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Articles and Statements

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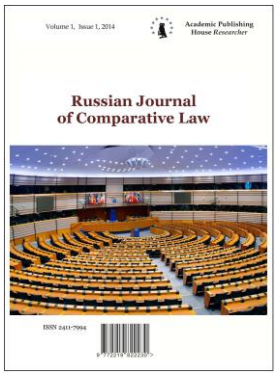

Articles and Statements

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Counterterrorism and Data Transfers in International Trade

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Abstract

The ongoing developments show the growing threat posed by international terrorism – including to global trade. This article begins by outlining the initiatives being taken by the US and the European Union for trade security. Their success is, to a considerable extent, dependent on transfers of information between the participating states. But what is the effect of information sharing on the security of data provided by participating companies, for the privacy of citizens and, ultimately, for national sovereignty and the rule of law? This conflict, however, reaches even further. It goes beyond the "issue of security" and impacts deeply on the relationship between the US and the European Union. The article explores the role of public authorities of the US and the EU and the implementation of the relevant international laws and regulations.

Keywords: international law, international trade, the USA, the EU, customs and border protection, counterterrorism, data transfers.

Introduction

The most recent attacks in Paris have shown unequivocally that the fight against terrorism will be one of the dominant policy issues of the future. The attack on New York's World Trade Center, carried out before our eyes on 11 September 2001, had already shown the potential dimensions of terrorism. Terror poses a threat, not only to civil society, but also to the world of international trade. Amongst customs and trade experts, a significantly increased awareness of risk has arisen: It was very quickly feared that international container traffic and seaports could come to the attention of terrorists. From low-security seaports, terrorists could extend their operations to reach international container traffic all over the world. Scenarios were developed, whereby terrorists in inadequately secured seaports could place bombs and other material for attacks into containers [1; 2; 3; 4]. In such scenarios, a potential threat of unprecedented proportions was quickly identified: In the "worst case" it was thought possible that, after a series of such attacks, no country could be sure that arriving containers would not contain even more bombs. In a subsequent panic, large parts of the container-transacted transport sector could, at least

temporarily, come to a standstill – with incalculable consequences, not only for individual ports and countries, but for the entire global economy [5; 6].

Materials and methods

The sources drawn on for the preparation of this article include legal, regulatory and policy documents of the US and the EU, the legislation of the European Court of Justice, as well as publications in journals and archive materials. The review is based on an analytical assessment and uses standard analytical methodologies, along with an examination of law from a comparative perspective. The author's arguments follow a chronological approach to examining the problems at hand. The historical and situational background is laid out and leads to an assessment of how international law standards in the US and the EU are implemented. The examination of comparative law further illustrates the differing views in the implementation standards of international law. The systematic approach used here makes a variety of disciplines (USA law, European law, commercial law etc.) accessible and open to comparison. And it ultimately illustrates that the present is determined by the past, just as present and past conditions will determine the future.

Discussion

1. Security initiatives for global trade

The USA, followed by other countries and the EU, responded with a range of initiatives [7; 8; 9; 10; 11; 12; 13]. These differ from each other in their specific protection objectives, and in their means of implementation. However, a significant, common characteristic is embodied in the fact that, until now, controls on container traffic have been carried out on imports, at the time of their arrival in the importing country. The new initiatives stipulate that the checks must now be displaced externally, to the actual dispatch location of the goods. The US "Customs and Border Protection ", for example, describes their CSI as follows: “The Container Security Initiative is a revolutionary program to extend our zone of security by pre-screening containers posing a potential security risk before they leave foreign ports for U.S. seaports [14]. Our goal is to process 85 percent of all containers headed for the United States through CSI ports by 2007“ [15]. The US security initiatives are discussed by, for example, see [16; 17; 18; 19; 20; 21].

The European concept of "Authorized Economic Operators" (AEO) is regulated in Art. 5a of the European Community Customs Code (CC). Important additional rules include Art. 14a to 14x of the Implementing Provisions the Customs Code (CC-IP). The concept of AEO consists of customs authorities identifying particularly reliable private operators and, following successful completion of an extensive examination procedure (certification), equipping them with specific trade-related privileges (so-called Authorised Economic Operator). This includes operational benefits – essentially a preferential and rapid settlement of customs procedures [22; 23; 24]. Taken together, these security concepts mean that high-risk cargo is identified before it even has a chance to reach the territory of the state which launched the initiative, (the principle of "Pushing Borders Out") [25; 26; 27]. Practical implementation, however, has shown the difficulty in identifying which risks are present at what stages of which supply chains. Therefore, the "visibility" of the supply chain is a critical factor in risk analysis. To determine risks and respond to them appropriately, governments and administrations need precise and up to the minute information about where any item of cargo is located in the supply chain – in other words, the ability to access this information in real time ("visibility on demand").

2. Data transfers: a central element of the fight against terrorism

These new security concepts throw up far-reaching questions: Not just regarding data protection, but extending particularly to the safeguarding of corporate data. Above all though, they raise issues of sovereignty under international law. The initiatives aimed at securing the supply chain break with hitherto common thinking, whereby the state’s security is ensured by those checkpoints that form the national borders. In contrast, it would now be increasingly advantageous to place the security controls ever further away.

To achieve this, intelligent systems collect the appropriate data and store it according to highly complex algorithms for specific, but also open-ended, and currently not yet foreseeable, purposes. This requires a high measure of collaboration among trading partners – primarily with

the countries from which the consignments most at issue will be sent. Regimes to secure the supply chain can thus be understood as real controls on virtual borders, i.e. borders that are projected out for the purpose of safeguarding the territory. For the initiatives to be practically implemented, it is therefore particularly important to have cooperation between the countries involved. To accomplish that, numerous agreements have been concluded to provide for mutual recognition and compliance with national and regional security regimes. They are of the utmost importance for international business practice:

For example, on 4 May 2012, the US and the EU reached an agreement for mutual recognition of their C-TPAT and AEO safety regimes. This came into effect on 31 January 2013. The agreement includes the comprehensive exchange of all relevant information amongst the participating countries. This mutual recognition is highly advantageous for the effected businesses: The US recognition of the European AEO means that the specific advantages of the C-TPAT are also conferred on business entities that don't have C-TPAT, but rather, have AEO certification. The same applies for US companies certified as C-TPAT, who are then brought within the scope of the AEO [28; 29; 30]. U.S. Customs and Border Protection has enhanced its partnership with import trade sectors, but challenges remain in verifying security practices [31].

The participating companies are very positive about their involvement in the international security programs, as it bestows on them clear and immediately tangible benefits. As a consequence, however, they must accept a diminished overview of what happens to their trade-related data once it has been submitted - in particular, what further dissemination is implied by international exchange and utilization. The possession of such data opens up an enormous strategic dimension. It is not surprising, therefore, that the USA in particularly, has been exposed to considerable criticism for its pioneering role. It has been argued that strategic considerations, rather than security, form the primary goal of the initiative, placing the far wider use of the collected data in the foreground [32].

This criticism, however, has not gained wide acceptance. Alan D. Bersin makes it unequivocally clear how important the unobstructed collection of data is, from the perspective of the United States. He quite stridently demands a change in thinking in the area of security, a change that fundamentally calls into question our current understanding of data protection [33, P. 3 et seq]. "The challenge of our times is that the future is not what it used to be" – with this quote from the poet Paul Valéry, Bersin asserts that anyone who is not able to adapt, is stuck in old ways of thinking and fails to recognize the challenge of our times. On a daily basis, the United States already exchanges billions of pieces of data with its trade partners - and in this area, "less is more" just does not apply. "Those who hoard information today, expecting their power to grow by forcing others to ask for it, soon find themselves isolated and, over time, ignored." [34, P. 3, 7]. Today it is critically important that all participating stakeholders contribute to risk reduction, through the exchange of information.

In an "anarchic world", without central global security structures, it resides in the sovereignty of individual states to launch initiatives directed towards this end [35; 36; 42]. However, approaches that remain limited to national initiatives can only inadequately fight the international terrorism phenomenon. And the compromised exchange of information allows even greater latitude for terrorists. Bersin says that information is power, and calls for a different perspective: "Old-fashioned, limited views of national interest, and reflexive notions of privacy and civil liberties, restrict willingness to share, and reinforce parochial and myopic concerns of long duration" [34, P. 3, 8]. He believes that a solution in the fight against terrorism will only come about through the free exchange of data and the consequent generation of actionable intelligence from that mass of information. And he asserts that data protection, as well as privacy, are assured. For only when signs of a "match" become evident, out of the multitude of anonymous algorithms, will the collected data be combined to produce recoverable information, and the previously existing privacy suspended.

This means that, in international trade, the state borders no longer serve directly as checkpoints for the guarantee of national security. In the future, it will be that exchange of information that determines where the "new frontiers" run.

3. The conflict between security, data transfers and the rule of law

"Border" traditionally signifies, principally, the opportunity to exercise control. But what opportunities for control are offered by the "new borders"? Fundamental questions come to mind: What about the protection of corporate data? What are the factors to be considered when balancing legitimate security concerns against other vital interests in need of protection? And above all: How can States ensure their citizens' fundamental constitutional freedoms in the face of "shifting traditional borders"? This development has long since become a reality and, as a result, the conditions affecting sovereignty and rule of law are changing. As an expression of their national sovereign rights, many states already regulate, to varying degrees, the collection and use of data within the national sphere. From Alan D. Bersin's point of view, the legitimization for exchanging data derives from a "bargaining process": „ ... the intersection between privacy protection and information sharing to enhance security in the global supply chain and global travel zones is crisp and sharp. One need not reconcile different visions, or points of departure concerning how to think about privacy, in order to arrive at a common position regarding what steps are required to protect personal data in a specific case. At end, some application of informed consent can account for a satisfactory outcome. In other words, entry and engagement in global travel or supply chain activity embodies a bargain between public authorities and private actors. The contours of the bargain regarding use and dissemination have long been settled once the threshold of entitlement to collection has been crossed" [37, P. 3, 15].

There can be no doubt that States, and the international community, must defend themselves against terrorism. The requirements of counterterrorism demand that data transfers are conducted on a far higher level. In critical situations, individual countries may not identify threats themselves, but are reliant on information from their exchange partners. Additionally, potential risks can be better identified when the respective knowledge of individual countries is summarized into an overall picture. This raises the question then, whether those involved in the negotiations on data transfers are fully aware of the associated consequences: Can the delegation of rights be justified in the name of collecting data for "open-ended" purposes? If the criteria under which the information is being collected remain unclear, then any assumptions as to how, and to what ends, it will be used later must be, by extension, vague and hypothetical. The European Court of Justice formulated principles for data transfers in the "Schrems" ruling: "Any such framework must therefore have sufficient limitations, safeguards and judicial control mechanisms in place to ensure the continued protection of the personal data of EU citizens including as regards possible access by public authorities for law enforcement and national security purposes" [38]. To this effect, on 2 February 2016, the EU Commission and the USA approved a new treaty for transatlantic data transfers (EU-US Privacy Shield). This set of rules is intended to address the Commission's heavily criticized and - by the ECJ - rejected "Safe Harbour" decision [39].

In the current debate, the tension between holding on to freedom or surrendering it through the disclosure of information, is becoming increasingly important. There is an argument that the liberal way of life needs to be actively defended to a far greater extent than used to be the case [40, P. 47]. The philosopher and writer Peter Sloterdijk, in particular, has proved quite polemical and provocative in drawing attention to this tension between enjoying freedom and defending it [41, P. 8]. Sloterdijk views Europe as being on the defensive. Till now, it has had little will, when required, to impose its interests by force. Rather, it has humbly depended on the quick acting and combat-ready United States to take on the task. In this relationship, the peaceable nature of one is made possible only by the boldness of the other. Sloterdijk points out that Europe's dependency on the defensive umbrella of the US has led to a significant sacrifice of European autonomy. This dependence affects virtually all policy areas, such as the "terms of trade" and many other economic sectors, the ceilings for emissions of exported diesel engines, the implementation of American skills standards or the screening of European data traffic, and even encompasses spying on European political leaders. Consequently, Sloterdijk calls for a stronger Europe and a Europe that speaks with one voice internationally. Only in this way will it be possible to regain lost "sovereignty", including that within the field of data control and usage.

The message, then, is that the international fight against terrorism, specifically in the collaboration between the US and Europe, needn't be conducted under asymmetric conditions, characterized by subservience and dependence. Recent developments have unequivocally demonstrated to Europe that its open society must be defended. And Europe well understands the

challenge. In meeting that challenge, Europe cannot defend itself from a position of dependency, but only from a position of strength, and this includes extensive cooperation with partners. The key now is how quickly Europe manages, under the preconditions of the considerable diversity and differing interests of the Member States, to formulate and assert its own way.

The dimensions are now shifting: It seems paradoxical that a state of freedom can only be achieved through a simultaneous defensive posture, even though that vigilance, as the example of data security shows, does not leave our civil rights untouched. Can enhanced security and greater political autonomy only be achieved by restricting freedom? This raises some far-reaching questions: Can enhanced security and broad political autonomy be achieved only by putting limits on our freedoms – and, if so, how much freedom must we surrender, in order to hold on to it at all?

Results

It is not just the civil society, but likewise the world of international trade, that finds itself exposed to the terrorist threat. To protect themselves, the US and the EU, along with other countries, have developed comprehensive regulatory regimes, such as C-TPAT and AEO. These approaches are based on separate national, or on European, approaches. The effective combating of terrorism, however, requires an international response. Because, at the international level, no regulatory framework, binding on all the States concerned, exists to protect international trade against terrorism, the States are obliged to cooperate with each other. This is achieved through comprehensive programs for the transfer of data.

Conclusion

The sharing of information between individual states is a central element in maintaining security in international trade. However, these data transfers profoundly impact on both the internal data security of corporations, as well as the privacy of citizens. It also raises fundamental questions about national sovereignty and the rule of law. Will safeguarding against terrorism mean a sacrifice of freedom? In the current debate, Europe is criticized for allowing its established values to be compromised. This comes about largely because Europe maintains its own “peaceable nature” by placing itself in a dependent relationship with the USA, a country which, by contrast, is self-assertive and ready to defend its interests and partners. Europe’s reliance on the United States goes to almost all policy areas, data security included. It is the position of this contribution, however, that the cooperation between the US and Europe needn’t be conducted under asymmetric conditions. By engaging in the defence against terrorism, whilst simultaneously pursuing greater security in data sharing, Europe can look after its own interests far more fully than it has done in the past.

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Контртерроризм и передача данных в международной торговле

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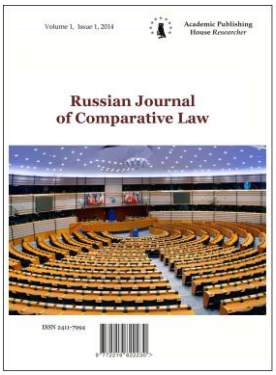
Аннотация. Происходящие события показывают растущую угрозу со стороны международного терроризма, в том числе в глобальной торговле. Статья начинается с изложения инициатив, предпринимаемых Соединенными Штатами и Европейским Союзом для безопасности торговли. Их успех в значительной степени зависит от передачи информации между странами-участницами. Но каково влияние обмена информацией о безопасности данных, предоставленных компаниями-участницами, на неприкосновенность частной жизни граждан и, в конечном счете, на национальный суверенитет и верховенство права? Этот конфликт выходит за рамки "вопрос безопасности" и глубоко воздействует на отношения между Соединенными Штатами и Европейским Союзом. В статье рассматривается роль органов государственной власти США и ЕС в осуществлении соответствующих международно-правовых норм.

