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AT THE FOREFRONT OF THE LEGAL RESEARCH

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THE DEVELOPMENT OF CONTRACT LAW IN THE FIELD OF BLOCKCHAIN TECHNOLOGIES

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Abstract

The paper provides an overview of different legal approaches to structuring contractual relations based on blockchain technology. The author considers the USA experience of building blockchain-oriented contractual relations to be cutting-edge legal solutions. The paper introduces the concept of a Simple Agreement for Future Tokens (SAFT). American investment lawyers invented this specific type of contract. SAFT shows the unique contractual solution that allows investors and inventors to form legal, contractual obligations that contradict neither American nor Russian contract law. The complexity of SAFT is also analyzed on the example of several recent blockchain projects and legal cases. The paper provides several approaches to optimizing Russian law and legal doctrine to new technological solutions. Among those are franchise, license, and loan agreements. The emphasis is made on the necessity of the implementation of new technology in the contract formation and amendment. The brief overview of COVID-19 challenges concerning the contract law doctrines of force majeure, hardship, frustration of contract are also analyzed in the scope of the paper's central hypothesis, namely: blockchain solutions.

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Keywords

Blockchain, token, cryptocurrency, ICO, SAFT, IPO, private placement, investments, smart contracts, securities, license, franchise, loan, COVID-19, force majeure, hardship

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I. Introduction

A blockchain technology has become widely known due to the introduction of cryptocurrencies into economic circulation. This new medium of exchange became popular following a series of global economic recessions that have undermined consumer confidence in traditional (fiat) currencies and traditional financial institutions.

The money "owners" felt they had been deprived of full control over their property.[2] Another significant reason for the growth of cryptocurrency in popularity was its ability to reach those parts of the world where previously financial transactions were impossible.[3] In certain geographical locations, not all the individuals, despite having legal capacity, can have a bank account in their name, due to cultural restrictions dominating in those regions.[4] Thus, cryptocurrencies

[2] Felix Martin, Money: The Unauthorized Biography (Knoopf 2014) (336).

[3] Paul Vigna, Michael J. Casey The Age of Cryptocurrency: How Bitcoin and The Blockchain Are Challenging the Global Economic Order 240–241 (2016). For example, with more than 70 % of the population living below the poverty line, Mali is one of the poorest countries in the world, and the region has no developed banking system. Mali residents working abroad to make their living have to hand cash through random travelers who are flying back home. The national banking system is underdeveloped, and electronic payments and cash transfers grow very slowly.

[4] Id. at 243. An example of women in Afghanistan and several other countries where women are prohibited from keeping bank accounts on their behalf. Husbands, fathers or brothers keep their income under full control.

(1) offered to increase the degree of control over assets, (2) and introduced new participants to the economic turnover, who did not have access to financial services before. The lack of a full-scale infrastructure and high level of anonymity of cryptocurrencies results in the downside. Cryptocurrencies global turnover requires a comprehensive approach from the leading nations to prevent illegal transactions. The FATF developed a regulatory regime to combat illegal cryptocurrency transactions, money laundering, and the financing of terrorism,[5] with which countries should bring in line their national legal framework. Besides, some countries are considering issuing their own cryptocurrency.[6]

Although cryptocurrencies contributed to the promotion of the blockchain technology, the main outcome of this promotion was the introduction of smart contracts. Most jurisdictions did not need any specific updates to merge smart contracts into the body of contract law.[7] Some countries, Russia included, had to amend their *corpus* of civil

[5] FATF is an inter-governmental body established in July 1989 by a Group of Seven (G-7) Summit in Paris, initially to examine and develop measures to combat money laundering and the financing of terrorism. FATF has set the internationally endorsed global standards against money laundering, terrorist financing and the financing of proliferation (the FATF Recommendations). The FATF Recommendations contain 40 recommendations that establish comprehensive requirements for anti-money laundering and combating the financing of terrorism and proliferation together with Interpretive Notes and the applicable definitions in the Glossary. On June 21, 2019, FATF published the Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers ("2019 Guidance"). At the same time, FATF adopted and issued an Interpretive Note to Recommendation 15 on New Technologies ("INR. 15"). The FATF defines terms used by professional players in the cryptocurrency market, such as Virtual Asset (VA) and Virtual Asset Service Provider (VASP). The FATF expects that its member states implement the new rules within the following 12 months. See: Yuriy V. Brisov, Otchet Komissii po provovomu obespecheniyu tsifrovoy ekonomiki pri Mosckovskom otdelenii Assotsiatsii yuristov Rossii [Interpretive Note of the Commission on Legal Support of Digital Economy, Moscow Branch of the Association of Lawyers of Russia]. URL: https://alrf.msk.ru/komissiya_po_pravovomu_obespecheniyu_cifrovoy_ekonomiki_pri_mos_3 (last visited Jun. 03, 2020).

[6] David B. Black, Who Needs Cryptocurrency FedCoin When We Already Have A National Digital Currency? URL: https://www.forbes.com/sites/davidblack/2020/03/01/who-needs-cryptocurrency-fedcoin-when-we-already-have-a-national-digital-currency/#633292614951 (last visited Jun. 03, 2020).

[7] Anton M. Vashkevich, Smart-kontrakty: chto, zachem i kak [Smart contracts: what, why, and how] 26 (Moscow: Simplawyer 2018). (In Russ.).

law to enable smart contracts-based transactions.[8] It is also important to note some new issues that blockchain-based transactions have faced due to the COVID-19 pandemic.[9]

We will also address the blockchain-based approach to traditional contracts, such as franchise, license, and loan agreements. These types of contracts have been adapted to blockchain technology and are used widely. Other critical issues we will be addressing are certain types of investment agreements: (1) blockchain-based crowdfunding solutions (ICO); (2) private placements; (3) initial public offering (IPO); (4) and Simple Agreement for Future Tokens (SAFT).

II. Legal regulation of blockchain in the United States

The US law has been allocating blockchain technologies for more than eleven years now since the launch of the most popular cryptocurrency Bitcoin. The popularity of Bitcoin gave rise to a new investment model for blockchain projects ICO (initial coin offering). The idea of ICO was to allow participants to exchange-listed cryptocurrencies, such as Bitcoin, Ethereum, and some other altcoins (alternative cryptocurrencies)[10] for the tokens (coins) of the new blockchain projects at a discounted price. This fund-raising method is called ICO, to distinguish it from initial public offering (IPO), regulated under security laws.

[8] Poyasnitelnaya zapiska k proektu Federalnogo zakona "O vnesenii izmeneniy v chasti pervuyu, vtoruyu i chetvertuyu Grazhdanskogo kodeksa Rossiyskoy Federatsii" (zakonoproekt No 424632-7) [Executive Summary to the draft Federal Law on Amendments to the First, Second, and Fourth Parts of the Civil Code of the Russian Federation. (Draft law No 424632-7)]. URL: http://sozd.duma.gov.ru/download/827EDEDA-92F1-46AE-A576-71C8113EB77C (last visited Jun. 03, 2020). (In Russ.)

[9] Yuriy V. Brisov, Fors-mazhor v resheniyakh angliyskikh i amerikanskikh sudov [Force Majeure in the Decisions of the UK and US courts]. URL: https://zakon.ru/blog/2020/04/05/fors-mazhor_v_resheniyah_anglijskih_i_amerikanskih_sudov (last visited Jun. 03, 2020). (In Russ.)

[10] Sergei Bazarov, Kriptovalyuty: terminy i sokrashcheniya [Cryptocurrency: terms and abbreviations] (In Russ.) URL: https://medium.com/bitcoin-review/криптовалюты-термины-и-сокращения-27293b8413cc (last visited Jun. 25, 2020). (In Russ.)

The US law applies a very broad description of securities[11] including a bill, a bond, an investment contract and the whole list of items that can be called a security.[12] This list is so extensive that it cannot be perceived as *numerus clausus*. Thus, the initial token offering can be either an investment contract (a security under the U.S. law)[13] or any other agreement. The United States Securities and Exchange Commission (SEC) is policing compliance with financial markets and securities law. The policing is based on a number of tests developed by the Supreme Court of the United States and known as "Howey Test" by reference to one of the first and major cases in this field SEC v. W.J. Howey Co. (1946).[14]

The facts in *Howey* were the following: W.J. Howey Co. (Defendant) was a Florida-based company operating on orange groves under the management of Mr. Howey. To attract investments, Howey sold the land to private individuals. Most of them were not farmers or even Florida residents, and they were offered to enter into service contracts to care for and cultivate citrus trees as a service. Eighty-five percent of

[11] Sergei A. Khabarov, Printsip legaliteta i voprosy kvalifikatsii tsennykh bumag [The Principle of Legality and Issues of Qualification of Securities], 4 Zhurnal predprinimatelskogo i korporativnogo prava [The Journal of Entrepreunership and Corporate Law] 41 (2016). (In Russ.)

[12] 15 USCS § 80a-2a(36). "'Security' means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

[13] Federal Securities Act No 73-22 on 27.05.1933, The Yale Law Journal Company. Inc. 43(2):171-217.

[14] SEC v. W. J. Howey Co. No 873 on 27.05.1946, URL: https://supreme.justia.com/cases/federal/us/328/293/ (last visited Jun. 26, 2020).

the buyers signed such service contracts. Howey Co. was in full control of the property and transactions. Clients were offered a portion of the profit generated from the sale of oranges.

The SEC (Plaintiff) filed a lawsuit against Howey for using interstate commerce to offer and sell unregistered securities in violation of Section 5 (a) of the Securities Act of 1933 (SEA). Howey claimed that he was not selling securities. The United States Court of Appeals for the Fifth Circuit agreed with Howey. The SEC then filed a *certiorari* petition with the U.S. Supreme Court, which was granted, and the Supreme Court ordered the case to be heard.

The judge (Murphy) presented an opinion that purchase contracts offered by Howey were securities. Subject to § 2 (a), SEA, the term 'security' includes many instruments. Although the term 'investment agreement' was not explicitly defined by law, it was usually defined in many state laws long before the SEA was adopted, and this definition is consistent with SEA's legislative goals. An investment contract involves "Placing capital or laying out of money in a way intended to secure income or profit from its employment is an investment, and the Certificates issued by the defendant were investment contracts" as was stated in State v. Gopher Tire & Rubber Co., 146 Minn. 52 (Minn. 1920).

Courts reviewed the substance and economic reality of any such contract to determine whether it was a security regardless of what it may be called. The court developed a four-step test and found that the contract offered by Mr. Howey was a security. Buyers received a portion of orange groves to generate profit from Howie's farming operations as a result. Most buyers lived outside Florida and were not committed to cultivating their land themselves. Howey had complete control of the business. Thus, sales contracts are essentially securities, and Howie's failure to comply with the SEA requirements cannot be justified because of his ignorance of the law.[15]

The SEC issued recommendations for initial coin offering (ICO).[16] The SEC warned that ICO participants and coordinators must consider

[15] Id.

[16] SEC.gov, Framework for "Investment Contract" Analysis of Digital Assets, URL: https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (last visited Jun. 26, 2020).

whether or not the U.S. federal securities laws apply to their token offerings.

The threshold question is whether [or not] a digital asset should be treated as a security under these laws.[17] A digital asset must be analyzed for its compliance with the characteristics of "security" according to the federal securities laws. The SEC guidelines provide a foundation for analyzing whether [or not] the digital asset meets the characteristics of an "investment contract".[18] The SEC recommends applying Howey test for this purpose.[19]

All offers of securities, including those related to digital assets, must be registered following the law or be eligible for an exemption from registration. The registration regulations require individuals to disclose certain information to investors, and this information must be complete and not misleading. These disclosure requirements contribute to the federal securities laws the goal to provide investors with the information necessary to make informed investment decisions. Required disclosures include company management information.[20] The absence of information required by law about corporate governance (persons in control and governance principles) or disclosures about the company's investment and business model gives rise to information asymmetry, which is a violation of law.

July 25, 2017, the SEC published a report on "the Decentralized Autonomous Organization" or DAO report, which was initiated to protect U.S. investors in ICO. The report emphasized that digital tokens are investment contracts; therefore, ICO must comply with the U.S. federal securities laws.[21]

The technology-based startup Tezos can be referred to as the victim of the first landmark crypto business case. This project raised

[17] 15 U.S.C. § 77(2) ("The Securities Act" of 1933); 15 U.S.C. § 78c(a)(10) (the "Securities Exchange Act" of 1934); 15 U.S.C. § 80a ("Investment Company Act" of 1940); 15 U.S.C. § 80a-2(a)(36) ("Investment Advisers Act" of 1940).

[18] Id. SEC.gov, Framework for "Investment Contract" Analysis of Digital Assets.

[19] SEC v. Howey Co., 328 U.S. 291 (1946).

[20] TSC Industries v. Northway, 426 U.S. 438, 441 (1976).

[21] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO. URL: https://www.sec.gov/litigation/investreport/34-81207.pdf (last visited Jun. 26, 2020).

$232 million. In October 2017, Tezos said the project has some internal problems, and investors never received their tokens. Moreover, lawsuits have been filed against Tezos. One of them, filed in a San Francisco court, was based on a violation of securities, advertising, and competition laws.[22]

It should be noted that American lawyers' experience has been considered and analyzed worldwide since the United States introduced blockchain technologies. The U.S. approach is usually considered as *ex-post*. The U.S. legislator and government agencies observe newly emerging practices. The agencies render authoritative opinions and recommendations. Only after that certain restrictions may follow. A different approach (*ex-ante*) has been applied by some states and it has generally created *corpus* of *nudum jus* regulations. We find the latter approach to be shortsighted and preventing the industry development.

The *ex-post* regulation seems to be the most reasonable approach to the statutory regulation of technology breakthroughs and it is traditionally used in the United States.[23] Based on the analysis of all *pro et contra*, the paper addresses potential threats inherent in some projects. When agencies prohibit project implementation relying on their recommendations alone, the court interferes with settling the dispute and contributing to flexible *ex-post* regulation. While this approach protects the industry against dangerous abuses, it does not limit its development.

The SEC aims its activities at streamlining the blockchain initiative rather than banning it. Both the SEC and FinCEN state they do not pursue combatting blockchain or cryptocurrencies. The government aims to prevent money laundering and terrorism financing and protect U.S. citizens from Ponzi-like investments.

Numerous explanations published on the SEC's website[24] confirm the priority of protecting the U.S. citizens from reckless investment by

[22] Yuriy V. Brisov, ICO na poroge pervogo klassovogo iska [ICO on the Verge of the First Class Action]. URL: https://zakon.ru/blog/2017/11/04/ico_na_poroge_pervogo_klassovogo_iska (last visited Jun. 26, 2020). (In Russ.)

[23] Matthew D. Adler & Chris W. Sanchirico, Inequality and Uncertainty: Theory and Legal Applications, 155 University of Pennsylvania Law Review 281 (2006).

[24] Spotlight on Initial coin offering and digital assets, URL: https://www.sec.gov/spotlight-initial-coin-offerings-and-digital-assets (last visited: 16.08.2019).

applying the legal regulation of blockchain technology and show the commitment to forming the transparent digital market. Still, some of the laws of some countries banned ICO referring to such explanations. China's government imposed a full ban on ICOs and similar ways of fundraising across the country.[25] Following China, South Korea has established a strict policy of ICO regulation.[26]

However, it was not only the activities of government agencies that facilitated the development of the legal basis for blockchain technology. An in-depth legal study of tokens was conducted in 2015. The following works by ICO lawyers may be given as examples: Santori "Appcoin Law: ICOs the Right Way"[27] and F. Ehrsam "How to Raise Money on a Blockchain with a Token."[28]

The lawyers implemented two basic approaches to the definition of blockchain tokens. The first approach assumed that the token should not necessarily be treated as security, since the law does not contain a definition of blockchain that is closed from arbitrary interpretation. Applying the analogy of the law also leaves a large field for interpretation. In the absence of a clear definition, the financial and legal essence of a token can be disclosed based on the problem that the blockchain project is designed to solve: a sale (token as a product), loan (token as a liability), franchise (token as a service), license (token as intellectual property), and stock (token as corporate rights).[29] As mentioned above, the second approach relied on *SEC v. Howey (1946)*.[30] In this case, the U.S. Supreme Court developed a test to determine whether a particular

[25] Tian Chuan & Rachel-Rose O'Leary, China Outlaws ICOs: Financial Regulators Order Halt on Token Trading. URL: https://www.coindesk.com/china-outlaws-icos-financial-regulators-order-halt-token-trading (last visited Jul. 2, 2020).

[26] Ilya Nemchenko & Lyudmila Petukhova, Yuzhnaya Koreya zapretila ICO vsled za Kitaem [South Korea banned ICO in the footsteps of China]. URL: https://www.rbc.ru/money/29/09/2017/59ce0aa99a7947e94cf30743 (last visited Jun. 26, 2020). (In Russ.)

[27] Marco Santori, Appcoin Law: ICOs the Right Way, URL: https://www.coindesk.com/appcoin-law-part-1-icos-the-right-way (last visited Jun. 26, 2020).

[28] Fred Ehrsam, How to Raise Money on a Blockchain with a Token, URL: https://blog.coinbase.com/how-to-raise-money-on-a-blockchain-with-a-token-510562c9cdfa (last visited Jun. 26, 2020).

[29] Ehrsam F. Op. cit.

[30] Santori M. Op. cit.

transaction is related to an investment contract. The U.S. law treats an investment contract as a security.[31] The United States use the Howey test to determine whether tokens are securities. A token is a security if it meets four criteria at the same time: (1) investors who (2) invested their own money (3) in a joint venture with (4) the reasonable expectation of profit from the activities of the promoters or other third party.[32] There are a number of precedents[33] that form a complex set of criteria roughly defined as the "Howey test". Legal literature provides a detailed study of particular cases analyzed by the U.S. courts. If the contract is recognized as an investment contract, it will be subject to the SEC authority.

III. Developing new solutions

The ICO's future is questionable, as some countries have forbidden it altogether. STO (security token offering)—an alternative model for attracting investment in blockchain projects, similar to IPO—proved to be costly, lengthy, and, most importantly, failed to offer a new solution that users were looking for in the blockchain technology. Thus, the urge to find alternative legal frameworks for building contractual relationships using blockchain technology has become evident. The major problem was to develop an investment model that was primarily intended to protect inexperienced investors from investing in projects at the first stages of development, i.e., when the risk of fraud is most significant.

That was when the SAFT appeared. The SAFT (Simple Agreement for Future Tokens — an agreement to convert investments into future tokens) has become the most promising model of investment on blockchain platforms. The SAFT design is different from the usual token sale (ICO), as it is an investment contract between developers and qualified investors. This model of raising funds is a modern transaction

[31] Yuriy V. Brisov, ICO vs IPO (Blockchain tokens. Smart Contracts. Cryptocurrency). URL: https://zakon.ru/blog/2017/07/16/ico_vs_ipo_blokchejn_tokeny_smart_kontrakty_kriptovalyuty (last visited Jul. 2, 2020).

[32] Peter V. Valkenburgh, Framework for Securities Regulation of Cryptocurrencies. Version 2, CoinCenterReport. 45 (2018).

[33] See also SEC v. Edwards No 02-1196 on 13.01.2004. URL: https://supreme.justia.com/cases/federal/us/540/389/ (last visited Jul. 10, 2020).

system that can significantly reduce the risks for token sellers. The new structure is formed together with investors, issuers, and developers.[34]

The general SAFT mechanism looks like this. The developers of the blockchain platform enter into a written SAFT with a pool of sophisticated investors. According to SAFT, investors must pay cash to developers in exchange for the right to receive tokens at a fixed price after the project is launched. The price for investors usually implies a discount. This two-step investment structure allows investors to earn money later on the difference between the token sale price of the current project and the price specified in SAFT, which in the "classic" ICO model corresponds to the pre-sale price (pre-ICO).

This model of structuring investment transactions is possible under the U.S. federal securities laws. Companies may not offer or sell securities unless the offer has been registered with the SEC or an exemption from registration has been granted. An offer of securities that is exempt from registration with the SEC is called a private placement or an unregistered offering.[35]

Private placements are not subject to certain laws and regulations aimed at protecting investors. These are requirements for disclosures for the investors to make informed decisions.[36] Hedge funds and other private funds often use private placements.[37]

Regulation D

Private placements usually refer to Regulation D. This regulation includes three rules regarding exemptions from the SEC registration requirements. These Rules are 504, 505, and 506. The issuers rely on

[34] Pete Rizzo, SAFT Arrives: 'Simple' Investor Agreement Aims to Remove ICO Complexities, URL: https://www.coindesk.com/saft-arrives-simple-investor-agreement-aims-remove-ico-complexities (last visited Jul. 2, 2020).

[35] Investor Bulletin: Private Placements Under Regulation D, Investor.gov, URL: https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-31(last visited Jul. 10, 2020).

[36] TSC Industries v. Northway, 426 U.S. 438, 441 (1976).

[37] Investor Bulletin: Hedge Funds, Investor.gov, URL: http://investor.gov/news-alerts/hedge-funds (last visited Jul. 10, 2020).

these rules when offering unregistered securities. Each rule contains special requirements for issuers.[38]

Rule 504

Rule 504 allows some companies to offer and sell up to $1,000,000 of their securities in any 12-month period. These securities can be sold to any number and type of investors, and the issuer is not subject to special disclosure requirements. Generally, securities issued under Rule 504 are restricted securities.[39]

Restricted securities are securities acquired in an unregistered, private sale from the issuing company or from its affiliate.[40] These securities usually include option plans or payments to investors under a convertible loan agreement. In other words, these are time-limited offers or offers restricted to general public (not intended for the public sale).[41]

Rule 505

Issuers can only offer and sell up to $5 million of its securities in any 12-month period. There are restrictions on the types of investors who can acquire securities. The issuer may sell to an unlimited number of "accredited investors" and up to 35 non-accredited investors.[42]

If the issuers sell their securities to non-accredited investors, the issuers must disclose certain information about themselves, including

[38] 17 C.F.R. § 230.506 (Lexis Advance through the April 29, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 23459 and 85 FR 23470. Title 3 is current through April 3, 2020).

[39] Rule 144: Selling Restricted and Control Securities, Investor.gov, URL: http://www.sec.gov/investor/pubs/rule144.htm (last visited Jul. 10, 2020).

[40] 17 C.F.R. § 230.144 (Lexis Advance through the April 29, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 23459 and 85 FR 23470. Title 3 is current through April 3, 2020.

[41] "[s]ecurities acquired directly or indirectly from the issuer thereof, or from an affiliate of such issuer, in a transaction or chain of transactions not involving any public offering". See: Oppenheimer Fund v. Sanders, 437 U.S. 340, 343 n.2, 98 S. Ct. 2380, 2381 (1978).

[42] Updated Investor Bulletin: Accredited Investors, Investor.gov, URL: http://investor.gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors (last visited Jul. 10, 2020).

the financial statements. If securities are sold only to accredited investors, the issuer may disclose information to investors at their own discretion. However, any disclosures made to accredited investors must be provided to non-accredited investors.[43]

Rule 506

Companies relying on the Rule 506 exemptions can raise an unlimited amount of money. The issuer relying on Rule 506(b) may sell its securities to an unlimited number of "accredited investors" and up to 35 non-accredited investors (same as under Rule 505). However, unlike Rule 505, non-accredited investors participating in the offer must have financial knowledge and experience in financial and business matters.[44] As for Rule 505, the issuers must disclose certain information about themselves to non-accredited investors. If securities are sold only to accredited investors, the issuer may disclose information to investors at their discretion. Any disclosure to accredited investors must be provided to non-accredited investors. In contrast to registered offers, which require disclosure of certain information, investors in private placements usually independently obtain the information they need to make an informed investment decision. Investors should fully understand the risks involved.[45]

Accordingly, by limiting the number of pre-sale participants to sophisticated investors, developers avoid the risk associated with the anticipation of revenue. According to the Howey test, the latter is a sign of investment activity, and it requires a special verification procedure

[43] An accredited investor must meet the following criteria: (1) have an annual income exceeding $200,000, or $300,000 for joint income, for the last two years with expectation of earning the same or higher income in the current year or (2) have net worth exceeding $1 million, either individually or jointly with his spouse (excluding the value of that person's primary residence and any loans secured by that residence). The requirements for accredited investors may differ from state to state. Billingsley v. Ariz. Corp. Comm'n, No 1 CA-CV 18-0630, 2019 Ariz. App. Unpub. LEXIS 1256 (Ct. App. Nov. 19, 2019).

[44] Pinter v. Dahl, 486 U.S. 621 (1988).

[45] Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 105 S. Ct. 2621 (1985).

under the U.S. law. Under SAFTs, developers issue future tokens, investors receive tokens when the project is launched, and registration with the SEC in this case requires simple filing.[46]

The authors of SAFT did not mean to get around the securities laws. On the contrary, they emphasize the full compliance of SAFT with the Securities Act of 1933. This structure avoids uncertainties usually arising when investing in a future company. Entrepreneurs follow the U.S. federal securities laws in the same way they do for venture financing.[47] At the same time, SAFT is equivalent to a simple written contract and it allows modifying to meet the project needs or requirements applicable in the jurisdiction. Pantera Capital P. Veradittakit, a venture investor, developed their own SAFT version as reported in the White Paper (project documentation). Veradittakit described SAFT as the first meaningful step towards creating a structure and standard in token financing that reflects the position and goals of companies.[48] The investor emphasizes that, on the other hand, the SAFT will have a limited application. The SAFT model is primarily focused on projects that raise funds for tokens that are not securities.[49]

E. Syvertse, the leading consultant of AngelList, notes that SAFT does not restrict the circulation of any other types of tokens. They may eventually be present in the CoinList listings, a new organization that the company is creating in partnership with ProtocolLabs to conduct the relevant ICOs.[50]

The future of the SAFT depends on the decision of the crypto community. In any case, this model will be useful as much as it will be in demand and accepted by industry players. Marco Santori emphasizes that the SAFT concept is the type of operation that fully complies with current laws and requires no changes in legal regulation. SAFT can

[46] Rizzo. Op. cit.

[47] Kirill O. Osipenko, Dogovor ob osushchestvlenii prav uchastnikov khozyaystvennykh obshchestv v rossiyskom i angliyskom prave [An Agreement on exercising company members' rights in Russian and English Law] 5 (Moscow: InfotropicMedia 2016). (In Russ.).

[48] Rizzo. Op. cit.

[49] Rizzo. Op. cit.

[50] Rizzo. Op. cit.

minimize the risks of venture investments and democratize access to the secondary markets.[51]

Undoubtedly, there are a number of problems that can hinder the application of a SAFT model. The main one is that SAFT lacks the promises that made ICO so attractive to the public, namely, SAFT is only available to sophisticated U.S. investors and may not be available to investors globally.

IV. The Telegram case

However, new investment concepts that use exemptions from securities registration rules are hardly airtight. A good example was presented in legal dispute SEC v. TON where Russian digital entrepreneur Pavel Durov confronted the U.S. justice.

In January 2018, Telegram, a company famous for its messenger, began raising funds to finance its new blockchain project "Telegram Open Network" or "TON Blockchain" and cryptocurrency "Grams". The project offered multiple solutions for contractual relationships based on smart contracts and blockchain apps to develop a comprehensive infrastructure for valid economic activities.[52]

In 2018, Telegram offered future Grams to 175 legal entities and individuals (sophisticated investors under an exemption from the securities registration rules) in exchange for fiat money. Token sales agreements allowed initial buyers to acquire TON blockchain tokens. The company raised about $1.7 billion and sold 2.9 billion Gram tokens to investors worldwide. Under sales agreements, Gram tokens were to be issued (and TON to be launched) on or before October 31, 2019.

On October 11, 2019, the SEC filed a complaint with the federal court for an illegal offer of securities, and asked for a temporary restraining order (TRO)[53] and a preliminary injunction[54] despite the

[51] Rizzo. Op. cit.

[52] Meghan Spillane, SEC Wins Injunctive Relief To Prevent Telegram's Distribution of $1.7B Worth of Cryptocurrency. URL: ttps://www.lexology.com/library/detail.aspx?g=e229fa49-10ae-4e9c-a219-401f41225176 (last visited Jul. 10, 2020).

[53] Temporary restraining orders (TRO) are short-term pre-trial temporary injunctions against asset management. USCS Federal Rules of Civil Procedure, R 65.

[54] SEC halts alleged $1.7 billion unregistered digital token offering. URL: https://www.sec.gov/news/press-release/2019-212 (last visited Jul. 17, 2020).

fact that, according to both parties to the proceedings, Telegram and the SEC were in the process of sharing information.[55] The court imposed a temporary restraining order on Telegram's assets.[56]

When the proceedings opened, Telegram postponed the TON launch until April 30, 2020. On January 15, 2020, both parties filed motions for summary judgment[57] and both were denied by the court, setting the case for trial by jury. Neither party testified in court despite the opportunity to do so. The parties presented the Court with a fulsome Joint Stipulation of Facts,[58] and each side offered deposition testimony,[59] exhibits, and declarations. The parties also filed cross-motions for summary judgment, and the SEC filed a motion to strike an affirmative defense, motions[60] which the Court found unnecessary.

[55] Court record. Southern District Reporters, P.C. (212) 805-0300 K2JAASEC2 Hearing. P. 48.

[56] A temporary restraining order (a TRO) aims at keeping the parties, while the claim is pending, as much as possible in the original positions they held at the time the claim was initiated, and preserving the ability of the court to make a meaningful decision after consideration of the case on the merits. A TRO is issued upon equitable discretion of a first-instance judge. No TRO is issued unless there is an adequate remedy. For example, preliminary injunctions are often issued in relation to trademark infringements or infringements of copyright or other intellectual property rights or when consumer safety is at stake. See: California v. Am. Stores Co., 495 U.S. 271 (1990); Univ. of Tex. v. Camenisch, 451 U.S. 391 (1981); Salinger v. Colting, 607 F.3d 68, 70 (2d Cir 2010).

[57] A motion for summary judgment (an MSJ) is a procedural application for summary judgment, due to the fact that the other party does not have enough grounds for a jury trial, since there is no issue of fact. USCS Federal Rules of Civil Procedure, R 56.

[58] A joint stipulation is a procedural document in which the parties inform the court of the agreements reached. In this case, the SEC and TON have agreed on an evidence-gathering process that may otherwise be expensive, complex, and lengthy. USCS Federal Rules of Civil Procedure, R 4.

[59] A deposition testimony in the law of the United States takes place when parties interview witnesses themselves at the evidence-gathering stage, and such testimony is given under oath, and filed with the court as a transcript or video. Witnesses may also be called to court to re-testify. USCS Federal Rules of Civil Procedure, R 32.

[60] An affirmative defense is a defense by making independent statements rather than responding to a claim. A motion to strike affirmative defenses is objections to the defendant's affirmative defense. A motion to strike affirmative defenses refuting the claim. USCS Federal Rules of Civil Procedure, R 12(f). Based on the motion, the court may strike an unfair defense. Objections are sustained when it is obvious that

On February 19, 2020, the parties appeared for oral argument on the motions for summary judgment and a preliminary injunction, but the motions for summary judgment were denied. On March 24, 2020, the court reviewed and granted a motion by the SEC to impose a preliminary injunction on the distribution of Telegram assets related to the TON project until the end of the trial.

The Court finds that the SEC has shown a "substantial likelihood of success"[61] in proving that the contracts and understandings at issue, including the sale of 2.9 billion Grams to 175 purchasers in exchange for $1.7 billion, are part of a larger scheme to distribute those Grams into a secondary public market, which would be supported by Telegram's ongoing efforts. Considering the "economic realities" under the Howey test, the Court finds that, in the context of that scheme, the resale of Grams into the secondary public market would be an integral part of the sale of securities without a required registration statement.[62]

Telegram knew and understood that reasonable purchasers would not be willing to pay $1.7 billion to acquire Grams merely as a means of storing or transferring value. Instead, Telegram developed a scheme to maximize the amount initial purchasers would be willing to pay Telegram by creating a structure to allow these purchasers to maximize the value they receive upon resale in the public markets.[63]

As part of its Howey analysis, the Court finds an implicit (though formally disclaimed) intention on the part of Telegram to remain committed to the success of the TON Blockchain post-launch. As such, the initial 175 purchasers possess a reasonable expectation of profit based on Telegram's efforts because these purchasers expect to receive profits from the resale of Grams in the immediate post-launch period.

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the affirmative defense is not relevant to the case under consideration, is unfair, and its removal from the case file corresponds to the principle of procedural economy. See: SEC v. Gulf & Western Indust., 502 F. Supp. 343, 345 (D.D.C. 1980).

[61] Supra note 5.

[62] Securities and Exchange Commission v. Telegram Group Inc. et al, No 1:2019cv09439 — Document 227 (S.D.N.Y. 2020). URL: https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2019cv09439/524448/227/ (last visited Jul. 17, 2020).

[63] Id.

Under the Howey test, the series of contracts represent a security within the meaning of the Securities Act of 1933 (the "Securities Act").[64]

Telegram asked the court to clarify whether the assets not related to the U.S. investors are also under injunction. On April 1, the court explained that all the project assets were seized, as they are a part of the general scheme.[65]

Telegram also filed an appeal with the United States Court of Appeals for the Second Circuit[66], unfortunately we would not be able to see the decision on the appeal. However, we can examine an explicit *amicus curia* brief that has been filed by the representatives of the blockchain industry.

The blockchain industry members filed their statement on April 3, 2020.[67] In particular, the *amicus curiae* brief states that "This future holds immense promise for U.S. consumers, investors, and innovators. The Court's decision will influence all future projects. Before filing this action, the Commission (SEC) had provided limited guidance on how to fund and present blockchain networks. However, what it had said differs drastically from its position in this case and the decision. Like many other cryptocurrency projects, Telegram and its council structured two-part fundraising, the first of which complied with existing exemptions for private placements and the second of which involved the delivery of functional assets. The Court nevertheless decided that this compliant sale was part of a "scheme" to effectuate an unregistered security offering."[68]

Therefore, this appeal addresses whether companies may enter into a private placement with sophisticated investors under SEC Rule 506 (Regulation D) to fund a blockchain network and deliver tokens to investors once the network is functional. The district court

[64] Id. 17–20.

[65] SEC v. Telegram Grp., Inc., No 19-cv-9439 (PKC), (S.D.N.Y. 2020).

[66] SEC v. Telegram Group, Inc., No 20-1076 (2d Cir., filed Mar. 25, 2020).

[67] JD Alois, The Blockchain Association Files Amicus Brief in Support of Telegram's Battle with the SEC. URL at: https://www.crowdfundinsider.com/2020/04/159894-the-blockchain-association-files-amicus-brief-in-support-of-telegrams-battle-with-the-sec/ (last visited Jul. 17, 2020).

[68] Brief of amicus curiae the blockchain association in support of appellants Case 20-1076, Document 55, 04/03/2020, 2814127, at 9.

erred by rejecting Telegram's private placement and the future delivery of blockchain tokens. The two steps are legally and temporally distinct. Indeed, the tokens did not even exist at the time of the private placement. Treating the two steps as one is against the purpose of the Commission's private-placement rules. Telegram gathered investments in a private placement with a proper Regulation D filing. Yet the court has barred Telegram from delivering the fruits of that investment and, even from finishing the harvest.[69]

However, despite the industry's resentment, the decision of the court of first instance was not reviewed. As a result, Pavel Durov announced in his Telegram channel on May 12, 2020,[70] that he would terminate the project. It was not until late June that media released information about the settlement agreement between TON and the SEC, under which Telegram terminates the TON project and returns money to investors and pays a fee, and the Commission, in turn, withdraws the charges and refuses further prosecution.[71]

The reason for Pavel Durov's project to have caused discontent of the Commission will remain a mystery. Previously, projects successfully negotiated with the Commission and went on with their business. For example, Block.One, which raised $4 billion, paid the SEC a $24 million fine and issued its cryptocurrency.[72] However, it should be noted that this happened before the publication of the SEC's DAO Report mentioned above.[73] At the same time, KIK, a Canada-based messenger, which implemented a scheme to raise funds using a similar to TON, has been

[69] Id.

