates on an equal footing with the law itself expressed through its institutions, while the legal doctrine contributes to the formation of a legal system, for example, through such a form of expression as legislation, but does not exist as a direct interdependent system: legal doctrine – the legal system.

Our country, having taken the vector of direction towards the establishment of a legal, democratic, social and nation-wide state in its essence, allows to coordinate the legal system to the extent possible and permissible within the framework of the Romano-Germanic law system.

Today there is a tendency of convergence of the two legal systems. The Anglo-Saxon legal system is increasingly characterized by the extensive legislative regulation of the procedural forms of the work of the courts, the expansion of the substantive law base, while the countries of the continental law system have begun to apply the decisions of the judges to fill gaps in legislation. The role of precedents has received certain recognition.

But the rapprochement with the legal system of the states of the world through the universalization of the legal system within the framework of one law family is reflected also in the presence of certain contradictions in the legal doctrine itself.


It should also be noted that the Russian legal doctrine in the context of its modern formation, developing quite actively, has not had enough time to form a sufficient fundamental base of original ideas about the law. As has been repeatedly noted in the scientific literature, science is lagging behind, to a certain extent, the demands of the legal doctrine and legal policy, which is reflected in the regulation of processes and phenomena of the surrounding reality by trial and error method. Because of this approach sometimes we have to borrow certain legal institutions and legal constructions from other legal systems. But borrowing can be controversial, and only the competent and well-developed progressive legal views and normative concepts are capable to resolve these contradictions, the number of which has recently increased.

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REVIEW OF THE XIII ANNUAL STUDENT MODEL TRIAL “ALL-RUSSIAN JUDICIAL DEBATE”

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Abstract: The article is devoted to the student model trial “All-Russian judicial Debate” which took place at Law Faculty of Kazan Federal University on 20–21 April of 2018. Students of the best universities and law academies of Russia get together
in Kazan every year to show their talents in five jurisprudence spheres. All-Russian judicial debate unites hundreds students within Russia and foreign countries. The article describes the main stages of how the idea of this event emerged, important issues of legal reality and results of discussions in the frame of sections of the conference. In addition, the scientific-educational and scientific-practical component of the project is disclosed. In addition to the above, the article introduces readers not only to tradition of debates at Law Faculty of Kazan Federal University but also to “schools of debates” at law faculties of other universities in Russia. There is also information on researchers and representatives of the judiciary and law enforcement systems, who act not only as judges at the Debate but they are also long-term partners of the project.

Keywords: Law Faculty, Kazan (Volga region) Federal University, All-Russian Judicial Debate, student self-government, Student Scientific Society, conference, debate.

On 20–21 of April 2018 Law Faculty of Kazan Federal University opened its doors for the 13th time for the students from all over the country to join a unique project – All-Russian Judicial Debate. The goal of All-Russian Judicial Debate is to gain insight into law reality issues in the sphere of national law, reinforce relationship with Russian universities, exchange theoretical and practical knowledge of law and prepare students to participate in real trials in an atmosphere as close to the real-life processes as possible.

Law Faculty of Kazan university is a fast developing center of classic law education, talented scientists and modern school of law science. From the very start, the foundation of Kazan law school was based at the interface between theory and practice, a proportionate combination of studying process and research undertaken by students and professors. Currently the idea of improving education through the involvement of students in the research is actively promoted at the Faculty. The research work by the students is a unique “workshop” for young scientists, the guarantee of their successful professional training.

One of such forms of scientific research is a large-scale event for the law community – All-Russian Judicial Debate. Cooperation of Kazan Federal University with the leading schools in higher education, the dynamics of law processes in the area of national law and the development of civil, criminal, constitutional and educational law proceedings create great conditions for organization of “All-Russian Judicial Debate” student model trial.

The Debate was a pioneer project among this kind of events for students of law departments. Such form of research and scientific practice goes beyond traditional conferences, forums, seminars and others. All-Russian Law Judicial make the studying process deeper, more effective, live and maximally close to the future work for students.

