Russian Journal of Comparative Law

Has been issued since 2014.
ISSN 2411-7994, E-ISSN 2413-7618
2017. 4(1). Issued 2 times a year

Journal is indexed by: **OAJI, MIAR, ROAD, E-library, Scilit**

All manuscripts are peer reviewed by experts in the respective field. Authors of the manuscripts bear responsibility for their content, credibility and reliability.

Editorial board doesn't expect the manuscripts' authors to always agree with its opinion.

Postal Address: 1367/4, Stara Vajnorska str., Bratislava, Slovakia, Nove Mesto, 831 04

Website: http://ejournal41.com/
E-mail: aphr2010@mail.ru

Founder and Editor: Academic Publishing House Researcher s.r.o.

Release date 20.06.2017.
Format 21 × 29,7/4.

Headset Georgia.

Order № RJCL-11.

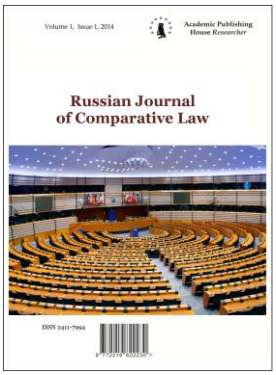
Russian Journal of Comparative Law

2017

Is. 1

C O N T E N T S

Articles and Statements



Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 3-8

DOI: 10.13187/rjcl.2017.1.3
http://ejournal41.com

Articles and Statements

Courts of Biys and Aksakals in Kyrgyzstan: What the History Teaches About?

Natalia Alenkina [a, *], Nazira Tursunbaeva [b]

[a] American university of Central Asia, Kyrgyz Republic
[b] Kyrgyz-Russian Slavic University, Kyrgyz Republic

Abstract

The courts of biys, which has been developing since XIX century, are usually compared with the courts of aksakals established in 1993. Indeed, both courts during the consideration of cases relied on customs and traditions. As well as the judges in the courts of biys, the members of courts of aksakals are elected by people. The major requirements for being the aksakal or biy are respect and authority.

Yet, can we consider the courts of aksakals as the contemporary prototype of the courts of biys? While comparing the common features and peculiarities of these institutions in the article the following steps were taken:

- Understand the causes of for the demand of public justice institutions in society as an alternative to state justice,
- Understand their compatibility with contemporary state and public institutions,
- Comprehend their ability withstand the challenges of modernity: absence of trust in courts, corruption, length of the proceeding, isolation of the court from people, absence of respect to the law.

This article is based on the theses presented at the ESCAS-CESS international conference, June 29- 2 July 2017, Bishkek, Kyrgyzstan.

Keywords: court of Biys, Aksakal courts, common law, trial, customs, traditions.

As in the past the future is ripening,
So in the future the past is smoldering.
A.Akhmatova

1. Introduction

Modern aksakal courts consisting of the most respected citizens are designed to resolve disputes at the local level. It is a characteristic institution of the patriarchal society, which reflects the tradition of respectful attitude towards people who have the greatest authority, power and influence. In a traditional Kyrgyz society such an institution existed in the form of a court of biys, but was abolished at the dawn of Soviet power.

* Corresponding author
E-mail addresses: alenkina_n@mail.ru (N. Alenkina), nazira.tursunbaeva@gmail.com (N. Tursunbaeva)

How to avoid mistakes of the past? What useful lessons can be learned from what has already been passed by our society? These questions inevitably arise before an inquisitive researcher who makes an attempt to comprehend the choice of the trajectory of the development of aksakal courts through an analysis of historical experience.

Comparative analysis of the arrangement of courts of biys and aksakals, the legal basis of their activities, the dispute escalation and cooperation with official structures are aimed at clarifying:

• reasons for the demand of public justice institutions in society as an alternative to state justice;

• their compatibility with modern state and public institutions;

• their ability to withstand the challenges of modernity: lack of confidence to the court, corruption, length of the process, isolation of the court from the people and lack of respect to the law.

2. Materials and Methods

The main sources for writing this article were materials of kyrgyz common law, normative legal acts of Russia of the second half of XIX century and legislation of the Kyrgyz Republic. Multi-sited field research investigating the interaction between state courts and aksakal courts in Chui oblast of the Kyrgyz Republic was carried out. For data collection the participant observation in Alamudun aksakal court of Chui oblast was used. All other sources (statistic, reports, and databases of state court decisions, mass media articles, reports of non-governmental and international organizations) were used as supplementary sources for illustration of certain arguments.

Research methodology includes general scientific and special legal methods, such as: historical, system-based, comparative, technical and others.

3. Discussion

Courts of Biys

- *Arrangement of Courts of Biys*.

Courts of Biys were developed in XIX century. In the first half of the XIX century courts of biys were exercising rules of common law of kyrgyz people along with courts of kaziys exercising norms of sharia, and arbitration courts. Arrangement of court of biys of this period looked different rather than in the second half of XIX century due to the affiliation to Russia. The system of court of biys before the affiliation had tribal courts of biys, there were also biys' congresses (Kojonaliev, 1963: 11, 12). In the second half of XIX century courts of biys became the part of the judicial system of Russia after which the arrangement of these courts was subjected to some amendments. Courts of biys began to act in the form of one-man trial of biys, volost congress of biys and extraordinary congress of biys (Proekt polojeniya, 1867: 30).

Biys were required to know the norms of common law, public speaking and have broad-based knowledge. They had to be distinguished by a natural mind, exemplary responsibility, honesty, directness and openness, resourcefulness and justice. Due to the fact that in the second half of XIX century the position of biy became an elective post, there were introduced the specific procedures for their election and appointment. Biys were elected by the people for three years. The main requirements were: the presence of respect and trust on the part of the people, no criminal record and no finding under investigation. There was an age limit of 25 years. The elected biys were then approved by the military governor (Grodekov, 1889: 176).

Biys were not intended to officially determined monthly or annual salaries (Voropaeva, 2004: 244). However, the reward (biylik) was provided to the court of biys, which was a special form of fine from the guilty person established by the people's custom in favor of judges, the amount of which should not exceed the tenth value of the claim (Grodekov, 1889: 176).

- *Legal basis of the activities*

Up to the middle of XIX century the legal basis of biys' activities was a common law, in the second half of XIX century it became a common law and normative legal acts of Russia. There were requirements to the personality of biys and their activities in such sources of common law as proverbs and sayings. The procedural activity of biys was also regulated by such source of common

law as the rule of extraordinary congresses. Finally, during the adjudication the biys referred to those or other rules of customary law.

- *Dispute escalation*

The trial on common law of kyrgyz people was not divided into civil and criminal (Borubashev, 2009: 218). Thus, the norms of common law did not distinguish such concepts as crime and civil offense. The trial was primarily aimed on reparation to the victim and only then to punish the perpetrator. The trial on common law of kyrgyz people consisted of these stages: bringing a case to the biys court, attempting to reconcile the parties, preparing the case for trial, trial, appealing the decision and executing the decision.

During the investigations of the cases biys have always paid special attention to reconciliation of the parties. Prior to the beginning of the trials biys were offering parties to conclude a peace deal called “butum” or to end the dispute with “salavat” – by forgiveness, giving the case to “oblivion” (Zagryajskii, 2005: 302). Biys often used various symbolic ceremonies, norms of grandfather traditions and ancient rules of the society. For instance, the rite which bore the name: "dostuk" – friendship. This rite was performed by biys in various ways. According to the materials of archives, at that time, in the battles fought by the parties, the parties were obliged "to embrace each other" through a bare saber or to kiss arms giving a vow of friendship. Sometimes biys used the norms and conditions of this rite which were aimed to rapprochement of the parties. Biy was offering to the parties or often forcing them (under the threat of rejecting the case or by other tricks) to hug each other, and then suggesting to call them "Dos-tamyr". Sometimes the biys were giving the parties a certain amount of time. The right to the time was first given to the plaintiff and then to the defendant's side with a time limit so that with its expiration the disputing parties could "cool off", forget the impulses of vengeance, enmity, and could reconcile. At that times’ prevailing ideology of the nomadic Kyrgyz society, the ultimate goal of biys’ justice was the truce and reconciliation of the disputing parties despite any degree of complexity and aggravation of their relationship.

- *Cooperation with official structures*

The decisions of court of biys were appealed by the parties in rare cases. In case of discontent, one of the parties until the middle of the XIX century could turn to a tribal or tribal manap, who made a decision regarding the legal fate of the biy’s decision at his own discretion. Manap either decided to convene a congress to consider a controversial case or in the presence of all the evidence ordered to satisfy the claim of the referring party (Kojonaliev, 1963: 18).

The participation of official structures in the court of biys regarding the appeal of their decisions is seen from the second half of the XIX century. Thus, the decisions of the courts of biys could be appealed to the district chief, who sent the complaints to the prosecutor. The prosecutor sent the case to the regional court which had the right to reverse biy’s decision. In case of reverse the case was returned for the resolution of the new decision with the proper instructions.

In response to the high credibility of the judges (biys) and legal and fair decisions taken by them parties voluntarily fulfilled the decisions of court of biys. Court of biys acted as a judiciary to which the parties were referring due to such court’s authority and confidence to their decisions. However, in rare cases of refusal to implement the court’s decision, there were own mechanisms for executing. The decisions of the biys were performed in the interaction of influential persons of the aiyl or the family of convicts until the middle of the XIX century. In the second half of the XIX century this activity was carried out by aiyl chiefs and rural marshals.

Aksakal Courts

- *Arrangement of Aksakal Courts*

Aksakal courts were established in 1993. Primarily they had a status of local courts (Constitution, 1993: frt.79), but afterwards were expelled from a state judicial system. Nowadays it is a public body which has been delegated by such functions as consideration of certain categories of disputes. Courts of aksakals pass the registration in local self-government bodies – district (local) *keneshes*. However, aksakal courts operate independently without forming a single system of bodies. According to the data of 2016, 795 aksakal courts were registered in the Kyrgyz Republic which is 10 times higher than the number of state courts (V Bishkeke..., 2017).

A member of aksakal court is an elected position. Composition of the court consists from 5 to 9 people. Citizens of the Kyrgyz Republic (both men and women) who have reached the age of 50, have completed secondary general education, have lived in the specified area for at least five years,

have no previous convictions, are respected and reputed among the population, capable of performing tasks on professional and moral qualities can be elected to court of aksakals (Art. 8, 9 of the Law on Aksakal courts, 2002).

Candidates for membership in aksakal court are nominated by residents of the area where the aksakal court is located. The election takes place by open voting at general meetings of citizens at the place of residence.

As a general rule, the activities of members of aksakal courts are not payable. However, in some regions of Kyrgyzstan and in its capital they receive a small symbolic reward from the expense of the local budget.

Aksakal courts consider property and family disputes between citizens, some administrative misdemeanors and criminal cases of minor gravity for which punishment is not provided in the form of deprivation of liberty. Aksakal courts consider cases only with the consent of the parties. However, the main purpose of aksakal court is to reconcile the disputing parties. This is especially important in a multi-ethnic environment when any domestic conflict can develop into an ethnic one. The aksakal court makes a decision on the merits of the property and family disputes only if it has not reached the reconciliation of the parties.

The aksakal courts also have a preventive and educational function. One of the main functions of these courts is the assistance to strengthening the legality of the law and prevention of offenses in the local territory; education of the citizens to respect the law, regulations of morals which have historically developed from customs and traditions.

- *Legal basis of the activities*

The legal basis for the activities of aksakal courts consists of the provisions of the Constitution of the Kyrgyz Republic on the right of citizens to establish aksakal courts (Art. 59) and the state's support of customs and traditions that do not infringe the human rights and freedoms (Art. 37), as well as the Law of the Kyrgyz Republic "On aksakal courts" from July 5, 2002. The interaction of state courts and aksakal courts is reflected in the Civil and Criminal procedural codes.

- *Dispute escalation*

Procedure of dispute settlement in aksakal courts has certain benefits:

- the period of consideration of the cases is 15 days.
- consideration of the cases is free of charge.
- there is no formalized procedure of dispute settlement.
- mediation is the main tool used by aksakal courts.
- there are certain grounds to which aksakal courts rely during the consideration, they are: the legislation of the Kyrgyz Republic, conscience, personal beliefs, morality which do not contradict to the legislation of the Kyrgyz Republic.

Disputes in aksakal courts are considered collectively, openly and publicly. The process of considering the case in aksakal court can be divided into the following stages which are consonant with the stages of the process in the state court: preparing the case for consideration; consideration of the case on the merits; adjudication.

During the court session record is issued, the content of which is regulated by law. At the same time the procedures at each stage are not strictly regulated which ensures the activity and initiative of the court of aksakals as a self-regulating organization.

The aksakal court has the right to apply measures of social influence to the person responsible for committing an offense (such as warning, public apology, public censure, etc.) which have the aim of moral impact on the offender (Art. 28 of the Law on Aksakal courts, 2002). Due to the provisions of the legislation on administrative responsibility aksakal courts may impose administrative penalties for certain offenses. This is a rare case in the practice of the Kyrgyz Republic when a public body is authorized by the law to apply measures of state coercion.

The decision of aksakal court may be appealed to the state court in territory of which the aksakal court is located (Art. 30 of the Law on Aksakal courts, 2002). The right of appeal is granted to a wide range of persons - the person against whom the adjudication was made, as well as to other persons participating in the case. The complaint against the decision of aksakal court is considered by the judge within 10 days from the date of its receipt. In this case, the judge checks the compliance of the decision of aksakal court with the law and the circumstances of the case.

If the judge finds the complaint justified, he willfully revokes the decision of aksakal court and returns the materials for reconsideration or closes the proceeding.

The authority of aksakal court rests on the authority and respect of aksakal court members which naturally implies the voluntariness of the parties' execution of the decisions. Aksakals court itself exercises control over the execution of its decisions (Art. 30 of the Law on Aksakal courts, 2002). If the parties fail to comply with the decision, it can be enforced through the district state court.

The judge checks the compliance of the decision of aksakal court with the current legislation. Based on the results of consideration of the application, a decision is made on the issue of the writ of execution or on refusal to issue it.

If the state court refuses to issue the writ of execution, the party will have the right to repeatedly apply to the aksakal court or to the state court.

- *Cooperation with official structures*

The courts of aksakals interact with the prosecutor's office, police (invitation of persons to a meeting), local *keneshes* (registration, issuance of certificates, material support of activities and encouragement, reporting) and state administration (methodological and organizational assistance, allocation of premises for holding a court session of aksakals).

Aksakal courts also constantly cooperate with state courts, both on organizational and procedural matters. Thus, state courts are entitled to refer cases (materials) to courts of aksakals with the consent of the parties of the dispute. The state court should close the proceedings if it has already been adjudicated by aksakal court. Aksakal courts also do not have the right to review the cases on which a decision of the state court has already been rendered. Appeals and enforcement of decisions of aksakal courts are carried out through the state courts.

However, the status of aksakal courts has changed over time, but the principles of interaction with state courts have remained the same. In some cases, they are distorted: the interaction is not symmetrical and has a tendency toward the state courts. It often looks like a patronage, especially on organizational matters. For instance, a certificate of a member of aksakal court is established by the Supreme Court of the Kyrgyz Republic. District (city) courts provide aksakal courts with methodological assistance in applying legislation. The state courts coordinate the regulations of aksakal courts.

4. Results

Thus, the institutions of public justice occupied and continue to maintain their stable place in the legal landscape of Kyrgyzstan, both because of the accessibility and effectiveness of dispute resolution, and because of trust in the public institution itself, to the authority of members of the courts and the proximity and understanding of the rules for resolving the conflict to the local population.

The logic of the historical process makes us think about the fate of aksakal courts in the near and long term. The administrative and judicial reforms that are taking place in society which affect, in particular, the aksakal courts, focus on adjusting informal justice to Western standards and ideals (introduction of qualifications for members of aksakal courts, mandatory business style in clothes, experiments with competence). Changes in the legislation are very technical and situational and are not based on a deep analysis of the historical, cultural, social context.

5. Conclusion

Historical experience shows that court of biys was the true people's court until the middle of IXX century, until the Kyrgyz affiliated to Russian Empire and the tsarist government began to adapt local legal norms and the judiciary to new conditions. That way, these changes took place: more detailed regulation of the activities of courts of biys, electoral procedures came into existence, the dependence of biys to the administration (military governor), affirming the candidacy of biys increased, the codification of sources of customary law, the accusations of improper deeds (false claims and charges, custom decisions, bribery, abuse of trust, red tape, etc.). Courts of biys quickly lost the basis of their legitimacy – moral and ethical qualities of biys, simplicity and clarity of rules and procedures.

Reflecting on the future of aksakal courts, it is necessary to take into account the lessons of recent history. Institutional and procedural rapprochement of courts of aksakals with state institutions impedes the preservation of elements of their identity, and on the contrary, promotes mimicry with state courts. The aksakal court risks losing its value as a non-state mechanism for settling disputes among the residents of the community.

References

Constitution, 1993 – Konstitutsiya Kyrgyzskoi Respubliki ot 5 maya 1993 goda (1993) [Constitution of the Kyrgyz Republic]. URL: http://www.cbd.minjust.gov.kg/act/view/ru-ru/1/10?cl=ru-ru [in Russian]

Law on Aksakal courts, 2002 – Zakon KR "O sudakh aksakalov" ot 5 iyulya 2002 goda N 113 [Law of the Kyrgyz Republic "On Aksakal courts" № 113]. URL: http://cbd.minjust.gov.kg /act/view/ru-ru/1070 [in Russian]

Borubashev, 2009 – *Borubashev B.I.* (2009). Gosudarstvenno-pravovoe regulirovanie obshchestvennykh otnoshenii kyrgyzov v sostave Rossiiskogo gosudarstva (1855-1917 g.) [State-legal regulation of public relations of the Kyrgyz people in Russia (1855-1917)]. Bishkek. [in Russian]

V Bishkeke..., 2017 – V Bishkeke obsudili rol' suda aksakalov i raspredelenie kolichestva sudov v regionah [In Bishkek discussed the role of courts of elders and the distribution of the number of ships in the regions]. 31.03.2017. URL: http://www.dem.kg/kg/article/14610/v-bishkeke-obsudili-rol-sudov-aksakalov-i-raspredelenie-kolichestva-sudov-v-regionah [in Russian]

Voropaeva, 2004 – *Voropaeva V.A.* (2004). Khrestomatiya po ustroistvu Kyrgyzstana [Reader on the device of Kyrgyzstan]. Bishkek: Raritet Info. [in Russian]

Grodekov, 1889 – *Grodekov N.I.* (1889). Kirgizy i karakirgizy of Syrdar'inskoi oblasti (Yuridicheskii byt) [Kirghiz and karakirgizy of Syrdarya region (Legal life)]. Tashkent. [in Russian]

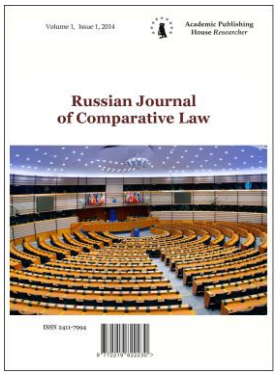
Kojonaliev, 1963 – *Kojonaliev S.K.* (1963). Sud I ugolovnoe obychnoe pravo kyrgyzov do Oktyabrskoi revolucii [The criminal court and customary law of the Kyrgyz before the October revolution]. Frunze: AN Kyrg. SSR. [in Russian]

Proekt polojeniya, 1867 – Proekt polozheniya ob upravlenii v Semirechenskoi i Syr-Dar'inskoi oblastyakh [The draft regulation on administration in Semirechensk and Syr-Darya oblasts]. Sankt Peterburg. [in Russian]

Zagryajskii, 2005 – *Zagryajskii G.* (2005). Uridicheskie obychai Kyrgyz [Legal customs of the Kirghiz]. Drevnii mir prava kazakhov. Materialy, dokumenty i issledovaniya. Almaty. [in Russian]

Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 9-13

DOI: 10.13187/rjcl.2017.1.9
http://ejournal41.com



The Comparative Analysis of the Provisional Patent Application Law Institute

A.A. Bashuk [a] , [*]

[a] Kursk State University, Russian Federation

Abstract

Russian Federal Service for Intellectual Property has started a public discussion about the use of provisional patent application in Russia. The article deals with the perspective of the implementation of the provisional patent application institute into the Russian intellectual property law. The article aims comparison of the provisional patent application procedure in different countries: the USA, the UK, India, the New Zealand and Australia. On an example of other countries the pros and cons of the provisional patent application institute are shown.

The relevant issue for the Russian intellectual property law today is what experience we shall use to create the Russian provisional patent application institute. Another question that should be answered if the priority received with filing of provisional patent application in Russia is recognized by the PCT system. In the end of this article the author comes to the conclusion about the relevance of the implementation of the provisional patent application institute into the Russian intellectual property law.

Keywords: provisional patent application, provisional specification, informal specification, intellectual property law, the PCT system.

1. Introduction

In August 2016, Rospatent launched a public debate on the feasibility of introducing the law institute of the provisional applications and the law institute in the Russian Federation. The letter from the Rospatent inviting for discussion of this topic was received by the representatives of the scientific, business and professional community (The Letter from 02.08.2016 № 02/16-638/08).

A provisional application, in general terms, is a description of the claimed entity for registration as an invention or utility model technical solution in any form. The only requirement for a provisional application is the sufficiency of disclosure of the invention. Claimed properly, the provisional application, according to the Rospatent's offer, should provide an inventor with the opportunity of the 12-month delay for the full patent application filing within the demands. So, the provisional application is aimed to getting a priority for the invention in a simplified form.

According to the Rospatent's letter, «the experience abroad represent high relevance of the provisional application law institute». Within the following article we discuss the law regulation of the provisional application law institute abroad and explore the topic of the priority validity, received in Russia with filing of the provisional application, in the system of the international law.

[*] Corresponding author
E-mail addresses: a.bashuk@yandex.ru (A.A. Bashuk)

2. Materials and methods

The common sources for this article are the official publications of the national patent offices in the USA, India, the United Kingdom, Australia and the New Zealand and, moreover, the materials published on the websites of the patent attorneys professional communities and journals.

The basic method of this exploration are the retrospective and comparative law methods. The use of the retrospective method allows to analyze the background of the provisional application law institute. Thanks for the comparative law method use, the similarities and differences of the law regulation of the provisional application law institute in different countries are observed.

3. Discussion

Nowadays, the provisional application law institute is fully represented in many countries: the UK, the USA, India, Australia, the New Zealand. Some countries unofficially allow to get priority with full patent application filing delay. However, in these countries the process of "the provisional application" is based upon the use of the features (defects) of the law system. For example, in Canada there is the opportunity of incomplete patent application filing and the following addition and correction of the application form in respond for the Canadian patent office request. Moreover, the inventor is provided with 15-month term for the respond, and the priority is fixed according to the date of the first incomplete application filing (Canadian Intellectual..., 2016). Nevertheless, it doesn't mean that the patent system of Canada includes the provisional application law institute.

Despite the fact that such a patent trick has the same result as the legal provisional application filing in the countries, possessing the same law institute. This patent trick is rather the Canadian lawyers' ruse than a legal established law institute. Along with that, the existence and the use of these tricks in the countries, that are not based upon the provisional application law institute, confirm the provisional application law institute relevance among the society.

Nevertheless, the experience of the countries that provide the opportunity of the complete patent application filing delay with the priority fixed for the inventor according to the provisional application filing to the national patent office is worth investigation (due to the legislative consolidation suggestion of the provisional application law institute in Russia by the Rospatent).