[70] URL: https://tgraph.io/What-Was-TON-And-Why-It-Is-Over-05-12 (last visited Jul. 17, 2020).

[71] Interfax, SEC ofitsialno podvela itogi ICO TON Durova [The SEC officially summed up the results of Durov's TON ICO]. URL: https://www.interfax.ru/business/714918 (last visited Jul. 17, 2020). (In Russ.)

[72] Valeriya Pozychanyk, "Pamyat korotkaya, no ruki dlinnye": istoriya proekta Pavla Durova i poverivshikh v nego investorov ["Memory is short, but hands are long": the history of Pavel Durov's project and investors who believed in it]. URL: https://thebell.io/pamyat-korotkaya-no-ruki-dlinnye-chto-investory-pavla-durova-budut-delat-posle-zakrytiya-ton (last visited Jul. 17, 2020). (In Russ.)

[73] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, URL: https://www.sec.gov/litigation/investreport/34-81207.pdf (last visited Jul. 17, 2020).

subjected to exactly the same sanctions and is pursuing proceedings against the Commission.[74] Therefore, there is no question of a "Russian trace" or "conspiracy of the United States authorities" against Pavel Durov. The U.S. and Canadian projects are facing similar challenges. Having made a solemn conclusion about the triumph of rule of law in the United States, we will leave this blissful jurisdiction for a while and see how things are in Russia.

V. Legal regulation of blockchain in Russia

The Russian Federation has enacted the whole bundle of new legislation. Finally, the bill "On digital financial assets" was adopted in July 2020. It has been aggressively promoted for more than a year.[75]

The Law "On Crowdfunding Platforms" took effect recently,[76] and new amendments regarding "digital rights" were made to the Civil Code

[74] Vladimir Oprya, SEC prodolzhaet sudebnoe razbiratelstvo po delu protiv messendzhera Kik [The SEC continues proceedings in the case against Kik. URL: https://bits.media/sec-prodolzhaet-sudebnoe-razbiratelstvo-po-delu-protiv-messendzhera-kik/ (last visited Jul. 17, 2020).

[75] Postanovlenie GD FS RF ot 22.05.2018 No 4030-7 GD "O proekte Federalnogo zakona No 419059-7 "O tsifrovykh finansovykh aktivakh" [Decree No 4030-7 GD of the State Duma of the Federal Assembly of the Russian Federation dated 22 May 2018 "On Draft Federal Law No 419059-7 on Digital Financial Assets"]. Article 3108. Official Gazette 2018 No 22. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2018, Item 3108 (In Russ.). Article 2 of the Law contains definitions of the following concepts:

A digital financial asset is property in electronic form created by using cryptographic tools. Ownership of this property is verified by entering digital records in the register of digital transactions. Digital financial assets include cryptocurrency and tokens.

A token is a type of digital financial asset issued by a legal entity or individual entrepreneur (hereinafter referred to as the issuer) to raise financing and is registered in the register of digital transactions.

A digital wallet is a software and hardware tool that enables storing information related to digital records (digital rights). A digital wallet can provide access to the registry of digital transactions.

[76] Raising funds through blockchain technology platforms is addressed in Federal Law No 259-FZ dated 02.08.2019 "On Raising Investments via Investment Platforms and on the Amendments to Certain Legislative Acts of the Russian Federation". Article 8 of the Law introduces the concept of utilitarian digital rights that can be

of the Russian Federation (Article 128).[77] These amendments added digital rights to the list of real property, intellectual property, and other rights. Federal Law (34-FZ) of 18.03.2019 amended Article 141.1 of the Civil Code of the Russian Federation, which preserves the concept of digital rights and added to Article 160, Part 1, of the Russian Civil Code, the rule that a written form of the contract is complied with if it is made by electronic or other technical means. All of this together shows that the Russian Federation is in the process of adapting its legal system to the new economic reality created by digital technologies. At the same time, law enforcement is leaning against the development of blockchain technology, rather than in support of the latter.[78]

Blockchain technology opens new horizons for the securities market because it provides new opportunities for trading and clearance. However, the widespread integration of distributed ledger technologies to the stock exchange, while being beyond the scope of individual experiments, is limited by Russian law. The Russian Federation regulates the issue of securities by Federal Law No 39-FZ "On the Securities Market" dated 22.04.1996.[79] In addition, the violation of the strict procedure of issuing

exchanged inside a digital platform, which corresponds to the technical description of a distributed registry or blockchain technology.

[77] Federal'nyi zakon No 34-FZ "O vnesenii izmeneniy v chasti pervuyu, vtoruyu i statyu 1124 chasti tretey Grazhdanskogo kodeksa Rossiyskoy Federatsii" [Federal Law of the Russian Federation on the Amendments to Parts 1, 2 and Article 1124 of Part 3 of the Civil Code of the Russian Federation], Ofitsial'naia Gazeta [Off. Gaz.] No 12, Art. 1224, 2019; Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of legislation] 2019, No 12, Item 1224. (In Russ.)

[78] E.g., some quoted and similar decisions where virtual assets are treated as the target of a crime, and the use of cryptocurrencies is interpreted a priori as confirming the illegality of the transaction: e.g. the Decision of the Kirov district court in case No 1-37/2019 of 25.04.2019, Arkhiv Kirovskogo raionnogo suda g. Kazani [Archive of the Kirov district court of Kazan]; Decision of the Sverdlovsk district court in case No 1-9/2018 (1-416/17) of 16.07.2018, Arkhiv Sverdlovskogo raionnogo suda g. Kostroma [Archive of the Sverdlovsk district court of Kostroma]; Verdict of the Ramonsky district court of the Voronezh Region No 1-90/2018 of July 10, 2018 in case No 1-24/2018.

[79] Federal'nyi zakon No 39-FZ "O rynke tsennykh bumag" [Federal Law of the Russian Federation on the Securities Market] dated 22.04.1996, Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of legislation] 1996, No 17, Item 1918). Article 128 of the Civil Code defines the objects of civil rights: "including property rights, including non-cash funds, non-documentary

new securities is against the law and invokes: administrative liability (Article 15.17, the Code of Administrative Offences), and criminal liability (Article 185, the Criminal Code[80]). While Russian law on crowdfunding is very new and very limited in scope yet,[81] there exists no unified legal approach to blockchain investment whatsoever. Therefore, it is hardly possible to draw a clear line between various economic forms of blockchain and ways to raise funds for the development of projects under Russian law.

The Ministry of Finance of the Russian Federation proposed introducing criminal liability for the issue and turnover of cryptocurrencies in Russia. It planned to add Article 187.1 "Money Surrogate Circulation" to the Russian Federation's Criminal Code. While the Russian Government and the Bank of Russia[82] are cautious about cryptocurrency, there is risk that any project based on the blockchain technology may be treated as "money surrogate" production even though the new law has been adopted.

Thus, it is too early to talk about the broad implementation of blockchain technology in Russia. It would be advisable to wait for the adoption of the entire block of special laws that should contribute to the introduction of terminological and legal clarity in the relevant sphere. However, we can implement some of the legal models developed in the U.S. even now.

The SAFT can be used for structuring investment transactions in Russia. A token cannot be considered a security under Russian law. In this regard, the SAFT model seems to be the most effective since

securities, and digital rights". No concept of digital rights is contained in the Civil Code, but it is disclosed in a special law that has not yet been adopted, but since its publication in 2018, it creates a theoretical basis for the new provisions of the Civil Code.

[80] Ugolovnyi kodeks Rossiiskoi Federatsii [Criminal Code of the Russian Federation] No 63-FZ of 13.06.1996. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1996, No 25, Item 2954.

[81] See: Crown Fund Act No 112-106 of May 4, 2012. URL: https://www.congress.gov/bill/112th-congress/house-bill/3606 (last visited Jul. 17, 2020).

[82] Informatsionnoe pismo Banka Rossii o natsionalnoi otsenke riskov OD/FT ot 14.08.2018 No IN-014-12/54 [Information letter No IN-014-12/54 of the Bank of Russia on the National Assessment of ML/FT risks dated 14.08.2018] Vestnik Banka Rossii [Bank of Russia Bulletin] 2018, No 64.

it establishes a balance between investors and the startup. SAFT is consistent with the applicable Russian law and creates no obvious criminal risks. In addition to the SAFT, Russian law contemplates other ways to structure contractual relationships in blockchain projects. Some of the ways include the use of license agreements and franchise agreements.

If a license agreement is applied, the rights associated with the token will correspond to specific contractual characteristics. The token issuer may place a contract that includes the right to grant or distribute all or some of the rights related to the use of software code (which initially is the intellectual property of the licensor). The licensor may also have the right to deny individuals the right to exercise such rights. Therefore, as a result of performing the agreement, the licensee receives either all or part of these rights. The scope of rights obtained depends on the licensor. Any rights granted to the holders of digital tokens are formed by the initial issue of tokens (similar to a license to use any other software).[83]

As for the franchise model, it is necessary to define the key terms. Russian law operates the term "commercial concession". The U.S. laws do not apply the concept of a concession since before World War II; instead, the law establishes the concept of franchising.[84] The latter, in turn, is not used in Russian law. No matter the term, this type of a legal relationship has long been known in the Russian civil law doctrine.

Usually, franchising is defined as an agreement under which the franchisor grants the franchisee the right to use a set of industrial or intellectual property rights in exchange for financial compensation.[85] It should be recognized that franchising actually contains not only signs of investment (capital), but also the indicators of investment activity.[86]

[83] Brisov. id. ICO vs IPO.

[84] DJ Kaufman, An Introduction to Franchising and Franchise Law, 603 Business and Legal Issues, Commercial Law and Practice 341 (1992).

[85] Aleksandr A. Yeremin, Franchaizing i dogovor kommercheskoi kontsessii: teoriia i praktika primeneniia: monografiia [Franchise and commercial concession agreement: the theory and practice of application. Monograph] 12 (Moscow 2017). (In Russ.).

[86] Mariya N. Titova, O meste franchaizinga v sisteme pravovogo regulirovaniia investitsionnoi deiatelnosti [The place of franchising in the system of legal regulation

"Franchising should be considered as a business model (project), which is carried out by its participants using a set of interrelated legal means to achieve a specific economic result."[87]

Pursuant to Article 1027 of the Civil Code of the Russian Federation,[88] the concessionary under the commercial concession contract makes direct efforts to develop business in its territory and the grantor exercises control (administration) remotely. The rights granted through the blockchain token allow the holder to contribute to the system, while the token issuer has remote control, although without the right to interfere in the project implementation. The contract terms are written in the blockchain, allowing you to avoid a negative subjective component in the form of, for example, bad faith of the assignor. Thus, the token holder is granted the rights to work in the system by the issuer for the purpose of its development, and not because of a passive investment interest (the Howie test). Under the commercial concession model, the grantor grants its intellectual property rights to the concessionaire. According to a similar scheme in the structure of a digital token, its holder gets access to the system, which is the main model on which the token holder operates. Under this model, it is also possible to control the behavior of users of the system by agreement and include provisions on non-disclosure of information.

Another interesting solution for crypto entrepreneurs may be the possibility of obtaining a loan in a Fiat currency, secured by cryptocurrency. Such a solution seems reasonable in the economic sense, since it makes it possible not to exchange the cryptocurrency to Fiat money, losing on the exchange rate and exchange. In addition, crypto entrepreneurs avoid the risks associated with high volatility of

of investment activity], 9 Pravo i Ekonomica [Law and Economics] 28–21 (2014). (In Russ.).

[87] Mariya N. Titova, Pravovoy status subektov franchayzinga biznes-formata [Legal Status of Business Format Franchise], 3 Predprinimatelskoe pravo [Entrepreneurial Law] 57–61 (2014). (In Russ.).

[88] Grazhdanskiy kodeks Rossiyskoy Federatsii. Chast vtoraya ot 26.01.1996 No 14-FZ (red. ot 29.07.2018) [Civil Code of the Russian Federation. Part II, dated 26.01.1996 Federal Law 14-FZ (as amended on 29.07.2018)]. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1996, No 5, Item 410.

virtual assets, while maintaining the ability to raise funds for business development.

As any property, including things, documentary and undocumented securities, tokens can be deposited in accordance with Article 926.1 of the Civil Code of the Russian Federation or deposited with the notary under Article 88.1 of the Fundamentals of the Russian Law on Notary System, and the notary is considered as an escrow agent and its actions are regulated by civil law provisions on escrow agreements. Articles 327.1 and 328 of the Civil Code of the Russian Federation and Articles 57–59, Resolution 54 of the Plenum of the Supreme Court of the Russian Federation dated 22 November 2016 "On Certain Issues of Application of General Provisions of the Civil Code of the Russian Federation on Obligations and their Performance" allow including a provision requiring depositing tokens with the notary and to stipulate conditions for the transfer of tokens to the beneficiary or return the token to the depositor.

The legal possibility of accepting tokens as a notary deposit follows from the definition of tokens as other property in accordance with the post-reform provisions of Article 128 of the Civil Code of the Russian Federation.

Article 128 of the Civil Code defines the objects of civil rights: "including property rights, non-cash funds, non-documentary securities, and digital rights." Although the Civil Code does not operate the term "digital rights", it is disclosed in a special law that has not yet been adopted, but since its publication in 2018, it creates a theoretical basis for the new provisions of the Civil Code. Article 2, draft Federal Law No 419059-7 "On Digital Financial Assets" contains the following definitions:

1. A digital financial asset is property in electronic form created by using cryptographic tools. Ownership of this property is verified by entering digital records in the register of digital transactions. Token and cryptocurrency are digital financial assets.

2. A token is a type of digital financial asset issued by a legal entity or individual entrepreneur (hereinafter referred to as the issuer) to raise financing and is registered in the register of digital transactions.

3. A digital wallet is a software and hardware tool that enables storing information related to digital records (digital rights). A digital wallet can provide access to the registry of digital transactions.[89]

Raising funds through blockchain technology platforms is addressed in Federal Law No 259-FZ dated 02.08.2019 "On Raising Investments via Investment Platforms and on the Amendments to Certain Legislative Acts of the Russian Federation".[90] Article 8 of the Law introduces the concept of "utility digital rights". These rights can be exchanged on a digital platform, corresponding with the technical description of a distributed ledger or blockchain technology.

Therefore, tokens that existed before the law "On Crowdfunding Platforms" can circulate beyond specific platforms. Article 5 of the Law applies to new tokens. At the moment, tokens that can only be received as a reward for mining, *i.e.* actions to maintain the platform's functionality, are not subject to special regulation. Therefore, they cannot be subject to the requirements of a particular law that indicates the time and method of creating the token, as well as the process of attracting investment.

Thus, the analysis of legislative initiatives in the Russian Federation shows that the main trends in Russian law are aimed at defining a token as a "digital right". Also, potential criminal and legal risks are the main concerns for domestic blockchain entrepreneurs. By analogy with international rules and Russian rules, we can summarize that it is necessary to follow the requirements for personal data protection regulations and disclosure of information regulations. Today, the vast

[89] Postanovlenie GD FS RF ot 22.05.2018 No 4030-7 GD "O proekte Federalnogo zakona No 419059-7 "O tsifrovykh finansovykh aktivakh" [Decree No 4030-7 GD of the State Duma of the Federal Assembly of the Russian Federation dated 22.05.2018 "On draft Federal Law No 419059-7 on Digital Financial Assets"], Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2018, No 22, Item 3108, Art. 2.

[90] Raising funds through blockchain technology platforms is addressed in Federal Law No 259-FZ dated 02.08.2019 "On Raising Investments via Investment Platforms and on the Amendments to Certain Legislative Acts of the Russian Federation" Article 8.

majority of the blockchain activities seem to be restricted in Russia. For example, the cryptocurrency exchange is treated as an illegal business. A similar understanding should apply to commercial mining, which remains in the gray zone.

However, despite the government's negative attitude to blockchain technology and a direct ban on some investment transactions, in the foreseeable future, blockchain technology is likely to establish a significant market segment. As a result of the research, we formed a position that in the absence of coordinated legislative regulation of the blockchain technology in the Russian Federation, some forms of structuring transactions such as a SAFT, a license agreement and franchising, have been and still can be applied.

VI. New contractual challenges in terms of COVID-19

The coronavirus epidemic has challenged all areas of social life, the law included. The controversy surrounding the performance and repudiation of contracts, and force majeure have acquired a fundamentally new perspective. Legal matters previously addressed solely in theoretical discussions have become urgent and in need of practical solutions. The issue of termination of a smart contract has become more than relevant. Before the pandemic these challenges did not emerge, since most events in ordinary life we can usually predict.

For example, France has recognized the coronavirus as force majeure (*cas de force majeure*). Accordingly, no delay penalties established by law and contract will apply to public procurement contracts. However, the situation is not so apparent for private contracts. According to the French courts' decisions, most cases related to the pandemic require to weigh the specific factual circumstances.[91] The position is similar with international commercial contracts. Most international sales contracts are concluded under the terms of the United Nations Convention on

[91] See: Cour d'appel de Nancy, 1re ch. civile, 22 nov. 2010, в деле No 09/00003 on dengue fever or Cour d'appel de Basse-Terre, 1re ch. civile, 17 déc. 2018, case No 17/00739: chikungunya virus.

Contracts for the International Sale of Goods (CISG) or the "Vienna Convention." Since the document was adopted as the law governing international transactions for the sale of goods, its Article 79 applies to the relations of the parties as a protection against liability for non-performance of obligations.

Article 79 of the CISG covers changing circumstances in a contract for the international sale of goods. It uses the term "impediments" to illustrate the circumstances in which a party, whether a buyer or a seller, may be relieved of liability for non-performance of a contractual obligation. The Article does not contain the term "force majeure," but the properties of the manifestation of impediments in contracts are very similar to *force majeure*. The CISG identifies three conditions for the occurrence of force majeure:

1) the failure was caused by an "obstacle" that the party could not control;

2) the obstacle is reasonably unforeseen at the time of signing the contract;

3) the party is reasonably unable to avoid or overcome the "obstacle" or its consequences.

These conditions are the main requirements for force majeure in civil law or for the frustration of a contract in common law countries.[92]

The U.S. courts use the frustration of purpose doctrine, similar to the English frustration of a contract doctrine. It is applied "in cases where a change in circumstances makes the performance of one of the parties practically useless for the other. If the party had known about these circumstances, it would never have agreed to enter into a contract."[93]

In any case, the courts try to narrow down the application of frustration to the case's specific circumstances. All contractual terms specified due to a well-thought-out algorithm for managing contractual relations in the smart contract were "weighed" anew, based on the

[92] See: Taylor v. Caldwell In the Queen's Bench 3 Best & S. 826 [1863] or Tsakiroglou & Co. Limited v. Noblee Thorl Gesellschaft mit beschrankter Haftung House of Lords AC 93 [1962].

[93] See: Evans v. Famous Music Corp., 1 N.Y.3d 452 (N.Y. 2004) or E-Pass Techs. v. Moses & Singer, LLP, No C-09-5967 EMC, 7 (N.D. Cal. Apr. 13, 2012).

changed reality, in the COVID-19 conditions. The system of additional duties related to primary obligations (Nebenpflichten), grounds (Wegfall der Geschäftsgrundlage), the duty to ensure the safety of the property of the company or even third person (Schuldpflichten),[94] the prohibition to demand performance in kind, overly burdensome to the debtor (Wirtschaftliche Unmöglichkeit)[95] in German law or hardship,[96] implied terms,[97] good faith efforts,[98] reasonable efforts[99] in common law—all these doctrines were put under question due to the widespread transition to smart contracts in the near future, since it became evident that a number of contractual doctrines allow renegotiation in the process of performance. On the other hand, COVID-19 promoted the transfer of contractual relations to the digital sphere.

In Russia, the courts have developed a unified approach that allows to use messages in digital messenger services as evidence in court.[100] This new development gave the parties new tools to prove that they have

[94] Dmitriy V. Dozhdev, Printsip dobrosovestnosti v grazhdanskom prave [The principle of good faith in civil law], in Printsip formalnogo ravenstva i vzaimnoe priznanie prava [The principle of formal equality and mutual recognition of rights] 149, 147–162 (Belyaev M.A., et al., 2016). (In Russ.)

[95] Vadim S. Petrishchev, Sushchestvennoe izmenenie obstoyatelstv: pravoprimenenie st. 451 GK RF i opyt stran obshchego i kontinentalnogo prava: preprint wp10/2007/06 V. S. [Material change in circumstances: the enforcement of Article 451 of the Civil Code of the Russian Federation and the and the experience of common and continental law countries] Preprint WP10/2007/06. M. GU VSHE 31 (2007). (In Russ.)

[96] Id., at 16.

[97] David Kelly, Ruby Hammer & John Hendy, Business Law. 3rd Edition (London: Routledge, 2017) (374).

[98] Kenneth A. Adams, Understanding "Best Efforts" and its Variants, 50 The Practical Lawyer 12–11 (2004).

[99] Sergei N. Vinokurov, Sovremennaya kontseptsiya dobrosovestnosti v obyazatelstvennom prave Frantsii, Germanii, SShA i Anglii [Modern concept of good faith in the law of obligations of France, Germany, the USA and England], 8 Pravo i politika [Law and Politics] 1–11 (2018). URL: https://nbpublish.com/library_read_article.php.id27104 (last visited: 02.03.2020). (In Russ.)

[100] Postanovlenie Plenuma Verkhovnogo Suda RF o primenenii chasti chetvertoy Grazhdanskogo kodeksa Rossiyskoy Federatsii [Resolution of the Plenum of the Supreme Court of the Russian Federation On the application of Part Four of the Civil Code of the Russian Federation] No 10 dated 23.04.2019, Rossiiskaya gazeta 2019, No 96, Item 55.

complied with the agreement;[101] damage was caused,[102] an opponent received the documents.[103]

At the same time, Russian case law shows that an agreement cannot be changed or terminated by short message service (SMS) communication, since this contradicts with clause 1 of Article 452 of the Civil Code of the Russian Federation (hardship).[104] In the context of the pandemic, the question of whether a contract can be concluded or terminated via SMS has become particularly relevant.

The 2019 amendments to Article 160 of the Civil Code of the Russian Federation[105] gave reason to believe that the conclusion of contracts by SMS messages may be considered as a written form of a contract (when the written contract is required by law) made "through electronic or other technical means to reproduce in a tangible medium unchanged the content of the transaction." Foreign courts have also adopted a digital communication between parties as sufficient to establish a written form when it is required by law (*e.g.* Statute of Frauds).[106] The Supreme Court of South Africa recognized the contract formed by the exchange of digital

[101] Postanovlenie Odinnadtsatogo arbitrazhnogo apellyatsionnogo suda [Decision of the Eleventh commercial court of appeal] dated March 05, 2020, in case No A72-13662/2019, URL: https://kad.arbitr.ru/Card/3fe80c69-840a-4aff-847f-0a1060a46762 (last visited: 11.05.2020).

[102] Postanovlenie Devyatnadtsatogo arbitrazhnogo apellyatsionnogo suda [Decision of the Nineteenth commercial court of appeal] dated Jan. 29, 2020, in case No A48-7646/2018. URL: https://kad.arbitr.ru/Card/b6ba1443-c8cd-4c07-b8d0-ecb3d71600ce (last visited Jul. 17, 2020).

[103] Postanovlenie Pyatnadtsatogo arbitrazhnogo apellyatsionnogo suda [Decision of the Fifteenth commercial court of appeal] dated Mar. 23, 2020, in case No A53-6254/2018. URL: https://kad.arbitr.ru/Card/8f428135-65bc-4f2e-8951-ea6145f05403 (last visited Jul. 17, 2020).

[104] Postanovlenie Vosmogo arbitrazhnogo apellyatsionnogo suda [Decision of the Eighth commercial court of appeal] dated Mar. 23, 2020, in case No A70-10890/2019, URL: https://kad.arbitr.ru/Card/6288bae1-a3eb-43ed-b681-6075cf0d9e39 (last visited Jul. 17, 2020).

[105] Federal'nyi zakon "O vnesenii izmeneniy v chasti pervuyu, vtoruyu i statyu 1124 chasti tretey Grazhdanskogo kodeksa rossiyskoy Federatsii" [Federal Law "On amendment to Parts One and Two and Article 1124, Part Three of the Civil Code of the Russian Federation], Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2019, No 12, Item 1224. (In Russ.)

[106] "The Statute of Frauds requires that a contract for lifetime employment be in writing. McInerney v. Charter Golf, 680 N.E.2d 1347, 1341 (1997).

messages concluded in accordance with the requirements of the law.[107] However, not every message exchange will be considered a contract. An *anima contrahendi* (a legal purpose for entering into a contract)[108] is required for a contract to exist, as South Africa's Supreme Court of appeal ruled in another case.[109] To determine whether a contract was concluded, the court used the objective reasonableness test.

Common law courts also consider the form of the contract to be met, with the exception of a special requirements form,[110] if the objective reasonableness test allows considering the contract: "[the contract] depends not on their subjective state of mind, from the consideration of what was communicated between them by words or behavior, and whether this leads objectively to the conclusion that they intended to create legal relations and agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."[111] However, a person who does not intend to enter into a contract will be bound by the objective features of the contract but cannot itself refer to an objective criterion against the counterparty.[112]

The U.S. courts recognize the written form of any communication between the parties to a contract in the form of sound, image, recording, or code.[113] In this case, the meeting of the minds of the parties is

[107] In: Spring Forest Trading 599 CC v. Wilberry: Opinion Supreme Court of Appeal, No 725/13, November 21, 2014. URL: http://www.saflii.org/za/cases/ZASCA/2014/178.html (last visited: 15.05.2020).

[108] Jean du Plessis, Bernhard Großfeld, Claus Lutterman, German Corporate Governance in International and European Context 14 (Springer, 2017).

[109] In: Kgopana v Matlala: Opinion of Supreme Court of Appeal, No 1081/2018, December 2, 201, URL: http://www.saflii.org/za/cases/ZASCA/2019/174.html (last visited Jun. 26, 2020).

[110] N Chumak & M Rybyno, Vvedenie v angliyskoe pravo [Introduction to English Law], 1 Peterburgskiy yurist [Saint Petersburg Lawyer] 43 (2014). (In Russ.).

[111] In: RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH&Co: UKSC No 2009/0048, March 10, 2010 URL: https://www.supremecourt.uk/cases/docs/uksc-2009-0048-judgment.pdf (last visited Jun. 26, 2020).

[112] In: HLB Kidsons v. Lloyd's Underwriters: Opinion of Supreme Court of Judicature Court of Appeal, No A3/2007/2450, A3/2007/2544, A3/2007/2546, June 17–20, 2008. URL: https://www.bailii.org/ew/cases/EWCA/Civ/2008/1206.html (last visited Jul. 17, 2020).

[113] "an electronic sound, symbol, or process, attached to or logically associated with a contract" (In: Tayyib Bosque, Corp. v. Emily Realty, LLC: Opinion of United

determined on the basis of the test of a reasonable observer, carried out by jurors in civil proceedings.[114]

Currently, we cannot present any examples in Russian case law that courts recognized SMS correspondence as a sufficient written form of a contract but given that "the development of electronic means of communication currently allows them to be actively used when the contracts are being concluded,"[115] we expect the Russian courts soon to permit such contracts.

Following this logical trail, we might suggest that the new version of Article 160 of the Civil Code of the Russian Federation should also become the basis for the "smart contracts".[116] There may be difficulties in their performance related to the abuse of rights "by the developers who have an abundant informational advantage," errors that accidentally occurred during the development and compilation of software code,[117] which can become a source of disagreement and disputes between the parties.[118] Their resolution, taking into account the specifics, should be based, *inter alia*, on the doctrines of common law, such as the test of a bona fide observer.

States District Court, Southern District of New York, 17 Civ. 512, June 17, 2019. URL: https://casetext.com/case/tayyib-bosque-corp-v-emily-realty-llc (last visited Jul. 17, 2020)).

[114] In: Senno v. Elmsford Union Free Sch. Dist.: Opinion United States District Court, S.D. New York, 08 Civ. 2156, July 28, 2011. URL: https://casetext.com/case/senno-v-elmsford-union-free-school-district?tab=keyword (last visited Jul. 17, 2020).

[115] SA Stepanov, ed., Grazhdanskoe pravo. T. 1. 2-e izdanie. Uchebnik [Civil Law. Volume 1, 2nd edition. Textbook] (Moscow: Prospect, 2019) 582 (In Russ.)

[116] Poyasnitelnaya zapiska k proektu federalnogo zakona "O vnesenii izmeneniy v chasti pervuyu, vtoruyu i chetvertuyu Grazhdanskogo kodeksa Rossiyskoy Federatsii" (zakonoproekt No 424632-7) [Executive Summary to the draft Federal Law on Amendments to the First, Second, and Fourth Parts of the Civil Code of the Russian Federation (Draft law No 424632-7)]. URL: http://sozd.duma.gov.ru/download/827EDEDA-92F1-46AE-A576-71C8113EB77C (last visited Jul. 17, 2020). (In Russ.)

[117] AY Ivanov, ML Bashkatov, YuV Galkova, et al., Blokcheyn na pike khaypa: pravovye riski i vozmozhnosti [Blockchain at the peak of hype: legal risks and opportunities] (Moscow: Higher School of Economics Publ., 2017) (237).

[118] Nikita V Lukoyanov, Pravovye aspekty zaklyucheniya, izmeneniya i prekrashcheniya smart-kontraktov [Legal aspects of conclusion, modification and termination of smart contracts], 11 Yuridicheskie issledovaniya 33 (2018). (In Russ.)

VII. Conclusions

As the study shows, blockchain technology has massive potential in structuring transactions. Despite the challenges of adapting this new technology to the applicable laws in different jurisdictions, the economic turnover can always find suitable solutions. The study also shows that a flexible regulatory approach (*ex-post*) contributes much more to the new legal models of contractual relations than strict regulation (*ex-ante*). Prescription endures no benefits to the new technology. The restrictive governmental approach usually pushes the progress out of the country together with the new ideas, opportunities, and investments. The COVID-19 pandemic has become a severe stress test for the existing contractual forms. By setting new challenges for smart contracts, the pandemic also showed that the development of distant transactions and different forms of automatic execution of contracts could be very much in demand. Thus, the governments should actively develop and introduce information technologies into the circulation, and lawyers should form proposals for regulating new technology.

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SMALL BUSINESSES AND PUBLIC PROCUREMENT: SOME PROBLEMS OF CORRELATION

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Abstract

This paper is dedicated to the analysis of some problems small business entities face with in the field of public procurement. The field is regulated by laws made by the State. A lot of laws exist that regulate the functioning of small business entities. The laws made by the State to regulate the field of functioning of small business entities and their performance in the field of public procurement are numerous. Made laws are characterized as legal norms that do not comply with each other. The paper contains examples of such rules and shows negative effects for small business entities when they implement the right under consideration in the field of public procurement. The author classifies the issues according to the sector of public procurement and provides case studies concerning such issues including cases from the author's legal practice. The author makes practical recommendations in the conclusion of the paper.

Keywords

Law, problems of legislation, economy, the State, small business entity, individual entrepreneur, register of small businesses entity, public procurement, the state defense order, combining persons

CONTENTS

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1. Introduction

The paper highlights the current problems of participation of a small business entity in public procurement (the term *public purchase* is also used as a synonym) in Russia. The COVID-19 pandemic, when many entities make decisions in favour of ceasing business activities due to lack of resources, has revealed the problem of participation of small business entities in public procurement and has prioritized this issue.

The purchase of goods, works and services for the State is carried out through special legislative procedures referred to as *procurement*. A minor part of the segment of procurement is reserved for small businesses.

The State has adopted various programs for the development of small businesses. However, they do not always achieve their goal. This paper provides examples to support this fact.

For small business entities the adoption of programs for their development is not as important as the presence of a correct legal framework for public procurement with the absence of bureaucratic barriers, bringing the law in line with the law on the development of small business. If the latest standards correlate with each other, the goal of developing the small business segment will be achieved.

This paper analyzes the problems arising from the legislation on public procurement faced with by small businesses.

2. Regulatory framework for public procurement

Federal Law dated 24 July 2007, No 209-FZ "On the Development of Small and Medium Business in the Russian Federation" (hereinafter Federal Law No 209-FZ) is the fundamental law for small businesses that consolidates their definition, status and other important provisions.[2]

The main sources of the legal regulation of public procurement include Federal Law dated 5 April 2013, No 44-FZ "On the System of Public Procurement Contracts for Products, Work or Services for State Municipal Needs" (hereinafter Federal Law No 44-FZ).[3] Federal Law No 44-FZ introduces the concept of procurement, identifies stages of procurement, and establishes their principles. Also, this Federal Law stipulates that the provisions contained in other instruments regulating these relations must comply with it. Thus, when considering the source of public procurement, it can be argued that Federal Law No 44-FZ is the fundamental instrument in this area.

This paper also analyzes Federal Law dated 18 July 2011, No 223-FZ "On Procurement of Goods, Works and Services by Certain Types of Legal Entities" (hereinafter Federal Law No 223-FZ).[4] For this study, the Law is interesting in terms of purchases that are carried out by state unitary enterprises. Such entities conduct purchases under Federal Law No 44-FZ and Federal Law No 223-FZ. The difference is in the source of funding for such purchases. Purchases made under Federal Law No 223-FZ are financed not from the state budget, but from the income raised by the enterprise as the result of its business activities.

[2] Federalnyy zakon ot 03.08.2018 No 313-FZ "O vnesenii izmeneniy v Federalnyy zakon "O razvitii malogo i srednego predprinimatelstva v Rossiyskoy Federatsii" [Federal Law of 3 August 2018 No 313-FZ "On Amendments to the Federal Law "On the Development of Small and Medium Business in the Russian Federation"]. URL: http://www.pravo.gov.ru (last visited Aug. 1, 2020).

[3] Federalnyy zakon ot 05.04.2013 No 44-FZ "O kontraktnoy sisteme v sfere zakupok tovarov, rabot, uslug dlya obespecheniya gosudarstvennykh i munitsipalnykh nuzhd" [Federal Law of 5 April 2013 No 44-FZ "On the contract system in the procurement of goods, works, services to meet state and municipal needs"]. URL: http://www.pravo.gov.ru (last visited Aug. 1, 2020).

[4] Federalnyy zakon ot 18.07.2011 No 223-FZ "O zakupkakh tovarov, rabot, uslug otdelnymi vidami yuridicheskikh lits" [Federal Law of 18 July 2011 No 223-FZ "On the procurement of goods, works, services by certain types of legal entities"]. URL: http://www.pravo.gov.ru (last visited Aug. 1, 2020).

If the State allows enterprises to make purchases under Federal Law No 223-FZ, certain provisions of this Law may be useful for Federal Law No 44-FZ. The author also illustrates this statement.