The origins of All-Russian Judicial Debate are far back in 2005. At that time the Debate was held at Law Faculty of former KSU of V.I. Uljanov-Lenin only for the students of the department, but wide perspectives of this project could be already foreseen then. It was already 2006 when the students tried out a new direction of the debates – criminal law proceedings.
The implementing this direction involved new trainers, new participants and new judges. The training of Kazan university team was imposed on the Department of criminal procedures and criminalistics of Law Faculty. More than one generation of honorable debaters, who not only represent the department and university, but also successfully achieve professional goals, grew up under the management of Antonov Igor Olegovich, the Head of Department, and with the support of professors Marina Evgenyevna Klukova, Marat Minifayetovich Shamsutdinov and Nadezhda Georgiyevna Muratova.

Also since 2006 the Debate acquired the status of All-Russian, each April gathering the best students of the country, which definitely marked a new stage in the history of the Debate.

Then since 2010 a compendium of legal positions of member teams is issued to outline the results of the model process.

Since 2016 two more directions appeared in the structure of the Debate – Constitutional law proceedings and civil legal proceedings in the courts of general jurisdiction.

In 2017 the section of “Trade Union Debate” was held the first time – a model process in social-educational law, the goal of which was to develop and determine students’ knowledge and practical skills in the area of educational law and processes.

Over many years of the Debate's history new scientific schools of debates have appeared in Russia. Thus the mentors of the member teams represent Kazan school of debate; these are Marat Vladimirovich Fetukhin, Honored Lawyer of the Republic of Tatarstan, Associate Professor of the Department of Environmental, Labor Law and Civil Procedure of Law Faculty of the Kazan Federal University, Yury Mikhailovich Lukin, lawyer of the Chamber of Advocates of the Republic of Tatarstan, head of student research work of Kazan University Law Faculty, Senior Lecturer of the Department of Theory and History of State and Law and Marina Evgenievna Klyukova, Honored Lawyer of the Republic of Tatarstan, Associate Professor of the Criminal Procedure and criminology Department of Law Faculty of Kazan Federal University. The representative of Rostov school of debate is Elena Sergeyevna Smidgina, an expert of the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation, Associate Professor of Southern Federal University. Saratov school of debate is represented by Mikhail Yuryevich Lebedev, Associate Professor of the Saratov State Law Academy. Representative of Ekaterinburg school of debate is Evgenia Rudolfovna Rusinova, Assistant Professor of the Civil Procedure Department of the Ural State Law University.

Yuri Mikhailovich Lukin started “Judicial debate. Junior League” club, realizing the need to train students of junior courses without beforehand preparation. The club is a starting point for future lawyers, for future debaters. Preparation and participation of new students of the department does not only support prestige of Kazan debate school, but it is also a real part of the studying process and an objective need for the students to have hands-on experience.

It is to be noted that the Student Science Club “Judicial debate” is run at the department. Its irreplaceable mentor and an inspiration for the students, Associate Professor Marat Vladimirovich Fetukhin, has been making a lot of effort to prepare the teams for judicial debates for many years and, as it is seen, it is producing results.
Speaking of trainers of member teams in civil law sphere, it should be stated that both Marat Fetyukhin and Yuri Lukin, being practicing lawyers, do not only prepare students for “adult life” and participation in the debates, but also share their knowledge and professional secrets, interesting and curious cases from their practice, the tactics of speaking in court and presenting their position, in other words their rich experience. Therefore, touching on the subject of preparation, it is more appropriate to speak of preparing a worthy replacement, of keeping the elitism and prestigious status of the profession and the name of a “Lawyer”. But discussing trainers and their contribution to trainees’ preparation would be impossible without mentioning who the trainees become. Thus the alumni of “Judicial debate” club currently take leading positions in the largest law companies of Russia, they become the managing partners or stay at the department and share their knowledge with the new students. Some of the alumni become the representatives of legislative, judicial and executive authorities.

It is worth mentioning that the graduation from the university and the club does not mean the interruption of links and breaking contacts. Both the trainer and the debaters will always remain one big close-knit family, each member of which is ready to give advice at any time, share new experience and support.

It must be stressed that both a real and model trial cannot do without worthy judging. Annually the leading experts in the field of jurisprudence are invited as judges: scholars, teachers, judges, prosecutors, solicitors, legal advisers and others. Traditionally, the jury judges for the section of civil proceedings are such leading experts as Professor of the Ural State Law University Dmitry Borisovich Abushenko; Senior Lecturer of Samara State University and a retired judge Vyacheslav Yuryevich Gusyakov; Professor of Russian Academy of Justice Askhat Nazarbaliyevich Kuzbagarov; Assistant Professor of Moscow State University Sergey Vladimirovich Moiseev; solicitor Andrei Alekseevich Pavlov; judges of the Supreme Court of the Republic of Tatarstan Rafail Valievich Shakiryanov, Eduard Il’isiyarovich Abdullin, Radik Shamilevich Adiyatullin, Ramil Gapteraufovich Bikmiev; Head of the military prosecutor’s office of the Kazan garrison Sergey Vladimirovich Gorb.