Ключевые слова: международное право, международная торговля, США, ЕС, таможенная и пограничная охрана, борьба с терроризмом, передача данных.



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The New Spanish Act on the Common Administrative Procedure of the Public Administrations

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Abstract

The article examines the Spanish legal system that has been originated in the previous autocratic regime, related to the Common Administrative Procedure. The Government has been reducing until the body top in which ends the State Administration, consequently, conceiving it as a mere appendage or extension of it, which would share their administrative nature. The article 97 of the Constitution definitely discards this conception and retrieves the political scope of the function of governing, inspired by the principle of democratic legitimacy. These traits define the Government and the Administration as constitutionally different public institutions and establishing the subordination of the Administration to the political direction of the precise Government. It must be noted now that the framework governing the legal regime of public administrations is the subject of an express policy adaptation, which configures with consistency and harmony constitutional principles. The Constitution guarantees the subjection of Public Administrations to the principle of legality, both with regard to the rules governing its organization and the legal regime, the administrative procedure and the accountability system. On the other hand, the Local Administration has a legal regime is established in the same article 149.1.18. The Constitution has a specific regulation in the current "Ley de Bases" that does not offer any difficulty of adaptation to the objectives of this Act and which does not require specific modifications.

Keywords: Common Administrative Procedure, Public Administrations, Public Sector, Autonomous Communities, citizens, stakeholders, Public Services, sustainable economy, General Electronic Access Point, Local Entities.

Introduction

On October 1, 2015 the Act 39/2015 of the Common Administrative Procedure of the Public Administrations [1] was adopted. The Act entered into force, with the exception indicated, the 2nd of October 2016.

This Act derogates: Arts. 4 to 7 of the Act 2/2011, March 4 [2]; Royal Decree 772/1999, May 7 [3]; Royal Decree 1398 / 1993, August 4 [4]; Royal Decree 429/1993, March 26 [5].

It derogated as indicated: certain provisions of the Royal Decree 1671 / 2009, November 6 [6]; Act 11/2007, June 22 [7]; Act 30/1992, November 26 [8].

Moreover, the Act: a) modified: Arts. 64, 69, 70, 72, 73, 85, 103 and 117 of Act 36/2011, October 10 [9]; Art. 3 of Act 59/2003, December 19 [10]; b) quoted: Act 2/2012, April 27 [11]; Act 47/2003, November 26 [12].

Materials and methods

The main sources for writing this article became the official documents of Spain, materials of the journal publications and archives, as well as the State Official Newsletter, where all laws are published as soon as they enter into force.

This article has been analyzed using Methods of interpretation of the law, which are the means available for the interpreter to establish the possible meanings and scope of interpreted law. These methods are commonly accepted by doctrine and sometimes expressly enshrined by the own legal systems. These elements are the grammatical, the historical, the logical, the systematic and the teleological element. The grammar element is the one that allows you to set your senses and scope of law making use of the tenor of the words of the law, namely the meaning of the terms and phrases that the legislator used to express and communicate its thinking. This interpretive method is based on the assumption that the will and intention of the legislator is steeped in the law. The historical element allows interpreting the legislated right referring this to the history of the legal text, which is interpreted. This history is reflected in each of the stories or stages of the process of formation of the law. The logical element consists of establishing the sense or scope of a law, relying on the intellectual analysis of the connections that have similar laws or with other laws related to the same subject. The systematic element makes possible to interpret the law according to the connections with the whole legal system of which it forms part, including the general principles of law. The teleological element, finally, is the one that allows establishing the meaning or scope of a legal precept according to the purpose.

Discussion

The legal sphere of rights of citizens against the actions of the public Administrations is protected through a range of instruments, both reactive in nature, notably the system of administrative appeals or the control carried out by courts and judges, as a preventative through the administrative procedure, which is the clear expression of that the Public Administration acts with full submission to the law and the right, as stated in the article 103 of the Constitution [13].

The report developed by the Commission for the Reform of Public Administration [14] in June 2013 stars from the belief that a competitive economy requires efficient, transparent and agile Public Administrations.

Along these same lines, the national Program of reforms in Spain for 2014 expressly includes the adoption of new administrative measures as one of the ways to impulse rationalizing the performance of the institutions and bodies of the Executive power, improving efficiency in the use of public resources and increasing their productivity.

The defects that have traditionally been attributed to the Spanish Administrations are due to several causes, but the existing system is no stranger to them, since the regulatory framework in which public performance has developed, has led to duplication and inefficiencies, with administrative procedures too complex, which, on occasions, have created problems of legal uncertainty. To overcome these deficiencies is required a comprehensive and structural reform that allows ordering and clarifying how the Administrations are organized and related both externally, with citizens and businesses, as internally with other Administrations and State institutions.

In relation to this context, a reform of public law articulated is proposed in two fundamental axes: relations "ad extra" and "ad intra" of Public Administrations. In order to do so, two new laws are simultaneously promoted that will constitute the pillars on which will settle the Spanish Administrative Law: the Act of Common Administrative Procedure of the Public Administrations and the Act on Legal Regime of the Public Sector [15].

This law is the first of these two axes, establishing a complete and systematic regulation of "ad extra" relations between Administrations and citizens, both in relation to the exercise of the right to independence and in whose virtue enacting administrative acts that directly affect the sphere of legal stakeholders, and as regards the exercise of regulatory powers and legislative initiative. It is thus brought together in a single legislative body the regulation of 'ad extra' relations carried out by the Administrations with citizens as administrative law of reference that must be

complemented by provisions in the budget legislation with respect to the actions of Public Administrations, especially provisions emphasizing the Organic Act 2/2012, April 27, Budgetary Stability and Financial Sustainability [16]; Act 47/2003, November 26 [17] and the Act of General State Budget [18].

The Constitution includes in its title IV, under the header «of the Government and the Administration», the characteristics that differentiate the Government of the Nation from the Administration, by defining the former as an eminently political body that retains the function of governing, the exercise of the regulatory power and the direction of the Administration and establishing the subordination of this to the Government.

In the mentioned constitutional title, article 103 establishes the principles that should govern the performance of the Public Administrations, including effectiveness and legality, when imposing the full submission of the administrative activity to the law and the right. The materialization of these principles is produced in the procedure, that consists of several formal channels, which must ensure the appropriate balance between the efficiency of the administrative performance and the essential safeguarding of the rights of citizens and enterprises, which must be exercised in basic conditions of equality in any part of the territory, regardless of the Administration that their holders are related to.

These "ad extra" actions of the Administrations have a special mention in article 105 of the Constitution, which establishes that the Law shall regulate the audience of citizens, directly or through organizations and associations recognized by the Law, in the procedure of administrative provisions that affect them, as well as the procedure through which the administrative acts must occur ensuring, when appropriate, the audience to stakeholders.

It should be highlighted that article 149.1.18.ª of the Spanish Constitution attributed to the State, among other aspects, the competence for regulating the common administrative procedure, without prejudice to specialties deriving from the organisation of the Autonomous Communities, as well as the accountability of all the Public Administrations.

Regarding to the constitutional framework, the present Law regulates rights and minimum guarantees which correspond to all citizens with respect to the administrative activity, both in its aspect of the exercise of the right to independence, as well as the regulatory power and legislative initiative.

In what refers to the administrative procedure, understood as the ordered set of procedures and actions carried out formally, according to the runway legally foreseen, to issue an administrative act or express the will of the Administration, with this new regulation, State and regional competences do not run out for establishing "ratione materiae" specialties, or to achieve certain ends, as the body competent to resolve, but that its character arise from its application to all Public Administrations and with respect to all its activities. Thus the Constitutional Court has come recognizing it in its jurisprudence, when considering regulating the common administrative procedure by the State does not preclude that Autonomous Communities dictate procedural rules necessary for the implementation of its substantive law, as long as they respect the rules which integrate the concept of Common Administrative Procedure with basic character.

Several are the relevant legislative backgrounds in this matter. The legislator has made to evolve the concept of administrative procedure by adapting the way of performance of the Administrations to the historical context and to the social reality of each moment. Aside from the known as Azcarate Act, on October 19, 1889, the first comprehensive regulation of the administrative procedure in our legal system is contained in the Act of Administrative Procedure of July 17, 1958.

The 1978 Constitution shines a new concept of Administration, expressly and fully subject to the Law and to the Right, as democratic expression of the popular will, when putting it to the target service of general interests under the direction of the Government, responding politically by its management. In this sense, the Act 30/1992, November 26, of Legal Regime of Public Administrations and Common Administrative Procedure [19], marked a key milestone in the evolution of administrative Law of the new constitutional framework. Therefore, it incorporated significant advances in the relations of the Administrations with the stakeholders by improving the operation of those and, above all, through a greater guarantee of the rights of citizens against the power of independence of the Administration, whose closing element is located in the judicial review of its actions of article 106 of the basic text.

The Act 4/1999, January 13, amending the Law 30/1992, November 26, of Legal Regime of Public Administrations and Common Administrative Procedure, reformulated various substantial aspects of the administrative procedure, such as the administrative silence, the system of review of administrative acts or the regime of liability of the administrations, which allowed to increase legal certainty for stakeholders.

The development of information and communication technologies has also been affecting deeply to the shape and content of managing relations with citizens and businesses.

Even though the Act 30/1992, November 26, was already aware of the impact of new technologies on the administrative relations, it was the Act 11/2007, June 22, electronic access of citizens to Public Services [20], which gave them a letter of legal nature, when establishing the right of citizens to interact electronically with Public Administrations as well as the obligation of these to provide the means and necessary systems in order to use this right. However, in the current environment, electronic processing is not yet a special form of management procedures but that should constitute the usual performance of Administrations. Because a paperless Administration based on a fully electronic operation not only better serves the principles of effectiveness and efficiency, to save costs to citizens and businesses, but it also strengthens guarantees of stakeholders. Indeed, the record of documents and actions in an electronic file eases compliance with obligations of transparency, as it allows to offer timely, flexible and up-to-date information to stakeholders.

On the other hand, the regulation of this matter came to suffer from a problem of regulatory dispersion and overlap of different legal regimes do not always consistent among themselves, what shows the successive adoption of standards with emphasis on the matter, which include: Act 17/2009, of November 23, of free access to the service activities and its exercise [21]; Act 2/2011, March 4, of Sustainable Economy [22]; Act 19/2013, December 9, of transparency, access to public information and good government, or Act 20/1013, December 9, of guarantee of the unity of market [23].

Given this legislative stage, it is key to have a new Law that systematizes all the regulation relating to the administrative procedure, which clarifies and integrates the content of the cited Act 30/1992, November 26 and Act 11/2007, June 22, and deepens in the streamlining of procedures with a full electronic operation. All this will revert on better enforcement of the constitutional principles of effectiveness and legal security that should govern the actions of public authorities.

The Act 2015 is divided into 133 articles, distributed in seven titles, five additional provisions, five transitional provisions, a repealing provision and seven final provisions.

The preliminary title, of general provisions, deals with the subjective and objective scope of the law. Among its main innovations, it should be noted, the inclusion in the object of the Act, with basic character of the principles that inform the exercise of legislative initiative and the regulatory power of Governments. The implementation of provisions under this law is expexted to all subjects included in the concept of the Public Sector, although Public Law Corporations are governed by their specific rules in the exercise of public functions, which have been allocated to them, and additionally by this Law.

Moreover, it emphasizes the forecast that only by Act may be established procedures other than those referred to in this standard, or additional being able to specify by regulation certain specialties of the procedure concerning the identification of the competent organs, deadlines, forms of initiation and completion, publication and reports to gather. This provision does not affect the additional or different procedures already collected in the special laws in force, nor to the realization that, in regulations, occurred from the competent bodies, the terms of the particular procedure by reason of the matter, forms of initiation and termination, the publication of acts or reports to collect, which will keep its effects. Thus, among other cases, it should be signalized the entry into force of annex 2 to which refers the additional provision twenty ninth of the Act 14/2000, December 29, of fiscal, administrative and social order measures [24], which establishes a series of procedures that are excepted from the general rule of positive administrative silence.

The title I, to those interested in the procedure, regulates among other issues, the specialties of the capacity to act in the field of administrative Law, making it extended, for the very first time, to affected groups, unions and unincorporated entities and independent or autonomous assets when the Law declares it explicitly. In terms of representation, new media are included to prove it in the exclusive field of Public Administrations, such as seizure "apud acta", face-to-face or

electronic, or the accreditation of its electronic registration of powers of Attorney of Public Administration or competent body. Also, it is the obligation of each Public Administration of having an electronic register of seizures, and existing the possibility for the territorial Administrations of adhering to the State, in application of the principle of efficiency, recognized in article 7 of the Act 2/2012, April 27, of Budgetary Stability and Financial Sustainability.

On the other hand, this title dedicates part of its articles to one of the most important innovations of the Law: the separation between identification and electronic signature and the simplification of the media to prove one or the other, so that, in general, it is required only the first one, and the second one shall be required when the will and consent of the person concerned must be accredited. It is set, as a basic rule, a minimum set of categories of means of identification and signature to be used by all Administrations. In particular, will be accepted as a signature systems: systems of electronic signature recognized or qualified and advanced based on qualified electronic signature, electronic certificates that include both electronic certificates of legal person and the entity without legal personality; systems of electronic seal recognized or qualified and advanced electronic label based on certificates qualified electronic seal; as well as any other system that Public Administrations consider valid, under the terms and conditions established. Be used as identification systems any of supported signature, as well as concerted key infrastructure systems and any other that establish the Public Administrations.

Not only identification systems but also signature systems provided in this Law are fully consistent with the provisions in the Regulation (EU) No. 910/2014 of the European Parliament and of the Council, July 23, 2014 of electronic identification and trust services for e-business in the internal market [25]. It should be recalled the obligation of member States of supporting systems of electronic identification notified to the European Commission by other member States, as well as signature and seal electronic systems based on qualified electronic certificates issued by service providers listed in the trusted lists of other member States of the European Union, in the terms provided in such Community legislation.

The title II, of the activity of the Public Administrations, is divided into two chapters. Chapter I, of general rules of performance, identifies as a novelty the subjects bound to interact electronically with the Public Administrations.

Likewise, the cited chapter stipulates the obligation of all Public Administrations of having a general electronic record, or, of adhering to the State General Administration. These records will be assisted in turn by the current network of offices in the field, which will be known as assistance offices in the field of records, which allows stakeholders to submit their applications on paper, which will be converted to electronic format.

In relation to archives, there will be introduced a new obligation of each Public Administration of keeping an unique electronic archive of documents corresponding to completed procedures, as well as the obligation that these records must be stored in a format that t guarantees the authenticity, integrity and preservation of the document.

In this regard, it should be noted that the creation of this single electronic file will be compatible with various systems and networks files in the terms provided in the legislation in force, and shall respect the sharing of responsibilities for the custody or corresponding transfer. Also, the single electronic file will be compatible with the continuity of the National Historical Archive in accordance with the provisions of Act 16/1985, June 25, of the Spanish Historical Heritage and its implementing regulations.