3. Case studies based on the author's practice showing the problems of small businesses in the field of public procurement

3.1. Lack of information in the Unified Register of Small and Medium-Sized Business entities

Under Federal Law No 44-FZ, customers are obliged to demand a declaration of belonging to the specified category of small business entities in procurement as a part of application. Participants involved, in turn, are obliged to declare their belonging to that category of entities. In this case, the customers have right to verify the information provided by participants.

The customers verify belonging to the category of small businesses entities using a special register. Such a register is maintained by an authorized state body. Under Article 4.1 of the Federal Law No 209-FZ this is the Federal Tax Service of Russia.

And what should customers do if there is no information in such registry? As an example I will describe the case from my practice. This case involves the decision of Moscow Federal Antimonopoly Service of 24 August 2017, in case No 2-57-10082/77-17 on violation of procurement legislation.[5] In this case I was the secretary of the customer's commission for consideration of procurement applications and then represented interests of the customer in Antimonopoly Service (FAS). At the meeting of the commission, it was revealed that there was no information concerning one of the participants in the Register of Small and Medium-Sized Business Entities. Thus, the application

[5] Reshenie Federalnoy antimonopolnoy sluzhby po g. Moskve po delu No 2-57-10082/77-17 o narushenii zakonodatelstva ob osushchestvlenii zakupok ot 24.08.2017 [The Decision of the Federal Antimonopoly Service in Moscow in case No 2-57-10082/77-17 on violation of the procurement legislation dated 24 August 2017]. URL: http://zakupki.gov.ru/epz/complaint/quicksearch/search_eis.html?searchString=0348100077717000053&strictEqual=on&fz94=on&cancelled=on&considered=on&regarded=on (last visited Aug. 1, 2020).

of such participation was refused. The participant filed a complaint against the actions of the Customer.[6]

Representing the participant in the FAS I emphasized that the participant is not in the Register of small business entities. The FAS considered this argument sufficient to recognize the commission's actions as legitimate.

Federal Law No 313-FZ "On Amendments to the Federal Law "On the Development of Small and Medium Business in the Russian Federation" was adopted on 3 Aug. 2018.[7] The Law corrected the concept of subjects of the analyzed category adding the mandatory presence of information about them in the Register of Small and Medium-Sized Businesses.

Accepting the amendment, the legislator did not take into account that for various reasons, information about the participant may not be available in the Register. These reasons can be divided in two groups.

The first includes subjective reasons, i.e. those that depend on the small business entity. For example, non-payment of mandatory payments. This leads to the fact that the State does not have information about such a procurement participant and, consequently, cannot enter information about it in the register. The fault of the procurement participant is obvious in this case.

The second group involves objective reasons that do not depend on the procurement participant. For example, various technical problems and system failures. This is not the fault of the procurement participant.

However, the customer's commission does not examine the reasons why the entity is not included in the Register. The entity that was rejected often also does not examine these reasons and does not appeal against customer's actions to higher authorities.

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[6] Rezultat opredeleniya postavshchika, sformirovannyy na osnovanii razmeshchennykh protokolov [Vendor determination result, generated based on hosted protocols]. URL: https://zakupki.gov.ru/epz/order/notice/ea44/view/supplier-results.html?regNumber=0348100077717000053 (last visited Aug. 1, 2020).

[7] Federalnyy zakon ot 03.08.2018 No 313-FZ "O vnesenii izmeneniy v Federalnyy zakon "O razvitii malogo i srednego predprinimatelstva v Rossiyskoy Federatsii" [Federal Law of 03.08.2018 No 313-FZ "On Amendments to the Federal Law"]. URL: http://www.pravo.gov.ru (last visited Aug. 1, 2020).

Such actions do not contribute to the development of small business. Thus, the achievements in this field declared by the government cannot be called reliable and effective.

Here, it is important to minimize all factors due to which the rights of participants in all legal relations and of small businesses cannot be implemented. At the same time, it is important to understand that there is a direct connection between the problems in the economy that the state must solve and the level of business development. We should agree with the view that "*The state plays a special role in supporting small businesses, as the development of small businesses will help solve the problems of unemployment, increase labor productivity, saturate the market with innovative innovations, and solve issues related to the inflationary instability of the Russian economy.*"[8]

Therefore, it is important for the state to find problems and take measures to solve them, as well as to try to anticipate, when making certain decisions, difficulties that may provoke a result different from the one that is planned to be achieved.

It is needed to indicate another problem that arises as a result of the rejection of the procurement participant due to the lack of information about her in the Register. It is appropriate to refer to Para 27 of Article 44 of Federal Law No 44-FZ. It establishes the rule that if during one quarter of a calendar year on the same electronic platform in respect of three or more bids filed by a procurement participant, the commissions made decisions concerning their non-compliance with the requirements of Federal Law No 44-FZ, the funds, blocked on the special account of the procurement participant in the amount of the security for each third of such an application, are subject to transfer to the appropriate budget of the budget system of the Russian Federation.

And the situation is quite real because the state provides for its needs through the procurement mechanism, when the participant in the procurement is rejected three times in one quarter due to lack of

[8] TA Glinova, Problemy razvitiya malogo biznesa v Rossii [Problems of development of small business in Russia]. 8 Nauchno-metodicheskiy elektronnyy zhurnal "Kontsept" [Scientific and methodological electronic journal "Kontsept"] (2015). URL: http://e-koncept.ru/2015/15266.htm (last visited Aug. 1, 2020).

information about the procurement participant in the Register. This, in turn, entails financial encumbrances.

Ideally, financial encumbrances should be justified and applied on clear and logical grounds. From the point of view of small business participants, the current situation discriminates against them. The state has moved to the rails of procurement. For entrepreneurs, participation in procurement is the best way to survive. However, for entrepreneurs represented by their small entities it is almost impossible to survive.

3.2. Small businesses and procurement under the State Defense Order (SDO)

Federal Law No 44-FZ does not provide an explanation as to who the small business entities are and who may be a participant in procurement in the field of the State Defense Order (SDO). To do this, you need to refer to special rules.

Under Federal Law No 209-FZ small business entities include legal entities and individual entrepreneurs. Therefore, if the purchase is made among small businesses, any person from this category can participate in the procedure.

Under Para 3 of Article 3 of Federal Law dated Dec. 29 2007, No 275-FZ "On the State Defense Order" (hereinafter Federal Law No 275-FZ), only legal entities participate in purchases that are made at the expense of the limits of budget obligations allocated for the implementation of the policy within of the SDO.[9]

Thus, individual entrepreneurs should be excluded from the total number of participants in purchases that are carried out within the framework of the SDO.

At the same time the purchase within the state defense order does not always include the supply of military complex equipment. It also covers, for example, the supply of low-freezing glass-washing liquid, repairs of office equipment, which may well be carried out by individuals belonging to individual entrepreneurs.

[9] Federalnyy zakon ot 29.12.2012 No 275-FZ "O gosudarstvennom oboronnom zakaze" [Federal Law dated 29 December 2012 No 275-FZ "On the State Defense Order"]. URL: http://www.pravo.gov.ru (last visited Aug. 1, 2020).

In this regard, when conducting such minor purchases under the SDO, customers have a direct obligation to reject applications that are submitted by individual entrepreneurs under the threat of administrative punishment in the amount of 1 percent of the initial (maximum) contract price, but not less than five thousand rubles and not more than thirty thousand rubles. Administrative responsibility is established under Part 2 Article 7.30 of the Code of Administrative Offences of the Russian Federation.[10] As an example, I will cite purchases within the framework of the SDO from my practice, for which individual entrepreneurs were rejected.

Purchase for the supply of cartridges for organizational equipment. The procurement notification was posted on 16 March 2018 No 0348100077718000016.[11] Three applications were submitted. Two of them were filed by legal entities and one by an individual entrepreneur. The last participant was rejected, as it failed to comply with the rules of the Federal Law No 275-FZ.

Purchase for the supply of low-freezing glass-washing liquid. The notification was posted on 28 September 2017 No 0348100077717000075.[12] Two applications were submitted from individual entrepreneurs. By law, the customer rejected them, and the auction was declared invalid. This required re-conducting the purchase, which increased the timing of both the purchase and delivery of the product.

[10] Kodeks Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh ot 30.12.2001 No 195-FZ [Code of the Russian Federation on Administrative Offenses dated 30 December 2001 No 195-FZ]. URL: http://www.pravo.gov.ru (last visited Aug. 1, 2020).

[11] Izveshchenie ot 16.03.2018 No 0348100077718000016 na postavku kartridzhey k organizatsionnoy tekhnike [Notification 16 March 2018 No 0348100077718000016 for the supply of cartridges for organizational equipment]. URL:http://zakupki.gov.ru/epz/order/notice/ea44/view/protocol/protocol-bid-list.html?regNumber=0348100077718000016&protocolId=17990187 (last visited Aug. 1, 2020).

[12] Izveshchenie ot 28.09.2017 No 0348100077717000075 na postavku nizkozamerzayushchey stekloomyvayushchey zhidkosti [Notification dated 28 September 2017 No 0348100077717000075 for the supply of low-freezing windshield washer fluid]. URL: http://zakupki.gov.ru/epz/order/notice/ea44/view/supplier-results.html?regNumber=0348100077717000075.

As a result of such actions on the part of the legislator, both the State in the face of customers and the vulnerable layer in the face of procurement participants remain unsatisfied.

In this situation it is necessary to make adjustments to the current legislation and try to solve the problem. In particular, it is acceptable to use the classifier of goods, works, services, based on their complexity, innovation, and technology to make a choice among all participants or without individual entrepreneurs.

The second problem with this question is the following. The situation is obvious when a legal entity has only one employee. This only employee acts as the CEO. He participates in the procurement, which is carried out under the SDO among small businesses. According to the law such a participant should be accepted. However, indifference is obvious when you compare it with an individual entrepreneur. The only difference between them is in their legal form. There is a legitimate question why there is a legislative imperfection when an individual entrepreneur is rejected, but a legal entity consisting of 1 person is accepted.

The third negative aspect was revealed above in the analysis of Part 27 of Article 44 of Federal Law No 44-FZ.

Discussions about procurement have been going on for a long time in the scientific sphere. Scientists with extensive experience in procurement still face a number of challenges. In their discussion of public procurement Snider and Rendon write that *"Scholars have yet to give sufficient efforts to the sort of conceptual theorising about policy that will lead to ordering devices and approaches that can help researchers and students make sense of its complexity, uses and limitations."*[13]

McCue and Prier write about using theoretical works too when "One wants to explain, predict, and understand behavior concerning the intent, purpose, and actual use of cooperatives in procurement."[14]

[13] KF Snider & RG Rendon, Public Procurement Policy: Implications for Theory and Practice, 8 (3) Journal of Public Procurement 311 (2008).

[14] C McCue & E Prier, Using Agency Theory to Model Cooperative Public Purchasing, 8 (1) Journal of Public Procurement 1 (2008).

As for Russia such fundamental works are absent. The field of procurement is developing rather slowly and inconsistently in Russia. The legislator, in turn, tries to get ahead of science, theory, in connection with which such inconsistencies arise. Another factor in the presence of problems is a non-systematic approach to the adoption of laws. And if science in terms of procurement is developing slowly, then the legislator could avoid the existing problems if he carefully approaches the adoption of laws.

Law should not be perceived as a means of tightening and restricting. The question arises about the performance of the regulatory function by law. Science does not dispute the fact that this function of law is a direction of influence of law on social relations, which is designed to provide a certain level of social order that most fully expresses the essence of law, as well as its relationship with other phenomena of social reality. The legislator misrepresented the essence of this function questioning the positive result of the policy.

4. Other problems identified by the author in analysis of the official website on procurement

4.1. Restrictions on procurement at the initial (maximum) contract price

Under Para 1 of Part 1 of Article 31 of Federal Law No 44-FZ, procurement made among small businesses at the initial (maximum) contract price must not exceed twenty million rubles. In this regard the question arises, are such participants in legal relations not able to fulfill a more expensive procurement?

The answer could be affirmative but for the provisions of Federal Law No 223-FZ that does not set restrictions on the initial (maximum) price.

After analyzing the information published in the Unified Information System in Procurement, it is concluded that the legislator underestimated the potential of procurement participants under Federal Law No 44-FZ by setting the upper limit of the initial (maximum) contract price. "*Procurements is an important part of economic*

activities encompassing in general public expenditures on goods, services and works."[15]

Therefore, it is not quite correct to split procurements for small businesses. The legislator can take one of the following paths.

The first path is to fix the upper limit of the initial (maximum) contract price in the law. This limit should be higher than it is currently set. And give the customer the right to choose whether to use this range in a particular procurement. The second option is to reject the upper limit of the initial (maximum) contract price or set a higher price.

To confirm the relevance of what has been said, we give examples. The customer, being a state unitary enterprise, carries out procurement according to the rules of federal Law No 223-FZ among the studied category. It should be noted that procurements under the provisions of this law are carried out among both small and medium businesses. The subject of the procurement is the application of horizontal road markings on public roads of regional or inter-municipal significance. The initial (maximum) contract price was 31 514 585.00 rubles.[16]

Another customer carries out procurement among small businesses in accordance with the Federal Law No 44-FZ. The subject of the procurement is similar, it is the application of horizontal road markings on public roads of regional and (or) inter-municipal significance. The initial (maximum) contract price is 18 310 518.00 rubles.[17]

Because of the restrictions established by Federal Law No 44-FZ on the initial (maximum) price of the contract the customer must split the procurement and on the same day place two more notifications on

[15] H Handler, Strategic Public Procurement: An Overview, URL: https://www.researchgate.net/publication/284725763_Strategic_Public_Procurement_An_Overview (last visited Aug. 1, 2020).

[16] Izveshchenie ot 14.04.2020 No 32009077746 [Notification dated 14 April 2020 No 32009077746], URL: https://zakupki.gov.ru/223/purchase/public/purchase/info/common-info.html?regNumber=32009077746 (last visited Jul. 4, 2020).

[17] Izveshchenie ot 29.04.2020 No 0338200008720000008 [Notification dated 29 April 2020 No 0338200008720000008], URL: https://zakupki.gov.ru/epz/order/notice/ea44/view/common-info.html?regNumber=0338200008720000008 (last visited Jul. 4, 2020).

a similar subject among small businesses. The price of one of them is 14 748 347.00 rubles.[18] The price of other is 15 124 479.00 rubles.[19]

It should be noted that the winner for all these purchases is the same individual entrepreneur Ildus Akhmadullin.

Thus, the customer under Federal Law No 44-FZ is forced to conduct more procedures in comparison with the terms of procurement based on federal Law No 223-FZ.

The legislator does not take into account the amount of expenses for himself (since the customer is the state represented by the relevant state body): specialists who must prepare documentation, time spent on approving documentation and conducting expertise, supporting documentation from the stage of entering into the schedule and ending with the stage of contract execution with a huge paperwork in terms of preparing and analyzing submitted applications for participation in each procurement, preparing protocols, potential complaints (the number of possible complaints is directly proportional to the number of purchases), *etc*.

It should agreed with the view that *"a need for research on supplier incentives at a market level, on the post contract management of suppliers and as an important sub-set, key supplier relationship management, along with professional development."*[20]

As a result of the legislator's actions small businesses are not stimulated or developed. Accordingly, the economy is not developing, too. It is more rational to review the provisions of Federal Law No 44-FZ concerning the upper limit of the initial (maximum) contract price for procurements among small businesses.

[18] Izveshchenie ot 29.04.2020 No 0338200008720000009 [Notification dated 29 April 2020 No 0338200008720000009], URL: https://zakupki.gov.ru/epz/order/notice/ea44/view/supplier-results.html?regNumber=0338200008720000009, (last visited Jul. 4, 2020).

[19] Izveshchenie ot 29.04.2020 No 0338200008720000010 [Notification dated 29 April 2020 No 0338200008720000010], URL: https://zakupki.gov.ru/epz/order/notice/ea44/view/supplier-results.html?regNumber=0338200008720000010 (last visited Jul. 4, 2020).

[20] Nigel Caldwell, Helen Walker, Christine Harland, Louise Knight, Jurong Zheng & Tim Wakeleyb, Promoting competitive markets: The role of public procurement, 11 (5–6) Journal of Purchasing and Supply Management 243 (September–November) 20050.

4.2. Associations of entities acting on the side of a procurement participant and public procurement

Under Part 1 Article 3 of Federal Law No 44-FZ, a procurement participant is any legal entity or any individual, including one registered as an individual entrepreneur.

According to the norms of article 3 of the Act No 223-FZ a procurement participant is any legal entity or several legal entities acting on the side of one procurement participant, or any individual or several individuals acting on the side of one procurement participant, including an individual entrepreneur or several individual entrepreneurs acting on the side of one procurement participant.

The difference between these concepts is quite obvious. Federal Law No 223-FZ has established the possibility to use the methods provided for by current legislation for combining persons for joint activities in procurement.

According to Federal Law No 44-FZ, participation in procurement is only possible for a single person.

It is not very clear how this decision of the legislator is justified. It is legal for procurement participants to join together, and there are no obstacles in terms of civil law to establish such a possibility in procurement conducted according to Federal Law No 44-FZ.

It is permissible for procurement under Federal Law No 44-FZ to remove the upper range of the price and introduce the formulation of the participant of the procurement not only as an independent entity or a legal entity, but supplementing it as an association of such entities.

As stressed by Laffont and Tirole, to investigate a theory of procurement one should take into consideration three main types of regulatory constraints: informational, transactional, and administrative and political.[21]

The State has the right to establish and regulate these restrictions. The State will be required to adjust Federal Law No 44-FZ in terms of the procedure for submitting documents from several persons acting on

[21] J-J Laffont & J Tirole. A theory of incentives in procurement and regulation, URL: https://link.springer.com/article/10.1007/s40812-018-0091-3#ref-CR2 (last visited May 02, 2020).

the side of one participant. It is quite clear that for some procurements small businesses may lack resources, production capacity and personnel for objective reasons. The introduction of a form of combining several persons on the side of one procurement participant will solve this problem. Moreover, the studied category of subjects can participate in competitions held for any category of participants according to Federal Law No 44-FZ and compete with large enterprises, since not all competitions can be attended by small businesses according to the current legislation. In order to be a small business entity the law sets limit on the number of employees. Customers often set requirements for purchasing participants to have more than 100 employees working under employment contracts. The customer by virtue of Federal Law No 44-FZ is not obliged to justify the evaluation criteria set by it for participation in the competition. Thus small businesses are excluded from procurement which is not entirely reasonable.

Another possibility to unreasonably exclude small businesses from procurement is to set a parameter rating based on the maximum offer from the offers made by the procurement participants based on the evaluation criteria. It is quite obvious that when a large participant and a small business entity are fighting, the latter's chances of winning are much lower.

5. Conclusion

The above problems both from the author's direct practice and the problems identified by the author in the analysis of ongoing procurement process show that under current legislation, procurement participants belonging to the category of small businesses face a number of difficulties that can be avoided if the legislator properly models the law. Current realities indicate that the State does not seek to eliminate existing problems. And the state is only required to adjust the current legislation.

This applies to the coordination of the concept of a small business entity in general and a small business entity as participants of procurements carried out within the state defense order. This is also an adjustment of the legislation on the SDO by changing the object of

procurement, namely, the target nature of limits for the procurement of simple objects, such as are presented in the examples given in this paper.

It seems real to consolidate in Federal Law No 44-FZ the provision that procurement participants can be combining persons under the rules of civil law for joint activities in procurement, which will make procurements more competitive on the one hand, on the other — the customer will get a better result, since it will employ more people with different opinions and opportunities.

Changing the current legislation, in turn, will raise the level of the economy. This is an important factor for the development of business and the State.

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TRANSFORMATION OF RUSSIAN LEGISLATION ON CIVIL PROTECTION IN EMERGENCIES CAUSED BY THE SPREAD OF DANGEROUS INFECTIOUS DISEASES

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Abstract

The paper deals with topical issues of the Russian State System for Prevention and Response to Emergencies in the context of the COVID-19 coronavirus pandemic. Some aspects of a possible legislation reform in the field of protection of the population and territories in emergencies caused by the spread of dangerous infectious diseases are investigated. The authors consider the issues of limiting the constitutional rights and freedoms of citizens in high-alert and emergency situations. Activities to protect the rights and freedoms of citizens in the context of a pandemic are based on article 55 of the Constitution, according to which the rights can be restricted by law only to the extent necessary to protect the health of citizens. Based on the analysis of changes in legislation in this area, the authors substantiate proposals for improving activities in the field of protection of the population and territories in emergencies, as well as expanding the functions of the Security Council of the Russian Federation.

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Keywords

Coronavirus pandemic, emergencies, national security, COVID-19, Security Council, public protection

CONTENT

I. Introduction

The coronavirus pandemic has raised questions for the leadership of the Russian Federation not only about the effectiveness of the health care system, but also about the activities of the entire national security system of the state. And if the economic consequences of the COVID-19 virus pandemic (in this case, one should assess the restrictions during the first and second waves of the epidemic) are quite clear, i.e. medium-sized and small businesses will suffer the most, the performance of the national security system has yet to be evaluated.

On the one hand, the pandemic has prompted the modernization of the legislation in general, as well as the identification of needs for such a modernization. This can give an impetus to law-making in various spheres of life. In the first half of 2020, we witnessed rapid changes in legislation related to the civil protection given the need to deal with the COVID-19 pandemic consequences.

On the other hand, changes in public relations during the pandemic require new legal norms. Thus, the coronavirus has changed the mass perception of norms of behavior in the public space. This indicates that a new sphere of rule-making is currently being formed, i.e. regulation of public relations in emergencies characterized by uncertainty and unpredictability of their development.

II. Prerequisites for the emergency law transformation

The most important events that have already taken place in the twenty-first century, as well as the analysis of the main trends in the development of modern society, which are becoming more and more clearly manifested in recent years, indicate that this century will go down in the history of civilization as a period of global changes and radical transformations. A striking example is the Fourth industrial revolution and the subsequent course towards digitalization of all spheres of life of the state and the population, including security. The scale, depth and significance of these changes are already unprecedented and have no analogues in the world history.

Most recently, the legislative initiative in our country has mainly been related to the coronavirus. We can even say that there is a new special regulatory COVID-regulation. The Federation Council has set up a working group to monitor coronavirus legislation. The tasks of the working group include collecting, analyzing and summarizing information about the state of the Russian legislation in terms of compliance with the changing conditions of the state's life, preparing proposals for its improvement aimed at ensuring the functioning and further development of the economy and social sphere under new conditions.[3] In the development of Federal legislation, local legal regulations are being changed. The issues of regulating the rights and obligations of citizens have become more relevant than ever.

A special feature of the high-alert regime introduced in most territories of the Russian Federation is the granting of special powers to restrict the rights and establish the duties of citizens and organizations.

The legal basis for such measures is the Federal Law "On Protection of the Population and Territories from Natural and Man-Made Emergencies",[4] which defines the mode of operation of the governing

[3] V Sovete Federatsii sozdana rabochaya gruppa v tselyakh monitoringa i sovershenstvovaniya zakonodatelstva v usloviyakh rasprostraneniya koronavirusnoy infektsii [The Federation Council creates a working group to monitor and improve legislation in the face of the coronavirus infection spread]. URL: http://council.gov.ru/events/news/115847/ (last visited Sep. 17, 2020). (In Russ.)

[4] Federalnyy zakon No 68-FZ ot 21.12.1994 (red. ot 01.04.2020) "O zashchite naseleniya i territoriy ot chrezvychaynykh situatsiy prirodnogo i tekhnogennogo

bodies and forces of the Russian State System for Prevention and Response to Emergencies (RSChS).

The legislation on the protection of the population and territories from emergencies does not explicitly divide emergencies and the responsibilities of particular bodies. The EMERCOM of Russia and the entire system of emergency situations is aimed at fighting the consequences of fires, accidents at industrial enterprises and other facilities, as well as the consequences of natural disasters. Still, our experience has shown that there might be other situations requiring a comprehensive approach and analysis.

According to the legislation, the RSChS functioning mode is the procedure for organizing the activities of the governing authorities and RSChS bodies. The heads of the Federal Executive authorities, state corporations, executive authorities of the constituent entities of the Russian Federation, local self-government bodies and organizations, governing the territory where such an emergency may arise or have already arisen, or being in charge of eliminating the consequences of the emergency, can issue a decree establishing one of the following modes of operation:

a) High alert — under the threat of emergencies;

b) Emergency mode — in response to emergencies and their consequences.

Given the specific situation, the relevant commissions for emergencies render a decision on the introduction of a particular RSChS operation mode.[5]

kharaktera" [Federal Law No 68-FZ of 21.12.1994 (as amended on 01.04.2020) "On protection of the population and territories from natural and man-made emergencies"]. Article 3648. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1994, Item 35. (In Russ.).

[5] Postanovlenie Pravitelstva RF ot 30 dekabrya 2003 g. No 794 "O edinoy gosudarstvennoy sisteme preduprezhdeniya i likvidatsii chrezvychaynykh situatsiy" [Decree of the Government of the Russian Federation of December 30, 2003 No 794 "On the Russian State System for Prevention and Response to Emergencies"]. Article 121. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2004, No 2 (In Russ.).

III. Modernization of the civil protection system in emergencies

The main feature of the emergency response associated with the coronavirus pandemic was that the introduction of any "high alert" or "emergency" regime aimed primarily at regulating the entire life of the country: from special restrictions for the population to restrictions on the activities of all economic structures. Not all this fit into the existing framework of the RSChS.

Amendments to a number of legislative and other normative legal acts were adopted in an accelerated manner.

First, the RSChS area of responsibility was expanded. Situations related to "the spread of diseases that pose a danger to others" were added to natural and man-made emergencies.[6]

Secondly, in the event of a threat of occurrence and (or) the occurrence of individual emergencies, the government of the Russian Federation is granted the right to make a decision on the exercise of the powers of the RSChS coordinating body and to establish the modes of operation of the system.[7]

Third, the powers of the government of the Russian Federation have been expanded in terms of granting the right to introduce a high-alert regime or a state of emergency on the entire territory of the Russian Federation or on its part in the event of a threat of occurrence and (or) occurrence of a federal or interregional emergency by establishing mandatory rules of conduct for citizens and organizations.

Fourth, the powers of state authorities of the Russian Federation's constituent entities and local self-government bodies have been

[6] Postanovlenie Pravitelstva RF ot 2 aprelya 2020 g. No 417 "Ob utverzhdenii Pravil povedeniia, obiazatelnykh dlya ispolneniia grazhdanami i organizatsiiami, pri vvedenii rezhima povyshennoi gotovnosti ili chrezvychaynoy situatsii" [Decree of the Government of the Russian Federation No 417 of 02.04.2020 "On the approval of the Rules of Conduct, binding on citizens and organizations, when a high alert or emergency regime is introduced"]. (In Russ.).

[7] Federalnyy zakon ot 01.04.2020 No 98-FZ (red. ot 08.06.2020) "O vnesenii izmeneniy v otdelnye zakonodatelnye akty Rossiyskoy Federatsii po voprosam preduprezhdeniya i likvidatsii chrezvychaynykh situatsiy" [Federal Law No 98-FZ of April 1, 2020 "On amendments to certain legislative acts of the Russian Federation on the prevention and elimination of emergency situations"]. (In Russ.).

expanded. They are granted the right to establish mandatory rules of conduct for citizens and organizations when introducing a high-alert or emergency situation, as well as, given the specifics of the emergency on the territory of the constituent entity of the Russian Federation, to establish additional mandatory rules for citizens and organizations. The government of the Russian Federation defined these rules in April 2020.

Fifth, the duties of citizens include requirements to comply with the established rules of conduct in a high-alert or emergency situation regime.

On April 2, 2020, by resolution No 417 the Government of the Russian Federation approved the rules of conduct for the introduction of a high-alert or emergency situation, which are mandatory for all citizens and organizations located in the relevant territories.

The rules provide, in particular, the following responsibilities for citizens:

• observe public order and the requirements of legislation on the protection of the population and territories from emergencies;

• comply with the legal requirements of emergency operational services and officials in connection with the implementation of measures to prevent and eliminate an emergency;

• when receiving instructions from authorized persons, including through the media, to evacuate from the infected area and (or) use collective and individual protective equipment;

• provide assistance to victims and carry identification documents.

It is important to note that when the "emergency" regime is introduced, citizens are guaranteed the rights (article 18 Law No 68-FZ), including:

• to protect life, health and personal property;

• use of collective and individual protection equipment and other property of Executive authorities of the Russian Federation subjects, local self-government bodies and organizations intended to protect the population from emergency situations;

• be informed about the risk of staying in certain places on the territory of the country, and about the necessary security measures;

• compensation for damage caused to their health and property as a result of an emergency;

• to medical care, compensation and social guarantees for living and working in emergency zones;

• to receive compensation and social guarantees for damage caused to their health while performing their duties in the course of emergency response;

• allowance provision in case of disability due to an injury or illness received while performing duties to protect the population and territories from an emergency;

• allowance provision for the loss of a breadwinner who died or later died from an injury or illness received while performing the duties to protect the population and territories from an emergency;

• to receive free legal assistance in accordance with the legislation of the Russian Federation.

It should be noted that the question that the powers and functions of the governing bodies of the RSChS, as well as the entire system as a whole, require modernization arose during the liquidation of emergency situations in 2010.[8]

The President of the Russian Federation, by his decree, declared a "state of emergency" on the territory of seven constituent entities of the Russian Federation and temporarily restricted the admission of citizens to certain territories and the implementation of economic activities thereon in order to avoid creating conditions that lead to fires in forests and peatlands, as well as to the death of people, loss of their housing and property.

It is important to note that changes in legislative and other regulatory legal acts adopted in 2020, under the conditions of the coronavirus pandemic, have left aside the EMERCOM of Russia, the Governmental Commission for Preventing and Eliminating Emergency Situations and Providing Fire Safety, as the RSChS governing body. The Government of the Russian Federation has created a single Federal

[8] Ukaz Prezidenta RF ot 2 avgusta 2010 g. No 966 "Ob obyavlenii chrezvychaynoy situatsii, svyazannoy s obespecheniem pozharnoy bezopasnosti" [Decree of the President of the Russian Federation of August 2, 2010 No 966 "On declaring an emergency situation related to fire safety"]. (In Russ.).

headquarters for the fight against coronavirus. Its powers were to monitor the current situation on coronavirus in the country and the world, prepare recommendations to state authorities, control and coordinate work on disease prevention.

In addition, a Coordination Council was established under the Government of the Russian Federation to combat the spread of a new coronavirus infection in the territory of the Russian Federation.[9] The main tasks of the Council are defined as:

a) consideration of problems, threats and challenges related to the spread of a new coronavirus infection;

b) development of proposals for measures aimed at combating the spread of a new coronavirus infection;

c) organization of interaction between Federal government bodies, state authorities of the Russian Federation constituent entities, local self-government bodies, and other bodies and organizations on the implementation of measures aimed at combating fight against the spread of a new coronavirus infection.

Thus, in the hierarchy of governing bodies, the Government of the Russian Federation performs the main coordination and general management of emergency prevention and response. Without derogating the role of the Government, it should be understood that in the context of a systemic (global) crisis all solutions to prevent and eliminate it are not only of medical and economic nature, but also political. Long-term consequences, such as the coronavirus pandemic, have an impact on the economy and the social situation in the country and regions. Therefore, the role of political structures, including the President of the Russian Federation, the Federal Assembly, political parties, and public associations is extremely significant, but it is the subject of a separate study.

[9] Postanovlenie Pravitelstva RF ot 14 marta 2020 g. No 285 "O Koordinatsionnom sovete pri Pravitelstve Rossiyskoy Federatsii po borbe s rasprostraneniem novoy koronavirusnoy infektsii na territorii Rossiyskoy Federatsii" [Decree of the Government of the Russian Federation of March 14, 2020 No 285 "On The coordination Council under the government of the Russian Federation to combat the spread of a new coronavirus infection in the territory of the Russian Federation". (In Russ.).

In general, speaking about the effectiveness of the public administration system during the emergency, the question of the ratio of powers of the Federal and regional levels of government should be considered separately. For the first time, in 2020, the Mayor of Moscow, referring to the norm of legislation on the protection of the population and territories,[10] introduced a "high alert" mode, as if before the "emergency" mode. This is a very strange scheme, in which the measures taken at the constituent entity level are much stricter than during the "emergency" mode, which was never declared. Decree of the Mayor of Moscow of October 6, 2020 No 97-UM "On Amendments to the Decrees of the Mayor of Moscow of March 5, 2020 No 12-UM and of June 8, 2020 No 68-UM" did not provide much clarity.

At the same time, it should be taken into account that the choice between efficiency and legitimacy is even more acute for regional authorities than at the Federal level. There is some authority, but not enough resources.

In the light of the practice of applying the powers of the constituent entities of the Russian Federation and local self-government bodies, the rule on powers and allocated resources, such as reserving medical resources, requires changes, as well as increasing responsibility for the result. This is confirmed by a very rapid adoption of the law on expanding the powers of the Government of the Russian Federation, in terms of declaring emergencies.

IV. Economic issues of coronavirus pandemic

An example of the importance of the Government of the Russian Federation decisions on regulating legal relations in the field of protection of the population and territories in emergencies is partly the Resolution of December 28, 2019 No 1928 "On the Rules of Transfer

[10] Federalnyy zakon No 68-FZ ot 21.12.1994 (red. ot 01.04.2020) "O zashchite naseleniya i territoriy ot chrezvychaynykh situatsiy prirodnogo i tekhnogennogo kharaktera" [Federal Law No 68-FZ of 21.12.1994 (as amended on 01.04.2020) "On protection of the population and territories from natural and man-made emergencies"]. Article 3648. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1994, Item 35. (In Russ.).

in Emergencies".[11] This is a very important decree of the Government, which could automatically provide victims with minimal payments and transfers when an emergency is introduced. Thus, the document provides that funds can be requested for the following purposes:

• one-time allowance to family members of citizens died as a result of an emergency to be paid in the amount of 1 million rubles for each victim;

• allowance to citizens whose health was grievously harmed as a result of an emergency (severe or moderate harm — 400 thousand rubles per person, mild harm — 200 thousand rubles per person);

• providing financial assistance to citizens in the amount of 10 thousand rubles per person.

For example, the families of officially dead from coronavirus infection Russian citizens could claim these payments in the event of a "state of emergency". Those who have received severe or moderate health harm due to a viral infection are interested in such payments. With a catastrophically large number of patients, the question of who could be considered for this category and the amounts of financial resources to be provided remains.

In addition, currently there is no provision for housing and utilities compensation for citizens, loans or rent for entrepreneurs. This

[11] Postanovlenie Pravitelstva RF ot 28 dekabrya 2019 g. No 1928 "Ob utverzhdenii Pravil predostavleniya inykh mezhbyudzhetnykh transfertov iz federalnogo byudzheta, istochnikom finansovogo obespecheniya kotorykh yavlyayutsya byudzhetnye assignovaniya rezervnogo fonda Pravitelstva Rossiyskoy Federatsii, byudzhetam subektov Rossiyskoy Federatsii na finansovoe obespechenie otdelnykh mer po likvidatsii chrezvychaynykh situatsiy prirodnogo i tekhnogennogo kharaktera, osushchestvleniya kompensatsionnykh vyplat fizicheskim i yuridicheskim litsam, kotorym byl prichinen ushcherb v rezultate terroristicheskogo akta, i vozmeshcheniya vreda, prichinennogo pri presechenii terroristicheskogo akta pravomernymi deystviyami" [Decree of the Government of the Russian Federation of December 28, 2019 No 1928 "On approval of Rules of provision of other interbudget transfers from the Federal budget, source of financial support which are budget appropriations of reserve Fund of the Government of the Russian Federation, to budgets of subjects of the Russian Federation on financial support of certain measures on liquidation of emergency situations of natural and technogenic character, compensatory payments to natural and legal persons who have suffered damage as a result of a terrorist act, and damages, caused during the suppression of a terrorist act by lawful actions"]. (In Russ.).

primarily applies to businesses that are expected to shift part of the losses to the state.

