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WELCOME NOTE

Dear Reader

In a rapidly changing world, the model of research activity is also changing. If knowledge as such was previously declared the main goal, in the context of the information society and total digitalization, it is becoming more accessible and is no longer a problem. Moreover, in the process of accelerated scientific and technological progress, any specific knowledge is rapidly obsolete and constantly updated. The main goal today is the ability to find relevant information and to use it effectively. Interdisciplinarity is emerging as the new trend of the era, affecting the most conservative disciplines. Innovative jurisprudence, which arose in the context of the need to regulate innovation, is based on an interdisciplinary approach that has become the leitmotif of this issue of our journal.

Thank you for your interest in the KULawR — we are looking forward to continuing our tradition of providing a high-quality resource to the legal community.

Vladimir I. Przhilenskiy,
Chief Editor

PHILOSOPHY AND THEORY OF LAW

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Preface

"We think that it is a kind of progress that our truth replaces the myths and symbols of our ancestors. However, those myths and symbols are no less expressive than our concepts, and our truth is no more valuable than those of our ancestors. The tree of life, the snake, the Eve, and the heaven, are the same things as life, knowledge, temptation, as well as unconsciousness. The concrete image of good and evil in mythology spreads as far as evil and good in ethics. What changes is not the depth of knowledge, but its background. Even if love has no Venus, and war has no Mars, life continues. These events aren't much easier to explain, or less confusing, while the constant of human life does not change because of this. Science is no more profound than poetic narrative."[1]

POST-RELIGIOUS ERA: REFLECTIONS ON THE LEGALIZATION OF RELIGIOUS ETHICS

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Abstract

Not only is the religion a spiritual belief, but also a general way of life. Traditional religions are questioned for lack of authenticity, and the death of God inevitably leads to the collapse of religion and its value system, which continues to weaken or even dissolve the meaning of

[1] Xiao Hang, Summary of Disintegration (Song Gang trans., Zhejiang University Press 2010) 235.

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the world and the meaning of life, etc. The secularization of religion is characterized by the separation of the transcendental elements of religion from the human knowledge structure or moral system. However, the removing process of religious factors may harm the morality itself. A feasible way is to translate moral elements by means of scientific language and to set the roots of morality within human reason or nature, that is, to find out the rational alternatives of religious ideas that carry morality for a long time. Law is the key element of post-religious society, and the overflow and migration of religious ethics to law will be conductive to create a new perfect order.

Keywords

Post-religious era, meaning consensus, secular ethics of religion, crisis of legal trust, moral legitimacy, natural law, symbol systems, intangible religion, perfect order

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I. Introduction

Religion comes with human civilization. By the end of the eighth century BC, the city — state has spread throughout Greek society. A temple is essential for all city-states except for the wall, inhabitants and port, so from this we can see the significance of religion to Greek society and the civilization under the axial age. The Enlightenment advocated replacing fantasy with knowledge, dispelling witchcraft and rejecting anything that did not conform to the principles of calculation and practicality. As a result, religious belief and religious ethics were regarded as the construction of human irrationality and were constantly suffering desalination and digestion. At the same time, the differentiation of modern society also makes religion no longer fully dominate the

society. Religion has been downgraded to a special functional system similar to politics, economy, morality, science and education. As Qichao Liang put it, science is in the ascendant, while religion has belonged to the age of last dharma. Due to the fact of religious decline, there is no universal or unique answer to solve the ultimate question of world meaning and life meaning. Meanwhile, the value consensus that human society can form is weakening day by day, the connotation is increasingly wishy-washy or even tends to die out, and the loss of the highest value plunges human society into nihilism. Does morality make sense without God?[3]An alternative order shall be established in the post-religious era, according to the requirements of new symbol system and secular order, religions shall abandon their theological content and integrate with other social sub-genre systems for common social significance. Therefore, *"the Law of the Night"* and *"the Law of the Day"* can benefit by associating together, with the spillover and migration of religious, it may become a new symbol in modern society to regain its pursuit of meaning and to undertake the construction of global ethics if religious ethics is reasonably accepted by laws.

II. "Faith and righteousness", religious sentiments and ethics

God in Western religions is a vivid image, combining the important contents of Judaism worship, Greek philosophical rationality and Christian moral practice, etc. Therefore, a God in the realm of religion is the basis of human religious belief, rational logic and moral value, and it's also the ultimate bearer of all values. However, why human beings need to fantasize about an *"absolute existence"* or *"the eternal"*, like God, Buddhist or Nirvana? Euripides explained that everyone's mind is a god. Plato also convinced that every man's spirit was divine, and that there was a spirit, that is a divine vigor in one's mind, to help them fly to heaven and close to their kind. The Samkhya of Hinduism put forward the concept of divine oneself, that is, to produce a greater sense of self-consciousness to transcend itself. Because the more people suffer, the more they identify with this world of life and death, the more they yearn

[3] Tim Morgen, *Understanding Utilitarianism*, at 41 (Tan Zhifu trans., Shandong People's Publishing House, 2012).

for the absolute and infinite truth of divine oneself. British religious scientist Muller believed that religion stemmed from infinite idea which was the most important prehistoric driving force of all religions for early human. He discussed religion by using the theory of occurrence, that is, *"religion is an inner instinct, or temperament, which enables people to understand the infinity under different names and various guises independently, without any feeling and reason"*, *"as long as we focus on listening, we can hear this spiritual moan from all religions. It was a desire to know the unknown, to speak the unspeakable, to receive the love of God."*[4] The modern theologian, Scherer, expressed a similar view. He considered that metaphysics or religion was an essential stipulation of human being, and because of the limitation of individuals, the existence of human being becomes occasional and thus becomes fragile and rootless. Therefore, the extension to the divine realm of absoluteness constitutes the essential intention of man. Supported by the divine, the human beings surpass their limitations, find out the meaning of life and settle down the order of the soul. Even, without the God's self-apocalypse, human beings will also construct metaphysics as a substitute for revelation belief.[5] Eliade proposed a compromise view, and he believed that the divine and the secular were two basic forms of human existence.[6] That is, transcendent, divine moral ideal and touchable and commonplace daily life. Secular life is a social dispersion state, and each person gives priority to himself, showing the desire for material life and the emphasis on private interests. Meanwhile, what the divine world awakens is the common social emotion and moral ideal of every human being. Each person's thought concentrates on the common belief and the common tradition, thus constructing,strengthening the collective ideal and restoring the individual and the whole morally. As explained in *"Galatians"*: regardless of Jews and Greeks, free men and slaves, men and women, you have become one in Christ. Like the

[4] Max Mueller, *The Origin and Development of Religion*, at 15 (Jin Ze trans., Shanghai People's Publishing House, 1989).

[5] Max Scheler, *"Death, Eternal Life, God"*, at 2 (Sun Zhouxing trans., Hong Kong Institute of Chinese Christian Culture, 1996).

[6] Mircea Eliade, *Sacred and Secular*, at 32 (Wang Jianguang trans., Huaxia Publishing House, 2002).

performance of mourners in the Greek games, God is also a human being who shows his pursuit and self-transcendence of the perfect world under the limitation of life.

The relationship between religion and morality has a long history. The great Greek philosopher Heraclitus said the virtue of man was his patron saint. After textual research, the philosopher, Heidegger, discovered that the ancient Greek word *"ethos"* for morality or ethics means the dwelling place where man lives near the God. Theologian, Harnak, believes that Jesus combines religion with morality, which is the relation between soul and form. It can be seen that the moral concept of human beings has the attribute of religion at first, and the core of religious ethics is the theodicy, that is the metaphysical view of God and the world. Its theoretical system is based on the question of where the individual *"comes from"* and *"where to be saved"* and *"how to be saved"*. Usually it contains two aspects of the relationship, namely, the relationship between man and God and the relationship between man and man. For instance, the first four articles of the *"Mosaic Commandments"* stipulated how to treat God and the last six articles stipulated that how to treat others. These two kinds of norms are scattered in any place of the *Bible*, ranging from unbelievable different gods to dietary taboos. The 631 commandments cover all aspects of human life, regardless of the typical theological norms or theological attributes of them. Many legal provisions are directly related to real life, human relations, human nature and the universal ideals of human society. *"Luke"* recorded that Jesus calls non-Jewish Samaritans neighbors. Because they are caring and able to save lives, what is expresses is Christianity's transcendence of natural race or national identity and the pursuit of universal benevolence. Like *"Matthew"* and *"Isaiah"*, they express noble sympathy and tolerance in different ways. Such as *"The bruised reed he shall not break: and smoking flax he shall not extinguish"*[7] or *"I have given my body to the strikers, and my cheeks to them that plucked them:* I *have not turned away my face from them that rebuked me, and spit upon me."*[8] The *Mahavira* and

[7] *See* Gospel According to St Matthew 12:20.

[8] *See* Prophecy of Isaias 50:6.

followers of Jainism regarded nonviolence as their only and enduring religious principle, and they believed that all creation with breathing, existence, living and perception should not be killed, nor should they be subjected to violence, ill-treatment, and torture or expelling. The Indian epic, *Mahabharata* is a classic expression of this idea. It describes the samurai temperament of the *Kshatriya*, and the tragic end of the story proclaims the end of the violent destiny of *Kshatriya* thought and the establishment of the spirit of the times as the ahimsa and compassion. In the first century AD, *Bodhisattva* became a new model of compassion in the Buddhist world. Not only will they not disappear into the blissful of *Nirvana*, but they will sacrifice their happiness for the good of the masses. They want to be the refuge of all living beings, the place of all living peace, the ultimate relief of all living beings, the island of all living beings, the light of all living beings, and the law of freeing all living beings.[9] Islam was originally called *Tazak*, and the term contains the meanings of pureness, generosity and chivalry, and Muslims are therefore required to possess the virtues of compassion and generosity. They are ordered by the lord to share their income with the poor, the *zakat* can remove the deep self-interestedness of their hearts, and the system of *niyyah* tries to regulate the differentiation of rich and poor. Although Islam is not a religion of ahimsa, the *"Koran"* only allows for fighting in self-defenses, which condemns war as a great crime and even retaliation must be effectively controlled within certain limits.

In ancient Greek mythology, judicial decisions came from the goddess of justice, Dike, who would be harmed by any perversions of the law. If the nobles accept bribes or perjury for personal gain, Dike will report to her father, Zeus, whose eyes can see and understand everything. Therefore, the protectors of society then punish the city-states of crime with plague, famine and political disaster. To give up the metaphor of myth, religious ethics has a practical influence on the application of law. For example, the early Christian leaders, on one hand, taught believers to pay taxes, register property, and obey the Roman rulers to the extent permitted by the Christian conscience and commandments in

[9] Karen Armstrong, *Axial Age,* at 435 (Sun Yanyan trans., Hainan Publishing House 2016).

accordance with *"Matthew"* and *"1 Peter"* and other doctrines. On the other hand, they would also urge the Roman rulers to reform the law in accordance with the new teachings, including to respect conscience and freedom of worship, prohibit unmarried cohabitation and kill children, limit arbitrary divorce, expand charity and education, reduce military violence, slow down criminal punishment, and release the slaves etc.[10] In the 12th and 13th centuries, two robbers were subdued for stealing the friars, and the monks in charge of the robber killed the robber for self-defense. Pope Alexander III believed that the monk was not a secular man and he should have higher moral requirements. Killing a person was a sin, even if the killed was a bad man. Jesus also warned that *"and if a man will contend with thee in judgment, and take away thy coat, let go thy cloak also unto him."*[11] Therefore, the monk should be held accountable. Another case occurred in the late 19th century when two adult men killed and ate the children for self-preservation after a British ship suffered a shipwreck in Cape of Good Hope. After returning home, the two men were charged with murder, and the defendant argued that there was no law under emergency. They claimed that anyone has an obligation to save his own life and that a person who has sacrificed others to save his own life in a state of emergency has no moral evil. The judge didn't agree, and the law of emergency risk aversion originated in ancient Greece, However, there was no reason that British Christians should not emphasize such a noble form of altruism, as what the heretics were claiming at the time was an altruistic morality of sacrificing oneself and fulfilling others. In the 15th century, the seven sacraments of the church had created a complex set of church laws that had an effect on every aspect of life. For example, the sacrament of marriage regulated sex, marriage and family life; the sacrament of confession regulates crime and infringement, and indirectly regulated acts of contract, affidavit, charity and inheritance; the sacrament of confession and the extreme unction not only standardized charity and the poor, but it also governed a large church-based network of guilds, foundations, hospitals and other

[10] John Witt, Zhong Ruihua, The Rise of the Traditional Teaching of French Religion in the West, 1 *Journal of East China University of Political Science and Law* 139 (2015).

[11] *See* Matthew 5:40.

institutions serving the poor in western societies; the sacrament defined the rights and duties of the clergy and the clergy, while baptism and sacrament regulated the natural rights and obligations of Christians.

To sum up, in a particular historical period, not only is religion a spiritual belief, but also a philosophy of life, a social system, an ideology, and a general way of life.

III. "Disenchantment": the decline of theology and the turn of ethics

The Enlightenment replaced fantasy with knowledge and dispelled witchcraft, that is to say, it is required to reject those claims that only contained sophistry and illusion without mathematical logic and did not conform to factual inferences.[12] Traditional religion is questioned for lack of authenticity, and God, represented by the "three-to-one", including faith, rationality and morality, was declared dead because of the criticism of Coperni, Darwin, Kant, Nietzsche and others. The death of God would lead to inevitable collapse of religion and its value system. Once the God no longer exists in the religious world, there will be no dependence for the immortal notions of eternity, eternal life and soul. Without god and immortality, the moral judgment of good and evil, merit and sin will lose the final basis, and the punishment of evil will also lose its fundamental effect. Therefore, a living god has a special significance for morality. Moral theory itself has an insurmountable dilemma, for instance, there are significant differences between the moral law of form and the law of substantial happiness. Virtue and happiness belong to different value systems, and the moral theory that cannot bring happiness to people is unconvincing. However, the only way to bridge the conflict is the existence of God. Kant thought that it must be assumed a higher, moral, holiest, and omnipotent being connects the two elements of perfection to make possible the supreme goodness of the earth. This idea derives from morality, not the basis of morality. Therefore, it is almost perfect moral theory that morality inevitably leads to religion, imagining an all-intellectual, all-good and

[12] David Hume, *Research on Human Understanding*, at 145 (Guan Wenyun trans., Commercial Press, 1957).

all-powerful god who knows everything and distributes happiness on the basis of every person's virtue, neither favour nor debt. While after enlightenment, the necessary judge is no longer there, and the basis of social ethical order is becoming increasingly fragile and uncertain. Obviously, without God, the moral requirements themselves no longer have any internal, reasonable authority, therefore, it makes no sense to obey moral demands.[13] Dostoevsky was deeply worried about this,and he was convinced that:

> *"No one man or a nation could live without a higher idea, and there is only one such idea in the world, that is, the human soul is immortal, there is only one idea that the soul of human beings will never die…This idea means life itself, the first source of integrity and truth of conscience, and also its categorical formula."*[14]

With the end of God, the religion that once taking a dominant position lost its social legal rights. There is no longer an objective, universal uniform rule and uniform answer to solve the ultimate question, such as the meaning of the world and the meaning of life. The life world presents the multi-value state, the reliability foundation of reaching the meaning consensus continues to be weakened, and the connotation is also getting thinner and even tends to dissolve. Modern society is one with multiple values, the political concept of the country is difficult to transform into the individual concept of life, and the core value of the society cannot be fully recognized by the individuals. Isolated atomized individualism has becoming more and more a trend, while the shared tendency towards collectivization becomes more and more decadent. The collapse of the holy order has plunged mankind into a void of value or into ignorance. People's emotional world shows loss, nothingness, fear and confusion, the crisis of identity makes the human society diffuse a lost atmosphere for a long time, so that utilitarian, commercialization, consumption, hedonic and other secularization tide

[13] C. Frank, *The Spiritual Foundation of Society*, at 17 (Wang Yong trans., Beijing: Life, Reading, Xinzhi Sanlian Bookstore, 2003).

[14] Nicholas Berdyaev, *Dostoevsky*, at 99 (Taipei Times Publishing Company, 1986).

rise up, thus giving rise to a pair of adverse vortices. The first trend of thought can be regarded as a fair current, which advocates that the order of the world is moving from sacred to ordinary. The affairs of this world need no longer be justified by a transcendental concept of meaning, and secular knowledge acquires the legitimacy of autonomy and non-religious citizenship.[15] The second trend of thought may be considered as an adverse current, there were more and more new Gods being established after the disenchantment.Voglin predicted that the new symbol which developed from the secular scientific language would replace the place of God. The rise of man-made things fulfilled his claim that goods and money eventually acquired this mystique, becoming a new world symbol. People are being controlled by more and more external things, the relationships, such as "man and the world", "a man and another" and "man and self", are suffering an indisputable alienation. However, the nihilism is not useless, it at least gives mankind the opportunity to formulate new values. Other theorists are well aware of the reality, and they are well aware that not only can there be no God, but if we want to keep the good, in a sense, we must throw away God, and the antitheism of religion is inevitable in this era. Without myth, religion may die, but morality must survive. Morality has lived with religion for a long time. If all the elements of religion are removed from morality, it is likely to harm the true elements of morality, and a viable way is to use scientific language to translate the true elements of morality originally expressed in religious language so that they cannot be abandoned by people because of social change. In short, we must find rational alternatives to religious ideas that carry the most fundamental morality for a long time. Ben Hofer, a representative of the modern radical secular theology school, claimed that the secularization of Christian religion and its ethical ideas was a golden age for the future of the church, namely, declaring the arrival of a non-religious Christian religion. This claim conceals God, breaks down pedantic sermons about hell, demons, and so on, leads the center of life of believers from the other shore to this life world, and God's transcendence is transformed

[15] Liu Xiaofeng, *Introduction to Social Theory of Modernity*, at 497 (Shanghai Sanlian Bookstore, 1998).

into transcendentalism of this life world. The church is transformed from the monarchs who rule mankind to exist for human beings and their societies. Even the neo-orthodox theological representative, Brunel, bluntly proposed the slogan of replacing theology with Christian religious ethics. Correspondingly, the new Buddhist movement also flourished in modern times. Master Taixu who had proposed thought of *rensheng fojiao*, had announced the onset of a revolution in Buddhism. The thought of *rensheng fojiao* which required discarding the mysterious and supernatural trappings, emphasizing humanistic Buddhism, creating Pure Land in the human world. Master Taixu believed that both the brahmacarya of transcending desires in the right dharma-age and the spell of leaving desires in the semblance dharma-age would be turned back into bypass, and the mainstream of Buddhism in the last dharma-age is to close to human life and to guide the devotees to the good. The notion of *rensheng fojiao* that rather than focusing on attaining rebirth in the Pure Lands, this world itself could be purified by making Buddhism the basis of individual and social life. The meaning of "attaining Buddhahood" is purification and development of human nature, and accomplishing the highest form of human personality. All these encourage the monks and believers to start from the real situation, to improve the society and human beings in the spirit of "self-sacrifice and benefit people" of Mahayana Buddhism, and to realize the ideal of Buddhist land in the human world.[16] Master Taixu had predicted the final stage of the social evolution, the scientific outlook of earlier stages would give way to the study of the various schools of Buddhism. During the final stage: Zhenyan Pure Land studies are a pure aesthetics. Huayan and Tiantai studies are a pure literature. Yogācāra is a pure philosophy, and a pure science. From this it can be seen that the dharma spoken of by the Buddha can encompass everything spoken of by humanity. Consequently, Master Taixu situated Buddhism at a higher level than the knowledge systems of the second, scientific stage of civilization.

With regard to the way religion exists in the future society, Lukeman believes that modern scientific worldviews are not sufficient to replace religion in an all-round way. Despite the near collapse of the divine order,

[16] See Taixu, *Book of Master Taixu*, 459 (Religious Culture Press 2005).

the value of religious existence cannot be completely denied, and the question of the significance of social and personal life can still be solved by religion rather than by science. For example, there are more and more questions in the world and life, scientific rationality is far from giving the ultimate answer to solve these endless unknown fields. In addition, it should be recognized that science and religion belong to two different fields. Science is based on knowledge, which tries to understand the mechanism of the universe; unlike science, religion is responsible for clarifying and transmitting meaning,[17] which belongs to another series of symbol systems that has no noumenon and does not exist in the outside world. After religious reform in Europe, a new religious outlook emerged in Western Europe and North America. The new view was that religion was not meant to explain the world but to exist as a system of discipline. That is to say, the meaning of religion is not in its doctrine of conformity with modern science's interpretation of the world, but in the psychology and human feelings it contains. In essence, it is a tortuous expression of man's instinctive desire, wish and pursuit of the ultimate goal. In psychological, it plays a role of satisfaction, compensation and regulation for those who are in confusion, thus promoting the special function of the development of human body and mind, which cannot be denied and obliterated at will. If the enlightenment kills God, it only indicates that modern rational movements and science have transformed or debunked the primitive, witchcraft, mythical worldview of religion, while science cannot therefore be considered to have murdered all religions. In addition to the primitive, witchcraft, mythological religious theories, there are other religious theories, such as the materialistic world, the human existential world, the psychic world, the separation of the soul from the super personal God and the Great Spirit. And there are some super-rational parts of it, hidden in the future of the human collective rather than in the collective past. From this point of view, science has stripped away the naive and immature spiritual view, or the pre rational world view. On the contrary, if the cloak of witchcraft and myth is not stripped away, the higher-level super rational insights

[17] Clifford Gertz, *An Explanation of Culture*, at 500 (Han Li trans., Yilin Press 1999).

about religion cannot be formed.[18] As Einstein predicted, the religion of the future will be a kind of cosmic religion, which will transcend the personified God and be far away from all dogmas and theologies. This kind of religion, containing both nature and spirit, as a meaningful unity, must be based on the religious concept generated by the practice and experience of things, whether spiritual or natural.

In short, the modern religion is no longer able to dominate society as a whole, and no longer serves as the sole foundation of moral legitimacy, but religion that has changed its form can still play a role in today's society. According to Luckman's judgment, a tangible religion which used to be a social system and has a set of organizational system will be transformed into an intangible religion which is an individual's internal belief.[19] About this change, the interpretation of *"Talmud"* is very clear. When the Pharisees saw their temple of worshiping God destroyed, Rabbi Joshua lamented that it was unfortunate that the place where Israel's sins had been redeemed had been destroyed. and then Rabbi John Lan comforted him: *"Don't grieve, we have a kind of redemption equal to the temple, and do something kind, just as* I *long for love rather than sacrifice"*.[20]

As a result, some tolerant Pharisees have learned that they do not need a temple to worship God. The mercy inherent in the human heart is more in accordance with God's will than the tangible temple, and their perception of religious ideas is almost transcendent, as the *"song of songs"* described that when two or three Jews sat to read together, God sat among them. A religious representative without God is half-consciously aware of the end of the superstitious era, and the morality existence without the Good is a most likely result.

IV. "Replacement and reconstruction", new order and law

The secularization process of religion shows that the transcendental elements of religion are removed from the human knowledge structure

[18] Ken Wilbur, *Grace and Courage: Beyond Death*, at 171 (Hu Yinmeng trans., BeiJing: Life, Reading, and Xinzhi Sanlian Bookstore, 2013).

[19] Lukman, *Invisible Religion: Religious Issues in Modern Society*, at 1 (Qin Fangming trans., Renmin University of China Press, 2003).

[20] C. G. Montefiore, H. Loewe, *A Rabbinic Anthology*, at 430 (New York, 1976).

or moral constitution, and the foundation of knowledge or the root of morality is set in the human reason or nature, just as Rabbi Joshua questioned the voice of nature: this commandment is not longer in heaven. The domination of post religious society must not be in God's hands. This historical change can be said to be a new spiritual era, but it is also worrying. The degradation of human religious emotion makes the traditional religion and personality worship no longer have the ability to integrate the society. The concept of Good cannot replace the worship of God and religious piety as a new emotional sustenance. The society is in a failure state due to the loss of meaning. God, who once existed, was the answer to all questions. Now his death threw all questions back to human beings. The series of events had two effects on the law: on one hand, the law gradually separated from religion. Inspired by enlightenment, the law is no longer supposed to be derived from God's revelation and divine preaching. Instead, individual or collective rational processes set out private morality and public law. The nation-state is no longer mingled with a national church or with a covenanted people blessed by God and it is glorified for itself. Officials have become secular priests, and the Constitution and laws are sacred because they express the moral concepts and customs of the national collective culture. An inevitable trend is the transition from religious law to secular law. For example, the law of Israel stipulates that the marriage and divorce of Jews in Israel shall be carried out in accordance with the Jewish Shariah, and the Rabbinical Court shall hear the marriage matters, including marriage, divorce, upbringing, guardianship, adoption, etc., the marriage without the approval of the rabbinical court is invalid, which is a typical sacramental marriage system. However, in modern times, Protestant countries in Europe and church theologians in their colonies defined marriage and family as a "social hierarchy" or a "covenant community" in the land on earth and this new idea takes the place of the traditional view of marriage as a sacrament. Subsequently, protestant secular rulers enacted a new national law, the main meaning of which was to establish the marriage system of parental consent, state registration, and church sanctity and peer witness, which essentially abolished the church's monopoly on marriage. At the same time, thanks to the rational and secular construction mode formed by enlightenment, the

law has been degraded to a well-designed tool for the implementation of a specific political, economic and social order, or an ability to calculate the consequences of their actions, to measure their own and other people's interests, and to weigh rewards and punishments. Eventually, the law which only plays a certain function in post-religious society will be limited, materialized and impersonal.[21] This mode of construction separates the law from the value entities that sustain people's lives, These values include "trust in fundamental religious and legal values" and "belief in and commitment to transcendental entities that make life meaningful", as well as "trust in any structure and process that brings about social order and social justice." As a result of disenchantment, the modern law cannot provide themselves with a moral obligation that people are willing to obey. However,

> *"A law that demands obedience to the law will be meaningless, the existence of that thing that it tries to create should be taken as a prerequisite. Which is the general obligation to serve the law, this obligation should and must be moral."*[22]

This problem may be fundamental, whether it is the rise of legal instrumentalism, the relativism of legal existence, or the public's disrespect for the law and the loss of legal effect, the reason lies in the complete separation of law and religion.[23] For this reason, Berman said that only by resorting to religion can we resolve the crisis of legal trust,[24] which means religion and law need to be compounded again. But compounding is by no means a direct identity between religion and law, let alone a certain religion to govern the world. He clearly denied that we should uphold the legitimacy of the old legal system and overcome

[21] Xueming Yu, Berman's Thoughts: From Legal Faith to Reflection on Modernity, 1 *World Religion and Culture* 10 (2019).

[22] Milne, *Human Rights and Human Diversity: Philosophy of Human Rights,* at 35 (Xia Yong, et al. trans., China Encyclopedia Press 1995).

[23] Harold J. Berman*, Law and Religion,* at 126 (Liang Zhiping trans., China University of Political Science and Law Press 2003).