In 1945, India approved the amendment to The Indian Patents and Designs Act, 1911 (Act II of 1911). It established the provisional application law institute in India. In India the provisional application is called "the provisional specification" (Indian Patent Office, 2017). The provisional application filed delays for the 9-month term to apply for the "complete specification". The provisional application in India should include the title of the invention, the description and drafts, if required, and a sample of the invention, if the inventor needs it to confirm the ability to provide the technical result described.

Then one should add the claim, drafts (if omitted), sample (if required by the Indian patent office expert). Also, the description should be extended to follow the sufficiency of disclosure criteria to provide the opportunity of reproduction by a specialist in this scientific area (enablement and best mode).

In order to state the priority of the complete application according to the earlier provisional application by an expert of the Indian patent office, the complete application should follow the provisional application. That means identity of the applications content. Moreover, the following complete application should exclude the elements omitted in the provisional application. Otherwise, an expert of the Indian patent office can deny to set the priority of the filing date of the provisional application in cause of controversy between the complete and the provisional applications and set the priority according to the filing date of the complete application.

In the United Kingdom the provisional application law institute appeared with establishment of the Patents Act in 1949. The Chapter 87 of this Act regulates the process of the complete and the provisional applications filing (UK Patents Act, 1949). The priority according to the national provisional application in the UK is set for the inventor in the 12-month term. According to the British lawyers, the provisional application in the UK law system differs from the complete application only in the absence of the patent claim (Warrilow, 2011). The other demands are the same.

In the New Zealand the demands for the provisional application are less complicated, than in the UK law system. So, according to the New Zealand Patents Act, established in 1953

(New Zealand Patents Act, 1953), the provisional applications in the New Zealand are not checked for the sufficiency of disclosure criteria. Particularly, the New Zealand patent office considers "Needs to disclose the invention in sufficient detail to provide basis for claims that may be made at a later stage, but not the full details." (Intellectual Property..., 2017).

The provisional application law institute in the New Zealand is less demanding for the complete application filing terms. So, the common 12-month term in other countries is automatically extended to the 15-month term in the New Zealand. Especially, in the law system of the New Zealand an inventor has opportunity before the 15-month term expiration to post-date the priority within the 6-month term with corresponding prolongation of the entire provisional application acting period. The provisional application law institute exists in Australia. Confidentiality of the provisional application data is particularly important there. The Australian patent office doesn't publish the invention disclosure in the open source in order to prevent unfair competition. Open source in Australia includes just the title of the invention and the information about the author.

In the USA the provisional application law institute appeared in 1994 with establishment of the amendment for the U.S. Patent Act, 1952. The introduction of the provisional application law institute in the patent law of the USA in 1994 was aimed to establish the rights equality between foreign and local applicants. The matter is that after the Brussel amendment for the Paris Convention for the Protection of Industrial Property ratification in 1901 (Paris Convention..., 1883) the USA passed the obligation to provide the citizens of the Paris Convention participants with 12-month priority for patent application filing in the USA since the national patent application filing in the mother country of the foreign inventor. So, the foreign applicants have advantage over the USA citizens in one year term between the priority fixation and the complete patent application filing in the USA. In order to overcome this inequality the USA adopted the provisional application law institute.

The provisional application in the USA should at least consist of description of the invention in any natural language and SB16 form filled in English. Unlike the complete patent applications, there are no special demands for the provisional applications. It can be, for example, the material of scientific articles, thesis summary or the R&D report, etc. Preferably, the provisional application consists of the drafts, if they help to understand the invention (U.S. Code..., 2012).

We should explore the question of the provisional application priority relevance abroad within the Patent Cooperation Treaty.

The Patent Cooperation Treaty (The Patent Cooperation..., 1970) in a.8 p. (2)(a) runs: "Subject to the provisions of subparagraph (b), the conditions for, and the effect of, any priority claim declared under paragraph (1) shall be as provided in Article 4 of the Stockholm Act of the Paris Convention for the Protection of Industrial Property" (Paris Convention...). The general idea of the Convention is to simplify mutual rights protection for the industrial property protected objects for both citizens and organizations. (Biriukov, 2014). In accordance with the Paris Convention a.4 any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed. (12-month term for the invention and utility models).

More than that, the Paris Convention establishes any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority. By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

The analysis of the international law sources concludes that the domestic provisional application filing declares the start of the 12-month term, when inventors can file complete patent application according to the Patent Cooperation Treaty system. The date of priority should be requested by the date of national provisional application filing.

Nevertheless, notwithstanding the general profit from use of the provisional application, there are some pitfalls in the provisional application process. An experts of the national patent offices don't check the provisional applications. The demands for the provisional applications less complicated than those for the complete application. The provisional application fees are lower than the complete

application ones. Consequently, there is a wrong opinion abroad towards the provisional application as a cheap and simple "entry ticket" to the patent system. The danger of this ignorance was noticed by the Australian patent attorney Mark Summerfield (Summerfield, 2015).

The following typical case is particularly important. The provisional patent application is submitted, and inventor has patent pending status. The inventor start talking his idea to friends, colleagues, manufacturers and potential investors, safe in the knowledge that he have "patent applied for" status. The response is good and the time comes to convert his provisional application and to turn it into complete patent application. The invention is fleshed out in the description, claims and abstract are added, and the figures are redrawn to show the latest incarnation of his invention. The full patent application is submitted and during examination inventiveness issues are perhaps raised by the patent examiner.

The only way to overcome these issues may be to use the new material added in at the time of submitting the full patent application, because the provisional application was too brief and not fully thought through during preparation. However, the inventor already disclosed the idea. There are some problems. If the inventor use the new material included in the complete patent application to overcome the patent examiner's objections, the patent will grant but will be invalid because of prior disclosure and because the inventor cannot back date that new material to the earlier filing date of the provisional application. If the inventor do not use the new material in order to try and maintain the link back to your first filed provisional application, then the patent examiner's objections cannot be overcome and the patent application is refused (Hocking, 2013).

Another disadvantage of the provisional application — the prolongation of the general term of the patent process. One year of the provisional application priority consequently prolongs the whole patent process for a year. The provisional application itself doesn't provide any legal protection. Taking into account, that the fees abroad are way more expensive than in Russia, economically it is worth to postpone patent process for a year filing the provisional application to find out whether a patent is required. In Russia the patent fees are rather low. That is why in Russia the provisional application filing wouldn't have such economical determination as abroad.

4. Results

In general, with the analysis of the provisional application law institute abroad, one can conclude:

1. The provisional application priority valid term is from 9 to 15 months in different countries. If there is no subsequent complete application, that was filed before the end of this term, the provisional application is considered cancelled and gets published in the open sources. That means including disclosure of the invention in the state of the arts.

2. The main criteria for the provisional and complete patent application is the "subsequence" criteria. The subsequent complete application should disclose the same object, described in the provisional application. The addition of the new elements is prohibited and leads to denial of the expert upon establishment of the provisional application filing date as a date of priority.

3. The provisional application should be adequate to the sufficiency of disclosure criteria. The violation of this criteria can lead to the denial of the patent grant for the subsequent application. Moreover, thus invalid provisional application discredits the novelty of the subsequent application, if the patent office states that the following application includes additional elements making it impossible to state the provisional application filing date as the date of the priority for the experts.

4. The provisional application fees are lower than the complete application fees.

5. Content of the provisional application, if compared to the Russian patent procedure, is represented by a part of the invention description. The claim and the abstract are not required. Usually the analysis of the state of the arts isn't also demanded.

6. The provisional application isn't checked by the substantive examination in the patent office. The examination checks the provisional application only after the complete patent application filing.

7. The domestic provisional application filing declares the start of the 12-month term, when inventors can file complete patent application according to the Patent Cooperation Treaty system.

5. Conclusion

To sum the comparative law analysis of the provisional application law institute up, we can mention that the provisional application is a tool for the priority fixation on the early stages of development. The practical value of the 12-month delay leads to opportunity of the scientific research continuation and the search of the investors. The provisional applications are the important part of the patent system in the law of the countries, that use the provisional application law institute. Moreover, the provisional application is relevant for the commercial patent strategy.

In our opinion, the establishment of the provisional application law institute in Russia will make the patent process more obtainable both financially and procedurally. That allows to increase the commercialization level for the intellectual property in Russia.

References

Canadian Intellectual..., 2016 – Canadian Intellectual Property Office, 2016. URL: http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr01413.html#IncompleteApplication

Indian Patent Office, 2017 – Indian Patent Office, 2017. URL: http://www.ipindia.nic.in/history-of-indian-patent-system.htm.

UK Patents Act, 1949 – UK Patents Act, 1949 URL: http://www.wipo.int/wipolex/en/text.jsp?file_id=127260.

New Zealand Patents Act, 1953 – New Zealand Patents Act, 1953. URL: http://www.legislation.govt.nz/act/public /1953/0064/latest/DLM280031.html

Intellectual Property..., 2017 – Intellectual Property Office of New Zealand. The provisional patent application filing. (2017). URL: https://www.iponz.govt.nz/about-ip/patents/patents-act-1953/1953-patents-act-practice-guidelines/filing-a-provisional-specification/

U.S. Code..., 2012 – U.S. Code § 111, 2012. URL: https://www.law.cornell.edu/uscode/text/35/111

The Patent Cooperation..., 1970 – The Patent Cooperation Treaty, 1970. URL: http://www.wipo.int/wipolex/ru/treaties/text.jsp?file_id=288641.

Paris Convention..., 1883 – Paris Convention for the Protection of Industrial Property, 1883. URL: http://www.wipo.int/wipolex/ru/ treaties/text.jsp?file_id=379398.

Biriukov, 2014 – *Biriukov P.* (2014). The intellectual property law. M. c. 190-*191*.

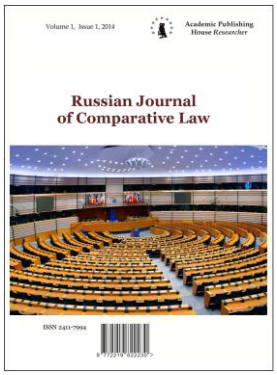
Hocking, 2016 – *Hocking A.* (2013). The dangers of cheap patents. URL: https://www.albright-ip.co.uk/2013/06/the-dangers-of-cheap-patents/

Summerfield, 2015 – *Summerfield M.* (2015). What's 'Provisional' About Provisional Applications? URL: http://www.blog.patentology.com.au/2015/04/whats-provisional-about-provisional.html.

Warriliow, 2011 – *Warrilow D.* (2011). Provisional Patent in the UK. UK Business Forums. URL: http://www.ukbusinessforums.co.uk/threads/provisional-patent-in-the-uk.198954

Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 14-25

DOI: 10.13187/rjcl.2017.1.14
http://ejournal41.com



The Relationship between International, European and National Law in Spain

Pavel Biriukov [a] [*]

[a] Voronezh State University, Russian Federation

Abstract

This article brings to light the problem of the relationship between international and national law of Spain. The author provides a number of norms which regulate the correlation of different norms in the legal system of Spain. The author analyzes the implementation of Spanish Constitution and the legislation, as well the procedure of the implementation of the rules of EU Law in detail is investigated. The obligations of the Spanish Kingdom in process of the implementation of the EU legislation are investigated in detail. The author examines the decisions of the Constitutional Court and characterizes its role in the process of the implementation of EU norms. The experience of the implementation of international norms in Spain will help to clarify the provision of the monistic concept the relationship between international and national law.

Keywords: the relationship between international and national law, the dualism, the monism, Spain, the implementation of international norms, the EU legislation.

1. Introduction

The problem of the relationship between international and national law occupies one of the central places in the doctrine and practice of any state. As it's known, there are two main theories - dualistic and monistic in this sphere. Monism is based on the assumption that international law and domestic law form parts of the same legal order. In countries with a monistic conception international law acts as a part of the national legal system that the courts should apply directly. No national measures of transformational nature are necessary. International law may have or may not have priority over national law in this legal order.

The monism has two varieties. According to one of them, 'monists claim that the laws of the state which are inconsistent with international norm, are not invalid in the internal legal order, insisting that in case of a conflict between international law and domestic law, the first must prevail' (Cazorla, 2013: 661). The second point of view is that the national law has primacy over international law. In this way, H. Kelsen (Kelsen, 1923; Kelsen, 1928) and A.Verdross (Verdross, 1937) considered that Austria's Constitution established the priority of national law over the international. However, as prof. G. Sperduti notes: 'a lot of lawyers who consider themselves to be monists, do it without on scientifical based theory of the correlation of international and national law, but they feel that monism, declared the priority of international law over national law, for this reason, can cause the regulation of international rules in the national system' (Sperduti, 1979: 459-460).

Dualism, on the contrary, is based on the assumption that international law and domestic law form two different systems of law. International law can become a part of national law only

[*] Corresponding author
E-mail addresses: birukovpn@yandex.ru (P. Biriukov)

by special incorporation of the national legislator. 'Dualism was created as a school of thought that sought to justify intuitive truth scientifically, to show that international law exists as a legal order independently. Thus, this law is distinct from domestic law' (Brótons, 2003: 178). According to prof. Casado Raigón R. 'dualists consider that a state that does not comply with international law in its domestic legal order to be under the international liability in which these two systems are not so different' (Raigón, 2012: 37).

What concepts of cooperation of international, European and national law do function in Spain?

2. Materials and methods

The main sources for writing this article became the official documents of the Spain, materials of the journal publications and archives. The study used the basic methods of cognition: the problem-chronological, historical and situational, systemic and the method of comparative law. Author's arguments are based on problem-chronological approach. The use of historical and situational method allows to reproduce assessment approach to the problem of the correlation of international law and national law in Spain. Method of comparative law defines the difference in views on actual rules of the activity of the subjects of Spanish law. A systematic method does achieve a variety of disciplines (constitutional law, administrative law etc) accessible and comparable, as present is determined by the past and the future - by the present and the past.

3. Discussion

1. The relationship between international and national law of Spain

Spanish researches are commonly divided into two groups: those, that were published before the adoption of the Constitution of 1978 (La Constitución española 1978) and thereafter.

For the first time, the republican Constitution of 1931 settled the place of international agreements in the Spanish legal system. In accordance with Art. 65 of the Constitution, all international agreements ratified by Spain and registered by the League of Nations, having the character of international law, would be considered an integral part of Spanish law, which must adapt to what they would be about.

In 1972 was adopted the Decree 801/1972, of March 24, on the organization of the activity of the State Administration in matters of international treaties (Decreto 801/1972, de 24 de marzo, sobre ordenación de la actividad de la Administración del Estado en materia de tratados internacionales).

The hierarchy of sources of Spanish law was enshrined in the Civil Code of Spain (Campos, 1977: 86-93). The reform of the Civil Code was carried out in 1974. Decree № 1836/1974 (Decreto 1836/1974, 31 Mayo. Texto articulado del Título Preliminar del Código Civil), approved the text, modifying the preliminary chapter of the Civil Code. Article 1.5 says: “The legal norms contained in international treaties are not directly applicable in Spain until they have become a part of domestic law by publication in the 'Official Gazette of the State” (Boletín Oficial del Estado) was included in the Spanish Civil Code.

After Franco's death in 1978 the new Spanish Constitution was adopted. The place of the international law in the legal order in Spain was established in Articles 93-96 of the Constitution (Martín, 1980: 143-184; Juste, 1978: 15-51). As emphasized by K. Salcedo: 'a preliminary draft of the Constitution contained a provision according to which agreements would have in the internal legal order 'hierarchy exceeding hierarchy of laws' (Salcedo, 1991). However, some experts objected to such posing the question. As a result, the Constitution didn’t strengthened directly the priority of international treaties over acts (Lloréns, 1984: 207).

Article 93 of the Constitution stipulates: 'Organic Act grants the right to enter into contracts, transmitting to international organizations or institutions the exercise of powers that do not contradict the Constitution, on the Cortes Generales or the Government; in each case the act places the responsibility to enforce treaties or resolutions emanating from the international or supranational organizations, authorized by this right. This constitutional provision establishes the legal framework for the incorporation of international law to the Spanish legal system. It allows the transfer of legislative, executive and judicial powers to the organizations of supranational nature (Martín, 1980: 143-184).

S.I. Sanz notes in this regard: 'in respect of treaties for which the Constitution requires the prior authorization of the Cortes Generales through an organic law (Art. 93), it is necessary

to publish the text of the above-mentioned law on accession to such treaty. Regarding the international treaties, which should be an object of authorization by the Cortes Generales, Article 94.1 of the Constitution recommends the same requirement in relation with reference to an Act of Parliament' (Sans, 2002: 181).

The basic rule of the correlation of international and national law is enshrined in Art. 96.1 of the Constitution: 'Existing international treaties, officially published in Spain, are an integral part of domestic legal order. Their provisions may be canceled, amended or suspended in the manner prescribed by the treaties themselves or in accordance with the general rules of international law'.

The question of the hierarchy of international agreements in Spanish law is not easy (Santaolalla, 1981: 29-56). Spanish law, mostly, united, although, according to M.T. Cazorla, in this question, 'the constitutional text would be clearer' (Cazorla, 2013: 664).

J.A. P. Ridruejo and P. Palomar emphasize: the texts of Articles 95.96 and 9.3, along with the legal practice allow to confirm that the hierarchical position of arrangements within the Spanish legal system is following. Agreements always take precedence over the laws, regardless of when they were adopted, but the Constitution will always prevail over agreements. Agreements are somewhere between the Constitution and the acts (Ridruejo y Palomar, 2007: 528).

This statement is supported by reference to the decisions of the highest judicial authorities in Spain. In this way, in the judgment of Supreme Court of Spain of 22 May 1989 specifically emphasized the impossibility of abolishing by the internal rate (even at the level of the Organic Act), the provisions of 'previous' contract.

The Court clearly stated: 'The agreement, that became a part of the Spanish legal order, is valid in our country and can't be abolished by the Labor Code in the subsequent edition, because the Constitution guarantees the principle of legality and the normative hierarchy (Article 9.3), and it should make the achieved agreement foreground'. The decision of the Supreme Court on February 12, 2009 states: 'A possible conflict that may arise between national law and international treaty, will exceptionally be a matter of the law applicable in a particular case, and will be resolved by the application of the principle of primacy of international treaties (Art. 96.1 of the Constitution)'.

At the same time on the issue of the relationship between the force of the Constitution and treaties Spanish Supreme Court don't always take an unequivocal position (Rodríguez, 1984). Thus, in the judgment of the Supreme Court on July 7, 2000 stated that the Treaty between Spain and the Holy See in 1979 dominates the Constitution. This approach gave rise to the doctrinal disputes, but in this case, the question had more a political rather than a legal nature, taking into account the role of the church in Spain.

The second time argument of the relationship between force of agreement and the Spanish Constitution arose in connection with the ratification of the Treaty establishing a Constitution for Europe (the European Constitution). Spanish Constitutional Court of the Spain (hereinafter – CCS) in the decision № 1/2004 of 13 December 2004 constants: the primacy of the Treaty, by which a Constitution for Europe is established, is argued, not as hierarchical supremacy of the treaty itself, but as an 'existential requirement of EU law, in order to achieve in practice the direct effect and the uniform application in all countries (Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004). So far as the EU Constitution had not entered into force, the question about the place of this agreement in the Spanish legal system, remained unresolved.

So after all, what concept of the relationship between international and European law is active in Spain? There is no consensus on this matter in the Spanish science. Prof. J.A.C. Salsedo sad: 'Nowadays the old doctrinal discussion faced with two opposed concepts: dualistic doctrine and monistic doctrine. For the first, international law and domestic law – two separate legal systems as to their sources, and due to the regulated matters (...). The monistic doctrine, on the contrary, supports the natural unity of the legal regulations and the principle that the validity and binding force of all the legal procedure are derived from the procedure of hierarchically higher' (Salcedo, 1991). A detailed analysis of the concepts requires a special investigation. At the same time, nowadays 'monism-dualism' concepts are not as relevant as they were before. In the doctrine a main attention focuses on the system of adoption of international treaties by Spain (automatic or special).

At the same time, M.I.T. Cazorla says that 'publicity is a prerequisite for the applicability of the agreement. The value that gives the publication allows us to define the doctrine by one way or

another (monism, continuing the historical Spanish tradition, or dualism, due to the fact that the adoption is not totally automatic). The hybrid nature of our system that gives it, of course, a certain feature which is not strange that the doctrine resorts to divergent definitions to refer to the same reality in which 'moderation' is a characteristic mark. Therefore, in Spain neither dualism nor monism in their latest versions (adapted) acts, but some combination that allows law enforcers to get acquainted with the rules of the treaty and its contents through the publication' (Cazorla, 2013: 662).

2. Implementation of primary EU law

Treaties of primary EU law are implemented by Organic acts (Ley Orgánica) in Spain (Biriukov, 2015: 121-127; Brótons, 2003 : 165; Carrión, 1982: 95-118).

Thus, the entry of Spain into the Community was issued by the Organic Act of August 2, 1985 (Ley Orgánica 10/1985, de 2 de agosto, de autorización para la adhesión de España a las Comunidades Europeas). In the Preamble of this Act it was mentioned about the conclusion of negotiations on European integration and the signing of the Accession Treaty. In p. 1 Art. 1 of this Act under Art. 93 of the Constitution there is a permission for the ratification of the Treaty of Accession of the Kingdom of Spain and the Portuguese Republic to the EEC and Euratom June 12, 1985.

In p. 2 Art. 1 of the Act there is a permission for Spain's accession to the Treaty about establishing the ECSC of 8 April 1951, in the terms set out in the EU Council decision of 11 June 1985. Article 2 establishes the procedure for the publication of the Act and its entry into force.

February 17, 1986 Spain signed the Single European Act, after that it was ratified by the Organic act of 26 November 1986 (Ley Orgánica 4/1986, de 26 de noviembre, por la que se autoriza la ratificación por España del Acta Unica Europea, firmada en Luxemburgo el 17 de febrero de 1986). In the preamble of the law it was emphasized: as the Single European Act changed some provisions of the treaties establishing the European Communities, that were ratified in accordance with the provisions of Art. 93 of the Constitution this treaty also required ratification. The text of the Act included two articles (about the ratification and about law's entry into force).

There was a serious discussion regarding the supremacy of EU law over the Constitution of the State in the Kingdom in the late '80s. A major role in resolving the contentious issues played the Constitutional Court of Spain (Iglesias, 1984: 216; Legido, 1991: 175-191; Lloréns, 1984: 207-220; Tremps, 1985: 157-181).

However, the question about whether constitutional review of EU law can carry out in this area is relevant. According to R. Iglesias and U. Woelker the Constitutional Court of Spain guarantees the protection of fundamental human rights in case of their violation by the national authorities in the application of European law (Iglesias, Woelker, 1987).

R. Iglesias noted that the Spanish Constitutional Court's position coincided with the practice in the Federal Republic of Germany and the Spanish doctrine (Iglesias, Woelker, 1987: 14). The decision of the Constitutional Court on 18 July 1989 emphasized: Community law can't be used as a parameter of the constitutionality of domestic law. According to the Constitutional Court, membership in the Communities does not mean that due to Art. 93 of the Constitution rules of Community law 'gained constitutional status and power'.

In the decision of April 24, 1990 the Constitutional Court recognized norms of Spanish law, contrary to EU law to be unconstitutional, but because of the other reasons - 'due to lack of competence'. Constitutional Court expressed its opinion about the lack of jurisdiction to resolve the question about the declared incompatible of the Organic act on the general electoral regime, which banned dual mandate, with the order of electing representatives to the European Parliament by direct secret ballot. Prof. C. Raigón expressed his doubts that whether this decision of the Constitutional Court was 'properly, in terms of the Community"? (Raigón, 2012).