There is no doubt, that the situation with the coronavirus pandemic is a force majeure. In fact, the Government itself does not classify the situation to be force majeure; it is the debtor who is forced to prove that. This comes from the Civil Code, which provides that an entrepreneur is exempt from liability if he proves that there was an act of providence, i.e. extraordinary and unavoidable circumstances. To date, there is no doubt that the situation with the coronavirus is force majeure. Still, force majeure does not terminate contracts. Moreover, a drop in demand for products caused by a pandemic, or a lack of necessary goods on the market, or even the debtor's lack of necessary funds, are not legally considered force majeure, such as an earthquake or a sudden military action. In addition, it is incorrect to assume that the emergency regime under the law on the protection of the population and territories from natural and man-made emergencies and emergency circumstances under the Civil Code are the same thing. A force majeure situation can be either noted when the emergency mode is introduced, or it can take place without it.

V. Protection of citizens' rights and freedoms in the context of the pandemic

The important question remains whether constitutional rights can be restricted in a high-alert mode. Article 55 of the Constitution states that law only to the extent necessary to protect the health of citizens may restrict human rights. The law can restrict the right to freedom of movement where special conditions are imposed due to infection. One of these "special conditions" is a high-alert mode, which was introduced in March 2020 in almost all regions of the country.

In the conditions of the pandemic, it has become the norm for the Russian Federation to exclude citizens over the age of 65 from economic and social life. This is not the case in other countries. According to the Decree of the Mayor of Moscow of October 12, 2020 employers are required to assign almost all employees from among citizens over 65 years of age to remote work mode.

For this category of citizens, it was decided to suspend the possibility of using social cards for preferential and free travel. This decision seems strange, given that the retirement age in the country has recently been raised to 65 years. Besides, for a long time the average age of doctors of science in Russia remains 63–64 years old.[12]

Here it is appropriate to quote the words of the Federal Chancellor of Germany: "We will not do what is sometimes the subject of discussion, namely, give the young all the freedoms, and push the elderly aside. This is unreasonable from an ethical point of view."[13] The Chancellor acknowledged that vulnerable groups should be protected from the coronavirus in a special way, but, according to her, they should not be "excluded from society".

VI. Trends in the civil protection legislation modernization

The effectiveness of the entire RSChS system, which has been developing over the years, during the coronavirus pandemic has not been recorded. Disputes about the introduction of an emergency mode or even a state of emergency, in our opinion, are not so relevant in comparison with a fundamentally different approach to the global management quality of in such a situation.

To date, the principles of security as the basis of state policy in this area are formulated in the national security strategy and go back to the Constitution of the Russian Federation. This is also enshrined in the Fundamentals of State Policy in the field of Civil and Territories Protection from Emergencies. The system of state management of the protection of the population and territories in emergencies is part of the system of state management in the sphere of national security of

[12] Alisa Veselkova. Srednestatisticheskomu rossiyskomu issledovatelyu vse eshche 47 let, i u nego net uchenoy stepeni [The average Russian researcher is still 47 years old and does not have a degree]. URL: https://nauka.tass.ru/nauka/6818815 (last visited Oct. 9, 2020). (In Russ.) .

[13] Sushchestvuyut shtrafy dlya lyudey 65+. Diskriminatsiya po vozrastu prodolzhaetsya? [There are penalties for people 65+. Does age discrimination continue?]. URL: https://zen.yandex.ru/media/pensy/suscestvuiut-shtrafy-dlia-liudei-65-diskriminaciia-po-vozrastu-prodoljaetsia-5ebfe89a64a20d0122a5a0c2 (last visited Oct. 9, 2020). (In Russ.).

the Russian Federation. It represents a set of measures aimed at the prevention or localization of emergencies and at the maximum reduction in threat to life and health of citizens from the destructive factors in emergencies and the damage from them.[14]

Pandemic and possible global environmental, climate, technological, and biological catastrophes open a fundamentally new subject of management, i.e. relations in the conditions of global (systemic) catastrophes. For this level of events, the role of individual ministries, including the EMERCOM of Russia, and perhaps the Government of the Russian Federation, has not become the key one. In our view, this is the level of the Security Council. This constitutional body, which currently exercises mainly advisory functions, should acquire additional rights and responsibilities precisely in the event of global and national emergencies.

According to the current legislation, the Security Council is a Constitutional Advisory Body that provides draft decisions of the President of the Russian Federation on security, defense organization, military construction, defense production, and other issues related to the protection of the constitutional order, sovereignty, independence, and territorial integrity of the Russian Federation.[15]

Interdepartmental commissions have been established under the Security Council: on security issues in the economic and social spheres, environmental, information security, strategic planning, etc. There is also a Scientific Council. But how effective is it? The comparison of the legal status of the Security Council of the Russian Federation with similar structures of other world powers is very revealing. Thus, the US National Security Council (NSC), which is an Advisory body of the US President by status, has about 170 people headed by the Assistant to the President for National Security Affairs. The influence of this figure on

[14] Ukaz Prezidenta RF ot 11.01.2018 No 12 "Ob utverzhdenii Osnov gosudarstvennoy politiki Rossiyskoy Federatsii v oblasti zashchity naseleniya i territoriy ot chrezvychaynykh situatsiy na period do 2030 goda" [Decree of the President of the Russian Federation of 11.01.2018 No 12 "On approval of the Fundamentals of the state policy of the Russian Federation in the field of protection of the population and territories from emergency situations for the period up to 2030"]. (In Russ.).

[15] Federalnyy zakon "O bezopasnosti" ot 28.12.2010 No 390-FZ [Federal Law of the Russian Federation of 28.12.2010 No 390-FZ "On Security"]. (In Russ.).

the implementation of the US national security strategy is sometimes very great. It were the people holding this post who often provided "breakthroughs" in the policy in the most important areas, first of all, foreign policy, since the functions of the National Security Council are dominated by international and military aspects of security.

According to A. A. Kokoshin: "In the American system of strategic management, it has already become a tradition to appoint prominent international scientists, economists and political scientists to such an important post as national security assistant. Among them, in addition to G. Kissinger, we can mention M. Bundy, W. Rostow, Z. Brzezinski. Assistant to President George W. Bush Rice served as Vice-Chancellor of Stanford University and then as a senior research associate in the Hoover Institute for war, peace, and revolution of this University until her appointment in January 2001."[16]

This approach allows the NSC to base its assessments and ideas on solid scientific forces in various fields, without creating, as a rule, analogues of the scientific Council under the Security Council of Russia. For the same reason, apparently, interdepartmental commissions are not formed under the NSC. However, special top-level working groups are often set up to provide strategic management in crises.

VII. Conclusion

In October 2020, at the height of the second wave of the coronavirus pandemic, the President of the Russian Federation signed a decree on the establishment of an Interagency Commission of Russia's Security Council on issues of developing a national system of protection against new infections.[17]

[16] Andrey A. Kokoshin. Strategicheskoe upravlenie: Teoriya, istoricheskiy opyt, sravnitelnyy analiz, zadachi dlya Rossii [Strategic management: Theory, historical experience, comparative analysis, tasks for Russia]. Moscow: MGIMO (U) MFA of the Russian Federation; ROSSPEN, 2003. (In Russ.).

[17] Ukaz Prezidenta RF ot 12.10.2020 No 620 "O Mezhvedomstvennoy komissii Soveta Bezopasnosti Rossiyskoy Federatsii po voprosam sozdaniya natsionalnoy sistemy zashchity ot novykh infektsiy" [Decree of the President of the Russian Federation of 12.10.2020 No 620 "On the Interdepartmental Commission of the Security Council of the Russian Federation on the Creation of a National System of Protection against New Infections"] (In Russ.).

The main task of this Interagency Commission is to fulfill the tasks assigned to the Security Council of the Russian Federation to respond to threats related to the spread of infectious diseases and antimicrobial resistance.

The functions of this Commission differ significantly from those of the interagency commissions already established under the Security Council.

First, it is an assessment of internal and external threats associated with the spread of infectious diseases and antimicrobial resistance; monitoring the spread of infectious diseases and antimicrobial resistance; assessing the level of protection of the Russian population from new infections, methods of treatment of infectious diseases, as well as developing recommendations for improving these measures and methods; organizing comprehensive scientific research in order to develop technological and other solutions for the prevention, diagnosis, treatment of infectious diseases, etc.

Secondly, it is the preparation of proposals and recommendations to the Security Council on issues related to the solution of strategic tasks to counter the spread of infectious diseases and antimicrobial resistance, as well as the development of preventive measures; to assess the effectiveness of spending budget allocations for purposes related to the Commission's activities; to coordinate the activities of Federal government bodies, other state bodies, local self-government bodies and organizations in solving operational, medium-and long-term tasks to counter the spread of infectious diseases and antimicrobial resistance.

Third, the Commission's functions include analyzing the effectiveness of bodies and organizations in implementing Security Council decisions in this area; participating in the development and implementation of strategic planning documents; and reviewing draft state programs and regulatory legal acts in the field of countering the spread of infectious diseases and antimicrobial resistance.

Fourth, it is an examination of draft decisions of Federal Executive authorities and Executive authorities of the Russian Federation subjects in the field of countering the spread of infectious diseases and antimicrobial resistance.

In our view, the creation of an Interagency Commission of Russia's Security Council on issues of developing a national system of protection

against new infections is the beginning of a system of measures aimed at using the potential of the Security Council not as an advisory body, but as the most logical, targeted and functional decision-making center, just in situations of the scale of the coronavirus pandemic.

The Security Council is a supranational, political body with the capacity and authority to make extreme decisions in extreme situations. The government of the Russian Federation and the entire vertical of management are performers; the President of the Russian Federation needs a special, status, competent body for making collective decisions. This, of course, must be a transformed Security Council.

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INSTITUTIONALIZATION OF DISTANCE LEARNING TECHNOLOGIES IN A LAW SCHOOL

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Abstract

The paper reveals the methodology of conducting a sociological study of the distance learning institutionalization in a law school, describes the main conclusions of an applied study on the effectiveness of implementing digital distance learning technologies in the educational process, traces the relationship between various educational strategies and the success of using digital technologies in new learning environments. The study reveals the factors of successful adaptation of technologies to the needs of students and teachers, analyzes the barriers to institutionalization, and provides recommendations for effective expansion of the use of distance learning technologies. The accuracy of the results of the sociological research is justified by a large sample of the survey, which included more than 1200 respondents, and the typology of respondents into three clusters: teachers, students, and support staff. In each cluster, a typology was carried out, which made it possible to identify different practices of using digital technologies during distance learning. The empirical material was collected in August 2020, which determines the relevance of the conclusions.

Keywords

Distance education, digitalization, institutionalization of digital technologies, student survey, sociological research

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CONTENTS

1. Introduction

The activity of the subject of social relations in modern society is subordinate to the logic of digital algorithms for organizing social contacts and achieving joint goals. The use of artificial intelligence systems to process heterogeneous information from actors with different competencies of social participation facilitates the achievement of synthesis of healing models developed taking into account regulatory markers and success criteria from different social fields. The multidimensional nature of social relations is increasing, in which social actors successfully unite, exchange mutually understandable information, reconstruct space, and find common parameters of goals and means of achieving them. At the same time, one subject participates in many social constructs of this kind. Each such participation has a special legal status and specific expectations of the actors. The logic of relations itself is hidden behind the digital algorithm for organizing relations. As a result, the subject makes many entries into the social constructs of the digital organization of relations, receives or does not receive the desired result. No member of such a relationship can reconstruct the integrity of the entire system of social ties. There is a fragmentation of the reflection of society with the hidden logic of organization. The institutional integrity of the functioning of society

is disintegrating, which leads to the disunity of the individual's life projects.

"The most important prerequisites for successful institutionalization are: firstly, the emergence of certain societies, the needs for new types of social activities and the corresponding socio-economic and political conditions; secondly, the development of the necessary organizational structures and related social norms and values, the formation on their basis of a system of personal needs, value orientations and expectations."[2] In the educational sphere, when the institutionalization of new teaching methods fails, negative consequences of the loss of a single logic of the organization and functioning of the social system by the subjects of social relations are most acute: the loss of criteria for the success of teaching, a decrease in interest in online communications, a decrease in the culture of communication and mutual respect in discourse, and the inability to correlate the strategy of preparation for classes with practical mechanisms for the formation of competencies.

Digitalization is a new property of social processes, its introduction into the educational process is just beginning. At the same time, "today in the Russian higher school, distance learning technologies in the education system are considered rather as a process of further promising development."[3] Therefore, it is natural to change the logic of field design and training practices. However, enough time has already passed to identify in society the most adaptive subjects (teachers and students) new forms of reconstruction of the integrity of the communication space at the university through the definition of new universal markers of success in the digital environment and the exploitation of the logic of forming a learning strategy with the adaptation of digital means to the individual vision of the meaning of education.

[2] Larisa A. Eremenko, Institucionalizaciya mestnogo samoupravleniya v sovremennoy Rossii: dissertation... candidate of sociological sciences [Institutionalization of local self-government in modern Russia. Cand. Sci. (Sociology) Thesis]. Moscow, (2011) 63. (In Russ.).

[3] L.P. Danilenko, E.Yu. Osipova. Perspektivy razvitiya distancionnogo obrazovaniya v vysshey shkole [Prospects for the development of distance education in higher education]. 3 Diary of Science (2020). (In Russ.).

In recent months, the need for digital technologies, a holistic system of digital communications, which would be perceived most naturally, close to the "pre-digital" everyday life, has soared worldwide. There is a need to rethink technologies and their applications as a new tool for integrating the everyday and institutional environment of society in a multidimensional, personalized space. This approach will indicate a way of humanely adapting digital technologies to the needs of a person — a subject of social relations. To understand the nature of the reconstruction of the interaction system in digital space, it is important to find out the relationship between trends in unification and personalization in distance learning.

In this regard, it becomes relevant to investigate new strategies of the most adaptive and constructive students and teachers, to expose the logic of digitalization to the educational organization of a multidimensional social space, to restore the integrity of the process of genesis and reproduction of educational cognitive and communicative practices in the visualized world. When the issue of the genesis of any social practices arises, the interface between the institutional system level and the individual design of social participation becomes important. The theoretical model of digitalization can differ significantly from the practice of its implementation. Although a number of education theorists believe that the process of introducing distance education "is based on the use of advanced information technologies, the application of which provides quick adaptation to modern realities,"[4] reflexion of new technologies by educational actors can both contribute to and create barriers to the institutionalization of innovations.

In the educational environment of the university, the duality of the systemic and subjective manifests itself in projecting the competencies of individual disciplines and, in general, specializing in the professional self-understanding of students. Modern world trends in education include "a focus in education on affirming personal principles in a person... in subordination to the training of specialists to the goals

[4] Yu.A. Mikulenok, A.A.Mikulenok, V.V. Solyanik, Nekotorye voprosy distancionnogo obrazovaniya [Some issues of distance education] 46-4 The Scientific Heritage 42–41 (2020). (In Russ.).

of man and society…"[5] The problem of maintaining the integrity of professional formation and overcoming the fragmentation of education is most acute here. If during traditional training many heterogeneous communications at a university are staples of "human work", they help to create a holistic image of the profession, to perceive a unified strategy for training a specialist, then in a remote environment information is supplied "injectedly", accurately, in relation to a specific task or competence. Modern researchers note that "a global rethinking of the role and function of universities as potential industries of the "person responsible" and "person aware" is seen as necessary.[6]

Therefore, professional formation requires the development of new channels and means of communication, new parameters of the discourse of students and teachers, in which multidimensional, complex and unified teaching practices aimed at creating a specific image of a professional would be restored. Then the steady intersection of the field of education and the field of profession will be restored, at the junction of which the competencies of future specialists are formed.

Thus, the scientific novelty of the study is the synthesis of the subject and systemic parameters of the reconstruction of the educational space in the process of total digitalization, which allows us to find models, methods, optimal conditions for restoring the institutional and communicative integrity of interactions at the university. Philosophical understanding of this problem will make it possible to expose the logic of digitalization of the formation of relations as a phenomenon of the social organization of modern societies. Sociological research is aimed at typologizing the strategies of the actors of institutional relations in various areas where distance learning has been introduced, the discovery of common parameters of social design that form the basis of social consensus in the new conditions of digital integration and the formation of tools for assessing the productivity and success of education.

[5] E.N. Ryabinova, L.A Marchenkova, K voprosu ob aktualnosti formirovaniya verbalnyh kompetenciy [On the relevance of the formation of verbal competencies of students of technical universities] 2 (26) Vestn. Samar. State Technician. Un. Psikhologo-pedagogich. sciences 175–171 (2015). (In Russ.).

[6] Novaya socialnaya realnost: sistemoobrazuyushchie faktory, bezopasnost i perspektivy razvitiya [A new social reality: systemic factors, security and development prospects. Russia in technosocial space] (Collective monograph). (2020). (In Russ.).

2. Methods

In order to understand the mechanism of building new strategies and methods of interaction between the teacher and the student in the context of distance learning, we conducted a sociological study of students and employees in a law university (Kutafin Moscow State Law University) on the basis of the Moscow State University Sociological Center. The study focuses on reflecting the personal experience of interviewees, their use of distance learning opportunities and other professional tasks during the pandemic. The research object has a complex structure, designed based on the deployment of professional, managerial and educational tasks. As a result, the study covered three clusters: students, faculty and administrative staff. The subject of the study was the attitude of the University's employees and students to the introduction of distance learning technologies and on-line environment in general to fulfill educational and other professional tasks in 2020.

The main goal of the study was to exploit the strategy of involving students and teachers in distance learning through their reflection of their experience in professional identification and involvement in the institutionalization of digital educational technologies. It would be a mistake to consider distance learning as an unexpectedly falling problem from the sky, which needs to be solved in a completely new way. Digital technology and remote communication have been used in education for more than a decade. Only the scale of the use of technologies has changed, the range of tasks has expanded, which has caused a new round of institutionalization of distance learning. Therefore, the study of the mechanisms for the introduction and adoption of these technologies should take into account the overlapping of past experience with the new institutional framework. How well the existing experience enters the new institutional and technological environment will depend on the preservation of the integrity of the educational process. Contradictions of experience, expectations, ideas about professional growth, on the contrary, will cause fragmentation in the education of future professionals.

Sociology methods are convenient to use to achieve this goal. Using sociological procedures, it is possible to cluster students and teachers

in order to understand the mechanism of genesis of new practices. The mass survey method made it possible to correlate real educational practices, expectations from new forms of education and assessment of the quality of implementation of distance education mechanisms. Thus, we will get a multidimensional picture of the reflection of the experience of integrating educational subjects into a new institutional environment.

Problems of the social research:

1) discovery of new quality parameters for lectures and hands-on exercises in a distance learning environment,

2) research on the formation of competencies in the use of online interaction technologies in accordance with individual digital means and technologies,

3) research of new properties of communication space in the process of remote education,

4) correlation of the structure of the virtual educational environment and institutional relations in the university,

5) identifying opportunities for further institutionalization of distance learning.

For the survey, selective selection of respondents by the method of accessibility of respondents was used. A total of 55 teachers, 34 administrative staff and 1,128 students were interviewed. The survey was conducted using the questionnaire method in July–August 2020. The collection of sociological data was carried out by the survey method in the form of an online questionnaire. The questionnaire contains both closed and open questions.

3. Results and discussion

3.1. Changing everyday life during distance learning

Let us turn to the description of the results of the study within the specified tasks.

When estimating the costs of forces and time for distance learning, a significant discrepancy is noticeable. Students note that they spend from 3 to 6 hours a day on distance learning. 24 % learn more than 6 hours (see fig. 1 and fig. 2). Objectively, these time costs are less

than in a full-time mode. However, subjectively, most students feel that they spend more time remotely than usual. This discrepancy indicates greater intensity and concentration in the distance learning process. Next, we have to find out the reason for the increase in the complexity of training: a temporary difficulty in adapting to new technology or a constant increase in energy for the use of digital technologies. The results of the study show that the second cause is more likely. However, before proving this, we will reveal other properties of institutionalization.

Fig. 1. Time spent on distance learning per day (in %, students)

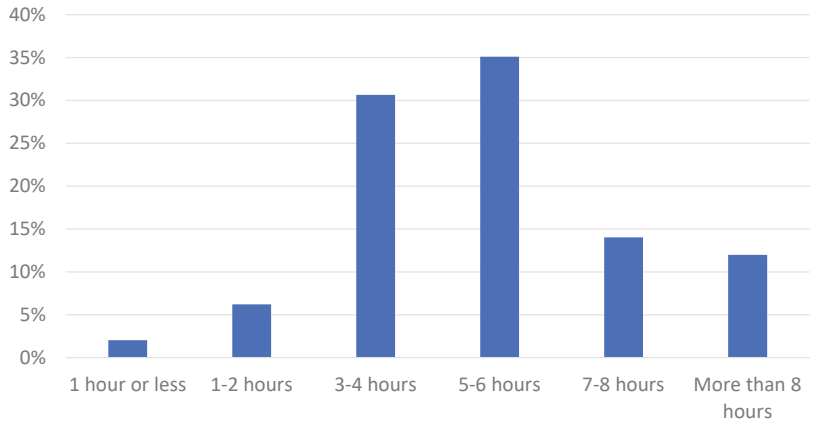
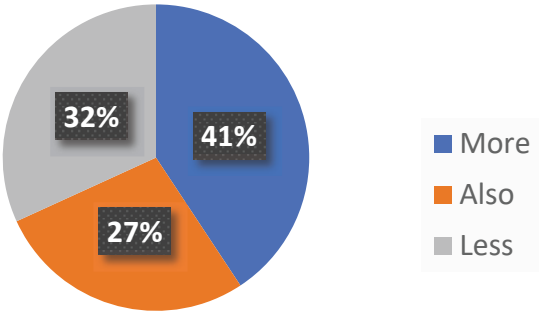


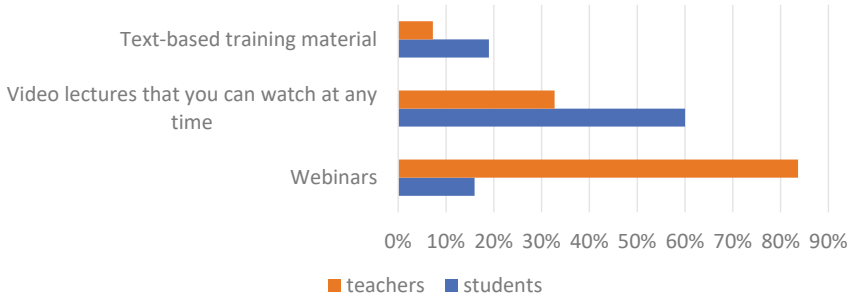
Fig. 2. Subjective vision of time spent on distance learning compared to normal (students)



3.2. Transforming classroom forms and methods

Choosing the forms of lectures, the preferences of students and teachers diverge. Students consider video lectures to be, which can be viewed at any time, the most convenient form of lectures, (see fig. 3). The most effective form of lectures for teachers are webinars. They consider online communication for lectures as optimal. Video lectures and text material, when it is not possible to interact directly with students, are evaluated as a low-productivity medium of study. In answers to an open question about the form of lectures, most respondents wrote about the desire to return to the form of lectures and practical lessons in the classroom.

Fig. 3. Preferred forms of carrying out lectures



The situation is similar with practical exercises. The webinar remains the preferred form. Its only alternative can be group project work, when students work in a group on a task, but have an opportunity to receive advice from the teacher (see fig. 4).

The main advantages of holding webinars, according to the teachers, are the convenient use of presentations, which can be shown in parallel with the reading of a lecture or discussing problems in a practical lesson. It is also convenient for teachers to conduct classes from home and accurately determine the number of students participating in the webinar (see fig. 5). Processing answers to an open question showed that only on the webinar teachers do see an analogy with live communication in the classroom, which for many is a significant efficiency factor.

Fig. 4. Preferred forms of practical training

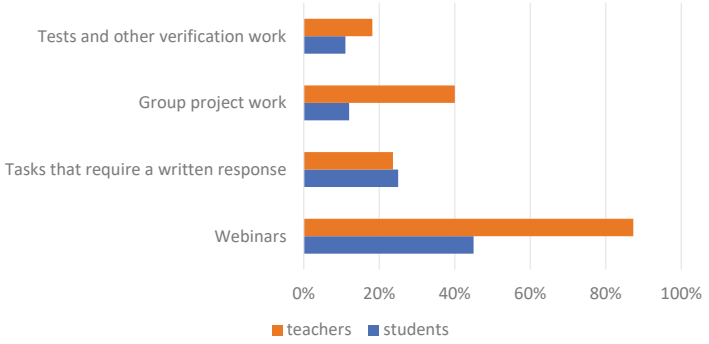
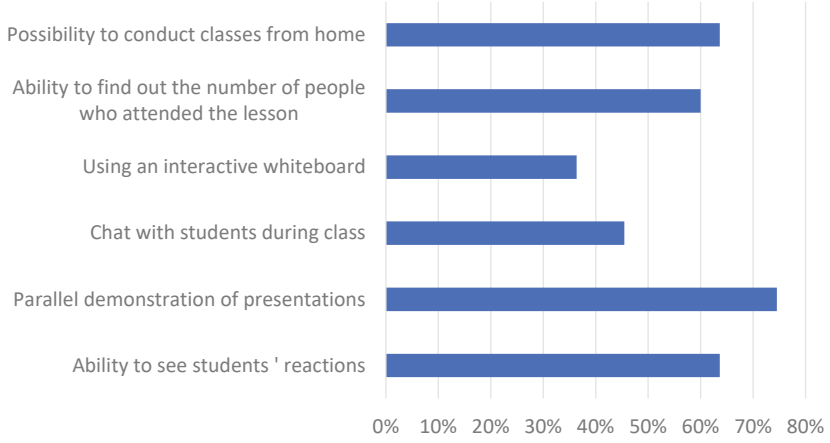
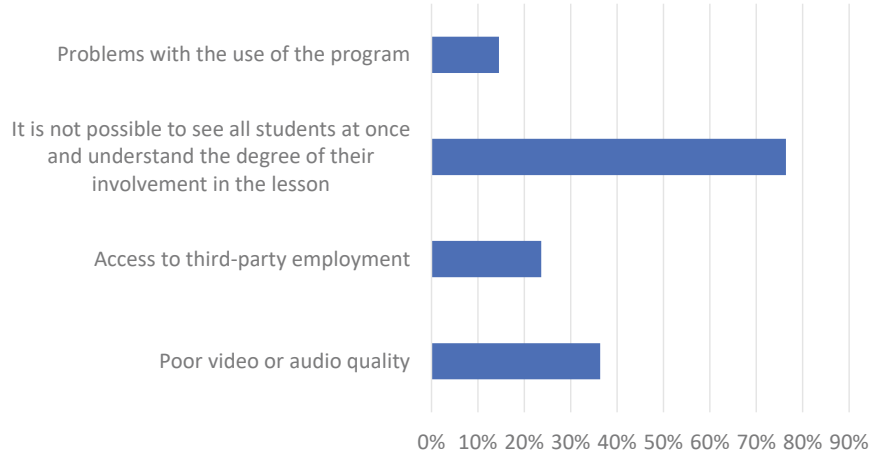


Fig. 5. Advantages of using webinars (teachers)



For teachers, the main disadvantages of webinars are the inability to see all the students at once and to understand their degree of participation in the lesson (see fig. 6). In the free response column, many teachers were unhappy with the 40 minutes limitation of the webinar in the Zoom service and the high emotional impact of working online.

Fig. 6. Disadvantages of using webinars (teachers)



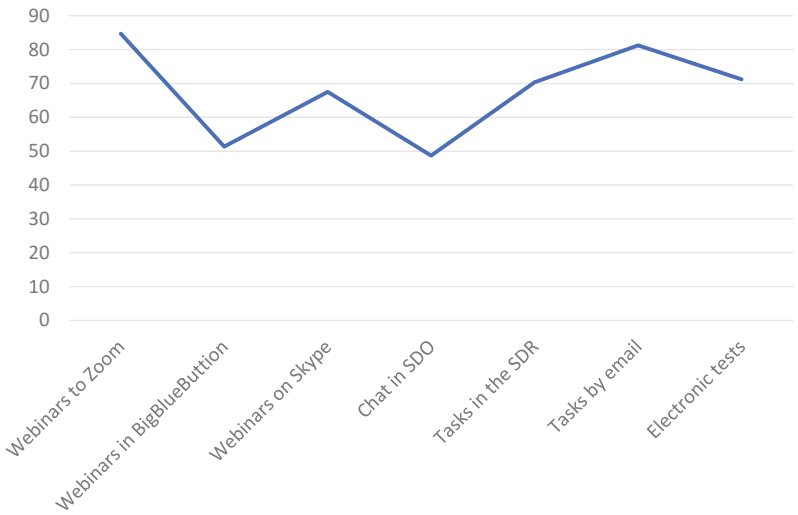
It turns out that all the respondents seek to reproduce or slightly modernize the previous experience of conducting classes. If it is important for a student to obtain certain information that allows assessing the cognitive framework of the discipline, the criteria for assessing its successful development, then it is important for the teacher to feel feedback, to reproduce two-way interaction with students. Apparently, through these forms it is possible to use the previous experience. There is a new duality in communication. In the new environment, students want to find new opportunities to independently choose the material for learning and simplify its perception. This will lead to increased competition between teachers for the attention of students. Teachers, on the contrary, are interested in reproducing disciplinary integrity, which allows actively influencing student attitudes. Such a contradiction should be resolved in order to further institutionalize distance education.

In the process of conducting practical classes, both students and teachers are interested in constant feedback in order to continuously monitor the communication process, the expectations of the other side and their ability to influence it. Therefore, for practical training, it is more convenient for everyone interviewed to connect to webinars.

3.3. Adapting digital technologies to distance learning

As a means of distance learning, students consider webinars in Zoom or e-mail tasks to be the most effective (see fig. 7). Largely, such estimates relate to the availability and usability of these tools. Teachers also consider webinars at Zoom to be the most convenient means of communication. Both students and teachers do not seek to find means of convenient interaction on their own and use the most affordable options. The Zoom program is quite easy to master and is successfully integrated into the distance learning environment of the university. However, many note its limited functionality, malfunctions. At the same time, there were no attempts to find a more successful solution for conducting practical exercises.

Fig. 7. Assessment of the quality of distance learning educational technologies for teachers (variation from 1 to 100, where 1 is the minimum score, 100 is the maximum)



Students were divided into two groups during the development of new learning facilities (see table 1). The first was aimed at maximizing the diversity of digital technologies and increasing autonomy in the new conditions. There is both a high level of adaptation and innovation. This group includes 32 % of students. The second group (26 % of respondents)

has a low level of innovation and an average rate of adaptation in the new conditions. It is important for them to use sustainable social practices to achieve goals. In a digital environment, they are looking for analogues with traditional ones. The remaining 46 % of students have not yet developed a clear position on how best to act in the new conditions.

Teachers were also divided into two groups by the nature of the use of digital media (see table 2). The first group (29 % of respondents) was dominated by the desire to use proven, more familiar and simultaneously institutionalized funds, regardless of their effectiveness. Adaptation over innovation prevails here. The second group (26 % of teachers) has more innovation and a desire to adapt technologies to themselves.

Table 1. Clustering of students in accordance with expectations from the forms of practical training (the correlation coefficient of the group with a positive attitude to the corresponding form of practical analysis is indicated

	Groups	
	1	2
Chat in the University's distance learning system	**,852**	,115
Webinars in BigBlueButtion	**,774**	,121
Tasks in the University's distance learning system	**,733**	,197
Webinars on Skype	,061	**,781**
Zoom webinars	,101	**,743**
Tasks by email	,315	**,578**

Table 2. Clustering of teachers in accordance with expectations from the forms of practical training (the correlation coefficient of the group with a positive attitude to the corresponding form of practical analysis is indicated)

	Component	
	1	2
1	**2**	**3**
Tasks by email	**,817**	-,330
Tasks in the University's distance learning system	**,667**	,248
Chat in the University's distance learning system	**,526**	,326

1	2	3
Webinars to Zoom	,497	,212
Webinars in BigBlueButtion	,009	**,818**
Webinars on Skype	,335	**,736**

A significant deterrent to the institutionalization of distance learning is the shortage of digital equipment and the quality of communications. This factor is relevant for all categories of respondents, but the overall technical availability of distance learning tools for students is significantly lower than for teachers. The most accessible are webinars in Zoom and e-mail tasks (see fig. 8). Most students had unsolvable problems with receiving tasks in their personal account and in the process of connecting to webinars through the Big Blue Button service. Most of the problems were caused by the inability to connect to the IPAA distance learning system, as well as by malfunctioning software packages (see fig. 9).

Fig. 8. Availability of distance learning tools for teachers (accessibility index for students from 1 to 100, where 1 is unavailable, 100 is fully available)

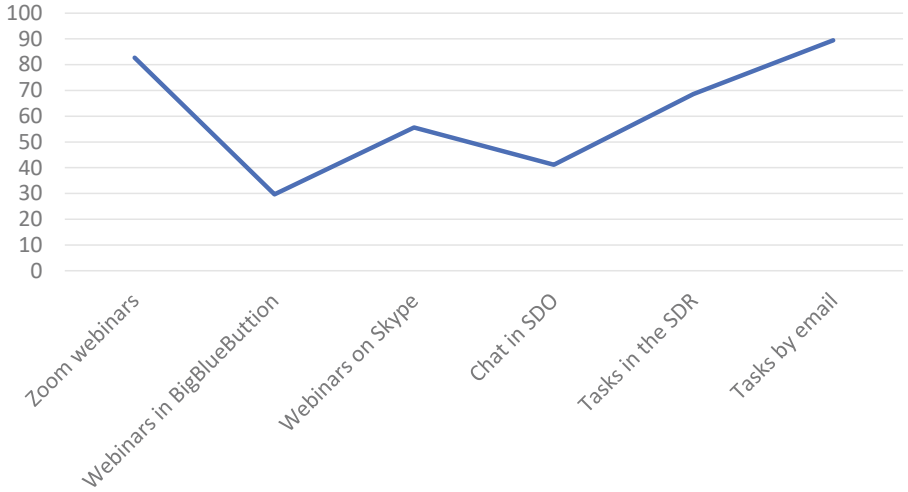
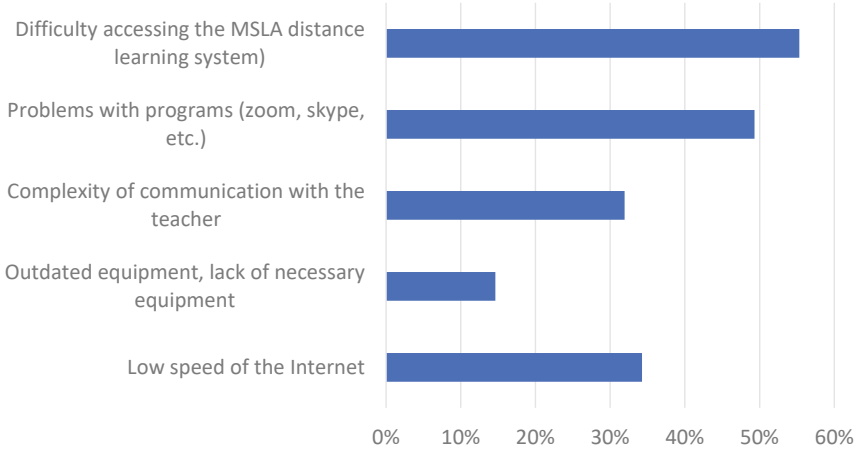


Fig. 9. Reasons for technical problems of distance learning for students



3.4. Development of new means of education during distance education

Let's take a look at how participants in the distance learning process treat certain types of classes remotely. Reflexion of class quality is still based on traditional criteria. Interviewees try to find analogues with the usual form of training, and do not proceed from the opportunity to take advantage of digitalization. For example, webinars conducted by students are evaluated as a fairly effective means of learning, since they are most similar to live communication in an audience (see fig. 10). Students are attracted by the opportunity to communicate with the teacher and one-group members, and interest in material is growing. Nevertheless, this form remains unusual, students are wary of it. When answering an open question, a number of students note the convenience of webinars, since there is an opportunity to study at home, in the usual environment. Many students talk about program failures, low sound quality and video.