Equally, the regime of validity and effectiveness of copies, where it clarifies and simplifies the current regime, is regulated in chapter I. The necessary requirements for an authentic copy are defined, the characteristics that must comply with the documents issued by Public Administrations to be considered valid, as well as what stakeholders should contribute to the procedure establishing the obligation of Public Administrations of not requiring documents already provided by stakeholders, developed by Public Administrations or original documents, subject to the exceptions referred to in the Law. Therefore, the person concerned may submit copies of documents, whether they are scanned by the person concerned or presented on paper.

Also, it stresses the obligation of the Public Administrations of having a record or other equivalent system that allows record the civil servants in charge of the realization of authentic copies, which ensures that they have been issued properly.

The chapter II, of terms and deadlines, establishes the rules for its computation, enlargement or the emergency processing. As main novelty is the introduction of the computation of time limits for hours and the declaration of Saturdays as non-working days, thus unifying the computation of time limits in the judiciary and the administrative scope.

The title III, of the administrative acts, is divided into three chapters and focuses on the regulation of administrative acts, their effectiveness and the rules on invalidity and violability requirements, keeping the vast majority the general rules already established by Act 30/1992, November 26.

A special mention deserve the novelties introduced in the field of electronic communications, which will be preferential and will take place in the electronic headquarter or in the enabled email address, as appropriate. Likewise, it is increased the legal security for stakeholders by establishing new measures that ensure knowledge of the availability of the notifications as: sending notification alerts, whenever this is possible, to electronic devices and/or the email address the person concerned have been communicated, as well as access to its notifications through the access General Electronic Access Point of the Administration that will function as a gateway.

The title IV, of provisions on Common Administrative Procedure, is divided into seven chapters and among its main innovations highlights that previous special procedures on sanctioning and liability that the Act 30/1992, November 26, regulated in separate titles, has now been integrated as specialties of the Common Administrative Procedure. This approach responds to one of the objectives pursued by this Law, simplification of administrative procedures and their integration as specialties in the Common Administrative Procedure, thus contributing to increase legal security. In accordance with the systematic followed, the general principles of sanctioning and liability of Public Administrations, insofar as they relate to more organic than procedural aspects, are regulated in the Act of Legal Regime of the Public Sector.

This title also incorporates widespread and mandatory use of electronic media to the phases of initiation, planning, instruction and completion of the procedure. Likewise, it joins the regulation of the administrative file by setting its electronic format and the documents that must integrate it.

As a novelty within this title, it is added a new chapter relative to the simplified procedure of the common administrative procedure, which states its objective scope of application, the deadline for a resolution, which will be thirty days, and its procedures. If in a procedure would be necessary to perform any other additional transactions, then the ordinary processing must be followed. Also, when in a transacted procedure in a simplified way the issuance of the opinion of the State Council or equivalent advisory body was mandatory, for a greater guarantee of stakeholders, the procedure will be continued but following the ordinary procedure, not the abbreviated, and it may be, in this case, performs other procedures not provided in the case of simplified procedure, like tests at the request of the interested parties. All this without prejudice to the possibility of urgent transaction contemplated in the Law 30/1992, November 26.

The title V, of the review of administrative acts, maintains the same ways foreseen in Act 30/1992, November 26, remaining therefore “revisión de oficio” and the typology of existing administrative resources to date (alzada, potestativo de reposición y extraordinario de revisión).

According to the volition of removing procedures, that far from constituting an advantage for the stakeholders, it was a burden which made difficult the exercise of rights, the Law does not already accept the previous claims in civil and labor proceedings, due to limited utility that have demonstrated to date and that, in this way, shall be deleted.

The title VI, of legislative initiative and regulatory authority of the Public Administrations, collects the principles that must adjust its exercise the holder Administration, making effective constitutional rights in this area.

Along with some improvements in the existing regulation on hierarchy, advertising rules and principles of good regulation, several new features are included to increase the participation of citizens in the process of developing standards, notably, the need to obtain, prior to the development of the standard, the perception of citizens and businesses about the problems that are intended to solve with the initiative , the necessity and opportunity of its approval, the objectives of the rule and regulatory and non regulatory possible solutions.

On the other hand, in the interests of greater legal certainty, and predictability of the system, it is committed to improve the normative planning ex-ante. For this reason, all Administrations

will disclose an Annual Regulatory Plan, which will include all the proposals with range of law or regulation expected to be high for approval the following year. At the same time, it strengthens the evaluation ex post, due to the fact that put together with the duty to review continuously the adaptation of the legislation to the principles of good regulation, it is imposed the obligation of evaluating periodically the application of the rules in force, in order to check if they have fulfilled the objectives pursued and whether the cost and charges arising from them was justified and properly valued.

As regards additional, transitional, repealing and final provisions, it should be referred to the concerning the accession by the Autonomous Communities and Local Entities to records and systems established by the State General Administration State in application of the principle of efficiency recognized in the Act 2/2012, April 27.

Finally, the Act contains transitional law provisions applicable to the proceedings underway, to its entry into force, to archives and records and to the General Electronic Access Point, as well as which enabled the development of provisions in the Law.

Results

During more than twenty years of validity of Act 30/1992, November 26, in the sinus of the European Commission and the Organization for Cooperation and Economic Development it has advanced in the improvement of the normative production ('Better regulation' and 'Smart regulation'). The various international reports on the subject define smart regulation as a legal framework of quality, allowing an objective regulatory compliance while providing appropriate incentives to boost economic activity, allowing to simplify and reduce administrative burdens. To do this, it is essential an adequate analysis of impact of standards, both ex-ante as ex post, as well as the participation of citizens and enterprises in policy making processes, because on them rests the enforcement of laws. In the last decade, Act 17/2009, November 23, and Act 2/2011, March 4, they assumed a step forward in the implementation of the principles of good regulation, especially as regards the exercise of economic activities. Already in this legislature, Act 20/2013, December 9, has given important additional steps, making available to citizens the legal relevance of the standard-setting procedure information.

However, it is necessary to count with a new regulation that, ending with the existing normative dispersion, strengthens citizen participation, legal certainty and the revision of the regulation. With these objectives, databases have been established for the first time in a law, pursuant to which has to develop legislative initiatives and regulatory authority of the Public Administrations in order to ensure their exercise in accordance with the principles of good regulation, ensure appropriate audience and participation of citizens in the development of standards and achieving predictability and public evaluation of the system, as a necessary corollary of the constitutional right to legal security. This novelty becomes especially crucial in a territorially decentralized State in which coexist three levels of territorial Administration that projected their regulatory activity on subjective and geographical spaces often coincidental. With this regulation, are followed the recommendations contained in this matter, developed by the Organization for Cooperation and Economic Development (OECD) in its report issued in 2014: «Spain: From Administrative Reform to Continuous Improvement».

Conclusion

Also it highlights the provision on the specialties which establish series of actions and procedures that shall be governed by its specific and supplementary legislation as provided in this Law, which includes tributes and review application in tax and customs matters, the management, inspection, settlement, fundraising, challenge and review in the field of Social Security and unemployment, where are included, among others, acts of recognition and membership of the Social Security and the economic contributions for dismissals involving workers of fifty or more years in companies with profits, as well as the actions and procedures in taxes and customs, in social order, in traffic and road safety and in the field of immigration.

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Новый испанский закон об общих административных процедурах в публичном управлении

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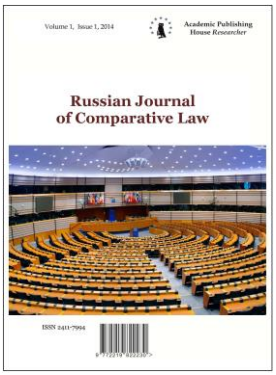
Аннотация. В статье рассматривается испанская правовая система, созданная в период Франко, относительно Общей административной процедуры. В статье 97 Конституции, безусловно, отбрасывает эту концепцию и извлекает политическую сферу функции самоуправления, построенного по принципу демократической легитимности. Эти черты определяют правительства и администрации, как конституционно различных общественных институтов и установления подчинения администрации политическим

руководством точного правительства. Следует отметить, что в настоящее время база, регулирующая правовой режим государственных администраций является предметом специального приспособления политики, которая настраивает с последовательности и гармоничности конституционных принципов. Конституция гарантирует подчинение общественных администраций на принцип законности, как в отношении правил, регулирующих ее организации и правового режима, административную процедуру и систему отчетности. С другой стороны, местная администрация имеет правовой режим устанавливается в той же статье 149.1.18. Конституция имеет определенную регулирование в нынешних «Ley де Основ», что не предлагают каких-либо трудностей адаптации к целям настоящего Закона и которые не требуют конкретных модификаций.

Ключевые слова: общая административная процедура, государственные органы, автономные Сообщества, граждане, заинтересованные стороны, публичные услуги, общие электронные точки доступа, муниципальные организации



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On Effect of a State Officer's Immunity in Case of Violation of Discrete Categories of International Law Norms

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Abstract

The article examines the legal basis on effect of a state officer's immunity in case of violation of discrete categories of international law norms. An opinion that the state immunity has effect only in respect of sovereign acts and that international crimes in no way can be considered as sovereign acts, particularly so when violation of *jus cogens* norms in question has a wide prevalence. Particularly often this argument is employed when a state immunity is denied in the process of civil proceedings. Also the article deals with the possibility to extend the *ratione materiae* immunity to an officer accused in an international crime perpetration. Immunity is spread only on sovereign actions, i. e. acts committed by the state authority, neither states nor their officers can insulate themselves from another state's jurisdiction if the case in hand is an international crime because such crimes for the most part represent violations of *jus cogens* norms and therefore cannot be sovereign acts.

Keywords: international crimes, immunity, officer, *jus cogens*, state authority, crime, international law.

Introduction

Some authors argue that it is impossible to extend the *ratione materiae* immunity to an officer accused in an international crime perpetration [1. P. 629; 2. C. 109]. In defense of this assertion it is said that, first of all, immunity is spread only on sovereign actions, i.e. acts committed by the state authority, neither states nor their officers can insulate themselves from another state's jurisdiction if the case in hand is an international crime because such crimes for the most part represent violations of *jus cogens* norms and therefore cannot be sovereign acts. Secondly, since the *ratione materiae* immunity can be referred to only if violations are perpetrated in forms of official acts adoption the acts that constitute international crimes cannot be qualified as official acts. Thirdly, it is argued that since norms of *jus cogens* have priority over all other norms they overcome all norms of international law that are tangent to immunity issue and incompatible with norms of *jus cogens*.

Materials and methods

The principal sources for this article writing are as follows: the most important treaties that define the fundamentals of international relations; documents of various international and regional courts. National laws of many states and judgments of national courts are also used. In the process of research general scientific methods of cognition as well as private law methods (technical, systemic historical methods and method of comparative jurisprudence) were used.

Discussion

An opinion that the state immunity has effect only in respect of sovereign acts and that international crimes in no way can be considered as sovereign acts, particularly so when violation of *jus cogens* norms in question has a wide prevalence. Article 53 of Vienna Convention on law of international treaties runs: "The peremptory norm of international common law is a norm which is accepted and recognized by the international community of states as a whole and deviation from this norm is inadmissible. The norm can be modified only with a subsequent norm of international common law of the same character".

Particularly often this argument is employed when a state immunity is denied in the process of civil proceedings. For instance, A. Bianchi writes: "Difficult violations of human rights cannot be qualified as sovereign acts: international law does not acknowledge as legally acceptable those acts of sovereign authority that not only violate international law but are aimed at destruction of its very basics and fundamental values" [3. P. 265].

It is real that availability of system of norms which states have no right to violate means that if a state acts in violation of such norm its actions cannot be considered a sovereign act. When performing such action a state deprives itself of international law protection in the form of the state sovereignty principle and certainly cannot qualify for immunity.

This argument has been mentioned over and over again in national courts. So the case of *Viotia prefecture* dealt with civil claim for reparations for atrocities the German troops committed in Greek village Diostomo (these acts brought about death of 200 civilians) [4. P. 595].

The court of first instance in Greece made the ruling which later on was supported by the Supreme Court of Greece [5] which adjudged reparation in amount of approximately $ 30 mln on the following ground: actions of German troops were a violation of *jus cogens* norms and could not have been considered as a sovereign act. Germany actually waived its immunity by perpetrating these actions.

However there is no unanimity among national courts. Applicants in the case of *Viotia* tried to achieve execution of the Greek court ruling in Germany but the Supreme Court of Germany did not permit that and declared that arguments of the Supreme Court of Greece are not the effective international law [6].

In a later consideration of massacre in Distomo the Supreme Court of Greece by majority of votes made the decision that a state immunity was generally recognized and generally accepted norm of international law and this norm forbade indemnification measure for crimes including torture perpetrated by foreign troops [7].

According to the Court, there was no sufficient homogeneous and wide-spread practice which could demonstrate availability of exception from the state immunity norm.

An American court considered "*Princz v. Federal Republic of Germany*" case [8]. Princz who suffered from the Nazi regime claimed indemnification and maintained that Germany deprived itself of immunity through violation of *jus cogens* norms. Majority of judges repudiated the claim and declared that such renunciation might be considered effective if it was done in response to recognition of claim validity and a claim's rightfulness.

Some US courts shared the position [9].

The Supreme Court of Italy in its ruling in *Ferrini v. Reppublica Federale di Germania* case repudiated the argument that acts made in violation of *jus cogens* norms could not be considered sovereign acts or that in such case denial of immunity occurred [10].

Lord Hoffman in case *Jones v. Saudi Arabia* considered by the House of Lords stated: "The theory of implied immunity denial does not get support in courts' rulings" [11].

The same position is also found in a decision of court of Argentine [12].

Now let us consider the argument from theoretical standpoint. Acts of authority that are knowingly aimed at perpetration of an international crime cannot be considered as sovereign acts

or, to put it differently, such acts are not acts of a legitimate sovereign authority. Indubitable illegality of such acts invites the opinion that international law cannot attribute admissibility to these acts. That thesis seems to be logical. However at the stage of examination when the question of immunity arises illegality of these acts and actions is still undetermined and it is impossible to say for sure that a state acted unlawfully. Therefore at this stage it is impossible to maintain a state deliberately ran to denial of immunity. It is impossible to forget that the assumption of innocence operates in an international criminal proceeding.

Further on, the issue whether an act has character of sovereign act or not, that is whether the act in question is being effected *de jure imperii*, for purposes of the immunity recognition, depends not on lawfulness of a state's activity pursuant to the international law but on answer to the question whether the act or action is initiated by public authorities. But at this point we come across the issue of the act adoption context. Lord Wilberforce in case of "*Congress*" stated: "Arguing whether the state has immunity the court has to take account of the full context of charges brought against the state in order to ascertain whether the respective acts can be considered as lying within confines regulated by the private law or activity of the state has been extended beyond the range of private law but in the sphere of sovereign activity" [13].

In another case [14] Lord Hope stated that it was precisely the nature of an act that defines whether an act should be characterized as *de jure imperii* or as *de jure gestiones*. An act subject to characterization should be considered in its context. Lord Hope noticed in the case under consideration the context was of particular importance because the case concerned ensuring conditions for training of military personnel and these servicemen's family members at one of American military bases in foreign land. And maintenance and support of a military base welfare are the sovereign activities of the state.

International crimes perpetrated by states usually happen during use of military or police forces. It is obvious that this activity constitutes *de jure imperii* activity. In the ruling on "*Nelson v. Saudi Arabia*" [15] case the US Supreme Court stated: "Manifestations of the military power, however monstrous they could be, execution of police force might by a foreign state have been always regarded as the activity which is sovereign by its very nature". The Federal Constitutional Court of Germany has specified: "Deals connected with international ties of the state and its military power, with laws, police operations and effectuation of justice fall in this generally accepted sovereign sphere of activity" [16].