[24] Zhong Ruihua, Harold J. Berman: The Father of Contemporary American Legal Religion, 5 *Comparative Law Studies* 198 (2017).

our overall crisis by various religious means and even returning to the Puritan Ethics. As a matter of fact, the religion cannot carry the task of supporting the belief in the law. Resorting to religion to preserve the law is like asking one drowning person to save another drowning person, and the religion and law face the same dilemma. However, if the "good" is as the fulcrum, it connects law and religion at the transcendental level so that the law contains not only human reason and will, but also his feelings, his intuition and devotion, and his beliefs. In this sense, the law may go beyond the rules, the tools and the boundaries of the state to become a more profound and integrated cultural system. Historically, the influence of religion on the law can be said to be ubiquitous, from abstract legal ideas to specific legal provisions, such as constitution, civil law, criminal law, procedural law, international law, etc., and then from legal methods to legal technology, all of them are involved. For instance, the original meaning of the ancient Greek word "canon" was a straight pole, which was used to measure the yardstick and was extended to "standard" or "rule and law". For later churches, "canon" could refer to biblical canons, monks of churches or churches, an important part of worship etiquette, church decrees.[25] Such as, the teachings of Hinduism once occupied the dominant position in the traditional Indian law system. Among them, Dharma is the core concept, which is most commonly used to mean "the privileges, duties and obligations of a man, his standard of conduct as a member of the community, as a member of one of the castes, as a person in a particular stage of life." According to the records of the *Manusmriti*: The whole veda is the first source of the sacred law, next the tradition and the virtuous conduct of those who know the veda further, also the customs of holy men, and (finally) self-satisfaction. In view of this, the four sources of Dharma are *Sruti, Smrti, Bhakti-Sadacara and self-satisfaction*, which have distinct religious characteristics. The *Bhaspatismti* compares a trial case to a sacrificial ritual, which reflects the connection between justice and religion in traditional Indian law from one side.[26] As Homer, the ancient Greek poet wrote in *Iliad* that it was as if the dark earth,

[25] He Qinhua, The Essence of Religious Law, 11 *Law Science* 33 (2014).

[26] Gao Hongjun, Law and Religion: The Central Position of Religious Law in Traditional Indian Law, 1 *Tsinghua Law* 16 (2019).

which was oppressed by the storm and groaned. In the cloudy autumn, showers of rain fell from the sky. This is the rage of *Zeus* to the guilty people, because the assembly was forced to carry out an unfair trial, regardless of the truth, without fear of God's severe punishment. These verses express the dissatisfaction of *Zeus*, the God of law and order, for those disregards of justice and misuses law in adjudication. A similar role in ancient India is Varuna. The god of heaven, Varuna has been described in *"Rigveda"* can gain insight into all the realms of the earth, regulate the four sides of the heavens, bind the realms with ropes, watch the realms of the gods and all the work of the mortals, and all the gods obey his decrees. Apparently, Varuna is the guardian of the world order, who is mainly responsible for supervising and punishing the behaviors of breaking the order. The *"Deuteronomy"* contains a large number of claims on secular areas, independent justice, constitutional monarchs, among which the most valuable is on judicial reform. In accordance with the mandate of the elders of the traditional factions to enforce the law in the local shrine, the reform calls for the appointment of magistrates in all municipalities and the establishment of a Supreme Court in Jerusalem to hear questionable cases. It also limits the prerogatives of the monarch, making it his sole duty to read the written law and obey it as much as the people do. The codification of Roman law could illustrate the relationships between the religion and law. Christianity wanted to systematize the law to unify the laws of different religions in the Roman Empire. The act of codification is regarded as an expression of God's fraternity, and the amendment of relevant legal provisions is basically handled according to Christian doctrines. When Rome was under siege, a group of well-known priests took great risks to collect and treasure the models of Roman law, and preserved them intact by recitation or oral transmission later. From the whole process of the compilation, revision, protection and dissemination of Roman law, the spiritual power of Christianity can be described to be extremely in depth. Similarly in Britain, the concepts of God and "God-made law" make the law above the king, and finally born the idea of the rule of law. The most glorious example is the formulation of the *Great Charter*. At the request of the church and the aristocracy, the *Great Charter* promised to give the church, the freedmen, the magistrates and their

courts, the king and the royal courts in England all kinds of freedom and rights, including procedural rights. These charters of rights which cited by Catholics, Protestants and Enlightenment revolutionaries became an important theoretical prototype against autocracy in the early modern era. *The Good Samaritan act*, which has far-reaching influence in some countries in North America and Europe, is directly derived from the allegory in *"The Gospel of Luke"*: a Jew is injured by a robber on the road, lying on the side of the road, and the priests and religious people who are both Jews don't pay attention to it, but are rescued by a Samaritan who is regarded as a heretic by the Jews. This is especially true of the United States, which enjoys the reputation of a State of law. The spirit of the United States Constitution and the original form of the terms were set by several Puritans on their way across the sea. These Puritans played an important role in guiding people's lives and creating social systems in the early colonies. There's also a saying that, the early Puritans were forced to migrate to the new world, directly or ostensibly because of religious persecution in England. However, the fundamental is puritan's pursuit of the city of God. As a result, Tocqueville couldn't help to admire the fact that puritanism is not only a religious doctrine, but in many respects corresponds to the most absolute doctrine of democracy and republic. Different from other religions, Weber called Christianity a unique urban, especially civic religion, and he emphasized that it was Christianity that formed the pattern of civil society, and eventually the modern society.

There are also numerous examples of the transformation of religious ethical content into legal norms, for example, such as "Accidents" and "Emergency Hedging" in legal defenses, which are translated in Anglo-American law as the act of God. And the reason why "Emergency Hedging" is not illegal is the principle of "No law if necessary", which is derived from medieval church law.[27] The author who proposed the idea of "freedom of conscience" was Arabella, a famous scholar of the French medieval period. Its original intention is that the believers produce an inner moral consciousness and the ability to judge right

[27] Zhang Mingkai, *Expansion of the Criminal Law Motto*, at 284 (Peking University Press 2013).

and wrong according to their belief in God. This principle leaves a space for Western society to transcend the spiritual freedom of secular law, which can be transformed into the core of the constitutional system. The right of civil liberties can also be expressed as the social and political rights of "Civil Disobedience".[28] The spirit of the contract also goes back to the Bible's *"Rainbow Covenant"* between God and Noah and his children: I have made a covenant with you that all flesh and blood will no longer be destroyed by the flood, nor will there be any destruction of the land by the flood. Through several agreements, the relationship between God and man has been changed. The "Last will and testament", a charitable gift that Catholics have been trying to save themselves, has now become a means of adjusting social and economic ties. The personal rights, freedom of speech and publication, freedom of religious belief, defense system, jury system, referendum and "No forced self-incrimination", which are familiar to modern people, are also closely related to the Protestant thoughts that were deeply influenced by the society at that time. Calvinists in the late period deduced rights from the *Ten Commandments* and other moral norms of the Bible, which laid a certain foundation for the western theory of democracy and human rights. The doctrines of the *Koran* are littered with norms of economic behaviors, such as: Don't use deceit to eat away at other people's property; Don't bribe officials with other people's property; Don't bribe officials; Prohibit interest; Remaining interest should be waived; Orphans' property should be returned to them, as well as the provisions that stipulate drinking and gambling as great sins, are of great practical significance in today's society. The Statute of the Squatter and the Congregation System in Buddhism, that is, "a day without work is a day without food" and the idea of educational punishment in the Dharma of repentance is also valuable for modern law. In the United States, many early evangelical believers combined personal belief behavior and sanctification process with national legal reform and moral improvement. Many evangelical believers participated in various social movements with others, such as,national anti-slavery, duel law,

[28] Shan Chun, On the Relationship between Western Religion and the Rule of Law Society, 12 *Journal of China University of Political Science and Law* 12 (2013).

freemasonry law, gambling law, alcohol law, Sunday Mail law, Sabbath breaking law, industrial exploitation law, and corporate corruption law, etc. In the late 19th century, they also participated in the struggle for the rights of liberated blacks, poor workers, women political supporters and union organizers, all of which promoted the rights of the individual and the civilization of society.

Religion and law overlap and coexist in history, the concept of sacredness is also interdependent with the concept of justice. In the long-term interaction, they both overlap and share the same concepts, such as fault, debt and covenant, sin and crime, righteousness and justice; they also overlap and share the same methods, such as interpretation of texts, determination of deductive principles, systematology of organizing materials methods, teaching method of imparting skills and ideas. Not only that, they share authority and express the characteristics of tradition and ceremony together. In religious societies, it is very common to express and carry out religious doctrines by law. For example, in order to implement the Shariah of *Koran* and the *Hadith*, the Islam has created a special Kadi court to be responsible for the trial of civil, commercial and criminal proceedings between Muslim parties. In order to implement the *Code of canon law*, the Christian Church Law not only stipulates the criminal procedure law and the civil procedure law, but also stipulates the procedure law similar to administrative litigation in modern and modern secular law.[29] The relationship between religion and law has a long history. Under the collapse of religious order, people are full of reverie about the alternative significance of law in modern society. The replacement of the religious order by the legal order is now only a fragile statement, and the emergence of a new order requires a long process. The interaction between religion and law is very meaningful, and its significance is not only to save religious ethics, but also to reconstruct the consensus of modern society. Modern law contains important values, such as human rights, freedoms, justice, rights, procedures, etc. However, the basic orientation of these values is abstract, external, impersonal and unnatural. Therefore, they are often lack of effectiveness. Accordingly, every legitimate legal system

[29] He Qinhua, The Essence of Religious Law, 11 *The Science of Law* 28 (2014).

should have the inherent sanctity, that is, to obtain political authority and public fear, obedience and respect. For instance, the reason why the church courts were popular in the medieval is that it expresses the inherent sacred value of man, which includes the special care given to widows, orphans, the poor, the disabled, abused wives, neglected children and distressed servants. So that these persons are entitled to appeal in church courts, to testify against their superiors without their permission, to get relief and asylum from ill-treatment and deficient, and to have the opportunity to get a pious, protected profession in the minor seminary. It also includes providing a way for individual believers to reconcile with God, their neighbors and themselves at the same time. The church courts examine both the legality and morality of the conflict, *"Code of canon law"* is also known as the mother of exceptions, the mother of righteousness and the epitome of the law of love. The remedies provided by the Church Court make the parties "righteous" and "just" not only in their relations with the other party and the rest of the Community, but also in their relations with God.[30] The future law will be deeply integrated with religious ethics, and justice and mercy, rules and balance, punishment and benevolence will also be balanced and complementary. Then a new order will emerge in modern society. This new order is very similar to the Spirit given by Asoka's Rock Edicts, Rock Edicts are scattered all over the world, written in Pali Language, and painted with animal images and similar figures of Dharma Chakra. The first part of each edict is called "Beloved-of-the-Gods, King Piyadasi", which mainly preaches ideas of Non-Violence and moral influence. In 262 B.C., Asoka's armies attacked and conquered Kalinga, the loss of life caused by battle, reprisals, deportations and the turmoil that always exists in the aftermath of war so horrified Asoka that it brought about a complete change in his personality. Beloved-of-the-Gods, King Piyadasi, spoke thus:

> *"Indeed, Beloved-of-the-Gods is deeply pained by the killing, dying and deportation that take place when an unconquered*

[30] John Witt, Zhong Ruihua, The Rise of French and Western Religion in Western Traditions, 1 *Journal of East China University of Political Science and Law* 142 (2015).

country is conquered. But Beloved-of-the-Gods is pained even more by this — that Brahmans, ascetics, and householders of different religions who live in those countries, and who are respectful to superiors, to mother and father, to elders, and who behave properly and have strong loyalty towards friends, acquaintances, companions, relatives, servants and employees — that they are injured, killed or separated from their loved ones. Even those who are not affected (by all this) suffer when they see friends, acquaintances, companions and relatives affected. These misfortunes befall all, and this pains Beloved-of-the-Gods."[31]

Therefore, Asoka ordered that edict to be carved on a large cliff, in order to alert those warlike kings, the war must be initiated in accordance with humanity, and the victory should held the desires of tolerance and light punishment. Asoka considered the best conquest was conquest by Dharma, the Dharma here is different from the Buddhist doctrines or Yoga about "No-self", but the virtues of good deeds and benevolence. And whatever efforts Beloved-of-the-Gods, King Piyadasi, is making, all of that is only for the welfare of the people in the next world.[32] Even all this effort seems to respond to Grotius's original conviction that even without God, natural law can still exist, however, what's the more worrying is how does it exist?

V. Conclusion

Berman had asserted that western legal science was actually secular theology, which was quite appealing in modern society after the collapse of religious order. Law is a key force in the construction of new order in the post-religious era. The result and manifestation of secularization of religion means the rise of legal order. However, is this order comparable to the God? Perhaps there are problems in the way of expression of religion, and the thought of ultimate concern and self-transcendence

[31] The fourteen rock edicts, https://www.cs.colostate.edu/~malaiya/ashoka.html?from=timeline.

[32] Karen Armstrong, *Axial Age*, at 409 (Sun Yanyan trans., Hainan Publishing House 2016).

contained in it is still of far-reaching significance. It leads human beings to transcend limitation and scarcity, pursue infinity and perfection, make people have good thoughts and dare to face the uncertainty of fate. Perhaps in a sense, we have to admit that religion is closer to the people than law.[33] Although the law itself contains important values including freedom, justice, rights, procedures, etc., the basic orientations of these values are abstract, dehumanizing, outward and skeptical of humanity. The external value and the corresponding system design cannot perfect the individual personality nor establish the moral ideal of the society, which is the reason why the law cannot become the perfect order eventually. Law has gained a dominant position in modern society. It doesn't need to share the glory of God, but the guidance of higher value can make it in a good state, just as the role which natural law once played. The secular ethics of religion can play the role of this higher law,[34] thanks to the filling of religious value, the law of post-religious era may dominate a new world order.

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[33] What Gramsci says is that religion is closer to the people than philosophy.

[34] Yu Xingzhong, *The Rules of Law*, at 123 (Law Press 2015).

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THEORETICAL AND APPLIED PROBLEMS OF THE BRANCHES OF LEGAL KNOWLEDGE

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PRINCIPLES OF PRACTICE PROCEDURE FOR THE JUVENILE: FROM THE INTERNATIONAL STANDARD TO CONDITIONS OF PERFORMANCE IN VIETNAM

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Abstract

In Vietnam, principles for conducting legal proceedings against juveniles, stipulated in the Criminal Procedure Code, are defined as the core idea throughout the whole process of creation and application of criminal procedures against juveniles. These principles help complete criminal procedures to guarantee juveniles' lawful rights and interests; correct limitations of courts as well as ensure compatibility with UNCRC and Law on child protection, care and education. However, in order to implement these principles properly, Vietnam still needs to revise its criminal procedures against juveniles, standardize qualifications of officials and enhance collaboration between its authorities.

Keywords

Criminal Procedure Code; international standards; principles of practice procedure; the juvenile

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CONTENTS

1. Introduction

The child-friendly criminal procedures are special procedures applied to ensure the best interest and fairness for juveniles who are accused persons, crime victims or witnesses.

Many amendments have been made in the 2015 Criminal Procedure Code relating to child-friendly criminal procedures (i.e. Chapter XXVIII; Part 7: Special procedures). A new article (Article 414) was introduced. This article consists of 7 principles that the competent authorities, individuals must abide by in juvenile-related cases. These principles also represent the value and the humanitarian policy on juvenile offenders of the Communist Party and State of Vietnam and ensure juveniles' rights and interests in proceedings.[2] They are compulsory and therefore, all officials must respect, implement and prevent any violations leading to infringement of juveniles' rights and interests.

Principles for conducting legal proceedings against juveniles stipulated in the Criminal Procedure Code are based on international standards in UNCRC (1989) and other documents such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") adopted by General Assembly resolution 40/33 of 29 November 1985.

This paper covers principles of practice procedure for the juvenile from the international standard to conditions of performance in Vietnam and the requirements to implement these principles.

2. Principles for conducting legal proceedings against juveniles — from international standards to the provisions of the Vietnam's Criminal Procedure Code 2015

2.1. The criminal procedures shall be child-friendly, appropriate for the juvenile's age and cognitive maturity; ensure the lawful rights and interests of juveniles; guarantee the best interests of juveniles[3]

This principle is defined verbatim under the international standards as: *"States Parties recognize the right of every child alleged as, accused*

[2] Dong Van Le, Criminal procedure against juveniles in 2015 Criminal Code, 3 *Journal of Procuratorate Studies* 13 (2018).

[3] Vietnam Criminal Procedure Code 2015 (National political publisher, Hanoi, 2016), Article 414 (1).

of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"[4] while also adds *"A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult."*[5]

This principle requires that the bodies responsible for the various aspects of criminal proceedings abide by the provisions of the law on special treatment for juvenile offenders so that their rights and best interests are guaranteed. The provisions on criminal procedures need be friendly to juveniles, or as mentioned previously "child-sensitive" and appropriate for the juveniles' personal psychological, physiological characteristics, age and level of development. Thus, when applying criminal proceedings, in addition to ensuring the enforcement of justice, it is necessary to aim at achieving the purpose of educating, inclining juveniles to the good and guaranteeing their best benefits and future despite being accused. On the other hand, when the juveniles are crime victims, the authorities must prioritize protecting their best benefits, punishing accused persons and bringing justice and faith to the juveniles. In addition, when they participate in the proceedings as witnesses assisting enforcement of justice, authorities must implement child-friendly criminal procedures and protect their best interests. Based on child-friendly investigation and child-sensitive principles, the Authorities must not bring burden onto a child. These criminal procedures against juvenile offenders must ensure the defense right; minimize implementation of coercive measures and unavoidable impacts on juvenile offenders caused by criminal proceedings; create favorable conditions for clarification of the crime's causes and conditions so that

[4] United Nations Convention on the rights of the child, Article 40 (1), 1989.

[5] G.A. Res. 40/33, Item a, Section 2.2, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"),* (Nov. 29, 1985).

the Court can adjudicate and declare the sentence which has positive effects on their mentality.[6]

2.2. Juveniles' personal privacy shall be respected

Based on the international standards, *"A child's privacy shall be fully respected at all stages of the proceedings"*[7] and *"The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling."*[8]

This principle is ingrained in Criminal Procedure Code, Article 414 (2) in 2015. This principle emphasizes how respect for the personal privacy of juvenile offenders plays a significant role in a child development as it works to shield the juvenile from stigmatization and isolation from peers, school, family or the community. This principle is meant to facilitate the juveniles' reintegration into the community and normal development after completion of the proceedings and fulfillment of the sentences. In addition to ensuring personal privacy for juvenile offenders, *"it is extremely important to protect the juvenile victims' worth and dignity as well as their safety and welfare. Information leakage may lead to serious consequences."*[9]

The right to privacy is one of the basic human rights and citizenship rights recognized and protected by the Law. The child's right to privacy is especially emphasized since children are in disadvantaged groups, inadequately developed awareness and physicality to protect themselves against affecting and intrusive actions.

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[6] Minh Thi Nguyen, *Psychological factors in criminal procedure against juveniles (May 4, 2019),* http://hvta.toaan.gov.vn/portal/page/portal/hvta/27676686/27677461?p_page_id=27677461&pers_id=28346379&folder_id=&item_id=146486239&p_details=1.

[7] United Nations Convention on the rights of the child, Item vii, Article 40 (2), 1989.

[8] G.A. Res. 40/33, art. 8 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (Nov. 29 1985).*

[9] Loc Thi Nguyen Privacy of juvenile crime victims in criminal procedure, 2 *Journal of Procuratorate Studies* 18 (2018).

Law on Children of Vietnam regulates that: *"Children have the right to inviolability of private life, personal and family secrets; they have their honor, dignity, personal prestige, mail, telephone and telegram security and other personal information exchange means protected by the law. The law also prohibits illegal interventions against personal information"* (Art. 21) and *"Agencies, organizations and individuals that provide information and communications products or services and organize activities on the network environment must secure personal secrets of as regulated by the law"* Art. 54 (2). To ensure implementation of such policies, Decree No 56/2017, supplementing many articles of Law on Children, was issued and took effect from July 1, 2017. In particular, Article 33 of the Decree defines Private information of a child as *"name, age and characteristics for personal identification; health status and privacy written in health records; personal images; family members and caregiver of the child; personal property; telephone number and mail address; address of and information on residence place…"*

Therefore, ensuring juveniles' privacy is not only the responsibility of authorities but also all agencies, organizations and individuals involved in the case.

2.3. The rights to be involved in the proceedings of juveniles' representatives, schools, youth unions, people with experience in and insights of psychological and social affairs, other organizations in the neighborhood where such juveniles are living, working and studying

This principle is based on the rights of the child, as expressed in Article 40 (2) of the UNCRC: *"To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her excuse";*[10] *"The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume*

[10] United Nations Convention on the rights of the child, Article 40 (2), Item b, 1989.

that such exclusion is necessary in the interest of the juvenile."[11] Beijing Rule 18.1 also specifies that: *"Orders concerning foster care, living communities or other educational settings."*

Based on the legal documents of the United Nations, Vietnam has made this content a principle of conducting criminal proceedings for juveniles which is stipulated in Article 414(4), Criminal Procedure Code 2015. As individuals, organizations, and others exercise their right to participate in or witness the proceedings, juvenile offenders are provided with mental (and legal) support as well as psychological and physiological stability. That way, the risk of abuse of power and breaches of the law by officials is reduced, while the rights and lawful interests of the juveniles are being protected.

As a result, competent authorities and individuals must be responsible for facilitating and providing necessary information on the criminal proceedings, rights and duties to juvenile and their representative, school, Youth Union or other organizations where the juveniles are studying, working or living.

2.4. Juvenile offenders' right to participation and presentation of their opinions shall be respected

This principle is stipulated in Article 414(4), Criminal Procedure Code and based on the United Nations Standard Minimum Rules, *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*[12]

To this end, in Viet Nam, a juvenile is entitled to the right to voice their views in any private proceedings to which he/she is related, directly or through a representative or an appropriate agency, in accordance with the procedural rules under the existing legislations. And, during the procedural process, although a juvenile's interests

[11] G.A. Res. 40/33, art. 12 Item 1.5.2 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*

[12] United Nations Convention on the rights of the child, Article 12, 1989 (Nov. 29 1985).

are protected by his/her own defense attorney and representative, the persons responsible for the procedure must respect the juvenile's views regarding the criminal procedures.

During criminal proceedings, the special procedures are extremely essential to ensure fairness and child-friendliness so juveniles may have the opportunity and the guidance to become legally responsible, to avoid similar violation and to abide by the laws in the future. Vietnam has engaged in Convention on the Rights of the Child in 1989 and has been promoting the improvement of the legal system regarding the protection of children's rights, especially juvenile offenders.[13]

2.5. The right of juvenile offenders to legal assistance shall be respected[14]

This principle is based on the following right of the child as defined by Article 37 (5) of the UNCRC: *"Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." The same article also adds that "throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country."*[15]

The right of juvenile offenders to legal assistance is among the special rights available to juveniles. Juveniles are psychologically and physiologically immature, limited in their understanding of the laws and unable to defend themselves against allegation and decisions of procedure-conducting bodies. As a result, their right to have access

[13] Minh Thi Nguyen, *Psychological factors in criminal procedure against juveniles (May 4, 2019),* http://hvta.toaan.gov.vn/portal/page/portal/hvta/27676686/27677461?p_page_id=27677461&pers_id=28346379&folder_id=&item_id=146486239&p_details=1.

[14] Vietnam's Criminal Procedure Code 2015 Article 414(5) (National political publisher, Hanoi, 2016).

[15] United Nations Convention on the rights of the child, Article 5, Article 37(4), 1989.

to defense and legal assistance free of charge has to be guaranteed. This principle also reflects the humanitarian policy of the State and Communist Party of Viet Nam on juvenile offenders. Moreover, *"during the stage of investigation, suspects are in need of defense counsels' presence and assistance especially when they receive decisions of filing charges, are interrogated for the first time, arrested, searched…"*[16]

Accordingly, the investigation, Procuracy, Courts shall be responsible for ensuring juveniles' defense right. Respecting and ensuring this right shall bring positive effects on the quality of trial and the determination of unbiased truths of lawsuit.

2.6. The principles in handling juvenile offenders under the Penal Code shall be respected[17]

This provision of the 2015 Criminal Procedure Code is based on Beijing Rule 17 which articulates a number of *"Guiding principles in adjudication and disposition"*[18] and complies with the humanitarian policy on juvenile offenders of the Communist Party and State of Viet Nam. Compared to international standards, Beijing Rules states: *"Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society (Rule 1.4)."*

The aims of juvenile principle are to help him/her to realize his/her wrongdoings and correct behavior, avoid punishments except for necessary cases. Article 91(1), Criminal Code 2015 regulates: *"Actions against juvenile offenders must protect their best interests"* and Article 91(4), Criminal Procedure Code 2015 regulates: *"At the trial, the court shall only impose a sentence upon a juvenile offender if it is considered that the exemption of criminal responsibility and*

[16] Phuc Thai Nguyen, Compulsory participation of defense counsel in criminal procedure, 4 *Legal Sciences Journal* 41 (2007).

[17] Vietnam Criminal Procedure Code 2015 (National political publisher, Hanoi, 2016). Article 414(6).

[18] G.A. Res. 40/33, art. 15 Item 1.5.1 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* (Nov. 29 1985).

application any of the measures specified in Section 2 or compulsory education in a correctional institution specified in Section 3 of this Chapter do not have sufficient educational and deterrent effects." Thus, during criminal proceedings involving juveniles, all officials must take into account this principle in order to avoid arbitrary, partial or discriminatory application of procedures.

2.7. Cases related to juveniles shall be addressed in an expeditious and timely manner[19]

This principle is based on Beijing Rule 17 requiring that each case involving a juvenile offender, from the outset, be *"handled expeditiously, without any unnecessary delay."*[20] The expediton of formal procedures in juvenile cases is a paramount concern. Without it, whatever good may be achieved by the procedure and the disposition is at risk. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically.[21] As a result, in order to safeguard the best interests of juvenile offenders, the expeditious and timely handling of juvenile-related cases is needed to release the juveniles from the pressure arising out of the burdensome criminal procedures and expedite their return to the families and communities to settle their lives.

The incorporation of these seven principles in our Criminal Procedure Code reflects a very fundamental change in the way the justice process deals with juvenile offenders. This new approach is grounded in the respect for the rights of children, an attention to the relevant international standards, and the realization of the humane approach and policy of the State and Communist Party of Viet Nam. These statutory principles are compulsory and require strict compliance by the relevant official bodies. Failure to comply with these principles is detrimental to the rights and interests of juvenile offenders and

[19] Vietnam Criminal Procedure Code 2015 (National political publisher, Hanoi, 2016) Article 414(7).

[20] G.A. Res. 40/33, art. 20 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (*Nov. 29 1985).

[21] G.A. Res. 40/33, art. 20 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (*Nov. 29 1985).

is prohibited. Through application of these principles, the Criminal Procedure Code has contributed to the improvement of the procedural mechanism aiming to protect the juveniles' lawful rights and interests; correction of difficulties, limitations and at the same time ensured compatibility with Convention on the Rights of the Child and Child Law 2016.

3. Requirements to ensure the implementation of these principles in Vietnam

In order to assure implementation of these principles in Vietnam, it is necessary to:

3.1. Further enhance the child-friendly criminal procedures in Criminal Procedure Code

One of the important requirements to ensure implementation of these principles is the comprehensive provisions of child-friendliness. Criminal Principle Code in 2015 has been amended comprehensively and added with many new remarkable regulations including criminal procedure against juveniles. The aims are to handle juvenile cases in an appropriate manner especially when they are suspect defendants, however, the ultimate purpose is not to punish but to educate, rehabilitate and reduce number of juvenile cases. Despite such amendment, there are still conflicts and incompletions among these principles. For that reason, our recommendations are as follow:

Firstly, it is necessary to shorten the time of investigation in juvenile case.

Regardless of the legal character, juveniles (especially accused persons) must go through a long process of proceedings in terms of time. This will greatly affect their psychophysiology as well as other activities such as learning, working or living habits. While the level of criminal responsibility of juveniles is much lower than adults, the time of investigation is still equal. In addition, Article 419, Criminal Procedure Code 2015 stipulates that the time limit for detention of accused juveniles equal two-third to that of adults. The 1989 Convention on the Rights of the Child has recognized: *"No child shall be deprived*

of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[22] Thus, similar time limit for investigation applied to juveniles and adults is not reasonable and does not promote settlement in a swift manner. We believe that the time limit of investigation for juvenile should be shortened to better protect their rights and benefits. This proposal is also in line with Article 414(7), Criminal Procedure Code: *"The cases in connection with persons aged below 18 must be settled in swift and timely manners."*

Secondly, secret trial must be applied to juvenile defendant and crime victim.