Other means of distance learning for students are even less familiar, they evaluate them with restraint (see fig. 11). The high spread of answers in the absence of a normal distribution indicates the inability

Fig. 10. Characteristics of webinars (students)

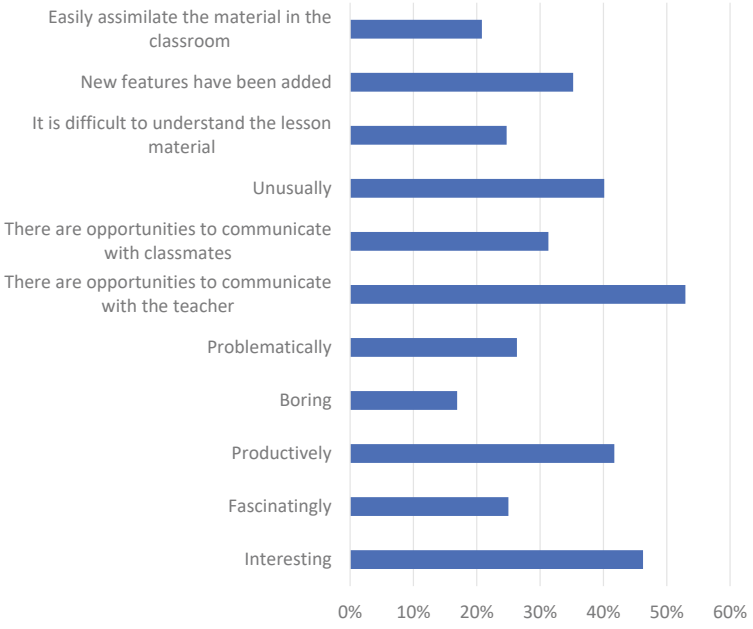
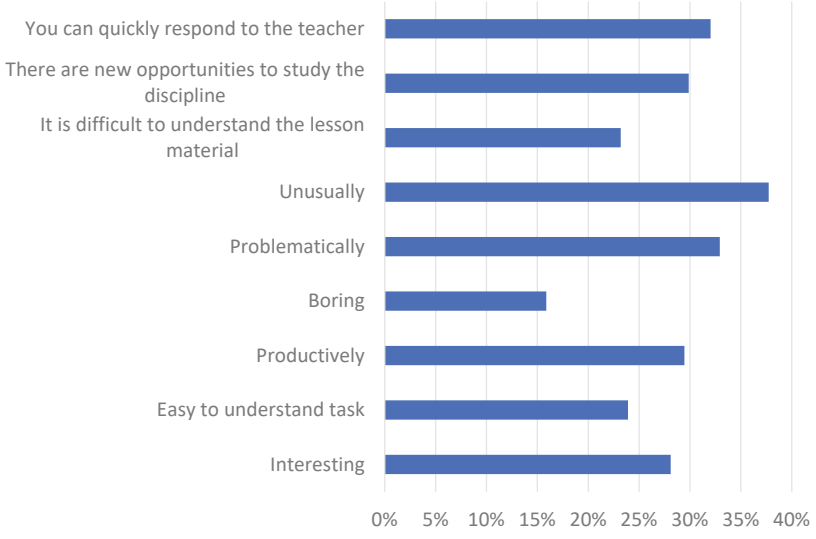


Fig. 11. Characteristics of other distance learning tools (students)



of students to give a clear description of these funds. In the comments, students noted the high dependence of the quality of the use of distance learning tools not on the type of technology, but on the teacher himself. If the teacher successfully uses the technology, then the effectiveness of the classes is significantly improved.

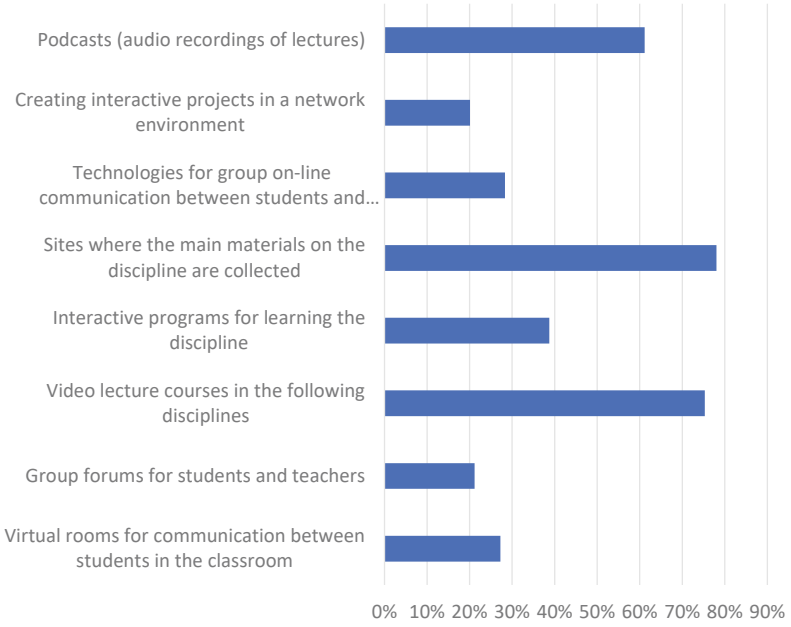
3.5. Barriers to institutionalization of distance learning

In studying the manifestation of subjectivity in the new conditions, it is important for us to find out whether the problems of using remote technologies relate to the inherent properties of a new means of education or are perceived as temporary difficulties of the transition period. To do this, we asked respondents about the possibilities of modernizing distance learning, their vision of solving existing problems. Answers to these questions showed distrust of the new technologies themselves. Digitalization is perceived as an unnecessary alternative to traditional forms of interaction and knowledge transfer. The main mechanism for restoring the effectiveness of training, according to respondents, can be a return to live interpersonal communication. This position is held by both students and teachers. However, there is a difference in understanding the optimal development of the situation.

For the modernization of distance learning, according to students, the most significant is the creation of sites where the main materials in the discipline will be collected, and the placement of a video lecture course (see fig. 12). In the answer to the open question, most students write wishes to move from distance learning to classroom work. The use of additional materials on the Internet is familiar to students, does not replace interaction with the teacher. However, they consider these tools to be the most convenient for learning in the new conditions. Teachers in this matter prefer online communication, while students prefer virtual databases.

At the social interaction level, adaptation was much faster than at the institutional level. It is quite difficult for students and teachers to determine the criteria for the effectiveness of their activities and the parameters for controlling the quality of the process in the new conditions. At the same time, it became a little more difficult for

Fig. 12. directions of distance learning modernization (students)



students to interact with the teacher during distance learning. 43 % of respondents did not note the difference, for 21 % the interaction was facilitated, and for 36 % it was complicated (see fig. 13). Students were able to quickly find the advantages of digital communications and restructure the tactics of interaction with the teacher. There are more situations in which it is necessary to ask the teacher a question. It became possible to individualize tasks, the process of their evaluation and discussion of results.

When modeling the monitoring situation, the positions of teachers and students change. During the certification, students are interested in limiting the interaction using digital means. Here, their installation is aimed at changes that exclude analogies with the traditional form of training. Teachers, on the contrary, seek to replicate traditional control procedures in distance learning. Therefore, when asked about the preferred forms of passing exams and credits, students answered that it was more convenient for them to perform written tasks. On this issue,

Fig. 13. Interaction with the teacher during distance learning (students, in %)

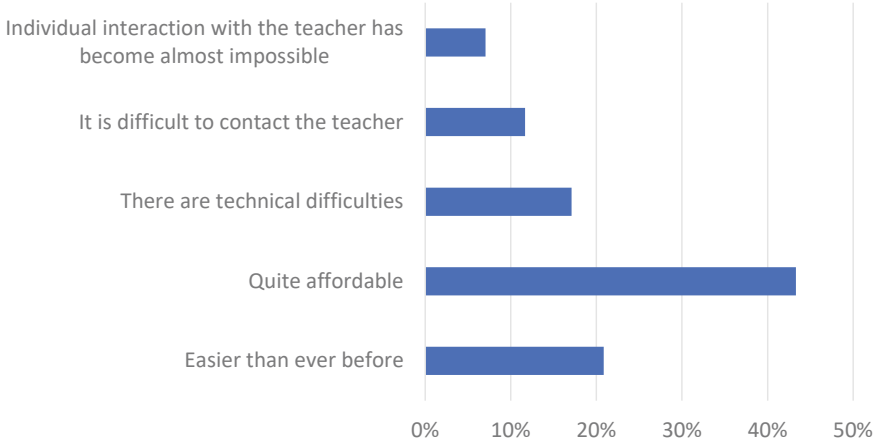
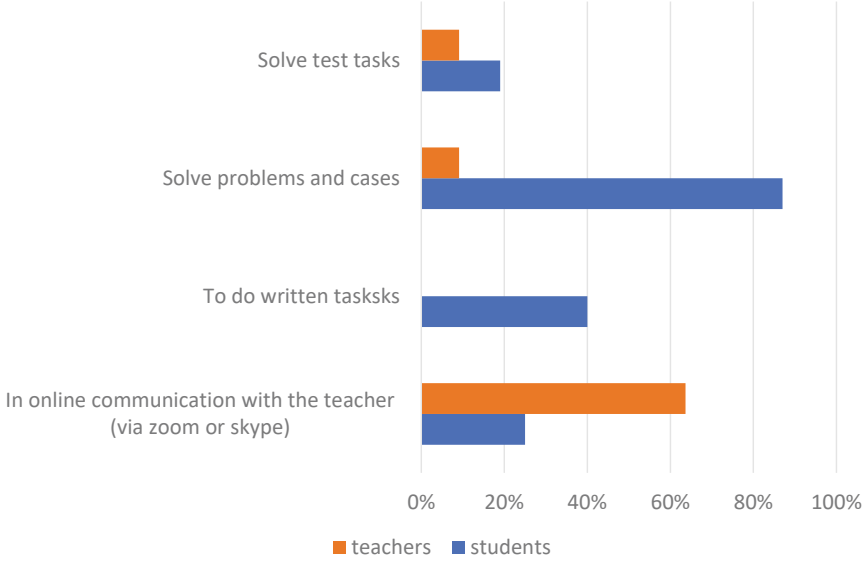


Fig. 14. Preferred form of exams and tests



their position diverges from the preferences of teachers, for whom it is more convenient to take tests and exams through online communication, for example, through Zoom (see fig. 14). Such positions in the context of institutionalization of distance learning require the formation of new methods for monitoring achievement. A departure from traditional methods should be compensated by new forms of digital interactions that combine virtual tasks, their corresponding material and online interactions both in the form of consultations for the preparation stage and in the form of an oral response from students of the prepared task. Only the balance of oral and written means of control, accompanied by interactive methodological material, will create in the subjects of the educational process an installation for the development of distance learning.

There is another deterrent in interpersonal interactions. The limited use of the potential of digital technologies is due to the fact that not all the capabilities of distance learning technologies have yet been mastered by most teachers. Students note that teachers use distance learning tools quite actively and widely. But this provision does not apply to all teachers. Most respondents identified 6–8 disciplines in which various mechanisms of interactivity are involved. That's less than half.

Students were asked an open question about disciplines in which distance learning technologies are most diverse and interesting. The respondents themselves entered the answer, so the collected data is quite objective. The disciplines most frequently indicated by students and the percentage of references among all the respondents are shown in table 3.

Table 3. Subjects with the most diverse and interesting use of distance learning tools

Disciplines	%
1	2
Criminal law	18,41
Theory of state and law	16,10
Civil law	12,44
Constitutional law	7,70

1	2
Administrative law	7,50
Labour law	5,73
English language	5,73
Criminal procedure	4,05

Other disciplines use a small set of interfaces (see fig. 15). As a result, interest in learning is lost, since the main factor of adaptation in the new conditions is not the final result, evaluation, successful completion of certification, but the teaching process itself, restoration of confidence in quality interaction, reliance on the personality of the teacher, his confidence in the effectiveness of the process. The teacher's inability to use technology, students' complaints about their imperfections and teaching difficulties dissipate students' motivations to overcome their problems when using technology.

Teachers poorly understand this problem. In their opinion, they use a variety of distance learning tools (see fig. 16). As the study showed, despite the fact that almost everyone has the opportunity to send an assignment by e-mail and conduct seminars at Zoom, this ends the use of technology. The usage of chat rooms, other means of online communication, such as Skype, Viber, etc., MS Team online training services are extremely rare.

Fig. 15. Teachers' use of distance learning tools based on students' assessments

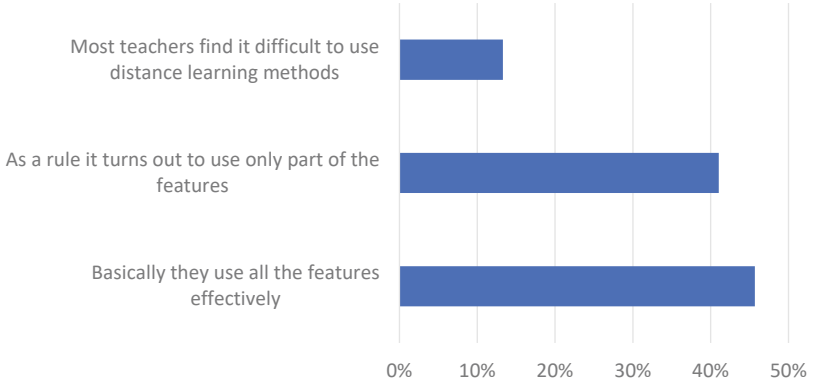


Fig. 16. The effectiveness of distance education technologies (teachers)

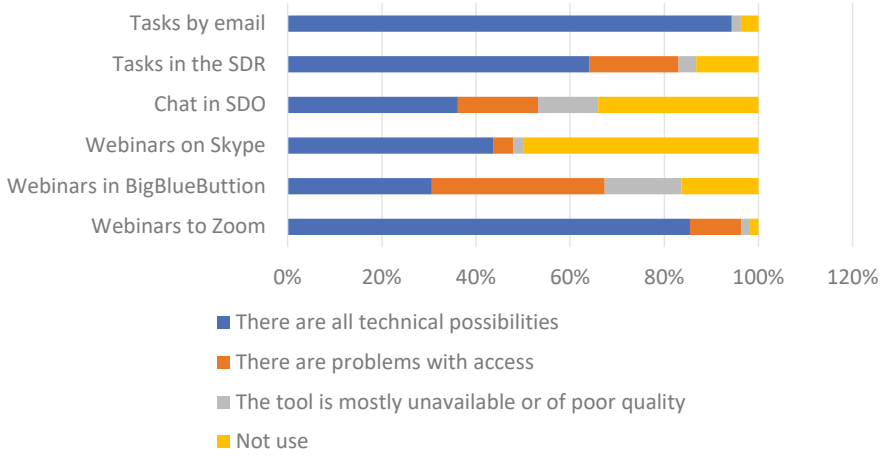
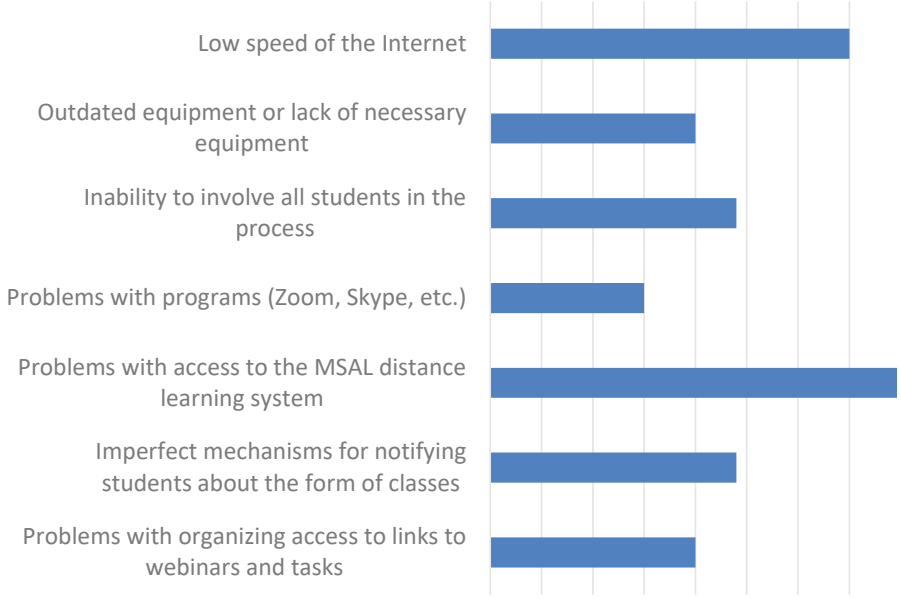


Fig. 17. Technical problems of using distance learning tools (teachers)



When using distance learning systems, one third of teachers had problems with loading tasks completed by students, 22 % experienced difficulties explaining tasks for practical classes to students (see fig. 17).

Teachers also noted the inconvenience of using systems when working with mobile devices, poor interface design and technical failures of the system.

The situation is complicated by the fact that teachers themselves are not trying to overcome difficulties when working with software packages and digital tools. This factor was noted by about a half of the respondents. Therefore, at the first stage of the institutionalization of distance education, it is necessary to establish high-quality permanent interpersonal interactions between the teacher and the student, expand the opportunities of teachers to confidently and versatile use of various digital technologies in order to interest the student, give him an impetus to confidently and subjectively engage in the design of online interaction situations. Then the introduction of new institutional standards, criteria for the quality of education in the digital environment will become understandable and will be perceived as a logical measure to modernize education.

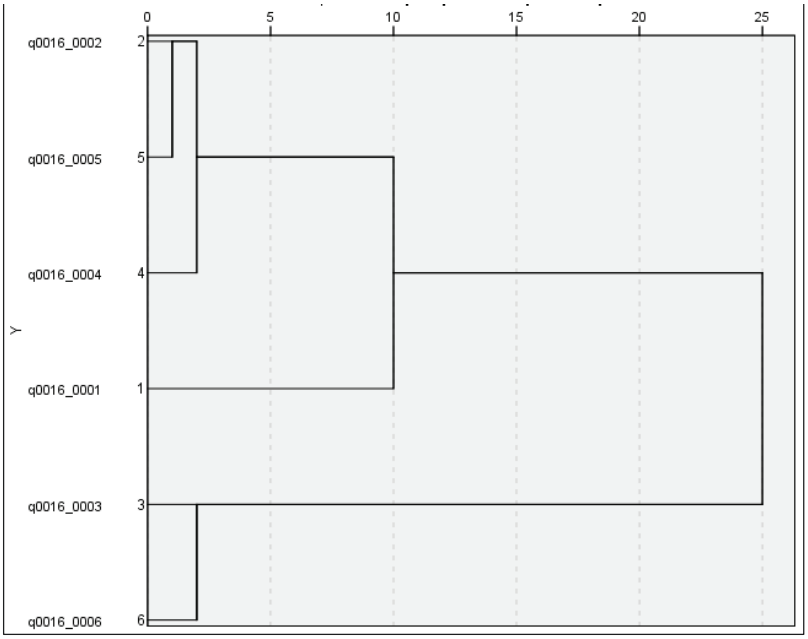
3.6. Adjustment of the organizational environment of the university to the new conditions of the educational process

The completion of the institutionalization of innovations depends not only on the regulatory environment and related infrastructure, but largely on the construction of strategies for achieving significant life goals in the new conditions. In our case, the introduction of distance education depends on the formation of sustainable strategies for obtaining education, the formation of a holistic image of a legal professional for a student and strategies for professional development, self-realization for a teacher.

Our study showed that there are opportunities to build sustainable educational strategies in students, but significant barriers to self-realization in teachers. Cluster analysis data allowed students to be divided into two groups (see fig. 18). In the first, interest in study has been preserved or intensified, new prospects for self-development have appeared. There was more time to prepare for classes, new opportunities for communication with the teacher appeared. In the second group there

Fig. 18. Results of cluster analysis of students

The distance between the factors of achieving learning objectives



Explanation to Fig. 18.	
Variable	**Label**
q0016_0001	I can have more time to prepare, study
q0016_0002	Learning has become more interesting
q0016_0003	It's harder for me to understand the training material
q0016_0004	Teachers have become more accessible for communication
q0016_0005	It became easier to understand the tasks for practical classes
q0016_0006	It became more difficult to communicate with the teacher

is growing uncertainty in the future, difficulties in building a training strategy. It became more difficult for such students to understand the material of lectures and practical classes, communication barriers arose when communicating with a teacher. The variance analysis showed that, nevertheless, the factors of the first cluster that positively affect the personal growth of students prevail slightly during the period of distance learning.

In order to comprehensively understand all the dimensions of the institutionalization of distance learning, it was important for us to establish the adaptation of support systems and administrative staff to new remote forms of work. In organizational terms, the interaction of the teacher and the student quickly created a technical support system. Teachers do not experience difficulties in establishing interaction with students. If teachers had problems working in the distance learning system of the university, then in 84 % of cases they received all the necessary assistance from the technical support service.

Most of the administrative staff interviewed were able to perform almost all professional tasks remotely using digital technologies. Only 21 % of those queried were unable to operate remotely (see fig. 19).

In the course of working remotely, university staff felt the need to access documents in hard copy and to see documents, but in most cases they could not do so (see fig. 20). These are the main difficulties of remote operation. At the same time, it became easier for employees to analyze large amounts of information remotely, contact teachers and students through corporate mail, exchange the necessary and up-to-date information among themselves, and quickly receive answers to requests (see fig. 21). In general, employees see more advantages than the disadvantages of working remotely.

When working remotely, employees have most of the technical conditions and capabilities to use digital technologies. It is most difficult to obtain quality software (see fig. 22). Here they need support.

Assessing their ability to work remotely and the period during which the quality of the tasks will not be affected, employees were divided into two groups. The first is dominated by the opinion that it is necessary to stop working remotely as soon as possible. For them, it is possible to perform professional tasks in isolation from the workplace for no more than 2 months. This group consists of 47 % of employees (see fig. 23). The second group is ready to work remotely permanently. It does not need to return to its workplace. The volume of the group is 44 % of employees. However, if you still have to constantly work at home, then most respondents hope to adapt to the new conditions. 61 % believe that their life will get better from this. 15 % view this idea extremely negatively (see fig. 24).

Fig. 19. Ability to perform professional tasks remotely (administrative and support staff)

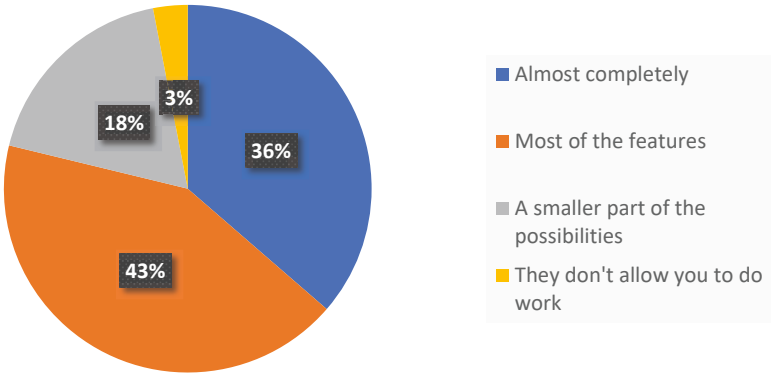


Fig. 20. Difficulties with performing professional tasks remotely (administrative and support staff)

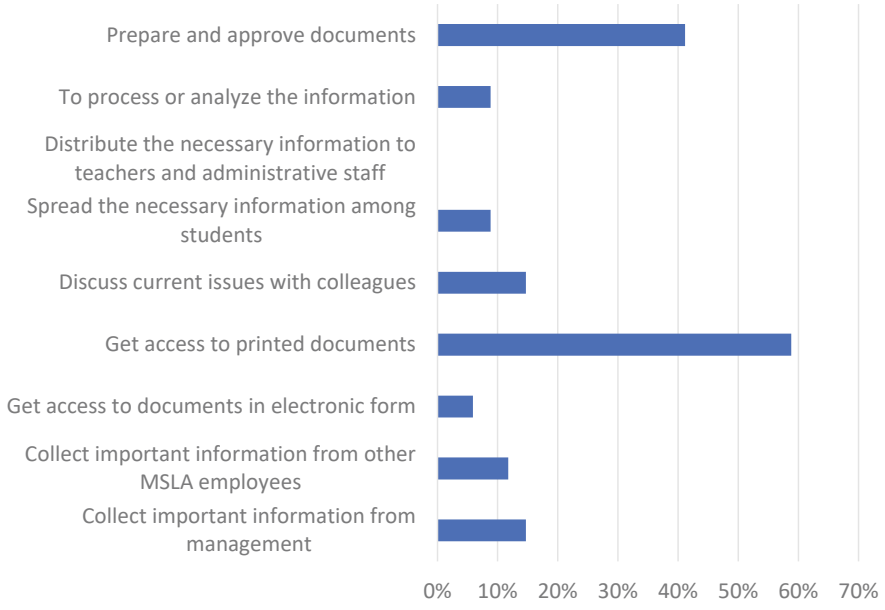


Fig. 21. Advantages of remote work (administrative and support staff)

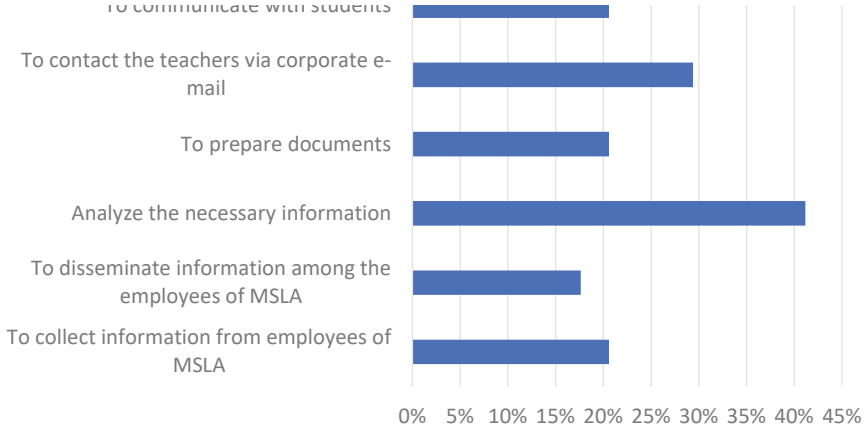


Fig. 22. satisfaction with remote work conditions (rating range from 1 to 100, where 1 is completely dissatisfied, 100 is completely satisfied)

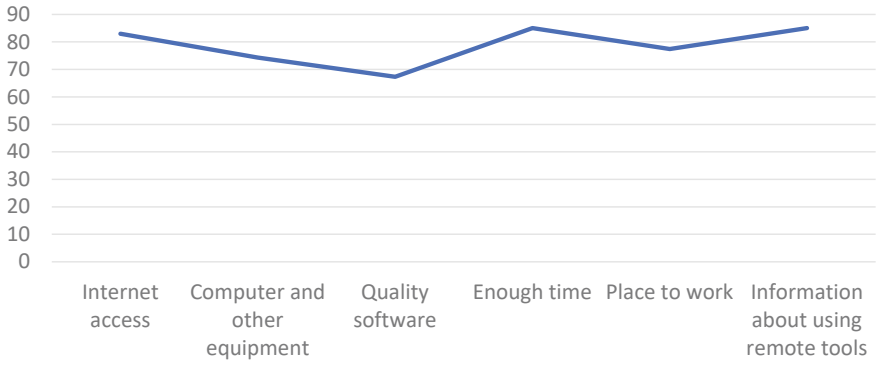


Fig. 23. the period of remote work without compromising the quality of tasks (administrative and support staff)

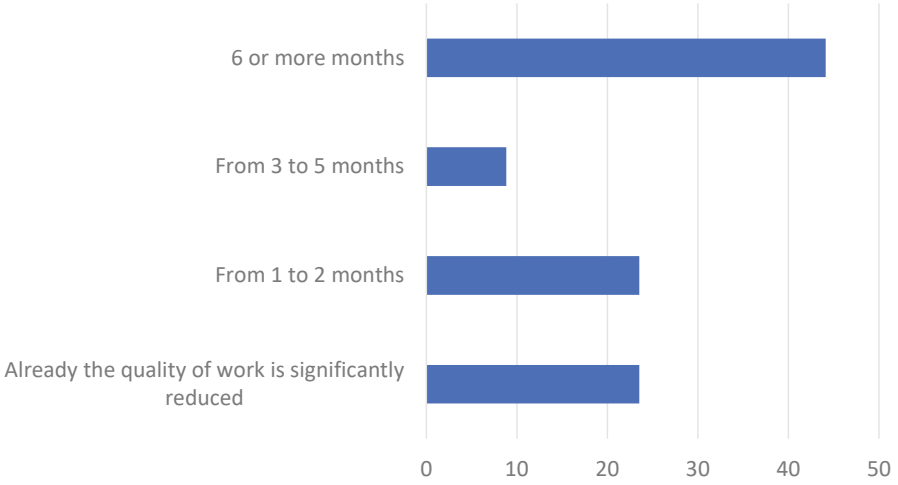
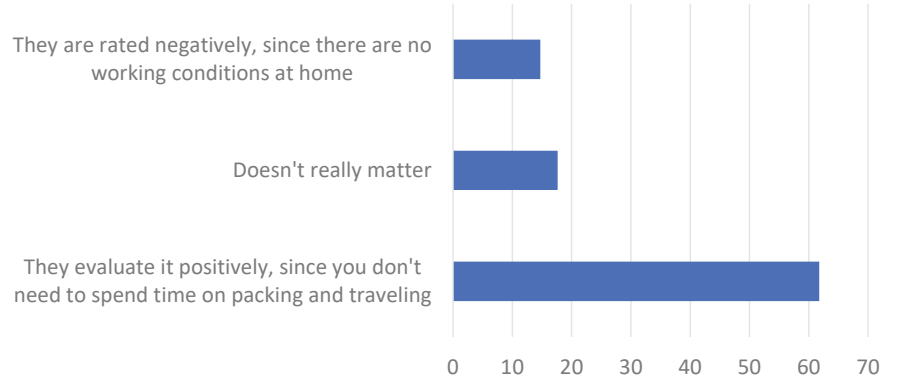
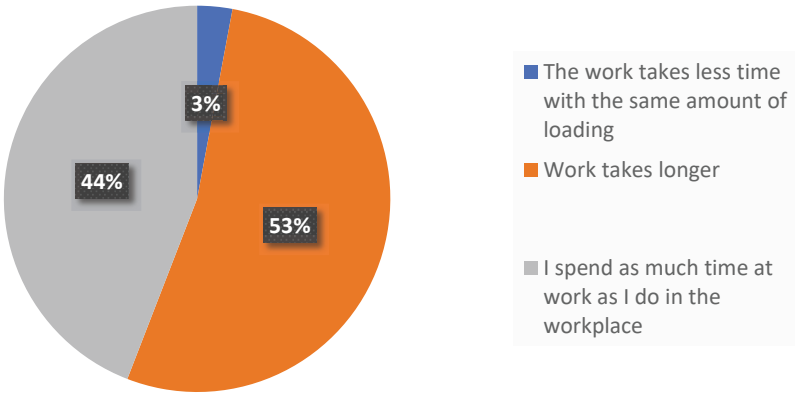


Fig. 24. Assessment of the ability to work at home on a permanent basis (administrative and support staff)



Working remotely, most university staff began to spend more time performing their duties. About half spend the same amount of time. Almost no one has been able to reduce their time (see fig. 25).

Fig. 25. Time spent working remotely (administrative and support staff)



4. Conclusions

Assessing the possibilities of distance learning, teachers see its advantages in saving time, the convenience of working at home, the emergence of new methodological opportunities to provide students with materials for preparing for classes. The shortcomings of distance learning are reduced to the impossibility of direct contact with students, the lack of a direct reaction to the words of the teacher. Lack of live communication makes it difficult to attract the attention of students, reduces the quality of assimilation of material. Many teachers note the difficulty of placing tasks through the university's distance learning software.

Students, on the contrary, prefer to work with finished materials rather than through online interaction. Their preferences tend to video lectures and interactive materials posted on specialized sites in disciplines.

Speaking about the benefits of distance learning, students note the lack of time on the road, the ability to better allocate time to study, health

safety and interest in new technologies. About 90 % of answers to the open question about benefits are limited to these factors. Students have almost three times more negative statements about distance learning than positive ones. The main reasons for dissatisfaction are high fatigue, increased study time, problems with the Internet, distractions at home, difficulty in understanding tasks, problems when interacting with a teacher, the inability to communicate directly with classmates, the difficulty of discussing practical situations and tasks.

Thus, the vision of distance learning among students and teachers is different. The polarization of positions regarding the effectiveness and feasibility of the introduction of distance learning, which is observed both among students and teachers, is growing. Some respondents support innovations and see them as more useful, advantages for themselves and study. Another part considers distance learning to be the reason for a decrease in the quality of education and deterioration in lifestyle.

We will draw conclusions on the optimization of the process of institutionalization of distance learning. Today, social technologies are increasingly "being used to improve legal, political and economic institutions, and to harmonize the entire institutional system of modern Russia."[7] In education, it is necessary to align the attitudes of students and teachers in distance learning. To make it more convenient for teachers to work with students remotely, it is important to develop, first of all, group online communication technologies with students. Then the participants of the interaction will be able to see the entire group, freely exchange information with everyone and see the reaction to its receipt. This can be helped by the development of technology for creating virtual rooms in which subgroups can interact, solving tasks. Another direction is to create video lecture courses, which should be done systemically. This will become a good methodological support for distance learning.

The importance of the development of means of online interaction is also explained by the control of students' knowledge. Teachers are more

[7] L.A. Voskobitova, V.I. Przhilenskiy. Socialnye tekhnologii i yuridicheskoe poznanie: monografiya [Social technologies and legal knowledge: monograph]. (2017). (In Russ.)

comfortable taking credit in the form of online communication than giving various tasks for written execution. Many teachers expressed a desire to take credits and exams exclusively in direct live communication with the student.