The intention (or goal) of immunity granting to a state is not abolition of consequences of a state's wrongful activities though that may have place. And the urge to implement immunity does not imply that a state ceases to bear responsibility pursuant to the international law. The international law has never presumed that immunity is applicable only when the executed actions have been lawful pursuant to the international law [17. P. 18]. On the contrary, the very intention of the norm of immunity granting lies in the fact that national courts are deprived of opportunity to establish lawfulness or unlawfulness of various actions of foreign states. Therefore it would be illogical to think that applicability of the rule depends on previous ascertainment of lawfulness or unlawfulness of an agent's behavior. To say that some action is sovereign one is not tantamount to saying that this action is legal pursuant to the international law.

When the UK House of Lords considered Pinochet case some members of the House maintained that an action of a state constituting a crime pursuant to the international law can be recognized as an official act of a particular state and therefore such act cannot be withdrawn from consideration due to application of *ratione materiae* immunity [41. P. 56–57].

However, as it was said above, character of an action committed by an officer does not depend on its rightfulness pursuant to international or national law. Criterion in this respect first can be a purpose for achievement of which an act has been passed or action has been committed as well as methods of an act adoption [18; 19].

If attainment of a purpose for which an act was passed coincides with purposes of a state policy, does not serve exclusively interests of individuals, and if an act was adopted with assistance of the state machine, i.e. the act in question was passed in a legal and lawful way, then such acts can be considered as official ones. Deeds that constitute international crimes are often adopted by individuals endowed with authority and usually are adopted in a state interests and not for individual ends. According to A. Barker's vivid expression, "to deny the official character of such acts is tantamount to flying away from reality" [20].

It is impossible to disagree with the International Law Commission that such acts are nothing but state acts and can be basis for initiation of proceedings in respect of a state responsibility [21].

In literature it was repeatedly maintained that due to *jus cogens* norms superiority in the system of international law these norms have to prevail over norms that regulate granting of immunity [3. P. 265; 22. C. 11-14].

An Argentine court expressed the same position in its ruling on "*Siderman de Blake v. Republic of Argentine*" case. The ruling says that *jus cogens* norms have the superior status in international law and therefore *jus cogens* norms enjoy the highest legal validity and can delegitimize norms that contradict them; the sovereign immunity is also a principle of international law and so it is, as it were, enclosed with *jus cogens* norms. If a state violates any *jus cogens* norm, the immunity created by the international law is annulled and a state-violator can be subject to a court proceeding [23].

Roughly the same argument is presented in rulings of many courts from Germany, Italy, Greece and other countries. However, stringency of the argument is doubtful. First of all, though International Criminal Tribunal for the former Yugoslavia produced the following characterization: "The greater part of international humanitarian law norms, in particular, those that forbid war crimes, crimes against humanity and genocide, represents also the imperative norms of international law or *jus cogens* norms; there is no chance to maintain that all norms that forbid international crimes are put up to the *jus cogens* level [24].

Though bans of aggression [25. P. 392], genocide [26], and torture [27] undoubtedly fall into this category it is doubtful that other norms of international humanitarian law are norms of *jus cogens*. Keen discussions that are held around military reprisals (such reprisals are forbidden in principle by the international law though the limits of prohibition is not clear exactly [28. C. 124]) are, to some extent, a confirmation of the thesis put forward in the previous sentence. Many authors rightly point out that just some violations of international humanitarian law can be justified as military or armed reprisals [29. P. 43].

True, the First Additional Protocol to Geneva Conventions greatly expanded the ban on armed reprisals but it is impossible to qualify norms of this Protocol as norms of international common law, let alone attaching these norms to *jus cogens* norms. Rebuttals by a number of states including the USA, Great Britain, and France against inclusion of these stipulations in the Protocol should be taken into account [29. P. 43].

Further on, it is difficult to image how norms that regulate immunity of a state may collide with *jus cogens* norms [30]. The main purpose of these norms is to prevent court proceedings of a state's actions in courts of other states. Hypothetically, a conflict situation may arise when there is the obligation of third states, states different from the violator state, to punish crimes in their courts. And this obligation in itself is a norm of *jus cogens*.

There is no doubt that certain norms really impose on third states obligations to punish some international crimes, for instance, deeds that are the flagrant violations of Geneva Conventions as well as the tortures. However in other cases of military crimes or crimes against humanity there is no generally recognized and generally accepted norm which would impose on third states an obligation to carry on criminal prosecution though such right may exist [31. P. 111–112].

In the same way and despite numerous court rulings on civilian indemnification provision third states are not liable to provide means for such indemnification [32]. Sure, it would be strange if a violation of a *jus cogens* norm automatically grant jurisdiction to courts of foreign state in spite of norms on immunity, even though international courts do not acquire jurisdiction in case of *jus cogens* norms violation [33; 39].

Further on, even in a small number of cases when a real obligation to initiate a legal prosecution exists, it would be wrong to suppose that this obligation has the imperative character or *jus cogens* character. A norm of jus cogens is a prohibition of certain activities and not a prescription to initiate legal prosecution by third states. It is precisely the state that committed a respective action that is the violator of *jus cogens* norm and not the state that did not carry out legal prosecution or did not assign means for civilian indemnification. If the obligation to inquire into a crime had jus cogens character, it would prevail over other norms of international law. Then the obligation to investigate a case would exist even in a situation when investigation would violate rights of an individual or of other states.

An opinion that in case of a violation of any *jus cogens* norm, the right to carry on universal jurisdiction emerges in third states, it is often aired in literature and in practical activities. So one of decisions made by the Investigative Chamber of the International Criminal Tribunal for the former Yugoslavia reads: "It appears that one of consequences arising from *jus cogens* character which is attached to prohibition of torture by the international community is the power of every state to carry out investigation, prosecution and punishment or extradition of individuals accused in use of torture if such individuals are within confines of its jurisdiction" [34].

It is impossible to disagree with A. Orakhelashvili who writes: "If violations of *jus cogens* norms are peremptory recognized as crimes then the obligation to carry out legal prosecution in respect of a culprit or his extradition must be seen as the mandatory one. Pursuant to international law, peremptory norms that form the very essence of human rights prevail over non-peremptory norms that govern immunity of a sate. In case of international crimes forbidden by *jus cogens* norms as crimes against humanity, it must be acknowledged that principles of immunity do not have the peremptory status and that conflict between these two bodies of norms must be solved with structure of normative hierarchy which grants superiority to peremptory norms taken into due account" [35].

If the right to implement universal jurisdiction arising from *jus cogens* norms is acknowledged then this right in itself is peremptory and prevails over those rights of states that do not correlate with the right of universal jurisdiction. However that is rather an exaggeration as it is rightly noted in the Draft of articles on states' responsibility made by International Law Commission in 2002. Firstly, it is doubtful that right of universal jurisdiction is automatically generated by the very fact of a *jus cogens* norm violation. Besides tortures and genocide, the peremptory ban in form of *jus cogens* norm is prohibition of aggression. Nevertheless there is no right of universal jurisdiction in respect of crime of aggression. International Law Commission has found out that some state had no competence to punish leaders of other states for committal of crime of aggression and that there was no practice of states that manifested existence of such right. As the Commission noted, many authors also thought that the right to self-determination had *jus cogens* character as well. However there are no sufficient opinion, reliably confirmed by the practice, that violation of such right affords ground for emergence of international criminal responsibility and that all states have a right to punish those who violate the right.

Assume that the right to carry our universal jurisdiction arises directly from the peremptory norm of some prohibition. Even in such case it does not result from such assumption that the right to carry out universal jurisdiction in itself has *jus cogens* character. Secondary, derived norms that arise in result of *jus cogens* norms violation do not necessarily have the effect of priority. For example, it is recognized that all states are obliged not to acknowledge situations created by violations of *jus cogens* norms as legitimate ones and that recognition is pointed out in the Draft of articles on responsibility of states. However the advisory opinion of the International Court on the case of Namibia states that these derived norms do not have peremptory effect and give way to humanitarian considerations that may arise if non-recognition causes a material damage to human rights [36]. This being said it will be necessary to demonstrate that a norm arising from another norm of *jus cogens* is perceived (in wording of Article 58 of Vienna convention on law of treaties) by the international community as the peremptory norm deviation from which is inadmissible.

Results

The argument that the immunity disappears in case of a *jus cogens* violation is repudiated by two international courts. The European Court of Human Rights in a number of cases maintained that violation of a *jus cogens* norm did not create priority over norms of a state immunity. In case of *Al-Adsani v. United Kingdom*, a narrow majority of the European Court (nine judges versus eight judges) decided that provision of state immunity in cases concerning tortures used by foreign authorities corresponds to the international law and therefore does not deny the right of access to a court. Admitting that prohibition of tortures is the peremptory norm of international law the European Court of Human Rights declared: "Notwithstanding the special character of prohibition of torture in international law, the Court is unable to find out and ascertain grounds in international documents, court rulings and other materials for conclusion that a state is deprived of its right to immunity from civil claims in courts of other state if torture is in question" [37].

This position has been repeatedly confirmed by the European Court of Human Rights in a number of other cases ever since [38; 40].

These cases dealt with a state immunity from civil claims. However if the European Court of Human Rights has accepted the theory of normative hierarchy and really thinks that prohibition of *jus cogens* character prevails over immunity in criminal cases, it is difficult to understand why such prohibition cannot overcome immunity in civil cases also.

Conclusion

Thus if a third state does not carry out prosecution or punishment of individuals who perpetrate international crime on the ground of these individuals' right to immunity that, in many instances, is not considered as a violation of international obligation. Moreover, even if a third state has obligation to carry out prosecution or punishment, this obligation does not have character of *jus cogens* norm. Therefore essentially there is no conflict between norm of immunity and prohibition of *jus cogens* character and such conflict is impossible.

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О действии иммунитета должностного лица государства в случае нарушения отдельных категорий норм международного права

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Аннотация. В статье рассматриваются вопросы действия иммунитета должностного лица государства в случае нарушения отдельных категорий норм международного права. Широко распространено мнение о том, что государственный иммунитет действует только в отношении суверенных актов и что международные преступления, особенно если речь идет о нарушении норм *jus cogens*, никак не могут считаться суверенными актами. Особенно часто этот аргумент применяется, когда отрицается иммунитет государства при рассмотрении гражданских дел. Так же в статье затрагивается дискуссионный вопрос о том, что иммунитет *ratione materiae* невозможно распространить на должностное лицо, обвиняемое в совершении международного преступления.

Иммунитет государства распространяется только на суверенные акты, то есть акты, совершаемые государственной властью, ни государства, ни их должностные лица не могут отгородиться иммунитетом от юрисдикции другого государства, если речь идет о международном преступлении, так как такие преступления по большей части представляют собой нарушения норм jus cogens, а потому не могут быть суверенными актами.

Ключевые слова: международные преступления, иммунитет, должностные лица, *jus cogens*, государство, суверенитет, преступление, международное право.

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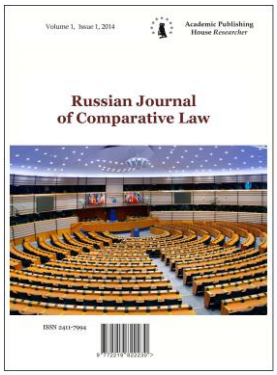

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Approaches to National Implementation of the Responsibility to Protect

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Abstract

The article seeks to examine the approaches of states, namely the UK, Germany, France, the USA, South Africa, to the domestic implementation of the responsibility to protect, particularly the responsibility of the state as a member of the international community to protect. It contains an analysis of the position of states on the legal nature of the responsibility to protect concept, foreign policy of states and their activities in international organizations towards the implementation of the responsibility to protect, as well as the position on the military intervention. Author argues that there are two approaches to the implementation of the responsibility to protect: formalistic and institutional. The formalistic approach can be described as the implementation of the responsibility to protect in the foreign policy of the state without a corresponding reinforcement of the mechanisms on its implementation. The institutional approach stipulates the implementation of the responsibility to protect both in the foreign policy doctrine of the state and in the internal state structure, which allows to coordinate policies and to identify an integrated approach of the state to the implementation of the responsibility to protect.

Keywords: responsibility to protect, implementation, contemporary responsibility to protect, military intervention, national defence.

Introduction

The responsibility to protect is the most debated international legal phenomenon at the present time. The normative formulation of this principle was given in 2005 World Summit Outcome Document (UN General Assembly Resolution 60/1) and henceforward the responsibility to protect was considered score of times by the United Nations' institutions. 10 years after, the responsibility to protect remains on the international agenda and helps to draw attention to the worst cases of human rights abuse – defined by the 'mass atrocities' concept. Nowadays the UN Security Council has formulated frequently resolutions using responsibility to protect language in spite of factual collisions on the map.

The responsibility to protect is a significant part of the UN's and its institutions' activity; despite that fact, equally important question in this respect is the implementation of the concept (either principle or emerging norm) into national legislative corpus a fortiori the states as the members of the international community formulate and actualize realization of responsibility to protect to particular situation. Furthermore, it's the domestic implementation of the responsibility

to protect, which allows us to speak about the concept as a legal (not political) principle. It is, therefore, the issue of different approaches of states to implementation of the responsibility to protect is urgent and useful at present.

Materials and methods

The main sources used for writing this article are foreign policy of states and legal acts with international focus, which are directly applied to the responsibility to protect. This article is also based on the recent researches on this issue (by Jason Ralph, Theresa Reinold, Philipp Rotmann, Gerrit Kurtz, Sarah Brockmeier, Samuel Andrew John Jarwis, Stewart Patrick, Malte Brosig, Harry Verhoeven, Sandy Africa, Rentia Pretorius, Philip Nel, Julian Junk, Dmytro Koval); but the lack of comparative studies on the subject is striking.

The primary method of this research is the comparative one. The study also uses the basic methods of cognition: historical, normative-logical, systemic, and method of legal technics etc. with their various conjunctions.

Discussion

The responsibility to protect consists of three components, so called 'pillars': (I) responsibility of the state to protect its own population from genocide, ethnic cleansings, war crimes and crimes against humanity; (II) responsibility of the international community to encourage and assist states in fulfilling this responsibility; and (III) responsibility of the international community to respond with all available means, including military action, in case of nonfeasance with this obligation by the state. This article analyses implementation of the second and the third pillars of the responsibility to protect, i.e. the implementation of the responsibility to protect by states as members of the international community. This will identify the potential for the application of the concept in different situations on a case-by-case basis, and also will determine the understanding and the interpretation of the responsibility to protect by particular states. The objective of this study is to identify mechanisms of domestic implementation towards the second and the third pillars of the responsibility to protect, then to compare them and to structure the legal approaches to the implementation of the responsibility to protect.

The responsibility to protect uses successively a large range of international legal and political tools, the most controversial of which is the military intervention. Thereat the analysis of the responsibility to protect implementation is combined with analysis of official national positions on military intervention – that will assist in determining place of military action (within the framework of the responsibility to protect) in overall national spectrum of military intervention.