He wrote that a formal repeal of the law, that is contrary to Community law, because of its unconstitutionality, not only does not harm to the principles of direct effect and supremacy of European law, but on the contrary confirms these principles.

Decision of the CCS 28/1991 of 14 February 1991 specified the provisions of Art. 93 of the Constitution (Pleno. Sentencia 28/1991, de 14 de febrero de 1991). According to the CCS, the Spanish authorities are not 'communitarian' authorities (even when they apply EU law). Constitutional Court of Spain with respect to European integration right used the adjective 'infra-constitutional'. This approach did not entirely consistent with the rule of EU law in the light of the decisions of the EC Court.

These CCS's decisions influenced all subsequent actions of Spain in relation to the Art. 93 of the Constitution has become a formal source of verification treaties of EC primary law (Biriukov, 2014: 163-172). The CCS described this Article as exceptionally procedural rule applicable to the accession to the treaties that require the transfer of sovereign powers to international organization with lawmaking functions, which application of rules becomes mandatory for the judiciary and the administrative authorities of Spain.

Another important area is the sphere of human rights. Pursuant to article 10 of the Spanish Constitution EU law contributes to the interpretation of human rights and freedoms enshrined in the Constitution.

Thus, the Constitution strengthened the mechanism of ensuring consistency with contracts, which constitute the primary EU law and its principles and norms. Control is provided by the COP in accordance with Art. 95.2 of the Constitution.

The resolution of conflicts between the primary right of European integration and the Spanish law is within the authority of the CCS. However, these control mechanisms relate exceptionally to primary law, as far as it possible due to Art. 96.1 of the Constitution. The difficulties for the CCS in considering issues related to the European integration of secondary law, arise from the fact that the Court is able neither to verify their compliance with the Spanish Constitution nor to invalidate them (Jimeno, 2006).

This doctrine of 'insignificance' in relation to the secondary law of the European integration was finally set out in the decision of the CCS in 1993. Constitutional Court of Spain pointed out that the application of the law of the European integration by the courts and by the administrative authorities does not affect the activities of the COP; its jurisdiction applies only to the protection of the Constitution (Lozano, 2006: 319).

Thus, according to the CCS, the task of ensuring the proper application of the law of European integration by public authorities lies with the EU Court and other EU institutions. The task of the Spanish courts is the right choice of the applicable rules in a particular case.

February 7, 1992, Spain signed the Treaty of Maastricht. However, it immediately became the subject of consideration by the Constitutional Court of Spain. The CCS specifically pointed to the need for ratification of the Treaty in its decision of 1 July 1992. At the same time the Court referred not only to the Art. 93, but also to art. 13.2 of the Constitution, which grants the right to participate in municipal elections to citizens of other countries in accordance with international treaty. As a result of the CCS's decision 27 August 1992 the Spanish Constitution was supplemented with a provision that takes into account the norms of the Maastricht Treaty (Pleno. Sentencia del Tribunal Constitucional № 1/1992).

Maastricht Treaty was incorporated into the legal system of the Spanish by Organic Act 10/1992 of 28 December 1992 (Ley Orgánica 10/1992, de 28 de diciembre, por la que se autoriza la ratificación por España del Tratado de la Unión Europea, firmado en Maastricht, el 7 de febrero de 1992). There was a reference to Art. 93 of the Constitution and to the previous ratification of treaties of primary law in the preamble. The text of the Act traditionally consisted of two articles.

As we can see, the accession to the treaties did not involve changes in the mechanism of implementation of the norms of the primary EU law. They were considered along with other international treaties. Checking their constitutionality, the CCS based on the general provisions relating to monitoring of international treaties.

However, since the adoption of the Treaty of Amsterdam in 1997 the procedure of implementation began to change in Spain. Spain signed the Treaty of Amsterdam 2 October 1998. Organic act 9/1998 (Ley Orgánica 9/1998, de 16 de diciembre, por la que se autoriza la ratificación por España del Tratado de Amsterdam por el que se modifican el Tratado de la Unión Europea, los Tratados constitutivos de las Comunidades Europeas y determinados actos conexos, firmado en Amsterdam el día 2 de octubre de 1997) was published December 16, 1998. The Act contained already the traditional reference to Art. 93 of the Constitution and an indication of the previous practice of the ratification of treaties. The text of the Act consisted of two articles. However, the Act contained the Statement of Spain (Declaración), concerning p. 2 and 3 art. K.7 of the EC Treaty. Spain recognized prejudicial decisions of the EU Court and the need of consideration of cases in the EU Court before the decision of a national court. Thus, the Act not only ratified the Treaty, but also provided the implementation of some provisions of European integration primary law.

In 2004 the Constitutional Court of Spain issued two important acts on the right of European integration: the Decision of 19 April and the Declaration of 13 December.

To begin with the decision № 58/2004 of 19 April 2004 (Sentencia № 58/2004 de Tribunal Constitucional, 19 de Abril de 2004). The Constitutional Court announced additional tax burden, set Art. 38.2.2 of the Act of Spain 1990 and the Catalan Act 1987 unconstitutional due to violation of the constitutional principle of legal certainty in its decision. In addition, the Constitutional Court said: 'When the Administrative Chamber of the High Court of Catalonia, ..., notes the contradiction between national and European law, it is, first of all, leads to doubts about the implementation of Community law, doubts that did not exist until this moment.

Thus, the court did not even expressed doubts about the incompatibility between domestic and European legal regulations, identifying the contradiction that no other judicial authority had watched before it (Martín y Pérez, 2005: 799). The Court had to turn with the prejudicial inquiry in accordance with the doctrine of the Court and Art. 234 of the EC Treaty, submitted the reasons why it considered that the national legislation was incompatible with Community law to the Court in Luxembourg. The Constitutional Court emphasized: 'In reaching a decision not to apply domestic legislation on the grounds that it is allegedly incompatible with Community law without prejudicial inquiry in accordance with Art. 234 of the EC Treaty, adopted by the tribunal, decisions that in accordance with national law are not subject to appeal, and on a subject in which the court applies the doctrine different from all the existing doctrines, being based on criteria established by the European Court in its several decisions, safeguards have been violated, which constituted the principle of a legal process'.

The Constitutional Court of Spain formulated four positions in the decision that were later used as appropriate by all public authorities of the Kingdom. The Constitutional Court:

1. provided protection against abuses, which directly cause was non-compliance with Art. 234 of the EC Treaty. 'It is true that the protection is not given on the grounds that Art. 234 of the EC Treaty is not fulfilled (it would be like granting European law 'constitutional status'). But we should not deny that the granting of protection on the basis that the breach leads to the violation of fundamental rights, is tantamount to the fact that European law (duty of submission prejudicial requests in accordance with Art. 234), may have constitutional significance';

2) deciphered duty directions of prejudicial question to the EU Court in respect of the content of the constitutional right to a fair trial (Art. 24.2 of the Constitution), which therefore also enables it to be protected by the complaints about the protection;

3) pointed out the control of the national courts' opinions on the question of duty of courts to deal with prejudicial inquiries;

4) gave the objective criteria for assessment, whether a judge was in a situation where he had a reasonable doubt about the necessity of a preliminary request to the EU Court.

In the decision of the Constitutional Court it's indicated that the traditional idea according to which the European law hasn't got a constitutional status, does not exclude it from the 'control of the judicial assessment of the possible conflicts between European law and domestic law, when it leads to a violation of fundamental rights outlined in the Constitution'.

The Constitutional Court extended this understanding to all the constitutional appeals. When considering applications for free pardon the Constitutional Court 'does not consider itself obliged to intervene in cases of violation of fundamental rights by an act of the state bodies, which are believed to be contrary to European law, or in cases of violation of fundamental rights as a result of the refusal of the Spanish courts by filing prejudicial request'.

The second - the Declaration of 13 December 2004 (Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004). Signing of the Treaty establishing a Constitution for Europe, contributed to the issuance of the Declaration by the Constitutional Court. European Constitution was approved by the Spanish people in a referendum. After that, the Government sent a request to the CCS, in which it asked to comment on the adequacy of Art. 93 of the Constitution to determine the order of integration of the Treaty in the national legal order.

CCS held that Art. 93 has got 'independent financial dimension that must not be ignored'. 'Article 93 of the Constitution, without a doubt, is the main constitutional basis for the integration of other legal systems in our own by distribution of exercising the powers arising from the Constitution. Other legal systems have to coexist with the national legal system, to the extent that they are separate legal systems.

Firstly, according to the Declaration of the Constitutional Court of 1992 (Pleno. Sentencia del Tribunal Constitucional № 1/1992), Art. 93 of the Constitution 'does not include the possibility of supervision equivalent to the constitutional reform process, which is regulated by Section X of the Constitution'.

Secondly, the position of the CCS is following: Art. 93 of the Constitution imposes certain boundaries on the process of the distribution of the powers of the European Union and on the integration of the rights of European integration in the Spanish legal system. 'It is inevitable for the sovereign powers of the state to make European law acceptable and compatible with the principles of social and democratic law-based state, established by the Constitution ... to respect the sovereignty of the state, our basic constitutional structures, system of fundamental values and principles enshrined in our Constitution, where the basic rights got its own independent nature (Art. 10.1 of the Constitution)'.

The Declaration of 2004 found that some of the provisions of the Spanish Constitution reinforce restrictions on the transfer of powers to the European Union; such restrictions constitute the content of article 93. The Constitutional Court has the authority to apply the relevant constitutional procedures 'to solve the problems associated with the possible contradiction of European law of the Spanish Constitution'. The CCS stated that it considered itself the final authority, that uses constitutional procedures 'to solve the problems associated with the possible contradiction of European law of the Constitution'.

Thus, mentioned decisions of the CCS have a great importance in the Spanish legal system. The Constitutional Court established that the conflict between the right of European integration and the Spanish legislation does not have the 'constitutional significance'. After that, most of the questions on the implementation of the primary law of the European integration has been removed.

The ratification of the Lisbon Treaty was made by art. 1 of the Organic act 1/2008 (Ley Orgánica 1/2008, de 30 de julio, por la que se autoriza la ratificación por España del Tratado de Lisboa, por el que se modifican el Tratado de la Unión Europea y el Tratado Constitutivo de la Comunidad Europea, firmado en la capital portuguesa el 13 de diciembre de 2007). There was made reference to Art. 10.2 of the Constitution and p. 8, Art. 1 of the Lisbon Treaty in Art. 2 of the Act. 'Rules relating to fundamental rights and freedoms in the Constitution should be interpreted in accordance with the provisions of the Charter of Fundamental Rights, published in the Official Journal of the European Union of 14 December 2007'. Hereafter was the full text of the Charter (all 54 articles). Thus, the law not only introduced the provisions of the treaty in the Spanish legal system, but also increased the legal status of the Charter of Fundamental Rights. Ratification of the rules of the Lisbon Treaty showed an improvement of the legal mechanism of implementation of norms of primary law of the European integration.

Finally we can draw the following conclusions.

The legal mechanism for the implementation of the primary law of the European integration, operating in Spain, suggests 'one-time' implementation of each new constituent of the EC Treaty.

The Constitution of the Spanish Kingdom takes precedence over the rules of law of European integration, including the EU primary law.

3. Implementation of secondary EU law

The provisions of primary law of the European integration are implemented in the rules of secondary law. Learn more about the implementation of acts of secondary law in the Spanish legal system.

For the purposes of implementing the instruments of secondary EU law on the recognition of EU vessels sentences Spain publishes the relevant laws. At the same time, reference to the article. 149.1.6.ª of the Constitution (on the subject matter jurisdiction of the central government) is made at each implementing legislation and it's stated that the law incorporates into Spanish Law corresponding EC document.

Thus, the Council Framework Decision of 13 June 2002 on the European arrest warrant Spain implemented by the Act 3/2003 on the European arrest warrant and extradition (Ley 3/2003, de 14 de marzo, sobre la orden europea de detención y entrega) and the Organic Act 2/2003 (Ley Orgánica 2/2003, de 14 marzo, complementaria de la Ley sobre la orden europea de detención y entrega), supplementing it. Council Framework Decision on the execution on the freezing of property and evidence in the European Union 2003 was included in the Spanish law by

the Act on implementation of the European Union decisions of freezing property and providing evidence in criminal proceedings 18/2006, and complemented by the Organic act 5/2006 (Ley Orgánica 1/2008, de 30 de julio). Council Framework Decision on confiscation of objects and property obtained by criminal means, 2005 harmonized the legislation of EU Member States in matters of the spirit and application of confiscation. The Act 1/2008 on the execution of the EU documents and on the recognition of financial penalties determined the modalities of application of this document (Ley 1/2008, de 4 de diciembre, para la ejecución en la Unión Europea de resoluciones que impongan sanciones pecuniarias).

Council Framework Decision on the application of the principle of mutual recognition to decisions on the confiscation of 2006 authorized using of the existing rules of the law of European integration, when their use can simplify or facilitate the procedure of execution of punishment in the form of confiscation. Council Framework Decision 2009/299/JHA of 26 February 2009 complement the framework decision 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition of decisions rendered in the absence of the person concerned in court. Mentioned documents were implemented by Act 4/2010 on the execution of documents of the European Union on the recognition of confiscation (Ley 4/2010, de 10 de marzo, para la ejecución en la Unión Europea de resoluciones judiciales de decomiso).

The Treaty of Lisbon entered into force in 2009. The structure of the EU and its legal instruments occurred qualitative changes (in particular, the elimination of the concept of the three pillars, the redistribution of competence, failure of framework decisions, etc.). Treaty on the Functioning of the European Union of 2007 (Art. 82) enshrined the principle of mutual recognition of foreign judgments as a legal framework for cooperation between national law enforcement authorities within the EU.

The first directive in the field of legal assistance of criminal matters was adopted on December 13, 2011. The aim of the Directive 2011/99/EC of 13 December 2011 on a European warrant for the protection of the victim was to strengthen protection through appropriate measures by a competent court of one state for execution on the territory of another EU Member State where the person resides or temporarily resides.

The next instrument was the Directive 2014/41/EC on the European Investigation Order and the protection of a minimum level of procedural rights. The Directive covered a wide range of investigative actions.

At the same time the Directive 2014/42/EC on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union was published, which has updated the corresponding community tools.

Bearing in mind the 'fertility' of EU institutions, the Spanish Kingdom faced the problem of the transposition of the Union rules into its national legal order. The existing practice of a single response on the Community documents would mean great normative activities. It was necessary to take a few special laws, as well as amendments to the Organic act on the Judiciary system, the Criminal Code and the Criminal Procedure Code.

Therefore, the Spanish authorities decided to improve the legislative technique, combining implementation document. As the result the transposition of Community acts was made at the same time, through the adoption of Act 23/2014 on the mutual recognition of judgments in the European Union (Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea).

At the same time, the Act 23/2014 did not include the above mentioned two directives of 2014. So, Directive 2014/42/EC had the transposition deadline - October 4, 2015. The Organic act 1/2015 (Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal) was adopted for its implementation, which amended the Criminal Code of Spain, and the Act 41/2015, renewing the Criminal Procedure Code (Ley 41/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para la agilización de la justicia penal y el fortalecimiento de las garantías procesales).

In Directive 2014/41/EC of the European warrant the detention period of transposition was appointed on May 22, 2017; it has not been implemented yet.

The Act of 2014 provides for a special procedure of the inclusion of each new Community document into the Spanish law order. It establishes a scheme which is easy to adapt to the future

directives in this area, and prevents the continuous reform of the Organic act on the Judiciary, if it to compare to the old practice of individual transposition.

Spain is moving towards 'single' implementation of secondary law of the EU.

Let's start with the Regulations. As it's known, regulations are directly applicable in the territory of States on the date of their entry into force.

Spain actively works on the implementation of the Regulations, resulting its legislation into conformity with EU law.

So, Spain implemented Regulation 3677/90 with the help of four different regulations: a) Circular of 19.12.1991 № 1029/1991; b) Order of 15.11.1994; c) Law of 10.01.1996; d) of the Decree of 6.06.1997 № 865/1997, which specifies the provisions of the law of 01.10.1996.

Regulation 1346/2000 on insolvency proceedings was carried out through the adoption of the Act 22/2003 on Bankruptcy. The Act included a number of provisions on transnational bankruptcy to eliminate obstacles to the application of Community rules in Spain.

Sometimes the Spanish authorities apply for suspension of certain provisions of the regulations in the country. As an example, Regulation 2011 on freedom of movement of workers within the Community. Due to serious disturbances on the labor market, Spain July 22, 2011 notified the Commission that it decided to re-introduce restrictions on access to the labor market for workers from Romania.

Spain invoked 'the need for urgent measures in connection with the seasonal situation in the agricultural sector'. The European Commission adopted a decision to suspend the application by Spain of Articles 1-6 of Regulation № 492/2011 to Romanian workers.

Directives. The Directive is obligatory for each Member State to which it is addressed, in relation to the expected result, but it maintains the freedom to choose the forms and methods of action for the national authorities.

The provisions of the directive should be implemented in the legal system of the Member States. According to R. Muellerat, proper implementation requires accurate, clear and transparent regulations so that everyone can understand their rights and responsibilities. The implementation should be made in full, avoiding ambiguity or introducing foreign legal categories which can complicate its implementation, making direct reference to the directive in its preamble, as well as the position of all canceled due to these norms (Mullerat, 2010: 29).

A high degree of cooperation of state bodies in the process of implementation of the directives is characterized for Spain.

Thus, Council Directive 85/374 / EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the responsibility for poor quality products was implemented by the law of 1994 'On the responsibility for poor-quality products' in Spain.

The Organic act 25/2009 on the small business was passed for the implementation of Council Directive 123/2006 on services in the internal market of 22 December 2009. This Act introduced changes in more than 300 acts.

A direct link with the acts of a directive, as a rule, is clearly stated in the explanation of motives to the relevant law (exposición de motivos).

In general, the directive takes the attribute of direct effect when it is implemented in national law properly. However, the directive may have a direct effect, that evidenced by the practice of EC Court.

There are: a) the vertical direct effect of directives action (within the relationship between the state powers) (see Case Ratti) and b) horizontal direct effect (within the relationship between individuals) (see Case Marshall). So, in relation to the EU Directive 2000/31/EC the Act 34/2002 on the services of the information society', which allows to applicable directives directly was adopted.

Non-applicability of national legislation into conformity with the requirements of secondary law is a violation of EU law. For example, the implementation of the Framework Decision 'On the application of the principle of mutual recognition to confiscatory measures' 2006 should have been completed by 24 November 2008 (Art. 22). However, Spain implemented it only in 2010 (Ley 4/2010, de 10 de marzo).

The Spanish government received a large number of notifications from the European Commission about the irregularities in the process of implementation of the directives. 16 June 2011, the European Commission notified Spain of the identified deficiencies in its transposition of EU water law.

The Directive 2000/60/EC was implemented by the Water Decree of 2001 in Spain. In view of the fact that Spain has already received a notice from the Commission on this issue and has not taken the necessary measures, the Commission initiated proceedings against Spain in the EU Court (see EU Court Decision on October 4, 2012 (C 403/11)). At the same time, not only official representatives of the Spanish government did not agree the position of the EU Court, but also some Spanish scientists, who pointed to the federal structure of the country, complicating the process of implementation of Community rules in this case. In Spain, as it's stressed by M.Pacheco, when it's spoken about the implementation of directives affecting the competence of the Authority, it will be carried out by the authorities of the autonomous regions (Pacheco, 2008).

According to the European Commission, Spain's record in respect of improper implementation of the directives was 1%. Especially Spain improved the performance of the implementation of the directives in the field of the internal market; the deficit was only 0.8 %.

Decisions. The decision, as a rule, is an individual act, although there are examples of regulatory decisions (such as the European Parliament resolution on the Ombudsman 1994). The decision is binding in all its parts for those to whom it is addressed. As an example, the European Commission's decision of 11 October 2012, which was adopted to encourage the development of the fishing industry in Spain.

The Spanish Government may declare the decisions of the EU institutions, which are applied directly in Spain. So, August 16, 2012 Agency for Food Safety and Nutrition published a list of decisions of more than 40 such decisions. At the same time, there were made references to the eight national regulations containing rules on the implementation of their provisions.

4. Results

1. The primacy of international agreements in relation to national acts is recognized in Spain. In case of conflict with national law, international agreement is applicable. However, the Constitution of the Kingdom takes precedence over international norms.

2. The Constitutional Court of Spain addresses issues of European law, guided by the following provisions.

A) Article 93 of the Constitution is considered only as a 'procedural rule' governing the activities of Parliament and the Government for the implementation of agreements or documents issued by the international organizations.

B) Application of the national authorities of European law does not affect the competence of the Constitutional Court; its activity concerns only the protection of the Constitution.

C) The rules of European law must be applied in accordance with the distribution of powers between the central authorities and institutions of the autonomous communities in Spain. With respect to acts of the EU institutions, to which Spain has transferred some parts of its powers, control is carried out by Spanish courts of general jurisdiction.

3. In general, in Spain the rules of law of European integration are provided by the appropriate mechanism. However, the quality of implementation of the directive in Spain is uneven. European law has affected virtually all sectors of the domestic law of the country.

5. Conclusion

1. The analysis of the Spanish legislation and practice of the implementation of international norms shows that, in general, Spain adheres to moderate monistic concept of the relationship between international and domestic law. International treaties of Spain after their publication become a part of the domestic legal order of the country. The Constitution of 1978 (Art. 93-96) regulates the issues about the place of international law in the legal order of Spain in detail.

2. International legal documents as one of the sources of the Spanish legal order are indicated in Art. 96 of the Spanish Constitution and in Art. 1.5 Civil Code of Spain, enshrining the list of Spanish sources of law. The legal norms contained in international treaties are not directly applicable in Spain until they have become a part of domestic law by publication in the 'Official Gazette of the State'.

3. With regard to the implementation of the provisions of secondary law, Spain is moving towards 'single' implementation of secondary law. The following rule applies. The implementing rules should be issued by the same body as the national law governing the respective relations. At the same time, the implementation of EU law can be carried out by means of delegated legislation, the

adoption of a normative act of a lower level (for example, the decree of the Government instead of the law). The government is entitled to change the acts of a higher level in implementing.

References

Biriukov, 2014 – *Biriukov P.* (2014). Implementation of the EU law on the internal market in Spain. InterEuLawEa§t. Vol. 1. Issue 1. pp. 163-172.

Biriukov, 2015 – *Biriukov P.* (2015). On the accession of Spain to the European Communities. Journal of Advocacy, Research and Education. 2015. Vol.(3), Is. 2. pp. 121-127.

Brótons, 2003. – *Brótons A.R.* (2003). The Spanish Constitution and International Law. IX Spanish Yearbook of International Law (2003).

Raigón, 2012 – *Casado Raigón R.* (2012). Derecho Internacional. Parte General. Madrid: Tecnos.

Campos, 1977 – *Campos J.D.G.* (1977). Comentarios a las reformas del Código Civil. El nuevo Titulo Preliminar del Código y la Ley de 2 de mayo de 1975. Madrid: Tecnos. Vol. I. pp. 86-93.

Carrión, 1982 – *Carrión A.J.R.* (1982). Regulación de la actividad internacional del Estado en la Constitución // Revista de Derecho Político. № 15. pp. 95-118.

Cazorla, 2013 – *Cazorla M.I.T.* (2013). Monismo o dualismo en el sistema españiol recepción de tratados internacionales? Un análisis a la luz de la doctrina y la práctica española más reciente // Basic concepts of public international law. Monism and Dualism / editor M. Novakovic. Belgrade. pp. 661.