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THE SANCTIONS FOR THE ACTS OF "OFFENDING THE HUMAN BEING'S HONOR AND DIGNITY" IN THE VIETNAMESE DECREE FOR THE ADMINISTRATIVE VIOLATIONS

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Abstract

In sanctioning administrative violations, the correct adoption of sanctioning forms and remedial measures against administrative violations is strategically vital. There have currently been wide ranges of overlap in the sanctioning forms and remedial measures for the acts "offending the honor and dignity." This paper analyses the overlap and inconsistency in the sanctioning forms and remedial measures among the decrees concerning the acts "offending the honor and dignity."

Keywords

Honor and dignity, sanctioning forms, remedial measures, administrative violation

CONTENTS

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I. Introduction

Article 20 of the Vietnam Constitution adopted in 2013 stipulates: *Everyone has the inviolable right to his body and the protection by law of his health, honor and dignity; no one shall suffered torture, violence, coercion, corporal punishment or any other forms of abuse of his body, health or offending his honor and dignity.*

Under Article 34 of the Civil Law adopted in 2015: *"Honor and dignity of an individual are inviolable and protected by law."* Due to the protection of the law, "offending the honor and dignity" means illegal behavior and it must be subjected to the punishments prescribed in administrative, criminal and civil law.

According to administrative law, the act of "offending the honor and dignity" is an illegal act that is infringing the quality and value of human beings, but not amounting to the gravity of a criminal act, and this behavior must be sanctioned according to administrative regulations. The sanctions for the acts "offending the honor and dignity" are stipulated in the Decrees of Administrative Violations of the Vietnam Government.

II. Awareness of the acts of "offending the honor and dignity" in administrative law

"Honor" and "dignity" are legal terms commonly used in Vietnam. However, until now, there have not been any Vietnamese legal documents which would provide their definitions. Hence there is a host of different understandings in practice.

According to the Vietnamese dictionary, "honor" means "great respect and evaluation," while "dignity" means "the quality and value of a human being."[2] According to the Dictionary of Law, "honor" refers to "the respect of the society for somebody or any organization and is recognized as moral rights", while "dignity" is "the quality and value of a specific person protected by law."[3]

From a linguistic perspective, *honor* means appreciation and high esteem demonstrated by the society for a person based on his or her morality and spiritual values, and *dignity* means all qualities that every person is blessed with. If dignity is the individual humane value, honor is the consequence of the process of building and protecting dignity.[4]

Thus, *honor* and *dignity* are likely to be understood as social categories always associated with a certain individual; they are the factors used to determine the role, position, quality, the value of a human being who is socially-assessed, acknowledged and protected by law.

According to the administrative law, "offending the honor and dignity" means illegal acts, that is to say acts infringing upon the quality and value of human beings, but not reachingthe requirements applied to criminal acts, and this behavior must be sanctioned according to administrative regulations. Thus, such actions are only administratively sanctioned when meeting the following requirements:

Looked at objectively, "offending the honor and dignity" is illegal. Such behavior is often expressed verbally (insulting, cursing, *etc.*), and non-verbally (gestures, spitting, throwing dirt, *etc.*), the dispersal (posting, spreading of humiliating information via the media, *etc.*). Victims — depending on their status, roles, responsibilities and the age are hurt, undervalued, despised by their families, peer groups, communities, and societies.

[2] Nguyen Nhu Y, Vietnamese dictionary 389, 1159 (Pub. National University of Ho Chi Minh City Ho Chi Minh 2013).

[3] Ministry of Justice — Institute of Legal Sciences (2013). Dictionary of Law, Pub. Justice. p. 209, 587.

[4] Pham Kim Anh, Regarding regulations on compensation for damages caused by honor, dignity and prestige in Vietnam's Civil Code and the direction of perfection. 03 Journal of Legal Science (2001).

The characteristic of the act of "offending the honor and dignity" is that it usually takes place directly, openly and in public. This act can be done publicly with (e.g. insults and curses in crowded places) or without the sufferer but the sufferer is consciously informed about this (such as defamation, insults on social networks). "Offending the honor and dignity" constitutes a composition; the consequences incurred are not mandatory signs in the composition of this behavior. Thus, "offending the honor and dignity" only needs three signs: behaviors, their illegality, and behaviours' qualification as an administrative violation subjected to administrative responsibility, under a legal document.[5]

In addition, in the objective aspect of administrative violations, there may include time, place, tools and means of offense, *etc*. However, these are not decisive significances in all components of administrative violations.[6] Specifically, in many violations, people take into account these signs, but for the acts of "offending the honor and dignity," time and place factors are not mandatory signs. The element of tools and means are compulsory in case that the competent persons can prove that these tools and means are the exactly decisive signs. In other words, the acts of "offending the honor and dignity" cannot be done without specific tools and means, then these tools and means are mandatory signs in the composition of this violation.

Subjectively, "offending the honor and dignity" is done with intentional errors. That means the offenders know their behavior is illegal but still carry out such actions. The purpose of these actions is to humiliate the others' honor and dignity.

In terms of subjects, the person who carries out these acts must be able to take administrative responsibility-he or she must be able to perceive and control their behaviors and reach the age of 14 years old.

In terms of objects, these acts infringe upon an individual who has the protection rights of honor and dignity, but not to the extent of being examined for penal liability (not the lawbreakers). Currently, the Criminal Code 2015 (amended and supplemented in 2017) also stipulates

[5] Nguyen Cuu Viet, Vietnamese Administrative Law Curriculum (Pub. National politics 2013) (499).

[6] Nguyen Canh Hop, Vietnamese Administrative Law Curriculum 563–564 (Pub. Hong Duc — Vietnam Lawyers Association 2018).

the punishments for the acts of offending the individual's honor and dignity through "committing the crime of *insulting others*." However, in order for such actions to be considered as criminal treatment, the victim's honor and dignity must be severely insulted.[7] That means the above behaviors must have the negative effects on a certain degree for the dignity and honor of the victims. However, in reality, it is not easy to determine that seriousness.[8]

Within the scope of this article, the author places emphasis on regulations concerning administrative sanctions for the acts of "offending the honor and dignity" because at present, these behaviors are adjusted in many different decrees. Therefore, the sanctioning forms, the levels of being fined, and the remedial measures for these are also very distinctive.

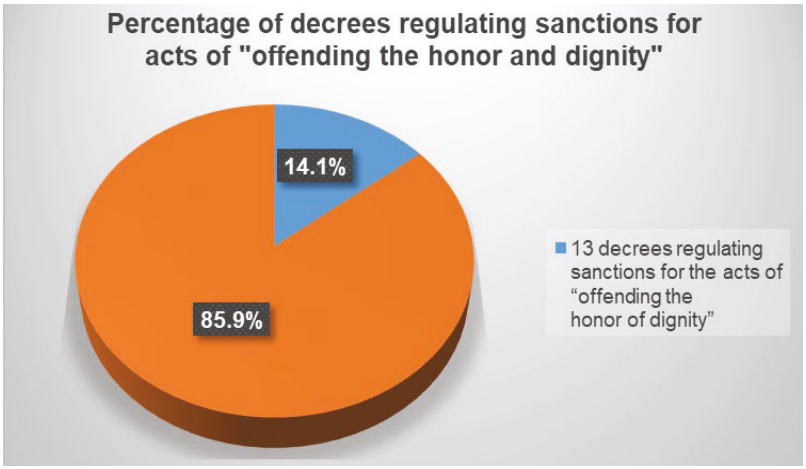
III. The overlap and inconsistency between the sanctioning forms, the levels of being fined, and the remedial measures for the acts "offending the honor and dignity"

According to statistics of the Ministry of Justice, there have been 92 decrees to regulate the sanctions for the administrative violations in various fields.[9] Among them, there have been 13 decrees that prescribe sanctions for the acts of "offending the honor of dignity" (accounting for 14.1 %). They are: Decree No 107/2013/ND-CP; Decree No 138/2013/ND-CP; Decree No 144/2013/ND-CP; Decree No 159/2013/ND-CP; Decree No 167/2013/ND-CP; Decree No 176/2013/ND-CP; Decree No 110/2013/ND-CP (amended and supplemented by Decree No 67/2015/ND-CP); Decree No 46/2016/ND-CP; Decree No 155/2016/ND-CP; Decree No 158/2013/ND-CP (amended and supplemented by Decree No 28/2017/ND-CP); Decree No 174/2013/ND-CP (amended

[7] Tran Thi Quang Vinh, Vietnam's Criminal Law Curriculum 127 (Pub. Hong Duc — Vietnam Lawyers Association 2013).

[8] Do Duc Hong Ha, Crimes of infringing upon people's lives, health, dignity and honor in Vietnam's Criminal Code — Inadequacies and suggestions for improvement. 03 Legal Professions Review Journal (2015).

[9] Ministry of Justice's. Report No 09/BC-BTP on summarizing 5 years of implementing the Law on Handling Administrative Violations in 2012 (2013 to 2018).



and supplemented by Decree No 49/2017/ND-CP dated April 24, 2017); Decree No 162/2018/ND-CP; Decree No 46/2019/ND-CP.

According to the findings of the research, the acts of "offending the honor and dignity" are divided into following aspects: *(i)*. The acts offending the honor and dignity as applied to specific subjects; *(ii)*. The acts offending the honor and dignity in specific areas; (*iii)*. The acts offending the honor and dignity at specific locations; (*iv)*. The acts of offending the honor and dignity through specific tools and means.

3.1. The acts of offending the honor and dignity as applied to specific subjects

In Decree No 167/2013/ND-CP, there are three laws stipulating different sanctions for the acts of "offending the honor and dignity". They are:

1. Stipulated in Para A, Clause 1, Article 5 of Decree No 167/2013/ND-CP, the acts of "offending others' honor and dignity" shall be warned or fined ranging 100,000 VND to 300,000 VND. However, if these violations happen to the family members, the fine shall be from 500,000 VND to 1,000,000 VND (Decree No 167/2013/ND-CP, Art. 51, Clause 1). In addition to this fine (from 500,000 VND to 1,000,000 VND), the violator is also subjected to the remedial measures named

"issuing public apology when the victims request."[10] Also, according to Decree No 167/2013/ND-CP, the acts of "offending the honor and dignity of authorities on duty" shall be fined from 2,000,000 VND to 3,000,000 VND (Decree No 167/2013/ND-CP, Art. 20, Clause 2). Thus, under the Decree 167/2013/ND-CP, once these behaviors have pointed to different subjects, the sanctioning forms, the levels of fines and the remedial measures shall be correspondingly divergent.

Legal basis	Decree No 167/2013/ND-CP	Decree No 167/2013/ND-CP	Decree No 167/2013/ND-CP
Description of behavior	Offending the honor and dignity *of others*	Offending the honor and dignity *of family members*	Offending the honor and dignity *of authorities on duty*
Forms of penalties and levels of being fined	— Warning; — Fine from 100,000 VND to 300,000 VND	— No warning; — Fine from 500,000 VND to 1,000,000 VND	— No warning — Fine from 2,000,000 VND to 3,000,000 VND
Average fines	200,000 VND	750,000 VND	2.500,000 VND
Ratio	1 time	3,75 times	12,5 times

According to Para B, Clause 1, Article 85 of Decree No 176/2013/ND-CP, the acts of "offending the honor and dignity of people using contraceptive methods, of people who give birth with all boys or all girls" shall be warned or fined ranging 100,000 VND to 300,000 VND. Consequently, the sanctioning forms and levels of being fined prescribed at Para b, Clause 1, Article 85 of Decree No 176/2013/ND-CP coincide exactly with the sanctions of "offending the honor and dignity of others" which is regulated in Para A, Clause 1, Article 5 of Decree No 167/2013/ND-CP.

According to Para C, Clause 3, Article 43 of Decree No 110/2013/ND-CP (amended and supplemented by Decree No 67/2015/ND-CP), the acts of "offending the honor and dignity of people under the legal aids" shall be fined from 500,000 VND to 1,000,000 VND. Obviously, this money fined is similar to that of the acts of "offending the honor

[10] Decree No 167/2013/ND-CP, Art. 51 (3).

and dignity of family members" in Clause 1, Article 51 of Decree No 167/2013/ND-CP.

According to Para B, Clause 5, Article 23 and Para A Clause 4, Article 31 of Decree No 46/2016/ND-CP, the acts of "offending the honor and dignity of cars' passengers" shall be fined from 1,000,000 VND to 2,000,000 VND. Thus, this fine is twice than that of the acts "offending the honor and dignity of the family members or of the people under the legal aids."

Legal basis	Decree No 176/2013/ND-CP	Decree No 110/2013/ND-CP (amended and supplemented by Decree No 67/2015/ND-CP)	Decree No 46/2016/ND-CP
Description of behavior	Offending the honor and dignity *of people using contraceptive methods, of people who give birth with all boys or all girls*	Offending the honor and dignity *of people under the legal aids*	Offending the honor and dignity *of cars' passengers*
Forms of penalties and levels of being fined	— Warning; — Fine from 100,000 VND to 300,000 VND	— No warning; — Fine from 500,000 VND to 1,000,000 VND	— No warning; — Fine from 1,000,000 VND to 2,000,000 VND
Average fines	200,000 VND	750,000 VND	1.,500,000 VND
Ratio	1 time	3,75 times	7,5 times

According to Clause 2, Article 14 of Decree No 158/2013/ND-CP (amended and supplemented by Decree No 28/2017/ND-CP), the acts "offending the honor and dignity of the candidates participating in the beauty contests, model contests" shall be fined from 5,000,000 VND to 10,000,000 VND. This fine is also set equivalently with that of for the acts of "offending the honor and dignity of children"[11] and "offending

[11] Clause 2, Article 27 of Decree No 144/2013/ND-CP on sanctioning administrative violations in sponsorship, social relief and child protection and care stipulates: "A fine

the honor and dignity of teachers, educational managers and learners."[12] According to Clause 2, Article 7 of Decree No 159/2013/ND-CP, the acts of "offending the honor and dignity of journalists" shall be fined from VND 10,000,000 to 20,000,000 VND.

Description of behavior	**Legal basis**
1	2
Offending the honor and dignity *of others* ***or*** *people using contraceptive methods, people who give birth with all boys or all girls*	Decree No 167/2013/ND-CP ***and*** Decree No 176/2013/ND-CP
Offending the honor and dignity *of family members* ***or*** *people under the legal aids*	Decree No 167/2013/ND-CP ***and*** Decree No 110/2013/ND-CP (amended and supplemented by Decree No 67/2015/ND-CP)
Offending the honor and dignity *of cars' passengers*	Decree No 46/2016/ND-CP
Offending the honor and dignity *of authorities on duty*	Decree No 167/2013/ND-CP
Offending the honor and dignity *the candidates participating in the beauty contests, model contests* ***or*** *children* ***or*** *teachers, education managers*	Decree No 138/2013/ND-CP**,** Decree No 144/2013/ND-CP, Decree No 158/2013/ND-CP (amended ***and*** supplemented by Decree No 28/2017/ ND-CP)
Offending the honor and dignity *of journalists*	Decree No 159/2013/ND-CP

of between 5,000,000 VND and 10,000,000 VND for acts of offending the honor and dignity of children".

[12] Clause 2 of Article 19 and Clause 2 of Article 21 of Decree No 138/2013/ND-CP on sanctioning administrative violations in the field of education stipulates: "A fine of between 5,000,000 VND and 10,000,000 VND for acts of offending the honor and dignity of teachers, education managers".

1	2	3	4	5	6	7
Forms of penalties and levels of being fined	— Warning; — Fine from 100,000 VND to 300,000 VND	— No warning; — Fine from 500,000 VND to 1,000,000 VND	— No warning — Fine from 1,000,000 VND to 2,000,000 VND	— No warning — Fine from 2,000,000 VND to 3,000,000 VND	— No warning — Fine from 5,000,000 VND to 10,000,000 VND	— No warning — Fine from 10,000,000 VND to 20,000,000 VND
Average fines	200,000 VND	750,000 VND	1,500,000 VND	2,500,000 VND	7,500,000 VND	15,000,000 VND
Ratio	1 time	3,75 times	7,5 times	12,5 times	37,5 times	75 times

Through the above analysis, it can be seen that despite the same offense, the levels of fines are attributed to the distinctive objects attacked. Accordingly, the fines from the acts of insulting honor and dignity of any person in the society are low on average (only 200,000 VND). However, if these offenses are directed to the candidates participating in a beauty contests and model contests, the average fines will be 37.5 times higher than normal ones. Even if these acts happen to "the journalists", the average fines will be 7,5 times higher than against other individuals in the society. From the perspective of various fines, the State implies that "offending the honor and dignity of journalists" is more serious than "offending the honor and dignity of teachers;" and "offending the honor and dignity of teachers" is more severe than "offending the honor and dignity of others in the society", does not it? This is quite unreasonable because the identifications of "honor, dignity" should be homogeneous without any discrimination, no matter all classes of the society it involves.

3.2. The acts of offending the honor and dignity in specific areas

According to Clause 1, Article 9 of Decree No 46/2019/ND-CP, the acts of "offending the honor and dignity in the field of sports" shall be fined from 15,000,000 VND to 20,000,000 VND. This average fine is higher than that applied in cases involving "the journalists".

In addition to being fined, the acts of "offending the honor and dignity in the field of sports" are also subjected to remedial measures named "issuing public apology for the acts of offending the honor and dignity." Hence, both the acts of "offending the honor and dignity of family members" and the acts of "offending the honor and dignity in the field of sports" are two of the decrees applied as the additional remedial measures, except the principal sanctioning form of fines.

Legal basis	Decree No 167/2013/ND-CP	Decree No 46/2018/ND-CP
Description of behavior	Offending the honor and dignity *of others (in all fields)*	Offending the honor and dignity *in the field of sports*
Forms of penalties and levels of being fined	— Warning; — Fine from 100,000 VND to 300,000 VND	— No warning — Fine from 15,000,000 VND to 20,000,000 VND
Average fines	200,000 VND	17,500,000 VND
Ratio	1 time	87,5 times

Obviously, the fact that the levels of fines attributed to the distinctive objects attacked is regulated by Decree No 167/2013/ND-CP. As stated, Decree No 167/2013/ND-CP does prescribe the penalties for the acts of "offending the honor and dignity of authorities on duty" (being fined from 2,000,000 VND to 3,000,000 VND). However, there are still two decrees regulating the acts of "offending the honor and dignity of authorities on duty." Firstly, according to Point a, Clause 4, Article 42 of Decree No 107/2013/ND-CP, the acts of "offending the honor and dignity of authorities on duty" shall be fined from 5,000,000 VND to 10,000,000 VND. Secondly, Point b, Clause 1, Article 47 of Decree No 155/2016/ND-CP also stipulates that fine from 5,000,000 VND and 10,000,000 VND for this offense can be imposed. Consequently, the

acts of "offending the honor and dignity of authorities on duty in the field of environmental protection and atomic energy" are much more serious than fines for acts offending authorities on duty in other fields (such as land, construction, transportation, securities, tax, finance, *etc*). Neither in theory nor in practice, the author finds out any findings to affirm this fact.

Legal basis	Decree No 167/2013/ ND-CP	Decree No 107/2013/ ND-CP	Decree No 155/2016/ND-CP
Description of behavior	Offending the honor and dignity of authorities on duty	Offending the honor and dignity of authorities on duty *in the field of atomic energy*	Offending the honor and dignity of authorities on duty *in the field of environmental protection*
Forms of penalties and levels of being fined	— Fine from 2,000,000 VND to 3,000,000 VND	— Fine from 5,000,000 VND to 10,000,000 VND	— Fine from 5,000,000 VND to 10,000,000 VND
Average fines	2,500,000 VND	7,500,000 VND	7,500,000 VND
Ratio	1 time	3 times	3 times

3.3. The acts of offending the honor and dignity at specific locations

There is a wide range of decrees pinpointing that the violating side is the facilitator of the levels of being fined, not the objects attacked. Going into details, according to Point h, Clause 4, Article 26 of Decree No 162/2018/ND-CP, the acts of "offending the honor and dignity of aviation staff, passengers or others at the airports" shall be fined from 3,000,000 VND to 5,000,000 VND. However, if these acts happen "on board", the violators will be fined from 7,000,000 VND to 10,000,000 VND (Point n, Clause 5, Article 26 of Decree No 162/2018/ND-CP).

Ironically, it might look like the honor and dignity of an individual will vary in different venues? Do the governors intentionally impose the fines depending upon the acts of "offending the honor and dignity of cars' passengers" that are much lower than the fines imposed for the acts "offending the honor and dignity of airplanes' passengers"? This regulation is unreasonable and needs to be addressed as "the inviolable rights to honor and dignity" or the human rights. As the result, all infringed subjects must be equally treated regardless of who they are and where the behaviors take place.

Legal basis	Decree No 46/2016/ ND-CP	Decree No 162/2018/ ND-CP	Decree No 162/2018/ND-CP
Description of behavior	Offending the honor and dignity of cars' passengers	Offending the honor and dignity of airplanes' passengers	Offending the honor and dignity of aviation staff, passengers or others at airports
Forms of penalties and levels of being fined	— Fine from 1,000,000 VND to 2,000,000 VND	— Fine from 7,000,000 VND to 10,000,000 VND	— Fine from 3,000,000 VND to 5,000,000 VND
Average fines	1,500,000 VND	8,500,000 VND	4,000,000 VND
Ratio	1 time	5,6 times	2,6 times

3.4. The acts of offending the honor and dignity through specific tools and means

Para G, Clause 3, Article 66 of Decree No 174/2013/ND-CP (amended and supplemented by Decree No 49/2017/ND-CP) stipulates that the acts of "offending the honor and dignity of others by means of the forms of digital information" shall be fined from 5,000,000 VND to 10,000,000 VND. Hence, the administrative violations are only applied via Para G, Clause 3, Article 66 of Decree No 174/2013/ND-CP

(amended and supplemented by Decree No 49/2017/ND-CP) when the acts of "offending the honor and dignity" must be carried out in the forms of "digital information".

According to Clause 2, Article 4 of the Law on Information Technology 2006, "digital information is information created by using the methods of digital signals." The production, transmission, collection, processing, storage and exchange of digital information must be carried out through information technology devices, including telecommunication networks, the Internet, computer networks and databases.[13] Thus, the acts of "offending the honor and dignity of othersby means of the forms of digital information" must be done through specific tools and means. Unlike "offending the honor and dignity" in the specific fields or at the specific locations, the acts of "offending the honor and dignity of others by means of digital information" require specific tools and means. As the result, the unique tools and means containing digital information are the absolute determinations whether the violations have been committed or not.

According to Clause 2, Article 51 of Decree No 167/2013/ND-CP, the acts of "offending the honor and dignity of family members through the media" shall be fined from 1,000,000 VND to 1,500,000 VND. Likewise, the acts of "offending the honor and dignity" according to Clause 2, Article 51 of Decree No 167/2013/ND-CP must be implemented through "the media". The shortcomings occur when "the media" under Clause 2, Article 51 of Decree No 167/2013/ND-CP is extremely capable of containing "digital information" showed in Para G, Clause 3, Article 66 of Decree No 174/2013/ND-CP (amended and supplemented by Decree No 49/2017/ND-CP). In other words, the acts of "offending the honor and dignity under the forms of digital information" is entirely carried out via "the media". There is a dilemma in below case study: "due to the conflicts occurred between two siblings in a family. The younger sister has offended the honor and dignity of the older sister on Facebook. Thus, will the competent persons apply Decree No 174/2013/ND-CP (amended and supplemented by Decree No 49/2017/ND-CP) or Decree No 167/2013/ND-CP to solve the case?

[13] Law on Information Technology 2006, Art 4 (4).

Legal basis	Decree No 167/2013/ND-CP	Decree No 174/2013/ND-CP (amended and supplemented by Decree No 49/2017/ND-CP)
Description of behavior	Offending the honor and dignity of family members through the media	Offending the honor and dignity of others by means of forms of digital information
Forms of penalties and levels of being fined	Fine from 1,000,000 VND to 1,500,000 VND	Fine from 5,000,000 VND to 10,000,000 VND
Average fines	1,250,000 VND	7,500,000 VND
Ratio	1 time	6 times

These two acts ("offending the honor and dignity by means of forms of digital information" and "offending the honor and dignity of family members through the media") have identical contents and characters. These two behaviors must be done through specific devices, tools and media, which contribute to their composition. Therefore, it is not straightforward to identify the legitimate basis for the sanctioning forms in the case because the criteria to distinguish between these two behaviors are unclear. This leads to the considerable embarrassment to the judges.

IV. Legitimate consequences

It is stated, there are 13 decrees regarding the sanctions for the acts "offending the honor and dignity" among 92 decrees concerning the sanctioning forms for the administrative violations in various fields. The advantage of establishing this regime is to meet the demand for adjusting the specific relationships in particular areas. Accordingly, each field will lead to disparate violations. These violations have different characteristics and levels. Therefore, the purpose of imposing sanctions for the acts of "offending the honor and dignity" in a host of Government decrees is to meet the appropriateness and peculiarity of each field. In addition, the governors shall confidently rely on those decrees to issue the decisions for the administrative infringements irrespective of facing

criticism or being settled in another lawsuit. Having said that, however, apart from the merits, imposing sanctions for the acts of "offending the honor and dignity" in 13 decrees is unquestionably risky. This would be explained in more details below:

Firstly, according to the 2013 Constitution, everyone has equal rights. Therefore, all residents' honor and dignity need to be respected and protected equally. Different sanctions for the acts of "offending the honor and dignity" could create inequality. Discriminatory practices with different levels of fines for the acts of "offending the honor and dignity" in 13 decrees, the rulers publicly and implicitly acknowledge the wide disparity of humane honor and dignity. This is absolutely not appreciated in the context of successfully building a society based on the rule of law-a state where freedom, equality and charity must be highly respected.

Secondly, if any social relationship requires its separate and particular adjustment, the Vietnamese legal system will become overloaded. Consequently, the application for sets of law shall become arbitrary. This not merely violates the rule of law, but also does not guarantee the general principle regarding building and promulgating legal documents mentioned in the Law on Enacting Legal Normative Documents 2015, concerning *"ensuring the constitutionality, legality and consistency of legal documents in the legitimate system."*[14]

Thirdly, administrative violations and criminal offenses in some cases share the same object.[15] However, administrative violations and criminal offenses still vary considerably in the dangerous levels to society.[16] In general, administrative violations have the lower jeopardous scale than perpetration.[17]

The acts of "offending the honor and dignity" at the "severe level" shall constitute the law breaking. According to Clause 1, Article 155 of

[14] Law on Enacting Legal Normative Documents in 2015, Art. 5 (1).

[15] Nguyen Cuu Viet, Vietnamese Administrative Law Curriculum (Pub. National politics 2013) (504).

[16] Nguyen Canh Hop, Vietnamese Administrative Law Curriculum (Pub. Hong Duc — Vietnam Lawyers Association 2018) (567).

[17] Tran Minh Hương, Vietnamese Administrative Law Curriculum (Pub. Hanoi People's Police 2018) (322).

the Criminal Code 2015 (amended and supplemented in 2017): "any individual who seriously provokes the others' honor and dignity shall be fined from 10,000,000 to 30,000,000 VND or serve non-custodial sentence up to 3 years." If the fine is selected, the Court shall decide the amount of fine ranging "10,000,000 VND to 30,000,000 VND" for these behaviors. Thus, in some cases, the fine in criminal punishments is lower than the administrative sanctions.

For example, an athlete ingringes upon the honor and dignity of the referee when participating in sports activities. According to Clause 1, Article 9 of Decree No 46/2019/ND-CP, the acts of "offending the honor and dignity in the field of sports" shall be punished by a fined from 15,000,000 VND to 20,000,000 VND. Due to extenuating circumstances, the authority applies the minimum fine of 15,000,000 VND. However, if this behavior is assessed at the "serious level", the criminal offense shall be constituted and the offenders shall be prosecuted as "committing the crime of insulting others" under Clause 1, Article 155 of the Criminal Code in 2015 (amended and supplemented in 2017). By virtue of the extenuating circumstances, the Court sentences this athlete to the fine with a minimum amount of 10,000,000 VND. Obviously, in this situation, the criminal fine is lower than the administrative fine, even though the criminal violations are always taken into account more seriously than the administrative violations.

V. Causes

Firstly, the contradiction and overlap of the sanctions for the acts of "offending the honor and dignity" in the State's decrees come into existence due to a host of governing bodies. In the above case, Decree No 167/2013/ND-CP is governed by the Ministry of Public Security; Decree No 176/2013/ND-CP is promulgated by the Ministry of Health; Decree No 138/2013/ND-CP is issued by the Ministry of Education and Training; Decree No 144/2013/ND-CP is executed by the Ministry of Labor, War Invalids and Social Affairs; Decree No 110/2013/ND-CP (amended and supplemented by Decree 67/2015/NĐ-CP) is conducted by the Ministry of Justice; Decree No 107/2013/ND-CP is supervised

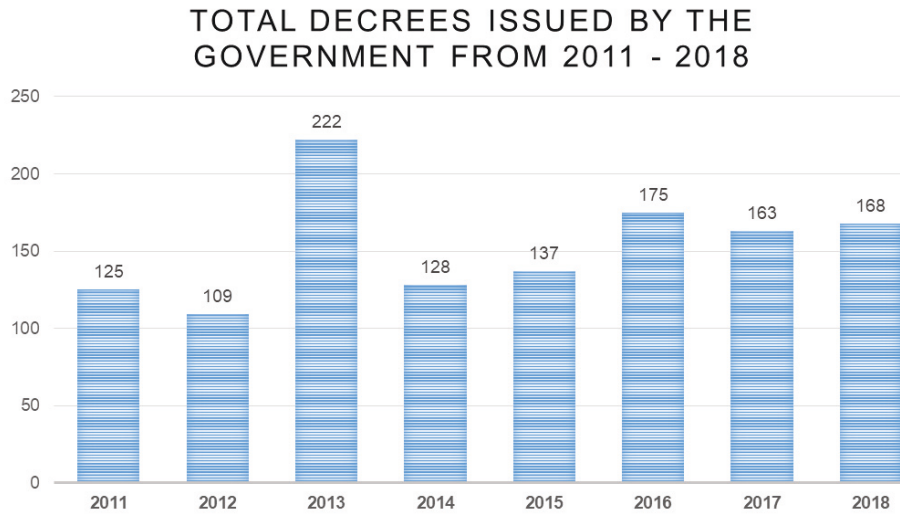
by the Ministry of Science and Technology; Decree No 155/2016/ND-CP is dictated by the Ministry of Natural Resources and Environment; Decree No 159/2013/ND-CP and Decree No 174/2013/ND-CP (amended and supplemented by Decree 49/2017/NĐ-CP) are regulated by the Ministry of Information and Communications; Decree No 46/2016/ND-CP and Decree No 162/2018/ND-CP are controlled by the Ministry of Transport; Decree No 158/2013/ND-CP (amended and supplemented by Decree 28/2017/NĐ-CP) and Decree No 46/2019/ND-CP are carried out by the Ministry of Culture, Sports and Tourism. Although all decrees concerning the administrative sanctions for the acts of "offending the honor and dignity" are all promulgated by the Government, the fact that the issuing agencies are different leads to this situation when one agency drafting a document has little interest in another document. In detail, the agencies who are in charge of drafting decrees are the Ministries, each of them when composing the documents places emphasis on their own perspectives[18] and pays less attention to other Ministries' viewpoints; hence, the situation when too many references, even overlapping and contradictory documents, have occurred within the administrative violations in general as well as the acts of "offending the honor and dignity" in particular.

Secondly, among 13 decrees stipulating the sanctions for the acts of "offending the honor and dignity", there are 9 decrees issued in 2013[19] — the year when the Government was "in rush" to "finish" all decrees regarding sanction for administrative violations. According to the statistics of the Government Office, the number of decrees issued by the Government from 2011 to 2018 was as follows: 125 decrees (in

[18] Cao Vu Minh, State management decision of Government 121 (Pub. National politics 2018).

[19] Up to now, there are 6 decrees still valid and they have never been amended and supplemented (Decree No 107/2013/ND-CP, Decree No 138/2013/ND-CP, Decree No 144/2013/ND-CP, Decree No 159/2013/ND-CP, Decree No 167/2013/ND-CP, Decree No 176/2013/ND-CP). There are 03 amended and supplemented decrees (Decree No 110/2013/ND-CP, Decree No 174/2013/ND-CP, Decree No 158/2013/ND-CP). However, the revised and supplemented contents in these three decrees are completely unrelated to sanctions for acts of "offending the honor and dignity." In other words, sanctions for acts of "offending the honor and dignity" in 13 decrees are still kept from the time of issuance until now.

2011); 109 decrees (2012); 222 decrees (2013); 128 decrees (2014); 137 decrees (2015); 175 decrees (2016), 163 decrees (2017), 168 decrees (2018), 57 decrees (up to June 2019).



It can be seen from the statistics, within 8 years (from 2011 to 2018), the number of decrees issued in 2013 is the highest, even twice higher than that of decrees issued in the previous year (2012). The sheer volume of badly issued decrees has placed the great burden on legislative drafting and appraisal. Perhaps this strain in the appraisal process and the tension to publish the decrees in order to promptly punish administrative violations in different areas, have led to the blooms and overlaps of the sanctions for the acts of "offending the honor and dignity".

Thirdly, the promulgation of existing sub-law documents is originated from the subjective desire of the management rather than from the demands of life. There is no doubt that the authority punishing administrative violations is heavily dependent on the direct provisions in the decrees regulating the penalties for administrative violations in a wide range of fields. Therefore, the Ministries with the role of the head

of proposal must "reach the compromise" between the decrees to create more management tools and power for the authorities to execute.

For example, according to Decree No 167/2013/ND-CP (drafted by the Ministry of Public Security), the official competence charging the acts of "offending the honor and dignity of others" only belongs to the Chairman of the Committee at all levels and the People's Police. According to Decree No 167/2013/ND-CP, the inspection forces fail to possess the authorities to sentence administrative violations for the acts of "offending the honor and dignity." Therefore, in order to "legalize" the rights of health inspection forces, Decree No 176/2013/ND-CP (drafted by the Ministry of Health) does cover the acts of "offending the honor and dignity of people using contraceptive methods, of people who give birth with all boys or all girls" and gives the rights to health inspectors. Eventually, the acts of "offending the honor and dignity of people using contraceptive methods, of people who give birth with all boys or all girls" are also the acts of "offending the honor and dignity of others." These two behaviors have a precise equivalent for the sanctioning forms and the levels of being fined. So is it necessary to design different terms in two different decrees? Unquestionably, the Ministries always would like to offer their officials more power to deal with administrative violations.

VI. Conclusion

"The inviolable right to the honor, dignity" is a constitutional human right. Once it is a constitutional right, all subjects having the honor and dignity offended must be treated fairly. Therefore, the current issuing of a multitude of decrees regulating the acts of "offending the honor and dignity" is not necessary and causes plenty of bottlenecks in adopting the laws. Therefore, reasonable adjustments should be needed. It can be divided into the following angles:

Angle 1: for the acts of offending the honor and dignity in specific fields or at specific locations. It should be indicated, it is vital to harmonize the sanctions regardless of the particular fields or locations. The nature of this violation is to lower the others' honor and dignity. Therefore, whether these behaviors occur in any particular fields or locations, they would not change the nature and dangerous level for the

society. In other words, the acts of "offending the honor and dignity" have the same nature and level no matter where they take place and what they involve. Therefore, in this case, the sanctions should reach a consensus.