Initially, it should be observed that neither all countries implement responsibility to protect in national policy nor they are supporters of it. The outstanding example is the Russian Federation, whose Concept of Foreign Policy (approved by the President of the Russian Federation on 02.12.2013) stipulates an exclusion of the military intervention (in the sense of forms of outside interference that undermine the foundations of international law) under the pretext of responsibility to protect. Russia's position in the UN confirms the negative perception of the responsibility to protect as international legal norm. However, it is noteworthy that in the UN context, Russia claims to express general support for the responsibility to protect while working to create safeguards, including international legal safeguards, to prevent obvious violations of the concept [1, p. 497]. During 2009 GA Debates on the responsibility to protect, Russian representative set that Russia will approve the responsibility to protect with the prerequisite "…that the proposed strategy for implementation of the responsibility to protect should focus on broad recognition of that concept in clear and understandable terms" [2]. As opposed to it, subsequent GA debates on responsibility to protect (provided annually since 2009) show the denial of the responsibility to protect by Russian officials. This study explores the mechanisms of the implementation of the responsibility to protect by states, which are proponents or supporters of the concept on global level.

Firstly, there is a need to consider the responsibility to protect implementation mechanisms in Great Britain.

The United Kingdom is the prominent proponent towards the promotion of the responsibility to protect on global level. The responsibility to protect arose in the British legal policy before the 2005 World Summit: the International Development Committee at the House of Commons on the

30th of March 2005 issued the Report "Darfur, Sudan: The Responsibility to Protect" [3], which for the first time referred to the responsibility to protect. Henceforth Great Britain became a strong proponent of the concept and was actively promoting it in the UN, EU and other international organizations. Moreover, Great Britain (together with France and Lebanon) had developed and initiated the adoption of the UN SC Resolution 1973 (2011), which authorized the use of military force in Libya [4, p. 9]. The representatives of the United Kingdom repeatedly note that the responsibility to protect "… should be an important governing principle of all countries' work across the conflict spectrum, as well as on human rights and development" [5]. Therefore, it would be fair to say that the responsibility to protect is inter alia an important benchmark of the British foreign policy.

Furthermore, the government of Great Britain finances numerous projects and initiatives regarding prevention of genocide, ethnic cleansings, war crimes and crimes against humanity all around the world: the UN Peacebuilding Commission, the Global Centre for the Responsibility to Protect, the Auschwitz Institute for Peace and Reconciliation, the Latin American Network for Genocide and Mass Atrocity Prevention etc.

It is noteworthy that issue about military intervention has been making a significant aspect of the British foreign policy. It's important that the responsibility to protect in the wording of the 2005 World Summit Outcome Document allows military action, but only authorized by the UN SC. In contrast, the UK Defence Doctrine recognizes "intervention to prevent an overwhelming humanitarian catastrophe" [6, p. 54], i.e. humanitarian intervention without authorization by the UN SC, to be corresponding to the existing international law (together with self-defense and authorized by the UN SC intervention). Moreover, after the use of chemical weapon in Syria in August 2013 the government of the United Kingdom expressed its willingness to launch a humanitarian intervention in Syria without the UN SC approval [7]. Abovementioned practice allows us to notice an important aspect: according to the position of the UK government the responsibility to protect is an alternative among other instruments (or concepts), and first of all is the concept of humanitarian intervention (that issue is quite controversial among scholars and states' positions). Therefore, if the military intervention within the framework of the responsibility to protect does not find support in the UN SC, the UK government may launch military humanitarian intervention without the authorization depending on political priorities of the United Kingdom. The House of Lords confirmed such position in the autumn 2015 debate: "The United Kingdom and its allies … are adaptable and ready to intervene or to support peacekeeping operations as the situation demands…" [8].

National implementation of the responsibility to protect in Great Britain is practiced within the framework of common national security system. The 2011 Building Stability Overseas Strategy does not name the responsibility to protect, though it concerns relevant issues: early warning, rapid crisis prevention and response, investing in upstream prevention [9, p. 4-5]. The responsibility to protect was included into the National Security Strategy at the end of 2015: "5.109 We will use the UN mechanisms such as the Responsibility to Protect, the Rights Up Front, the Human Rights Council, and the Children in Armed Conflict agenda to drive global change, in line with British values" [10, p. 63]. Establishment of new public bodies for the implementation of the responsibility to protect is not mentioned in the document mainly because the United Kingdom has already developed the conflict prevention mechanisms – such as the Building Stability Overseas Strategy, the early warning, the National Security Risk Assessment, the Stabilization Unit, the Conflict, Stability and Security Fund. Nevertheless, it is worth emphasizing that this system seeks to prevent conflicts; this is not similar to the prevention of genocide, ethnic cleansing, war crimes and crimes against humanity – categories, which the responsibility to protect operates with. Moreover, the conflict prevention mechanisms are directly related to the category of national interest in the 2013 Conflict Pool Strategic Guidance, which limits their use to the situation where political priorities of the United Kingdom are in danger. The emergence and the spread of ISIL gives us a vivid example of situation where conflict prevention mechanisms have not played appropriate role.

Close examination of the French foreign policy is crucial for the issue of the implementation of the responsibility to protect.

France along with other European and African countries initiates and strongly supports an adoption of the responsibility to protect at the 2005 World Summit. Later on the French representatives have closely participated in the development of the responsibility to protect.

Moreover, in 2008 the French Minister of Foreign Affairs Bernard Kouchner proposed the responsibility to protect for the use with regards to the humanitarian catastrophe in Burma (that was not positively accepted by the international community). The French representatives in the UN have repeatedly stressed the normative nature of the responsibility to protect (in contrast to initiative or concept): "the responsibility to protect is a working principle" [11]. France, as a permanent member, has been presenting this coherent position in the UN SC; for instance, in 2012, France has initiated an adoption of the UN SC resolution 2085, which authorized military intervention within the framework of the responsibility to protect.

At the French domestic level, the responsibility to protect is implemented in series of acts. The French 2013 White Paper on Defense and National Security defines the responsibility to protect as a priority of foreign affairs: "… France intends to make the consolidation of this principle a priority of its external action" [12, p. 24]. Other acts refer to the responsibility to protect as well. For instance, the 2012 Humanitarian Strategy defines the responsibility to protect as an integral part of the human rights policy. Noteworthy that changes in French structure of public bodies as to the implementation of the responsibility to protect did not happen.

The French foreign policy is characterized by approving approach with regards to a military intervention. France was one of the initiators of the military intervention in Libya and it strongly supports the UN military actions. The 2013 White Paper on Defense and National Security defines the objectives of the military intervention: "… ensuring the protection of French nationals abroad; defending our strategic interests and those of our partners and allies and exercising our international responsibilities" [12, p. 79]. Considering forms of military intervention the White Paper distinguishes two types: coercive operations and crisis management operations [12, p. 128]. At the same time, the White Paper does not distinguish military operations within the framework of the responsibility to protect among other forms of crisis management operations. Nay the document named "Contribution of the armed force to the prevention of the external crises" (2013) considers several elements of military action and permits the possibility of military operations without approval of the UN SC; although it is mentioned that such approval is desirable [13, p. 17]. Thus, according to the position of the French government, the responsibility to protect can be a cause for the military action, but it is not evolved into a separate category of a military operation.

It is also important to analyze the position of the Federal Republic of Germany.

Germany was one of the advocates for the adoption of the responsibility to protect at the 2005 World Summit. However, in the one year after adopted the German Security Policy and the Future of the Bundeswehr the responsibility to protect is mentioned only as a doctrine. The act highlights the necessity of improvement and pursuing the concept as well as importance of obtaining of a recognition from the international community. "Germany is committed to share the responsibility for the maintenance of world peace and international security in the context of the United Nations" [14]. Later on Germany was actively involved in the conception's development. Upon that the German representative refrained from voting for the 1973 Resolution in the UN General Assembly (regarding the military intervention into Libya). Nevertheless, the representative expressed his support in favor of the principle of the responsibility to protect: "Germany firmly supports the principle of the responsibility to protect, including the responsibility of the international community, through the Council, to take appropriate action… Now is not the time for us to begin to step back from or compromise on the commitments that all of us have undertaken by endorsing the principle of the responsibility to protect" [15]. Therefore, the responsibility to protect may be considered as one of the priorities of the German foreign policy.

It is worth noting that in contrast to the position of France and Great Britain who deem the responsibility to protect as outlined in the 2005 World Summit Outcome Document as a policy tool, the German government considers the responsibility to protect as a reference point for further building of the legal norm. [16, p. 439].

Germany considers the responsibility to protect within the framework of the conflict prevention based on the human rights policy and policy in the field of development by strengthening regional and international organizations as well as financial and political support of the UN Secretary General and his special advisors. The Federal Government confirmed such position in the Bundestag [17, p. 3-4]. On the German national level for the purposes of performance of the responsibility to protect, an inter-ministerial working group for civil crisis prevention and early warning and an adjunct advisory council were established [18].

Nevertheless, the German Federal Government currently does not intend to establish a body identical to the US Atrocities Prevention Board [27, p. 65]. It may be stated that Germany implements responsibility to protect not only with regards to its conception of foreign affairs but also institutionally to the Federal Government's activity.

It is worth mentioning that Norwegian and Danish legal acts in case of examining of European countries contain references regarding the responsibility to protect [19, p. 19].

The United States approach to the implementation of the responsibility to protect differs significantly from the approach of European countries. During the presidency of George W. Bush, the Presidential administration limits all obligations arising from the responsibility to protect as such that limits sovereignty [20, p. 66]. The US representative at the 2005 World Summit emphasized that responsibility to protect was not a legal norm [21, p. 365]. This position explains the fact that the United States refrained from the intervention in conflict in Darfur [22, p. 226]. Succeeding administration of the president Barack Obama has considerably changed the position towards the responsibility to protect. The 2010 National Security Strategy (the first one on the presidency of B. Obama) states that "… the United States is committed to working with our allies, and to strengthening our own internal capabilities, in order to ensure that the United States and the international community are proactively engaged in a strategic effort to prevent mass atrocities and genocide" [23, p. 48]. The 2015 National Security Strategy refers to the responsibility to protect highlighting prevention measures: "…options are more extensive and less costly when we act preventively before situations reach crisis proportions" [24, p. 22]. It is particularly important that "prevent mass atrocities" is not included in chapter devoted to the international order but is included in "Chapter VI. Values". All of the abovementioned allows speaking about the responsibility to protect as of a major value of the US national security and foreign policy.

On the 23rd of April 2010 a special position in the structure of the National Security Council was designed – Director for War Crimes and Atrocities. Later on, in August 2011 President Barack Obama issued the Presidential Study Directive 10, which established the Atrocities Prevention Board. This Board provides a comprehensive national approach to the identification and the prevention of threats, as well as monitors the institutional changes to prevent genocide and mass atrocities. In addition, the President's administration designed "A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities", which includes the allocation of areas towards the implementation of the responsibility to protect, and allocation of functions between the US public authorities. The aforesaid proves that the responsibility to protect is directly implemented at the US national level, and what is especially important – the institutional mechanisms for the implementation of the responsibility to protect were defined, the tasks among public institutions were allocated.

It is well known that the US approach to military intervention does not require authorization from the UN Security Council. B. Obama in his May 2014 speech sets that "international opinion matters, but America should never ask permission to protect our people, our homeland or our way of life" [25]. Noteworthy is that the authorization for military intervention by the international community is desirable and it is one of the principles of military intervention. Nevertheless, "when intervention is warranted but a UN imprimatur is unreachable…" the United States "…should seek to act through regional groupings like NATO or like-minded coalitions" [26]. The important point is also about limiting the prerequisites for military intervention: military "…intervention should be limited to stopping or preventing egregious atrocities…" [26]. Thus, the US approach to the implementation of the responsibility to protect defines the military intervention as one of the tools for the concept of the responsibility to protect and, if it does not correlate with the concept of humanitarian intervention as a right to intervene, it identifies intervention as a separate instrument of the US foreign policy.

There is a need to consider the implementation mechanisms of the responsibility to protect in South African Republic as well.

During the 2005 World Summit, South Africa was one of the countries-proponents of the responsibility to protect. Indeed, approach of South Africa and its position towards the intervention in Libya and Côte d'Ivoire emphasized an accent on measures short of military, foremost through regional organizations, but not except military actions. South African position in the UN SC with regards to Syria in February 2012 demonstrated commitment to the principle of the responsibility to protect and military intervention as its integral part in cases of mass atrocities

commission – South Africa voted in favor of the military intervention to Syria [27, p. 43]. It is worth noting that South African understanding of the responsibility to protect and military intervention as outlined by differs significantly from the understanding of Western countries [28, p. 528].

The implementation of the responsibility to protect on the South African national level has not occurred. The Strategic Plan 2013-2018, just like its predecessor, has not defined the responsibility to protect. Moreover, the Strategic Plan emphasizes on the rejection of military action within international law: "South Africa also upholds the belief that the resolution of international conflicts should be peaceful and in accordance with the centrality of the UN Charter and the principles of international law" [29, p. 4]. Institutional changes in South Africa towards the implementation of the responsibility to protect, did not happen.

The primary activity of South Africa regarding the responsibility to protect focuses on the framework of the African Union. As a member of AU South Africa maintains the right to intervene, which is set out in article 4 (h) of the AU Constitutive Act [30, p. 403]. In the course of further interpretation of the AU Constitutive Act, South Africa in 2011 has proposed the Common African Position on the Proposed Reform of the United Nations (Ezulwini consensus); it reflects South African position with regards to the responsibility to protect: "it is important to reiterate the obligation of states to protect their citizens, but this should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states" [31]. It should be stressed that South Africa was an initiator of a construction of the African Peace and Security Architecture. Generally, South African position regarding military intervention corresponds to the position of the African Union, for example, as to the intervention in Kosovo: "unilateral intervention, no matter how noble the pretext, is not acceptable" [32]. This fact emphasized the vital importance of AU actions with regards to the implementation of the responsibility to protect by South Africa. South Africa is also actively promoting the development of the provisions of the responsibility to protect in the AU law; for example, the South African government was an initiator of designing the Pretoria Principles on ending mass atrocities pursuant to article 4 (h) of the Constitutive Act of the African Union.

Conclusion

There is an undoubted need for the implementation of the responsibility to protect in the corpus of domestic national legislation. The analysis of states' practice shows that domestic implementation of the responsibility to protect as the responsibility of state as a member of international community is held in two spheres: foreign policy (literally legal) and institutional.

Depending on this, there are two approaches to the implementation of the responsibility to protect: 1) implementation of the responsibility to protect only into foreign policy of the state – formalistic approach; 2) implementation both into the foreign policy and into the functioning of public authorities of the state –institutional approach.

The formalistic approach is characterized by the implantation of the responsibility to protect into foreign policy of a state without corresponding reinforcement by instruments of its realization. Under this approach, the implementation of the second and the third pillars of the responsibility to protect is completely transferred within the framework of international organizations. A minimal modification in the domestic system of public authorities takes place: the function of execution of the responsibility to protect is added among other functions of the existing public institutions without changing the processes of their functioning (methodology, structure etc.). The formalistic approach to the implementation of the responsibility to protect is fraught with a modification of the goals and objectives of the responsibility to protect, and mixing the concepts of humanitarian intervention and military intervention within the framework of the responsibility to protect. This can reduce the effectiveness of the responsibility to protect practically. The formalistic approach is typical for the United Kingdom and France. Approach of South Africa to the implementation of the responsibility to protect can be named extremely formalistic – the responsibility to protect is not fixed as a foreign policy guideline (or priority); however South Africa implements the responsibility to protect within the framework of international, first of all, regional organizations (AU, Southern African development Community).