Iglesias, 1984 – *Iglesias R.* (1984). Problemas juridicos de la adhesion de Espana a la Comunidad Europea. Cursos de Derecho Internacional de Vitoria-Gasteiz.

Iglesias, Woelker, 1987 – *Iglesias R., Woelker U.* (1987) Derecho Comunitario, Derechos fundamentales y Control de Constitucionalidad: la decision del Tribunal Constitucional Federal Aleman de 22 de octubre de 1986. Revista de Instituciones Europeas. № 14.

Jimeno, 2006 – *Jimeno M.* (2006). La aplicación del derecho comunitario. Los principios de efecto directo y primacía. La cuestión prejudicial del art. 177 TCE.

Kelsen, 1923 – *Kelsen H.* (1923). Österreichisches Staatsrecht: Ein Grundriss entwicklungsgeschichtlich dargestellt. Mohr, Tübingen.

Kelsen, 1928 – *Kelsen H.* (1928). Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus. R. Heise, Charlottenburg.

Legido, 1991 – *Legido S.* (1991). Las relaciones entre el derecho comunitario y el derecho interno en la jurisprudencia del Tribunal Constitucional. Revista Espanola de Derecho Constitucional. № 11. pp. 175-191.

Lloréns, 1984 – *Lloréns J.C.* (1984). Los tratados internacionales como fuente directa del ordenamiento jurídico en el artículo 96 de la Constitución española. Estudios en homenaje al Profesor Diego Sevilla Andrés. Historia, Política y Derecho. Valencia. V. I. pp. 207-220.

Lozano, 2006 – *Lozano G.M.T.* (2006). El Tribunal Constitucional ante el principio de primacha del derecho comunitario. Anales de derecho. Universidad de Murcia. 2006. № 24. pp. 319-352.

Martín, 1980 – *Martín A.M.* (1980). Cuestiones de Derecho internacional público en la Constitución española de 1978. Revista de la Facultad de Derecho de la Universidad Complutense. № 61. pp. 143-184.

Martín y Pérez, 2005 – *Martín J. y Pérez de Nanclares.* (2005). Hacia una nueva conncepción del artículo 93 de la Constitución: Comentario a la Declaratcon 1/2004 del Tribunal Constitucional. LVII REDI (2005-2). pp. 799-818.

Mullerat, 2010 – *Mullerat R.* (2010). How Spain Implements European law. Jean Monnet / Robert Schuman Paper Series.Vol. 10. № 2.

Pacheco, 2008 – *Pacheco M.* (2008). Proceso de transposición de Directivas. Derecho Comunitario. January.

Ridruejo y Palomar, 2007 – *Ridruejo J.A.P. y Palomar P.* (2007). Public International Law before Spanish Domestic Courts. The Legal Practice in International Law and European Community Law. A. Spanish Perspective. Leiden, Boston: Martinus Nijhoff Publishers.

Ridruejo, 1964 – *Ridruejo J.A.P.* (1964). La estipulación y la eficacia interna de los tratados en el derecho español. Revista Española de Derecho Internacional. № 17. pp. 39-59.

Rodríguez, 1984 – *Rodríguez L.I.S.* (1984). El proceso de celebración de los tratados

internacioonales y su eficacia interna en el sistema constitucional español (Teoría y práctica). Madrid.

Juste, 1978 – *Juste R.* (1978). El Derecho Internacional Público en la Constitución Española de 1978. Anuario de Derecho Internacional. 1977-1978. № 4. pp. 15-51.

Sans, 2002 – *Sans C.I.* (2002). Intervención parlamentaria en la celebración de tratados internacionales en España. Revista Electrónica de Estudios Internacionales. № 4. pp. 181.

Salcedo, 1991 – *Sans J.A.C.* (1991). Curso de Derecho Internacional Publico. Madrid: Tecnos.

Santaolalla, 1981 – *Santaolalla L.F.* (1981). La ley y la autorización de las Cortes a los tratados internacionales. Revista de derecho político. № 11. pp. 29-56.

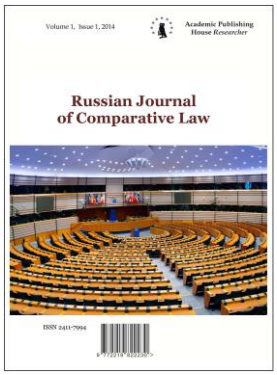
Sperduti, 1979 – *Sperduti G.* (1979). Dualism and Monism: a Confrontation to be Overcome. Estudios de Derecho Internacional. Homenaje al Profesor Miaja de la Muela. V. I. Madrid: Tecnos. pp. 459-460.

Tremps, 1985 – *Tremps P.* (1985). Justicia comunitaria, justicia constitucional y tribunales ordinarios frente al derecho comunitario // Revista Espanola de Derecho Constitucional. № 13. pp. 157-181.

Verdross, 1937 – *Verdross A.* (1937). Völkerrecht. Berlin: J. Springer.

Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 26-30

DOI: 10.13187/rjcl.2017.1.26
http://ejournal41.com



The Comparative-Legal Analysis of the Invention and Utility Models Registry Process in Certain Brics Participants

Vladimir Chichkanov [a] , [*]

[a] Kursk State University, Russian Federation

Abstract

In the following article the order of inventions and utility models patenting is taken under consideration. It's especially important to realize the specific of such a process for the participants of BRICS, among which there're Brazil, the Russian Federation, India, and China. The discussion here is dedicated to the comparison of the registration process, the order and peculiar features of expertise process in the countries above mentioned. We also enumerate the specific features of inventions and utility models registration, for those unique and present in the only one state. The nuclear power engineering in India serves as an example of patenting limits for certain branches.

In conclusion we demonstrate the common features of patenting in the mentioned BRICS participants: Brazil, the Russian Federation, India, and China. There're just slight differences present, and all of them are connected with the review process order and the patenting terms. The institute of development patenting restriction is considered promising. And that's why we find it demanding for the following study in order to compare the acceptability of development limit declaration within patenting and international obligations, accepted by international organizations participating countries.

Keywords: patenting, BRICS, invention, utility model, intellectual property right, patenting restrictions.

1. Introduction

It's well-known that the Russian Federation participates in BRICS. The participating countries possess commercial and economic ties between them. The intellectual property objects registration is a part of these international relationship within the organization, so each participating country should be observed in order to reveal the features of this process there. The terms, order and specific of expertise during intellectual property objects registration are of the highest importance due to revelation the stages an applicant faces in BRICS participating states. So, we're up to analyze the intellectual property right of Brazil, the Russian Federation, India and China.

As for the industrial property objects expertise, there're also several special features of patenting in the BRICS participants. Within the topic of scientific development we mention the significance of realizing what kinds of industrial property object are permitted to be patented in the countries above mentioned to build up the common patenting strategies.

[*] Corresponding author
E-mail addresses: chichkanov.vladimir@mail.ru (V. Chichkanov)

2. Materials and methods

The current article is based upon the following sources: normative legal documents of the Russian Federation, Brazil, India and China in the intellectual property area and the materials of journal publications. The comparative-legal method was chosen as the basic one. Its application revealed the common and different features of inventions and utility models registration process in the BRICS participants.

3. Discussion

According to the article 27 of the Trade intellectual property right agreement, «the patents are given for any inventions with no dependence on their being a product or a way in all industrial branches on conditions that they are characterized by novelty, level of inventiveness and possibility of industrial applicability».

The similar definitions for an object liable to patent are included in the BRICS participants' legislation: Russian (The Russian Civil Code (part four), 2008), Indian (The Patents Act, 1970), and Chinese (Patent Patent Law of the People's Republic of China (as amended up to the Decision regarding the Revision of the Patent Law of the People's Republic of China, 2008) one (Patent Patent Law..., 2008). Brazil conducts quite a wider definition for a patentable object: any invention can be considered patentable if possessing novelty, level of inventiveness and industrial applicability (Ley № 9 que regula Derechos y Obligaciones Relativos a La Propeidad Industrial, 1996, supplemented Ley N° 10.196 de 14 de febrero de 2001 (Enmiendas a la Ley de Propiedad Industrial), Ley N°12.663 de 5 de junio de 2012 (Ley General de la Copa del Mundo). As a utility model in Brazil one can register «an object of practical application», or a part of it, enabling its practical application, presented by a renovated form or elements placement that lead to the functional perfection of its use or production (Ley № 9..., 2012).

Moreover, in the Russian Federation, Brazil and China one can apply for both invention and utility model patent. However, in India one should notice that there's no "utility model" functioning.

The patent legislation of the BRICS participants (Brazil, the Russian Federation, India and China) enumerates the common list of objects which are not liable to registration as an invention or a utility model there. The list includes the following items: discoveries, scientific theories, mathematical methods, playing rules and methods, intellectual and economic activities, computer programs, reporting, breeds and plant varieties.

Nevertheless, every certain state can possess its own peculiarities an applicant should take of. For example, in India a person is prohibited to patent objects of nuclear power engineering. This restriction was stated by the Indian «The Atomic Energy Act» (The Atomic Energy Act, 1962). The article 20 restricted patenting for the inventions utility or connected with nuclear power production, control, use or utilization according to the Indian government. The act discussed also provided Indian government with ability to check any patent application for the criteria mentioned in the article 20 of «The Atomic Energy Act» (usefulness or connection with nuclear power production, control, use or utilization). This restriction is resulted by the strategic importance of nuclear power for India. It's considered that individuals' and foreigners' patent approval may lead to the threat to the national Indian interests.

As for the patenting specifics in BRICS countries (Brazil, the Russian Federation, India and China), let's observe the invention expertise process in India. As opposed to the Russian Federation, India demands duty-paid obligatory application for expertise to initiate application processing (Manual of Patent..., 2010). In the Russian Federation the application for expertise isn't considered obligatory if duty-paid according to p.1.1 (Invention patent application registry in the Russian Federation and consideration due to formal expertise results) and p.1.8 (Invention substantive examination process and consideration upon the results) Regulation upon the patent and other duties for legally relevant activity (Russian Newspaper, 2008) and signature in invention patenting application. In this case the applicant applies for substantive examination while filing the application for their invention registry. The terms for application for expertise since priority date or application date are also surprising for a Russian applicant . In India they are 48 months.

After consideration about the expertise the application for patent is attached to an expert. So, the specialist is to make formal and substantive review according to the area of invention and the expert's specialization. After that, the expert analyzes the application materials thoroughly,

conducts a preliminary search to state the novelty, and makes up a report upon the invention patentability. They are also to find out whether the invention possesses the level of inventiveness and is industrially applicable. The prior art is closely related to these criteria, as it includes all the data open for general use all over the world before the priority date of the invention applied, all the national patents and the filed applications with the earlier priority dates (The newsletter..., 2013).

Generally, the review process seems to be alike for all the BRICS participants (particularly, for inventions; and in Brazil and The Russian Federation – for utility models as well). On the first stage the application is to be filed to the Patent Office (in The Russian Federation this stage is not considered obligatory, and it can be conducted after the substantive review, consideration and signature duty is paid; in this case the application is filed while applying for patent). After that the experts of the Patent Office are to check whether the objects applied can be patented as inventions or utility models in their state. Consequently, an expert checks the objects for the patentability criteria according to the prior art. During any of the stages an expert can make a request for the applicant to respond and comment upon some details. In dependence upon the review results the patent application is getting either approved or denied.

Moreover, it should be noted, that the reasons for denial can be rather peculiar for a patenting country. For example, the Indian practical guide for the Patent office activity p. 08.03.06.01 runs: any invention can be declined if obviously fancied and contradicts the legislation. For instance, a machine with 100 % efficiency, a machine producing without input, or a perpetual motion machine serve as good examples of gadgets of this sort. Nevertheless, p. 08.03.06 of the Guide states, that these examples are just illustrations and aren't considered the final ones. The objective decision upon patent approval is taken individually anyway.

Also, one should take into account the fact that India doesn't approve the applications on plants and animals in general and their parts (including seeds, sorts and kinds), but the micro-organisms. For example, in The Russian Federation a person can register various sorts of plants and animals as the result of selection.

Consequently, the expert's report is checked by a supervisor within a month since received. If some objections are made, they are sent to the applicant as the expertise report form with annexes and specification if required. If there's no objections made the patent gets approved.

More than that, according to p. 08.04 of the Practical guide upon the Patent office activity if there're objections towards conformity of the invention with patentability criteria, the applicant receives a complete report from the expert. We draw the readers' attention to the fact that it functions in contrast to the Russian Federation legislation, for example, where the expert just sends a request for explanation and clarification to the applicant.

Also the substantive review terms are to be discussed in the ongoing article as far as the expected expertise term and patenting term as well are of the considerable interest for the applicants.

In the Russian Federation, according to p. 140 of the Order of the Ministry of Russian Economic Development dated 25 May 2016 № 315 «About approval of the Administrative regulations of Federal Service of Intellectual property invention registry and patenting service» (The order..., 2016), the maximum term of substantive review numbers 24 months since the date of receipt of the substantive expertise application approval. In general, the patent approval or the first expert's request can be expected to be received within one year since the very moment of the application for the substantive review. The same terms function for the Chinese Patent office as well. To sum it up, the Russian Federation and China possess the shortest invention patent terms among all the BRICS participants (Brazil, the Russian Federation, India and China). In India an applicant should be waiting for about two or three years, in Brazil even about ten years may pass (The newsletter..., 2013). Consequently, the most long-term patent processing is there in Brazil.

It's also relevant to mention the Indian institute of patenting restrictions in certain areas and whether it is admissible for the international organizations participation. According to the Indian legislation, the nuclear power engineering is a strategically important area there. Consequently, that kind of patenting is restricted here in order to prevent national interest threat from both foreigners and Indian individuals.

Moreover, it should be noted that India is one of the World Trade Organization participants since 1 January 1995. So we have to contend with the situation in which an international organization participant has unilaterally restricted the patent possibility in certain area for both

foreigners and Indian applicants.

However, the Institute mentioned is considered promising. That's why, in our opinion, it demands the following observation in order to state the acceptability of patent limits and international obligations taken by international organizations participants. It's also relevant to consider whether it's possible and acceptable to establish patent restriction Institute for some areas in the Russian Federation too and how to justify such a decision (for example, there's an opportunity to declare an area strategically important and to prohibit patenting within such an area for individuals and, especially, foreigners as the process leading to national interests threat).

4. Results

To sum all the above mentioned up, we can conclude the patenting process analysis for such BRICS participants as Brazil, the Russian Federation, India and China in the following way:

1. Any possible invention in any technological area has an opportunity to be patented regardless of being either a product or a way. Despite that, the demands for the process are the same there: the invention applied should be characterized by its novelty, the level of inventiveness and should possess practical application.
2. The list of objects which are not liable to patenting as an invention or a utility model in the BRICS participants (Brazil, the Russian Federation, India and China) is quite common. It includes the following items: discoveries, scientific theories, mathematical methods, gaming rules and methods, intellectual and economic activity, computer programs, reporting, breeds and plant varieties. Nevertheless, in India there's invention patenting prohibition for the nuclear power engineering area.
3. The order of the substantive review is quite similar for the BRICS participants (Brazil, the Russian Federation, India and China). In the beginning, an applicant files the application to the state Patent Office, and then the experts check the patentability of the object as an invention or a utility model. Consequently, a specialist checks the conformity of the object applied with patentability criteria according to the prior art. On any presented stage of the review an expert may send a request to the applicant to respond or comment upon some details. As the result of substantive review, the patent application is getting either approved or denied.
4. The terms of expectation for patenting process finished in the BRICS participants (Brazil, the Russian Federation, India and China) are rather different. For instance, in The Russian Federation and China the consideration of the application is the most short-term and takes just about one year. Meanwhile, in India the process of the application takes about two or three years. Finally, Brazil is characterized by the most long-term expectation period, which numbers about ten years.

5. Conclusion

To sum it up, the inventions and utility models patenting in the BRICS participants (Brazil, the Russian Federation, India and China) is quite similar in general features. However, there're some peculiarities which can be established by certain state legislation. Of course, that fact should be taken into account in order to patent one's object successfully in each of these countries.

For example, before application for invention or utility model registry a person is recommended to check whether the object is liable to registry in the country chosen. For instance, one will be denied to patent seeds, sorts and kinds of plants in India, while in the Russian Federation they may be approved as the result of selection.

References

Ley № 9..., 2012 – Ley № 9 que regula Derechos y Obligaciones Relativos a La Propeidad Industrial, 1996, supplemented Ley N° 10.196 de 14 de febrero de 2001 (Enmiendas a la Ley de Propiedad Industrial), Ley N°12.663 de 5 de junio de 2012 (Ley General de la Copa del Mundo). URL: http://www.wipo.int/wipolex/ru/details.jsp?id=515,http://www.wipo.int/wipolex/es/details.jsp?id=547, http://www.wipo.int/wipolex/es/details.jsp?id=14846

Manual of Patent..., 2010 – Manual of Patent Office Practice and Procedure (2010). URL: http://www.wipo.int/wipolex/ru/details.jsp?id=7648

Patent Patent Law..., 2008 – Patent Patent Law of the People's Republic of China (as amended up to the Decision regarding the Revision of the Patent Law of the People's Republic of China, 2008 // http://www.wipo.int/wipolex/ru/details.jsp?id=8229

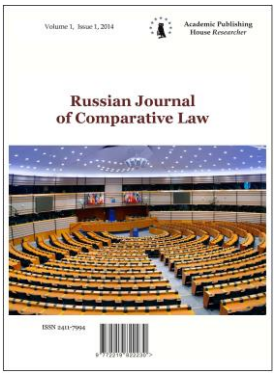
The Atomic Energy Act, 1962 – The Atomic Energy Act, 1962. URL: http://dae.nic.in/?q=node/153.

The Patents Act, 1970 – The Patents Act, 1970. URL: http://www.wipo.int/wipolex/ru/text.jsp?file_id=295102

The Russian Civil Code (part four), 2008 – The Russian Civil Code (part four) (2008). Russian Newspaper. № 289. 22.12.2006

The newsletter..., 2013 – The newsletter of the law firm «Gorodisskii i partnery» (2013). № 3 (93). P. 3.

The order..., 2016 – The order of Russian Ministry of economic development № 315 (2016). URL: http://www.pravo.gov.ru. 15.07.2016.



Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 31-37

DOI: 10.13187/rjcl.2017.1.31
http://ejournal41.com

The Legislative Protection of Sámi Languages in the Nordic Countries and the Russian Federation

Anthony Fortin [a, *]

[a] Université de Sherbrooke, Québec, Canada

Abstract

The Sámi people form an indigenous community identified by its diversity of dialects and languages, and that is spread in different European countries, mainly the Nordic countries (Norway, Finland and Sweden) and the Kola Peninsula in Russia. Throughout their history, they have fought against the spread of the majority languages of their respective countries in order to preserve their distinctness and their culture. Today, as indigenous people are slowly recovering rights and recognition, different legal systems for the protection of Sámi languages were put in place in the foregoing states. However, while some of these provisions seem wide and strong, the practical reality does not reflect it. We will therefore examine the international undertakings and national implementations of these countries with regards to experts' observations in order to establish their shortcomings in the protection of Sámi languages.

Keywords: Sámi, language, legal protection, Nordic countries, Kola Peninsula, implementation.

1. Introduction

The Sámi people form the only indigenous group recognized by the European Union. They are dispersed in the Nordic countries and the Russian Federation, but are mostly found in Norway and Finland. We estimate the number of Sámi people between 40,000 and 60,000 in Norway, between 15,000 and 20,000 in Sweden, approximately 9,000 in Finland and 2,000 in Russia (Tauli-Corpuz, 2016) where they are concentrated in the Kola Peninsula. We can also count three principal Sámi dialects, divided in nine distinct sub-dialects. Heterogeneous regarding their languages, religions and livelihoods, they still present themselves as one common ethnicity (Language, dialect or variety: 98).

A glance at the discrimination and the atrocities Sámi people have been the target of before and during the Second World War suffice to understand these people's claims for a better recognition and protection (Koivurova et al. 2004: 99, 100; Kotljarchuk, 2012: 61, 62). As a pillar of the Sámi culture, the Sámi languages represent a first-importance stake in the related negotiations. To this day, Norway, Finland, Sweden and the Russian Federation, home of these communities, have legislatively responded, although differently, to Sámi people's demands. The Nordic Sámi Convention, a document pleading for the standardization of the protections in place in the Nordic countries, if yet to be adopted was nevertheless drafted and is being negotiated among the interested parties. However, remainders of the pre-war Sámi languages crisis (Ricco) can still be

* Corresponding author
E-mail addresses: anthony.fortin@usherbrooke.ca (A. Fortina)

found in each of the States under study, and concerns keep being raised among the indigenous communities. Without denying the major role of politics in this matter, this comparative study will concentrate on the legal aspects of the protections in place across the aforementioned jurisdictions and their concrete impact on the situation of Sámi languages.

2. Materials and Methods

We will first take a look at the most important international instruments in place for the protection of Sámi languages and examine which undertakings were taken by every State under study. We will then concentrate on the national implementations of these undertakings among the States and on the other national protections offered. Finally, an analysis of the disparities between the different systems will allow us to notice the improvements that are still to be made in each country.

This work represents a recension of existing publications relating to Sámi languages issues and protections. Sources have been found mainly in the Åbo Akademi University digital and physical libraries, as well as online. Being a Canadian law student, I wrote the first version of this essay while completing a four-months semester abroad in the city of Turku, Finland, as a requirement for the course Comparative Law - Public Law. It is to be noted that I have not been able to collect my own data and acknowledge the actual situation of Sámi languages in the states under study for myself. However, the present version has been through processes of correction and peer review.

The international undertakings for the protection of minorities rights represent commitments of the States towards the improvement of their internal situation. When evaluating the efficiency and sufficiency of the domestic legal protections of Sámi languages such commitments must therefore be borne in mind. Here are some of the most important international instruments to consider.

The ILO Convention No. 169 entered into force in 1991. It pleads notably for the equality of treatment of indigenous peoples as well as the recognition and promotion of their cultural and social identity (Art. 2(a) and (b)). It provides children with the right to be taught, when possible, how to write and read in their indigenous language (Art. 28(1)) and obligates the signatory States to translate the regulation related to indigenous peoples in their languages (Art. 30). So far, only Norway has ratified the Convention, while Finland is currently studying a proposal for ratification (Tauli-Corpuz, 2016). The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), adopted by the UN General Assembly in 2007, reiterates the principles of the ILO Convention No. 169. In addition, it provides indigenous peoples with the rights to autonomy and self-governance in matters relating to their internal and local affairs (Art. 4), pleads for their representation in the media (Art. 16 and 17) and their consultation prior to decisions on matters that may affect them (Art. 18 and 19). Since it is a declaration, it automatically applies to all UN Member States, including Norway, Finland, Sweden and the Russian Federation (ILO standards: 1, 2).

Another important instrument is the European Charter for Regional or Minority Languages, adopted by the Council of Europe in 1992. With even broader provisions, especially regarding the learning of minority languages in the mandatory curriculum from pre-school to secondary (Art. 8) and their inclusion in the judicial and public spheres (Art. 9 and 10), it additionally provides for a monitoring system in the form of a periodical review (Art. 15). Only Russia omitted to ratify the Charter after its signature (Chart).