In addition representatives of the business community as future employers of prospective talented young lawyers participating in All-Russian Judicial Debate are invited as guests of the event. The annual participation of students from leading Russian universities, the professional judiciary and the excellent organization of the event with an exciting final make All-Russian Judicial Debate a unique scientific project.

Thus the students of best universities, academies and institutes of Russia gather in Kazan annually to try their hand in five directions: civil proceedings in arbitration courts, civil proceedings in courts of general jurisdiction, criminal proceedings, constitutional proceedings and the trade union section. Each higher educational institution that took part in this event represented its own university with one or several teams in each direction. All-Russian Judicial Debate unites hundreds of students across Russia. In addition, in 2018 Law Faculty of Kazan (Volga region) Federal University hospitably received students from abroad during the Debate. Thus the Debate is expanding its
geography reaching already the international level. In 2018 the event was attended by students from the Transnistrian State University named after Taras Shevchenko and universities of Kazakhstan including Almaty Management University.

More than 450 students sent their applications for participation in Debate 2018, of which only 200 became the participants. The teams competed among themselves in rounds, demonstrating to their opponents the skill of oratory, knowledge in various branches of law, and the ability to analyze legal facts.

All-Russian Judicial Debate was covered in such mass media as the official portal of the Prosecutor’s Office of the Republic of Tatarstan, the Supreme Court of the Republic of Tatarstan and other sources.

All-Russian Judicial Debate is traditionally held in late April and the entire event takes two full days.

The opening ceremony took place in the oldest beautiful lecture hall of Kazan University. All-Russian Judicial Debate opened with a welcome address by Liliya Talgatovna Bakulina – Dean of Law Faculty of Kazan University, Ildar Shafkatovich Khalikov – Chairman of the Tatarstan regional branch of the All-Russian Public Organization “Association of Lawyers of Russia”, Yuliya Vladimirovna Vinogradova – Director of the Department for Youth Policy, Social Issues and Development of System of Physical Education and Sport of Kazan Federal University, Azam Khisamov – judge of the Supreme Court of the Republic of Tatarstan.

At the opening there were also judges of the Supreme Court of the Republic of Tatarstan Rafail Valievich Shakiryanov and Maxim Mikhailovich Nurmiyev, Ramziya Anasovna Mingaleeva – member of the Board of Chamber of Advocates of the Republic of Tatarstan, Andrei Andreyevich Gorlenko – Director General of the Institute of Modern Arbitration, Elena Sergeevna Smagina – Head of the Department of Civil Procedure and Labor Law of the Faculty of Law of the Southern Federal University. The participants and guests of the Debate were also welcomed by the partners of the event, represented by the Tatarstan regional branch of the All-Russian Public Organization “Association of Lawyers of Russia”, the company “InfoCenter “ConsultantPlus” – the Regional Information Center ConsultingPlus in the Republic of Tatarstan, the publishing house “Statut”, the education center “Comfest”, Editorial Board of the journal “Herald of the Civil Process.”

The administration of the Faculty and honorary guests expressed their heartfelt wishes to the participants wishing them effective work and stimulating discussions. They expressed hope that this celebration of science will make a real contribution to the collaboration between higher education institutions and will facilitate the establishment of contacts between scientific schools.

After the opening ceremony, the participants were invited to attend informational and cognitive for the students masterclasses run by the experts who shared their rich invaluable experience with the participants. A genuine excitement among the tired but interested participants was caused by the masterclass with Marat Fetyukhin, Associate Professor of the Department of Environmental, Labor Law and Civil Process of Law Faculty of Kazan Federal University and practicing lawyer Rustam Yusupovich.
Samigullin on the topic: “The algorithm of preparation for All-Russian Judicial Debate and the main criteria for judicial discretion”. Also the masterclass gave the floor to the famous Kazan lawyers Emil Amirovich Gataullin and Mikhail Grigorievich Raskin. After giving the lecture, the lawyers answered all the questions, shared their knowledge and gave useful advice to the students.