The institutional approach can be described as the implementation of the responsibility to protect both into foreign policy of a state and into agenda of national public authorities. This approach allows to coordinate policy and to identify a unified position towards the

responsibility to protect. In contrast to the formalistic, the institutional approach assumes essential modifications in an internal system of the public authorities. These modifications allow a state to implement the responsibility to protect comprehensively. This generates a direct legal-technical link between foreign policy (legal position) and functions of public institutions towards the implementation of the responsibility to protect. The negative aspect of this approach is the formation of a uniformed state approach to the responsibility to protect; it has effect on flexibility of the responsibility to protect to particular situation on case-by-case basis. The institutional approach is inherent to the United States and to a lesser degree to Germany.

The concept of the responsibility to protect is an evolving mechanism and its development largely depends on its application in practice. Significant changes came over in foreign policy of many countries in recent years, which is also associated with the concept of the responsibility to protect and its consideration within the framework of the United Nations. Designated approaches to the implementation of the responsibility to protect can be modified and improved furthermore, with the prerequisites of the development of the responsibility to protect, its application by multi-national structures on the land, and consolidation on a national level.

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Подходы к национальной имплементации «обязанности защищать»

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Аннотация. В статье рассматриваются подходы государств (Великобритании, Германии, Франции, США, ЮАР) к внутригосударственной имплементации «обязанности защищать», в частности, «обязанности защищать» государства как члена международного сообщества. Анализируются позиции государств к юридической природе концепции «обязанности защищать», внешнеполитические доктрины государств, их деятельность в международных организациях в вопросе реализации обязанности защищать, а также позиции государств к военной интервенции как таковой.

На основе проведенного исследования автор выделяет два подхода к имплементации «обязанности защищать»: формалистский и институциональный. Формалистский подход можно охарактеризовать как внедрение «обязанности защищать» во внешнюю политику государства без соответствующего подкрепления механизмами её реализации. Институциональный подход подразумевает имплементацию «обязанности защищать» как во внешнеполитическую доктрину государства, так и во внутренние государственные структуры, что позволяет скоординировать политику и определить единый подход государства к реализации «обязанности защищать».

Ключевые слова: обязанность защищать, ответственность за защиту, имплементация, военная интервенция, национальная безопасность.

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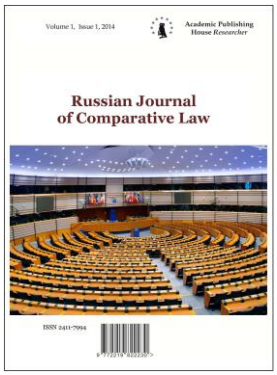

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Developmental Theories and Criminometric Methods in Modern Criminology: Analytical Overview

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Abstract

The scientific interest in studying the functional dependence of crime intensity on socio-economic processes has led to the emergence of contradictory concepts that are based on different hypotheses. The assessment of the merits and disadvantages of developmental theories shows that each research is valid for certain offenses in certain time and conditions due to the nonlinear development of countries. Therefore the context – economic, social and cultural parameters of development and crime – should be taken into account in order to elaborate the explanatory statements of criminalization. Criminometrics seems to become a scientific brunch engaged in the construction of formal criminological models and their quality evaluation. It creates the possibility to construct models using mathematic methods, separating the essential variables from the inessential ones, identifying variables' dependence (multicollinearity).

Keywords: crime, development, criminometrics, method, criminology.

Not all things that can be counted count and not all things that count can be counted.
Albert Einstein.

Introduction

In the transition to the post-industrial type of operation, many communities have faced the paradox that in contrast to the expected positive and progressive impact created a number of socio-economic and derived there from criminogenic threats and risks, which reflect the adaptive nature of criminal activity to the development. Currently popular concept of sustainable development has evolved from the environmental problems to the problems of security, including the component of criminological security. Accordingly, one of the defining challenges of modern criminology, which focuses on the nature and conditionality of crime, is to identify the dialectical interactions between the indicators of social and economic development and crime rate in order to work out an adequate prevention strategy and minimize factors of criminal acts reproduction on the individual and mass levels.

On behalf of international community the actors of UN Congresses on Crime Prevention and Criminal Justice permanently stressed the links between crime, development and prevention necessity. The Second Congress focused on crime, including juvenile delinquency, "that resulted

from social changes accompanying rapid economic development". The Fourth Congress was the first to adopt a declaration, calling on governments to take effective steps to coordinate and intensify their crime prevention efforts in the context of economic and social development. It further recognized that crime in all its forms sapped the energies of nations, undermining efforts to achieve a more wholesome environment and a better life for their people. Under the theme "Crime prevention and the quality of life", the Sixth Congress recognized that crime prevention must be based on the social, cultural, political and economic circumstances of countries. The topic of "Economic and financial crime: challenges to sustainable development" was discussed during The Eleventh Congress [1].

The overarching message from the 13th UN Congress on Crime Prevention and Criminal Justice (will be held in Doha, Qatar, 12-19 April 2015) was that there could be no sustainable development without effectively tackling crime and having respect for the rule of law. Crime destroys livelihoods and has an impact on development. To help countries achieve successful sustainable development, they need to tackle crime and ensure they have effective criminal justice systems in place and respect for the rule of law [2]. This Congress took an income indicator for calculations and deduced that over the period 2003-2013, high-income countries reported decreasing trends for both violent crimes and property crimes, whereas upper-middle-income countries had rising trends for most crimes except homicide, and low- and lower-middle-income countries had diverse trends over the period. Although the different levels of data quality and police practices should also be factored in, these data suggest that crime trends in the past decade are related to the countries' income level [3].

Traditionally in Ukrainian modern criminology the influence of social and economic factors on crime is assumed an acxiom and has been recognized both among policymakers and in academic circles. On the background of numerous theoretical studies the lack of research giving the empirical evidence of the nexus, as well as the connections' tightness between the indicators and certain crime is observed. The qualitative analysis prevails to the detriment of complex data analyzing. The negative impact of crime on societal development is also undoubted among the scholars. But the absence of elaborated methodology of crime cost and harm estimation leads to the inconclusive empirical evidence and to the weak criminological policy.

Materials and methods

A complex methodology will be employed in order to make the assessments of modern criminological theories achievements. Taking into consideration that our conclusions will be based on the secondary data of theoretical conceptions we use primarily content analysis, comparative and germenevtic methods.

Discussion

The previous studies of the nexus between crime and development were primarily focused on understanding the social nature of crime. At the beginning of XX century scientists predicted that crime would lose its causal base after improvement of public relations. They also considered that social, economic, political and cultural development would lead to a significant reduction of crime. But now optimistic forecasts about its reduction are not justified either in developed or in developing countries.

The classical theory of disintegration put a foundation for contemporary developmental theories and studies in criminological field. Its author, E. Durkheim pointed out that in the process of modernization, rapid social changes disrupt the integrative force of the collective conscience, and consensus on social values associated with traditional society breaks down, resulting in social disintegration (anomie) that becomes the social factor of deviance and crime (Durkheim, 1897) [4].

The academic interest to economic model of crime studies, in particular microeconomic, has grown up since the emergence of G. Backer's fundamental work on analysis the offender's rational choice and the cost of crime as well (Backer, 1968) [5].

Continuing from these scientists, contemporary scholars proposed both theoretical and empirical theses based on criminometric methods describing and predicting the patterns of crime and deviance under development.

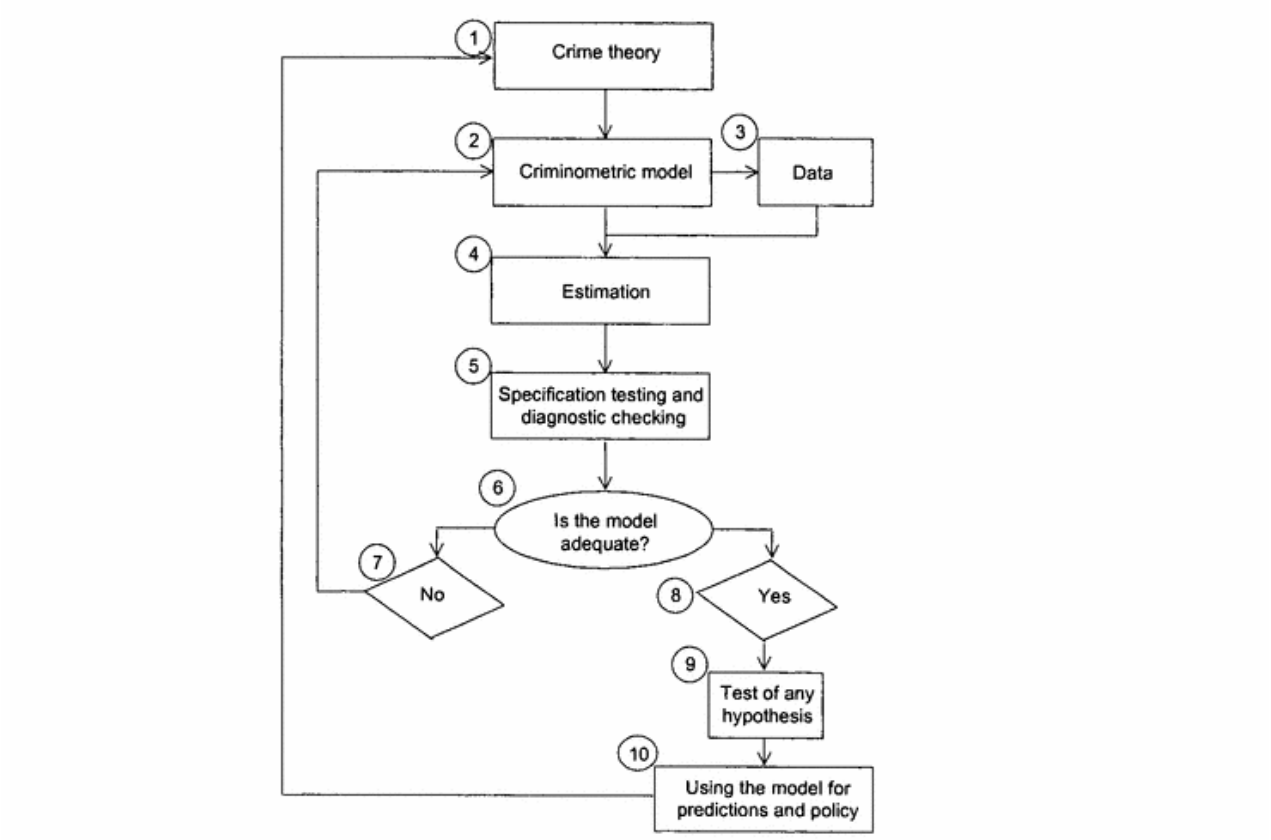
Criminometrics is an example of interdisciplinary scientific synthesis and represents a quantitative (mathematical) analysis of criminological data. This methodology originates from

econometrics and exploits the statistical methods adapted to criminological issues. It allows the construction of complete and reliable quantitative models of complex social processes.

The efficacy of mathematic modeling is called into question in some criminological research. Non-linearity and multifactorial process of society criminalization serves as the main arguments for the opponents.

Disabused in the possibility of rational and purposeful social management, community mainly tents to rely on the processes of spontaneous self-organization resulted in the prevalence of conventionalism for ordering and harmonizing people's interactions. Meanwhile the intuitive theoretical concepts that are not confirmed by empirical quantitative and qualitative research have weak chances for operationalization in practice of crime counteraction.

The expediency of mathematical modeling has been proved repeatedly in biometrics, psychometrics, sociometrics etc. Its achievements stimulated the research of social processes cyclicality and helped to identify recurring cycles in history, sociology, political sciences. The study of time series dynamics and the extrapolation of reviled trends have led to the construction of so-called Harvard Barometer in economy that substantially improved the quality of forecasts of the studied systems' future state. According to Barometer concept the dynamics of the various components of any multi-factor phenomena, including criminal one, comprises factors that are changing far ahead of changes in other components. The property of each curve to repeat the motion of the other curves in certain sequence and with a certain lag has been laid to the basis of the forecast using the Harvard barometer [6, p.127-128]. There are many examples of a particular model representation giving the effective results in one or another humanity science, but it has not found its proper interpretation in modern criminology in Ukraine.



The penetration of mathematical methods into jurisprudence is assumed to overcome the significant difficulties connected with the nature of criminological processes. Most of the objects studied by criminology can be defined as a complex system. The common understanding of the system is a combination of elements interacting with each other, as well as the environment, and forming indurated integrity, unity. The fundamental quality of a complex system is the emergence, in other words the presence of such properties that are not inherent to any of the elements of the

system, but inherent to the system as a whole. Therefore, the analysis method (division into elements and then examining these elements separately) is deficient while studying systems. The complexity of the system is determined by the number of its member elements, the links between these elements, as well as the relationship between the system and environment. A criminal situation has all the features of the system. Schematic description of the steps involved in a criminometric analysis has been performed by Horst Entorf and Hannes Spengler [7, p. 98].

Getting back to the developmental theories essence the meaning of modernization concept should be highlighted.

The modernization approach emphasized the influence of economic institutional and social structural changes (increased socioeconomic development, rapid urbanization, population growth but breakdown in family relations) on criminal behavior. It was based on the assumption that modern transformation results in social disruption that produces alienation and, in the end, criminal activity. This point of view has been well described in studies of Clifford (1963) [8], Clinard and Abbott (1973) [9], Krohn (1976) [10] etc.

One of the greatest achievements in the elaboration of criminological modernization theory belongs to L. Shelley (1981). "Crime has become one of the most tangible and significant costs of modernization", – she deduced in the fundamental study [11, p. 137]. Her analyses divided countries into three groups: developing countries, developed countries, and socialist countries. The level and distribution of criminality were examined in terms of the extent and speed of the urbanization process, the degree of industrialization, changes in the social structures and the impact of the criminal justice system. According to L. Shelley observations of crime under modernization, the rate of property and violent crime increases in the cities, and in rural areas, despite the agricultural potential and migration of people to cities, violent crime dominates. The evidence that the process of modernization has a distinct and consistent impact on both rates and forms of criminal behavior was also demonstrated in the research. Nevertheless Shelley characterized her theory as a more descriptive rather than predictive one.

Comprehensive cross-national studies were represented by Neuman and Berger (1988) [12], Neapolitan (1997) [13], Lafree (1999) [14], Messner (2003) [15] ets. These studies were focused primarily on crime patterns in developed countries.

According to Entorf and Spengler (2000) [16] reporting crime rates are strongly correlated with development: richer countries report a higher fraction of crimes. In some other research significant negative effect of income on crime is observed (Kelly, 2000) [17]. Soares (2004) has deduced that development (income per capita), by itself, does not have any significant effect on crime, although increases in the economy's growth rate reduce the number of thefts; education is also a factor that has negative effects on numbers of thefts and contact crimes. The reductions in inequality and increases in growth and education are associated by the scholar with reductions in crime rates [18].

However Newman (1990) considered that impact of crime on society can be less with an increase in development level, despite the increase in the number of crimes [19].

Aebi and Linde (2014) studied homicide trends in 15 West European countries from 1960 to 2010 and found out that none of the traditional demographic and socioeconomic predictors of homicide was significantly correlated with the rates of homicide. The authors proposed an explanation based on lifestyle approach [20, p. 567].