3. Discussion

National Legislative Protections

Norway. Norway's legislative initiatives for the protection of Sámi languages significantly started with the adoption of the Sámi Act, in 1987, which had the purpose of enabling the Sámi people to safeguard and develop their language, culture and way of life (s. 1-1). It created the Sámi Parliament and defines the Sámi people with regards to linguistic and self-consideration criteria. The Sámi Parliament is habilitated to give opinions or refer concerns to authorities regarding "any matter that in [its] view [...] particularly affects the Sámi people" (s. 2-1). In return, public bodies have the duty to consult the Sámi Parliament before making decisions on matters of its business (s. 2-2). Finally, the Act provides that Sámi and Norwegian languages are "of equal worth" (s.1-5).

Norway soon amended its Constitution, in 1988, to add the following protection: "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life." (Art. 110a) This modification led to

the inclusion of chapter 3 in the Sámi Act on languages, which especially provides Sámi people with the right to give and receive communications in their indigenous languages for matters that concern them and for all public services within the six municipalities enumerated in section 3-1(1). It also gives the right to Sámi education (s. 3-8) – this right is also protected by chapter 6 of the Education Act – and created the Sámi Language Council, under the supervision of the Sámi Parliament (s. 3-12).

The ratification of the ILO Convention No. 169 by Norway also led to two important domestic reforms: the Finnmark Act of 2005 on the management of natural resources in traditional Sámi areas, as well as a formal agreement between the State and the Sámi Parliament, guaranteeing the participation of the Sámi people in decisions that affect their interests (Mörkenstam et al., 2016: 16, 17).

Other domestic laws contain provisions to strengthen the protection of Sámi languages, like the Place Names Act, the Kindergarten Act, the Courts Act and the Patients' Rights Act (Action Plan for Sámi Languages, 2009: 14).

In 2009, the Government of Norway released a detailed Action Plan for Sámi Languages (Action Plan for Sámi Languages, 2009: 14). Despite all of the foregoing legislative protections, the plan acknowledges the critical situation of Sámi languages and suggests a variety of detailed improvements to be made regarding, notably, the instruction in Sámi languages, the use of these languages in public services and their visibility to the public. The final report on the Action Plan, which was expected in September 2016, is yet to be published (Tauli-Corpuz, 2016).

Finland. The first important legislative action of Finland towards the protection of Sámi languages goes back to 1991, with the adoption of the Act on the Use of the Sámi Languages Before Authorities. It provided Sámi people with the rights to give and receive communications with public authorities in Sámi languages (The Finnish Sámi Parliament, 1997).

The 1919 Constitution Act of Finland was amended, in 1995 and 1996, to include the right of Sámi people and other indigenous groups to "develop their own language and culture" and the basis of the Sámi peoples' cultural autonomy regarding languages and culture in their homelands (Koivurova et al., 2004: 100). These provisions were later picked up in sections 17 and 121 of the actual Constitution of Finland, entered into force in 2000.

Following this constitutional reform, a new Sámi Language Act was born in 2003, with the aim to "ensure the constitutional right to maintain and develop their own language and culture" of the Sámi people (s. 1). If its scope is for most part similar to the former Act (now abrogated), its provisions were rewritten in order to "secure the linguistic rights of the Sámi without them needing specifically to refer to these rights" (s. 1). For instance, while the former Act merely allowed Sámi people to receive, upon request, translations of public communications in their own languages, additional provisions in the new Act formally require public authorities to have personnel trained for communication in Sámi (s. 14 to 18). The new Act contains measures to promote the Sámi languages, such as the possibility for personnel of public authorities to receive paid leave of absence in order to learn Sámi languages. Each public authority is henceforth responsible for the supervising of the Act and the Finnish Sámi Parliament, for the monitoring of the Act by the means of recommendations and initiatives. It applies the controversial - but nevertheless applicable – definition of a Sámi given in the Act on the Sámi Parliament of 1995 (s. 3(2)).

The Act on the Sámi Parliament recognized the linguistic and cultural autonomy of Sámi people within three municipalities and the area of the reindeer owners' association of Lapland in Sodankylä, and created the Sámi Parliament (s. 1 and 4). The role of the Finnish Sámi Parliament is to "look after the Sámi language and culture, as well as to take care of matters relating to their status as an indigenous people" (s. 5(1)) by the means of initiatives, proposals and statements to the national authorities on these matters (s. 5(2)). It also represents the Sámi people in national and international relations (s. 6). In addition, the national authorities are obligated to "negotiate with the Saami Parliament regarding all far-reaching and important measures, that directly or indirectly may affect the Saami's status as an indigenous people (s. 9). However, as we will discuss later, the latter statutory protection is not efficiently implemented in practice. Finally, this Act defines the Sámi people with regards to criteria of land, taxation and population registers in addition to the linguistic criterion that existed under the former decree on the Sámi Delegation. This more recent definition was rejected by the Sámi Parliament (The Finnish Sámi Parliament, 1997).

The Basic Education Act of 1998 allows the teaching of Sámi languages as first or second languages, and specifically provides those living in the Sámi administrative areas to be taught in

their own languages (s. 10). It recognizes Sámi languages as mother tongues (s. 12). On the counterpart, provided by the Act on the Financing of the Provision of Education and Culture of 2009, the education in Sámi languages is today restricted to the Sámi administrative areas, even though most of the Sámi students live outside of them. The lack of funding provided by the national Government leads to shortages in Sámi teachers and education material. Moreover, in the Sámi administrative areas, there are no official Sámi schools, but rather Finnish schools applying a translated version of the Finnish curriculum. Still, the national Government undertook in 2014 to bring considerable improvement to the situation by 2025 (Tauli-Corpuz, 2016: 59).

Sámi languages are also partly protected through their media, especially in consequence of the Sámi-only language policy. Among others, radio and the increasing television shows in Sámi are the most important media platform. The policy even requires that the television shows originally in Finnish majority languages is translated in the three Sámi languages spoken in Finland (Northern, Inari and Skolt). On the counterpart, the press lacks of resources. Only one magazine in Inari Sámi is released quarterly. Finally, the Internet gives a new access point to join the youth of this community, which is less interested by the other media. Numerous challenges are still to be faced by Sámi community, including the undeniable impact of the majority languages on their owns as well as the enterprise of simultaneously fulfilling both of their missions: ensuring the remembrance of Sámi culture while promoting its evolution (Pietikäinen, 2008: 19).

Overall, as stated in section 1 of the Language Act, it must be remembered that the official languages of Finland remain Finnish and Swedish, and that Sámi languages do not have the same legal status.

Sweden. The Sámi Parliament Act of 1993 established the Swedish Sámi Parliament, giving it the "primary task of monitoring questions related to Sámi culture" (s. 1). Therefore, it can put forward initiatives and has decision-making powers regarding Sámi languages, culture and schools, but is not an official body that has to be consulted by the national Government (Koivurova et al., 2004: 101). The Act also defined the Sámi people with regards to a linguistic criterion, without referring to any land, taxation or population register criteria (s. 2).

The next major legislative measure for the protection of Sámi languages came in 2009. The National Minorities and Minority Languages Act introduced protections of the right to use national minority languages in the public administration and courts, extended the Sámi administrative areas to twenty and established a special working group under the Government responsible for the supervision of minority protection (Zimmermann, 2010).

In the same year came the Swedish Language Act, which reiterates the status of Swedish as the principal language of Sweden in general (s. 4), the official language in international contexts (s. 13) and as the language of the public sectors (s. 10). However, it does not affect other legislations on the use of minority languages in the public sectors (s. 10) and mentions the public sector's "particular responsibility to protect and promote the national minority languages" (s. 8).

Sweden's constitutional recognition of the Sámi people only arrived in 2010 (The Constitution of Sweden; Mörkenstam et al., 2016: 14), with the incorporation of the following provision in the Instrument of Government: "The opportunities of the Sami people [...] to preserve and develop a cultural and social life of their own shall be promoted." (Chap. 1, Art. 2) A new Education Act followed, adding to the existence of Sámi schools under the former Act by expressly addressing the right of Sámi children to be taught in their indigenous language, provided that they learn Swedish as a second language. However, the Act lets the government the ability to put restrictions on the education in maternal language (chap. 13, s.7). Indeed, the Swedish Educational Decree adopted in 2011 recognizes the right of Sámi people to receive teaching in their mother tongue, but contrarily limits the mother-tongue teaching to half of the total teaching, in order to increase Swedish teaching (Tauli-Corpuz, 2016).

Russia. The Russian Federation does not formally recognize the existence of 'indigenous peoples'. Article 69 of its Constitution provides that: "The Russian Federation shall guarantee the rights of the indigenous small peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation." This concept comprises only the "ethnic groups of less than 50,000 members, maintaining a 'traditional' way of life and inhabiting certain remote Northern or Asian regions of the country" (Raipon, Infoe, 2008: 6), including the Sámi people of the Kola Peninsula. Three federal acts

provide for the protection of indigenous small peoples, none of which address the language issues of the Sámi people (Rohr, 2014: 14).

The RF is very reluctant of using the concept of 'self-determination' when it comes to indigenous communities. The Kola Sámi Assembly, created in 2010 by the Sámi population on the model of the Sámi Parliaments of the Nordic Countries, was not recognized by the federal government. It is rather civil society organizations (CSOs) like the Association of Kola Sámi and the Governmental Organization of the Murmansk Region Sámi (OOSMO) that represent Sámi people in matters of their interests (Berg-Nordlie, 2011: 54).

4. Results

On the international level, apart from the fact that Norway is the only country to have ratified the ILO Convention № 169 and that Russia is the only State that is not part of the European Charter for Regional or Minority Languages, most of the instruments examined bind all of these States. However, it is clear that the situation of Sámi people varies a lot at the national, or even local level. These undertakings represent a will to improve, but the global picture shows the relative impact of international law in the concrete fight against racial discrimination (Lenzerini, 2008: 164-166). The true commitment of the countries in improving the situation of Sámi languages must be examined with regards to their domestic laws, as implements of their international undertakings. Overall, we must acknowledge that, on the legislative level, Norway is the one that complies the most with its international undertakings, therefore offering the best protection of Sámi languages, while Russia clearly makes the least efforts.

The protection of a minority's languages necessitates the protection of the minority itself. The protection of a minority passes first by an adequate definition of the members of this minority. Otherwise, the protections offered run the risk to be applied to the wrong persons, therefore scrambling the identity of the people concerned and leading to a contrary effect. This problem is observable in Finland, where the definition of Sámi people partly relies on criteria of land, taxation and population register. This too broad definition allows Finnish people who never participated in the Sámi community to consider themselves as part of it and benefit from their protections, to the detriment of the identity of these communities (Koivurova et al., 2004: 108-109). Meanwhile, Norway and Sweden rather rely on a linguistic criterion that prevents people that have no link with Sámi languages to claim the status.

The protection of a minority passes also by its due constitutional recognition. On this matter, the wording of Norway's Constitution is much stronger. It gives the 'responsibility' to the 'State' to 'protect and promote' Sámi languages. Finland, for its part, recognizes the 'right' of Sámi people to 'develop' their own language and culture, without putting a clear burden on the State. Even worse, the Swedish Constitution vaguely says that the 'opportunities' of development on Sámi languages should be 'promoted', not even clearly recognizing the right of Sámi people to protect their languages.

The perception of a country on a minority's languages can also be observed through the status that it gives them. Norway's equal treatment of Sámi and Norwegian languages stands out from the recognition of Sámi languages as minority languages in Finland and Sweden. Still, all the states undertook to make Sámi languages useable in the public sectors. The status of the languages in the education system must also be considered. The concept of Sámi schools exists in both Norway and Sweden. However, this is not a gage of quality education in Sámi languages. For instance, in Sweden, the law only requires a minimum of four hours of teaching in Sami per week and children can only be taught in Sámi for half of their total education (Tauli-Corpuz, 2016). Still, this represents a stronger protection than what Finland provides: no Sámi schools, but rather Finnish schools that apply a translated version of the Finnish curriculum, which does not properly consider Sámi culture and languages.

To ensure the progression of the situation of Sámi languages in the Nordic countries, the representation and consideration of Sámi people in the legislative reforms is essential. This is why the roles of the Sámi Parliament is crucial. The Norwegian and Finnish Parliaments have a statutorily recognized influence on their respective national governments, especially due to the latter's duty to consult them, in opposition with Sweden's Sámi Parliament. However, such position is worthless if no actual political structure is built to implement these provisions, as it is especially the case in Finland, were that shortcoming adds up to the lack of competency of the public authorities regarding Sámi matters. The composition and the resources of the Parliaments also

justify the accrued influence exercised by the Norwegian Parliament (Mörkenstam et al., 2016: 16; Josefsen, 2010: 8).

May it be understood that none of the States under study can claim perfect situation. Norway's Government accuses derogations to some agreements it reached with the Sámi people (Mörkenstam et al., 2016: 17) and still has to work towards a complete implementation of its Action Plan. Finland especially has to negotiate with its Sámi Parliament to agree on a clear definition of the Sámi people and build a true Sámi education curriculum that adequately considers Sámi languages and culture. Sweden, for its part, is known for its weak wording and its lack of willpower to effectively implement the even little legislative protections it has put in place. It must also make the Sámi Parliament more independent from the State and more influent (Tauli-Corpuz, 2016). Russia does not give a proper voice to Sámi people of the Kola Peninsula (Berg-Nordlie, 2011: 54).

5. Conclusion

The overall portrait is quite grim. Notwithstanding the legislative means in place for the safeguard of Sámi languages, concrete improvements hardly follow-up. Even in Norway, where the protections are stronger on paper, all of the Sámi languages are actually considered as either "definitely endangered", "severely endangered" or "critically endangered" (Atlas of the World's Languages in Danger, 2010).

The true problem remains one of implementation. For instance, if the Sámi Parliaments of Norway and Finland seem legislatively strong, Sámi Parliaments are still generally considered as having a limited impact on the outcome of negotiations (Lenzerini, 2008: 379-380). As indicated by the UN Special Rapporteur on the Rights of Indigenous Peoples:

The Sami languages are central to Sami identity and essential to their survival as a people. [...] While the Special Rapporteur appreciates that the Governments concerned have adopted different affirmative measures to revitalize Sami languages, more needs to be done." (Tauli-Corpuz, 2016).

The foreseen Nordic Sámi Convention represents an additional effort from the governments of Norway, Finland and Sweden towards the protection of Sámi languages and culture. It notably includes provisions related to its implementation and a complaint mechanism. The three countries participated actively in the negotiations, which were planned to be done by March 2016, but the UN Special Rapporteur remains concerned with the delay for the completion of the document. It also hopes that the outcome will be translated in a more uniform implementation among the States Parties and that the Convention will be harmonized with the States human rights international undertakings (Tauli-Corpuz, 2016). Still, the efficiency of the new complaint mechanism will have to be proved and negotiations will have to be engaged with the Russian Federation regarding its ratification of the agreement.

One pessimist will say that the fight of indigenous people for recognition is an everlasting one and that no initiative will ever suffice. But when it comes to survival, the resilience of the endangered must never be underestimated. The timeline of improvements regarding the protection of Sámi languages is a long one. Nevertheless, it demonstrates that efforts made by the community are promiscuous. While a lot remains to be done, history says that it can be.

References

Action Plan for Sámi Languages, 2009 – Action Plan for Sámi Languages (2009). Norwegian Ministry of Labour and Social Inclusion. URL: https://www.regjeringen.no/globalassets/upload/FAD/Vedlegg/SAMI/HP_2009_samisk_sprak_engelsk.pdf

Atlas of the World's Languages in Danger, 2010 – Atlas of the World's Languages in Danger, (2010). UNESCO. URL: http://www.unesco.org/languages-atlas/index.php

Chart – Chart of signatures and ratifications of Treaty 148. Council of Europe. URL: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures

The Constitution of Sweden – The Constitution of Sweden. The Fundamental Laws and the Riksdag Act. (2016). p. 25-50. URL: http://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf

The Finnish Sámi Parliament, 1997 – The Finnish Sámi Parliament, Land Rights, Linguistic Rights, and Cultural Autonomy for the Finnish Sámi People. (1997). URL: http://arcticcircle.uconn.edu/SEEJ/sami1.html

ILO standards – ILO standards and the UN Declaration on the Rights of Indigenous Peoples. International Labour Organization. URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100792.pdf

Berg-Nordlie, 2011 – *Berg-Nordlie, M.* (2011). Striving to Unite. The Russian Sámi and the Nordic Sámi Parliament model, Arctic Review on Law and Politics, vol. 2, 1/2011, p. 52-76. URL: http://www.Users/anthonyfortin/Documents/Universite%CC%81/A%CC%8Abo%20Akademi%20University/3%20-%20Semester/Comparative%20Law%20%20Public%20Law/Russian%20Sa%CC%81mi.pdf.

Josefsen, 2010 – *Josefsen, E.* (2010). The Saami and the national parliaments: Channels for political influence, Inter-Parliamentary Union and United Nations Development Program, Mexico. URL: http://www.ipu.org/splz-e/chiapas10/saami.pdf.

Koivurova et al., 2004 – *Koivurova, T., Joona T. and Shnoro, R.* (2004). Arctic Governance. Juridica Laponica 29, The Northern Institute for Environmental and Minority Law.

Kotljarchuk, 2012 – *Kotljarchuk, A.* (2012). Kola Sámi in the Stalinist Terror – A Quantitative Analysis, Journal of the Northern Studies, vol. 6, No. 2, Umeå University and The Royal Skyttean Society, 2012. URL: http://sh.diva-portal.org/smash/get/diva2:579047/FULLTEXT02.

Language, dialect or variety? – Language, dialect or variety? samer.se Sápmi internet edition // http://www.samer.se/4567

Lenzerini, 2008 – *Lenzerini, F.* (2008). Reparations for Indigenous Peoples: International and Comparative Perspectives, OUP Oxford. URL: http://site.ebrary.com.ezproxy.vasa.abo.fi/lib/abo/ reader.action?docID=10581743.

Mörkenstam et al., 2016 – *Mörkenstam, U., Josefsen E. and Nilsson, R.* (2016). The Nordic Sámediggis and the Limits of Indigenous Self-Determination, Journal of the Indigenous Peoples Rights, No. 1. 1st ed., Guovdageaidnu / Kautokeino, Norway. URL: http://www.galdu.no/journal.348859.en.html.

Pietikäinen, 2008 – *Pietikäinen, S.* (2008). Sámi in the Media: Questions of Language Vitality and Cultural Hybridisation, Journal of Multicultural Discourses, 19 December. URL: https://www.academia.edu/12237862/Sami_in_the_media_Questions_of_language_vitality_and_cultural_hybridisation.

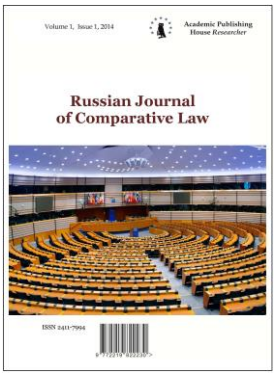
Raipon, Infoe, 2008 – *Raipon, Infoe* (2008). Parallel Information: Discrimination against indigenous small-numbered people of the Russian North, Siberia and Russian Far East, 13 June. URL: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/RU/RAIPON_IWGIA_RUS_UPR_S4_2009anx_Indigenous_Peoples_Russia_RAIPON_INFOE_2008.pdf.

Ricco – *Ricco, E.* The Sámi Language Crisis. URL: http://www.laits.utexas.edu/sami/dieda/ling/languagecrisis.htm

Rohr, 2014 – *Rohr, J.* (2014). Indigenous Peoples in the Russian Federation, Report 18, IWGIA. URL: http://www.iwgia.org/iwgia_files_publications_files/0695_HumanRights_report_18_Russia.pdf.

Tauli-Corpuz, 2016 – *Tauli-Corpuz, V.* (2016). United Nations Special Rapporteur on the Rights of Indigenous Peoples, Report on the human rights situation of the Sami people in the Sápmi region, United Nations – General Assembly – Human Rights Council, 33rd session, Agenda item 3, A/HRC/33/42/Add.3, 9 August. URL: http://www.unsr.vtaulicorpuz.org/site/index.php/en/documents/country-reports/155-report-sapmi-2016.

Zimmermann, 2010 – *Zimmermann, D.* (2010). Better Protection of National Minorities and Minority Languages in Sweden? International Law Observer, 16 February. URL: http://www.internationallawobserver.eu/2010/02/16/better-protection-of-national-minorities-and-minority-languages-in-sweden.



Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 38-47

DOI: 10.13187/rjcl.2017.1.38
http://ejournal41.com

The Principle of the Presumption of Innocence in Britain and France: Towards a "European Model" of Protection

Nolwenn David [a, *]

[a] University of Montpellier, University of Rennes 1, France

Abstract

This article undertakes a comparative legal study of the principle of the presumption of innocence in Britain and in France. The author attempts to answer the following questions: What are the differences of implementing this principle in the United Kingdom in comparison with the French system of criminal trial? What are the consequences of implementing this principle for the status of a defendant? How does the European Convention of Human Rights protect this principle and how does it strive towards harmonizing national standards of presumption of innocence, if at all? Taking into account the differences in approaching this principle in the said jurisdictions, the author ponders around the future prospects of the European model of fair trial, set up by the European Convention of Human Rights.

Keywords: presumption of innocence, fair trial4 European Convention of Human Rights, the United Kingdom, France.

1. Introduction

The Latin adage "*in dubio pro reo*" ascribed to Aristote "[when] in doubt, for the accused" signifies that a defendant may not be convicted by the court when doubts about his or her guilt remain. By the early Antiquity, the principle that we now commonly known as the "presumption of innocence" was already deemed substantial in the way the trials were handled.

Why is the presumption of innocence so important? Is it because people are uncomfortable believing that suffering is random and that sometimes unfortunate events happen for no reason at all? The approach of law is to not to believe that people must have done something to deserve what they get but to exclude the possibility that an innocent person is accused of a crime.

The concept of presumption of innocence is one of the oldest principles embodied in criminal justice systems around the world. The right to be presumed innocent until proved guilty is one of those fundamentals that influence the treatment to which an accused person is subjected from the criminal investigations through the trial proceedings up to and including the end of the final appeal. This principle is fundamental for the protection of human rights and should guide the prosecution as well as the defence lawyers. The attention paid to the presumption of innocence gives rise to the question of the exact meaning of this principle. it is significant to not overlook that the principles doesn't refer to an actual presumption. Indeed, the suspect is not actually presumed to be innocent but it is rather a legal adage; "Presumption", in the context of the presumption of innocence, means that the burden of proof of the charge is on the state. This guarantees that guilt

* Corresponding author
E-mail addresses: nolwenndavid20@gmail.com (N. David)

cannot be declared until the charge has been proven by the state. The presumption of innocence guarantees the benefit of the doubt for the accused. The fact finder, namely the judge(s), must ignore all pre-trial evidence of guilt and determine the guilt or innocence evaluating only the evidence presented at the trial.

2. Methods and materials

The presumption of innocence is enshrined beyond the sole Europe by Article 11 (1) of the Universal Declaration of Human Rights and by Article 14 of the United Nations Covenant on Civil and Political Rights. We will focus our analysis on the way this right is protected by the distinct national mechanisms of two countries belonging to this same European regional organizations. While sharing some common features, legal orders of Britain and France possess very different characteristics.

The choice of these two countries systems is worthwhile insofar as it involves two countries belonging to a same regional system, but also two different existing methods of exposing evidence in the legal process of the criminal trial; the adversary and the inquisitorial procedures. A relevant comparison between these three different safeguarding forms of protection of a fundamental Human Right (The overall European stage, and the specifics in United Kingdom and France) helps to understand the current real issues in stake thereon. As a matter of fact, even if the presumption of innocence is a constant principle in the law of the countries of the Council of Europe, its implementation does not occupy the same place in the hierarchy of norms. While the main objective is for the European system the necessary harmonization of all the national rights in Europe, some questions arise on the issue of the presumption of innocence:

What are the different roles this principle plays in the United Kingdom in comparison with the French system of criminal trial?