Article 423(2), Criminal Procedure Code provides that: *"If a defendant or crime victim below 18 years of age must be protected in special circumstances, the Court can decide to hold a secret trial."* However, there is no specific guidance concerning "a defendant or crime victim below 18 years of age [that] must be protected." Thus, in fact, secret trial of juvenile defendants is mostly public. Citizens and journalists are free to attend, write articles, reveal identification of the defendants, even in sexual abuse cases. This brings negative impact on their future development, causing embarrassment and discrimination particularly in child sexual abuse cases.

Based on circular No 02/2018/TT-TANDTC dated September 21, 2018 detailing the trial of criminal cases involving proceeding participants who are under-18 persons under the jurisdiction of the family and juvenile tribunal: *"For a case involving an under-18 sex assault, domestic violence or human trafficking victim, the court shall organize a closed hearing; for other cases where under-18 persons or their representatives so request or it is necessary to protect under-18 persons or their privacy, the court may also organize a closed hearing but shall publicly pronounce."* We believe that all juvenile lawsuits must be secret trial regardless of types.

We also propose that secret trial is compulsory in cases of juvenile defendant and juvenile crime victim. Accordingly, Article 423(2) should

[22] United Nations Convention on the rights of the child, Item b, Article 37, 1989.

be revised to: *"If a defendant or crime victim is below 18 years of age, the Court must hold a secret trial."* This revision complies with Article 414(2) *"Personal information of individuals below 18 years of age must be kept confidential"* and other international standards.

*Thirdly, regarding legal proceedings of representative, school or other organizations*participation of representative, school or other organizations is essential to ensure rights and interests of juveniles, as well as to provide psychological and legal assistance and to oversee competent authorities. However, Article 420 only takes account of participation but not absence of those parties. According to Article 423(3),*"the representatives of defendants aged under 18, representatives of the school or organization where such defendants pursue education and do daily activities must attend the trial against the juveniles, unless such representatives are absent not due to force majeure or objective obstacles."* So, will the court be postponed when they have reasonable excuses? To end this, Article 8 of joint circular No 06/2018/TTLT-VKSNDTC-TANDTC-BCA-BTP-BLDTBXH dated December 21, 2018 On the coordination in the implementation of a number of provisions of the Criminal Procedure Code regarding the procedure applicable to under-18 persons, has been issued. When conducting the proceedings with regard to an under-18 proceeding participant, a body or person competent to conduct the proceedings shall request the commune-level People's Committee of the locality where the under-18 proceeding participant resides to appoint a guardian if he/she has no natural guardian; request the Labor, Invalids and Social Affairs office, Ho Chi Minh Communist Youth Union, Vietnam Women's Union, Association of Child Rights Protection or related body or organization at the place of arrest or where the offense is committed or which has the investigation competence to appoint a representative for the under-18 proceeding participant in case he/she has no clear place of residence, his/her backgrounds are unidentifiable or his/her representative is intentionally absent or refuses to participate in the proceedings; to request a state legal aid center to appoint a legal aid provider for the criminally charged under-18 person or victim if he/she is entitled to legal aid under Article 7 of the 2017 Law on Legal Aid and Joint Circular No 10/2018/TTLT-BTP-BCA-BQP-BTC-

TANDTCVKSNDTC of June 29, 2018, on coordination in the provision of legal aid in the proceedings; request or propose a bar association to assign a law-practicing organization to appoint a defense counsel; or assign the Central Committee of the Vietnam Fatherland Front or one of its member organizations to appoint a people's advocate for the criminally charged under-18 person under Article 76 of the Criminal Procedure Code.

A representative or teacher of an under-18 person, or a representative of the school, Ho Chi Minh Communist Youth Union or another body or organization where such person studies, works or lives shall be present on time and at the place indicated in the notice. In case he/she is absent for a plausible reason or due to an external obstacle, the body or person competent to conduct the proceedings may postpone the proceedings or request him/her to appoint another person to participate in the proceedings to defend lawful rights and interests of the under-18 person.

With those articles, proceedings and participation of representative, school and other organizations will become even smoother. However, the joint circular still does not consider how the competent authority will handle absence not due to force majeure or objective obstacles. Article 423(3) stipulates*: "The representatives of defendants aged under 18, representatives of the school or organization where such defendants pursue education and do daily activities must attend the trial against the juveniles, unless such representatives are absent not due to force majeure or objective obstacles"* but does not include whether the court shall be continued or postponed. Moreover, this article is for the defendant only. So how will the court handle the juvenile cases in which the representative of the crime victim is absent due to reasonable excuses? Considering all of the above, we propose revisions of Article 420 and 423 as follow:

Article 420:

4. A representative or teacher of an under-18 person, or a representative of the school, Ho Chi Minh Communist Youth Union or another body or organization where such person studies, works or lives shall be present on time and at the place indicated in the notice. In case he/she is absent for a plausible reason or due to an external

obstacle, the body or person competent to conduct the proceedings may postpone the proceedings or request him/her to appoint another person to participate in the proceedings to defend lawful rights and interests of the under-18 person.

Article 423:

3. The representatives of defendants aged under 18, representatives of the school or organization where such defendants pursue education and do daily activities must attend the trial against the juveniles.

The representatives of crime victim aged under 18 or protector of legitimate rights and benefits must attend the trial against the juveniles.If such people are absent not due to force majeure or objective obstacles, the trial panel shall continue the trial.

3.2. Promote cooperation between competent authorities entitled to conduct criminal procedure and other agents, organizations and individuals in juvenile cases

Unlike adult cases, juvenile cases require participation of many parties including agencies, social organizations and individuals because education is the top priority and punishment is used only when it is necessary. During proceedings of cases in which juveniles are accused persons, victims or witnesses, all related parties must cooperate and guarantee implementation of child-friendly procedures and respect of their rights and interests. As a matter of fact, cooperation between these parties remain weak and some do not fully perform its obligations. To overcome this situation, on December 21, 2018, Chairman of Supreme People's Procuracy, Chief Justice of Supreme People's Court, Minister of Public Security, Minister of Justice, Minister of Labor, War Invalids and Social Affairs signed joint circular No 06/2018 / TTLT-VKSNDTC-TANDTC-BCA-BTP-BLĐTBXH. This Circular took effect from February 5, 2019 and replaced Joint Circular No 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLDTBXH dated July 12, 2011 of the People's Procuracy, Supreme People's Court, Ministry of Public Security, Ministry of Justice and Ministry of Labor, War Invalids and Social Affairs guiding the implementation of a number of provisions of Criminal Procedure Code for juvenile procedure. The circular details coordination in the

implementation of a number of provisions of the Criminal Procedure Code regarding the procedure applicable to under-18 person. It consists of 19 articles prescribing the coordination among bodies competent to conduct the proceedings, persons competent to conduct the proceedings and other related bodies, organizations and individuals in the implementation of a number of provisions of the Criminal Procedure Code regarding the procedure applicable to under-18 proceeding participants. The trial of criminal cases involving under-18 defendants or victims under the jurisdiction of the family and juvenile tribunal shall be conducted in accordance with Circular 02/2018/TT-TANDTC of September 21, 2018 of the Chief Justice of the Supreme People's Court detailing the trial of criminal cases involving under-18 persons under the jurisdiction of the family and juvenile tribunal. However, to implement effectively, individuals, competent authorities and organizations must be aware of its own responsibilities while cooperating with others, for example: cooperation between representative of the school, Youth Union or another body or organization where such person studies, works or lives; coordination in the supervision of criminally charged under-18 persons; application of deterrent and accompanied escort measures. For cases and matters involving under-18 victims who are sexually assaulted, physically abused or trafficked, bodies and persons competent to conduct the proceedings shall closely coordinate with one another and with other related bodies, organizations and individuals right after receiving reports on offenses; and expeditiously examining, verifying and collecting evidence, initiating and investigating criminal cases, prosecuting and trying offenders, ensuring the quick and timely settlement of cases and matters.

3.3. The need to have officials with higher qualifications in juvenile cases

At present, there are only specialized judges in Family and Juvenile Court while the number of specialized judges in other agencies entitled to conduct legal proceedings such as the Investigation and Procuracy is very limited. It affects negatively the quality of proceedings because juvenile rights need to be exercised right from the first stage. If the

Investigator, Investigation Officer, Procurator do not regularly handle cases or handle many things at the same time, they may not specialize in pressing charges, investigating, prosecuting and adjudicating juveniles lawsuits. It can be seen that education and sensitization must be done during pressing charges and investigating. However, not all competent authorities are aware of the matter. To improve the quality of proceedings, we must broaden our psychological knowledge about juveniles of officials and have specialized officials in the investigation.

Besides, it is necessary to strengthen officials' legal skills in juvenile cases and juveniles' psychological and educational understanding. In addition to training courses, it is recommended that Juvenile Justice in legal be taught training institutions. With early education in the universities, students may have a well-built background. It is also necessary to hold advanced training to improve legal skills in many aspects such as marriage and family cases; criminal cases; application of redirection measures).

3.4. The need to have guidance on the organization and operation of the Family and Juvenile Court

The establishment of a Family and Juvenile Court in Vietnam is a fundamental step to prove its commitments to protect the rights of children and juveniles in accordance with international conventions, especially the United Nations Convention on the Rights of the Child in 1990 and to keep up with the organization of other courts in the world. Vietnam is aware of juveniles' rights and interests with establishment of Family and Juvenile Court but it needs a clear guidance on the organization and operation to function well.

First, it is necessary to implement legal documents on Family and Juvenile Court such as Circular No 01/2016 / TT-CA dated January 21, 2016 of the Chief Justice of Supreme People's Court organizing specialized courts, including Family and Juvenile Court if they are qualified for operation; Circular No 01/2017 / TT-TANDTC dated July 28, 2017 of Chief Justice of Supreme People's Court regulating the provision of equipment for friendly court rooms of the Family and Juvenile Court; Circular No 02/2018 / TT-TANDTC dated September 21, 2018 of Chief

Justice of SPC Detailing the trial of criminal cases involving proceeding participants who are under-18 persons under the jurisdiction of the family and juvenile tribunal; Joint Circular No 06/2018 / TTLT-VKSNDTC-TANDTC-BCA-BTP-BLĐTBXH taking effect from February 5, 2019.

Second, the system of documents guiding the application of law on juvenile cases including civil, administrative and criminal proceedings has improved, evidenced by the draft Resolution of the Council Judge of Supreme People's Court guiding application of a number of articles of the Criminal Code regarding crimes involving child sexual abuse, violence; a handbook on skills for handling juvenile cases.

Third, there should be better coordination between ministries, local party committees; the support of the United Nations Children's Fund (UNICEF) and other international organizations in training juveniles' psychology, educational science for Judge, Secretary of Family and Juvenile Court.

4. Conclusion

The incorporation of these seven principles in Criminal Procedure Code 2015 reflects a very fundamental change in the way the justice process deals with juvenile offenders. This new approach is grounded in the respect for the rights of children, an attention to the relevant international standards, and the realization of the humane approach and policy of the State and Communist Party of Viet Nam. These statutory principles are compulsory and require strict compliance by the relevant official bodies. Failure to comply with these principles is detrimental to the rights and interests of juvenile offenders and is prohibited.

However, in order to effectively implement these seven principles, Vietnam needs to have conditions to ensure the implementation of these principles. For example, Criminal Prosedure Code should have further enhance the child-friendly criminal procedures or Vietnam needs to have guidance on the organization and operation of the Family and Juvenile Court or Vietnam also needs to have officials with higher qualifications in juvenile cases... Without the guaranteed electrictity, the above principle will not be able to perform well in reality.

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EXTENUATING CIRCUMSTANCES ADMINISTRATIVE LIABILITY IN THE LAW ON HANDLING OF ADMINISTRATIVE VIOLATIONS OF VIETNAM

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Abstract

Extenuating circumstances administrative liability in Vietnamese law are understood as such circumstances related to the determination of sanctioning and the extent of responsibilities towards individuals, organizations which violated administrative law. These circumstances are to alleviate the extent of danger for the society of the violations; therefore, when these circumstances are applied, individuals, organizations violating the administrative law will incur lower legal consequences than normal cases. The paper analyzes the theoretical issues of extenuating circumstances administrative liability in Vietnamese law, points out some shortcomings and provides proposals for improvement.

Keywords

Extenuating circumstances; administrative liability; administrative violation; administrative sanctions; Vietnamese law

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I. Introduction

Handling administrative violations is not only to punish violators but also to educate them about the awareness to abide by laws and present the humanity of laws. The Law on Handling of Administrative Violations 2012 regulates the sanction principles as follows: *"The sanctioning of administrative violations must be based on the nature, seriousness, and consequences of these violations, violators and* ***extenuating as well as aggravating circumstances.****"*[2] The Law on Handling of Administrative Violations 2012 issues extenuating circumstances to guarantee humanity and to encourage violators to intentionally cooperate with positive attitudes to the problems and declare honestly. Meanwhile, aggravating circumstances are to punish more strictly those who commit crimes in a more dangerous manner, with behaviors that are detrimental to society.[3] Within this paper, the author will focus on analyzing legal provisions on extenuating circumstances applied in how

[2] Law on the Handling of Administrative Violations in 2012, Art. 3 (1.c).

[3] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 129 (Nguyen Canh Hop ed., Publisher Hong Duc., 2017).

to deal with sanctioning administrative violations, spouting out some shortcomings of the current law and proposing the complete directions.

Based on Article 9 of the Law on Handling of Administrative Violations 2012, the following are deemed as extenuating circumstances administrative liability:

— An administrative violator has taken an act(s) to prevent or limit consequences of his/her violation or voluntarily remedy consequences and pay damages;

— An administrative violator has voluntarily reported his/her violation or has shown sincere repentance for the violation, or has actively assisted functional agencies in detecting or handling administrative violations;

— A person commits an administrative violation in the state of being emotionally provoked by an illegal act of another person; or acts beyond the legitimate defense limit or beyond requirements of an emergency circumstance;

— A person commits an administrative violation under force or due to his/her material or spiritual dependence on another;

— An administrative violator is a pregnant woman, a weak aged person or a person suffering an illness or disability which deprives him/her of the ability to perceive or control his/her acts;

— A person commits an administrative violation due to his/her particularly difficult plight which is not attributable to his/her acts;

— A person commits an administrative violation due to his/her ignorance;

— Other extenuating circumstances stipulated by the Government.

Compared to the Ordinance on Handling of Administrative Violations 2002 (amended and supplemented in 2007, 2008), the Law on Handling of Administrative Violations 2012 added 3 extenuating circumstances included as follows: *i. An administrative violator has shown sincere repentance for the violation, or has actively assisted functional agencies in detecting or handling administrative violations*; *ii. Committing an administrative violation which is beyond the legitimate defense limit*; *iii. Committing an administrative violation*

which is beyond the requirements of an emergency circumstance. An addition to the circumstances *"An administrative violator has shown sincere repentance for the violation; or has actively assisted functional agencies in detecting or handling administrative violations"* is essential to encourage violators to correct the violations, cooperate with competent governmental agencies in order to promptly prevent, discover and handle violations. Meanwhile, adding the two circumstances *"Committing an administrative violation which is beyond the legitimate defense limit"* and *"Committing an administrative violation which is beyond the requirements of an emergency circumstance"* is considered to be appropriate in actual situations. This illustrates the humanity of laws when the subjects are in particular situations and must protect the legitimate interests of the government and organization as well as legitimate benefits and the rights of themselves and others.

II. The specific characteristics of extenuating circumstances administrative liability

Firstly, the application of extenuating circumstances reduces the level of administrative liability of individuals and organizations that violate administrative violations compared to normal cases.

The values of extenuating circumstances administrative liability are shown when violating subjects in these circumstances will be reduced to administrative liability compared to normal cases (average sanctions). For example, in cases of being fined, Law on Handling of Administrative Violations 2012 issued *"if such violation involves an extenuating circumstance(s), the fine may be lower but must not be lower than the minimum level of the fine frame."*[4] For the sanction of deprivation of the right to use licenses or practice certificates for a definite time or suspension of operation for a definite time in road and railway traffic sections, Decree No 46/2016/ND-CP issued:

"the duration of the suspension of a license or practicing certificate or transport business operation as a penalty for a violation specified

[4] Law on Handling of Administrative Violations in 2012, Art. 23 (4).

in this Decree is the average level of the bracket. The minimum level shall be applied if there is a mitigating factor..."[5]

Through it, it can be seen that the applications of extenuating circumstances are of importance in detail administrative responsibilities, guaranteeing equality in applying laws, violating individuals, and organizations have to take administrative responsibilities which are associated with characteristics, nature, and extent of the violation of each subject.

Secondly, the extenuating circumstances administrative liability with "open-ended" characteristics.

Analyzing the regulations in Article 9 of the Law on Handling of Administrative Violations 2012 to demonstrate that the extenuating circumstances are not in the "closed-in" list but can be expanded and added because along with the extenuating circumstances issued by the National Assembly which are listed in detail from Clause 1 to Clause 7, the Law is also regulated in an open manner in Clause 8 when allowing the Government to issue other extenuating circumstances. The expansion and addition depend on the decision of the Government. This regulation is necessary to create advantages for the authorities for actively making and choosing suitable extenuating circumstances with the variety of administrative violations in each different domain which aims to bring benefits for violators. This is a specific difference between extenuating circumstances and aggravating circumstances because of the policy of aggravating circumstances in a closed list which belongs to the authority of the National Assembly.[6]

[5] Decree No 46/2016/ND-CP, Art. 77 (2).

[6] Article 10 of the Law on Handling of Administrative Violations 2012 stipulates a "closed list" of aggravating circumstances including the following 12:

a) Committing an administrative violation in an organized manner;

b) Repeatedly committing an administrative violation; recidivism;

c) Inciting, enticing or using a minor to commit a violation; forcing one's materially or spiritually dependent person to commit an administrative violation;

d) Using a person who, with the clear knowledge of the violator, suffers a mental illness or other illness which deprives such person of the ability to perceive or control his/her acts, to commit an administrative violation;

e) Affronting or libeling a person on public duty; committing an administrative violation in a hooligan manner;

It must be noticed that only the government can have this privilege, other agencies which manage the authorities cannot issue regulations related to extenuating circumstances. This is a completely appropriate policy because the National Assembly is not the direct subject to carry out administrative activities, to arise relationships in administrative activities which occur unpredictably so it is needed to vary the form of sanction. Simultaneously, the Government is the highest state administrative body of the Socialist Republic of Vietnam, with the duty to unify and manage from the state to the local area, to enact the Decree in sanctioning administrative violations in all domains. By getting the Government to expand the foundation of extenuating circumstances administrative liability, it helps the competent individual to handle actively towards the variety of circumstances and violators, to enhance democracy in the handling of administrative violations.[7] However, in the process of enacting the Decree on sanctioning administrative violations in each field, the competent agencies only focus on stipulating the administrative violations and the extent of sanction but not on other extenuating circumstances regulations.[8]

f) Abusing one's position or powers to commit an administrative violation;

g) Taking advantage of war conditions, a natural calamity, disaster, epidemic, or other special difficulties of the society to commit an administrative violation;

h) Committing an administrative violation while serving a penalty under a criminal judgment or while executing a decision of application of an administrative violation handling measure;

i) Continuing to perform an act of administrative violation after being requested by a competent person to stop such an act;

j) Absconding or concealing an administrative violation after committing such violation;

k) Committing an administrative violation on a large scale or involving a large quantity of goods or goods of large value;

l) Committing an administrative violation against many persons, a child, an aged person, a disabled person or a pregnant woman.

[7] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 169 (Nguyen Canh Hop ed., Publisher Hong Duc, 2017).

[8] Dao Thi Thu An, Extenuating and Aggravating Circumstances in Handling Administrative Violations — Practice and Issues Raised, 5 *Democracy and Law Journal* 10 (2007).

Thirdly, the extenuating circumstances administrative liability are applied by the authorized person and must be reflected in the decision to sanction an administrative violation.

Sanctioning of administrative violations is an activity of practicing the state power, through sanctioning, the competent holder in the name of the State's power to issue sanctions decisions compel the subject to administrative violations. It must be abided by sanctioning forms and remedial measures. Given the nature of the State's exercise of power, the application of this coercive measure must be sanctioned by the competent subjects in accordance with the provisions of law.

The extenuating circumstances administrative liability are details associated with the violating subject, which reduce the level of administrative responsibility of that subject, so the application of these circumstances must be considered together with the decision to sanction administrative violations. Therefore, if the subject of administrative violations is considered to be applied the extenuating circumstances, these details must be shown in the content of the decision to sanction the administrative violation.[9] On that basis, the subjects with sanctioning competence may apply lower sanctions compared to normal cases. When applying these circumstances, competent subjects must rely on objective truths to comprehensively consider and assess details attached to violating subjects. Therefore, in order to ensure the openness, the strictness of the law and consistency in the sanctioning process, the law stipulates that the application of the extenuating circumstances must be reflected in the sanctioning decision issued by the competent subjects.

Fourthly, the application of the extenuating circumstances administrative liability is "concreteness".

The "concreteness" of the application of the extenuating circumstances administrative liability firstly has been shown by the extenuating circumstances having to be considered in each violation

[9] *See* The Form of Decision on sanctioning administrative violations No. MQĐ02 in the Appendix "Some forms in handling administrative violations" issued together with the Government's Decree No 97/2017/ND-CP of August 18, 2017 amending and supplementing a number of articles of the Government's Decree No 81/2013/ND-CP of July 19, 2013 detailing a number of articles and measures to implement the Law on Handling of Administrative Violations 2012.

case. If an entity commits an administrative violation many times at different periods, the consideration and application of the extenuating circumstances (if any) shall only be applied according to each specific case. Suppose, on August 15, 2017, Mrs. A committed an act of *"insulting the honor and dignity of others"* as prescribed at Decree No 167/2013/ND-CP[10] a warning or a fine ranging from VND 100,000 to VND 300,000 shall be imposed for this violation. At the time of performing the act, Mrs. A is 8-month pregnant, this is the time when the woman has unusual emotional, psychological, and mental manifestations, so when considering sanctioning for Mrs. A, the authority may consider adopting the extenuating circumstance as *"pregnant woman who has been an administrative violator"* to reduce her administrative liability. However, on April 3, 2018, Mrs. A continued to commit acts of *"spreading nails on roads"*, according to Decree No 46/2016/ND-CP, a fine ranging from VND 6,000,000 to VND 8,000,000 shall be imposed for this act.[11] This time, Mrs. A had given birth, so at the time of carrying out the act, Mrs. A was in a completely normal state of mind and consciousness, so there were no other circumstances to be mitigated and thus, she was sanctioned as in common cases.

In addition, the "concreteness" of the application of the extenuating circumstances in sanctioning administrative violations is reflected by the fact that only those who satisfy the prescribed signs can apply the extenuating circumstances, which shows that clear in the case of multiple people committing an administrative violation. The Law on Handling of Administrative Violations 2012 stipulates that *"many people committing the same act of administrative violation shall each be sanctioned for such administrative violation."*[12] However, the level of administrative responsibility of each person may vary depending on the specific circumstances attached to each violator. When conducting the sanctioning, the competent subject will have to base on these facts to decide the sanctioning form and level of sanction for each violator. For example, N and H jointly perform an act of "Stealing property" of other

[10] Decree No 167/2013/ND-CP, Art. 5 (1.a).

[11] Decree No 167/2013/ND-CP, Art. 11 (6.a).

[12] Law on the Handling of Administrative Violations in 2012, Art. 3 (1.d).

people (the value of the stolen property is not sufficient to constitute a crime) as prescribed at Decree No 167/2013/ND-CP, this act may be subjected to a fine from VND 1,000,000 to VND 2,000,000.[13] When discovered by a competent agency, N *"voluntarily declared"* the violation while H was still resolute not to declare his violation. Therefore, when carrying out the sanction, the competent person will still sanction both N and H for the "Stealing property" of other people. However, only N will be considered for application of the extenuating circumstance as *"The violator voluntarily declared the act"* as prescribed in Clause 2, Article 9 of the Law on Handling of Administrative Violations 2012.

The practice of implementing the Law on Handling of Administrative Violations 2012 has proved that the application of the administrative violations to individuals and organizations committing administrative violations is effective and practical, effective in personalizing, distributing the level of administrative responsibility. However, the legal regulations on the extenuating circumstances of administrative violations in sanctioning administrative violations still exist many shortcomings, leading to many difficulties and inconsistencies in the application of laws, reducing the effectiveness of sanctions against administrative violations, therefore, there is a need to make proposals for further improvement.

III. Some practical issues of extenuating circumstances administrative liability in vietnamese law

3.1. Extenuating circumstances in sanctioning administrative violations

The Law on Promulgation of legislative documents 2015 issued: *"The language of legislative documents is Vietnamese must be accurate, common, clear, and understandable. Contents of legislative documents must be specific, not vague..."*[14] This is one of the important requirements of the development and promulgation of legal documents to ensure that everyone can read and understand the laws easily and in the spirit of the agency drafting, thereby facilitating the observance

[13] Decree No 167/2013/ND-CP, Art. 15 (1.a).

[14] Law on Promulgation of legislative documents in 2015, Art. 8.

and application of legal regulations in an easy and uniform manner in practice.

Basically, most of the bases for using the extenuating circumstances are quite clear and easy to apply in practice. However, there are still some unclear grounds that could make it difficult for the competent entity to apply. For example, Clause 5, Article 9 of the Law on Handling of Administrative Violations 2012 stipulates that *"an administrative violator is a pregnant woman, a weak aged person or a person suffering an illness or disability which deprives him/her of the ability to perceive or control his/her acts."* In general, these subjects have certain limitations in terms of awareness, psychology, and health at the time of committing administrative violations, so it is necessary to consider applying the extenuating circumstances, but to apply which one in each regulation is not easy.

Regarding the circumstance that *"the administrative violator is* ***a weak old person****"*, there are currently no regulations guiding this content. According to the provisions of the Law on the Elderly 2009, *"the elderly people prescribed in this Law are Vietnamese citizens aged full 60 years or older."*[15] Meanwhile, according to the guidance of Resolution No 01/2006/NQ-HDTP dated May 15, 2006 of the Council of Judges of the Supreme People's Court guiding the application of a number of provisions of the Criminal Code, *"old people"* are defined as people aged 70 or over.[16] According to Resolution No 01/2007/NQ-HDTP dated October 2, 2007 of the Council of Judges of the Supreme People's Court guiding the application of a number of provisions of the penal code on the statute of limitations for executing a judgment, exempting from serving penalties or reducing the time limit for serving penalties, there are also guidelines on the subjects *"people who are too old and weak"* who are 70 years of age or older or people aged 60 or older but often sick.[17] Thus, it can be seen that although there have been a number of documents mentioned, the subjects specified in the above-mentioned guiding documents are not identical with the subjects of *"****a weak old***

[15] Law on the Elderly in 2009, Art. 2.

[16] Resolution No 01/2006/NQ-HDTP, Section 2 (4).

[17] Resolution No 01/2007/NQ-HDTP, Section 4 (1.a).

person" prescribed in Clause 5, Article 9 of the Law on Handling of Administrative Violations 2012 and, thus, are not applicable in the field of sanctioning of administrative violations but are applied in the field of criminal matters. Therefore, the determination of the circumstance that *"administrative violators are weak aged people"* when sanctioning in reality now completely depends on the subjective judgment of the person with sanctioning competence. In order to correctly identify this particular subject, the person with sanctioning competence must base on each specific case to assess the health status and age of the violator at the time they commit the administrative violation.