There were also some scientific attempts to examine the interactions between crime and political management. Pinker (2011) in his comprehensive analysis of the secular reduction of violence across the globe has assigned a decisive role to democracy and its institutions in this process [21]. Karstedt (2015) has found different violence trajectories of contemporary societies, as the different institutional settings and stability generate different violence outcomes. According to this research, institutional and state failure coincides with high levels of interpersonal and repressive state violence [22, p. 471].

Other relevant studies include the assessment of globalization impact on crime. Messner and Rosenfeld (2000) argued for a need to restrain the market and prevent the economy from dominating other institutional realms, with reference to their institutional-anomie theory [23]. Findlay (1999) comprehensively reviewed criminogenic conditions during globalization processes, especially in developing countries [24].

The issue of reciprocal connection between crime and development was scrutinized not only at macro level, but also at local communities primarily in the environmental criminology field. According to Kick and Lafree (1986) "opportunity" theory modernization and development enhanced urbanization, which decreased interpersonal ties and contact among intimates and acquaintances, thereby reducing interpersonal violence, while development increased opportunities for theft by providing a vast supply of readily available commodities in a time where surveillance and social control was lower [25]. Freedman and Owens (2011) estimated that constructing low-income housing in disadvantaged communities reduced robberies and assaults by about 2 % [26].

A few studies were devoted to the connections between economic crime and economic growth. Asif Islam (2012) has found a negative relationship between firm losses due to crime and economic growth. Expressed in terms of standard deviations, an increase in real GDP per capita growth by 1 standard deviation resulted in a 0.09 standard deviation reduction in the losses due to crime over total sales. The suggested mechanism for this effect is that economic growth increases opportunities elsewhere and thus increasing the opportunity cost of crime. He has also noticed that economic growth is more effective in reducing crime loses for firms with female owners and managers [27].

Moreover, scientists has pointed out the reverse relationship, for instance, the impact of crime on the labor market. Nagin and Waldfogel (1995) demonstrated that a number of convictions for a crime increased the instability of the labor market. Sharp increase in crime in the long term will lead to at least the fact that the lower productivity of criminal populations negatively affects the economy as a whole [28]. In Ehrlich's (1973) opinion, economic growth also serves as an indicator of increasing prosperity and thus the effect on crime may depend on the level of risk aversion [29]. At an international level, an analysis of the effects of crime on economic development is offered by Van Dijck (2007), who has worked out a composite index of organized crime for 150 countries. The analysis underlines how crime tends to depress economic growth through the presence of corruption and a weakening of the Institutional systems, in particular those necessary for long-term economic growth [30].

Over the past decades, many fundamental scientific criminological works have appeared on the territory of the former Soviet Union. They have made a significant contribution to the understanding of crime modifications in connection with the current social and economic processes. The importance of the scientific work of Prof. V. Dryomin (2009) [31] is undoubted. He considered crime as a kind of social practice and also mechanism of criminal activity institutionalization. J. Gilinsky (2004) [32] analyzed deviant and in particular criminal acts through the lens of psychology of consumer society and the realities of social exclusion. V. Shakun (1996) highlighted the impact of urbanization on crime [33].

Criminometric methodology was applied by Y. Andrienko (2001). He explored that violent crime was being replaced by mercenary one under the decline of income inequality, the growth of real incomes and unemployment. His expectation is a further increase in property crime during the sustained economic growth in Russia [34]. Relevant etnometric study helped Y. Latov and N. Latova to find the significant correlations between mentality indexes and the participation of Russians in the shadow economy (including corrupt relations) [35].

Results

Summarizing the studies we are able to deduce their main statements:

- The increased criminality is an unavoidable consequence of socioeconomic and industrial development (theory of modernization point of view).
- Underdevelopment is the factor of crime (socioeconomic theories point of view, usually rejected by critical criminology).
- Crime delays development (crime and development are considered both as a cause and as a consequence of each other).
- There is no significant interaction between crime and development.

Thus, the academic interest in study of the functional dependence of crime intensity on socio-economic processes has led to the emergence of contradictory concepts that are based on different hypotheses. The flaws in the methodology of extrapolating of sociological and economic sciences

achievements, exploring the models of interaction within the framework of social mobility status and roles, as well as the development of resources and financial capital, and wealth redistribution into the criminological matter resulted in some phases to quite opposite conclusions about the nature of crime. They are: the statement of the countries progressive criminalization that is not actually confirmed by official statistics within the UN survey; the explanation of crime as a result of poverty, alongside with observing the accelerated pace of crime intensity in countries with high GDP per capita; the statement of some of the most economically developed countries criminological safety (eg, Japan and Switzerland) without adequate justification of their exclusivity among general regularities; the statement that crime tends to oppress development, but comparatively higher crime rate is observed in developed countries. Furthermore, the empirical studies predominantly used cross-national data of Western societies and developing countries. There is a need in studies of the socioeconomic transformations impact on crime in underdeveloped countries. In modern globalized word the risk of using underdeveloped countries with weak government as a base location by transnational organized crime with terroristic and other criminal activities has increased. This problem keeps the attention of international community and demands coherent solutions.

The main demerit of each theory and study is the lack of universality. It means that each theory is valid for certain offenses in certain time and conditions due to the nonlinear development of countries. Therefore the context – economic, social and cultural parameters of development and crime – should be taken into account in order to not only give the description but also an explanation.

Criminometrics seems to become a scientific brunch engaged in the construction of formal criminological models and their quality evaluation. A researcher is able to borrow a rich experience from developed economic and statistical models and examine crime theories and hypotheses through descriptive, correlation and regression analyses. At the same time it is also possible to construct models using multiple regression, separating the essential variables from the inessential ones, identifying variables' dependence (multicollinearity). The contextual analysis of concepts leads to the inclusion variables of different linearity into the regression equation. It enables to analyze systems with essentially nonlinear relationships.

Nevertheless the empirical criminometric study of the nexus between crime and development has some obstacles taking into consideration the next issues.

First of all there are no uniformed, internationally accepted criteria for development assessment. In our research we'll combine different indicators, relevant to economical and social transformations.

Secondly, every scientific research would benefit from high quality data, but the complex nature of crime doesn't allow a direct certain and exhaustive measuring of illegal activities. Moreover, the researcher is obliged to rely primarily on official statistics on reported crimes. It discloses the problem of crime underreporting and underrecording and remains the latent crime out of sight especially under the gaps of crime statistics quality. Perhaps, it may be the main reason of the scientific interest within criminometric methodology to study ordinary violent and mercenary crime and omit other crime types. For example, due to the high level of white-collar and organized crime latency the reliability of obtained outputs can be very low. There were some scientific attempts to fill this gap with data of victimization surveys (Andrienko (2001), Soares (2004)). But this approach is not applicable in Ukraine due to the absence of comprehensive victimization surveys at the national level. Thus, the analysis of secondary data on crime and development leaves uncertain the observance of validity requirements for primary data.

In addition the vast majority of previous studies used cross-national data and designs. Besides the well-known data compatibility problems due to the cross-national differences in definition, procedure, and criminal justice practices, cross-national data do not reflect the intrinsic longitudinal nature of the modernization process under political, economical, and historical contexts of particular countries. In Ukraine even at the national level there is a problem of rather frequent changes in definitions of certain crimes that mechanically impact the data of crime rate in official statistics. This is the case for theft, for example. Considering inflation, growth in income and other factors, the government changed the definition of theft several times during the studied period automatically increasing or decreasing the total crime rate as theft reaches 40 % on average of total crime in Ukraine.

Finally some weakness of criminometric analysis projections should be acknowledged due to the fact that during the calculations of one or more variables on crime factors one cannot consider them all. It is also complicated to establish pace (progression) of criminalization.

Conclusion

Criminometrics in Ukraine has not been formed as a separate line of scientific and practical activities. But the achievements and success of this methodology in national and cross-national studies allow applying it to Ukrainian criminological realities and enabling to shift from description to explanation and prediction of crime and development reverse interaction.

Примечания:

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Теории развития и криминометрические методы в современной криминологии: аналитический обзор

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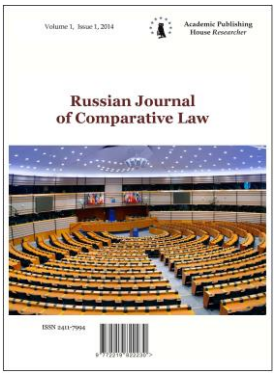
Аннотация. Научный интерес к изучению функциональной зависимости интенсивности преступности от социально-экономических процессов привел к появлению противоречивых концепций, основанных на различных предположениях. Оценка достоинств и недостатков теорий развития показывает, что каждое исследование справедливо лишь для некоторых преступлений, совершенных в определенное время и при определенных условиях, учитывая нелинейность развития стран. В связи с этим контекст – экономические, социальные и культурные параметры развития общества и преступности – должен приниматься во внимание для выработки объяснения криминализации. Криминометрика способна стать научной отраслью, которая занимается построением формализированных криминологических моделей и оценки их качества с помощью математических методов, отделяя существенные переменные от несущественных, выявляя взаимозависимость переменных преступности и параметров развития (мультиколлинеарность).

Ключевые слова: преступность, развитие, криминометрика, метод, криминология.



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Municipalities in Finland: Constitutional and Human Rights Related Issues

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Abstract

Departing from the principle of municipal autonomy the article overviews the history and the competence of modern municipalities in Finland. It moves to the issues of welfare functions of municipalities regarding implementing economic, social, and cultural rights. The main constitutional problem which arises when one focuses on the welfare functions of Finnish municipalities is the on-going social services reform in Finland, known as "SOTE". This reform aims at creating new social and health service production districts replacing the existing municipalities currently carrying out such welfare functions. In the present constitutional settings of Finland several important public law dilemmas stem from the "SOTE" project. We analyze these problems and come to a conclusion that direct local elections to the social district management board would allow one to avoid decisive constitutional problems deriving from the constitutional right to local democracy.

Keywords: Finland, local self-government, municipal competence, welfare rights, administrative reform

Introduction

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Finland is a unitary state [1, Art. 119, Art. 121], composed of municipalities belonging to municipal districts or regions [1, Art. 119] and, of course, accommodating an autonomous region of Åland Islands [1, Art. 120]. In the 1940s the number of municipalities reached the record number of 603. Since then it has been gradually decreasing due to various administrative reforms entrusting municipalities with steadily enlarging duties to provide various public services. These obligatory tasks are financed partly by the state subsidies and partly by the competence of municipalities to collect taxes from inhabitants and businesses inside their borders. Too high municipal taxes, and as a result the inhabitants and businesses tend to leave; not enough municipal tax revenues or other municipal incomes – e.g. from its own energy production company or other businesses – and in the end the municipality will bankrupt. Moreover, the growth of urban municipalities is gradually circumscribing the autonomy of small country-side municipalities surrounding large urban districts, because the center city municipality and the countryside municipalities merge and often in terms clearly favorable to the city as "a gravity center". The country side municipalities face also fatal challenges caused by the work related migration of

population to urban municipalities leaving them to struggle with ageing and retired population. As a result they might be forced to merge with their more vital neighbors. In this almost evolutionary 'survival of the fittest' process destiny of many municipalities has been to vanish. For example, only since 2013 the number of municipalities in Finland lost 19 entities, having decreased from 329 to 310 municipalities in 2016 [2].

The legally strong position of municipal democracy is in a sort of paradoxical contrast to the aforementioned struggle for survival many municipalities face in reality. In Finland the local self-government is constitutionally entrenched. Constitutional regulation of local self-government requires participation of citizens and foreigners permanently resident in Finland in municipal elections (Art. 14) and the competence of municipalities to decide on financial matters, including municipal taxes (Art. 121). The mechanism of realization of these constitutional provisions is stipulated by the 1995 Local Government Act, 365/1995 [3]. This Act gives due to the diversity of municipalities while recognizing the welfare of population as a primary goal of municipal administration. In accordance with this Act, the highest decision-making body in every municipality is a "local council," elected directly by the residents (Art. 1, par. 2).

In legal terms maintaining self-governance of municipalities has traditionally been an important issue for the Finnish constitutional law. Yet it is nowadays rooted also in the European law. The principle of local self-government, as enshrined by Art. 3, par. 1 of the 1985 European Charter of Local Self-Government, "denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population" [4]. This principle is recognition of direct citizen participation in managing public affairs as it is exercised "by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute" (Art. 3, par. 2).

Amidst modern reforms in Finland it is difficult to achieve an ideal of public participation due to the growing tendencies for rationalizing the production of public services for population, especially with respect to health care and social services. The more municipal administration becomes the executor of patient's or social services client's clear cut subjective rights, the less leeway there is for direct involvement of citizens' opinion in local decision making in these central matters.

Materials and Methods

The author addresses academic writings as well as legal sources from Finland. Government proposals regarding the administrative reforms in Finland are consulted with. Moreover, statistical data from the sources openly available in the Internet is also used. The method of legal textual analysis is primarily employed in this text. This analysis is conducted the context of the discussions regarding local democracy. For instance, S.H. Bailey in his book "Cross on Principles of Local Government Law" comments the case of Britain lacking a written constitution with a speculative question what it would mean from the standpoint of local authorities to introduce a written constitution. As an answer to his question Bailey maps a list of competence and, what Hans Kelsen would call, "competence-competence" issues [5]. Of course the competence matters get a way more complicated once the federalism is adopted as a key principle of the whole legal system saturating the legislative, executive and judicial branches of government, as e.g. in the United States [6].

Discussion

Conventional problems of federalism include the issues of competence arrangements between the federal center, the territories, and municipalities - the subparts of the states with own jurisdiction in certain matters. These issues culminate in the notion of local democracy. However, stereotypical problems for federal states at a closer look are relevant also for unitary states. Legally this means that there should be clear division of competence the center as a top of hierarchical state administration, and the autonomous public entities – the municipalities. Moreover, the competence should be also divided between various public organs inside the municipalities. This article argues that the functional complexity of modern (post)welfare state as a social system

is among the main reasons for similar dilemmas in federal and unitary sates when it comes to the division of competence. This is demonstrated with the case of Finland.

The origins of municipal autonomy in Finland

The history of Finnish municipalities date back to early XVII century. Originally the units which are nowadays known as municipalities were established according to the existing church parishes [7, P. 85]. The borders of a church parish, in their turn, imitated the borders of older, pre-Christian era venues for "semi-court districts" [8, P. 121]. These districts were called with the Scandinavian term "ting" - alike the U.S. English term "thing" in the sense of "the subject matter of a right" [9, P. 1518] – and were set up in order to administer justice. The Protestant parishes represented a platform for the later development of modern municipalities in Finland due to the reforms in Sweden in the 17 century [7, P. 123]. During those times the King of Sweden pursued a policy of establishing the so-called "true confession", namely the overwhelmingly Lutheran variant of Protestantism religion for everybody and as a sort of official ideology. The pragmatic goal was to strengthen the position of the royal state administration in Stockholm. Yet the King's administration was somewhat desperately lacking means of enforcing its policy at a local level. Although the Army of Sweden was present in Finland – which was an integral part of Sweden during those days and cannot be seen as a "colonized" area [10, P. 337] – other than military means of enforcement were weak at best. Hence in many important every day issues the state administration could hardly penetrate everyday life in Finland by influencing such processes as organization of economy, marriages, land sales, political beliefs, etc. Hence, the church parishes were entrusted with several tasks which in the Nordic context nowadays would be considered as "typical state functions", i.e. they maintained population registers, acknowledged real estate deals by virtue of reading publicly in the churches these announcements as well as the various orders of the King of Sweden. Parishes also provided religious school education for children. Finally, the parishes – and later the municipalities – were granted a right to collect taxes to fulfill their tasks [7, P. 127]. Also in this respect the root was in the earlier practice of the Catholic parishes to collect tithes. Hence, the closely to state bound Lutheran church parishes combined the elements of local self-governance (by local elite) to the right to allocate own resources under procedural and material limits set by the King of Sweden.