What are the consequences of such a different system in the regulation means of the presumption of innocence and does it impact the trials and therefore the manner for the defendant to be considered?

How does the European system protect this principle and how does it manage to harmonize the national standard of presumption of innocence in the regional system?

Following an historical overview of the different foundations on which the protection was established, we will first consider the implementation of the principle in the three systems, and its different places with regards to the two different existing methods of exposing evidence: the inquisitorial and the adversarial procedures respectively in France and in the United Kingdom. Notably, through this study we raise the delicate relations between freedom of expression, the need for security and the right to be presumed innocent which represent a very challenging issue. Some cases illustrations will then, help to truly understand the impacts in stake in the daily life at each step of the different criminal procedures, underlying in particular the rule and exceptions of the burden of proof. Regulating those interactions at a wider scale, the European protective framework of the presumption of innocence shed lights on the issues in stake regarding the preservation of member states' sovereign rights and a need for common regional standards. Finally, after considering all the remaining divergences and the global convergence factors of the two systems across the Channel, it is worth noting that the current globalizing context of the World today give rise naturally to common responses addressing shared concerns in criminal law. The respect of the accused rights and especially of his presumption of innocence is central to this analysis.

This is a comparative law study. The choice of jurisdictions for comparison was undertaken taking into account the following considerations. In France and in United Kingdom, the successive reforms on criminal justice that have been occurring for thirty years try to meet the need of efficiency and procedural equity. Those same objectives come through different ideology and techniques in each side of the Sea.

It is true that the variations between procedural traditions in the said both jurisdictions are such that they are frequently regarded as antagonistic models. Even though they come from a common European template characterized by the use of the “Judgement of God”, the judiciary practices radically diverged from the XII century. In the United Kingdom, a panel of judges has been established to determine the truth while in France, the Romano-Canonical enquiry was build up which raise d the judge has the “sovereign master of facts and law”. Therefore, the two systems of crimina l justice seems to be opposable in every manner. Tough their intrinsic differences, a new

proximity can be observed between the judiciary organisations and the procedures today. One could ask on this preference of focusing of this two state parties and not for example on other European system such as in Italy, or Germany. But the reason is that is all countries share common features with each other's in their proceedings, the United Kingdom and France are traditionally seen as the most "opposite" models.

The purpose of this analysis is to compare this movements and confront the English and French mechanisms in the light of the European context when concerning the principle of innocence, which is in the core of the systems. Yet, this fundamental principle is greatly affected by the structural systems and reflects an excellent and concrete example of the resultant consequences. In England, the procedural rules are scattered in numerous legal texts, for some of these really old, and in an abundant case-law. On the contrary, they are in France only governed by a single Criminal Code and few Constitutional Principles such as the presumption of innocence.

Beyond these formal differences, the practice settings are, as well, very distinct. As in the UK the judges who are deciding guilt or innocence of a suspect are non-professional, the criminal jurisdiction in France are essentially composed of career judges, civil servant, recruited through a competitive process. They work in collaboration with the public prosecutor who is hierarchically subordinate to the Minister of Justice.

The administration of criminal justice, one of the major sovereign functions of the States, has been from the Second World War, subject to international regulation with the aim of fundamental rights protection. France and the United Kingdom therefore both ratified several treaties dedicated to Equity in the implementation of criminal repression and confer legal rights to the defendants.

Among them, the Convention for the Protection of Human Rights and Fundamental Freedoms holds a central place in the system. The dynamic interpretation by the European Court has especially strengthened the "Right for a fair trial", giving to the concept an autonomous definition. The presumption of innocence is considered as crucial and the emphasis is given to the respect for the rights of the defence and in particular the "equality of arms" and the adversarial character o f the trial. If the guarantees defined by the European model appear to be more familiar to the common law tradition, it has to be recognized that both the United Kingdom and France have been repeatedly condemned for non-compliance with the procedural rights protected by the Convention.

Revealing the subtleties of each legal framework and their imbrication with the overseeing european provisions provide insights into the reasons why the presumption of innocence is a key feature of any criminal proceedings analysis. The compared analysis of the criminal justice dynamics and the fundamental protections of the presumption of innocence prevent a generalization too simplistic but unfortunately common that the judicial mind-set in the United Kingdom and in France are radically opposite.

3. Discussion

Let's start with an historical overview of the principle of presumption of innocence implementation: The tenet was, according to researchers, born in the late XIII century, and was preserved in the universal jurisprudence of ancient time s. Later it survived in the early modern period and the notion of "presumption of innocence" arose in two civilisations, Rome and England, were it evolved independently. However the theory officially entered the European legislation in the beginning of the 18th century.

In France, a country of written law it was Article 9 of the 1789 Declaration of the Rights of Man that served the first foundation of the presumption of innocence appeared clearly claiming that: "Every man is presumed innocent until convicted ". This text has a constitutional value.

The common law however didn't provide at the time such precise enactment and the judges had to interpret the law in the light of sources. The fundamental texts to which they still refer today are, first of all, the great 1215 Charter (Magna Carta) which provides that: "No free man shall be arrested or imprisoned or dispossessed of his property ... without a loyal judgement of his peers in accordance with the law of Countries ". Moreover, the Bill of Rights and the Habeas Corpus Act, which contain principles relating to the rights of the defence.

Following the World War II, the European Convention of Human Rights the international treaty signed by the member states of the Council of Europe entered into force in 1953 in the framework of an individual liberties protection mind-set. Its Article 6, para. 2 states that:

"Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law."

In addition to its former protection, the French system established then an Alina 1 to the article 9 I/ of the Civil Code in January 1993 which states that "Everyone has the right to respect for the presumption of innocence which is an aspect of the right of the personality". The princip le was therefore elevate to a personality right.

It was still not until 1998 when the UK Human Rights Act finally incorporated the European Convention of Human Rights into its domestic legal system. From now on under Section 6 of the Human Rights Act, the decisions of the judicia l authority have to be compatible with the ECHR and therefore with the protection of the presumption of innocence. It is indeed a far narrower view of the presumption of innocence than a "rule of proof". Yet it has to be said that the English jurisprudence provides a significant contribution for the embedment of the principle in common law. The most significant decision is the landmark 1935 House of Lords case of Woolmington v. Director of Public Prosecutions (Woolmington v DPP, 1935) where the presumption of innocence was first articulated in the Commonwealth. The Court stated this formula repeatedly: "Throughout the web of English criminal law, one golden thread is always to be seen: it is the duty of the prosecution to prove the guilt ". However, a significant limit to this appliance occurs in case of a contradictory "statutory law" the Convention may be set aside.

Eventually, both the civil law and the common law recognized the two main aspects of the presumption of innocence: a shield that prevents the infliction of punishment prior to conviction and also a rule of proof casting on the prosecution the burden of proving guilt. But while France reinforced the presumption of innocence by elevating it to a personality right, and more recently, solemnly repeated the Constitutional principle again in an organic law from 2000 and in the French Code of Criminal Procedure, the jurisdictions of United-Kingdom tend to view the doctrine as a mere rule of proof without effect before trial. In order to harmonize the systems in all the European national states, the Charter of Fundamental Rights signed by the fifteen countries on 7 December 2000 bounds in its Article 48, the presumption of innocence with the rights of the defence.

To fully understand the ins and outs of the comparison between the United Kingdom and France and their issues in stake, it is first crucial to understand the two different existing methods of exposing evidence they adopt in court and which divide the European countries in general.

The adversary, or accusatory procedure, endorsed in the Anglo-American legal system and therefore in the United Kingdom emphasises the role of the parties. The trial is conceived as a contradictory, public and largely oral confrontation between the prosecution and the defence. Each party must prove the facts in support of his case. The power of the judge is there fore solely to arbitrate, rather than to instruct: on the one hand, to ensure the fairness of the trial, and on the other hand to divide the litigants according to their claims, arguments and evidence.

The inquisitorial procedure, typical of countries that base their legal systems on civil or Roman law, such as precisely in France, in contrast, accentuates the difference between criminal and civil law. The position of the judge is meant to represent the general interest and he is charged with directing the investigation in order to discover the truth. In this system, the judge is a professional magistrate with significant powers to enable him to carry out the investigations for the prosecution and for his own defence. The parties are therefore not directly obliged to carry out the investigation in support of their claims. This model supports its legitimacy on the idea that repressive justice is not limited to arbitrating litigation between litigants but is of interest to society itself. Consequently, the inquisitorial procedure is generally written, often secret, and rather not contradictory, the place left to the parties is then naturally reduced.

Nothing is clearer than the description of the protection of the presumption at each step of the proceedings in Court. Contrary to the English tradition, the principle of separation of the Public Prosecutor and the "Juge d'instruction" (that could be translated as "investigating magistrate") entail in France, a major role assigned to this specific magistrate "Juge d'instruction". Indeed, he combines the investigative power and the jurisdiction. In response to criticism generated by people's fear of an excessive authority, the 15 June 2000 Law withdraw from this institution the power to decide the pre-trial detention of a suspect in favour of a separate judge known as the "liberty and custody judge".

Nowadays, once an action is brought against someone, the French law provides that the "Juge d'instruction" must gather evidence "of innocence as well as guilt" and is under a duty

to inform the accused person of his or her right to remain silent. Then, sometimes in parallel, the pre-trial detention of the individual concerned is ordered by only the "liberty and custody judge". However, this practice must remain the exception and cannot exceed a reasonable time. During the trial, when Jurors are involved (in the event of serious crimes), they must swear "to betray neither the interests of the accused nor those of society" and "to remember that the accused is presumed innocent." The procedure before the trial judge is oral and public. The prosecution has to prove all the elements of the alleged offense but judges freely assess the evidence and decide according to their inner conviction. The police, under the subordination of the Public Prosecutor take part in the investigation. Moreover, and that is far more true in France than in the Common law systems, (especially in the USA but slightly also in the United Kingdom), a ll necessary measures must be taken to prevent a person handcuffed or shackled from being photographed or filmed. In a 2009 case from France (1ère Civ, 30 avril 2009, N° pourvoi: 07-19.879) the Court asserted that if the defendant feel like his or her right to be presumed innocent has been infringed by the press, an ac tion is possible but subject to a specific limitation period of three months after the publication involve.

The common law world presents a very different picture. The presumption of innocence is merely an evidentiary rule in common law jurisdictions. The UK system tend to simply consider the principle as another way of expressing the traditional rule putting the burden of proving guilt beyond a reasonable doubt on the prosecution. In contrast with Roman law in France, in the United Kingdom common law, there is an organic detachment between the police that has a functional autonomy and the Crown Prosecution Service (the equivalent of the French Public Prosecutor). Then, once an action is brought against an individual, the police has the full responsibility for the research for evidences of the guiltiness and is free to initiate the proceedings. Then, during the trial in Court, is the questioning of witnesses in the core of Common law. The Counsel for the prosecution will then try to reverse the burden of p roof from which benefit the accused individual by attacking the opposing party testimonies. The system is based on the balance of probabilities (of the guilt) and on reasonable doubt to approve a conviction instead of a basis on the search for the exact truth as in the French system. The idea is that a truth should emerge at the end of the confrontation and it has to be considered as such even if a small and acceptable doubt remains. Therefore, the "day in court" in United Kingdom is far more decisive than in a French trial, where the hearing is often nothing more than a repetition of what has already been analysed for a long time. Such as in Roman law, no one should ever arbitrarily be arrested and placed in detention before the trial but on the contrary of the French ones, the Courts in the United Kingdom are really few to proclaim that the presumption of innocence is more than merely procedural, and the principle has no such substantive scope and no such practical consequences for the defendants as in France before the trial. A relevant example is the 2011 Rebecca Leighton case involving a nurse who had been arrested in connection with the contamination of bags of saline with insulin, and faced charges of criminal damage with intent to endanger life after unexplained deaths at Stepping Hill hospital, Stockport, England. She was held in prison but released after all charges were dropped. Her full name and photo had however already been published all over the news by the media, including the famous newspaper "The Guardian".

A remark should be added about the place reserved to the accused in both countries and in many countries in Europe; the defendant sits apart from his attorney and is isolated in the courtroom, sometimes even handcuffed. The enclosed dock has always been used in criminal trials when dealing with high-profile cases. This practice could be therefore seen as an infringement of the principle of presumption of innocence. However, in each system, the need to keep the balance between Human Rights and security is a recurrent issue in stake. However a control needs to be made to avoid any abuses. Recently, three Members of Parliament, i.e., Jim Devine, David Chaytor and Elliot Morley, appeared in a glass cage at Westminster Magistrates Court in London, whilst they were only charged with fiddling their expenses (MPs in the dock, 2010). Reports of this case published in two newspapers –the Guardian and The Times – served to turn attention towards the neglected issue of the appearance of the accused at trial. The issue of those people confronted with this humiliating experience provided the opportunity to expose this question to public debate. The limitations of the rights of expression and the freedoms of the press are likewise very difficult to define with regards to possible violations of the presumption of innocence.

4. Results

Following the analysis of the importance given to the principle in each system, through the organization supervising the opposing parties in Court, it seems no w essential to go deeper in the comprehension and apprehend the exceptions to the “burden of proof” principle. As we said in the introduction, the principle in Europe is that the burden of proof belongs exclusively to the accusing parties pursuant to Article 6, para. 2 of the ECHR. The exceptions should therefore not be accepted by the European Court of Human Rights. But they are. On this point, the jurisprudence of the Constitutional Courts are not identical.

The French system has been built on the universal principles for a fair trial applicable to all types of contentious litigations as a guarantee of civil liberties. This gave rise to theoretical modelling and on the contrary of the Common law system, “fundamental principles” emerged through the French doctrine before defining detailed rules. According to the French system, the prosecution bear the burden of proof, requiring him to offer sufficient evidence to base its statement. By means of the role of the investigating magistrate, due account is taken of both prosecution and defence evidence and ensure the balance of each side interest.

A derogation from the rule may appear however in very exceptional cases, when the judge admit the reversals of the burden of proof leading to presumptions of guilt: "such presumptions may be established in particular as regards to contraventions, since they are not irrebuttable, and as far as the respect for the rights of the defense is ensured, and that the facts reasonably justify the likelihood of accountability ". Since 2004 though with the introduction of the “Perben” law (The “Perben” law), the “plaider coupable” (which could be translated by “guilty plea”) was also introduced in France. A new procedure was created in order to avoid cumbersome examination in court when an investigation is not useful. This way, the Public Prosecutor can propose, directly and without trial, one or more sentences to a person who already recognizes the charges against him or her. It is nevertheless strongly criticize by practitioners as an infringement of the proper rights of the defense.

Common law does not prioritize “universal principles” but the Gold -thread is that “the prosecution must prove the guilt of the prisoner”. One first issue in stake here is that the way the burden of proof is shared should protect effectively the innocent and respect the rights of the indicted person. Yet, the loopholes of this criminal system have been illustrated in the numerous miscarriages of justice in 1980's, shedding light on the tremendous inequalit y between the excessive powers of the police in comparison with the limited capacities of the accused. A striking example is the Guildford Four case in October 1974 where four defendants confessed to the bombing of a pub they did not commit recognized subsequently due to coercion by the police, ranging from intimidation to torture. The decision was reversed only in 1989 after they had served up to 16 years in prison.

As a matter of facts, the lack of duty-bound for the state to investigate both incriminating and exonerating evidence entail the risk of confession extracted under duress and does not lead to finding the truth. In order to counteract this concern, the Police and evidence Criminal Act 1984 and later the Criminal Procedure Rules from 2005, instituted new guarantees among which the access of legal counsel from the time of the arrest in a police station, or the recording of the police interviews. Furthermore, imitating France, the United Kingdom recognized a new rule whereby the prosecution shall provide the defence with all the information that may help him (disclosure of evidence). This is a major milestone is the traditional common law system fo r which the “surprise effect” was a legitimate weapon in a criminal case. This evolution reveal an attenuation of the accusatory strategy in the United Kingdom.

When it comes to the possibility of exceptions to burden of proof however, the United Kingdom system is more flexible than the French system. While the burden of proof rests in principle on the prosecution, as soon as the accused pleads guilty, "prosecution" is immediately relieved of its obligation to prove evidence and the Court is compelled to condemn the accused, even if a doubt subsist in his mind. He is not intimately convinced of the guilt. The presumption of innocence is then “undermined” by the “guilty plea”. This kind of limited scope vision of the presumption of innocence is clearly apparent in the daily work practice of British Courts. A recent scandal involving the British Ministry of Justice besides broke out in United Kingdom. Indeed, the department published a guide, official document aimed at people with learning difficulties facing trials. It explained to them what they can expect if they are accused of a crime and say they are not

guilty. The guide, completed with a drawing depicting such a scenario explained that the defendant has to “show” he is innocent if he doesn't want to go back to the second degree of the Court. Even if in this case the Ministry was obviously forced to withdraw the advice leaflet, this incident might be a hint as to understand the approach direction of the government on this question.

When it comes to the european safeguarding the protection scheme is more modest. The European case-law lead to the emergence of a new procedural model, characterized by its high degree of abstraction that transcend the domestic traditions. Until recently, the exercise of its control over the respect of the presumption of innocence was criticized to be very flexible while the objective of harmonization between all the countries' systems would require a more stringent supervision. Indeed, to go back on the above example of the delicate relations between freedom of expression and the right to be presumed innocent, the Court cannot directly sanction violations of the presumption of innocence by a journalist, whereas only the public authorities are liable for the obligation at international level. However, the strict control by the international court of compliance with positive obligations should give effect to Article 6, para. 2 of the Convention.

The European model of fair trial challenges some aspects of both certain attributes of the English and French criminal procedural system but enforce in different ways.

In France, Article 55 of the Constitution draw up a monist approach regarding the implementation of international law in the French national system. Consequently, Article 6, para. 1 and para. 2 can be directly invoked before domestic courts. In addition, the judges are empowered to preclude the application of a national law which is contrary to a provision of the Convention. This is based on the principle of primacy of ratified international treaties over law.

On the contrary, in the UK the dualistic approach adopted a separation of the two spheres and the litigants have to claim their rights through the use of the domestic 1998 Human Right Act. This legislation prohibits the jurisdiction facing a domestic law inconsistent with the Convention, to declare such legislation inapplicable. The judges can only issue a “forma l declaration of incompatibility” but it has no immediate effect on its validity.

However, despite those technical differences, one cannot overlook the growing stamp of the European standards on the domestic systems of the state parties. This has been the consequence of several condemnations for non-compliance by the United Kingdom and France with the procedural rights protected by the Convention.

According to the conception of the European Court, the core element of its reasoning remains the objective compliance with each procedural elements. Indeed, in practice, for the presumption of innocence to be meaningful, the judges focus on certain procedural safeguards to be in place. The Court reiterated in its decisions that the presumption of innocence was only “one of all the elements” of a fair trial. Yet, taking into account the weaknesses of its control, no later than last 12 February 2016 (Directive (EU) 2016/343), in Brussels, the Ministers from the EU Member States have adopted new rules that will guarantee the presumption of innocence of anyone accused or suspected of a crime by the police or justice authorities. In order to do so, the initiative focuses on the implementation of first of all, the right not to be presented as guilty by the authorit ies before final conviction. Moreover, the new rule clarify that the burden of proof for establishing guilt is on the prosecution, rather than on the accused person to prove that they are not guilt y. The suspect shall benefits from any doubt (in dubio pro reo). Finally, it underlines the right not to incriminate oneself, the right not to co-operate, the right to remain silent, and the right to be present at one’s trial. Therefore, the principle of “Innocence until proven guilty” should be enforced with this new rule which prohibits public authorities and judicial decisions from making any public references to guilt, before a person is proven guilty. It can be drawn now from the Court (ECtHR) case-law that “at the core of the principle is the requirement that the court or tribunal responsible for determining whether or not guilt has been proved must not prejudge the case. There is today a common definition across all Member States of what the presumption of innocence is. Using this standards, the European system protect the presumptio n of innocence in the regional system dealing with diversified domestic frameworks.

In the 2000 case of Rowe and Davis v. UK (Rowe & Davis v. UK, 2000) the British Government was found liable for violation of Article 5 of the Convention and the Court especially recalled that it requires that the offender should be able to challenge periodically the legality of their detention, from which he was deprived in this case.

On the other side of the Channel, France has also been condemned in the 2010 case of Medvedyev v. France for not immediately bringing the claimants before a judge or other magistrate authorized to exercise judicial power after having been arrested (Medvedyev v. France, 2010). The Court underlined that the French prosecutor's office cannot be regarded as a "judicial authority" within the meaning of the Convention "because it lacks in particular the independence of the executive power in order to be so qualified".

Limits to the principle of the presumption of innocence are envisaged as well at the European level of protection. In short, the European Convention protection comes closest to the French system inasmuch that it accepts three kinds of derogations from the rules governing the burden of proof; through statutory presumptions of guilt, when the accused raises affirmative defences such as duress, necessity or self-defence or finally some exceptions can also appear when the issue involves very minor infractions (such as a car badly parked).

Yet if the european legal framework takes a major part in overseeing and supervising at a regional scale the harmonization and compliance with the respect of the presumption of innocence, in France as well as in the United Kingdom, the new convergence towards a uniform protection is also explained by national autonomous developments lead by new common necessities. This is especially noticeable in the current context turned to the prevention and fighting against organised crime. The progression towards a new punitive mind set is enhanced in both countries. In today's world, characterized by a globalisation of the exchanges, the criminal networks are no borders. The growing convergence of both systems seems actually to be more the outcome of a factual adaptation to a common environment. This latter, defined by a need for balancing efficiency and respect of equity entail comparable legal responses. Rather than an harmonized project, this shifting is more the accumulation of successive measures aiming at addressing the shared modern issues.

A gradual and noticeable convergence is assessed broadly speaking through a turning point in the politic and therefore judicial reasoning toward punitive actions in each of the two countries. One can observe a clear trend leading to exaggerating the criminal risks in the current economic and social crisis context. A greater account is, in parallel taken concerning the individual as a victim with regards to an integral reparation of his or her prejudice. Such a change in the judicial system perspective entail regrettably a blurring of the rehabilitative aim. While emphasis is largely given to repression of criminal act, in the discourses in each side of the Channel, this is more about political institutionalization in order to get more votes than an actual seek for the truth and for justice. As a result, in the United Kingdom as well as in France, a hardening in the supervision of the suspect from the moment of the arrest, and a manifest correlated weakening of the principle of presumption of innocence.

To start, the policing competences are the first impacted by this new punitive mind-set as their empowerment appears more legitimate in responding to the society needs. In the United Kingdom, starting with the Police and Criminal Evidence Act 1984, the power of enquiry of the police increased significantly. As an illustration, one could mention the legalization of the sting operations, the interception of private communications, and the regulation framework regarding the arrests and searches have been facilitated. All those measures raise serious issues of balancing interest with the fundamental respect for one's private life (Article 8 of the ECHR) and therefore with the presumption of innocence before conviction. A similar shift can be observed in France, all the more in the very present time, characterized by a never-ending “state of emergency”. This form of exceptional measure is meant to allow the authority exceptiona l powers in matters of policing for a very limited period, in order to address an emergency threat. This has been set up following the terrorist attack on the country on 13 November 2015 and has been consistently extended until then, the new time-limit being July 2017 so far. It is thus referred by critics as the antithesis “permanent state of emergency”. On a practical level, this involves a multiplication of called residency, day and night searches, taking away some Judiciary's prerogatives. The Council of Europe's Commissioner for Human Rights shared his concern on this issue doubting the efficiency of the measure and regarding the risk for the democracy. In general terms however and especially since the Perben II law in 2004, the legal means allocated to police officers to fight against organized crime never stop growing. In either systems, inquisitorial or accusatory approach, the increase of the investigating power jeopardized the guarantees of the accused.