In addition, the Law on Handling of Administrative Violations in 2012 does not provide guidance on the fact that *"an administrative violator is* ***a person suffering from an illness or disability which deprives him/her of the ability to perceive or control his/her acts****."* These are special subjects that, when committing an administrative violation, they are not fully aware of the dangers to the society of their act and cannot control the act, so the Law on Handling of Administrative Violations 2012 stipulates that this is the extenuating circumstance. However, the question is how to identify a person at the time of committing an administrative violation falling into the above situation. For instance, if a driver of a vehicle with the flu has dizziness or distraction leading to a traffic law violation, it is considered as a disease that limits the ability to perceive or control the behavior. Is it allowed to apply this extenuating circumstance? This requires a thorough medical evaluation to determine, while the majority of sanctioning authority have no specialized knowledge in this field.

In addition, the contents of the extenuating circumstances are when *"a person commits an administrative violation due to his/her particularly difficult plight which is not attributable to his/her acts"* (Clause 6, Article 9) or *"A person commits an administrative violation due to his/her ignorance"* (Clause 7, Article 9), but there is no clear explanation. What circumstances are considered to be "particularly difficult", just based on the presentation of the violator or must be certified by any state agency or not? What criteria to identify an administrative violator with "ignorance"? All of these questions are currently being left out by the Law on Handling of Administrative

Violations in 2012, which implies the risk of inconsistent application of the law, possibly even a fertile area for a competent person to apply these facts at will. Therefore, it is imperative that there is a specific need to explain these grounds for the extenuating circumstances to be applied correctly when the actual sanctions are applied.

Therefore, the Law on Handling of Administrative Violations 2012 and its implementing documents need to supplement regulations explaining terms and guiding specific identification criteria for the extenuating circumstances that have not been clearly defined to create the solid legal framework for the application of these circumstances, avoiding the situation of arbitrary application of the law in practice.

The application ofthe circumstance *"Administrative violators are weak old people"*, requires competent sanctioning of persons to prove that violators are both "old" and "weak". The proof that the violator is an "old person" may be based on their age, but the current law does not specify how old is considered "old". Meanwhile, to prove that a person is "weak" is even more difficult because it requires thorough supervision and medical examination, so it is difficult to give a common criterion to apply for those different cases. Therefore, according to the author, it is necessary for the Law on Handling of Administrative Violations 2012 to absorb the provisions of the criminal law in dealing with this inadequacy. The previous Criminal Code only used the criteria "the elderly" without the additional "the weak" criteria to apply the mitigating factors of criminal responsibility to offenders,[18] but the application also encountered obstacles due to lack of specified instructions as stated. In order to solve this problem, the Criminal Code 2015 (amended and supplemented in 2017) has been improved when specifying the age of offenders to serve as quantitative criteria for the application of the mitigating factors of criminal responsibility for offenders instead of the previous criteria "old people". Specifically, this Code stipulates that *"offenders who are full 70 years of age or older"* are allowed to apply mitigating factors on criminal responsibility.[19] Therefore, the author thinks that the Law on Handling of Administrative Violations

[18] Criminal Code in 1985, Art. 38 (1.e); Criminal Code in 1999 (amended and supplemented in 2009), Art. 46 (1.m).

[19] Criminal Code in 2015 (amended and supplemented in 2017), Art. 51 (1.o).

2012 should also learn from the experience of criminal law and replace the extenuating circumstance *"Administrative violators are weak aged people"* to *"Administrative violators are people full 70 years of age or older."* This provision will make it easier to identify the extenuating circumstances in reality, while also ensuring the humanity of the law because according to many health experts, the 70-year-old landmark is also considered a suitable landmark to evaluate the "old" and "weak" factors in a particular person.[20]

For other circumstances, such as *"A person who commits an administrative violation has a disease or disability that limits his / her ability to perceive or control his/her acts"*, *"A person commits an administrative violation due to his/her particularly difficult plight which is not attributable to his/her acts"* or *"A person commits an administrative violation due to his/her ignorance"*, the author boldly proposed the Law on Handling of Administrative Violations in 2012 need to consider supplementing the regulations allowing the Government to enact a specific Decree to guide the application of these circumstances. For each extenuating circumstance, the Government should promulgate clear guidelines for each specific criterion so that the authorized sanctioning person can base on that to be considered and applied in practice.

3.2. Legislative documents that stipulate additional extenuating circumstances that are not in accordance with the provisions of the Law on Handling of Administrative Violations 2012

As mentioned, one of the characteristics of the extenuating circumstances in sanctioning administrative violations is *"open-ended"*, reflected by the Law on Handling of Administrative Violations 2012 which allows the Government to enact the Decrees about how to define new extenuating circumstances in accordance with each specific field of state management to enable citizens to enjoy favorable circumstances

[20] Diep The Vinh, *The definitions of "the elderly, the feeble and elderly, the over feeble and elderly" need to be changed.* May 18, 2017. https://kiemsat.vn/can-sua-doi-cac-khai-niem-nguoi-gia-nguoi-gia-yeu-va-nguoi-qua-gia-yeu-trong-blhs-47028.html.

to reduce their level of administrative responsibility. However, through the survey, the author found that there are still existing cases where the unauthorized subject entity *"arbitrarily"* stipulates new extenuating circumstances that are not in accordance with the provisions of the Law on Handling of Administrative Violations 2012.

For example, the issue of sanctioning administrative violations in the field of science-technology and technology transfer is now governed by the Government's Decree No 64/2013/ND-CP of June 27, 2013 (amended and supplemented by Decree No 93/2014/ND-CP dated October 17, 2014). The content of this Decree does not contain any provisions on the extenuating or aggravating circumstances when sanctioning administrative violations in the field of science — technology and technology transfer. However, the Ministry of Science and Technology's Circular No 20/2015/TT-BKHCN of November 5, 2015, guiding the implementation of Decree No 93/2014/ND-CP, "arbitrarily" supplemented the extenuating circumstances for violations of the registration of results of performing State budget-funded scientific and technological tasks as follows: *"Imposing the extenuating circumstance for cases where the hosting organization has registered the results within 01 year, counting from 30 days after the date of official acceptance of the scientific and technological task until the violation is detected."*[21] The issue to note here is that the Decree No 64/2013/ND-CP (amended and supplemented by Decree No 93/2014/ND-CP) issued by the Government did not mention this extenuating circumstance. Thus, it can be concluded that in this case the Ministry of Science and Technology has "arbitrarily" provided additional extenuating circumstances, although this agency is not allowed by the Law on Handling of Administrative Violations 2012 to do this.

Conducting a thorough review of legal documents that stipulate the sanctioning of administrative violations, especially the Circulars guiding sanctioning Decrees in the fields to promptly detect and abolish the regulations of "arbitrary" supplementing the extenuating circumstances. It is necessary to abolish the provisions of Article 5 (2.a) of Circular No 20/2015/TT-BKHCN: *"Applying the extenuating circumstances*

[21] Circular No 20/2015/TT-BKHCN, Art. 5 (2.a).

when sanctioning for the case where the host organization has registered the results within 01 year, counting from 30 days after the date of official acceptance of the science and technology task until the violation is detected" because of the Ministry of Science and Technology does not have the right to stipulate more new extenuating circumstances.

3.3. The Law on Handling of Administrative Violations 2012 has not yet developed a general principle to determine the specific level of sanctions in case of administrative violations with extenuating circumstances

From the perspective of administrative law, the principle in state management is the overall administration of legal provisions with the main ideas as the basis for organizing the implementation of State management activities.[22] The application of the extenuating circumstances in administrative sanctioning activities also needs to adhere to certain principles so that the application of these circumstances will achieve the expected effect. Unfortunately, the Law on Handling of Administrative Violations in 2012 and its implementing documents have not yet developed general principles to apply the extenuating circumstances when sanctioning, thereby creating many legal gaps when applying these facts in sanctioning practice.

The extenuating circumstances are characterized by a reduced level of administrative responsibility of the subject of administrative violations, but these circumstances are only meaningful for those administrative violations subject to sanction forms on the fine bracket (with regulations on the minimum to the maximum level) such as fines, deprivation of the right to use licenses, professional practice certificates for a definite time or suspension of operation for a definite time. For sanctions such as confiscation of material evidence, means of administrative violations or deportation, the application of the sanctions is not meaningful because of the fixedness of these sanctions. For the form of warning sanction, the extenuating circumstances are meant as a condition for subjects of administrative violations for individuals aged

[22] Hanoi Law University. Vietnamese Administrative Law Curriculum. Publisher People's Police. 75, 76. (2008).

full 16 years of age or older and organizations violating administrative regulations to apply this form of sanction (non-serious administrative violations with involved extenuating circumstances, and according to regulations subject to this sanctioning form of warning).

Currently, the Law on Handling of Administrative Violations 2012 only stipulates the principle of determining specific levels of fines in case of extenuating circumstances for fines. Meanwhile, for other sanctions such as deprivation of the right to use licenses, professional practice certificates for a definite time or suspension of operation for a definite time, the Law does not have any specific principles for determining the level of sanctions. For fines, the Law on Handling of Administrative Violations 2012 stipulates: *"The specific fine level for an administrative violation is the average of the prescribed fine bracket for such behavior; if there are extenuating circumstances, the fine may be reduced but not lower than the minimum of the fine frame; if aggravating circumstances are involved, the fine level may be increased but must not exceed the maximum fine level of the fine bracket."*[23] However, this provision is still general, so it creates a non-uniform application in practice.

For example, Decree No 102/2014/ND-CP stipulates a fine of between VND 5,000,000 and VND 10,000,000 for acts of encroaching on or occupying residential land.[24] According to the guidance of the Law on Handling of Administrative Violations 2012, when individuals commit the above violations with extenuating circumstances, the person with sanctioning competence may reduce fines below the average level (below VND 7,500,000) and the lowest reduction is VND 5,000,000. However, the question is based on the criteria to determine the specific reduction. This issue has not been thoroughly resolved by the Law on Handling of Administrative Violations 2012, resulting in the decision to reduce the amount of the fine depends entirely on the subjective awareness of the person with sanctioning competence without relying on any quantitative criteria.

[23] Law on Handling of Administrative Violations in 2012, Art. 23 (4).

[24] Decree No 102/2014/ND-CP, Art. 10 (3).

In order to solve the above problems, a number of Decrees and Circulars guiding the sanctioning of administrative violations in the fields have developed the principle of determining specific levels of a fine when violating subjects that have extenuating circumstances, through our survey, the following two common ways are summarized:

The first way determines the sanction reduced by a percentage. For example, for administrative violations in the field of tax, Decree No 129/2013/ND-CP stipulates that *when a fine is imposed, a specific fine for a tax procedure violation is the average of the frame fines are prescribed for such acts. For acts of violating tax procedures, each extenuating circumstance is entitled to a 20 % reduction of the average fine level of the fine bracket*.[25] In the field of competition, Decree No 71/2014 / ND-CP (amended and supplemented by Decree No 141/2018/ND-CP) provides for administrative violations regarding control of restrictive acts, in case of competition or unfair competition regulations, each extenuating circumstance shall be *reduced by 15 %* of the fine level compared to ordinary violations.[26] Meanwhile, Circular No 07/2014/TT-BTC guiding the sanctioning of administrative violations in the field of management and use of State assets stipulates that *for every extenuating circumstance, the fine will be reduced by 20 % compared to the average level of the fine bracket which is prescribed for that behavior*.[27] Although the determination of reduced fines by percentage makes it easy for the competent entity to determine the specific amount of fines when the extenuating circumstances are available, if this method is applied to the sanctioning of administrative violations in all sectors, it still has certain limitations. Specifically, if the lawmaker stipulates that the percentage (%) is too low (less than 10 %), the sanction will not promote the value of the extenuating circumstances because the actual reduction of fines will not be different than a normal violation. Conversely, if the percentage (%) is 10 % or 20 % or more, there is also the risk of being disabled in many cases. In fact, if the lawmaker has set a percentage (%) of 10 %, or 20 % or more, only one

[25] Decree No 129/2013/ND-CP, Art. 3.

[26] Decree No 71/2014/ND-CP (amended and supplemented by Decree No 141/2018/ND-CP), Art. 4 (5), and Art. 5 (4).

[27] Circular No 07/2014/TT-BTC Art. 3 (2.b).

extenuating circumstance is required, the fine is equal,[28] even lower than the lowest fines of fine bracket.[29] Therefore, if there are two or three extenuating circumstances, it is only possible to apply the minimum fine of the fine frame but not different from the case of having one. This is completely inconsistent with the purpose of sanctioning to educate and deter violators and also not in accordance with the principle of sanction that must be *"based on the nature, seriousness, and consequences of the violation, regarding violations and the world center, aggravating circumstances."*[30] It would be absurd if the violating subject has many extenuating circumstances, the fine applied is exactly the same as the violating subject having only one extenuating circumstance.[31]

The second way determines the reduction sanction according to the principle of reduction of the average. In the field of price, fee, fee and invoice management, Decree No 109/2013/ND-CP (amended and supplemented by Decree No 49/2016/ND-CP) stipulates the fine of a violation against regulations on pricing, fee, and invoicing, without aggravating or extenuating circumstances is the average level of the fine bracket for such violation. The average fine is the arithmetic mean of the minimum and maximum fines. *An extenuating circumstance shall cause the average fine to decrease. The decrease is the arithmetic mean of the minimum fine and average fine. The minimum fine shall*

[28] Article 6 (2.b) of the Decree No 46/2016/ND-CP sanctioning administrative violations in the field of road traffic and rail transport prescribes a fine of from VND 80,000 to VND 100,000 for the act of "Going three abreast or more". If the violator has an extenuating circumstance and applies the "10 % reduction of the average fine level of the fine frame", the fine will be VND 81,000 (VND 90,000 – 10 % × VND 90,000 = VND 81,000). This fine is approximately equal to the minimum fine.

[29] Article 6 (1.a) of the Decree No 46/2016/ND-CP sanctioning administrative violations in the field of road traffic and rail transport prescribes a fine of from VND 60,000 to VND 80,000 for the act of "*Disobeying road signs or road markings*". If the violator has an extenuating circumstance and applies the "20 % reduction of the average fine level of the fine frame", the fine will be VND 56,000 (VND 70,000 – 20 % × VND 70,000 = VND 56,000). This fine is even lower than the minimum fine.

[30] Law on the Handling of Administrative Violations in 2012, Art. 3 (1.c).

[31] Cao Vu Minh, Issues in Need of Amendment under the Law on Handling of Administrative Violations in 2012, 1 *State and Law Review* 9 (2019).

apply if two extenuating circumstances are found. An aggravating circumstance shall cancel out an extenuating circumstance.[32]

In our opinion, this method has many advantages over the method of determining the reduction in percentage and can be applied to all areas, because determining the reduction in this way helped the authority to easily determine the reduction of sanction levels when there is an extenuating circumstance while creating a division of administrative responsibilities between the violation of having a single extenuating circumstance and the violation with many extenuating circumstances.

Regarding the sanctioning form of depriving of the right to use licenses, professional practice certificates for a definite time or suspending operation for a definite time, although the Law on Handling of Administrative Violations 2012 has not specified the principle of determining the reduction level of fines when having extenuating circumstances, but through the survey of Decrees stipulating the sanctioning of administrative violations in the fields, we found that there are a number of Decrees guiding the determination of reduced fines for these sanctions when there are extenuating circumstances as follows:

Decree No 46/2016/ND-CP sanctioning administrative violations in the field of road and rail transport provides: *"The duration of the suspension of a license or practicing certificate or transport business operation as a sanction for a violation specified in this Decree is the average level of the bracket. The minimum level shall apply if there is an extenuating circumstance..."*[33] Meanwhile, Decree No 33/2017/ND-CP sanctioning administrative violations in the field of water resources and minerals provides the principle for determining the reduction level of fines for the issuance of extenuating circumstances with sanctioning forms of "deprivation of the right to use licenses, professional practice certificates" or "operation stoppages" are as follows:

"The period of suspension of a license or practicing certificate or suspension of operations as a sanction for a violation specified in this

[32] Decree No 109/2013/ND-CP (amended and supplemented by Decree No 49/2016/ND-CP), Art. 3 (6).

[33] Decree No 46/2016/ND-CP, Art. 77 (2).

Decree is the average level of the suspension period bracket applied to such violation. It may be shorter than the average level, but not shorter than the minimum level of the suspension period bracket if there are any extenuating circumstances…"[34]

However, both of these methods also have certain limitations, so they cannot be used as a common standard to apply to all fields. If being applied according to Decree No 46/2016/ND-CP, it will not make a difference in the level of administrative liability reduction in case the administrative violator has many extenuating circumstances, because for the violators shall be applied the *"minimum of the time frame"* for deprivation or suspension of operation with only one extenuating circumstance. Meanwhile, if applying under Decree No 33/2017/ND-CP, the specific reduction cannot be determined, but depends on the discretion of the sanctioning authorities. Therefore, it is necessary that lawmakers also need to develop an appropriate general principle to apply to all areas of administrative sanctions for forms of sanctioning "deprivation of the right to use permits and certificates" or "suspend operation" when the violators have the extenuating circumstances.

Thus, lawmakers need to consider adding in the Law on Handling of Administrative Violations 2012 the principle of determining reduced sanction levels for specific administrative violations when the extenuating circumstances are available. As analyzed above, we believe that the lawmakers should not choose the method of determining the reduced sanction levels by the percentage (%). Otherwise, we highly recommend that lawmakers should determine the reduced sanction levels based on the average sanction level of the sanction bracket. The average reduction principle should be considered in accordance with the provisions of Decree No 109/2013/ND-CP (amended and supplemented by Decree No 49/2016/ND-CP). Accordingly, the Law on Handling of Administrative Violations in 2012 may be amended as follows:

Regarding the sanctioning form of fines: *"The specific fine level of an act of violation is the average of the fine bracket prescribed for such violation. In case there is an extenuating circumstance, the*

[34] Decree No 33/2017/ND-CP, Art. 66 (2).

average reduction is applied. The average reduction is determined by halving the total of the minimum and the average. In case there are more than one extenuating circumstances, the minimum rate of the fine bracket shall be applied. In the case of both aggravating circumstances and extenuating circumstances, the principle of an aggravating circumstance is deducted for extenuating circumstances."

For the sanctioning form of "deprivation of the right to use licenses, professional practice certificates or to suspend operation for a definite time", the provisions are as follows:

"Time limits for deprivation of the right to use licenses, professional practice certificates or suspension periods only specifically activate for a violation which is the average of the time frame of deprivation or suspension of operation specified in that act. In case there is an extenuating circumstance, the average reduction is applied. The average reduction is determined by halving the total of the minimum and the average. In case there are more than one extenuating circumstances, the minimum of the time limit shall be applied. In the case of both aggravating circumstances and extenuating circumstances, the principle of an aggravating circumstance is deducted for an extenuating circumstance."[35]

IV. Conclusion

The state of law must uphold the rule-of-law principle. The rule-of-law principle is to recognize the objective existence of the law, to ensure the supremacy of the Constitution and the law. That means state agencies, civil servants and officials are all bound by the law.[36] Not stopping there, the rule of law essentially requires the law to be published publicly, with clear content, no conflict, stability, predictability, feasibility, and general application for all relevant stakeholders reflect the values of social progress such as freedom, dignity, humanity, justice, democracy

[35] Cao Vu Minh, Issues in Need of Amendment under the Law on Handling of Administrative Violations in 2012, 1 *State and Law Review* 10, 12 (2019).

[36] Tran Thai Duong, Discuss the Concept and Principle of Rule-of-Law, 3 *State and Law Review* 4 (2017).

and human rights.[37] Therefore, the amendment of the Law on Handling of Administrative Violations 2012 and its guiding documents are related to the establishment and application of the extenuating circumstances is imperative to create a solid legal framework for the application of using these circumstances in the actual sanctioning of administrative violations, thereby creating a division of administrative responsibilities, promoting the educational value of the sanction and showing the law's humanitarian.

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PROBLEMS OF REALISATION OF PUBLIC OVERSIGHT IN THE FIELD OF TRANSPORT COUNTERTERRORISM POLICY

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Abstract

This paper is based on the analysis of transport, counterterrorism and public oversight statues law and common practice, examines legal points of using public oversight for the convenience of the transport counterterrorism safety precautions. Terrorism on transport networks is a problem which may hardly be combated beyond transport security, which, in turn, is constitutionally and legally grounded in the Russian Federation due to its high importance. For example, Article 71 of the Constitution of the Russian Federation classifies economic development, federal transport and rail transport, defense and security as falling under the jurisdiction of the Russian Federation. Public security protection,

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social security, environmental security, emergency prevention and response, including in transport services, are classified pursuant to Article 72 of the Constitution as falling under the shared jurisdiction of the Russian Federation and the constituent entities of the Russian Federation.

Keywords

Transport security; terrorist threats; safety of the transport system; transport legislation; public control

CONTENTS

1. Introduction

Transport services as a form of social activity entail carrying any given objects and involves the transportation of cargos, passengers, luggage, and postal items. Transport, accordingly, is viewed as a crucial branch of economy supporting the commodity exchange process. Simultaneously, transport is also a part of national economy and, unlike the production sector and agriculture, and is designated at moving the existing tangible objects (and not creating new ones), establishing and supporting ties among business entities. Transport is also viewed as a critical component of the national security system. Given a special role of transport, normal and optimal functioning of the transport system is important to the economy, national economy, socio-economic sector, and Russia's national security.

The aforesaid circumstance coupled with the vulnerability of the transport system, its exposure to numerous threats of various nature and levels, including terror threats which are of particular interest to us for the purposes of this research, trigger the necessity of ensuring security on transport networks, which, in turn, determines the need for

clear and full legal support and system-wide organizational alignment of activities in this domain.

As for the second component of the "transport security" category in question, it should be noted that Federal Law No 390-FZ On Security of December 28, 2010, contains no legal definition of the term "security." Previously, Law of the Russian Federation No 2446-1 On Security of March 5, 1992, which is no longer effective, defined security as the state of protection of vital interests of an individual, society and state against both internal and external threats.

Apparently, a lack of legal definition of this basic concept was bound to cause the emergence of numerous and highly diverse research definitions. Today's scientific approaches to understanding the term "security" which we find to be the most adequate are built on categories such as protection, threat (yes or no), ability, activity, attitude, etc.

However, most viewpoints are based on understanding security as sort of protection of a system (part, structural element of a system) against undesirable effects and threats.

2. Methods

The founder of humanistic psychology Abraham Maslow perceived the need for security as a basic motivation mechanism underlying the human activity.

The analysis of evolution of security connotations shows that it has been traditionally interpreted within the framework of commonplace perceptions. For example, Enlightenment philosophers Thomas Hobbes, John Locke, Jean-Jacques Rousseau, etc. construed security in their works as a state of calmness resulting from a lack of real, physical or moral danger.[4]

K. S. Belsky notes that the term "security" can be found in the works of legal scholars of the 18th and first half of the 19th century specialising

[4] N.N. Kunyaev, *Pravovoe obespechenie natsionalnykh interesov Rossiyskoy Federatsii v informatsi-onnoy sfere: avtoref. dis.... d-ra yurid. nauk [Legal support of the national interests of the Russian Federation in the information sphere. Author's abstract of Dr. Sci. (Law) Dissertation]* (2010) (Russ.).

in police law,[5] they wrote that security in the sense of protection its nationals (citizens) "constitutes as if the life and soul of the state."[6]

Jacques Georges Vedel defined security as the "activity aimed at preventing any danger which may jeopardize the team or individuals, ranging from the prevention of plots against national security to accident prevention."[7]

Broadly speaking, the term "security" as regards a certain social system can be perceived as follows: security is the state of a system protected against / resistant to potential/real adverse effects/threats. It becomes obvious that the classification of security types is possible or (for categorization purposes) necessary depending on the type of threats, the field in which the system functions, and the interests being protected. This conclusion seems to be critical to any subsequent analysis of the role of transport security in the system of different security types, a capture of its essence and the underlying principles.

As for the term "national security", the analysis of regulatory acts makes it possible to draw a conclusion about a dramatic change of approaches towards its definition as compared with the previously existing approaches, both domestic and international. Previously, it was used solely to define the state of being protected (as a nation) against the external military threats. For example, in accordance with the earlier National Security Concept of the Russian Federation (approved by Decree of the President of Russia No 1300 dated December, 17 1997) Russia's national security was associated with the security of its multi-ethnic population as the bearer of sovereignty and the only source of power in Russia. Foreign scholars of this period also associated the concept of "national security" with protecting a country against the external military threats. In this regard, J. Romm noted: "generally speaking, for many decades, the term "national security" was a synonym of military security. In contrast, at present this connotation

[5] K.S. Belskiy, *Politseyskoe pravo: lektsionnyy kurs [Police law: a lecture course]* 258 (2004) (Russ.).

[6] K.S. Belskiy, *Politseyskoe pravo: lektsionnyy kurs [Police law: a lecture course]* 9 (2004) (Russ.).

[7] Vedel G. *Administrativnoe pravo Frantsii [Administrative Law of France]* 466 (1973) (Russ.).

is increasingly questioned as the decreasing tension of the cold war coincided with growing concerns about diverse non-military security threats faced by America."[8]

In recent years, the evolution of the legal category of "national security" has evolved to be understood as the state of being protected (as an individual, society or state) against both internal and external threats, which state allows protecting constitutional rights, freedoms, decent quality of life and living standards for citizens, sovereignty, territorial integrity and sustainable development of the Russian Federation, national defense and security.

3. Results and discussion

Consequently, possible national security classifications depend on:

— first, the subject whose interests are to be protected. From this perspective, security should be divided at least into national, public, and personal security. More detailed classifications can possibly include territorial, corporate security, etc.;

— second, the interests to be protected against (potetial or real) threats. Possible types of security based on this criterion include social security (life and health, family, maternity, childhood, etc.), religious, financial, economic, defense (military, cross-border, mobilization, etc.) security. Naturally, more detailed classifications upon the same ground can possibly include geopolitical, domestic political, international, information, environmental, energy and, of course, transport security. Again, this is a non-exhaustive list.

The National Security Strategy of the Russian Federation approved by Decree of the President of Russia No 683 dated December 31, 2015, defines the national interests of the Russian Federation as the objectively meaningful needs of an individual, society or state for being protected and develop sustainably.

Praxeological analysis allows drawing an unambiguous conclusion that the problem of security protection has been transformed into specific national policies in different life spheres of the society and the

[8] Joseph J. Romm, *Defining National Security: The Nonmilitary Aspects*. 122 (1993).

state. Multiple interests to be protected, as well as adverse factors/ threats determine a variety of security types, further prescribed by legislation.

E.g., the terms used in Articles 37, 71, 74, 82 of the Constitution of the Russian Federation in addition to the "security" concept include: "security of state" (Articles 13, 55); "national security" (Article 114); "public security"; "environmental security" (Article 72); "security of citizens" (Article 56); "security of people".

Article 1 of the Federal Law on Security contains mentioning of the following types of security: security of state, public security, environmental security, security of an individual, and other types of security as provided for in the laws of the Russian Federation. Consequently, the list of security types both listed in the Constitution and specified in the Federal Law On Security is not exhaustive.

A legal definition of transport security is contained in Federal Law No 16-FZ On Transport Security of February 9, 2007, in which transport security means the state of protection of transport infrastructures and vehicles against any acts of unlawful interference. The goals of transport security are to ensure sustainable and safe functioning of the transport sector, protect the interests of an individual, society and state in the transport field against any acts of unlawful interference. However, recently, vehicles have been increasingly used to commit terrorist attacks.

It is noteworthy that there are still no legal definitions or complete definitions of the following terror threats:

— electromagnetic terrorism, i.e. powered electromagnetic radiation via networks, supply cables, on air;

— the employment of unmanned aerial vehicles;

— insider.