Angle 2: for the acts of offending the honor and dignity as applied to specific subjects. It should be stated, by virtue of maintaining the Vietnamese traditions, ethics, customs and practices, if the acts of offending the honor and dignity concern special subjects, the lawmakers could assume as aggravating circumstances to punish more strictly. Consequently, the competent persons will sentence the maximum fine to act as a deterrence.

For example, for the acts of "offending the honor and dignity of adolescents," the competent persons may adopt the aggravating circumstances due to "administrative violations of adolescents, which is prescribed at Para M, Clause 1, Article 10 of the Law on Handling of Administrative Violations 2012. The acts of "offending the honor and dignity of authorities on duty" could be executed according to aggravating circumstances prescribed in Para E, Clause 1, Article 10 of the Law on Handling of Administrative Violations for authorities on duty 2012." If this method is applied, the sanctions' framework for the acts of "offending the honor and dignity" would be applied uniformly no matter who is involved. However, the acts of "offending the honor and dignity" as applied to specific subjects such as children, authorities on duty shall be fined higher because of the possibility of adoption of aggravating circumstances.

Angle 3: for the acts of offending the honor and dignity through specific tools and means.

The violators for the acts of "offending the honor and dignity through the media" should be punished more severely than acts of offending the honor and dignity without using the media.

It should be demonstrated in order to establish the right order in the administrative sanctions, it is necessary to introduce a complete, elaborate and highly legitimate system about administrative responsibility like the Code. Therefore, the Vietnamese National Assembly should investigate the legalization and enact the Code on Administrative Sanctions similar to the Code of Administrative Offences of the Russian Federation.

Once the Code on Handling of Administrative Violations is passed, the Vietnamese National Assembly might specify an article stipulating sanctions for the acts of "offending the honor and dignity." This article could be divided into two obvious clauses. Firstly, Clause 1 stipulates the sanctioning forms and the consensus levels of fines without discrimination in favor of particular objects, fields and locations. Clause 2 will point out the higher fines for the acts of "offending the honor and dignity through the media," as compared with Clause 1. The levels of fines would certainly be ranged from minimum to maximum in order for the competent persons to apply the correspondingly aggravating circumstances according to the specific objects.

Regarding the sanctioning forms and levels of fines, all 13 decrees now impose the fines, there are 2 decrees prescribing the sanctioning forms of warning instead of the fines. That would be explained by the fact that either a warning nor a fine could be adopted in case of different circumstances. However, personally speaking, the acts of "offending the honor and dignity" could not be taken into account as less severely administrative violations so as not to design the sanctioning forms of warning. Additionally, the sanctioning forms of warning are not strict, not effective in the fight against violations and indeed are less applied in practice. Therefore, for the acts of "offending the honor and dignity," the lawmakers should impose the fines only. The crucial legalization is placed on how much the fine is and which principles must be followed?

Administrative violations and criminal law-breakings may have the same objects, but vary in their characters and levels for society. With that mindset, the administrative fines for "offending the honor and dignity" must be lower than the criminal ones for "committing the crime of insulting others." In addition, the levels of the fines must comply with the principle that "the disparity between the minimum and maximum fines is not too large." The fines for "*committing the crime of insulting others*" are "from 10,000,000 VND to 30,000,000 VND." Therefore, the possible maximum fines for the acts of "offending the honor and dignity" could not exceed 10,000,000 VND-the minimum fines for "*committing the crime of insulting others*."

According to Decree No 174/2013/ND-CP (amended and supplemented by Decree 49/2017/NĐ-CP), the acts of "offending the

honor and dignity of others under the forms of digital information" shall be fined from 5,000,000 VND to 10,000,000 VND. This amount is quite reasonable because of not outrunning the minimum fines (10,000,000 VND) for "*committing the crime of insulting others*." However, the distance between the minimum and maximum fines is still moderately large. Therefore, on the basis of empirical research, it should be possible to shorten the amplitude of fluctuation between the minimum (from 8,000,000 VND) and maximum fines (10,000,000 VND). Hence, the fines for the acts of offending the honor and dignity without the means of communication would be from 6,000,000 VND to 8,000,000 VND.

The acts of "offending the honor and dignity" could cause certainly physical and mental consequences. Therefore, in addition to a rich variety of sanctions, the application of remedial measures should be taken into account as the efficient solutions to overcome the corresponding consequences. For example, there is little doubt that the sanctions for the acts of "offending the honor and dignity of others under the forms of digital information" are mandatory; however, if the sanctions are solely made without attaching the significance to the existence of the insulting information, in some cases, such actions may have dire consequences. In order to restore the initial status before the violations, the lawmakers must clearly stipulate that the sanctions in conjunction with remedial measures must also be applied. Consciously, 2 decrees among 13 decrees governed the sanctions for the acts of "offending the honor and dignity" introduce the utilization of remedial measures together with the sanctioning forms (Decree No 167/2013/ND-CP and Decree No 46/2019/ND-CP).

According to the author, it is possible to design the following rules:

"*Article... : The acts of offending the others' honor and dignity*

1. Shall be fined from 6,000,000 VND to 8,000,000 VND for the acts of offending the others' honor and dignity", except for the terms prescribed in Clause 2 of this Article.

2. Shall be fined from 8,000,000 VND to 10,000,000 VND for the acts of offending the others' honor and dignity through the media.

3. Remedial measures:

a) shall be forced to speak out apology for the acts specified in Clauses 1 and 2 of this Article;

b) shall be forced to remove, withdraw the contents containing insulting information to others' honor and dignity through the media for the acts specified in Clauses 2 of this Article."

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REGULATIONS ON THE PRESIDENT OF VIETNAM

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Abstract

The term "*Head of State*" means the highest leader of a country. As a result of the difference in political regimes, organizational models and operation of supreme state power, this position is flexibly referred to as President, State President, King, Emperor, or Queen in different countries. In Vietnam, the Head of State is the President. This article analyzes Vietnam's legal regulations concerning the office of the President.

Keywords

Head of State, President, State President, King, Emperor, Queen, Constitution, Vietnam

CONTENTS

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I. Introduction

The term "*Head of State*" means the highest leader of a country.[3] As a result of the differences in political regimes, organizational models and operation of the supreme state power, this position is flexibly referred to as President, State President, King, Emperor, or Queen[4] in different countries.

For example, Article 80 of the Russian Federation Constitution clearly states that *"The President of the Russian Federation shall be the Head of State."* According to Article 1 of the 1946 Constitution of Japan, the Emperor is the symbol of the State and of the unity of the People, deriving his position from the will of the people with whom resides sovereign power. The Japan's Constitution does not stipulate that the Emperor is the head of state. However, as a symbol of the State and of the Japanese unity, performing the acts in matters of state under Article 7 of the Constitution on behalf of the people, the Emperor of Japan is the head of this country. In Vietnam, according to the 2013 Constitution, the head of state is the President.

II. The President under Vietnamese law

2.1. Position and legal status

Article 86 of the 2013 Vietnam Constitution stipulates that: "*The President is the Head of State and represents the Socialist Republic of Vietnam both in domestic and foreign affairs*." As a *"head of the State,"* the President expresses the State's responsibility in relations with the people, other states and organizations. As a "*representator of the State*", the President expresses the unity of state power in external relations. Under Article 86 of the 2013 Constitution, it is understandable that the President expresses the systematic and internal consistency in the state apparatus as well as in relations with other subjects.[5]

[3] Hoang Phe (editor), Vietnamese Dictionary 672 (Da Nang Publisher).

[4] Noel Cox and Raymond Miller, New Zealand Government and Politics 133 (Oxford University Press 2006).

[5] Do Minh Khoi, The constitutional role of the Head of State, 3 Journal of Legal Science (2013).

Article 87 of the 2013 Constitution stipulates the President is elected by the National Assembly among its members. His or her term of office follows that of the National Assembly. At the expiration of the term of the National Assembly, the President shall remain in office until a new President is elected by the new legislature. According to this regulation, the President has to be a member of the National Assembly to ensure the cohesion between the head of state (the President) and the highest representative body of the People, the highest body of state power of the Socialist Republic of Vietnam (the National Assembly).

According to Clause 7, Article 70 of the 2013 Constitution, after being elected, the President, Chairman of the National Assembly, the Prime Minister, and the Chief Justice of the Supreme People's Court must declare an oath of loyalty to the Fatherland, the People and the Constitution.[6] However, it is different from the oath of the Chairman of the National Assembly (the head of the legislature), the Prime Minister (the head of the executive agency), the Chief Justice of the Supreme People's Court (the head of the judiciary).

The oath of the President (Head of State) has a lot of profound meanings. *First*, the President's oath in Vietnam meets common practice in the world. According to the Constitution of the Russian Federation (Article 82), when taking office the President of the Russian Federation has to take the oath of loyalty in the presence of members of the Council of the Federation, deputies of the State Duma and judges of the Constitution Court of the Russian Federation as follows:

I swear in exercising the powers of the President of the Russian Federation to respect and safeguard the rights and freedoms of man and citizen, to observe and protect the Constitution of the Russian Federation, to protect the sovereignty and independence, security and integrity of the State, to faithfully serve the people.

According to Article 130 of the Constitution of Poland, the President of the Republic of Poland has to swear to the National Assembly in the inauguration as follows:

[6] The 2013 Constitution, Art. 70.7 stipulates: "After being elected, the President, the Chairman of the National Assembly, the Prime Minister, and the Chief Justice of the Supreme People's Court must declare an oath of loyalty to the Fatherland, the People and the Constitution."

Assuming, by the will of the Nation, the office of President of the Republic of Poland, I do solemnly swear to be faithful to the provisions of the Constitution; I pledge that I shall steadfastly safeguard the dignity of the Nation, the independence and security of the State, and also that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation.

Second, the President's oath is sacred. It is the inspiration for all people in society, creating the integrity of the apparatus of power and people's belief in the government. *Third*, the President's oath emphasizes the supremacy of the Constitution. The oath is a firm commitment of the President on his or her responsibility to protect the Constitution.[7]

However, it is not stipulated in the 2013 Constitution how the President of Vietnam would take the oath of loyalty and whom he or she would report to. According to Article 29 of the Resolution No 102/2015/QH13 on issuing Rules of the National Assembly sessions

The Chairman of the National Assembly, the President, the Prime Minister and the Chief Justice of the Supreme People's Court swear to be loyal to the Fatherland, the People and the Constitution. In addition to the oath of loyalty to the Fatherland, the People and the Constitution, the person taking the oath decides remaining content of the oath in accordance with assigned responsibilities. The person taking the oath has to stand before the national flag while swearing. The time for swearing is no more than 3 minutes.

Therefore, the President's oath must contain phrase *"be loyal to the Fatherland, the People and the Constitution,"* and the President decides the remaining words of the oath. However, this issue may create inconsistency in works of the President. Implementation of the President's oath in practice has proved the inconsistency.[8]

[7] Cao Vu Minh, The President in the 2013 Constitution and the formulation of the Law on the President, 23 Journal of Legislative Studies (2014).

[8] Speech of Le Minh Thong — Former Deputy General Secretary of the National Assembly: "Up to now, there are no specific regulation on oath. We do it and learn experience at the same time. Then it would become rules when being stable." VnExpress.net, "Which process of oath does Vietnam apply?", April 1, 2016. URL: https://vnexpress.net/tin-tuc/thoi-su/tuyen-the-o-viet-nam-thuc-hien-theo-quy-trinh-nao 3379666.html (last visited: 1 Jul., 2019).

Specifically, on 2 April 2016, the President Tran Dai Quang swore in his inauguration ceremony:

In front of the sacred national flag, the National Assembly, the people and voters, I — Tran Dai Quang — President of the Socialist Republic of Vietnam — declare: Be absolutely loyal to the Fatherland, the People, and the Constitution of the Socialist Republic of Vietnam; strive to do my best to fulfill tasks entrusted by the Party, State and People.[9]

Meanwhile, on 25 July 2016, taking the oath for the second time, Tran Dai Quang swore:

Under the sacred national flag, the National Assembly, the People and voters, I — President of the Socialist Republic of Vietnam declare: Be absolutely loyal to the Fatherland, the People, and the Constitution of the Socialist Republic of Vietnam; strive to fulfill tasks entrusted by the Party, the State and the People.[10]

In the inauguration ceremony on 23 October 2018, the President Nguyen Phu Trong put his hand on the Constitution and swore:

Under the sacred national flag, in front of the National Assembly, the people and voters, I — President of the Socialist Republic of Vietnam — declare: Be absolutely loyal to the Fatherland, the People, and the Constitution of the Socialist Republic of Vietnam, strive to fulfill all tasks entrusted by the Party, State and the People.[11]

Due to the solemn nature of the Head of State, the inauguration ceremony and the President's oath must be legalized. The sacred image of the inauguration ceremony of the President will reinforce the people's belief, and help the people overcome all difficulties.

[9] Tienphong Online, Mr. Tran Dai Quang served as President, 2 April 2016. URL: https://www.tienphong.vn/xa-hoi/ong-tran-dai-quang-lam-chu-tich-nuoc-987885.tpo (last visited: 1 Jul., 2019).

[10] VOV (The Voice of Vietnam), "Mr. Tran Dai Quang for the second time sworn in as President of the country", 25 July 2016. URL: https://vov.vn/chinh-tri/quoc-hoi/ong-tran-dai-quang-lan-thu-hai-tuyen-the-nham-chuc-chu-tich-nuoc-533640.vov (last visited: 1 Jul., 2019).

[11] Nhan Dan newspaper, Comrade Nguyen Phu Trong took the oath of office as President, on 23 October 2018. URL: http://nhandan.com.vn/chinhtri/item/38011002-anh-dong-chi-nguyen-phu-trong-tuyen-the-nham-chuc-chu-tich-nuoc.html (last visited: 1 Jul., 2019).

2.2. The President's competence to promulgate legal documents

Promulgation of legal documents is an important competence of the President. Article 91 of the 2013 Constitution stipulates: "The President shall issue **orders and decisions** to perform his or her tasks or to exercise his or her powers." According to Article 88 of the 2013 Constitution, the President has the power to promulgate ***orders and decisions*** to regulate issues such as: Promulgation of Constitution, laws, ordinances; ratification or termination of international treaties; to promulgate or annul decisions to declare a state of war; to issue an order on general mobilization or partial mobilization, to declare or cancel a state of emergency.

According to Article 17 of the Law on the Promulgation of Legal Documents in 2015, the President issues orders and decisions to: declare full or partial mobilization; declare, cancel states of emergency according to resolutions of Standing Committee of the National Assembly; declare, cancel states of emergency nationwide or locally in case Standing Committee of the National Assembly is not able to hold a meeting; decide other issues within the competence of the President. However, according to Article 91 of the 2013 Constitution and Article 17 of the Law on the Promulgation of Legal Documents in 2015, it is unclear when the President issues an order and when he or she issues a decision. The answer for this question can only be "inferred" from relevant provisions.

According to Clause 5, Article 88 of the 2013 Constitution, *b*ased on the resolution of the Standing Committee of the National Assembly, the President issues **an order** on general mobilization or partial mobilization, to declare or cancel a state of emergency. Clause 6, Article 19 of the Law on National Defense in 2018 stipulates: "Based on the resolution of the Standing Committee of the National Assembly, the President shall issue **an order** to cancel the general mobilization or partial mobilization." Moreover, Clause 21, Article 21 of the Law on National Defense in 2018 also stipulates: "When political security, social order, and safety in one or several localities are seriously violated to the

extent that far beyond the control of the local government, the President shall issue orders to declare martial law according to the proposal of the Government." In these emergency cases, the President must promulgate legal documents in the form of orders to ensure the effectiveness in management works. Besides, the President issues orders to promulgate the Constitution, laws, and ordinances as well.

Thus, according to Article 88 of the 2013 Constitution, orders of the President are used for solving issues such as: to promulgate the Constitution, laws and ordinances; based on the resolution of the National Assembly or the Standing Committee of the National Assembly to proclaim or retract the decision to declare the state of war; based on the resolution of the Standing Committee of the National Assembly to issue an order on general mobilization or partial mobilization, to declare or cancel a state of emergency. For example, Order No 18/2013/L-CTN dated 8 December 2013 of the President On promulgation of the Constitution; Order No 13/2015/L-CTN dated 9 July 2015 of the President on promulgation of the 2015 Law on State Budget.

As mentioned above, the law only stipulates that the President issues a decision to implement his or her duties and powers. However, with such regulations, the 2015 Law on Promulgation of Legal Documents does not specify what are the duties and powers that the President issues decisions to perform.

If the President issues orders to perform the issues mentioned above, following exclusion principle, the remaining duties and powers of the President in Article 88 of the 2013 Constitution will be performed by issuing decisions. For example, the President's Decision is issued to ratify, accede to or terminate international treaties within his or her competence. The President also issues decisions to grant amnesty. For example, Decision No 332/2004/QD-CTN dated 7 June 2004 of the President on adhering the Berne Convention for the Protection of Literary and Artistic Works; Decision No 1366/2015/QD-CTN dated 10 July 2015 of the President on special amnesty.

2.3. The competence of the President in relation to the legislature

Under Vietnamese law, the President must be a member of the National Assembly. This regulation explains the close relationship between the President and the National Assembly. According to Article 84 of the 2013 Constitution, the President has power to submit draft laws to the National Assembly. However, the President has never submitted any draft law to the National Assembly since 1992. In fact, in Vietnam, more than 95 % of laws are drafted by the Government. The Government then submits the draft laws to the National Assembly for consideration and promulgation.[12] As the highest administrative agency, the Government performs function of state management in all fields. Therefore, the Government can promptly identify problems that arise in social life. And promulgation law is one of the high-efficiency solutions to solve those problems. Thus, content and progress of the National Assembly's legislative program depends on demand to adjust social relations of the Government rather than demand to fulfill the President's role.

The President also has the following duties and powers in the relationship with the National Assembly:

1) to promulgate the Constitution, laws and ordinances; to request the Standing Committee of the National Assembly to reconsider its ordinances, within ten days of their passage; if those ordinances are still voted for by the Standing Committee of the National Assembly and disapproved by the President, the President shall refer the matter to the National Assembly for decision at its next session;

2) to propose to the National Assembly to elect, relieve from duty or remove from office the Vice President or Prime Minister; and, based on resolutions of the National Assembly, to appoint, relieve from duty or dismiss Deputy Prime Ministers, Ministers or other members of the Government;

[12] Nguyen Dang Dung, Discussion on the principle: State power is unified, with the division of responsibility between the three power branches: legislative, executive and judiciary, 12 Journal of Legislative Studies (2011).

3) to propose the National Assembly to elect, relieve from duty or remove from office the Chief Justice of the Supreme People's Court or Procurator General of the Supreme People's Procuracy; and, based on resolutions of the National Assembly, to appoint, relieve from duty or dismiss Judges of the Supreme People's Court; to appoint, relieve from duty or dismiss Deputy Chief Justices of the Supreme People's Court, Judges of other Courts or Deputy Procurators General or Procurators of the Supreme People's Procuracy.

Unlike the President of the United States, the Vietnam's President has no power to veto laws of the National Assembly. The laws of the National Assembly will be passed when voted for by more than half of the total number of the National Assembly deputies. And no later than fifteen days from the date of adoption, the President must announce this law (Article 85 of the 2013 Constitution).

From legal perspective, competence includes tasks and powers (rights and obligations).[13] In the 2013 Constitution, there are regulations on rights of the President, but there are some regulations solely about the President's obligations. With that mindset, *"promulgation of the Constitution and laws of the National Assembly"* is a duty of the President. The reason is that the President simply must do this task without the ability to veto. However, promulgation of ordinances is not a duty of the President because he or she has power to "softly veto" ordinances. The President has the power to request the National Assembly's Standing Committee to reconsider its ordinances within ten days of their passage. If those ordinances are still voted for by the Standing Committee of the National Assembly and disapproved by the President, the President shall refer the matter to the National Assembly for decision at its next session. However, this soft veto is disabled by other regulations in the Vietnamese legal system.

According to Article 151 of the Law on Promulgation of Legal Documents in 2015, "the effective date of the whole or part of a legislative document shall be specified in the document. Nevertheless, the effective date is not sooner than 45 days from the day on which it is ratified or

[13] Nguyen Cuu Viet, Administrative reform: about the concept of authority, 8 Journal of Legislative Studies (2005).

signed if it is promulgated by a central regulatory agency." The Law on Promulgation of Legal Documents in 2015 regulates that the legal validity of legislative documents is started from the time of *"approval,"* not from the time of *"announcement*" as in the Law on Promulgation of Legal Documents in 2008.[14] However, in most cases, the effective date of a legislative document has been specified in the document itself.

For example, Clause 1, Article 371 of the Law on Administrative Procedure in 2015 stipulates: (this law was announced by the Order No 23/2015/L-CTN on 8 December 2015). Similarly, Clause 1, Article 77 of the Law on Compensation Liability of the State in 2017 stipulates: "*This Law shall take effect since July 1, 2016*", (This Law was announced by the Order No 07/2017/L-CTN on 3 July 2017). The above provisions also demonstrate that, to a certain extent, duties and powers of the President in promulgation of the Constitution and laws is only a formality. Therefore, it is reasonable for the 2015 Law on Promulgation of Legal Documents to regulate effective date of a legislative document from the day on which it is approved, not the day on which it is "announced."

However, the above regulations related to the Ordinance of the Standing Committee of the National Assembly still needs to be discussed more. Specifically, Article 85 of the 2013 Constitution stipulates that "Laws and ordinances must be promulgated within fifteen days of their passage, unless the President requests reconsideration of an ordinance." With the above analysis, the promulgation of ordinance is not the duty of the President because he or she has the power to "softly veto" an ordinance.

The National Assembly only holds two regular sessions a year, each session lasts for more than a month. What would happen if after an ordinance has just been passed by the Standing Committee of the National Assembly, the President requests the Standing Committee to reconsider this ordinance, but is it still voted for? In this case, the President would submit this problem to the National Assembly for

[14] Article 78 of the Law on Promulgation of Legal Documents of 2008 stipulates: "The effective time of legal documents is stipulated in documents but not earlier than forty-five days from the date of publish or sign for issuance."

decision at its next session.[15] However, the question is whether this ordinance takes effect? Logically, this ordinance has not taken effect yet. However, according to the Law on Promulgation of Legal Documents in 2015, such an ordinance may come into force because it has been *passed* and the effective date is not sooner than 45 days from the day on which it is approved. The Law on Promulgation of Legal Documents in 2015 does not provide any exception; therefore, this possibility may occur.

One important thing is that there are many ordinances which the effective time is sooner than 45 days from the day of passage.[16] Especially, there are ordinances which take effect from the date on which they are signed.[17] In these cases, it is clear that the President's "soft veto" is greatly affected. In fact, the President has never requested the Standing Committee of the National Assembly to reconsider any ordinance since 1992. When enacting the ordinance, the National Assembly's Standing Committee has determined its effective date. The ordinance will automatically take effect on that day without any resistance from the President.

According to the 2013 Constitution, the President will propose to the National Assembly to elect, relieve from duty or remove from office the Vice President, Prime Minister, Chief of Justice's Court and Procurator General of the Supreme People's Procuracy. Thus, the impact of the President on selection these positions only stop at "the right to propose." The selection of the Vice President, Prime Minister, Chief Justice's Court and Procurator General of the Supreme People's Procuracy will be decided by the National Assembly through an election mechanism. It can be said that the right to propose to the President is

[15] The National Assembly of Vietnam usually meets twice a year in May and October. If the Standing Committee of the National Assembly passed the ordinance in July, so it would be more than 45 days in September. Thus, according to the Law on Promulgation of Legal Documents in 2015, such ordinance has taken effect. If the President did not agree, he or she will submit to the National Assembly for its decision at the nearest meeting. However, the National Assembly cannot meet until October.

[16] Ordinance on amending and supplementing articles of 4 ordinances relating to planning in 2018 dated 22 Dec 2018 took effect on 1 Jan 2019. Thus, the period from passage to the effective date is only about 10 days.

[17] Ordinance on Order of, and Procedures for, Considering and Deciding on the Application of Administrative-Handling Measures at People's Courts in 2014 takes effect from the date of signing.

not a decisive factor but still is a necessary and important one because he or she is the person who connects works of agencies in the state apparatus.

Apart from the "*right to propose,*" based on the resolutions of the National Assembly, the President would appoint, relieve from duty or dismiss the Deputy Prime Ministers, Ministers, other members of the Government, and the Judge of the People's Supreme Court. In general, this right is only a formality. It actually should be considered as the President's obligation because when the National Assembly has approved, the President has no choice but to appoint, relieve from duty or dismiss Deputy Prime Ministers, Ministers, other members of the Government, and the Judge of the People's Supreme Court.

According to Article 87 of the 2013 Constitution, the President is responsible, and report on his or her work to the National Assembly. Besides, as the head of state, the President is obliged to answer questions from the National Assembly's delegates (Article 80 of the 2013 Constitution). This regulation is considered as necessary to bind the responsibility of the President in performing his or her duties and powers. However, the President has never reported to the National Assembly and has never answered questions from the National Assembly delegates directly. In particular, the President has never had to provide any explanation about decisions on his or her competence which has not been stipulated in the Constitution yet (such as the right to mitigate the death penalty).[18]

According to Article 61 of the Law on Organization of the National Assembly in 2014, "The Standing Committee of the National Assembly shall hold regular meetings once a month. **When necessary**, the Standing Committee of the National Assembly shall meet under the decision of the Chairperson of the National Assembly, or at the proposal of the President…" In addition, Article 90 of the 2014 Law on Organization of the National Assembly stipulates: "The National Assembly shall hold its sessions in public. The National Assembly may, **when necessary** and at the proposal of the President… decide to conduct a closed session."

[18] Cao Vu Minh, Authority of the President should be uniformly stipulated in the Draft Amendment of the Constitution, 237 Journal of Legislative Studies (2013).

"When necessary" is a very arbitrary regulation. Different subjects may understand the term "when necessary" in different ways. What will happen if the President supposes *"necessary"* and propose a meeting of the Standing Committee of the National Assembly, but this agency finds it is not necessary to meet? Similarly, what will happen if the President supposes "necessary" and requests a closed session, but the National Assembly does not hold? These questions have not been answered in current regulations.

Article 15 of the Law on Organization of the National Assembly in 2014 stipulates: "The National Assembly shall annul documents of its Standing Committee which contravene the Constitution, laws or resolutions of the National Assembly **at the proposal of the President.**" According to the Law on Promulgation of Legal Documents in 2015, the Standing Committee of the National Assembly promulgates ordinances and resolutions as legislative documents. Therefore, the National Assembly has the power to annul ordinances and resolutions of its Standing Committee if these documents are contrary to the Constitution, laws or resolutions of the National Assembly.

When the President request the National Assembly to annul its Standing Committee's legislative documents which contravene the Constitution, the Law Committee of the National Assembly will verify the President's proposal on documents which contravene the Constitution.[19] However, it is not easy to identify illegal regulations in legislative documents of the Standing Committee of National Assembly (especially in ordinances).

For example, according to the Law on Handling of Administrative Violations in 2012, district-level people's courts are competent to decide on application of measures of consignment to reformatory, consignment to compulsory education institutions and consignment to compulsory detoxification establishment. Article 29 of Ordinance on Order of, and Procedures for, Considering and Deciding on the Application of Administrative-Handling Measures at People's Courts in 2014 stipulates: "Decisions on application of the measures of consignment to reformatory, consignment to compulsory education institutions and consignment to compulsory detoxification establishment may be

[19] Law on Organization of the National Assembly in 2014, Article 70.2.

complained." However, the procedure for complaint and settlement of complaint for decisions on these administrative-handling measures does not comply with regulations on procedure for settlement of complaints in administrative procedures and state management.

In principle, the right to complain at the first time and the second time of people must be ensured by laws. This principle is regulated in both the Law on Administrative Procedures in 2015 and the Law on Complaints in 2011. However, the Ordinance on Order of, and Procedures for, Considering and Deciding on the Application of Administrative-Handling Measures at People's Courts in 2014 only allows persons who are applied the measures of consignment to reformatory, consignment to compulsory education institutions and consignment to compulsory detoxification establishment to complain for the first time (and also the last time). In this case, is it possible to consider whether this Ordinance is contrary to the Law on Administrative Procedure in 2015 and the Law on Complaints in 2011? Next, who will verify the President's proposal on ordinances which contravene laws of the National Assembly? Clause 2, Article 70 of the Law on Organization of the National Assembly stipulates in 2014 that the National Assembly's Law Committee only verifies the President's proposal on documents which contravene the Constitution, not verify the President's proposal on documents which contravene laws. When there is no binding regulation, the Law Committee of the National Assembly may not take more task.

In fact, before proposing to the National Assembly to annul an ordinance of the National Assembly's Standing Committee, the President must make sure about illegality of the ordinance. In our opinion, this is not an easy task. *"Proposing the National Assembly to annul documents of its Standing Committee"* is an important power of the President. However, proving the illegality of an ordinance must have great support from the Advisory Council.[20] In other words, the

[20] Similarly, according to the Law on Special Amnesty in 2018, the President decides to grant special amnesty. However, before the President decides to grant special amnesty, there is a Special Amnesty Advisory Council to support him. The Advisory Council for Special Amnesty is a joint organization that includes representatives of relevant agencies and organizations decided by the President to implement decisions on special amnesty and to advise the President on implementation of special amnesty.

President will not be able to effectively perform this power without the Advisory Council's support. The Advisory Council will analyze, examine to prove the illegalness of ordinances. Based on advices of the Advisory Council, the President will decide on proposing the National Assembly to annul its Standing Committee's documents. Who will be members of the Advisory Council? How will the Advisory Council work? How will the President propose to the National Assembly? How is the proposal? Who will verify the President's proposal?.. They are the issues that need to be specified in legal documents. If these regulations are unclear, the President will not be able to perform this important power.

According to Article 49 of the Law on Organization of the National Assembly in 2014, the President has power to propose the Standing Committee of the National Assembly to interpret the Constitution, laws and ordinances. Until now, the Standing Committee of the National Assembly has just interpreted the Constitution, laws and ordinances only 5 times, which is a very small number.[21] However, the President has never proposed the National Assembly's Standing Committee to interpret the Constitution, laws and ordinances because of not having a clear motivation. Normally, when there is no clear benefit or concern, state agencies will not perform their duties proactively and positively.[22]

2.4. The President's competence in relation with executive bodies

In Vietnam, the President has powers to propose to the National Assembly to elect, relieve from duty or remove from office the Vice President or Prime Minister; and, based on resolutions of the National

[21] Resolution No 58/1998/NQ-UBTVQH10 dated 20 August 1998 on housing transactions established before July 1, 1991; Resolution No 746/2005/NQ-UBTVQH11 dated 28 January 2005, explaining Clause c Article 241 of the Commercial Law in 1997; Resolution No 755/2005/NQ-UBTVQH11 dated 2 April 2005 on the settlement of a number of specific cases of housing and land in the process of implementing housing and land management policies and social renovation policies before 1 July 1991; Resolution No 1037/2006/NQ-UBTVQH11 on housing transactions established before 1 July 1991 that relating to Vietnamese in overseas; Resolution No 1053/2006/NQ-UBTVQH11 dated 10 November 2006 on the explanation of Clause 6 Article 19 of the Law on State Audit.

[22] Nguyen Minh Duc, Mechanism to resolve conflicts between legal documents — from a regulation, 16 Journal of Legislative Studies (2012).

Assembly, to appoint, relieve from duty or dismiss Deputy Prime Ministers, Ministers or other members of the Government. These powers express the relationship between the President and the executive body (led by the Government). However, they are only formal powers.

According to Article 90 of the 2013 Constitution, "the President may attend meetings of the Government. The President may request the Government to meet to discuss issues that he or she considers necessary to fulfill his or her tasks or exercise his or her powers." Before the time when the 2013 Constitution was passed, there was an opinion that the President should be entitled to attend and chair the Government's meetings. On the one hand, it is not commensurate for the President to attend the Government's meetings as a guest, on the other hand, the President has no competence to have an effect on activities of the Government.[23] However, in the current context, we believe that the regulation *"The President may request the Government to meet to discuss issues that he or she considers necessary to fulfill his or her tasks or exercise his or her powers"* has been a huge step in Vietnam.

Firstly, according to the 2013 Constitution, the President only is the head of the State, not is the head of the Government; therefore, he or she cannot chair meetings of the Government. *Secondly,* the Prime Minister is the head of the Government. He or she is responsible to the National Assembly for works of the Government (paragraph 2, Article 95 of the 2013 Constitution). If the Prime Minister makes inappropriate decisions as a chair of the Government's meetings, his or her responsibility will be clearly defined. Meanwhile, when the President is the chair of the Government's meetings and makes inappropriate decisions, he or she cannot blame for the Prime Minister. *Thirdly*, if the 2013 Constitution stipulated that the President were the chair of the Government's meetings, there had been a transformation from the current model of Vietnam (which has many parliamentary characteristics) to the presidential or semi-presidential model. This issue may change not only state institutions but also political institutions.[24]

[23] Vu Van Nhiem, Some comments on the state apparatus in the draft amendment of the 1992 Constitution, 3 Journal of Legal Science (2013).

[24] Do Minh Khoi, The constitutional role of the Head of State, 3 Journal of Legal Science (2013).

In order to specify this provision, Clause 3, Article 44 of the Law on Organization of the Government in 2015 stipulates that the Government shall convene the meeting as requested by the President to discuss issues that the President finds it necessary to perform duties and powers of the President.

However, this provision may be "obscured" by Clause 2, Article 44 of the Law on Organization of the Government in 2015: "In case the Government does not convene the meeting, the Prime Minister shall decide to ask for written opinions from its members."[25] The Government performs its duties and powers under the collective working regime and the majority rule for important works. Therefore, it would be not reasonable if the Government decides to ask for written opinions from its members for important works. In fact, since the 2013 Constitution and the Law on Organization of the Government in 2015 took effect, the President of Vietnam has never exercised the power to request the Government to discuss issues that the President finds it necessary.[26]

Article 96 of the 2013 Constitution stipulates: "The President has the power to organize the implementation of the Constitution, laws and resolutions of the National Assembly, ordinances and resolutions of the Standing Committee of the National Assembly, and orders and decisions of the President." According to the 2013 Constitution, it can be said that among legislative documents, the National Assembly's documents are more effective than documents of the Standing Committee of the National Assembly. Similarly, documents of the Standing Committee of the National Assembly are more effective than the President's documents. Following this logic, the President's documents are more effective than documents of the Government and the Prime Minister. Thus, the Government must perform the President's documents.

According to the Law on Promulgation of Legal Documents in 2015, promulgation of legal documents must ensure the consistency

[25] Cao Vu Minh, Government Governance Decision — Theory and Practice 169 (National politic 2017).

[26] VOV.VN, the President has not asked the Government to hold a meeting because of a lack of mechanism, on March 22, 2016. URL: https://vov.vn/chinh-tri/quoc-hoi / chu-tich-nuoc-sour-yeu-cau-chinh-phu-hop-ban-vi-thieu-co-che-492022.vov.

of the legal document system. This means legal documents issued by lower-level state agencies must not be contrary to documents of higher-level state agencies. Thus, a general principle is "legal documents of the Government and the Prime Minister are not contrary to legal documents of the National Assembly, the Standing Committee of the National Assembly, and the President." However, there are cases when legal documents of the Government and the Prime Minister are contrary to legal documents of the National Assembly, the Standing Committee of the National Assembly, and the President. The important question is how to deal with these illegal documents of the Government and the Prime Minister.