A second significant illustration is the generalization of "simplified procedures". The common thread shared by France and the UK is the search for gaining effectiveness. In this way, reforms in each side of the Channel introduced the concept of "negotiated justice".

In the UK, the diversion process has always been part of the system. When it comes to juvenile contentious for example, the police officers makes massive use of simply "police cautioning" and since 2003, operate as well through "conditional caution". This latter process engages the suggestion by the Crown Prosecution Service an alternative measure to the penal proceedings such as reparation or rehabilitation. The cornerstone of the negotiated justice however remains the "guilty plea" in common law in exchange of a promise of lesser sentence.

In France, in contrast, the said represents a recent phenomenon. Reminder of the law, conditio na l dismissal of a case, compel therapeutic intervention or mediation as alternatives were of an exceptional nature at first. Since 1990, they extended significantly aiming to further facilit ate the immediate access to reparation for the victim. If this evolution has the advantage of preventing slow and cumbersome traditional procedures, there is another side of the coin however. Indeed, a too radical simplification entails the risk of overlooking the merit of the case. Especially when it comes to the "guilty plea" or "plaider coupable" in France, the removal of the prosecution based on a thorough investigation call into question whether the decision is actually well founded. The less costly measures seem, as a matter of fact, to prioritize rapidity over the defence. Yet it is essential to the inform consent of the accused and prevent all possible risk of tendency towards a too prompt acceptance. This could be solely founded on pressure from the authority and mistaken belief that innocence will not be proven.

5. Conclusion

Answering the questions raised at the beginning it is isignificant to eventually define if legal protection of the presumption of innocence is progressing towards a European common legislation. Knowing whether the European system did actually manage to harmonize the national standard of presumption of innocence in between all the countries remains unclear. What is known for sure is the current tendency of the Strasbourgh Court to increase the degree of protection of the presumption of innocence. In this way, the last directive will complement the legal framework provided by the European Convention of Human Rights and the Charter of Fundamental Rights and strengthen mutual trust and confidence between the judicial authorities of the member states and will facilitate the mutual recognition of decisions in criminal matters. A real stringent supervision by a "European model" is not yet to be achieved however. The different places the presumption of innocence occupies in the United Kingdom in comparison with the French system is part of the entire operational logic of their respective system and belongs to the thought pattern, the "mentalit y" of each state which arises from their distinctive history.

Nevertheless, it is worth noting that for now a new alignment can be observed that doesn't appear to be directly the consequence of the European regulation but a natural convergence due to a shared objective. Both rooted in the current globalisation processes, the United Kingdom and France gradually face the same difficulties and challenges, including the economic context or the fight against organized criminality. This situation comes down to an approximation of both procedural regimes impacting the way the accused is handled.

The trend has been since the 1980's towards more protection of the defendant and a increasing protection of the presumption of innocence principle through a variety of safeguards, progress slowed recently with the new punitive mind set of the countries. Indeed, the shared determination to reduce costs and to meet the demands of the society in line with a political logic undermine in some extent a genuine quest for the truth and jeopardized the fundamental principle of presumption of innocence.

References

Magna Carta – UK, Magna Carta "The Great Charter" 1215. URL: http://www.constitution.org/eng/magnacar.pdf.

Woolmington v DPP, 1935 – UK, House of Lords, Woolmington v. the Director of Public Prosecutions, 1935, AC 462. URL: http://www.bailii.org/uk/cases/UKHL/1935/1.html.

1ère Civ, 30 avril 2009, N° pourvoi : 07-19.879 – France, Cort of Cassation, case No. 07-19.879. URL: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020576 296

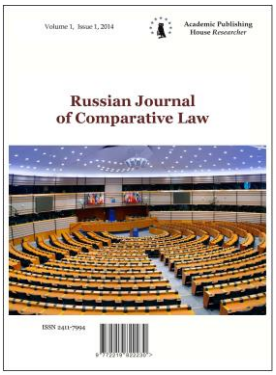
MPs in the dock, 2010 – "MPs in the dock: from kings of the castle to a glass cage", publication in the Guardian, Thursday 11 March 2010. URL: https://www.theguardian.com/politics/2010/mar/11/mps-dock-expenses-westminster.

The "Perben" law – France, Law No. 2004-204 «portant sur l'adaptation de la justice aux évolutions de la criminalité». URL: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000249995&dateTexte=20040310

Directive (EU) 2016/343 – Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. URL: https://www.db.eurocrim.org/db/en/vorgang/315.

Rowe & Davis v. UK, 2000 – European Court of Human Rights, Rawe & Davis v. UK, Application No. 28901/95, Judgment of 16 February 2000.

Medvedyev v. France, 2010 – European Court of Human Rights, Medvedyev and others v. France, Application No. 3394/03, Judgment of 29 March 2010.



Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 48-53

DOI: 10.13187/rjcl.2017.1.48
http://ejournal41.com

Theoretical and Practical Aspects of Human Rights Monitoring

Igor I. Onyshchuk [a, *]

[a] Ivano-Frankivsk university of law named after King Danylo Halytskyj, Ukraine

Abstract

In the scientific article was investigated theoretical and practical aspects of human rights monitoring. It was found that monitoring of the legal system is a key aspect of analysis in the field of human rights. Legal monitoring participates in the implementation of almost all functions of the legal system: integrative, regulatory, enforcement, communication, legal incentives, provide a uniform legal space of the state, international legal cooperation.

Monitoring of the legal system is a key aspect of analysis in the field of human rights. It is impossible to control all the practical aspects, especially in relation to individual cases. Monitoring the investigation of cases requires the application of the methodology is beyond the scope of control over individual cases as isolated cases. It is necessary to identify human rights violations in a particular case and to provide personal protection.

In our opinion, the legal system monitoring should also be aimed at identifying patterns and trends in violations of international standards. For example, to assess the conformity of national legislation with international human rights, it is necessary to perform and daily practice in litigation. The right to a fair trial, access to treatment and to justice, the independence of the judiciary and the proper administration of justice are the basis of a fair and effective justice system. Monitoring the justice system can be directed primarily on the criminal justice process, particularly at the initial stage.

As a result of the monitoring of human rights, should develop recommendations on ways to effectively address the problems faced by the justice system. For example, with the reform in the field of law and policy to create and develop the institutions, including accountability mechanisms, the provision of remedies, training and capacity building, administrative and logistical support, resource allocation, etc.

Keywords: legal monitoring, human rights, legal system, legal norm, legal act, rule of law, justice, freedom, international humanitarian law, assessment.

1. Introduction

In modern attempts to control and assess the legitimacy and justice, there is a significant fragmentation. Therefore, innovative approaches needed to eliminate legislative gaps and bring Ukraine closer to international standards of respect for human dignity, freedom, democracy, equality, the rule of law and human rights.

* Corresponding author
E-mail addresses: revival.if.ua@gmail.com (I.I. Onyshchuk)

The conceptual clarity of legal monitoring strengthened by the introduction of fundamental constitutional values and principles (freedom, equality, an effective system of justice, access to justice, etc.) into the legal and political system.

2. Materials and methods

In the scientific works of foreign and Ukrainian scientists there is a lack of unified approaches to understanding the phenomenological basis for monitoring human rights, the way it is understood and interpreted. It seems advisable to focus on the theoretical and applied aspects of monitoring human rights, as well as to clarify the essence of legal monitoring as an element of the legal system of society and its role in ensuring the quality and effectiveness of law.

This problem was reflected in the scientific research of foreign scientists: R. Jegard, Z. Kmechak, J. Madej, M. Novitski, N. Sazhienko, J. Tlembaeva, Z. Fialova, etc. Ukrainian scientists are also working on the issues of legal monitoring: T. Antsupova, Yu. Gradova, O. Zaichuk, V. Kosovich, O. Kopilenko, N. Onishchenko, I. Shutak and others.

The article based on the analysis of scientific literature on the legal monitoring of the Russian Federation, the United States, the EU, Kazakhstan and Ukraine. In the process of research, a set of general scientific (analysis and synthesis, logical, etc.) and private-scientific (system analysis, comparative-legal, etc.) methods of theoretical research were used.

3. Discussion

Protagoras's thesis "Man is the yardstick of all things" has become a testament to the person's comprehension of one's own value, significance and contribution to the universal. Humanism is manifested here not in the search for ways to freedom, not in the definition of the transcendental origins of man, but in the search for harmony, symmetry, orderliness, expediency.

Ideas of human rights go back to ancient times. Already in the Code of Hammurabi (XVII century BC) it is mentioned that the tsar is the basis of power, justice, protection of the weak from abuse by the strong. The Greek Sophists and Stoics professed natural freedom, equality of people and the superiority of natural law over the camp. Roman thinkers, in particular, Cicero and Seneca, followed the idea of natural law. In ancient Rome, the fundamental right to a fair trial was born, and in Act XII of the Tables from 449 BC. There is a record of the prohibition of the use of the reverse right. A lot of modern thinkers pay attention to the devaluation of human rights in the modern world. Human rights again cause lively debate and debate (Madej, 2014 : 11).

Violation of human rights in certain cases may be the result of an isolated incident or the conduct of specific participants, for example, a corrupt judge or an indifferent the Internal affairs officer. In order to identify systemic problems that require attention or reform, it is necessary to monitor a number of cases and establish trends and characteristics in order to draw general conclusions on the functioning of the system and make recommendations for comprehensive reforms.

The Ukrainian legislator is increasingly using the term "legal monitoring", in particular, after the simultaneous ratification of the Association Agreement between Ukraine and the EU on September 16, 2014 by the Verkhovna Rada of Ukraine and the European Parliament. According to the Agreement, the stage of legal monitoring and evaluation, which is practically absent today, should be strengthened by clear mechanisms for general current and final evaluation of the legal system and provide free public access to information (Onyshhuk, 2015 : 78).

In Ukraine, the issues of legal monitoring at both the theoretical and practical levels are developed by specialists of the Institute of Legislation of the Verkhovna Rada. Among the main tasks of the Institute, in accordance with the Decree of the Chairman of the Verkhovna Rada of Ukraine No. 770 of August 4, 2003 "On Approval of the Regulations on the Institute of Legislation of the Verkhovna Rada of Ukraine and Its Structure", is the organization of monitoring the effectiveness of the current legislation and forecasting the consequences of its application.

Legal monitoring is necessary to ensure the rule of law, the rights and freedoms of citizens, to improve the quality of political and legal decisions, to open the law-making activities, to reduce the level of contradictory legislation, to streamline the activities in the field of lawmaking, to provide a single legal space for the state, and to improve the effectiveness of law enforcement practice.

Special attention, in our opinion, deserves foreign experience in conducting legal monitoring.

Kazakh specialists take into account a number of shortcomings of the current normative legal acts, which require elimination primarily through legal means. In accordance with the

Methodological recommendations for conducting legal monitoring of the normative legal acts and preparation of the concept of normative legal acts projects of the Ministry of Justice of the Republic of Kazakhstan, the subject of legal monitoring are: the identification of contradictions, collisions and gaps between the norms of the law of various normative legal acts; change or abolition of archaic norms; redundancy or insufficiency of legal regulation of public relations; duplication of norms; Analysis of norm-application, norms of declarative nature; the recognition of acts as invalid; development of new projects; Certain violations of legislative practice, legal techniques; Editorial weaknesses; Non-authentic text and the like (Metodicheskie rekomendacii).

In addition, the Concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020, approved by the Decree of the President of the Republic of Kazakhstan dated August 24, 2009, No. 858, states that "the development of the system of scientific expertise will help solve the task of drafting normative legal acts that are up-to-date and Prospects for the development of society and the state" (Tlembaeva, 2012: 42).

It seems that such an experience could be useful in Ukraine.

Justice and the rule of law are indispensable principles for the existence of the European Union (hereinafter referred to as the EU), which influence the policy of the EU and its instruments. A vivid example of the importance of justice is the expansion of policies, which focuses on legal monitoring and assessment of the level of justice and the rule of law in the candidate countries. The EU policy is based on the existence of a common understanding of justice and mutual trust, the ability of each national system to achieve and maintain high standards of justice and the rule of law.

Domestic law can be defined primarily through the instrumental (regulatory, regulatory) subsystem of the legal system. This understanding is set forth in Art. 2 of the European Convention on Nationality (1997), where domestic legislation is disclosed through the main sources (forms) of law. It includes "all kinds of provisions of the national legal system, including the constitution, laws, decrees, decrees, case law, customary rules and practices, as well as rules that come from international treaties and are binding.

On the eve of Poland's accession to the EU, as a result of cooperation between the Office of the Committee for European Integration and the Governmental Law Center, "Recommendations on policy in the field of legislative technology" were developed and published. The recommendations contain a set of rules and advice to ensure the effectiveness of European Union law in Polish law. The creation of national legislation, after accession to the EU requires compliance with certain rules and responsibilities arising from belonging to this particular organization. European communities are developing within the framework of international law, in which the principles of efficiency, solidarity, devotion and unity are realized (Wytyczne polityki legislacyjnej i techniki prawodawczej: 7).

International humanitarian law (IHL) and human rights for a long period remained separate branches of law. Depending on the state of international relations, the application of human rights law was related to the state of peace between states, and the international humanitarian law of armed conflict ("jus in bello") was associated with the state of war. The basis for this provision was the traditional assumption that the so-called human rights law refers to issues related to the attitude of the state to its citizens, as well as to persons residing on its territory. The central goal of international humanitarian law is the protection of citizens or representatives of hostile states/communities in times of armed conflict (Przybysz, 2010 : 70).

In 1998, the third intergovernmental working group on the right to development was established on the basis of Commission on Human Rights resolution 1998/72 and the decision of the United Nations Economic and Social Council. The Working Group meets once a year and reports to the Human Rights Council and the UN General Assembly.

The mandate of the working group on the right to development includes monitoring and analysis of progress made in the realization of the right to development, as enshrined in the Declaration on the Right to Development, both internationally and nationally.

In 2001, at the 29th ordinary session in Tripoli (Libya), the African Commission on Human and Peoples' Rights adopted a Resolution on Freedom of Expression in Africa, which encouraged the establishment of a mechanism to facilitate the examination and monitoring of adherence to standards of expression, to investigate violations and develop recommendations for the Commission itself and Member States.

In 2002, the Commission adopted the Declaration of Principles on Freedom of Expression in Africa, which enshrined the most important standards in this field, such as equal opportunities in exercising the right to freedom of opinion, the right to access to information and the duty of the public authorities to provide information.

The European Committee for Health (CDSP) has prepared recommendations for the governing body of the CE – the Committee of Ministers. For example, the following recommendations were adopted: Recommendation CM/Rec (2010) 11 on the impact of genetics on the organization of health services and training of health workers; Recommendation CM/Rec (2010) 6 on good governance in the health system; Recommendation CM/Rec (2009) 3 on the monitoring and protection of human rights and the dignity of persons with mental disorders; Recommendation Rec (2008) 1 on the inclusion of gender differences in health policy, and others.

With a view to systematizing and codifying the European electoral heritage, the Council of Europe, while encouraging the adoption of the Code of Reference Standards for Referenda (Venice, October 13-14, 2006, March 16-17, 2007), also hoped to design a tool Cooperation with other international institutions whose activities are aimed at ensuring the conduct of democratic elections and the procedure for their monitoring. These international institutions include, in particular, the Office for Democratic Institutions and Human Rights of the OSCE, as well as the Association of Heads of Election Commissions of Central and Eastern Europe.

In the Strategy for the Effective Implementation of the Charter of Fundamental Rights of the European Union (Brussels, 19 October 2010), the European Parliament and the Council of Europe have proclaimed monitoring compliance with basic human rights in the Union as one of their priorities for the future in the field of justice, freedom and security. Respect for fundamental rights is subject to in-depth monitoring by the court and is an important component in the construction of the EU. During the legislative process, the proposals of the European Commission in the legislative act can be amended.

The European Council in the Stockholm program calls on EU institutions and member states to ensure that legislative initiatives are consistent with fundamental human rights throughout the legislative process by making more effective use of the methodology for systematic and rigorous monitoring of compliance with the European Convention on Human Rights as enshrined in the Charter of Fundamental Rights of the European Union (Strategy).

In 2012, on the initiative of the Ombudsman for the Rights of the Child and the Ministry of Social Affairs of Estonia, the monitoring of the rights of the child and parenthood organized for the first time. The main objective of the monitoring is to map the public awareness of the rights of the child, as well as to analyze the positions and problems in the issues of raising children and supporting paternity, taking into account the prospects of both children and adults. For this purpose, data were collected from both the adult population and children.

The first survey was conducted in the period 01.03.2012 - 18.03.2012 within the Omnibus survey conducted by Turu-Uuringute AS. 1,000 people aged 15 to 74 who interviewed questions related to parental responsibilities and the rights of the child were interviewed. The data were weighed and the results by sex, age and region (Northern Estonia, Northeast Estonia, Western Estonia, Central Estonia, Southern Estonia) were presented. In 2013, the project "Monitoring the validity and reliability of the findings and provisions on the placement of persons applying for refugee status in protected premises and in custody for the purpose of removal" was financed and implemented in Poland from the funds of the Stefan Batory Foundation (Sieniow, 2013: 3).

An important aspect of monitoring human rights is the monitoring of freedom of conscience and religion. The European Court of Human Rights has repeatedly cited the very clear in article 9 of the European Convention on Human Rights: that freedom of thought, conscience and religion is one of the foundations of a democratic society. Religious pluralism is inseparably linked with a democratic society that has been formed over the centuries (Gerhard, 2010: 79).

The rule of law is a multifaceted concept, which consists of eight planes: 1) responsibility before the law; 2) access to information; 3) independence of the judiciary; 4) the effectiveness of the judicial system; 5) respect for fundamental rights; 6) effective implementation of laws; 7) access to justice; 8) absence of corruption (Gramatikov, 2012 : 2).

The control of legal systems is the analysis of institutions and the system as a whole, in order to consolidate good practices, eliminate shortcomings and problems. Control is an instrument, not an end in itself. Its importance is reflected in the integrity and consistency of information, accuracy

and depth of analysis, as well as in the relevance and practical applicability of the recommendations (Monitoring pravovyh system).

Thus, legal monitoring is an important condition for the effective functioning of the legal system. The purpose of monitoring is to bring the legal system in line with the law, including with applicable international and regional norms, and to promote compliance with the principles of the rule of law. International and regional norms provided for in treaties or other instruments and other norms that provide for legitimate criteria for assessing progress towards the creation, restoration or strengthening of the justice system in post-conflict environments. As for the UN, the universal applicable rules adopted under its auspices serve as a normative basis for activities aimed at supporting justice and establishing the rule of law (Monitoring pravovyh system).

Fundamental principles exclude discrimination, equal treatment, in particular: access to justice; Fair treatment of victims; Access to judicial remedies and/or reparation in accordance with the law; Treatment in accordance with domestic law; Fair nature of the substantive and procedural aspects of the proceedings; Prevention of impunity for crimes provided for by international law; Independent and impartial justice (Rule-of-law : 5).

Violation of rights in certain cases may be the result of an isolated incident or the conduct of specific participants, for example, a corrupt judge or an indifferent ATS officer. In order to identify systemic problems that require attention or reform, it is necessary to monitor a number of cases and establish trends and characteristics in order to draw general conclusions on the functioning of the system and make recommendations for comprehensive reforms (Prospective Evaluation Methods).

In recent decades, monitoring assessment has become an important element in the legislative practice of many countries. Concerning institutionalization, procedural and organizational arrangements can be distinguished. Procedural measures are, for example, evaluation clauses (obligations to carry out a forward-looking and retrospective assessment) or an obligation to prepare periodic reports. Organizational arrangements concern the creation of special bodies or services responsible for monitoring the assessment of legislation. Such bodies or services can be established within different ministries (decentralized decision), in one separate ministry (centralized decision), within the framework of parliamentary services or as autonomous bodies (for example monitoring office or court). They can independently assess the impact of legislation or empower external experts (Prospective Evaluation Methods).

It is necessary to pay special attention to monitoring the implementation of law (laws and other regulatory legal acts). Unfortunately, until this day, civil servants, deputies and citizens turn to the law only when it is necessary to receive a privilege, or in cases of obvious violations of the law. Therefore, the most important task of each structure (state, economic, etc.) is to ensure the operation of the law and other regulatory legal acts.

4. Results

Monitoring of the legal system is a key aspect of human rights analysis. It is impossible to control all practical aspects, and especially with regard to individual cases. Monitoring the investigation of cases requires the application of a methodology that goes beyond the control of individual cases as single cases. It is necessary to identify violations of human rights in a specific case and provide individual means of protection.

As a result of the monitoring of human rights, recommendations should be made on how to effectively solve the problems faced by the justice system. For example, through legal and policy reform, establish and develop institutions, including accountability mechanisms, legal remedies, training and capacity-building, administrative and maternal.

5. Conclusion

In our opinion, monitoring of the legal system should also be aimed at identifying patterns and trends in violations of international standards. For example, to assess the compliance of national legislation with international human rights, it is necessary to analyze daily practice in court cases. The right to a fair trial, access to treatment and fair justice, the independence of the judiciary and the proper administration of justice underpin a fair and efficient justice system. Monitoring of the justice system can be directed, first of all, to the criminal justice process, i particular at the initial stage.

References

Gerhard, 2010 – *Gerhard R.* (2010). Germany is an integral part of Religion in the International Encyclopaedia of Laws. 184 p.

Gramatikov, 2012 – *Gramatikov M.* (2012). Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead? 28 p.

Madej, 2014 – *Madej J.* (2014). W poszukiwaniu dobrego prawa [In search of a good law]. Ius Novum. p. 11–12.

Metodicheskie rekomendacii – Metodicheskie rekomendacii po provedeniju pravovogo monitoringa normativnyh pravovyh aktov i po podgotovke Koncepcij i proektov NPA. [Methodical recommendations on conducting legal monitoring of regulatory legal acts and the development of concepts and projects of the normative legal acts]. URL: http: //www. minijust.kz/ru/node/15896.

Monitoring pravovyh system – Monitoring pravovyh system. Instrumenty obespechenija gospodstva prava v postkonfliktnyh gosudarstvah [Monitoring of legal systems. Tools to ensure the rule of law in post-conflict states]. URL: http://www1.umn.edu/humanrts/russian/hrtsbook/Rlegsysmont.html [in Russian]

Onyshhuk, 2015 – *Onyshhuk I.* (2015). Doslidzhennja pravovogo monitoryngu: ponjattijno-kategorial'nyj aparat [Study of the legal monitoring: conceptual-categorical apparatus]. *Visnyk Nacional'noi' akademii' pravovyh nauk Ukrai'ny*. №1 (80). p. 72–81. [in Russian]

Prospective Evaluation Methods – Prospective Evaluation Methods. The Prospective Evaluation Synthesis. United States General Accounting Office. URL: www.gao.gov/special.pubs/10_1_10.PDF

Przybysz, 2010 – *Przybysz M.* (2010). Zastosowanie praw człowieka w realiach konfliktu zbrojnego. Przegląd Prawa Konstytucyjnego. Zagadnienia współczesnego konstytucjonalizmu państw europejskich. p. 69-81.