The 2030 Transport Strategy of the Russian Federation provides for achieving the goal of Transport System Security Protection, which would allow improving the security of transport services, flights and navigation, ensuring efficient operation of emergency rescue services, civil defense units, special services, achieving a safe level of functioning of transport infrastructures, raising the level of transport system conformity to the objectives of a country's military security, thus

creating the necessary conditions for the relevant level of nation-wide security and reducing terrorist risks.[9] It is further noted that "as part of achieving the aforesaid goal through a range of activities, the level of security of transport services, flights and navigation to be achieved is expected to comply with both international and national requirements. Owing to transport security, transport infrastructures will be better protected against wrongful acts, including of terrorist nature, which may jeopardize a safe and secure functioning of the transport sector."

It should be further considered that the long-term national transport policy priorities prescribed by the National Program of the Russian Federation for Transport System Development include, but are not limited to, a comprehensive security and stable functioning of the transport system, including the enhancement of transport security, the reduction of adverse environmental impacts of transport and transport transition to new fuel types.[10]

Security (the state of being protected) is ensured through the activity of the security system participants (security protection activity). For example, the law construes transport security protection as the implementation of a state-defined system of legal, economic, organizational or other measures in the transport sector in line with the threats of commitment of any unlawful interference acts.

It would be reasonable to include in the participants in the system of counter-terrorist security on transport networks not only government authorities exercising supervision and oversight, juridical persons, executives or other persons, but also civil society institutes. However, initially, the role of public control received mixed reviews. For instance,

[9] Transportnaya strategiya Rossiyskoy Federatsii na period do 2030 goda, utverzhdennaya rasporyazheniem Pravitelstva Rossiyskoy Federatsii ot 22 noyabrya 2008 g. № 1734-r [The transport strategy of the Russian Federation for the period until 2030, approved by the order of the Government of the Russian Federation of November 22, 2008 No 1734-r].

[10] Postanovlenie pravitelstva RF ot 15 aprelya 2014 g. № 319 "Ob utverzhdenii gosudarstvennoy programmy Rossiyskoy Federatsii "Razvitie transportnoy sistemy" (s izm. ot 31 marta 2017 g.) [Decree of the Government of the Russian Federation of April 15, 2014 No 319 "On approval of the state program of the Russian Federation Development of the transport system" (as amended on March 31, 2017)], Sobranie Zakonodatelstva RF [Collection of Legislation of the Russian Federation], 2014, No 18 (Part III), art. 2165 (Russ.).

some authors objected against granting any rights to the general public.[11] Apparently, in such cases the rights and powers which are essential to any practical activity within the limits of formulated tasks get mixed with the rights to directly take corrective actions in respect of those who committed discovered omissions or violations from the government authorities to which public authorities render assistance. There is a need for broader positioning of the transport security problem in the society, distribution of powers and liability between the state and civil society.

Control is a critical area of activity for civil society institutes. The shaping and development of civil society institutes designated to counter-balance the power of state have to do with improving the nature of control of government authorities' activity.

It should be noted that applicable Federal Law on the Fundamentals of Public Control in the Russian Federation No 212-FZ[12] of July 21, 2014 (hereinafter "212-FZ"), when defining in Part 1 Article 4 public control as "the activity performed by public control subjects for the purposes of monitoring the activity of government authorities, local governments, state-owned and municipal organizations, other authorities or organizations exercising certain public powers under federal laws, as well as for the purposes of public audit, analysis and public assessment of their published acts and adopted decisions" relies on a somewhat different understanding of the objects and, most importantly, the subject of public control.

Therefore, it seems possible to argue that the subject of public control (under 212-FZ) can be defined as the activity of supervised authorities and organizations related to the exercise of public powers and, as emphasized by the provision of the Law, "their published acts and adopted decisions." Apparently, this kind of special emphasis on

[11] A.P. Alekhin, K voprosu o roli obshchestvennosti v upravlenii zheleznodorozhnym transportom [On the role of the public in the management of rail transport], 3 *MSU Vestnik (Law)* 26–34 (1962) (Russ.)

[12] Federalnyy zakon ot 21 iyulya 2014 g. № 212-FZ "Ob osnovakh obshchestvennogo kontrolya v Rossiyskoy Federatsii" [Federal Law of July 21, 2014 No 212-FZ "On the Basics of Public Control in the Russian Federation"], Sobranie Zakonodatelstva RF [Collection of Legislation of the Russian Federation], 2014, No 30, part I, art. 4213 (Russ.).

a public power of the above-mentioned authorities and organizations has no legal meaning since the "issue of acts", not to mention "decision making", are an inherent and significant component of public powers. Apparently, a special focus is aimed at explaining more significant areas of public control and the applicable forms of control.

The legal definition of public control contained in Article 4 212-FZ, namely: "the activity performed by public control subjects for the purposes of monitoring the activity of government authorities, local governments, state-owned and municipal organizations, other authorities or organizations exercising certain public powers under federal laws, as well as for the purposes of public audit, analysis and public assessment of their published acts and adopted decisions," despite its practical value, is not intrinsic in nature and does not disclose the signs of this phenomenon with the necessary level of detail.

Apparently, a lack of theoretical legal concept of public control gives rise to numerous misapprehensions adversely affecting not only the theoretical part of the issue, but also the practical aspect of legal regulation by kickstarting conceptual confusion with all that it entails. Undoubtedly, a clear and unambiguous definition of processes and phenomena of legal sense is a fundamental issue of legal science, being a methodological and general issue subject to scientific apprehension and subsequent legalization in positive law.

The exercise of public control is controlled by a special law and other regulations.

The objects of public control include, but are not limited to:

— activity in the field of national defense and security of state, social security, and public security protection;

— activity of the police, investigative agencies, prosecutor's offices, and courts;

— enforcement related activity;

— control of traffic in narcotic drugs and psychotropic substances;

— maintenance of orphans and children abandoned by their parents;

— mental health services, etc.

Article 9 of the Federal Law "prescribes that the subjects of public control include and be limited to:

— Public Chamber of the Russian Federation;

— public chambers of the constutuent entities of the Russian Federation and municipalities;

— public councils under federal executive authorities, public councils under legislative (representative) and executive authorities of the constituent entities of the Russian Federation.

This is an exhaustive list, but Article 3 212-FZ expressly entitles citizens, public associations or other non-governmental non-profit organizations to participate in exercising public control "in accordance with this Federal Law or other federal laws" by granting the latter, inter alia, the right to act as the organizers of public control forms, such as public monitoring, public consultation, or participate in exercising public control in such other forms as prescribed by this Federal Law. Moreover, the general rule is that participation of citizens in exercising public control is treated as an activity mediated by the exercise of powers of public controllers or inspectors.

4. Conclusion

Public control of security protection in the relevant fields is provided for in a number of special regulations.

For example, public associations are entitled to exercise public control of compliance with the applicable rules, standards, and regulations in the radiation security protection field.[13]

Public control in the environmental protection field (public environmental control) is exercised for the purposes of exercising everyone's right to enabling environment and the prevention of violations of environmental laws. It is exercised by public associations or other non-profit organizations in accordance with their articles of associations, as well as citizens under the applicable law.[14]

[13] Federalnyy zakon ot 9 yanvarya 1996 g. № 3-FZ "O radiatsionnoy bezopasnosti naseleniya" (s posl. izm. i dop.) [Federal Law of January 9, 1996, No 3-FZ "On Radiation Safety of the Population" (with the last amended and supplemented)], Sobranie Zakonodatelstva RF [Collection of Legislation of the Russian Federation], 1996, No 3, art. 141 (Russ.).

[14] Federalnyy zakon ot 10 yanvarya 2002 g. № 7-FZ "Ob okhrane okruzhayushchey sredy" [Federal Law of 10 January 2002 No 7-FZ "On Environmental

Certain provisions concerning public control are also contained in the applicable subordinate regulatory acts and by-laws in the transport field, including rail transport. These include the provision prescribing that arrangements be made for the exercise of public control in port by a public health and safety inspector elected from among trade union members or staff members, entailing the recording of all detected defects and corrective actions aimed at creating safe and healthy working conditions, the improvement of organizational aspects of preventive actions and operational control of compliance with the applicable health and safety standards and regulations by all employees.[15]

Paragraph 10.3 of the Decree of the Ministry of Railways of the Russian Federation on Rail Traffic Security Protection Measures further provides for a mandatory search for and implementation of new forms of public control, every possible effort to ensure the use of monetary and non-monetary incentives to encourage traffic security protection.

However, it is fairly obvious that there is no proper regulation of public control in the field of transport security and security on transport networks. It is hardly possible to claim the existence of a necessary system or at least a group of interrelated legal norms prescribing general provisions, public control policies and procedures in the transport security field. The above entails the need for developing scientifically grounded proposals for laying a legal foundation for public control in the transport security field.

As we see it, significant areas of activity of civil society institutes in the transport security field also include the establishment of transport associations, specialized public funds involved in transport security protection. Their highly important efforts encompass participation in coordinating interactions among transport security subjects, awareness raising, training, promotion and campaigning in general and among certain population groups. The necesity of establishing an authority

Protection"], Sobranie Zakonodatelstva RF [Collection of Legislation of the Russian Federation], 2002, No 2, art. 133 (Russ.).

[15] Pravila po okhrane truda pri vypolnenii peregruzochnykh rabot v rechnykh portakh, utv. Mintransom Rossii 30.12.1999 (POT RO-00030171-99) [Rules for labor protection in the performance of reloading operations in river ports, approved], Ministry of Transport of Russia on 30.12.1999 (POT RO-00030171-99), 2012 (Russ.).

performing coordination roles in the transport security protection field is obvious.

Consequently, preconditions for counter-terrorist transport security protection include its further conceptual and methodological apprehension based on doctrinal approaches, as well as the development and scientific substantiation of proposals for the improvement of transport security and counter-terrorist security regulation. Analysis further shows that the potential of civil society institutes in the field of counter-terrorist transport security protection remains underutilized to a proper extent and even understudied and under-identified, thus causing the urgent need to apprehend possible areas and forms of participation of public associations and the associations of juridical persons in the efforts to combat transport terrorism.

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2. Belskiy K.S., *Politseyskoe pravo: lektsionnyy kurs* [*Police law: a lecture course*] (2004) (Russ.).

3. Kunyaev N.N., *Pravovoe obespechenie natsionalnykh interesov Rossiyskoy Federatsii v informatsionnoy sfere*: avtoref. dis... d-ra yurid. nauk [*Legal support of the national interests of the Russian Federation in the information sphere. Author's abstract of Dr. Sci. (Law) Dissertation*] (2010) (Russ.).

4. Platonov I., *Vstupitelnye ponyatiya v uchenie o blagoustroystve i blagochinii gosudarstvennom [Introductory concepts in the doctrine of landscaping and deanery of the state]* (1856) (Russ.).

5. Romm J. Joseph, *Defining National Security: The Nonmilitary Aspects*. 122 (1993).

AT THE FOREFRONT OF LEGAL RESEARCH

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BIG DATA FOR LAWYERS: HOW TO USE AND REGULATE?

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Abstract

This paper is a research on using a big data analysis for lawyers, attorneys and law firms. Big data is a new gold — has been noticed in media and many conferences. Today big data is driven by digital transformation. It helps to analyze a huge amount of data, creates opportunities for increasing performance and gets competitive advantage for private and public sector.

A legal regulation of big data is still under the question in many countries. The main aspect and confusion are privacy concerns. Meanwhile, big data analysis actively used by governments, private and public market players. The market offers different legal tech innovations, software for analyzing big data and methods that we review in the article. Interestingly, there are different tools and application of big data for lawyers; and this what each legal professional must know.

In this paper we are observing some aspects of using big data analysis for legal ndustry and discussing issues of legal regulation. We provide some practical ways on application of big data analysis for legal professionals. Some insights in this article adopted from

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author's previous research made during the study in the Maastricht School of Management based in the Netherlands. The research is partly published in the Second Edition of Global Legal Insights AI, Machine Learning & Big Data in 2020.

Keywords

Big Data, digital economy, digital law, AI, regulations, legal profession, legal technologies

CONTENTS

1. Introduction

Modern economic theory has an assumption that economy develops by cycles.[2] Today we are living in a new cycle, the so-called Industry 4.0. that leads to change of the process of creating additional value: using more mechanization and automatization process.[3] We

[2] N.D. Kondratiev, Die Langen Wellen der Konjuntur, Arch. Sozialwiss. 56 (3) *Sozialpolitik* 573–609, in: Kondratiev and the dynamics of economic development: long cycles and industrial growth in historical context (Barnett V., Springer, 2016). at 127–130.

[3] *See* K. Schwab, *The fourth industrial revolution*. Geneva: World Economic Forum (2016).

are observing deeper automatization, using modern information and communication technologies that lead to the so-called digitalization process.[4] Particularly, data is generated from different sources and technologies. A new generating data creates an opportunity to analyze it by applying technologies. The power of big data is in its massive reserves that is generating every day by each person, organizations, government bodies, courts etc.

Data analysis allows us to automatize gathering big data and analyze it in order to make necessary conclusions and predictions. It is necessary to say that big data analysis helps us to optimize our life and work processes. Lawyers are well familiar with one side of optimization process by using popular legal databases (e.g. Consultant Plus, Garant, LexisNexis, Westlaw etc). However, the other side is an availability of algorithms, software and analytical techniques that can help to perform "intelligent" solutions. One of such algorithms is a text analytics. Merging text analytics algorithms with machine learning could extremely increase effectiveness of lawyer's work.

Technologies can increase productivity and quality of life in terms of working conditions and work flow. Big data provides new research methods that could be used for effective decision making process. At the same time, there is an issue of legal regulation of such data and protection rights. Anticipation of technology by lawyers and legislators are costly for business and society. Meanwhile, the transition to digital economy is connected with high demand for qualified lawyers who could help legislators and businesses. In these terms, it seems obvious that modern lawyers and legislators should understand Industry 4.0 dynamics and, particularly, use the big data technologies and understand the scope of legal regulations.

In this paper we analyze big data application in the legal field by private and government sector. We define how big data could be used to improve the effectiveness and performance of the organisation by using big data models and algorithms.

[4] *See* M. Hirooka, *Innovation dynamism and economic growth: A nonlinear perspective*. Edward Elgar Publishing (2006).

2. Big Data is new gold

We cannot ignore the fact, that the idea connected with big data, i.e. that it will change everything, is a hype. Statistical approaches were developed a long time ago and used by scientists to make conclusions about the research subject. Paraphrasing Marx, we could say that statistical approach used by scientists was a way to interpret the world, in a different way. The point, however, is to predict it. Big data allows to predict customer's behavior, market tendency, find discrepancies, similarities or even more — help with decision making. The study of successful companies that use big data shows us cases of gathering, storing and analyzing data by means of new ways. According to Marr,[5] there is a prediction, that every human will generate 1.7 megabytes every second by using devices, internet, GPS systems, photos and videos. Completely new approaches to analyzing and storing data make this process even faster. Specifically, cloud technologies and distributed computing tools could help to store and analyze the data. Some modern algorithms, such as speech and photo recognizing systems connected with artificial intelligence, machine learning create new possibilities to analyze the data and make predictions. Thus, digital development provides us with a myriad of tools to gather and analyze data, the so-called big data.

Big data itself could be characterized as a set of extracted information that could be analyzed by special software (e.g. Hadoop, Tableau, Microsoft Azure etc.). Doug[6] proposed to associate big data with the following key concept: (i) *volume* (big data has a huge volume of information), (ii) *variety* (there are different data sets with structure or without it), and (iii) *velocity* (high speed of gathering data, analyze and get results from it). These key features with possibility to use technology or software to analyze big data, allows to transform it into

[5] B. Marr, *Big data in practice: how 45 successful companies used big data analytics to deliver extraordinary results*. John Wiley & Sons. New York, 113 (2016).

[6] L. Doug, *3D data management: Controlling data volume, velocity and variety*. META Group Research Note. 6 (70) (2001). https://blogs.gartner.com/doug-laney/files/2012/01/ad949-3D-Data-Management-Controlling-Data-Volume-Velocity-and-Variety.pdf

value.[7] We believe that value here is not just a result of big data analysis with conclusions. It is more about evaluating patterns, for example, for business intelligence, eDiscovery, text analytics, legal case predictions and so on. At first glance, it could be a presumption that things are not connected, but analyzing them we can got an idea about specific pattern.[8] Data visualization allows us to read and understand the data transformed from long technological analysis to simplified conclusion. There are a lot of cases where big data is applicable for legal purposes. In addition, big data analysis is applicable in such fields as government and social security, education, banking, money laundering prevention, due diligence, customer relationships and billing for law firms etc.

3. The law and Big Data

At first glance big data associates more with data analytics related to STEM (science, technology, engineering and mathematics) disciplines. However, a lot of unordinary ways to use and apply big data are already known. Some companies got a competitive advantage by using big data. Thus, we do not associate big data analysis exclusively with data analytics or engineering.[9] We review big data analysis as an opportunity for lawyers and undefined field for legal regulation.

Legal field is complicated because it mostly deals with government regulation. Governments actively use big data analytics for national security, economic research, urban planning and even tax policy. In 2015 Russian tax authorities introduced Automated control system VAT-2 that analyzes information gathered from value-added tax declarations in order to find tax evasion schemes. This system made it possible to reveal tax evasion schemes and create obstacles for breach of law connected with false VAT declarations submitted by taxpayers. Russian government is also gathering data for analyzing and identifying productivity of its

[7] A. De Mauro, M. Greco, M. Grimaldi, A Formal definition of Big data based on its essential Features. 65 (3) *Library Review* 122–135 (2016).

[8] A Maheshwari, *Business intelligence and data mining*. Business Expert Press. New York. 4-6.2014.

[9] S. Miller, Collaborative approaches needed to close the big data skills gap. 3 (1) *Journal of Organization design* 26–30 (2014).

bodies. The government's data is available on Open Source web-site.[10] The AVATAR system used by US immigration and customs can use video and audio sensors to make probabilistic judgements about a person — whether he lies, has dangerous behavior or is hiding something. Big data United Nations Global Working Group unifies countries in order to develop new solutions and share experience on Big data analytics. United Nations Program Global Pulse helps countries implement innovations connected with Big data and develop policies. Governments actively use modern technological trends by cooperating with private sector. Russian tech-startup FindFace could analyze a database of social networks and find any person by face recognition. In 2018 the project was closed for public users due to the government project on finding solutions in face recognition. The possibility of data analytics to analyze and recognize myriads of people having personal profiles on social websites is a field for long legal debates. In this respect, modern lawyers should understand legal regulation of big data.

At the end of 2019, a first step toward legal regulation was made by the Russian legislator. Particularly, a new Article 783.1 of the Civil Code provides that parties may enter into the agreement on provision of information. Such an agreement can content an obligation of a party not to disclose such information to third parties. Before this amendment business used an agreement on provision of information and data based on the legal doctrine of "freedom of the contract". Meanwhile, there was a risk of breaching legislation on personal data. The reason is legal uncertainties. Big data is the impersonalized information, however, in order to gather it sometimes you need to process the data. Upon gathering and processing the data it usually transmitted to other party for analysis. In this case we got a debate on whether we need to notify a person or other third parties while processing and analyzing the data. One could argue that non-disclosure agreement could be incorporated in the terms and conditions on the agreement on provision of information (big data). However, we can keep the information or agreement as confidential, but the law and case law do not provide us with certain position on this issue. In this respect the new article in the Civil Code

[10] Open Data Portal Russia. https://www.data.gov.ru.

seems a kind of signal to market for being protected by the statute while exchanging big data or providing it to third parties.

Big Data is recognized by practitioners as impersonalized data. However, personal data regulation is very strict in Russia. At the end of 2019, penalties for breach of personal data law were increased. In particular, these penalties were connected with a breach of law on the localization of personal data. Russian law requires the localization of personal data on Russian citizens on servers situated in the Russian jurisdiction. Any breach of this provision may lead to a penalty and ban in Russia. LinkedIn failed to comply with the regulation and was banned upon a court decision. In 2019–2020, the Russian authority Roskomnadzor (Federal Supervision Agency for Information Technologies and Communications) started court proceedings against Twitter and Facebook. Upon the court decision, a penalty was imposed on both Twitter and Facebook. Twitter appealed to the court but was unsuccessful. Failure to comply with laws on personal data may lead to a ban of service in Russia. LinkedIn was banned and lost the entire Russian market and is today almost unknown in the region. It is advisable to have a legal compliance team and to cooperate with Russian authorities.

The main difficulties for big data deals is personal data regulation. Today, the regulation is very broad and personal data-processing rules apply. However, we have seen common practice which involves many market players asking customers to consent to the processing of personal data that includes big data analytics (data anonymization and transfer of data). Gathering big data in compliance with personal data regulation is a good policy for companies. Due to legal uncertainties concerning the definition of big data, the best way to process and acquire personal data would be to proceed in compliance with the personal data law in Russia.[11]

The process of gathering data also poses a question on privacy concepts. Whether is it good to gather information from the devices and make predictions on people's life? On the one hand, big data analysis is a blind-based analysis without specific personalization. On the other

[11] Rustam Rafikov, Artificial intelligence / big data trends and considerations under Russian law. AI, *Machine Learning & Big Data*. Global Legal Insights. Rafikov & Partners ((Berkowitz M., Thompson J. eds, 2nd edition, 2020).

hand, by segmenting people we can perform behavioral prediction of a particular group of people. People usually do not think about the flaws of big data and ready to sharing it till the moment, while such big data presents useful information. Whether the law should protect people? It seems reasonable that the law should require consent on gathering and sharing even impersonalized data. If so, then what can we do when we perform ex-post analysis using existing data? Some authors argue that such approach could be used in legal predictions of cases by analyzing case law. Simply speaking, we can create a system for automatically performed judgments. However, all analyses based on mathematical or statistical models are simplified analyses based on theory and interpretations of results.[12] In this case we need human's judgment on specific case details and evidence.

The overall technological improvements and results of using big data create more and more questions for legislators. Meantime, big data is a tool for improving effectiveness and decision making process. In this regard, modern lawyers must understand ways to apply big data analysis in their routine work.

3.1. Big data for legal industry

3.1.1. Case analysis

Today most of court decisions are published in government sources or available through computer-assisted legal research software. Lawyers analyze court decisions in order to understand possible case outcome, find main rulings (precedent, case-law), judge's style or even find correlations of law enforcement. Usually law firms buy access to the software and delegate this work to paralegals, trainees. The case analysis made by legal automated systems using big data analytics could help to perform text analytics and do link analysis in order to find correlations and patterns. It is more important for lawyers from common law countries, where case law principle is a cornerstone. Meantime, understanding patterns in order to understand practice of

[12] C. Devins, T. Felin, S. Kauffman & R. Koppl, The Law and Big Data. 27:357 *Cornell J. of Law and Public Policy* 371–382 (2017).

law enforcement could help law firms evaluate the case, its difficulty and possible needed time and resources. Understanding time and labor costs for a specific case could help to offer adequate price for customer.

3.1.2. eDiscovery

People communicate electronically. They use e-mails, chats, create and sign documents, use databases. Sometimes lawyers need to find evidence of entering into the contract, evidence of having communication about specific subject or find a fact of sending information to someone. All acts in computer systems or web are connected with creating footprints, such a metadata. People change information on their devices through workflow or intentionally, they also remove and destroy it. However, metadata is a part of the information that does not appear, but can be retrieved from the file.[13] The process of retrieving the information is an analysis of Big data in order to find the fact (pattern) or the document. Exploring database of a client during due diligence, lawyers could need to find specific metadata in billions of emails or documents. Clustering diverse information and presenting it using visualization could help to finalize due diligence process and evaluate risks for the client. The same could be said about law firm itself. Finding an essential document, e-mail, picture or any file created by employee in order to evaluate someone's effectiveness or quality of work is a necessary part of management.

3.1.3. Text analytics

Analyzing huge amounts of typical documents in order to find discrepancies and patterns could be an interesting option for law firms. Today many technologies companies are working on text recognition and text analysis. Law firms can use technologies for analyzing legal documents. Litman-Navarro[14] has analyzed length and readability of 150

[13] S.C. Bennett & J. Cloud, Coping with metadata: Ten key steps. 61 *Mercer L. Rev*. 471 (2009).

[14] K. Litman-Navarro, We Read 150 Privacy Policies. They Were an Incomprehensible Disaster. *The New York Times* (2019). https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html.

privacy policies from popular tech companies. Using Lexile software, the researcher measured text's complexity and its difficulty for easy or hard understanding (see Figure 1).

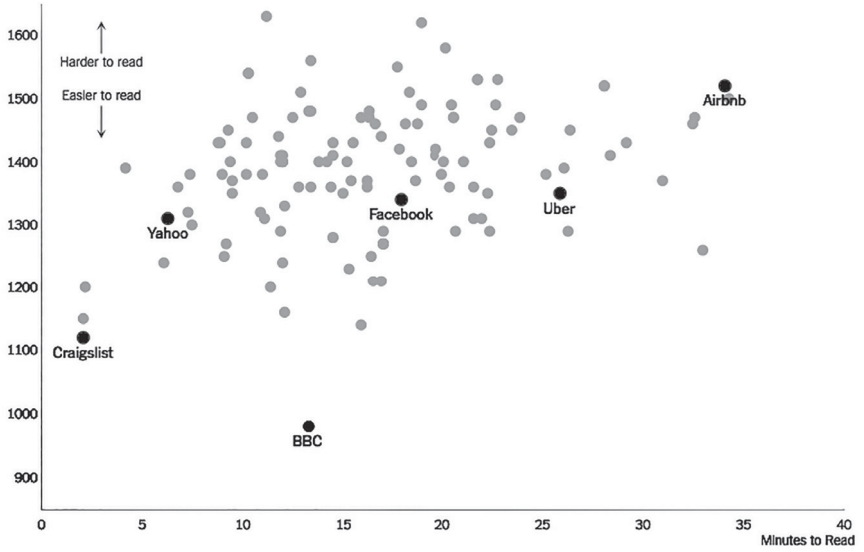

Figure 1. Text analytics of different privacy policies (Litman-Navarro, 2019)

The applied link provides the analysis by researching all versions of Google privacy policies. Litman-Navarro found that Google changed policies by making it easier to understand (see Figure 2). This is a very practical study that shows how Big data analysis applies to text analytics and could help law firms to succeed. Instead of using huge number of documents, get people compare them, it is easier to automatize the whole process.

Another broad application of text analytics is an ability to search cases and legal acts for law firms. In order to perform Big data text analytics, we need to gather documents, structure the matrix and apply data tools, such as finding patterns, classification and cluster analysis.[15] The analysis of previous cases could help to predict case outcome and

[15] A. Maheshwari, Ibid. 127–128.