Modern Finnish municipalities evolved in the course of secularization in Sweden and the Grand Duchy of Finland since the mid XVIII century. In Finland the decisive step towards the modern municipalities was taken in the "Municipality Act", and "the Poor Act" of 1865 accepted by the Finnish Senate, i.e. the administrative body representing the Russian Emperor in the Grand Duchy, and confirmed by the Emperor ultimately. In the social dimension the 1852 "Poor Act" introduced the principle that local authorities were legally responsible for organizing the basic security of the poor [11, P. 61]. In the organizational dimension the 1865 "Municipality Act" entrusted parishes only with the function of keeping population records. Other tasks were entrusted in the secular municipalities which could establish a municipal council to be their supreme decision-making body. Whereas "the Poor Act" created a set of new social services and obligated municipalities to provide these services to those in need as well as to collect the required funding [7, P. 140]. The last mentioned aspect of administering their own budget presupposed a principle that municipalities would have a competence to collect new taxes for new tasks "inside the purpose of municipalities" [7, P. 141]. Politically the goal of the 1879 "Poor Act" was to limit the benefits for the poor in the spirit of liberal "Night Watch" state policy [7, Pp. 96-97]. But opposing this Grand Duchy Senate driven "minimum state" policy the wealthiest industrialized towns in Finland began to provide much better benefits than those set by the "Poor Act". These towns claimed that public order and balance in the society would be better served by a higher level of benefits for poor.

The "Poor Act" represented a milestone in the genesis of modern Finnish municipalities. Before this Act was introduced, the collection of funds for the poor had remained a religious duty or a sign of mercy. After the "Poor Act" was enacted that duty transformed into a statutory obligation of municipalities. Although social benefits were limited during those days their entrenchment in statutory law gave impulse for new social law reforms which followed later. In this respect Finland followed the example of Sweden. Sweden enacted the town administration reform law in 1862 [7, P. 27]. Finally both towns and countryside municipalities got own statutes: the 1865 "Municipality Act" and the 1869 "Town Act." The delay in adopting the "Towns Act" was

caused by the unwillingness of the officials to weaken the position of the poor by subsidizing them less. Yet eventually the towns were allowed to follow own policies in this respect. The events left a new principle in the Finnish administrative law: the municipal authority has a competence to provide better benefits or other benefits than those ordered by the legislator, if this is not explicitly prohibited. Respectively also countryside municipalities were entitled to alternate the quality and range of welfare services.

Welfare functions of municipalities

Later in the XX and early XXI century the history of Finnish municipalities linked with the processes of democratization in the society and the idea of a welfare state. The XIX century municipalities were ruled by the male council elected according to a voting system in which a number of votes were directly proportional to the amount of municipal taxes which individuals paid [8, P. 148-149]. In 1917 the suffrage in municipal election was extended to women. In 1917 the suffrage in municipal elections was extended to women and became equal for both sexes irrespectively of wealth or other facts [12, P. 3].

During the early development of the welfare state from the 1950s until 1980s the municipalities represented institutional organizations of local democratic power and division of labor which had differentiated from the central government and other state bodies. The production of new public welfare services followed a standard pattern inherited from the earlier centuries: parliamentary acts established new obligations to municipalities in service production, a central supervising bureau for the introduced services was established in Helsinki and possibly new supervisory tasks were addressed to provinces as part of state administration, and the duty to actually produce the services was addressed primarily to municipalities as "a statutory based obligation" [8, P. 150].

The transition to the welfare state resulted in a new budget policy of the state. Instead of outsourcing the problem of financing welfare services to municipalities the state began to subsidize those services which were compulsory. Subsidizing mechanisms also represented the means of a stricter supervision of municipalities [13, Pp. 17-18]. But the idea of municipal self-governance as a constitutional principle left its mark on the way in which financing municipal welfare functions is reflected in the laws. Laws provided that that central funding for welfare services allows wide discretion for municipalities to decide how the funds would be actually allocated to meet various needs inside the annual municipal budget. There was, hence, a constitutional tension between the intensified state supervision, culminating in the state's competence to practice real time supervision over bankrupting municipalities, and the right to self-government of municipalities. It was also important that intensified state supervision over municipalities by various state bureaus would focus as main rule on the quality of produced services *ex post facto*. The state gave a lump sum as a state subsidy to the municipality which decided on the allocation of this funding inside limits prescribed by subjective rights to daycare, education, health care, aged persons services, housing, library services, sport venues and facilities etc. Nowadays the amount of state subsidies in annual municipal budget varies a lot between municipalities; the main reason for this is the Parliament's willingness to use this funding in order to support decreasing municipalities. For example, Salla and Ranua - small municipalities in Lapland – receive 63 % and 70 % subsidies respectively. At the same time Espoo belonging to the Capital metropol district receives 2 % subsidies. Helsinki itself gets 9% subsidies. The amount of subsidies depends of the level of economic development in the municipality [14]. Would the service production fail in terms of quantity or quality the municipality would bear responsibility as sanctions, imposed by the state, as happened in the Supreme Court Case law of 1990s. These sanctions are cuts in subsidies, based on tort liability. This entitlement to use discretion inside the municipal decision-making and the *ex post facto* liability for the outcomes of municipal administration fortified municipal autonomy.

The autonomy of municipalities in budget matters was balanced by their responsibility to collect own funding on top of state subsidies. As mentioned before, already in the XIX century municipalities had gained an independent right to collect taxes from both natural and legal persons residing in their territory. Besides, the municipalities had a right to run own businesses with own risks. In this way the municipalities could combine the subsidies from the state, own tax incomes, and possible business profits in order to pursue their goals. For example, they could choose between providing compulsory welfare services at a high average quality level and most probably

high taxation level, on the one hand, or reaching rather a low taxation level by providing only basic services, etc.

Joint municipal authorities

Due to the processes of urbanization and the small population in Finland, municipalities were driven towards cooperation after the Second World War. Co-operation processes have resulted in creation of 184 regional joint municipal authorities which produce welfare services for more than one municipality [15]. The most important areas of cooperation are health care, social services, and education at the secondary level institutions, such as professional schools.

Joint municipal authorities are established by specific acts and operate in a similar way as other legal persons such as firms or foundations. Such joint authorities for social and health care service production are steered by "general assemblies", i.e., the supreme decision-making bodies, according to Art. 51 of the Municipality Act of Finland No. 10.4.2015/410. As an example one can mention the special health care districts. Each district has a professionally distinguished university central hospital, as stipulated by Art. 52 of the Health Care Act of Finland No. 30.12.2010/1326. The membership of municipality in one of the districts is compulsory, and members pay the operational costs of university hospitals as well as other special health care units by paying per use fees and fixed membership fees as agreed. The key operations and budget are controlled by the general assembly of the district.

Kainuu and Åland Islands Regional Assemblies are the exceptions from the typical goal specific regional assembly arrangements. These two regions accommodate directly elected Regional Assemblies animating rather traditional municipal councils with a wide, though not universal, competence instead of just a task specific service production assembly. Although Kainuu and Åland Islands are in the terms of population and economy small regions they are important experiments of regional self-governance.

Members of the municipal assemblies, as joint authorities, are not directly elected but are nominated by municipal councils. Member municipalities are responsible for funding the joint authority, as laid down in their Charters. Typically, similar municipalities, in terms of population or budget resources, have been willing to form a joint authority. Yet the recent planned administrative reform in the welfare services production will inevitably mean a change with respect of the competence of joint municipalities.

Whereas Regional Councils are joint municipal boards including representatives of municipalities in the region. Presently there are 18 regional councils in Finland [16]. These complement the role of joint municipal authorities. Regional councils are statutory bodies. These councils are rather discussion forums responsible for regional development and supervision of the interests of regions and provide a platform for voluntary co-operation. Respectively the regional councils have no independent budget-making power. According to par. 4 of the Regional Development Act of Finland No. 17.1.2014/7, regional development authority in each region is responsible for managing functions, related to regional development.

Ensuring welfare rights and the "SOTE" reform

Implementation of welfare - i.e., economic, social, and cultural - rights (ESCRs) stipulated by the Constitution of Finland and amplified, among human rights instruments, especially by references to the European Social Charter, is a special issue associated with functioning of municipalities. ESCRs require the state to provide services to everybody. Yet the state of Finland decides on its own how exactly to organize the production of these services. Therefore, inside the manifold Finnish public service model the issue of implementing ESCRs turns easily into a jurisdictional dispute between, on one hand, the state and its central agencies and, on the other hand, the municipalities and their various combinations.

The "SOTE" project [17], i.e., the recent administrative reform in Finland plans to set up new joint social and health care districts charged with the provision of welfare services. These joint districts will substitute the functions of the existing municipalities regarding the provision of these services. The new districts will substitute autonomous budget powers of municipalities and the present joint municipal authorities. This will mean most probably an increased central control over the most important of functions of municipalities, namely the production of health care and social services.

The latest pending SOTE proposal by the government in the Autumn 2015 suggests 15 service production districts based model to replace the existing almost 190 various joint authorities [18]. Again the proposal brings in constitutional problems mapped and explicated by the Constitutional committee of the Parliament in its statement 67/2014 (released actually on 19.2.2015) in relation to the earlier similar style proposal of by the then government [19]. The most serious of these concern the municipal autonomy which is guaranteed by the Constitution. Article 14 of the Constitution stipulates that: *"every Finnish citizen and every foreigner permanently resident in Finland, having attained eighteen years of age, has the right to vote in municipal elections and municipal referendums, as provided by an Act. Provisions on the right to otherwise participate in municipal government are laid down by an Act.*" An essential part of this constitutional right is the right of municipality residents to influence the decision making by elected organs, i.e. municipal councils, in matters of producing health care, social services, and the related public spending as well as taxation.

The "SOTE" model is based on the present government proposal that all important budget decisions will be made by 15 joint authorities. Municipalities have to pay for welfare services, according to the rates, established equally *per capita* to all member municipalities of the joint authority, as assumed by the abovementioned Government proposal No. 268/2014. Another constitutional problem reveals itself at this point. Municipalities will have own representatives in decision making bodies of the forthcoming joint authorities, according the size of population. The decisions will be made, according to a qualified majority rule so that at least the majority of representatives of two municipalities must support the initiative. As a result, small municipalities will have no opportunity to influence the initiatives, supported by the municipalities with the greatest population inside the joint authority. In effect, this is capable of in fact eroding the right of the residents in small municipalities, set up by Article 14 of the Constitution of Finland. The "SOTE" project tried to balance this situation by introducing the duty of the joint authority to hear closely the people to whom the services are produced. Yet this recommendation does not establish any right of municipal residents to actually participate in the decision making. The overall erosion of municipal autonomy is fostered by the governmental plan to establish a new central agency to monitor and steer activities of joint "SOTE" authorities [20]. Finally, state subsidies will be paid directly to the new joint authorities, instead of municipalities. For now, it remains open whether the new "SOTE" districts would have or not their own right to collect taxes or should they rather get per inhabitant fixed subsidies from the state. The main argument for their own taxation competence is a classic in the Finnish context; the electorate which wants to enjoy the ESCRs related services must also pay a substantial part of the bill in the end of the day. If there is an option to send the whole service bill to the state, as an outcome is a risk of free riding at the expense of all districts' all tax payers who would pay the bill as the state taxes. Whereas the main argument against this "economic responsibility" is its younger nemesis: the goal to guarantee as good as possible right to equal social and health care services for all in Finland due to human and constitutional rights. To put it bluntly this turns into a clash between the long term experience and ideal principle of human rights. The experience (of the Finns) says a sound welfare economy cannot spend more than the people and businesses inside its reach earn and are able to pay in taxes; the human rights emphasize says that the public sector must meet its obligations to provide high level services to all. It might be so that the decisive argument will finally be Finland's economic crisis and its current trend to drop down in the international credit ranking reviews, yet this remains to be seen.

Results

We pursued to claims that one of the main constitutional problem of the "SOTE" reform is ensuring the right of the residents in the municipalities to take part in local self-government. In other words, the "SOTE" project brings in the need to choose between the long-term experience in administration and the ideal principle of human rights. The experience prompts that welfare economy cannot allow more spending than its subjects earn and pay as taxes. Adherence to human rights would mean that public sector must meet its obligations to provide high level services to everybody and the service addresses should be able to affect decision-making. More particularly, indirect way of establishing managing boards in new social and health-care districts contradicts the principle of electing the supreme decision-making bodies at the local level. Direct elections to the

boards of new districts would allow to avoid decisive constitutional dilemmas derived from the constitutional right to local democracy.

Conclusion

Implementation of municipal autonomy is a mode of indirect public participation in the conduct of public affairs. In Finland it culminates in the power to collect and allocate municipal budget and introduce, if needed, municipal taxes and businesses. The new administrative reform in Finland - the "SOTE" project – illustrates the importance of the local budgetary powers; its key democratic dilemma is to define which subjects – states, municipalities, or SOTE districts themselves - should collect taxes in order to pay the bills of new joint authorities. The parallel development to strengthen patient rights to choose service providers rather strengthens the position of the public services. At the political level the choices should be made when SOTE districts will set specific rules for organizing offer competitions to make contracts with various service producers. At the same time, the choice of how public resources will be exactly spent is supposed to be made in other ways than the established municipal self-government via elected councils. To safeguard the constitutional right to local democracy, new democratic mechanisms are necessary in order to link the new "SOTE" districts with the self-government right of individuals who reside in municipalities or inside the SOTE district. This necessitates a rejection of certain parts of the present municipal democracy as why to have any more overlapping elections on two local levels if the power to make budget decisions shifts from municipalities to SOTE districts. The introduction of a requirement of direct elections in joint authorities and representative boards would allow to observe the principle of local self-government. Further, without own taxation powers the new SOTE district councils would be in a weak position to practice effective decision-making.

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Муниципалитеты Финляндии: конституционно-правовой анализ с точки зрения прав человека

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Аннотация. Исходя из конституционного принципа самостоятельности местного самоуправления, настоящая статья рассматривает историю создания муниципалитетов в Финляндии и генезис их компетенции. Автор комментирует и социальные функции муниципалитетов в области обеспечения экономических, социальных и культурных прав. Говоря о социальной функции муниципальных образований в Финляндии, нельзя не затронуть важных конституционно-правовых проблем, связанных с проведением социально-административной реформы под названием "СОТЕ". Эта реформа нацелена, во-первых, на создание новых округов, ответственных за организацию социальных услуг и услуг здравоохранения. Иными словами, новые округа будут выполнять функции, которые в настоящее время выполняют муниципалитеты. Во-вторых, данная реформа нацелена на расширение прав пациентов по выбору конкретного поставщика услуг здравоохранения. В современных конституционно-правовых условиях Финляндии проект "СОТЕ" порождает ряд дилемм. Автор анализирует эти дилеммы и приходит к выводу о том, что в целях сохранения принципа самостоятельности местного самоуправления необходимо предусмотреть прямое избрание населением управляющих органов новых округов.

Ключевые слова: Финляндия, местное самоуправление, компетенция местного самоуправления, социальные права, административная реформа.