An equally stimulating and interesting masterclass on the subject: “Proportionality and oratory as components of Constitutional judicial proceedings” was given by Sergey Sergeevich Zaikin, Candidate of Legal Sciences, Senior Lecturer at Kutafin Moscow State Law University. He is a judge of the Constitutional Justice Competition “Crystal Themis” and a member of the editorial board of the scientific journal “Comparative Constitutional Review”. Sergey Zaikin was awarded the 3rd prize at the competition of the Central Election Commission of the Russian Federation for the best work in electoral law and election process, increasing legal and political culture of voters (referendum participants), election organizers and participants in election campaigns.

The final act of the first day was the first round of battles. Thus at Kazan Alma mater simultaneously for two hours, there were about thirty fights. Students in each of the sections, in an atmosphere of heated discussion at a very high professional level, fiercely defended their point of view, giving arguments in defense of their legal position.

The arbitrators at the battles of the model process were practicing lawyers and judges:

Vyacheslav Yu'evich Gusyakov – Deputy Chairman of the International Union of Lawyers, former judge, Associate Professor of the Faculty of Law of Samara State University, Candidate of Legal Sciences;

Rustem Timurovich Miftakhutdinov – former judge of the Supreme Arbitration Court of the Russian Federation, Associate Professor of Kutafin Moscow State Law University;

Azat Khamzovich Khisamov – judge of the Supreme Court of the Republic of Tatarstan;

Igor Nikolayevich Smolensky – judge of the Arbitration Court of the Volga Region;

Aidari Rustemovich Sultanov – Head of the Legal Department of PJSC «Nizhnekamskneftekhim»;

Andrey Vladimirovich Yudin – Professor of Samara State University;

Andrey Andreevich Gorlenko – Director of the Institute of Contemporary Arbitration;

Emil Amirovich Gataullin and Mikhail Grigorievich Raskin – lawyers of the Bar Association «Raskin and Partners»;

Sergey Sergeevich Zaikin – Senior Lecturer of Kutafin Moscow State Law University;

Elena Sergeevna Smagina – Head of the Department of Civil Procedure and Labor Law of the Faculty of Law of the Southern Federal University;

Evgenia Rudolfovna Rusinova – Associate Professor of the Ural State Law University;

Rustam Yusupovich Samigullin – practicing lawyer;

Ayrat Damirovich Iskhakov – Associate Professor of the Academy of the General Prosecutor’s Office of the Russian Federation;

Rushan Danilevich Mardanov – judge of the Supreme Court of the Republic of Tatarstan;

Olga Igorevna Migunova – judge of the Supreme Court of the Republic of Tatarstan;
Murman Davidovich Silagadze – judge of the Supreme Court of the Republic of Tatarstan;
Aidar Rafaelevich Ishmuratov – judge of the Supreme Court of the Republic of Tatarstan;
Mars Ravilevich Samitov – judge of the Supreme Court of the Republic of Tatarstan;
Renat Rimovich Valeev – Head of the Investigation Department in Vakhitovsky District of Kazan;
Svetlana Iskanderovna Sarayeva – Senior Inspector of the Organizational and Control Department of the Administrative Department of the Criminal Code of the Russian Federation for the Republic of Tatarstan;
Ildar Anvarovich Mukhametzyanov – prosecutor of the Criminal-Judicial Department of the Prosecutor’s Office of the Republic of Tatarstan;
Milyausha Anvarovna Idrisova – Judge of the Vakhitovskiy District Court of Kazan;
Eduard Evgenevich Safonov – Chairman of Kazan Garrison Military Court;
Alexander Pavlovich Salapov – Head of 384 Military Investigation Department of the Russian Federation for Kazan garrison;
Andrei Vyacheslavovich Sysolyatin – military prosecutor of Kazan garrison;
Irina Stepanovna Petrova – Senior Assistant to the Prosecutor of the Republic of Tatarstan;
Rustem Iskanderovich Adiatullin – Head of the Second Department for Investigation of high-profile cases of the Criminal Code of the Russian Federation for the Republic of Tatarstan;
Evgeniy Batyrovich Sultanov, Associate Professor, Head of the Department of Constitutional and Administrative Law of Law Faculty at KFU;
Alsu Makhmutovna Khursatullina, Assistant at the Department of Constitutional and Administrative Law of Law Faculty of KFU;
Aleksandr Lvovich Vasin – former judge of the Constitutional Court of the Republic of Tatarstan, Senior Lecturer of the Department of Constitutional and Administrative Law of Law Faculty at KFU;
Artem Sergeevich Tarasov – Assistant at the Department of Constitutional and Administrative Law of Law Faculty of KFU;
Zarina Nailevna Nutfullina – adviser to the judge of the Constitutional Court of the Republic of Tatarstan;
Julia Vladimirovna Safiullina – Head of the Scientific and Analytical Department of the apparatus of the Constitutional Court of the Republic of Tatarstan;
Rustam Samatovich Sadykov – leading consultant of the Scientific and Analytical Department of the apparatus of the Constitutional Court of the Republic of Tatarstan;
Rosalia Zakievna Gaifutdinova, Associate Professor of the Faculty of Law at Naberezhnye Chelny Institute, branch of KFU;
Ivan Aleksandrovich Novikov – a graduate of the club «Judicial Debate»;
Rafat Khanifovich Khamidullin – lawyer of the company «Sphere of Law»;
Rustem Azatovich Yantikov – lawyer of the company «Sphere of Law»;
Iskander Rinatovich Asatullin and Ayrat Ramilevich Davletshin – graduates of the club «Judicial Debate»;
Konstantin Valentinovich Egorov – Director of the law firm «StroyKapitalKonsalting».