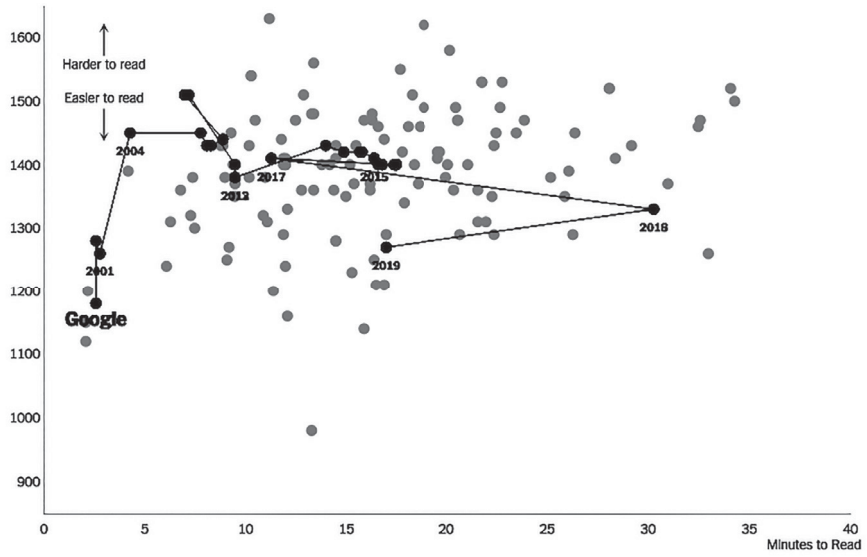

Figure 2. Link analysis of Google privacy policy (Litman-Navarro, 2019)

estimate litigation costs. Washington University professors tested an algorithm for forecasting Supreme Court decisions.[16] The research showed that statistical method revealed better results than lawyers. The similar algorithms predicted 79 % of case outcomes of the European Court of Human Rights.[17] Particularly, in some specific cases predictions made by algorithms were higher than made by legal experts. This shows that prediction analysis could be enhanced and developed to deliver better quality.

Additionally, text analysis on e-discovery stage could be presented to a judge in order to proove evidence by applying mathematical models and text analysis outcome. However, this method should be clearly evaluated in order to be qualified and verified for a judge's decision. As

[16] T.W. Ruger, P.T. Kim, A.D. Martin & K.M. Quinn, The Supreme Court forecasting project: Legal and political science approaches to predicting Supreme Court decision-making. *Columbia Law Review*, 1150–1210 (2004).

[17] N. Aletras, D. Tsarapatsanis, D. Preoţiuc-Pietro & V. Lampos, Predicting judicial decisions of the European Court of Human Rights: A natural language processing perspective. 2 *PeerJ Computer Science* 93 (2016).

Scholtes and van der Herik pointed: "The first generation of e-discovery technology taught us how to deal with big data, the next generation will teach us how we can learn from big data and train our algorithms to provide better decision support and ultimately, on the condition it is properly fenced, defensible and understood, make better decisions by itself."[18]

Text analytics can help with due diligence process where lawyers need to analyze a huge number of documents in order to find discrepancies or legal risks. In my personal practice I have done a huge job on document review and analysis. We completed a checklist to discover possible risks for clients. However, some modern tools evolving data analysis can automatize the routine work. For example, Kira System software provide tools to analyze different legal documents and create patterns for future link analysis. Need to say, there are a lot of software that can help law firm to use Big data analysis and enhance productivity by automatization.[19] Most of software providers associated with legal technologies develop the trend on the automatization for legal field. Automatization of legal field mostly concerns the private sector, lawyers, attorneys that can use big data and technology for better performance.

4. Big Data for lawyers

Law firms have different set of data that could be used in order to create big data model. Some data available in external sources, such as government sources and legal databases. If law firm uses cloud technology, the documents that are uploaded there could be analyzed as well. Additional internal sources of data available for the analysis are firm's customer management systems, billing software, intranet etc. These sources allow them to gather data about customer satisfaction,

[18] J.C. Scholtes & H.J. van den Herik. *Big data Analytics for Legal Fact-Finding* (May 18 2019). Maastricht University. https://textmining.nu/2019/05/18/big-data-analytics-for-legal-fact-finding/.

[19] E.A. Rayo AI in Law and Legal Practice — A Comprehensive view of 35 current applications (May 20 2019). *Emerge Artificial Intelligence Research*. https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/.

billing time and provide ways to analyze customer segmentation, time spent for projects and employee's effectiveness.

In order to create algorithms for analyzing big data, law firm should apply some theoretical approaches. By using theoretical approaches, law firms could create big data model.

4.1. Decision trees

A classical approach of discussing a legal problem with the client is to ask questions. A lawyer will continue asking question till the moment when he finds a reasonable decision. A reasonable decision comes from the past experience, educational background and practice. There is an algorithm where the gathered data in the form of answers to specific questions applies to some rules and practical experience. Thus, we can choose some variables — a number of question needed to be answered. Analyzing documents during due diligence process, we could input specific questions in order to find similarity or patterns. For example, there could be the following questions for company due diligence (see Figure 3).

Director is disqualified	*Legal address*	*Tax debts*	*Shareholders*	*Charter capital*
yes	no	yes	Offshore	No paid
no	yes	no	Residents	Paid
yes	mass address	no	Foreign	No documents (no paid)

Figure 3. Decision tree questions

Having received the answers to these questions we compare them with some past experience and past decision — whether it is good to have unpaid charter capital or no evidence of its payment? We can also enlarge particular questions, e.g. how much is tax debt — more than 5 000 EUR or less.

The issue here is to create hierarchical structure of the tree — from less important questions to most important. If all the less important questions are positive, but most important is negative, than we have

to decide whether it is a risk or not? In this case, the decision tree should be divided again to different decisions. The results with less risk should be the right decision. Researchers use various decisions algorithms. Some algorithms have more and more splitting or stopping criteria or help to prune a decision tree at the specific moment.[20] The decision tree should reflect the desire outcome of the data analysis. Thus, developing a decision tree model we need to evaluate questions that should be asked and algorithms of finding a right decision.

4.2. Cluster Analysis

Clustering helps to group and segment different things to the right order. In this method we do not find right decision, we just segment data for creating conclusion. Researcher just need to understand how many clusters should be created. Law firms could easily adapt cluster analysis to segment type of projects and understand which practice is more profitable or where more time has been spent. Lawyers can cluster cases or legislation to find better presumptions. These results could be used by law firms in order to prepare analysis of specific situations (e.g. making newsletters or legal alerts for clients)

The broad application of clustering technique is a text analysis. Law firms could analyze documents in order to find similarities or discrepancies for specific topics. For example, they applied clustering methods in the above case of analyzing 150 confidential policies by technological firms. In order to create a cluster model, law firms should define the scope of specific cluster. It is people who prepare documents, thus lawyers use different approaches and techniques. In this case, we need to find patterns taking into account different techniques, legal formulas and expressions in the text. Clustering method could be strengthened by applying new models for machine learning: finding better ties and distance in data.

4.3. Survival analysis

The survival analysis helps to find out where the risk event could occur. A law firm can create some patterns that could signalize about several risks. For example, gathering data from internal sources of law

[20] A. Maheshwari, Ibid. 63–76.

firm, we can find grammar errors in our legal opinions, patterns that lead to a wrong model of a document. High-standard law firms have internal scripts for documents: it's format, specific disclaimers etc. Survival analysis could help to find discrepancies in order to prevent risks for the firm.

The algorithm can also predict the situation, where no updates made for specific case or project. This could be a signal for potential loss of a client or missing a deadline. Survival analysis should incorporate specific models and gather data from internal or cloud sources to help a law firm to get competitive advantage in customer's satisfaction.

5. Conclusion

In our research, we identified possible ways of big data models and algorithms usage for legal field and especially for lawyers, attorneys. We have concluded that using big data could increase effectiveness of a law firm and enhance performance of attorneys and lawyers. Using big data models could help to get competitive advantage for law firms. We tend to advice to use software available on the market and research additional ways of using big data analysis. As far as a big data a new gold, lawyers, government and firms should actively engage in applying new technologies.

Our study shows interesting application of big data not just as competitive advantage, but also for effectiveness of organization and cost reductions. Another finding is that using big data models by law firms could increase customer relationship, provide tools for case analysis and enrich law firm's market research (e.g. for case perspectives).

Surprisingly, there is a huge amount of data available for lawyers to analyse (e.g. government sources, databases etc). These data could be used to make better decision, make lawyer's work more effective and even play a cost reduction role. In this connection, we recommend to review data analysis tools and solutions on the market for analysing big data for any law firm despite of its size and for any practicing or researching lawyer.

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THE JUDGMENT OF SPORT JURISDICTION BODIES ON DOPING CASES

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Abstract

This paper studies how sport jurisdiction bodies encounter doping cases when they are called upon, hear the parties involved, and decide in the first or second instance on the sanctions imposed. In any case, the attitude of the sports authorities plays a crucial role not only in the implementation of the regulations, the issuance of decisions and therefore the creation of Lex Sportiva, but also in the attitude of the sports community towards doping. The present study is based on the use of interpretive and jurisprudential review as the core of the methodological approach. Then, there is a comparison between the decisions of the National and International Federations, the WADA (World Anti-doping Agency) and the decisions of the CAS. (Arbitration Court for Sports). The research showed how the attitude of the bodies differs not only in the severity of the crises but also in the imposed sanctions. Through CAS decisions, it is clear that as the authority of the bodies increases, so does the rigor they display. In particular, WADA always appears stricter in doping cases and often brings them before CAS demanding stricter sanctions than those already in place. On the other hand, the International Federations often appear less strict, while the national federations often show

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the most lenient attitude. Furthermore, there is a difference in the decisions and argumentation of CAS, which comes either from the different legal culture of the referees or from the more tolerant interpretation concerning the athlete objective responsibility. In short, it is observed that the treatment of doping cases lacks stability.

Keywords

Sports; sports law; doping; sport bodies; sport jurisdiction; Court of Arbitration for Sport; WADA

CONTENTS

1. Introduction

There is no doubt that victory is the sole purpose of top level sport. On this basis, many athletes, in order to improve their performance and achieve victories, resort to doping.[3] It is well-known that doping not only threatens the athletes' health and well-being, but also corrupts fair competition, promotes fictitious patterns, and enhances the degeneration of the athletic ideal.[4] In the field of international and national sports law, sport and political bodies are in a constant effort

[3] N. Cox, Victory with Honour or Victory at All Costs: Towards Principled Justification for anti-Doping Rules in Sport, 22 *Dublin ULJ* 19 (2000).

[4] Dimitrios P. Panagiotopoulos, Zografenia Kallimani**,** Implementation of WADA Code in the Greek Sports Legal Order, IV(1-2) *e-Lex Sportiva Journal* 135–139 (2016).

to combat and limit this ever-growing phenomenon. As a whole, doping cases are addressed to the competent sport courts, which are called upon to impose sanctions, to hear the parties involved, or/and to adjudicate in second instance on appeals.[5] Several cases override athletic jurisdiction and are brought before civil courts as well.[6] In all cases, the approach of the sport governing and judicial bodies plays a crucial role in the implementation of lex sportiva and the ruling process, but also in the attitude of the sports community towards doping and the methods of combating it. Thus, the purpose of this research is not to comment on the verdict of the CAS (Court of Arbitration for Sport), but, to highlight and interpret the different approach in the judgment of sport bodies, by presenting and comparing their positions and arguments in doping cases.

2. Combating Doping

WADA (World Anti-Doping Agency) defines doping, as a criminal act of possession, manipulation, use or attempted use of substances and methods as defined and prohibited by WADA, as well as behaviors that obstruct or violate the sampling and control procedures prescribed by the Code, and any possible complicity or association with persons accused of doping.[7] The WADA Code and the UNESCO International Convention against Doping, together with the regulations of the International Olympic Committee, are the cornerstones of the entire sports community in combating doping. These provisions define both the regulations of the international and national federations, and the relevant national legislative acts. It is worth noting that over the years there has been a more harmonized relationship between the Code and the regulations of the federations. However, there are often divergences between federations and international sports organizations. These divergences are identified at two levels: (a) the severity of the judgment,

[5] T. Kavanagh, The Doping Cases and the Need for the International Court of Arbitration for Sport (CAS). 22 *UNSWLJ* 721 (1999).

[6] D. Panagiotopoulos, International Sports Rules' Implementation-Decisions' Executability: The Bliamou Case, 15 *Marq. Sports L. Rev.* 1 (2004).

[7] WADA World Anti-Doping Code, art. 2, at 17–24, 2015.

and then consequently (b) the imposition of the sanctions envisaged. Both categories of divergences appear mainly when a doping case arrives at the judicial bodies, and in particular in front of the CAS, where the intentions of the sport bodies can be observed through their testimonies. In this view, there has been a comparison of the decisions and positions of National and International Federations and the WADA through the jurisdictional committees and before the CAS. The comparative criteria for interpreting the judgment of each institution are the argumentative approach and the proposed sentences. Below are presented some examples which support these arguments.

3. International bodies vs national bodies

3.1. The case of Irene Kokkinariou[8]

Very often there is a lack of cohesion between the national and international jurisdictional organs. The case of the Greek swimmer Irene Kokkinariou reveals this incoherency. The athlete participated in the official athlete's biological passport program (ABP), and was found guilty of doping offenses, there was a difference between the SEGAS and IAAF judgment.

The facts

Specifically, after examining four 2006–2009 samples taken in the context of hematological parameters and nine samples in the period 2009–2011 under the ABP program, abnormal blood values were found in the athlete's samples; the IAAF post-mission expert report called on her for explainations. The athlete's explanations were insufficient and the IAAF informed her through SEGAS that she would be sentenced to a four-year sentence under IAAF Rule 40.6, which applies to aggravating circumstances that may increase the penalty period. SEGAS briefed the sportswoman on the IAAF decision, citing part of the regulation stating that if convicted, the sentence would be reduced to two years. The athlete denied the allegations and requested a hearing from the SEGA Disciplinary Committee.

[8] *See* CAS 2012/A/2773, http://jurisprudence.tas-cas.org/Shared Documents/2773.pdf.

National body assertion

Following the hearing, SEGAS issued a decision alleging that the athlete violated Rule 32.2[9] on the use or attempted use of a prohibited substance or prohibited method, and imposed the two-year penalty provided for by Rule 40.2,[10] without recognizing a violation of 40.6 as this regulation is not applied in this case.

4. International body assertion

The IAAF then appealed to the CAS, where neither the SEGAS nor the athlete participated. In this case, the IAAF's attitude towards that of SEGA was stricter, as the International Federation considered that Regulation 40.6 was the one to be applied, in contrast to the Greek Federation, though it had twelve controls in its hands. In 2006–2011 it stated that this case is not a case of repeated use but: *"…a case involving an abnormal variation in the blood profile according to those provided by the IAAF Blood Testing Protocol…*", essentially stated that because the samples were taken for ABP, they could not be subject to a violation of Rule 40.6.

CAS verdict

The court, after examining the parties' positions and background to the case, rejected the argument of the National Federation and ruled in favor of the IAAF, imposing four-year exclusion on the athlete.

4.1. The case of Tatyana Chernova[11]

The facts

Similarly, in the case of heptathlon athlete Tatyana Chernova, the athlete was found guilty of violating Rule 32.2(b) of the IAAF Rules: *"Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method."* Again, these allegations were based mainly on

[9] IAAF Competition Rules 2011, Rule 32.

[10] IAAF Competition Rules 2011, Rule 40.

[11] *See* CAS 2016/O/4469, http://jurisprudence.tas-cas.org/Shared Documents/4469.pdf.

the participation of the athlete in the ABP program for the period 2009–2014 with the collection of 19 blood samples. Though the first of these 19 samples, was collected on the occasion of the 2009 IAAF International Championship that took place in Berlin, and when it was retested in 2013, the athlete was found positive for the anabolic steroid called "oral turinabol".

National anti-doping body assertion

As a result, but with a delay of almost two years on 20 January 2015, the Russian Disciplinary Anti-Doping Committee (RUSADA), imposed a 2 years ineligibility period from 22 July 2013 to 21 July 2015 and disqualified all her results from 15 August 2009 (date of the sample collection) to 14 August 2011.

International body assertion

A few months later IAAF filed an appeal (still pending) against this decision of RUSADA (CAS 2015/A/4050), requesting an increased sentence both for the ineligibility of the athlete and also for her results in more events. At the same time, a group of experts analyzed the ABP profile of the athlete on an anonymous basis and found that the hematological profile is highly likely to be a result of the use of prohibited substances. Hence, the IAAF Anti-Doping Administrator informed the All-Russia Athletics Federation (ARAF) that they will put charges against the athlete unless she could prove otherwise. The athlete failed to provide convincing explanations, and at the same time upon request of the IAAF, the Expert Panel issued the "Joint Expert Opinion" concluding that it is highly possible that the usage of prohibited substances from the athlete took place. Further on, its pushing and strict strategy against any possible doping violation, IAAF suspended ARAF's membership and took over the case calling the athlete to stand in front of a CAS sole arbitrator as a first instance. Moreover, according to Rule 42 IAAF set ARAF as a respondent to its claim since, according to IAAF, ARAF turned to be incapable of resolving the case on time and thus they are responsible for part of the arbitration fees. At this point, it can be seen that IAAF leaves no space to anyone for

deflecting away from its Rules the Code and the battle against doping. Additionally, IAAF asked before the CAS Court Office that the athlete should provide relevant information regarding her possible doping usage before August 14 2009, the date of the first sample, pushing her more. However, the Sole Arbitrator did not allow this since it was profoundly possible that such an addition would further harm the athlete. During the hearing, the IAAF raised the issue of whether the athlete had had a second anti-doping rule violation, and suggested that neither the principle of proportionality nor the principle of fairness should be applied in this case. By the same token, the IAAF was seeking for the strictest award of 4 years of ineligibility and disqualification of all competitive results from 14 August 2009 until 5 February 2016.

CAS verdict

The Sole Arbitrator after examining all evidence, allegations and facts, partially upheld the IAAF's claim by imposing an ineligibility period of three years and eight months starting from 5 February 2016 and disqualify any result from 15 August 2011 to 22 July 2013. Again, on this case the international federation left no margin for any attempt to treat any possible doping violation lenient. They did not even hesitate to disengage their member federation (ARAF) because of its loose handling and accelerate the process.

Likewise, it is well known that WADA has a clear view of doping and considers how an athlete is responsible for entering its body, in other words the athlete bears objective responsibility, and therefore he has been subject to doping and must be subject to strict penalties,[12] WADA's rigorous stance is also confirmed in a recent doping case by José Paolo Guerrero.

[12] A. Duval et al. The world anti-doping code 2015: asser international sports law blog symposium, 16(1-2) *The International Sports Law Journal* 99–117 (2016).

5. WADA vs International body

5.1. The case of José Paolo Guerrero[13]

The facts

The soccer player was found to be positive in the presence of the cocaine metabolite benzoelectin ("BZE") after an in-competition Anti-Doping control match against the Argentinian National Team for the Qualifier Rounds of the 2018 FIFA World Cup Russia.

International federation assertion

The FIFA Disciplinary Committee imposed a 30-day exclusionary penalty under the interim measures. The player then lodged an appeal with the FIFA Appeals Board, seeking the decision of the Disciplinary Committee to be quashed. The Appeals Board dismissed the player's appeal and upheld the interim measures I had been imposed on him. At the start of the proceedings against the FIFA jurisdictions, the football player filed his position in writing with the evidence in his possession. Following the hearing, the FIFA Disciplinary Committee examined written submissions and supporting evidence and imposed a one-year suspended sentence on the player.

The player then turned to the appeals committee, which reduced his sentence to six months. However, the player, following the procedure and not accepting the verdict of the FIFA institutions, addressed the CAS, by completing an appeal.

WADA assertion

Immediately after the player's recourse to the CAS, WADA requested to intervene in the process as permitted by the CAS code as well managed: (a) the position of the player seeking the annulment of the FIFA disciplinary decision and the annulment of the WADA appeal; (b) the position of FIFA seeking the cancellation of the player's appeal and imposition of a six-month ban on (c) the position of WADA seeking to dismiss the player's appeal, annul FIFA's decision and impose a maximum penalty of two years as set forth in the FIFA Regulation.

[13] *See* CAS 2018/A/5546 & CAS 2018/A/5571, http://jurisprudence.tas-cas.org/Shared Documents/5546, 5571.pdf

CAS verdict

Finally, after reviewing all the facts, the CAS concluded that the player's appeal should be rejected and that FIFA and WADA's positions were partially accepted, imposing a total penalty of 14 months.

5.2. The case of Damar Robinson[14]

The facts

In another case, the case of Jamaican track and field athlete Damar Robinson, there was involvement of both the national bodies and WADA. At this case after Mr. Robinson's participation in the National Junior Championship of Jamaica, he was selected for doping control.

National body assertion

His urine sample proved to be positive and the same happened with his sample B. Because of this, JADCO (Jamaican Anti-Doping Commission) informed him that he was provisionally suspended from all official competitions immediately. A few weeks later Mr. Robinson accepted a scholarship from Cloud County Community College in Concordia, Kansas, U.S.A., and in January 2014, started competing at the National Junior College Athletic Association and National Collegiate Athletic Association events, representing his college. At this point, it is important to mention that none of these associations is signatory to WADA and therefore obliged to operate under the WADA code. On February 2014, the Disciplinary Panel of JADCO decided to suspend him for one year according to Article 10.5.2 of the Jamaican Anti-Doping Rules[15] for acting with No Significant Fault or Negligence. Mr. Robinson appealed but the Appeals Panel rejected his grounds and upheld the first decision. Furthermore, the Appeals Panel found that Mr. Robinson had failed to prove that he had provided "Substantial Assistance" under Article 10.5.3. However, JADCO even if they could appeal asking for a stricter decision, they did not do so.

[14] *See* CAS 2014/A/3820, http://jurisprudence.tas-cas.org/Shared%20Documents/3820.pdf.

[15] *See* JADCO Anti-Doping Rules, Article 10.5.2.

WADA assertion

On November 2014, WADA filled an appeal to CAS with respondents both Mr. Robinson and JADCO. WADA stated that according to the code, the sanction for Mr. Robinson's offense is two years and not one as JADCO decided, since he is not meeting any of the attenuating conditions of Article 10.5. Besides, he *"failed to establish any link between any specific product (whether given to him by his Coach or otherwise) and the prohibited substance in his system."* Moreover, WADA profoundly mentioned that regardless Mr. Robinson's relationship with his coach this was *"incompatible with his personal duty under the World Anti-Doping Code and the JADCO [Anti-Doping] Rules"*.[16] Finally, WADA argued that Mr. Robinson's participation to the National Junior College Athletic Association and National Collegiate Athletic Association events was not allowed according to his suspension.

CAS Verdict

Finally, the court decided to set aside the first decision, suspend the athlete for two years and disqualify all the results retrieved from events organized by bodies that are bound by WADA Code only.

Considerations

In the above cases, it can be seen that the judgment of the judicial authorities changes according to their jurisdiction. As jurisdiction grows, so does the severity of the judgment on doping cases. In some of the above cases, there were examples where the national body would show a more lenient attitude while the international body demonstrates a stricter one and finally WADA would show the strictest. At the same time international bodies and WADA more often, would also stand before CAS by filling appeals not only regarding the athletes but also the subsistent bodies who were incapable to apply the anti-doping rules at a level that would protect the integrity of sport according to the purpose and scope of WADA Code.[17] For this, the rules clearly give the bodies the right to take control over cases where the national body did not act

[16] *See* CAS 2014/A/3820, Ibid, 7.

[17] *See* World Anti-Doping Code, 11(2018).

within time limits or with the necessary caution like the case of Tatyana Chernova mentioned before. Moreover, as it was shown in the cases of José Paolo Guerrero and Damar Robinson, WADA can anytime bring a case to CAS if they do not agree with the decision rendered at the previous stages, investigating most of the times additional facts that could draw extra measures for the parties. This is an extra evidence to support WADA's *"surveillance culture"* in view to more restrained sport bodies.[18] The above study raises several questions as to: a) whether different opinions and positions of the institutions regarding the same cases can contribute to a fair and equal treatment of all parties involved, b) whether the rights of athletes are safeguarded and c) whether a sense of justice is provided. This is because one would expect that based on the harmonization of the regulations of the federations and national legal systems with the anti-doping rules of WADA, there would be a common and coherent approach. As it has been presented in the past concerning the Bliamou case[19] and has shown in some of our case studies, the sport bodies using their autonomy, and their political influence power, regarding their jurisdiction, can proportionally exert pressure on both the subsistent bodies and before the CAS, requiring stricter or more lenient treatment in the cases of its interest. One could state that WADA, which has proved over the time to stand against any doping case with a more authoritarian and rigid manner, is an exception. Moreover, sports authorities have full jurisdiction over the sports affairs, even the disciplinary ones as we are discussing now, while the arbitration clause prohibits those involved in sports from having to resort to civil courts even in cases of unlawful decisions.[20]

[18] J.K. Park, Governing doped bodies: the world anti-doping agency and the global culture of surveillance. 5(2) *Cultural Studies, Critical Methodologies* 174–188 (2005).

[19] Panagiotopoulos, D. International Sports Rules' Implementation [...]. Op. cit., p. 11–12. (2004).

[20] Dimitrios P. Panagiotopoulos, Arbital Jurisdiction in Sports Activities. IV(1-2) *e-Lex Sportiva Journal* 20–34 (2016).

6. Conclusion

Within the context of sport bodies jurisdiction in doping case several issues emerge: a) the need for careful application of the principle of justice in order to develop an institutional framework that is not only credible, but also homogeneous; b) the political influence on the sport governing bodies once again confirms the unbalanced and heterogeneous nature of the contractual relationships among sport stakeholders; c) there is a deep subjectivity that characterizes sports organizations, even on the same issue; d) the role of the institutions is crucial and, therefore, it is imperative that they respond to doping cases on the basis of a common framework that will be respected in the light of an independent judiciary, with a view to protecting sports, respecting the rights of athletes and recognizing their peculiar organization, as appropriate and effective.

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MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS IN THE PROCESS OF DEALING WITH CHILD SEXUAL ABUSE CASES IN VIETNAM

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Abstract

International cooperation can be understood as competent bodies of the Social Republic of Vietnam and other countries coordinating, supporting each other in investigation, prosecution, adjudication and execution of criminal cases. International cooperation in criminal procedure includes mutual legal assistance in criminal, extradition, receipt and transfer of prisoners and other activities as stipulated in Criminal Procedure Code 2015, international laws on mutual legal assistance and conventions of which the Social Republic of Vietnam is a member.

Child sexual abuse cases in Vietnam and other countries in the world, especially in ASEAN region, have become increasingly complicated. Many Vietnamese children were and have been victims of sex trafficking to foreign countries, a lot of them were fooled by job opportunities and then were sold into prostitution near the border of China, Cambodia, Laos and other Asian countries, namely Malaysia, Korea, Singapore, Taiwan and Thailand... Therefore, prevention of child sexual abuse is an integral task and a top priority of Vietnam currently. Solving child sexual abuse cases consisting of international factors requires Vietnam to have close international cooperation with other countries.

This article focuses on the analysis of the provisions of criminal procedure law and the practical implementation of mutual legal assistance in the process of solving child sexual abuse cases. In

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addition, the article provides solutions to improve the effectiveness of mutual legal assistance in solving child sexual abuse cases.

Keywords

Child sexual abuse; mutual legal assistance in criminal matters; Viet Nam; Criminal Procedure Code

CONTENTS

1. Introduction

Nowadays, no country in the world can survive and develop on its own without the connection with other countries. This means international cooperation is not only the internal necessity of a country itself for its socio-economic development, but also has the responsibility and obligation of each country under the view of international laws. The growth of international integration, especially, the establishment of ASEAN community has brought about a lot of favorable conditions and difficulties to the practice of law enforcement. In terms of child sexual abuse offences, integration and open policies for travelling and business might indirectly lead to the development of this kind of crimes. Therefore, strengthening mutual legal assistance in criminal matters between Viet Nam and foreign countries to promptly restrain crimes and ensure the legal cooperation on criminal cases has become a current issue.

2. Concept of Mutual legal assistance (MLA) in criminal matters in the process of dealing with child sexual abuse cases

Mutual legal assistance plays an important role in the criminal proceedings of each country and in the regulations of international criminal laws. Aiming at supporting the domestic criminal law enforcement, the government of each country cooperates with one another in transferring offenders and executing other relevant measures of criminal investigation, including collecting and providing evidence.