Rule-of-law – Rule-of-law tools for post-conflict states. Monitoring legal systems. United Nations. 52 p.

Sieniow, 2013 – *Sieniow T.* (2013). Stosowani e detencji wobec cudzoziemców. Raport z monitoringu i rekomendacje. 123 p.

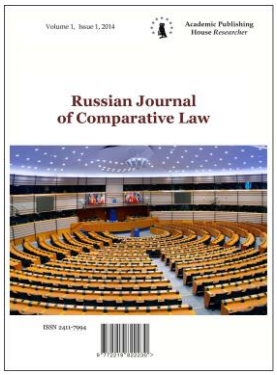
Strategy – Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union. European commission, Brussels. URL: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC0573.

Tlembaeva, 2012 – *Tlembaeva Zh.U.* (2012). Pravovaja jekspertiza NPA kak sredstvo obespechenija jeffektivnosti zakonodatel'stva. [Legal review of the normative legal acts as a means of ensuring the effectiveness of the legislation]. *Pravo i gosudarstvo*. № 1 (54). p. 41-45. [in Russian]

Wytyczne polityki legislacyjnej i techniki prawodawczej, 2009 – *Wytyczne polityki legislacyjnej i techniki prawodawczej* (2009). Zapewnienie efektywności prawu Unii Europejskiej w polskim prawie krajowym. Warszawa: Urząd Komitetu Integracji Europejskiej Departament Prawa Unii Europejskiej. 126 p.

Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
2017, 4(1): 54-60

DOI: 10.13187/rjcl.2017.1.54
http://ejournal41.com



The Principle of Flexibility in the European Union: Before and After Constitutionalisation

Gulnara R. Shaikhutdinova [a, *]

[a] Kazan (Volga Region) Federal University, Russian Federation

Abstract

The principle of flexibility was first introduced in the European Community in the late 1950s and is a natural result of European integration. The peculiarity of functioning of this principle in the EU is that it was first fixed in practice and only then in law. Examples of the flexible approach are the Schengen agreements, which united five states of Europe in the beginning, the so-called adaptation provisions of the treaty of accession of new member states to the EU, the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it. After the principle of flexibility was introduced into the European law in accordance with the Treaty of Amsterdam and later on in the Treaty of Nice and the unsuccessful Constitution for Europe, it has never been used. Only after the Treaty of Lisbon of 2007 there appeared the three examples of practical implementation of the principle of flexibility in the EU.

The hypothesis of the article is that the principle of flexibility was more widely used in the practices of the European Union before its constitutionalisation in the EU founding documents. The arguments can be found in the rather strict regulations of the mechanism in the founding documents.

Keywords: the principle of flexibility, the European Union, differential integration, enhanced cooperation, multi-speed Europe, the Treaty of Lisbon.

1. Introduction

The principle of flexibility was taken by the European Union from constitutional theory and practice of such European countries as Germany, Switzerland, Belgium, France, and Spain, in which it is a constitutional principle and is manifested in a horizontal contractual relationship between the constituent units of federations and between the administrative-territorial entities of unitary states as well as in vertical contractual relations between federations and their constituent units (Shaikhutdinova, 2016: 139).

The principle of flexibility in the federal context means the treaty arrangements among constituent units (the horizontal dimension) and between a federal center and constituent units (the vertical dimension) in further widening and deepening mutual cooperation, going far beyond the margins established in the relevant federation (Steyger, 2002). It is a constitutional principle in a number of federations worldwide, such as Germany, Switzerland, the USA and the Russian Federation (Goudappel, 2002: 29).

* Corresponding author
E-mail addresses: ildar_sh@mail.ru (G.R. Shaikhutdinova)

The principle of flexibility was first introduced in the European Community in the late 1950s and was formulated by the Minister of European Affairs of Spain Carlos Westendorp in his report of 5 December, 1995. The principle of flexibility is a natural result of European integration. It was originally intended to exercise the so-called "linear integration", the essence of which was that all States move at the same tempo without any exceptions and transitional periods. In the course of accession of the new states to the Communities this system became more and more unrealistic. The idea of a flexible approach to merging of the European states, which implies granting freedom of choice to the Member States, arises along with the idea of integration of the European states (Schimmelfennig et al., 2015: 764).

The principle of flexibility was first introduced into the European law in accordance with the Treaty of Amsterdam. A clear procedure for the establishment of flexible integration relations was established under the name of "closer cooperation" (Chauvet, 1998). This procedure was significantly changed by the Treaty of Nice, which came into force in 2003. The Nice Treaty uses the term "enhanced cooperation". The Treaty of Lisbon 2007 concretizes and extends the scope of enhanced cooperation in the European Union. Currently, the principle of flexibility means the possibility for a certain number of EU member states to deepen integration in any sphere through the use of the institutions, procedures and mechanisms of the Union. At the same time, the European Union Member States, which were not included for any reason in the leading group, may join later, upon the occurrence of the necessary conditions (Shaikhutdinova, 2007).

2. Materials and methods

The main sources for analysis were the European Union founding treaties, international agreements among the EU member-states, other EU documents, mainly the EU Council regulations, the constitutions of EU member-states, materials of the journal publications. The study used the basic methods of cognition: the chronological, historical, systemic and the method of comparative law. Author's arguments are based on chronological and comparative approaches. The use of historical method allows to follow the evolution of the principle of flexibility in practice and its regulation in European law. Method of comparative law allows to assess the different mechanisms of flexible cooperation, which have existed in the EU.

3. Discussion

In the EU the principle of flexibility arises in the beginning and is first fixed in practice and only then in law. The Schengen area is the first concrete example of the flexible cooperation among the member states of the European Union.

Before the creation of its legal basis, the principle of flexibility in the EU was carried out in various forms: multispeed Europe, European vanguard, the core of Europe, various geometry, a la carte, concentric circles, etc. Respectively, now within the EU the concepts with the same name of the enhanced cooperation are realized (Shaw, 2005: 60).

The concept of the multispeed Europe presupposes that a certain group of the EU states wishing and able to do it follows the way of deeper integration, and the others gradually join the leading group. All member states have uniform common goals and wish to reach them; the element of flexibility concerns only the period of time during which all EU member states will achieve common approved objectives. Enhanced integration can happen at the same time in various areas of cooperation, and the corresponding "subgroups of cooperation" can unite various member states. So, the Schengen agreement united five states of Europe in the beginning, gradually other EU member states joined it. Examples of the "multispeed Europe" concept can be found in the so-called adaptation provisions of the treaty of accession of new member states to the EU. Thus, paragraph 1 of Art. 3 of the Act on conditions of accession of the Czech republic, Republic of Estonia, Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and amendments to foundation agreements of the European Union provides that provisions of the Schengen acquis and acts adopted on their basis and otherwise related, as well as any subsequent acts which can be adopted before the date of the entry of a new member states into the EU will be considered legally obligatory and are to be applied in these new member states from the date of their accession to the EU. However, the second paragraph of this article describes the situation indicating that the application of the specified provisions in new member states is put

under certain conditions and is actually postponed for some time, namely before the corresponding conditions. Paragraph 2 of art. 3 of the Act provides that the legal statuses about the Schengen acquis specified in para 1 Art. 3, though they will be considered legally obligatory for new member states from the date of their accession to the EU, will be applied in new member states only after acceptance by the Council of the decision confirming that according to the Schengen assessment procedures the necessary conditions for use of all parts of the Schengen acquis are executed in this member state, and after consultations with the European Parliament. Thereby, the EU shows flexible approach to integration of new members into the Union. For some time they remain in the second echelon of the organization, move on the way of integration at a slower pace in comparison with the states making the Union up to May 1, 2004.

European avant-garde is considered one of the forms of the "multi-speed Europe" model. Vanguard is a group of the most developed leading EU member states grouped for the purpose of further accelerating progress towards jointly established goals of integration in various fields. Moreover, this group of states is more resistant in comparison with the advanced group of countries moving at the highest rate according to the multi-speed Europe concept.

Another embodiment of the concept of avant-garde is the "core of Europe" which suggests that a certain number of countries within the framework of the avant-garde would like to go further in European integration and adopt policies within the enhanced cooperation. Traditionally France and Germany are considered the potential leaders of the "core".

The concept of variable geometry is based on the factor of space and presupposes dividing the European Union into geographical areas, one of which is more developed and the other is less developed. This form of differentiation suggests a difference both in the speed of integration and the final goals of integration. The fundamental point of this concept is the recognition of the fact that there are significant differences between the ability and the desire to integrate between the twenty-eight European Union member states. There are several examples "of variable geometry" in the contemporary European Union: the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it.

The concept of a la carte, or "prefer and choose" provides the European Union member states with the opportunity to choose as if from the menu those areas of integration in which they will and are able to participate. Such flexibility provides exceptions or the freedom of choice in the interests of certain states that may be involved or excluded fully or partially from the application of certain rules or institutions.

For the first time the principle of flexibility was constitutionalised in the Treaty of Amsterdam in 1997 under the term of "closer cooperation", then in 2003 in the Treaty of Nice which uses the term "enhanced cooperation" and finally in the Lisbon Treaty of 13 December, 2007.

Now the acts on enhanced cooperation are adopted by the European Union member states on the basis of the rules on enhanced cooperation and are binding only for the states participating in them.

They have the most important features: the conventional character, the direct application on the territory of the European Union member states, which carry out enhanced cooperation, subject to the jurisdiction of the Court of Justice of the European Union. They perform preparatory and integrative function: they pre-determine the future of European integration, identify the priority areas of the cooperation between the European Union member states and develop the legal basis of the cooperation in specific areas. Moreover, they are of subsidiary nature: if the European Union is unable to carry out further integration in a specific area of cooperation, a certain number of member states can make it within the framework and using the procedures and mechanisms of the Union.

The question of the legal nature of the acts on enhanced cooperation of the European Union member states is important both from the viewpoint of the theory of European law and the practice of its implementation. It defines the correct understanding of the scope of such acts, binding force of their provisions, the possibilities of appeal to the Court, etc. The founding treaties of the European Union do not contain the specification of the legal form of enhanced cooperation acts. Moreover, in order to implement the provisions on enhanced cooperation of states properly it is necessary to determine the place of acts on enhanced cooperation in the structure of European law.

The TEU and the TFEU do not define the legal nature of the enhanced cooperation acts either. These treaties are silent on the form and order of the adoption of such agreements. The Treaty on European Union in Article 20 only confirms that acts adopted in the framework of enhanced cooperation are binding only for the member states that take part in it. They are not

considered as acquits which must be accepted by candidate states for accession to the Union. The TFEU provides that the Commission of the European Union takes the necessary transitional measures concerning the application of the acts that have already been adopted in the framework of enhanced cooperation (Art. 331).

Based on the fact that acts of enhanced cooperation are not considered to be part of EU law, that is the main component of European law, it can be assumed that these acts are as a specific part of European law. It seems that these acts will be acts of international public law, to decorate the relations between members of the international public law – sovereign Member States. According to international public law, there are rights and obligations for States that adopt them, rather than directly for legal entities and citizens of these countries.

The acts of enhanced cooperation are formed along with the European Union law. They contain the necessary potential to become later a part of Union law. Acts of enhanced cooperation are not included in European law, and constitute a potential European law. In support of our statement we present a number of arguments:

1. In accordance with Article 43 (1) (j) of the Nice Treaty the enhanced cooperation «is open to all Member States» of the EU. This provision should be interpreted in conjunction with the provision of Article 43 of the Nice Treaty, which gives more detailed regulation, namely: the enhanced cooperation in its establishment is open to all MSs and is still open to them at any time in accordance with Articles 27.E and 40.B of this Treaty and Art. 11A of the Treaty establishing the European Community. Moreover, the European Commission and the Member States participating in enhanced cooperation, sought to encourage the participation of a larger number of MSs in advanced areas of cooperation. Under the TEU and the TFEU, it is expected that all European Union MSs will sooner or later become parties to enhanced cooperation. Thus, paragraph 1 of Art. 20 of the TEC states that «the enhanced cooperation is open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.» This article specifies that the enhanced cooperation in its establishment is open to all Member States, with the qualification about the necessity to comply with certain conditions. The Commission and the MSs that participate in enhanced cooperation care about promoting the participation of as many Member States as possible. Paragraph 2 of Art. 20 of the TEC stipulates that a decision authorizing the enhanced cooperation shall be adopted by the Council as a last resort, where the Council determines that the objectives pursued by the data collaboration, as a whole cannot be achieved by the Union within a reasonable time. Moreover, this paragraph establishes a quantitative benchmark for such cooperation, namely, “that it involves at least nine Member States”.

2. The enhanced cooperation in accordance with Art. 43 (1) (a) of the Nice Treaty was “intended to contribute to achieving the objectives of the Union and the Community to protect and ensure their interests and advance their integration process.” According to paragraph 1 of Art. 20 of the TEC, “the enhanced cooperation is intended to contribute to achieving the objectives of the Union, protect its interests and reinforce its integration process.” Article 334 of the TFEU provides that the Council and the Commission ensure the consistency of actions undertaken in the framework of enhanced cooperation and also provides the consistency of such activities with the policies of the Union, and cooperate for this purpose.

3. The enhanced cooperation is carried out by using European Union institutions. Article 43 (1) of the EU-Nice provides that the European Union MSs which intend to implement the enhanced cooperation can use institutions, procedures and mechanisms that are covered by this Treaty and the TEC, on the condition that the planned cooperation “respects ... a single institutional framework of the Union.” Paragraph 1 of Art.e 20 of the EC Treaty provides that Member States that wish to establish enhanced cooperation between themselves within the framework of non-exclusive competence of the Union can make use of its institutions.

4. Areas in which the enhanced cooperation defined in the TEU and the TFEU. Thus, in accordance with paragraph 1 of Article 329 of the TFEU, the scope is stipulated by the contract, except for areas of exclusive competence of the Union. Procedures for the implementation of enhanced cooperation are defined in Articles 329-331 of the TFEU.

These arguments in favor of the acts of enhanced cooperation are not acts of European law, but have certain features that allow them to continue to be incorporated into the law of the EU, and thus become part of European law. Thus, the enhanced cooperation acts are special acts that are formed along with the traditional European law and required only for a certain range of the

European Union MSs. It is possible to imagine the picture of the bubbles in the bulk material, which then exist separately from each other and from the substance, then merge with each other but not with the substance, and then suddenly burst and disappear, or dissolve in the substance (if all MSs of the EU join the advanced group and acts of enhanced cooperation become part of the acquis), or disappear at all – unnecessary, obsolete or unclaimed, like light smoke on the substance carried by the wind. Acts of enhanced cooperation contribute to the formation of the vanguard in the framework of the Union, which may be called "unions in the Union" (Shaikhutdinova, 2007).

If there was not a mechanism for flexible cooperation in the European Union, its expansion would not possibly be happening so rapidly and the membership of states that have recently joined the European Union would be highly problematic. The principle of flexibility ensures the interests of the European Union member states, which do not participate in enhanced cooperation. Such states have the opportunity not to engage in deep integration temporarily, but remain the members of the Union; they can join enhanced cooperation at any time later, when there will be fully mature economic, social, political and other conditions. Moreover, the non-participating member states may apply to the European Court of Justice in case of disagreement with the establishment of enhanced cooperation policy if they deem that such situation violates the provisions of the founding treaties of the Union. For instance, the United Kingdom has repeatedly filed cases in the Court on annulment of the EU Council decisions on authorizing enhanced cooperation. One of the latest cases reviewed by EU Court concerned the requirement of the UK to cancel the Council Decision 2013/52/ EU of 22 January, 2013 authorizing enhanced cooperation in the area of financial transaction tax. The Council Decision on the establishment of enhanced cooperation in the area of the unitary patent also faced the opposition on the part of the non-participating EU member states – Spain and Italy, which filed cases on annulment of this decision in the EU Court of Justice.

The European Union's appeal to the principle of flexibility and its legal regulation in the main founding documents of the Union is caused by a number of reasons. First, there strengthens the contradiction between the European Union Member States committed to the integration and those seeking to preserve the traditional interstate relations without deepening the integration (Leruth, Lord, 2015: 754) . There is no consensus between EU member states on the prospects of integration and consequently the Union's objectives. Secondly, the enlargement of the European Union requires a flexible approach in view of the significant differences between member states in the economic, social, cultural and other spheres. It should, on the one hand, enable the member states of the European Union which will and are able to integrate further and deeper to do so and, on the other hand, ensure the rights and interests of non-participating member states. The principle of flexibility, on the one hand, creates the mechanism that can preserve the European Union as an integrative formation; on the other hand, it is a way to ensure the sovereignty and national interests of the European Union member states. Thus, the principle of flexibility solves the dual task: it provides unity and diversity within the European Union.

The important question is the interrelation of enhanced cooperation and state sovereignty. Enhanced cooperation is the realization of the state sovereignty of the European Union member states, and it involves a choice – to participate or not to participate in a treaty regulating the issues of cooperation in certain areas. Enhanced cooperation indicates not only the pragmatic approach to European integration but often the reluctance of member states to renounce their national sovereignty. The essence of the enhanced cooperation is twofold. On the one hand, this cooperation is "for selected ones", for a limited number of European Union member states, so that in the issues of integration they are not decelerated with the slow movement of the other member states. On the other hand, this collaboration aims to promote the interests of the Union as a whole and the gradual involvement of all member states in such cooperation. Enhanced cooperation is not the mechanism of separation, it is the mechanism of integration. A certain temporary isolation of a number of European Union member states from the specific policy takes place in order to maintain the development strategy of the Union as a whole and presupposes association with the other member states at subsequent stages of the integration.

The practice of interstate relations on a global scale indicates the practical application of enhanced cooperation and its prospects. The European law has already formed a system-wide institution of enhanced cooperation, which permeates virtually all of its branches and is a set of interrelated legal standards. The enhanced cooperation of states can subsequently grow into a system-wide institution of international law, because not only the EU refers to the mechanism

of enhanced cooperation (Warleigh-Lack, 2015: 871) but also the states within the Commonwealth of Independent States. The practice of enhanced cooperation of states is being formed, the first regional agreements are being concluded, but there is no formed international legal framework for enhanced cooperation of states yet, namely the set of interrelated international legal norms in this area. As being legally formalized in the system of international law enhanced cooperation could find a place along with such recognized system-wide institutions of contemporary public international law as the institution of international legal personality, the institution of international representation, international rule-making institution, the institution of international legal responsibility, the institution of settling international disputes. "...There are so-called supra institutions penetrating several sub-branches or branches" of international law, as Professor D. Feldman wrote in his monograph "The system of international law". System-wide institutions permeate all branches and sub-branches of contemporary international law, they are cross-cutting. The institution of enhanced cooperation will be able to permeate all branches of international law the same way. Enhanced cooperation is possible in any sphere of international relations, if the subjects of international law wish so.

4. Results

After constitutionalisation of the principle of flexibility in the Treaty of Amsterdam and the Treaty of Nice it was never used in practice (Kroll, Leuffen, 2015: 353). And only after the adoption of the Lisbon Treaty there were two examples of enhanced cooperation in the EU, namely enhanced cooperation in the area of the law applicable to divorce and legal separation and in the area of the creation of unitary patent protection. Recently the third example, the Council Decision of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, was adopted.

The conditions of close and enhanced cooperation provided for in the founding treaties of the European Communities and the European Union turned up to be very difficult to comply with.

The main difficulty is a quantitative condition on the minimum number of member states, which can form an advanced group. Under the Treaty of Amsterdam the minimum number of participating states was at least the majority of the EU member states. In 1999 the majority was formed by eight member states. The Treaty of Nice did not change this condition and stated clearly that the minimum number of participating member states should be eight. The Constitution for Europe has slightly changed the above condition: it stated that the number of participating states should be at least one third of all member states, that meant nine member states. Under the Treaty on European Union, the minimum number of participating states is the same - nine member states. For example, Prum Convention – Schengen III is not considered to be an act of enhanced cooperation because it unites only seven European Union member states. The elimination of the condition on the minimum number of European Union member states, which form the enhanced cooperation group, would serve the benefit of the case.

Another point, that causes the difficulty of implementation of the principle of flexibility in practice is the attitude to it as to the "last resort". It would be expedient not to consider the principle of flexibility the "last resort", but to consider it a kind of peculiar alternative mechanism of the European Union integration.

5. Conclusion

1. The principle of flexibility was more widely used in the practices of the European Union before its constitutionalisation in the EU founding documents: the Schengen agreements, adaptation provisions of the treaty of accession of new member states to the EU, the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it, etc. After constitutionalisation of the principle of flexibility in the Treaty of Amsterdam and the Treaty of Nice it was never used in practice.
2. There are only three examples of implementation of the principle of flexibility in the EU, which took place after the adoption of the Lisbon Treaty: in the area of the law applicable to divorce and legal separation, in the area of the creation of unitary patent protection, in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property

regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships.

3. The arguments for reluctance of the EU member states to use the mechanism of flexible cooperation can be found in the rather strict regulations of this mechanism in the founding documents. One clear obstacle for formation of the enhanced cooperation group is the condition for the minimum number of participating states. Under the Treaty on European Union, at least nine member states form such group. The other obstacle is the attitude to the mechanism of enhanced cooperation as to the last resort, when all other means are unsuccessful.

References

Chauvet, 1998 – *Chauvet J.* (1998). Flexibility in the Treaty of Amsterdam: towards a legal understanding of a political concept. Leeds: University of Leeds.

Goudappel, 2002 – *Goudappel F.* (2002). The Influence of Flexibility on the Institutional Balance of the European Community and the European Union. Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings-Groningen: Europa Law Publishing. p. 29.

Kroll, Leuffen, 2015 – *Kroll D., Leuffen D.* (2015). Enhanced cooperation in practice. An analysis of differentiated integration in EU secondary law. *Journal of European Public Policy*. Volume 22, Issue 3. p. 353-373.

Leruth, Lord, 2015 – *Leruth B., Lord C.* (2015). Differentiated integration in the European Union: a concept, a process, a system or a theory? *Journal of European Public Policy*. Volume 22, Issue 6: Differentiated integration in the European Union. p. 754-763.

Schimmelfennig et al., 2015 – *Schimmelfennig F., Leuffen D., Rittberger B.* (2015). The European Union as a system of differentiated integration: interdependence, politicization and differentiation. *Journal of European Public Policy*. Volume 22, Issue 6: Differentiated integration in the European Union. p. 764-782.

Shaw, 2005 – *Shaw J.* (2005). Flexibility and the Treaty Establishing a Constitution for Europe. The EU Constitution: The Best Way Forward? The Hague, T.M.C. Asser press, p. 60.

Shaikhutdinova, 2007 – *Shaikhutdinova G.* (2007). Prodvinutoie sotrudnichestvo gosudarstv v evropeiskom prave [Advanced cooperation of states in European law]. Monografiya. Kazan: Akademija upravlenija "TISBI", 232 p. [in Russian]

Shaikhutdinova, 2016 – *Shaikhutdinova G.* (2016). Regionalism and Distribution of Powers in Federal States. *Public Administration Issues*. Special Issue. p. 138-149.

Steyger, 2002 – *Steyger E.* (2002). Flexibility and the Acquis Communautaire. Flexibility in Constitutions. Forms of closer cooperation in federal and non-federal settings. Groningen: Europa Law Publishing.

Warleigh-Lack, 2015 – *Warleigh-Lack A.* (2015). Differentiated integration in the European Union: towards a comparative regionalism perspective. *Journal of European Public Policy*. Volume 22, Issue 6: Differentiated integration in the European Union, p. 871-887.