At this point the official and educational part of the first day of the event was over. The second day of All-Russian Judicial Debate began with the announcement of the results of the first round, when the participants were facing an agonising wait. After the announcement of the results, the semifinal of the model process took place, where already the best students were able to compete for the title of the finalists of the event. They were asked to complete written assignments. Already after a few hours the teams that had qualified for the finals became known, those were the teams that were only a step away from the final battle and from the main prize – the statue of Themis.

The outcome of the day and the whole event was a solemn closing, in which the winners of the sections were awarded, and the results of the lottery organized jointly with the partners of the event were announced. Also it is necessary to note the invaluable contribution of the team of the organizers of the All-Russian Judicial Debate, since without them there would not have been such a large-scale celebration of science. Thus the Head of the research work of the students of Law Faculty of KFU Yuri Mikhailovich Lukin and the Council of the Student Scientific Society of Law Faculty together with the chairman Nikita Nikolaevich Makolkin performed their work professionally thanks to which the event was organised at the highest level.

Summarizing the above we can say with confidence that the Debate differs significantly in format from the scientific and practical conferences and forums students are accustomed to. This is a unique project of Law Faculty of Kazan (Volga) Federal University, inspired by the traditions of Kazan law school and modern trends.

Student judicial model process “All-Russian Judicial Debate” is one of the most effective and useful forms of teaching students. It allows you to feel and experience not only the intensity of emotions experienced by practicing lawyers in their activities, but also the complexity of the legal profession. This includes the complexity of preparing your legal position, the difficulty of responding to opponents’ criticism, the difficulty of winning over an impartial judge to their side, as well dealing with the bitterness of defeat. However, speaking of defeat it is worth noting that this event allows you to test your strength without the fear of letting anybody down. Thus the defeat in the judicial debate is also a victory, a victory over yourself because defeat is the stimulus and the impetus for further development in the professional capacity.

In conclusion, it should be noted that All-Russian Judicial Debate in 2018 became even more intense and more interesting. This year the Debate has reached the international level, which, of course, raises its profile. The informative and hands-on masterclasses also were a new addition to the event this year. Thus during these two days the participants of the Debate acquired not only experience in practical activities, oratory, the ability to defend their position, but also made new interesting acquaintances, were charged with positive and exciting emotions. The precious memories will remain
with the participants for the rest of their lives. And a year later the All-Russian Judicial Debate will meet the students again for new interesting battles. All-Russian Judicial Debate is not just an event, but a big friendly family!

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- Legal technics and technology (2)
- History and methodology of judicial science (2)
- Academic communication (3)
- Comparative legal studies (4)
- Methodology of teaching the jurisprudence in higher school (2)
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- International commercial arbitration (4)
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- Diplomatic and consular protection in international business (4)
- International legal protection of intellectual property (2)

Elective courses (credit points):
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- International economic organizations (4)
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Organizations, conducting external economic activity, representative branches of the Republic of Tatarstan abroad, governmental entities all over the world, courts and attorney offices, international organizations, Eurasian Customs Union, embassies, consular agencies.

More information
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