Every country has the supreme power, especially the jurisdiction within its territory to carry out legislature, executive, judicial activities and other necessary management activities to its agencies, organizations, citizens in all fields. When the courts or competent agencies of a country have to handle a foreign-related case, they will not only base on the national laws and international treaties that the country is a party to, but in many cases, they also have to seek for the assistance from the courts and competent agencies of foreign countries in carrying out several independent procedures that are necessary for the cases. However, it is difficult for a country to perform its jurisdiction on its agencies, organizations, citizens in the territory of other countries without their permission. That is why mutual legal assistance (including service of papers, documents, collecting evidences, assistance in investigation…) of functional agencies in foreign countries is necessary in that circumstances.

Internationally, MLA is also interpreted as a concrete manifestation of national sovereignty that other countries must respect and must not force or interfere in the internal affairs of that nation under any circumstances. As a result of declaring a national sovereignty and criminal procedure activities that can be proceeded or cannot be proceeded as well as minimum requirements to be followed, each nation has different laws regulating MLA. Mutual legal assistance and international cooperation in preventing and dealing with crimes must be considered as a kind of indispensable requirements in the current context of strong growth in international relations in general and in civil, economic-business interactions among organizations, persons of various nations in particular.

On 24 October 1970, United Nations General Assembly issued the Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, accordingly, every nation, the basic subject of international law, is obligated to cooperate with each other. The scope of cooperation obligation is very large, including mutual legal assistance in criminal matters.[2]

Recently, there are various opinions about mutual legal assistance, for example: *"Mutual legal assistance in criminal matters is an international legal procedure that procedure-conducting bodies of relevant nations cooperate with one another in assisting the collection and provision of information, evidence, testimony and other relevant documents under international treaties, national laws aiming at investigating, handling foreign-related criminal cases."*[3]

Another opinion*: "Mutual legal assistance in criminal matters is an international legal procedure that procedure-conducting bodies of relevant nations cooperate with one another in assisting the collection and providing of information, evidence, testimony and other relevant documents; conducting extradition of offenders."*[4]

In our opinions, *Mutual legal assistance in criminal matters is the exercise by the competent bodies in the proceedings of this country to conduct legal proceedings or proceedings as required by the competent bodies in the proceedings of the other country on the basis of the agreement of the respective countries.*

The concept *"children"* is defined in many different documents. According to Law on Children adopted by National Assembly of S.R. Viet Nam on 5 April 2016, "children" is defined as persons under 16 years old. Among variety of understanding about "children", we can conclude that "children are those who are in the period of growing,

[2] G.A. Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations — Resolution 2625 (XXV), 6, 1970.

[3] Ngọc Anh Nguyen, Van Manh Nguyen, Van Cong Pham, at 16, *Mutual legal assistance, theoritical and practical issues*, People's Police Publishing House (2009).

[4] Institute of Strategy and Science under Ministry of Public Security, at 1261, People's Police Encyclopedia Dictionary of Viet Nam, People's Police Publishing House (2005).

have not matured physically and mentally, are vulnerable to negative effects of social environment. Law on Children 2016 stipulates that agencies, organizations, education institutions, families and persons are responsible for taking proper measures to ensure the safe and healthy life of children; preventing and handling child abuse activities. Nevertheless, in fact, child sexual abuse crimes have developed complicatedly with many new artifices. Child sexual abuser is using violence or threatening to use violence, forcing, implicating, enticing children to participate in sexual activities, such as: rape, rape of the care-dependent persons or persons in extreme difficulties, sexual intercourse with children, molestation of children, and using for pornographic purposes. Pursuant to Article 34 of the Convention on the rights of the child (1989), States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. Other relevant international legal documents are *The Optional Protocol to the Convention on the Rights of the Child on children trafficking and pornography of (2000)*, *United Nations Convention against Transnational Organized Crimes (2000)* (UNTOC) and *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of UNTOC (2005)* (Protocol BBN). The practice in Viet Nam shows that there are some kinds of sexual abuse crimes frequently happening, such as: rape of a child, rape of a care-dependent child or child in extreme difficulties, sexual intercourse with a child, molestation of a child. Some localities sharing border with neighboring countries also witnessed an increase in the number of child trafficking, child swapping, child abduction with the aim of sexual abuse. To protect children against sexual abuse, apart from conclusion of Treaties on mutual legal assistance in criminal matters, procedure-conducting bodies have to ensure the prompt and impartial exercises in mutual legal assistance relating to the handling of child sexual abuse cases.

It can be defined that, *mutual legal assistance in criminal matters relating to the handling of child sexual abuse cases is the exercise of legal proceedings or proceedings, done by the competent bodies of a*

country as required by the competent bodies in the proceedings of another country on the basis of the agreement between these countries on serving the investigation, prosecution, adjudication and execution of criminal judgement relating to child sexual abuse.

The content of legal assistance in criminal matters relating to child sexual abuse cases include: executing mutual legal assistance requests and transfer of case files, documents, materials and items of child sexual abuse cases. Mutual legal assistance in criminal matters is performed under the forms of making the requests to foreign countries or executing the requests from foreign countries between competent agencies of relevant countries for assisting in conducting procedure acts that are necessary for handling foreign-related criminal cases. Through which, competent criminal justice authorities of relevant countries will collect documents, evidence, testimony, conduct the search and arrest of offenders and other procedural activities in accordance with the concerning international treaties or reciprocity principle. The subjects which have the jurisdiction to execute mutual legal assistance will be defined by national law, they normally are criminal judicial authorities. Almost all countries tend to define their Central Authority as receiving and transferring mutual legal assistance requests and the system of criminal justice bodies executing concrete mutual legal assistance activities.

3. Vietnam criminal procedure law on MLA in the process of dealing with child sexual abuse cases

Before Criminal Procedure Code 2015 becoming effective, Criminal Procedure Code 2003 included for the first time regulations on international cooperation in criminal proceedings, seven articles in two chapters (from Article 340 to Article 346), and then Law on Mutual legal assistance 2007 was adopted and became effective on 1 July 2008. These two laws has worked as the legal framework for procedure-conducting bodies in Vietnam and their foreign counterparts to cooperate and assist one another in carrying out international legal assistance activities, such as: mutual legal assistance in criminal matters, extradition, and transferring a person who is serving a sentence of imprisonment.

However, in the context of deep and wide international integration and globalization, there is an increase in crimes and especially foreign-related crimes, transnational crimes of a highly complicated degree and committing artifice. Accordingly, there has been a higher demand for international cooperation in criminal proceedings in reality, meanwhile, many bilateral and multilateral treaties have been concluded in Vietnam, but relevant regulations have not been stipulated in Criminal Procedure Code 2003 and Law on Mutual legal assistance 2007. Foreseeably, there is a gap between Criminal Procedure Code 2003, Law on Mutual legal assistance 2007 and the actual demands.[5] Besides, the guiding documents of Laws are also contradictory and different from one another, for example, the lack of regulations on payment of costs for executing requests for Mutual legal assistance in civil matters, causing the effect to firm implementing Mutual legal assistance between Vietnam and countries to which Vietnam has not concluded Mutual legal assistance Treaty. The contents of Article 17 Law on Mutual legal assistance are not adaptable to Vietnam's international commitment and does not meet the actual demands.[6] Hence, Criminal Procedure Code 2015 with a lot of amendments relating to this issue aims at improving the legal framework for conducting international cooperation in criminal proceedings. There are following new regulations:

— International Cooperation in criminal proceedings is the assistance and support from competent agencies of the Socialist Republic of Vietnam and competent agencies of foreign countries for performing activities supporting the investigation, prosecution and adjudication of criminal cases and execution of criminal judgments.

— International Cooperation in criminal proceedings consists of mutual legal assistance in criminal matters, extradition, transferring a person who is serving a sentence of imprisonment and other international cooperation activities as defined in the Criminal Procedure Code, Mutual Legal Assistance laws and international treaties to which Vietnam is a party.

[5] Moj, *Report on Summary of 6 years implementing Law on Mutual Legal 2007* (2014).

[6] Ngoc Anh Nguyen, *International Cooperation of Vietnamese People's Police force in prevention and fight against crimes,* Justice Publishing House, at 20 (2007).

— International Cooperation in criminal proceedings within the territory of the Socialist Republic of Vietnam is conducted in accordance with international treaties to which Vietnam is a party or reciprocity principle, Criminal procedure code, law on mutual legal assistance and other relevant regulations of Vietnam.

Many regulations on mutual legal assistance in criminal proceedings were stipulated in detail and more comprehensively, for instance:

"Materials, items collected by competent agencies of foreign countries as requested by competent agencies of Vietnam or materials, items transferred by competent agencies of foreign countries for prosecuting one's criminal liability might be viewed as evidence. In cases these materials and items having the characters defined in Article 89 of Criminal Procedure Code, will be viewed as exhibits."[7]

In terms of receiving, transferring materials and items relating to the cases:

"Receiving, transferring materials, items relating to the cases shall be conducted in accordance with international treaties to which the Socialist Republic of Vietnam is a party, regulations of this Code, Law on mutual legal assistance and other relevant regulations of Vietnam."[8]

Based on Criminal Procedure Code and other legal documents concerning mutual legal assistance in criminal proceedings, competent procedure-conducting bodies of Vietnam have made a variety of requests for mutual legal assistance to foreign countries in the process of dealing with criminal cases. Some agencies have asked foreign countries to provide information via INTERPOL Office under Ministry of Public Security; some agencies dispatched their officers from foreign countries for collecting materials; some others made requests for mutual legal assistance and sent to the Supreme People's Procuracy of Vietnam, the Central Authority of Vietnam in Mutual legal assistance in criminal matters, for asking foreign countries to assist in collecting and providing materials and evidence; procedure-conducting bodies in

[7] Criminal Procedure Code 2015, National Politics Publishing House, Hanoi, 2015. Article 494

[8] Criminal Procedure Code 2015, National Politics Publishing House, Hanoi, 2015. Article 497.

localities sharing border with neighboring countries like China, Laos and Cambodia are allowed to make requests for direct assistance. The results of Mutual legal assistance in criminal matters are used as evidence for the cases.

4. Practical implementation of MLA in dealing with child sexual abuse cases in Vietnam

Over the recent years, child sexual abuse crimes have developed complicatedly despite the strong restraint. In 2017, 1592 cases were detected, declining by 3 percent from last year. In the first half of 2018, 700 sexual abuse cases were detected, 0 percent of the victims are baby girls. Under the impact of globalization, transnational crimes including human trafficking (with the purpose of sexual abuse) tend to increase. Recently, the number of requests for mutual legal assistance in criminal matters between Vietnam and foreign countries has increased rapidly, the contents of requests have become more and more complicated. 80 percent of human trafficking victims in Vietnam are ethnic minority women and children.[9] Criminal justice authorities of Vietnam have instituted 1000 criminal cases with 2000 accused involving human trafficking. The number of victims is 3100 persons, of whom 519 persons have not been rescued. The majority of victims were trafficked to China and were forced to marry the locals, were sexually abused and forced to work.[10]

In terms of Requests for mutual legal assistance (MLA) in criminal matters sent by competent procedure-conducting bodies of foreign countries to Vietnam:

During the period of 2011 and 2015, Supreme People's Procuracy (SPP) of Vietnam received and dealt with 341 MLA requests from foreign countries, 84 percent of which came from countries having

[9] National Assembly Judiciary Committee, *Statistics in the hearing on implementation of laws on prevention and combatting human trafficking crimes between 2012 and 2017 organized by National Judiciary Committee in the morning of* 23/8/2018 in Hanoi.

[10] Duc Minh, *80 % of trafficking victims are sexually exploited* (August 24, 2018) (https://plo.vn/xa-hoi/80-nan-nhan-mua-ban-nguoi-bi-boc-lot-tinh-duc-789117.html).

MLA treaties with Vietnam like: Czech Republic, Russia, Hungary and South Korea).[11]The contents of MLA requests are mainly identifying, collecting, providing evidence, services of documents, papers, transfer for prosecuting one's criminal liability.

The reality shows that the Southeast Asian countries have become a favorite destination for child sexual abusers because of their developing economy with affordable price services, stable political condition, undisciplined legal system. Among 11 Southeast Asian countries, Thailand is "the leading country" in child sexual abuse tourism. Cambodia is the second one, where 33 thousand children are forced to work in prostitution service institutions, Indonesia is also one of the "top countries". Thailand has recently taken tougher measures on managing child sexual abuse tourism, Cambodia, Vietnam, Laos and Myanmar are eventually attractive to child sexual abusers instead. Vietnam witnessed an increase in the number of child sexual abuse cases relating to foreign tourists. Apart from benefits brought by tourism, Vietnam is now facing a lot of negative impacts including the increase of child sexual abuse.[12]

In reality, offenders coming to Vietnam by different ways committed child sexual abuse crimes. For example, in May 2013, competent agencies of France issued the international wanted notice against Larroque Olivier, French nationality, a doctor, for committing child sexual abuse acts and raping children. France requested Interpol in various countries to arrest him once detecting and extradite him in accordance with the national laws of the requested countries or bilateral, multilateral treaties. After being detected and arrested by competent agencies of Vietnam, Larroque Olivier stated that he immigrated to Vietnam in 2000, worked six weeks per year in a hospital of Hanoi under a contract. After that, Vietnam conducted the extradition procedures against Larroque Olivier.[13]

[11] Report on Summary of implementation of mutual legal assistance in criminal matters by SPP of Vietnam between 2011 and 2015.

[12] Duc Tran, *Cooperation in preventing child sexual abuse in tourism: New but active* (Oct. 1, 2013) (https://congly.vn/thoi-su/thoi-cuoc/hop-tac-phong-chong-xam-hai-tinh-duc-tre-em-trong-du-lich-moi-me-nhung-chu-dong-31608.html).

[13] Huong-Bac-Duc, *Portrait of French doctor sexually assaulting hundreds of Vietnamese children* (May 5, 2015) (https://baomoi.com/chan-dung-bac-si-phap-xam-hai-tinh-duc-tram-tre-em-viet/c/16620192.epi).

In terms of MLA requests of Vietnamese procedure-conducting agencies to foreign countries:

In the period from July 2008 to June 2018, the SPP received 926 MLA requests of domestic competent procedure-conducting bodies and sent to foreign countries for execution, 341 of which received the results from foreign countries. About 70 percent of MLA requests of Vietnam were sent to following countries, territories: Laos, China, Hong Kong, Singapore, Malaysia, South Korea… the number of requests tends to increase quickly. MLA activities mainly occurred in the stage of investigation.[14]

MLA requests related to collecting and providing evidence, documents, papers, identification of offender judicial curriculum vitae of Vietnamese citizens or foreigners committing crimes in Vietnam. Human trafficking and rape are two kinds of crimes were mentioned in MLA requests.

Prime Minister approved the Program on Prevention and fight against human trafficking in the period of 2016 and 2020, in which international cooperation with three neighboring countries including China, Laos, Cambodia is a focal point. Accordingly, from 2016 up to now, Border Guard force of Vietnam has successfully addressed 27 special cases, arrested and handled 167 cases with 125 perpetrators, prosecuted and handed over to the Police Investigation Agency 53 cases with 81 subjects, a total of 430 victims, including 206 rescued victims, 110 received victims, 114 self-returned victims. Every year, coordination and international cooperation between Vietnam's border guard forces and the anti-trafficking forces of the three neighboring countries are carried out regularly over 10 human trafficking cases.[15]

The child abuse crimes in the form of trafficking, abduction are not numerous but the consequences and danger occurring towards children are very serious. The children who were fooled be sold to China were sexually exploited with extreme cruelty. It is difficult to detect these crimes, or if they are found, the handling of the subject is very difficult,

[14] SPP, Report on MLA activities between 2011–2018.

[15] Trung Nguyen, *Coordination in activities of preventing and fighting against human trafficking crimes* (July 1, 2018) (http://www.bienphong.com.vn/phoi-hop-dau-tranh-phong-chong-mua-ban-nguoi/,).

because the perpetrators are living in China, whereas the international cooperation to combat this crime is limited. The fact that procedures must go through many levels, take a lot of time, greatly affect the proving of crime.[16] In addition, the Supreme People's Procuracy of Vietnam has coordinated with the Ministry of Public Security of Vietnam to facilitate and assist foreign procedure-conducting persons to come to Vietnam for witnessing the implementation process of MLA requests or sending investigators abroad to testify in cases involving Vietnamese citizens.[17]

It is possible to recognize the shortcomings and limitations of MLA in Vietnam in general and child sexual abuse cases in particular as the following main points:

— The development of legal regulations (including domestic legal documents and related international treaties) for serving MLA in criminal proceedings in Vietnam has been fulfilled. However, there are still many shortcomings and obstacles, leading to difficulties for the agencies performing MLA in criminal proceedings.

— The dissemination and fostering of knowledge of international law, guiding MLA skills and foreign languages for procedure-conducting persons are not regular and have not been properly invested in. Vietnam has not built up a group of professional negotiators who have specialized legal skills, who have the skills to negotiate and have foreign languages at a level comparable to the job requirements, especially negotiating MLA treaties, which often involve complex international legal issues as the legal systems of each country are different.

— The examination and periodical evaluation of MLA activities has been carried out annually but has not been paid enough attention and performed thoroughly. The competent bodies have not yet found out the causes of limitations in MLA in order to enhance this process. The coordination between Supreme People's Procuracy and Ministries

[16] Thai Hung, *Situation and results of prevention and fight by People's Procuracy of Quang Ninh province against child sexual abuse* (Apr. 01, 2013). (http://vksndtc.gov.vn/tin-chi-ti- et-3222).

[17] Duc Minh, *80 % of trafficking victims are sexually exploited* (August 24, 2018) (https://plo.vn/xa-hoi/80-nan-nhan-mua-ban-nguoi-bi-boc-lot-tinh-duc-789117.html).

has not yet been strengthen in terms of negotiating, signing and implementation MLA treaties.

— The length of time spent on executing MLA requests is long (many cases lasted for years) that do not meet the requirements of the time limit of adjudication domestically, thus, affecting the proceedings. It can be seen that the effectiveness of MLA is limited due to shortcomings in making MLA requests which is in charge of the Vietnamese agencies, such as Judicial: Dossiers of MLA requests made by Vietnamese competent agencies in contravention of law, including the payment of fees, were not executed by foreign countries even though they had been sent to competent agencies...

5. Some solutions to improve the effectiveness of MLA activities in dealing with child sexual abuse cases in Vietnam

Firstly, it is necessary to intensify negotiations conclusion of MLA treaties with other countries in the world, with priority given to the negotiation and conclusion of MLA treaties with ASEAN member countries and China. In addition to consolidating, strengthening and establishing cooperation between Vietnam and other countries in the world, especially those with traditional ties, border-sharing countries and member countries of ASEAN for concluding MLA treaties, Vietnam needs to strengthen its cooperation with international agencies and organizations that have the function of preventing and combating crimes in around the world such as ASEANPOL, UNODC, INTERPOL as well as judicial agencies, law enforcement agencies of countries in the continent and over the world.

Regarding the content of cooperation, attention should be given to the following areas: exchanging information and databases relating to crime; wanted criminals; transferring of MLA requests; consultancy, policy making, development of laws; exchanging experience and professional knowledge; training officials between the Vietnamese Police and ASEANPOL, INTERPOL, UNODC as well as between Vietnamese judicial authorities and judicial authorities of countries in the region and the world. On the form of cooperation, through meetings, international forums, conferences and seminars on the review or

implementation of action programs on the prevention and combat of crimes and mutual legal assistance in criminal matters co-organized by the General Assembly of ASEANPOL, INTERPOL, UNODC or other judicial bodies of other countries. These agencies and organizations shall make summaries and assessments on the crime situation and on the results of MLA in criminal matters as well issuing resolutions to draw experiences or provide guidelines and recommendations for the anti-crime bodies of member countries to apply.

Secondly, overall reviewing of MLA treaties concluded by Viet Nam prior to the 2007 Mutual Legal Assistance Law for the purpose of negotiating, amending or supplementing MLA treaties with the countries concerned. Creating a common legal framework among nations in the fight against child sexual abuse crimes is a top priority. Therefore: (1) It is necessary to step up bilateral or multilateral MLA treaties, extradition of criminals between countries with emphasis on cooperation in combating sexual crimes relating to tourism; (2) Organizing study tours and seminars to exchange experiences in the fight against this type of crimes among experts of countries in the region and in the world; (3) There should be close cooperation mechanisms between countries and international and regional organizations of prevention and fight against crimes such as Interpol, ASIANPOL to maximize the advantages of these organizations in coordination to hunt down criminals.

Thirdly, to raise the capacity and quality of competent procedure conducting persons in Vietnam and those related to the MLA activities in criminal proceedings. The effectiveness of MLA activities depends much on those who have the authority to conduct the proceedings. To do so, it is necessary to strengthen international cooperation in training and intensive training in order to improve professional skills, legal knowledge and foreign languages for staff working in the prevention and combat of transnational crimes, foreign- related crimes. To take the initiative in co-hosting the international conferences, seminars and training courses of Interpol, which are related to activities of combating transnational organized crimes and foreign-related crimes. In addition, Vietnam needs to study and accelerate the development of the Law on Extradition, fully domesticize Vietnam's international commitments. Law on extradition must stipulate principles of extradition, refusal of

extradition, procedures of extradition in order to meet the practical requirements of combating crimes in the context of globalization, international integration and judicial reform.

Fourthly, to further promote propagation and communication concerning regulations on child protection, care and education in order to raise the awareness among people, especially people in border areas and National key tourist sites for child sexual abuse criminals. The propagation and dissemination of laws must have specific plans and programs for short and long-term aims, focusing on integrating communication contents into the daily life of residential zones, into the extracurricular activities of all educational levels and activities of organizations at all levels, it is necessary to step up the implementation of the movement to build cultural families and civilized lifestyles in the population community. Attention should be paid to the form of consultation, counseling and direct conversation with families and communities about skills to protect children from danger; to strengthening the inspection and supervision of child protection and care at the grassroots level, thus contributing to minimize the situation of children suffering from violence and sexual abuse.

6. Conclusion

Mutual legal assistance holds an important role in the criminal proceedings of each country and in the provisions of international criminal law. The content of this paper focuses on the analysis of the provisions of criminal procedure law and the practical implementation of judicial assistance in the process of solving child sexual abuse cases. In addition, the article provides solutions to improve the effectiveness of criminal justice mutual assistance in dealing with cases involving child sexual abuse.

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4. Institute of Strategy and Science under Minstry of Public Security, People's Police Enclopedia Dictionary of Viet Nam, People's Police Publishing House, at 1261 (2005).

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THE LOGIC PARADIGM OF BUCHANAN'S CONSTITUTIONAL ECONOMICS

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Abstract

Buchanan believes that the modern government operates between the Leviathan model and the democracy model, and the role of the Democratic restriction mechanism trusted by the public is increasingly weak. Therefore, a new form of political technology and democracy is required to control the spread of bureaucracy. Hence, Buchanan proposed to put "constitutionalism" before "democracy" and combine "rule restriction" with "non-rule restriction" to realize his constitutional proposition. Buchanan's constitutional economics is composed of methodological individualism, contractualism and the principle of consensus. This paradigm has standardized and renovated the existing theories of law and politics.

Keywords

Anarchy, efficient system, democratic decision-making process, political exchange, constitutional economics, methodological individualism, contractualism, consensus

CONTENTS

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I. Introduction

There are countless roads to get out of the Hobbes jungle, but what is the best choice? Are people doomed to endure "filth, barbarity and poverty" in anarchy or "filth, barbarity and slavery" under the rule of Leviathan? After abandoning the anarchy, the unrestrained leviathan is not an expected efficient system. In order to strive for a favorable situation, it is necessary to minimize the power of leviathan by some means of constraint, that is, to establish a rule to prevent possible disaster damages. In Buchanan's view, the significance of the rule lies in that it can extract a balanced result or result pattern for a community of social people with established capabilities and goals, which is the most common expression of constitutional theory. Moreover, Buchanan's constitutional view is a theoretical construction based on the theory of public choice and the paradigm of constitutional economics. This theoretical construction has two characteristics: first, it discusses the choice of institutional rules at the most general level; second, the discussion or theoretical construction of this system is empirical. Therefore, Buchanan intends to break a religious concept of state or dreamlike democratic system, and realize implicitly rationalization of a political structure that has never been considered to have a strict theoretical basis. Its purpose is to provide some theoretical certainty for the individualist democracy,[2] so that the democratic decision-making process can obtain a more solid theoretical basis.

[2] James M. Buchanan & Gordon Tarlock, *Calculation of Consent: The Logical Basis of Constitutional Democracy* 328 (Guangjin Chen trans., China Social Sciences Press 2000).

II. The context of Buchanan's constitutional theory

Buchanan believes that the modern government is actually operating between the leviathan model and the democratic model. In his view, the modern country still hasn't eliminated the leviathan trend, and the government still has a very obvious power over individuals.[3] Compared with market transaction and politics, the competition between individuals is almost completely impersonal in operation. Market mechanism restricts individual decision-making behavior and makes all decisions become marginal decisions. Therefore, the wish of an individual to gain more trading benefits by changing his trading behaviors, such as raising or lowering the prices of goods will not always be achieved. Because as far as the whole market is concerned, his trading partner has a variety of ready-made alternatives, no individual can dominate the market alone. However, as a kind of political exchange, there is no alternative. It is not easy for individual participants to withdraw from this ultimate social contract and turn to an alternative seller of public goods if they want to make a new agreement. Compared with the market, politics seems more like a transaction between two isolated individuals. Everyone knows that there is no alternative buyer and seller, nor room for bargaining. The governments enjoy most resources, they are in an internal monopoly position in terms of products and services. Not only that, like other social institutions, the government institutions under the modern democratic system are made up of different individuals with personal motives and interests, and these individuals who constitute the governments will inevitably incorporate their personal interests into the governments and government decision-making. It can be assumed that the power of the government may be exercised for the personal interests within a certain range, and the power of the state often becomes a powerful means for a few people to obtain interests, which will make the government's inherent *"public interest"* characteristics degenerate into

[3] Buchanan's definition of modern national characteristics is based on his criticism of three types of government models. He rejects the model of autocratic rule of charity. In this model, the government is considered to take social interests as its own interests, and take the maximum welfare of the whole people as its own policy goal. At the same time, it can maintain an absolute authority, not bound by any form. In Buchanan's view, this model has the absurdity of reality.

partiality, parochialism and dishonesty. In fact, the abuse or misuse of coercive power is a very persistent danger.[4]

On the other hand, the problem is that under the conditions of modern parliamentary democracy, most people have implicitly accepted — the popular presupposition in the 20th century — that the electoral process itself in a democratic system is enough to ensure that government behavior is within acceptable limits. In fact, as mentioned before, the decision-makers in democratic government may show a certain tendency of self-interest, thus, the government power becomes a means for a few people to seek personal interests. These problems also exist for the democratic mechanism that restricts the state power, and the individuals in the democratic mechanism are likely to participate in politics for personal interests, hence the democratic restriction function cannot be effectively played. As for democracy itself, in view of people's one-sided understanding of the majority's decision-making rule, modern democracy in a sense acquiesces in the majority's enforcement of the minority. Buchanan is concerned that democracy in this situation may be transformed into a leviathan that we cannot avoid. Buchanan foresees that the modern democratic system is experiencing double failures: on the one hand, it cannot effectively restrict the power of the state government. on the other hand, the modern democratic system makes the "majority decision-making rule" absolute, and the reasonable demand of the minority is ignored by the democratic decision-making system, which has gradually lost its democratic attribute of democratic election and democratic decision-making.[5]

Buchanan was sure that collective choice based on the majority rule commonly used in modern democratic countries does not really stand for democratic decision-making, which originated from Kenneth Arrow's *"impossibility theorem"*. According to Arrow's view, there is no social choice function which satisfies the following four basic axioms at the same time: 1. The unlimited system of personal preference; 2. The

[4] Jeffrey Brennan & James M. Buchanan, *The Power to Tax* 101 (Keli Feng, et al. trans., China Social Sciences Press 2004).

[5] Buchanan believes that in terms of the current system of electoral competition under the rule of majority and the process of majority, the majority views on the restriction of political power by electoral rules may be too optimistic.

weak Pareto principle; 3. The independence of uncorrelated goals, that is, the social preference order of a pair of social goals is not affected by the change of other goals' preference order; 4. The non-autocracy of social preference. Through the analysis of the theoretical model, Arrow has come to the conclusion that according to the majority decision-making principle, a single and reasonable social preference order cannot be obtained from a number of reasonable individual preference orders, and there is no social choice mechanism that can convert the individual preference order of N alternatives into the social preference order, and accurately express all kinds of individual preferences of all members of the society. Democratic voting does not produce a social choice, and the existence of the lack of consensus and mutual vote has made the democratic decision-making system violate the non-imposed standard.[6] Buchanan clearly realized that in the face of modern scale public sectors and bureaucracies, the power of democratic restriction mechanism is becoming increasingly weak, and the Democratic restriction mode is becoming more and more naive and ridiculous.[7] Therefore, he advocated the invention of a new political technology and a new way of expressing democracy to control the spread and growth of the bureaucratic privileged class, and the most important thing and the main motivation in the normative sense is to prevent the exploitation of people by people through political procedures.

III. Propositions of Buchanan's constitutional theory

In Buchanan's view, the people who study political process have not realized all kinds of ineffectiveness levels and deep reasons, although the modern state system and democratic system have exposed various

[6] Kenneth J.Arrow, *Social Choice and Personal Value* 56 (Zhiwu Chen, et al. trans., Sichuan People's Publishing House 1987).

[7] Buchanan also stressed that people should pay attention to two issues in democratic elections: first, there are likely to be ignorant constitutional decision makers among voters, whose actual political power may be limited to a narrow range, and they have to delegate their discretion to others. Second, unlike bureaucrats, there must be information asymmetry among the voters, which not only provides opportunities for misleading the voters, but also makes it possible for the bureaucrats to abuse their powers.

problems. On the contrary, they always fantasize that they are committed to completing the reform through the innovation of personal motivation and the moral restriction of personal interests and the emphasis on the concept of public interest, etc. The innovation of morality rather than the reform of structure is always the important reason why the problem has not been solved. Therefore, Buchanan stressed that the first thing to be established is a constitutional mentality. He was convinced that without an individualistic position and some initial common basis for dialogue, any discussion on design would be useless. Constitutionalism mentality must first break a metaphysical presupposition that political authority is composed of a group of moral Supermen, so as not to replace independent rational thinking with illusory or arbitrary coercion. Secondly, it is necessary to inject a little realism into individual behavior in politics. The logic of constitutionalism is contained in the following implicit foresight: any power granted to the government may be exercised in some scope and in some occasions, different from the desired purpose stipulated by citizens in the veil of ignorance.The rulers who act as agents have no more moral guarantee than ordinary citizens, individuals have the same motivation in public choice and private choice. Those who make government decisions have the possibility of their moral behavior (altruistic behavior). However, a more reasonable constitutional thinking really needs to exclude such moral behavior as the premise of normative analysis. Those who believe that government should be analyzed on the basis of the assumption of benevolent agents deny the legitimacy of any constraints on the government, including the elected government. In this case, there is no logical basis for constitutionalism. Based on the above considerations,Buchanan's attitude is very clear.

"If we evaluate the following two situations: one is an unrestricted democratic process in the conceptual sense, the other is a form of governance that explicitly limits the scope of politics, and even if we choose in this form of political governance, even if there is no democracy, we will still prefer the second situation."[8]

[8] Jeffrey Brennan & James M. Buchanan, *The Power to Tax* 38 (Keli Feng, et al. trans., China Social Sciences Press 2004).

The specific content of Buchanan's constitutional theory includes two aspects: rule restriction and non-rule restriction. The constitutional conception of rule restriction is only about understanding the meaning of the preposition constitutionalism of democracy, which Buchanan defined as a series of rules reached in advance, and subsequent actions are carried out within the scope of these rules.[9] His constitutional thought is a rule system based on metarule, and the rich relationship between rules expresses its unique theoretical characteristics. In order to express his constitutional view clearly, Buchanan quoted a supplementary concept — justice, what is different is that in Buchanan's view, rules are the basis of justice, rules are logically prior to justice, and the value of justice lies in the observance of rules. As for the judgment of whether the rules are fair or not, it can only be made according to the more abstract rules (i.e. metarule) which are applicable to the judgment between different rules. The formation of political action and law is based on certain rules (or metarules).[10] The binding force of rules depends on its compliance with metarules. If the rule is formed under the agreed metarule, then the rule does not need to be agreed and can also be binding. "Consensus" is a core category, because the agreement imposed cannot make the rules legitimate, and it cannot support the moral obligation to abide by the rules. It should not be considered that justice can provide an independent norm, on the contrary, only consensus can play such a basic normative function, which is the most profound logical relationship in Buchanan's constitutional theory.

Buchanan disagreed with the assumption that too much attention should be paid to the voting rules and arrangements, and that the electoral process alone would be enough to restrain the government of its own accord. Therefore, in addition to the proposition of rule restriction, he also covered the non-election means with the constitutional perspective. Buchanan said in his book *the Power to Tax* that financial constraints could actually replace election constraints. He saw that the right to resist tax has a typical constitutional orientation. The form of fiscal

[9] Jeffrey Brennan & James M. Buchanan, *Constitutional Economics* 1 (Keli Feng, et al. trans., China Social Sciences Press 2004).

[10] The main idea is: as long as the screening process conforms to the accepted meta rules, then the rules selected from them are just.

and taxation system is not to cut taxes and expenditures at one time, but to establish a clear constitutional constraint, which is applicable to the indefinite future. The purpose of externalization is to limit the size of the government, to keep it below the standard level of the electoral process, and to control the power of the government within a moderate range.

"Whether the government is a continuous Leviathan, a Leviathan with probability, or a majority democracy dominated by middle voters, the most ingenious and reliable way to subvert the existing foundation of society is to corrupt its currency."[11]

Similar to the constitutional significance of the right to resist taxation, property right also guarantees the individual's status of free contracting in some aspects. In property as a guarantor of liberty, Buchanan is cautious when talking about market economy or the characteristics of social structure in essence — division of labor and exchange will make individuals rely on others, thus increasing the risk and uncertainty in personal life. Individuals are endowed with the absolute value of the freedom to withdraw from the market relations; the withdrawal is possible because of the existence of private rights. Private rights enable individuals to withdraw from the interdependent network formed by exchange market, and move towards the precious state of self-sufficiency.[12] Buchanan stressed that the right way to avoid exploitation and market harm is not to replace people's property rights completely with collective or state ownership, but rather to keep the possibility of withdrawing from market dependence by making people enjoy property rights, so as to avoid the impact of blind market forces. In this sense, the property of an individual or several individuals is suitable as a guarantee of freedom, that is, completely independent of the political or collective decision-making process.[13]

[11] John Maynard Keynes, *The Economic Consequences of Peace* 236 (Hackett Blaise and Howe 1920).

[12] James M. Buchanan, *Property And Freedom* 37 (Xu Han trans., China Social Sciences Press 2002).

[13] Ibid. 59.

IV. Analysis of Buchanan's constitutional theory paradigm

The paradigm of Buchanan's constitutional theory consists of three elements: methodological individualism, contractualism and the principle of consensus.[14] These three elements show the theoretical characteristics. Through targeted research, we can understand the deep meaning of Buchanan's constitutional theory, and adopt this simplified method to make its constitutional thought more clearly and accurately expressed.[15]

A. Methodology Individualism

The methodology individualism adopted by Buchanan expresses the idea that only the individual is the unique and final entity of choice and behavior. Any understanding of the social interaction process must be based on the analysis of the behavior of process participants. A collective or society will never have a real sense of choice behavior. In other words, to understand society as only a collection of countless individuals, it has no value, goal or behavior independent of individuals itself. This model expresses Buchanan's attitude towards system design. The most important significance of Buchanan's methodology individualism lies in giving people the ultimate sovereignty status on various issues concerning social organizations. Individuals are given such a qualification that they have the right to choose the organizational, institutional structure of which they are willing to live, and the individual is the sovereign in the final sense, which is proved to be the basis of the legitimacy of a free social order.[16] The advantage of the veil of ignorance

[14] Buchanan's speech at the Nobel Prize for economics in December 1986 said: Wicksell deserves the title of the most important pioneer of modern public choice theory, because in his 1896 paper, we found all three components of Public Choice Theory: methodology individualism, economic man, and politics as a transaction.

[15] Buchanan's theory of contractualism has both empirical and normative significance. From the perspective of integrating market behavior and political behavior with a trading relationship model, it is empirical. At the same time, the contractualism is regarded by him as the most helpful system design to express personal value and to provide a dialogue context for rule selection, so it also has normative significance.

[16] Ibid. 96.

and the method of Constitutionalism Analysis is that it allows us to find a logical basis for this kind of norm from personal choice rather than from hypothetical external ethical standards.[17] Buchanan rejects the existence of a rule system that lies outside people's cognition, and its purpose is to construct an equal democratic participation procedure with priority status. In this way, people create group rules through discussion, analysis, lobbying, mutual consultation and other processes. In essence, free individuals agree to restrain themselves in order to obtain freedom. And "consent" makes the democratic participation process consistent with the subjectivity of participants rather than separate.

Buchanan's individualism theory consists of two levels: one is in the analytical sense, the individual is the only analytical unit.The other is in the philosophical or normative sense, the individual is the only philosophical existence and the only source of value evaluation. On the first level, Buchanan believes that the construction of constitutional system depends on those individuals who act or make decisions in the process of group selection. Those typical individuals may be egoists, altruists, or any combination of egoism and altruism. And these people are independent individuals with independent goals. They have different purposes for collective action. In fact, if the individual interests are assumed to be the same, then the subject will be eliminated, and there will be no organized activities. The different individuals have unique implications for the theory of political decision-making. On the second level, Buchanan understands the state as a means and place for individual citizens to make collective decisions to achieve their personal goals. In his view, the human individual is the primary philosophical entity, the state itself is not the purpose rather a tool.[18] In terms of the relationship between the two, if there is no provision of the second level, the first level is relatively meaningless for the analysis of the constitutional structure derived from personal preferences. The interests that the individual chooses and promotes are exactly what the individualistic

[17] Jeffrey Brennan, James M. Buchanan, *The Power to Tax* 228 (Keli Feng, et al. trans., China Social Sciences Press 2004).

[18] James M. Buchanan, The Pure Theory of Government Finance: A Suggested Approach, 57 *Journal of Political Economy* 496 (1949).

value promotes. If in the second level, the non-individual value is the final standard, then most of the constitutional economic analysis will lose its significance. It is impossible to derive the logic of the rules unless the interests expressed by the individual are used.

B. Contractualism

Buchanan explains the thinking of choosing contract theory, It is expressed as follows:

"Some theorists refuse to regard the theory of state contract as an explanation of the origin or foundation of political society — this refusal is appropriate in itself, but they often ignore the elements of the traditional contract theory that do provide us with a 'bridge' between individual choice calculation and group decision-making."[19]

In the systematic argumentation of constitutional theory, Buchanan accepted Hobbesian's contractual doctrine, and supplemented it with Adam Smith's "economic man" hypothesis. In the book limits of freedom, Buchanan admitted that it is necessary to find a starting point for the process of social evolution for the convenience of research. What can serve as this starting point is the jungle society discussed by Hobbes. Like all contract theorists, Buchanan explains the reasons for the formation of state and law in his own way-as a rational animal, people always have a calculation in their relationship with others. After many games, he will find that cooperative games are more beneficial to himself and can produce stable results .When enough people realize this, they will reach an agreement, sign a contract together, establish a country and follow common rules. According to his point of view, the contractual paradigm of political science is trading paradigm. As long as the source of value is located in individuals and there is no difference between people, then all political affairs can be regarded as a complex trading or contractual system involving multiple people.

Buchanan's contractual analysis model has two meanings, one is the meaning of figurative evaluation, the other is the meaning of empirical

[19] James M. Buchanan, A Contractarian Paradigm for Applying Economic Theory, 2 *American Economic Review* 229 (1975).

confirmation. If it is not combined with his specific contractual content, it will be difficult to understand. The problem is: does any historical experience show that individuals have completed the constitution in the way of contract? Buchanan made an explanation different from that of Rawls. Rawls believed that the formation of rules must be the consensus obtained under the condition of excluding the influence of all background conditions. When the original contractors decided what principles were the basis of regulating the basic structure of society, they had no idea of their special identity, social status, intelligence, physical strength, income, wealth psychological tendency, not even their own unique value dreams, the only basis for the contractor to choose was general common knowledge. Therefore, it is impossible for anyone to make use of the advantages of material, intelligence or information to gain benefits for himself through specific social organizational arrangements.[20] Buchanan claims that when individual participants make decisions for the final result, i.e. social choice, they cannot understand the result, which leads to the inevitable ignorance of individuals involved in group selection. This special uncertainty in political choice and the limitation of individual rationality in the process of choice increase, not decrease, the possibility of reaching an agreement. The influence of specific rules on everyone's situation contains a kind of real uncertainty. In the face of this kind of uncertainty, under the guidance of the calculation of self-interest, individuals will focus on the choices that can eliminate or minimize the potential disastrous results.For example, in the context of constitutional choice, individuals give their own uncertain influence due to different choices. The more vague this uncertainty is, the more likely individuals are to promote fair agreements. Critics will think that Rawls's "veil of ignorance" is an ideal normative construction, while Buchanan's "veil of uncertainty" does not fall into a similar situation, because it does not require individuals who enter the constitutional dialogue process to change their moral ways. Obviously, Buchanan is inclined to a theory of procedural justice, rather than any principle proposed by Rawls. In his view, only the individual is the only and ultimate entity of choice and behavior, and any understanding of social

[20] Rawls, *On Justice* 136 (Huaihong He, et al. trans., China Social Sciences Press 1988).

interaction process must be based on the analysis of process participants' behavior. And contractualism is to ensure the identity of individual as the Sovereign of social governance rules all the time. Buchanan refuses the exist of the rule system structure which beyond people's cognitive scope. At the same time, contractualism denies any transcendental truth judgments,which's purpose is to construct an equal democratic participatory procedure with priority status.

C. Principle of Consensus

Early contract theorists assumed that the formation of the original contract was the consensus of opinions, because the nature of any contractual arrangement was voluntary participation, and no rational person would voluntarily agree to cause himself expected net loss or net injury. Knut Wicksell first realized the importance of the consensus rule as an ideal benchmark rule, because it is important to ensure that all government actions reflect a real improvement in the situation of all. Political game is a positive sum game, and all positive sum games must have some solutions covering all participants. But if the interests of more than two individuals are in conflict, it is impossible for all to agree. If the behavior is not completely restrained, some interests will surely prevail over others. Considering that the cost of reaching consensus may be very high, rational individuals will make trade-offs, abandon some narrow current efficiency of the principle of consensus to obtain the operability of the political process, and actually allow these activities to be organized according to some decision-making rules that are not unanimous enough, which is generally the reason for adopting majority decision-making rules, But in fact, the transition from the principle of consensus to the rule of majority decision has greatly weakened the binding force of pure election behavior.

Many people who accept the democratic model will recognize the validity of the limited contractual structure, and the majority rule may be accepted as a necessary condition of democratic politics, or directly equate "democracy" with "simple majority rule". However, majority rules do not guarantee the performance of the rules themselves, because once the majority coalition holds power, it is likely for them to take

the actions against democracy, the tyranny of the majority is as real as other forms of tyranny. In fact, it may be more dangerous, because it draws energy from such an ideal fantasy — participation is everything.[21] This kind of fixed concept determines that there is no criticism or improvement on the majority rules, which implicitly allows the majority to exploit the minority. In recognition of this danger, most people tend to rethink the principle of consensus even if they do not actually choose. The principle of consensus has some special attributes, by adopting this rule, an individual can ensure that he or she is not harmed by the external, private or collective actions of other individuals. If the cost of decision-making can be reduced to a negligible proportion, then rational individuals will always support this consensus requirement before the final political decision is made.

Orthodox theorists tend to arbitrarily abandon the principle of consensus as a possible alternative to the majority rule or the minority rule, the critical view holds that the principle of consensus is not feasible at all. But Buchanan judged that the so-called "infeasibility" may be the operational level of decision-making rather than the characteristics of its constitutional level. Distinguishing these two different levels can eliminate many of the confusion in the modern interpretation of the theory of state contract. His point of view is very clear, Constitutionalism is a long-term rule choice, with forward-looking and durable characteristics etc. As far as constitutional choice is concerned, unlike any individual's special decision or decision, it is quite rational based on a long-term view of collective behavior which contains many different time series and many different allocation of economic resources. Choosing the only best rule is quite different from deciding how to allocate resources optimally in a specific time zone. In the context of constitutional choice, individuals do not know where they will be in the decision sequence of the expected collective behavior chain. Because of the unrecognizable self-interest and the unexpected vision, the decision-makers are in the partial ignorance and can instead reach an agreement on all aspects of the rules. The rules of decision-making are divided into different levels, the more basic human rights

[21] James M. Buchanan, *Property and Freedom* 64 (Xu Han trans., China Social Sciences Press 2002).

and property rights are involved, the greater proportion of majority consent is needed until consensus is reached. The more fundamental human rights and property rights are involved, the greater the need for a greater proportion of majority consent until unanimous agreement is reached. The highest level is the constitutional level, the main task of this level is to choose rules. Obviously, it can also determine the lower level decision-making rules, so these levels of non-consensus rules have the legitimacy basis of consensus rules. Buchanan believes that democratic politics can implement the majority rule, not necessarily the "all pass" of Wicksell's style, but this majority decision-making rule should or must be extended from some kind of contractual logic of consensus.[22] And any choice made by the majority should be applied equally to all members of the society, without discrimination against the minority.

V. Conclusion

The most creative of Buchanan's constitutional theory system is his public choice theory and constitutional economics paradigm. His constitutional economics paradigm tries to eliminate all illusionism, so as to make the theoretical basis of constitutionalism stable and credible. After the necessary transformation and restatement of the veil of ignorance and the principle of consensus, Buchanan expressed the ideas of Rawls and Kant with an acceptable limit. The whole thread of his thought is as follows: to walk out of Hobbes' jungle, to achieve Kant's universalism by relying on the partial veil of ignorance and through the principle of consensus which is similar to Habermas's. This kind of universalism is not derived from the idea of good in essence, but from the logic of consent that is justice. In summary, the significance of constitutional economics is not the discourse provided by the paradigm itself, but the theoretical depth opened up by it.

[22] Buchanan believes that the following three conditions must be met for vicksell's"consensus rule": 1. Consent must be unanimous, and if the cost is too high, the majority principle will be considered, such as the voting principle of two-thirds majority (but this proportion should be increased as far as possible); 2. Consent is reached among a group of rational individuals with self-interest; 3. Consent must be based on a voluntary balance of individual interests, and the utility of these individuals is not comparable.

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Book review: Ekaterina V. Kudryashova "Pravovoe regulirovanie strategicheskogo planirovaniya v sfere gosudarstvennykh finansov: monografiya" [Legal regulation of strategic planning in public finance: monograph]

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Russia has strong traditions of state planning since the Soviet times and it is now among the first few states which issued the law on strategic planning — the Federal Law No 172-FZ of 28 June 2014 "On strategic planning in the Russian Federation". The law on strategic planning did not appear without any background. In fact, in the late soviet period, various attempts were made to come up with the legal basis for planning and there were a few main milestones. However, no results were achieved and no legal basis was elaborated. The Federal Law on Strategic Planning of 2014 is a systematic attempt to establish a new legal regulation for the formation of state policy. The legislator announced that there would be a whole system of strategic planning in the Russian Federation. The political significance of the law should be noted as this law represents the advanced level of social consensus on the framework of strategic planning in Russia, which is a positive sign in terms of social stability and trust.

Another formal basis for strategic planning in Russia, which may be even more important, is the bunch of executive orders of the Russian President setting the goals of development for the presidential term. The President's executive order of 2018 is now in the focus of the political and social life and it is widely discussed in the mass media. The members of Russian Government and the heads of the regions are supposed to bear the personal political liability for implementation of the strategic goals and objectives outlined in the President's orders.

All these developments in Russia reflect the importance of strategic planning in contemporary Russia.

The issues of strategic planning are discussed not only on the national but also on the international level. Strategic planning and public management are subjects of documents issued by different international organizations like the World Bank, the Organization of Economic Cooperation and Development. For example, in 2013 the Organization of Economic Cooperation and Development issued the document entitled "Strategic Insights from the Public Governance Reviews: Update".[1]

Strategic planning in the public sector is in the top lines of the academic discussion. There are some new books on the topic of strategic planning issued and debated in the international academic environment.[2] The author of the reviewed monograph is also involved in the international debates as she took part in one of the international study on the strategic management in different parts of the World.[3]

In Russia the topic of strategic planning is mostly discussed in the articles,[4] rather than in full-fledged monographs. Although the

[1] OECD, Strategic Insights from the Public Governance Reviews: Update. OECD Conference Centre. Paris. (2013).

[2] *See* P. Joyce. *Strategic management in the Public Sector*; Bryson JM *Strategic Planning for Public and Nonprofit Organizations: a Guide to Strengthening and Sustaining Organizational Achievement* (5th Edition. Wiley, 2018); Drumaux A., Joyce P. *Strategic Management for Public Governance in Europe*. IIAS Series: Governance and Public Management. London NY. Palgrave MacMillan (2018).

[3] E.V. Kudryashova State Planning and Budgeting in the Russian Federation, *Developments in Strategic and Public Management* (P. Joyce et al. eds, 2014). https://doi.org/10.1057/9781137336972_10.

[4] See e.g. M.V. Vilisov Rol zakonodatelstva o strategicheskom planirovanii v formirovanii gosudarstvennoi politiki [The Role of Legislation on Strategic Planning in Public Policy], 24 (6) *Vlast*. 5–14 (2016). (in Russ.).

problem is very important as we could see in the introductory part of this review. The reviewed book is one of the first fundamental research on the issues of strategic planning in the monographic form after the Federal Law on Strategic Planning was adopted. The monograph contains a really profound research and relies on the amplified range of sources pertaining to different scientific schools, different epochs and different countries. This range of sources enhances the credentials of the monograph.

The reviewed monograph is a culmination of previous efforts of the same author to study the legal regulation of strategic planning and the factors influencing the way of its development. The author published her first monograph on legal issues of strategic planning in 2013.[5]

The book *"Legal regulation of strategic planning in public finance"* as it follows from the title covers only the legal aspects and only the public finance field of strategic planning. This scope is cogently justified in the monograph. The implementation of strategic planning in Russia coincided with a number of reforms. The main reforms are administrative and budgetary reforms that constituted the environment for strategic management at the beginning of the 21st century in Russia. Strategic planning initially was piloted in the planning of the public finance and shifting to the program budgeting. In one of her articles in English preceding the reviewed monograph, the author has demonstrated how the strategic planning fit in the context of the budgetary reform in Russia.[6]

Notwithstanding the narrowed scope of the monograph, the author employs the conceptual approach to strategic planning as to one of the methods of public management. Therefore, many conclusions can be made and applied to other social spheres. It is notable that the author does not consider the program method as the main and or the only possible dimension of strategic planning. The combination of program,

[5] E. Kudryashova *Sovremennyy mekhanizm pravovogo regulirovaniya gosudarstvennogo planirovaniya [The contemporary legal regulation mechanism of the state planning*], Moscow. Biblio-Globus (2013).

[6] E. Kudryashova. Budgetary institutions in the context of budget reform in Russia, 2 (6) *Kutafin University Law Review* 347–357 (2016).

normative and other approaches is proposed as the best practice. The evolution of planning from the short-term internal planning to the strategic paradigm is presented in the first chapter of the book showing the logic of the development. The main components of the contemporary strategic planning according to the monograph are the goal-setting and the horizon of planning as it follows from the social sciences recent achievements. These two main components are to be reflected in the law. The Russia's practice and the practice of the other states, advantages and disadvantages of different legislative and political models are explored in the book. For example, during the political, economic or social crisis the horizon of planning shrinks. The monograph demonstrates how this pattern is accommodated in the law. The author alleges that the financial planning is the first one to recover after the deep political crunch and it will recover with a very short horizon. The author of the monograph points out that the horizon of planning should not be understood only as the timeperiod. The planning horizon is concerned with the resources of different types, space and risks.

Much of the book is devoted to the theoretical legal issues of the planning acts that are nearly most peculiar in the contemporary law. It is alleged that the planning act should be considered as integrated indivisible rule of law representing the desirable vision of the future. The individual provisions, indicators, figures or other type of provisions cannot be separated and considered to be specific rules of law. The planning act according to the monograph is a regulating unity. The planning act represents certain level of the regulation requiring further legal acts that shall proceed from the level of general vision to the level of relations between the specific subjects. These findings are quite important from the legal theory point of view. In this respect, the title of the monograph may be misleading, and many interested researches can pass by these important conclusions. In the financial sphere there are quite a few finance planning acts. The monograph deals in details with the main ones: law on budget, state programs etc. Some historical forms of planning acts that are not in force any more are also mentioned as examples.

The issues of planning are demonstrated across a broad set of cases. By this empirical analysis the inconsistencies and problems in the day to day law application become clear. Here it comes to the recurring problem of the law field that lacks the theoretical basis for the application of the law. To certain extent the monograph *Legal Regulation of Strategic Planning in Public Finance* gives theoretical guidelines for courts, therefore, the book certainly has potential or actual usefulness in practice. Although the powers of the law science are not highly rated today in the community of practitioners.

The shortcoming of the monograph is that the author has not paid much attention to the detailed criticism of the Federal Law on Strategic Planning Provisions. The law is progressive, but it is not flawless. This law is central for all kind of planning even though the public financial planning has its own sound legal basis analyzed in the monograph. The detailed commentary to the provisions of the Federal Law on Strategic Planning could be expected in the book with this title. May be even the numerous executive strategic orders could be commented in the monograph although they tend to be more tactic documents with a limited period of validity. Another point of criticism is that the book fails to engage the supranational level of strategic planning in the scope of the analysis. It is one of the prospective directions of the strategic planning development. There are already academic studies of strategic planning in the European Union. Some common programs have already been introduced in the EU and already have encountered some opposition in the member-states. These processes have already attracted the researches. The analysis of this experience and the academic findings regarding the EU experience could be very appropriate in the book on strategic planning theory. Moreover, there is a legal framework for macroeconomic coordination in the Eurasian Economic Union and certain discussion has already begun on strategic planning. There are a few ideas about strategic planning on the EAEU level in one of the recent articles by Ekaterina Kudryashova.[7] Still it seems that the detailed research is missing in the book.

[7] S. Shokhin & E.V. Kudryashova, Macroeconomic coordination in the Eurasian Economic Union: strategic aspects, 7 (3) *Russian Law journal* 38–53 (2019).

Yet, those are by no means fatal omissions of this timely and important book. The book is full of interesting ideas and offers important insight into the legal regulation of strategic planning. It may be predictable that the book could be interesting not only to the national but also to the international readers, therefore, it is worth taking efforts to make it available for the international academic audience. It may be recommended that the book be translated into English and the access to it should be expanded.

In summary, the book by E. Kudryashova *Legal Regulation of Strategic Planning in Public Finance* certainly becomes a landmark for research in the field of public planning. It is nothing less than an excellent attempt to come up with a doctrinal systematic approach to strategic planning. The reviewed book addresses difficult problems and the law science is amplified and enriched by theoretical and empirical findings. The book deserves closer attention by the specialists and further discussion.

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