Specifically, the National Assembly would annul documents of the Government, Prime Minister that contravene the Constitution, laws or resolutions of the National Assembly (paragraph 10, Article 70 of the 2013 Constitution). The Standing Committee of the National Assembly would annul documents of the Government, Prime Minister that contravene ordinances or resolutions of the Standing Committee of the National Assembly (paragraph 4, Article 74 of the 2013 Constitution). However, the President would not have power to annul documents of the Government and Prime Minister that contravene legal documents of the President. Who has the power to annul documents of the Government and Prime Minister that contravene legal documents of the President? This issue was not regulated in the 2013 Constitution. Therefore, it is impossible to identify who has the power to annul legal documents of the Government and Prime Minister that contravene the President's orders and decisions.

The 2013 Constitution clearly stipulates the coordination of state agencies in the exercise of legislative, executive and judicial powers. However, when there is no regulation on the power to "suspend, to annul the legal documents of the Government and the Prime Minister that contravene the President's orders and decisions," the Constitution still lacks regulations relating to controlling state power as well as accountability of state agencies.

Clause 5 Article 88 of the 2013 Constitution stipulates: "The President assumes command of the people's armed forces." However, according to the Charter of the Communist Party of Vietnam, "The

Party leads the People's Army and the People's Police of Vietnam absolutely and directly in all aspects." It means that the Central Military Commission is the supreme commander of the armed forces. According to the Charter of the Communist Party of Vietnam, the General Secretary is the Secretary of the Central Military Commission, while the President is only a Standing Member of the Central Military Commission. What is the meaning of the regulation "The President assumes command of the people's armed forces"? With above analysis, it is forced to regulate that the President assumes command of the people's armed forces because the General Secretary has the real power to assume command of the people's armed forces in practice. The Prime Minister "shares" this power as well.

According to Article 23 of the Law on National Defense in 2018: "People's armed forces include the People's Army, the People's Police and the Militia and Self-Defense Force." According to Clause 2, Article 28 of the Law on National Defense in 2018, the Minister of Defense is the highest commander in the People's Army and the Militia and Self-Defense Force. According to Clause 2, Article 28 of the Law on National Defense in 2018 and Clause 1, Article 19 of the Law on People's Police in 2018, the Minister of Public Security is the highest commander of the People's Police. Meanwhile, Clause 1, Article 98 of the 2013 Constitution stipulates: "The Prime Minister leads the Government's work." This means the Prime Minister is the leader of the Government's members, including the Minister of Defense and the Minister of Public Security. Thus, the Prime Minister is the leader of the people's armed forces. This issue shows that, in Vietnam, the power to assume command of armed forces is "divided" between three different subjects: The General Secretary, the President and the Prime Minister. This fact leads to an unclear answer to the question who has the "real power" to assume command over the people's armed forces.[27]

According to the 2013 Constitution, the National Defense and Security Council is composed of the Chairperson, Vice Chairperson and members. The President is the Chairman of the National Defense and

[27] Cao Vu Minh, The President's competence should be uniformly stipulated in the Draft Amendment of the Constitution, 237 Journal of Legislative Studies (2013).

Security Council. This agency works on a collegial basis and makes its decisions by a vote of the majority (clause 1, Article 89 of the 2013 Constitution). The question is how decisions would be made if the number of members of the National Defense and Security Council is an even number?[28] As a result, what would happen "if two parties vote equally." There is no provision in the 2013 Constitution to resolve this issue. In our opinion, it should be stipulated: "In case the vote is equal, the Chairman of the National Defense and Security Council shall have the deciding vote." On the one hand, this regulation highlights the collegial basis of the National Defense and Security Council; on the other hand, it enhances the individual role of the President as well. Unfortunately, this issue has not been regulated. Therefore, it leads to difficulties in operation of the National Defense and Security Council.

According to Clause 1, Article 26 of the Law on People's Public Security in 2018, "The President has power to decide on the award, promotion of the rank of general to the Public Security officers." This is entirely consistent with clause 5 Article 88 of the 2013 Constitution.[29] According to the Law on People's Public Security in 2018, the Minister of Public Security has power to decide on the award, promotion to the rank of a rank of colonel and to appoint the Director, Deputy Director of the provincial-level Public Security Departments.

A new provision in the Law on People's Public Security in 2018 is the highest rank that will be decided by position. Article 25 of the Law

[28] According to Resolution No 141/2016/QH13 of the National Assembly dated 11 April 2016 approved the President's proposal on Vice Chairperson and members of Defense and Security Council, the Defense and Security Council consists of 06 members:

1. Chairman of the Council: The President Nguyen Phu Trong.

2. Vice Chairman of the Council: Prime Minister Nguyen Xuan Phuc.

3. Member of the Council: Chairwoman of National Assembly Nguyen Thi Kim Ngan.

4. Member of the Council: Deputy Prime Minister — Minister of Foreign Affairs Pham Binh Minh.

5. Member of the Council: Minister of Defense — General Ngo Xuan Lich.

6. Member of the Council: Minister of Public Security — Senior General To Lam.

[29] Clause 5 Article 88 of the 2013 Constitution stipulates: "The President decides to decide on the award, promotion of the ranks of general officers in the people's armed forces."

on People's Public Security in 2018 states: "The highest rank for position of Directors of the Public Security Departments in Hanoi, Ho Chi Minh City is Major General, the highest rank for positions of the Directors of Public Security Departments in province-level administrative units that are categorized grade I, and are complex in security areas, large population is Brigadier General." Thus, the Minister of Public Security has no power to "decide on the award, promotion of the rank of general" but he or she could "set up" a person to be "awarded, promoted to the rank of general." If a police officer were appointed to the Director of Public Security Department in Hanoi or the Director of Public Security Department in Ho Chi Minh City, this person could be promoted to the rank of general, even to the Major General. Thus, the mechanism of coordination between the President and the Minister of Public Security in appointment of the Director of the Public Security Department in Hanoi or in Ho Chi Minh City must be clear. Of course, under leadership of the Party, there is no problem of power conflict; it is important to clarify this coordination mechanism in legal documents.[30] However, this problem has been "left" as well.

2.5. The President's competence in relation with judicial agencies

In the relationship with the judiciary, the President has a very important power, which is the right to decide on a special amnesty. It is a special leniency of the State decided by the President to grant special amnesty for prisoners who meet requirements on occasions of great national events or anniversaries or in special cases.

According to Article 11 and Article 12 of the Law on Special Amnesty in 2018, the President has the power to decide other cases of being or not being proposed to grant special amnesty. It can be seen that the requirements for proposing or not proposing special amnesty are not closed lists. The President has the power to decide on supplement regulations. Personally, it is reasonable for the President to regulate other requirements for proposing special amnesty. However, the list of

[30] Cao Vu Minh, The political and legal basis of the promulgation of the Law on the President, 1 Journal of Legislative Studies (2016).

requirements for not being proposed must be a close one. "Other cases decided by the President" is a regulation that totally depends on the President's judgment. Currently, the Criminal Code of 2015 (amended and supplemented in 2017) and the Law on Handling of Administrative Violations of 2012 both stipulate that mitigating circumstances are open lists[31] and aggravating circumstances are close lists.[32] Therefore, it is necessary to abolish the provision "other cases decided by the President" in the requirements for not proposing special amnesty in Article 12 of the Law on Special Amnesty in 2018. This amendment would limit cases in which the President decides requirements for not being granted special amnesty unreasonably and sensitively.

Moreover, the 2013 Constitution does not stipulate that the President has power to commute capital punishment. However, the President still exercises this power in practice. Clause 4, Article 27 of the Law on Organization of People's Courts in 2014 stipulates: "The Chief Justice of the Supreme People's Court submits to the President his/her opinion on **cases in which convicts apply for commutation of capital punishment."** Point C, Clause 4, Article 59 of the Law on Execution of criminal judgments in 2010 stipulates: "Before executing the capital punishment, the Chairman of the death penalty execution council announces... **the President's decision to reject the application for commutation of the death penalty."** Thus, in principle, the capital punishment only be executed when having the President's decision to reject the application for commutation of the death penalty. However, there is no regulation stipulating when the

[31] Clause 2 of Article 51 of the Criminal Code in 2015 (amended and supplemented in 2017) stipulates: "When deciding penalties, the Court may consider the animal **or other** facts **as extenuating circumstances** but must specify the reason for the mitigation in the judgment". Similarly, Clause 8, Article 9 of the Law on Handling of Administrative Violations in 2012 stipulates: "**Other extenuating circumstances prescribed by the Government"**.

[32] Clause 1 of Article 52 of the Criminal Code in 2015 (amended and supplemented in 2017) stipulates: "Only the following circumstances are regarded as aggravating circumstances for criminal liability". Similarly, Clause 1 of Article 10 of the Law on Handling of Administrative Violations in 2012 stipulates: "Only the following circumstances are regarded as aggravating ones".

President must respond to accept or reject the application.[33] In our opinion, this issue must be clearly regulated in legal documents to limit arbitrary decisions of the President. Furthermore, it is necessary to regulate the specific principles, conditions for commutation of the death penalty, the procedure of execution and duration for the President to respond the application for commutation of the death penalty... in this legal document. It would contribute to demonstrating the powers of the President within the judicial branch.

III. Conclusion

In 2011, *Law on the President* was mentioned in the Law and Ordinance making Program of the XIII National Assembly.[34] However, at the end of the term of the XIII National Assembly, this law had not been submitted to the National Assembly yet. Until now, there is no body to mention to the proposal of Law on the President in the Law and Ordinance making Program of the XIV National Assembly.

According to Clause 6, Article 70 of the 2013 Constitution, the National Assembly has the power to regulate organization and operation of the National Assembly, the President, the Government, the People's Courts, the People's Procuracy, the National Council of Election, the State Audit, local administrations, and other bodies created by the National Assembly. After the 2013 Constitution was approved, the National Assembly promulgated Law on Organization of the National Assembly in 2014, Law on Organization of the Government in 2015, Law on Organization of the People's Courts in 2014, Law on Organization of the People's Procuracy in 2014, Law on Organization of Local Governments in 2015, and Law on State Audit in 2015. At the beginning, the National Assembly has effectively exercised its power. However, until now, the National Assembly has not promulgated the *Law on the President* yet. The National Assembly has not fulfilled its responsibilities. Therefore,

[33] According to Report No 122/BC-CP of the Government, since January 1, 2014, this right had been implemented very "cautiously" in practice because there were no specific regulations, especially provisions on procedure of implementation.

[34] Resolution No 20/2011/QH13 dated 26 Nov 2011 on the Law and Ordinance making Program of the XIII National Assembly.

promulgation of the *Law on the President* is not only the motivation but also the responsibility of the National Assembly, and this responsibility needs to be implemented soon. *The Law on the President* when being promulgated would solve the problems and shortcomings mentioned.

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THE FORM OF WARNING SANCTION IN THE LAW ON HANDLING ADMINISTRATIVE VIOLATIONS IN VIETNAM

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Abstract

Sanctioning of administrative violations is considered an effective solution in the struggle and prevention of administrative violations; it includes application of sanction forms, remedial measures with respect to individuals and organizations committing acts of administrative violations which are implemented by the competent persons. Among the sanctions imposed for administrative violations, warning is a special form of sanctions and is commonly applied in the fields of state management. The paper analyzes the theoretical and legal issues about the form of warning sanction in accordance with the Vietnamese law, shows some shortcomings on the regulation of this sanction and makes proposals for improvement.

Keywords

Warning, administrative violation, administrative liability, administrative sanctions, Vietnamese Law

CONTENTS

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I. Introduction

Administrative violations are among the types of law violations, however, compared to other law violations such as criminal law violations (crimes), civil law violations (civil violations), violations of state discipline (disciplinary violations), administrative violations are the most common type of law violations in Vietnam.[2] To prevent and combat administrative violations, the law stipulates that individuals and organizations committing administrative violations will have to bear the legal responsibility; in this case — administrative liability.

In theory, administrative liability is the consequence of an administrative violation, which is reflected in the application by the competent persons, who have the authority to enforce administrative law sanctions on individuals, organizations committing acts of administrative violations, according to the procedure prescribed by the promulgated regulations. It is the State's response to the subject who commits the administrative violation, resulting in the subject incurring unfavored physical or mental consequences. Formally, administrative liability manifests itself through the coercive forms (measures) applied to violating subjects, including sanctions and remedial measures. In terms of content, it is the negative assessment of the State and the society for the violations and its implementers.[3] Thus, it can be understood that the

[2] Dinh Phan Quynh, Discuss on the concept of administrative violations, 4 Vietnam Lawyer Journal 1 (2016).

[3] Nguyen Cuu Viet, Vietnamese Administrative Law Curriculum, at 507 (National Political Publisher, 2013).

sanctions for administrative violations are the outward demonstration of administrative liability.

Having been researched the legal regulations on sanctioning administrative violations in Vietnam so far, the author realized that there were not any regulations defining the form of sanctioning administrative violations but listing the specific sanctions to apply to administrative violations. This has caused certain difficulties in the perception of the form of sanctioning administrative violations. From a scientific perspective, there are documents that indicate the form of sanctions which are administrative coercive measures prescribed by law for the subject of administrative violations, showing the assessment of the State in terms of the level of dangers towards the society of administrative violations. Setting up a system of sanctions that are stringent enough to meet the requirements to fight against administrative violations is always the first task of the law on handling administrative violations.[4]

Currently, the form of sanctions for administrative violations in Vietnam prescribed in Article 21 of the Law on Handling Administrative Violations 2012 includes: *i. Warning; ii. Fines; iii. Stripping off the right to use permits, professional practice certificates in a definite term; or suspension of operation in a definite term; iv. Confiscating material evidences, means of administrative violation used to commit administrative violations; v. Expulsion.* Among the above-mentioned sanctions, "Stripping off the right to use permits, professional practice certificates in a definite term; or suspension of operation in a definite term" are the two different sanctions but the Law on Handling Administrative Violations 2012 combines them.[5] Thus, it can be seen that there are currently six sanctions applied in sanctioning administrative violations in Vietnam. Diversifying the sanctioning forms in order to raise the autonomy of the person with sanctioning competence and ensure that the sanctioning form is applied uniformly and fairly, suitable to the nature and severity of each violation.[6]

[4] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 213 (Nguyen Canh Hop ed., Hong Duc Publisher, 2017).

[5] Nguyen Cuu Viet, Vietnamese Administrative Law Curriculum, at 522 (National Political Publisher, 2013).

[6] Nguyen Nhat Khanh, Improvements of Legal Regulations on Additional Sanctions in the Administrative Violations, 21 Legislative Studies 31 (2019).

Among the above sanctions, **the form of warning sanction** (herein after referred to as "***warning***") is quite a common form of sanction. According to the Law on Handling Administrative Violations 2012, warning may be imposed on individuals and organizations that commit non-serious administrative violations which involve extenuating circumstance(s) and are, under regulations, subject to warning, or may be imposed for all administrative violations committed by minors who are between full 14 and under 16 years old. Warning must be decided in writing.[7]

II. The specific characteristics of warning in the Law on Handling Administrative Violations

Firstly, warning is only applied as a main sanctioning form, not as an additional sanctioning form.

Based on the nature of the sanctioning forms, they are classified into two categories; main sanctioning forms and additional sanctioning forms. In particular, the main sanctioning form is the type of sanction applied independently for each administrative violation without necessarily applying other sanctioning forms attached. Meanwhile, additional sanctions are those that cannot be independently applied and must be accompanied by a main sanction. If the person who is competent to issue the sanctioning decision only has an additional sanctioning form but no main sanctioning form, the sanctioning decision is illegal. The main sanctioning form expresses the official attitude of the State to the violation, hence the law stipulates that each administrative violation will bear only one main sanctioning form. Meanwhile, the stipulation of additional sanctions is to perform the function of supporting the main sanctioning form, a legal measure to help the sanctioning to be accurate, and at the same time, it helps the state agencies to apply measures to eliminate conditions that individuals or organizations violating may use to continue the violations. This function of the additional sanctioning form will help the main sanctioning form to achieve the precautionary purposes by preventing violators from continuing to commit administrative violations in the future.[8]

[7] Law on Handling of Administrative Violations in 2012, Art. 22.

[8] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 229 (Nguyen Canh Hop ed., Hong Duc Publisher, 2017).

Under the provisions of the Law on Handling Administrative Violations 2012, warning is only applied as a main sanctioning form and not as an additional sanctioning form.[9] As a form of main sanction, warning is applied independently without necessarily applying the additional sanctions.

Secondly, warning shall be applied in two cases.

In the first case, for individuals aged full 16 years or older and organizations committing administrative violations, warning may be applied only when all the following conditions are fully met: *i. non-serious administrative violations; ii. involve extenuating circumstance(s); iii. under the regulations, warning will be imposed.*

In the second case, warning will be applied to all administrative violations committed by minors aged between full 14 and under 16 years. For this group of subjects, although their administrative violations are serious, the competent persons must also apply warning but no other sanctions. This shows most clearly the protection of the State for children,[10] a group of subjects that are specially protected by the State, law and the society. This provision also reflects the principle of sanctioning minors in Clause 1, Article 134 of the Law on Handling Administrative Violations 2012: "*The handling of minors (including children) who have committed acts of administrative violations is implemented only in necessary cases aiming to educate, assist them to repair mistakes, develop healthily and become useful citizens of society*."

For example: On July 19, 2019, the Police Chief of Chon Thanh District, Binh Phuoc Province, Vietnam issued Decision No 46/QD-XPHC to sanction administrative violations against Ngo Thi Thu Thao (born on November 3, 2003) for committing acts of borrowing identity card to commit acts contrary to law provisions. According to Point c Clause 2 Article 9 of Decree No 167/2013/ND-CP, the act of "*Hiring, borrowing or renting or lending identity cards to other people to perform acts in contravention of law*" will be subject to a fine of between VND 1,000,000 and VND 2,000,000. However, at the time of

[9] Law on Handling of Administrative Violations in 2012, Art. 21 (2).

[10] Article 1 of the Children Law in 2016 prescribes: "A child is a human being below the age of 16".

committing the above violation, Ngo Thi Thu Thao was under 16 years of age, so the competent person applied a sanction of warning instead of a fine.

Thirdly, warning shall be decided in writing.

Based on the provisions of the Law on Handling of Administrative Violations in 2012, the sanctioning of administrative violations may be carried out according to the procedures of making records (*normal procedures*) or not making records (*simple procedures*). Sanctioning procedures without making records shall be applied in case of warning or a fine of up to VND 250,000 for an individual or VND 500,000 for an organization, except for cases of administrative violation detected by the use of means, technical and professional equipment that must be sanctioned by the procedures of making records.[11] Since this provision can be determined when applying warning to individuals and organizations committing administrative violations, the persons with sanctioning competence shall apply the sanctioning procedures without making records. However, it should be noted that, according to the provisions of law, the application of warning must be in the form of sanctioning decisions in writing. Sanctioning in oral form will not be legally valid and will not be considered as warning.

Fourthly, the main purpose of warning is to educate the sense of observing the law of the subject of administrative violations.

The forms of administrative sanctions are the means to ensure that administrative law provisions can fulfill the task of protecting the rules, social order and interests of the State, legal rights and interests of citizens and organizations, and educate people to observe the law.[12] The application of sanctions to violators is aimed at many purposes such as punishment, deterrence, education against violators, or prevention

[11] Law on Handling of Administrative Violations in 2012, Art. 56 (1), Art. 57 (1).

[12] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 226 (Nguyen Canh Hop ed., Hong Duc Publisher, 2017).

of violators continuing to commit administrative violations. However, each form of sanctions reflects the above purposes in a different aspect.

The purpose of fines is manifested by depriving a person of material benefits directly from the violating subject, causing them to suffer property damage and this clearly reflects the purpose of punishment which is to deter the violating subjects. Sanctioning deprivation of the right to use licenses, professional practice certificates for a definite time or suspension of operation for a definite time shall be imposed on individuals or organizations that seriously violate the activities stated in the licenses or the certificates. The deterrent purpose of this form of sanction is reflected in the temporary deprivation of the right to use licenses, professional practice certificates or the forced suspension of operation for a certain period of time rather than invalidating the values of the legal license of the subject of administrative violations. The sanctioning form of confiscation of material evidences of administrative violations and means used for administrative violations is applied to prevent the possibility that violating subjects may continue using such material evidences and means to commit violations in the future. The administrative sanction of expulsion is applied to end foreigners' ability to continue administrative violations when forcing them to leave the Vietnamese territory. Meanwhile, the warning represents the public reprimand of the State against individuals and organizations committing administrative violations. The deterrence of this form of administrative sanction is reflected in causing the subject to suffer certain mental damages rather than causing direct economic damage like other sanctions. The mental loss suffered by the sanctioned subject is the negative assessment of the State about their sense of law observance, forcing them to have a change in awareness and action so as not to commit other administrative violations in the future. Thus, compared with other sanctions for administrative violations, the warning is considered the lightest form of sanctions, the purpose of this sanction is to educate rather than to punish with an aim to respect the observance of the state management order.[13]

[13] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 234 (Nguyen Canh Hop ed., Hong Duc Publisher, 2017).

III. Some practical issues of Warning in the Law on Handling Administrative Violations in Vietnam

3.1. "Administrative violations with extenuating circumstances" when applying warning

As stated, for individuals aged between full 14 and under 16 who commit administrative violations, the sanction in all cases should be warning. Therefore, for this group of people who only need to meet the age conditions, the competent person will automatically apply warning without regard to other conditions attached. Meanwhile, for individuals aged full 16 years or older and organizations committing administrative violations, warning may be applied only when all the following conditions are fully met: *i. non-serious administrative violations; ii. involve extenuating circumstance(s); iii. under the regulations, warning will be imposed*. In other words, if one of these three conditions is missing, warning will not be imposed.

Currently, the provisions on the sanctioning forms and conditions of application belong to the competence of the National Assembly through the content of the Law on Handling Administrative Violations 2012, and the determination of the type of administrative violations (serious or non-serious) and which sanctions are imposed under the Government's authority through the promulgation of Decrees on sanctioning administrative violations in specific fields.[14] Therefore, from the author's point of view, the first condition "*non-serious administrative violation*" and the third condition "*under the regulations, warning will be imposed*" is entirely due to the decision from the Government. The person with sanctioning competence will not be able to conclude by himself whether an administrative violation is serious or not, but must be based on the provisions of the Decrees on sanctioning administrative

[14] Article 4 of the Law on Handling Administrative Violations 2012 stipulates: "Pursuant to regulations of this Law, the Government shall prescribe acts of administrative violation, sanctioning forms, levels of sanction, remedial measures applicable to each act of administrative violation; the sanctioning competence, specific fine levels according to each title and competence for taking minutes for administrative violations in each the state management sector; the regime of application of administrative handling measures and stipulate the forms of records, the forms of decisions being used in administrative violation sanctions."

violations in specific fields. At the same time, the imposition of any sanction is the right of the subject having the sanctioning competence, but they can only decide to apply the sanctions prescribed in the Government's Decrees.

In addition, the author believes that the third condition "*under the regulations, warning will be imposed*" implies the first condition "*non-serious administrative violations*." The rationale for this assertion is that the Law on Handling Administrative Violations 2012 only once referred to the phrase "*non-serious administrative violations*" as one of the three conditions for application of warning. This means that when the Government stipulates that an administrative violation will be imposed with warning, it also indirectly asserts that it is "*non-serious administrative violation*." To determine whether the administrative violation satisfies the first and the third condition in order to apply warning or not, then the persons with sanctioning competence only need to compare with the Government's Decree prescribing the sanctioning forms applicable to such acts, if warning is prescribed, these two conditions are satisfied.

Therefore, the only remaining condition that a person with sanctioning competence must determine before deciding to apply warning to the violating subject, which is "*Administrative violations with extenuating circumstances*." Extenuating circumstances are specified in Article 9 of the Law on Handling of Administrative Violations in 2012, including:

— 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.

It can be seen that the advantage of stipulating "*administrative violations with extenuating circumstances*" is the condition for applying warning, showing the differentiation of the nature and degree of danger of administrative violations compared with cases where other sanctioning forms are applied. However, this condition also raises a number of inadequacies, thereby causing many difficulties for the competent person when carrying out the actual sanction.

Through research, the author found that there are two ways of prescribing warning for administrative violations in various Decrees of the Government.

The first way is that an administrative violation shall be imposed in warning or fine.[15] For example, Clause 1 Article 28 of Decree No 71/2019/ND-CP on sanctioning administrative violations in the field of chemicals and industrial explosives stipulates: "*A warning or a fine ranging from VND 500,000 to VND 1,000,000 shall be imposed on entities involved in chemical activities for failure to report all contents related to chemical activities*."

This type of regulation creates conditions for the competent person to take initiative in the process of performing state management activities in order to apply the law in accordance with certain circumstances and purposes. Therefore, depending on the specific situation, the competent person may consider to apply warning or a fine to the violator. However, this regulation gives rise to an overlap in the application of warning and

[15] This way is applied in the majority of Decrees on sanctioning administrative violations in the fields of state management.

a fine. Because in the case of "administrative violations with extenuating circumstances", the competent person may also choose the form of a fine instead of warning, according to Clause 4 Article 23 of the Law on Handling of Administrative Violations in 2012: "*The specific fine level for an administrative violation is the average of the fine bracket prescribed for such violation;* ***if extenuating circumstances are involved, the fine level may be reduced but not lower than the minimum level of the fine bracket;*** *if aggravating circumstances are involved, the fine level may be increased but must not exceed the maximum fine level of the fine bracket*."

For example: Clause 1, Article 7 of Decree No 33/2017/ND-CP on sanctioning administrative violations in the field of water and mineral resources stipulates: "***A warning or a fine ranging from VND 100,000 and VND 500,000*** *for acts of exploring and exploiting underground water in cases where it is required to register without registering as prescribed*." Based on this regulation, on August 5, 2019, Chief Inspector of Department of Natural Resources and Environment of Soc Trang Province issued Decision No 34/QD-XPVPHC to sanction administrative violations in the field of water and mineral resources for the Management Board of construction investment projects of Cu Lao Dung District due to the implementation of such acts *"Exploiting underground water in cases subject to registration without registration as prescribed."* Owing to administrative violations of the Management Board of construction investment projects of Cu Lao Dung District, the extenuating circumstance was applied: "*Voluntarily declared and sincerely apologized as stipulated in Clause 2 Article 9 of the Law on Handling of Administrative Violations 2012*" so the competent person applied warning. Compared with the condition of warning to the organization, this case can be seen, Chief Inspector of Department of Natural Resources and Environment of Soc Trang Province has applied the sanctions in accordance with the law.

However, suppose this case Chief Inspector Department of Natural Resources and Environment of Soc Trang Province did not sanction warning, but applied a fine towards Management Board of construction investment project of Cu Lao Dung District, what would the consequences be? According to Clause 4 Article 23 of the

Law on Handling Administrative Violations 2012, Chief Inspector of the Department of Natural Resources and Environment of Soc Trang province may also decide to apply the form of fines for administrative violations of Management Board of construction investment project of Cu Lao Dung District with a fine of from 100,000 to less than VND 250,000 due to "*administrative violations with extenuating circumstances*."

The question is, based on what criteria will the authority decide to apply warning or fine? Obviously, in this case, the law on sanctioning administrative violations has absolutely no answer and the imposition of warning or fine depends entirely on the will of the person with sanctioning authority on an "*administrative discretion*" basis.[16] Thereby giving rise to the same issue of administrative violations of the same nature, degree and circumstances, but from time to time subject to warning, or occasionally subject to fine, while the legal consequences of these two sanctions are absolutely different. Warning is meant to be educational, with the purpose of reminding violators to respect and abide by the law provisions on state management. Meanwhile, the main purpose of the fine is to deprive the violating material owners of direct material benefits, causing them to suffer property damage.

One of the important principles of sanctioning administrative violations is "*ensuring fairness*."[17] The content of this principle requires that administrative sanctioning activities must ensure that violators are handled in accordance with the nature and seriousness of their violations, there are grounds for aggravating, extenuating circumstances, no act of injustice or wrong, but ensuring strict handling, administrative violations of the same nature, severity, aggravating, extenuating circumstances must be sanctioned in the same manner.[18] Nevertheless, with the above mentioned inadequacies, in many cases,

[16] Cao Vu Minh, On Discretion in Activities of Administrative Agencies, 11 State and Law Review 10–21 (2013).

[17] Article 3 (1.b) of the Law on Handling Administrative Violations 2012 prescribes: "The sanction of administrative violations must be conducted fast, with publicity, objective and proper competence, ensure fairness, in accordance to law provisions".

[18] Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 135 (Nguyen Canh Hop ed., Hong Duc Publisher, 2017).

the content of this important sanctioning principle is not guaranteed to be implemented in practice.

The second way is that the regulation of administrative violations only applied one form of sanction is warning. For example, Clause 1 Article 10 of Decree No 142/2017/ND-CP on sanctioning administrative violations in the field of maritime regulation stipulates: "*Warning shall be imposed for failure to comply with instructions given by a competent authority or officer when entering or leaving the port land area or boarding the ship*."

According to the author's survey as of June 30, 2020, the Vietnamese legal system currently has about 26 Government's Decrees on sanctioning administrative violations, provides that administrative violations are subject to a single sanction "warning" for individuals aged full 16 years or older and organizations that commit administrative violations.[19] Therefore, when sanctioning these acts, the competent

[19] Decree No 98/2013/ND-CP sanctioning administrative violations in the field of insurance business and lottery business (amended and supplemented by Decree No 48/2018/ND-CP); Decree No 108/2013/ND-CP sanctioning administrative violations in the field of securities and securities market (amended and supplemented by Decree No 145/2016/ND-CP); Decree No 109/2013/ND-CP sanctioning administrative violations in the field of pricing, fee management, and invoicing (amended and supplemented by Decree No 49/2016/ND-CP); Decree No 110/2013/ND-CP sanctioning administrative violations in the field of judicial assistance, judicial administration, marriage and family, civil judgment enforcement, enterprise and cooperative bankruptcy (amended and supplemented by Decree No 67/2015/ND-CP); Decree No 120/2013/ND-CP sanctioning administrative violations in the field of defense and cipher; Decree No 129/2013/ND-CP sanctioning administrative violations in the field of tax; Decree No 134/2013/ND-CP sanctioning administrative violations in the field of electricity, safety of hydroelectric dam, thrifty and effective use of energy; Decree No 138/2013/ND-CP sanctioning administrative violations in the field of education; Decree No 162/2013/ND-CP sanctioning administrative violations within territorial waters, islands and the continental shelf of the socialist republic of Vietnam (amended and supplemented by Decree No 23/2017/ND-CP); Decree No 176/2013/ND-CP sanctioning administrative violations in the field of health; Decree No 95/2016/ND-CP sanctioning administrative violations in the field of statistics; Decree No 155/2016/ND-CP sanctioning administrative violations in the field of environmental protection; Decree No 104/2017/ND-CP sanctioning administrative violations in the field of disaster preparedness, operation and protection of hydraulic structures and flood control systems (amended and supplemented by Decree No 65/2019/ND-CP); Decree No 119/2017/ND-CP sanctioning administrative violations in the field of standards, measurement and quality of goods; Decree No 142/2017/ND-CP

person can only apply the main sanctioning form of warning and not any other sanctions.

In this way, in order to apply warning, the competent person must determine whether the actual administrative violation involve extenuating circumstances or not. In case there are extenuating circumstances, the sanction will be extremely simple, the competent person will issue a sanctioning decision for the subject of administrative violations to apply warning. In contrast, if the administrative violations do not have extenuating circumstances, the person with sanctioning competence will face a real dilemma. If the competent person applies warning to the administrative violation without extenuating circumstances, sanctioning decisions will be illegal due to ineligibility to apply. On the contrary, if the violating subject does not have extenuating circumstances and thus cannot be sanctioned, it will lead to the omission of the administrative violations. This is against the rule *"All administrative violations must be detected and stopped in time and handled strictly and clearly, all consequences caused by administrative violations must be overcome strictly according to law provisions."*[20] A violation of both cases makes the person with sanctioning competence bear legal responsibility related to the exercise of his sanctioning competence. According to the provisions of Decree No 19/2020/ND-CP stipulating the examination

sanctioning administrative violations in the field of maritime; Decree No 41/2018/ND-CP sanctioning administrative violations in the field of accounting and independent audit; Decree No 55/2018/ND-CP sanctioning administrative violations in the field of fertilizer; Decree No 64/2018/ND-CP sanctioning administrative violations in the field of livestock breeds, animal feeds and aqua feeds; Decree No 45/2019/ND-CP sanctioning administrative violations in the field of tourism; Decree No 46/2019/ND-CP sanctioning administrative violations in the field of sports; Decree No 51/2019/ND-CP sanctioning administrative violations in the field of scientific and technological activities, and technology transfer; Decree No 63/2019/ND-CP sanctioning administrative violations in the field of management and use of public property, thrift practice and wastefulness combat, national reserve and state treasury; Decree No 75/2019/ND-CP sanctioning administrative violations in the field of competition; Decree No 88/2019/ND-CP sanctioning administrative violations in the field of monetary and bank; Decree No 28/2020/ND-CP sanctioning administrative violations in the field of labor, social insurance and sending Vietnamese workers abroad under contracts; Decree No 36/2020/ND-CP sanctioning administrative violations in the field of water resources and minerals.

[20] Law on Handling of Administrative Violations in 2012, Art. 3 (1.a).

and handling of discipline in the enforcement of the law on handling of administrative violations, if a person with sanctioning competence "Does not sanction an administrative violation against the violator according to law provisions" or "Applying the sanctioning forms, levels, and remedies improperly and inadequately with administrative violations", he will be disciplined.[21] The above shortcomings have made the competent people very confused when sanctioning, resulting in many mistakes arising in the process of law application. Specifically:

Firstly, the competent people apply warning, although administrative violations are sanctioned without extenuating circumstances.

Clause 1 Article 27 of Decree No 110/2013/ND-CP (amended and supplemented by Decree No 67/2015/ND-CP) prescribing sanctions against administrative violations in the field of judicial supplementation, judicial administration, marriage and family, civil judgment execution, bankruptcy of enterprises or cooperatives stipulates that warning shall be imposed on the person responsible for birth registration of children[22] but failing to register it within the prescribed time limit.

Applying this regulation, on July 9, 2019, Chairman of People's Committee of Hiep Binh Chanh Ward, Thu Duc District, Ho Chi Minh City, Vietnam issued Decision No 498/QD-XPVPHC to sanction administrative violations against Mr. Nguyen Gia Vu (born in 1987) due to the fact that he did not register the birth for his son (Nguyen Gia Minh Duc, born on February 22, 2019) within the prescribed time limit with the sanction form of warning. Nonetheless, it is worth mentioning that in the content of the decision to sanction, the People's Committee Chairman Hiep Binh Chanh Ward did not apply any extenuating circumstances to Mr. Nguyen Gia Vu. Hence, the application of warning

[21] Decree No 19/2020/ND-CP, Art. 25 (1.a, 1.b, 2.a).

[22] Article 15 (1) of the Law on Civil Status in 2014 prescribes: "Within 60 days after the birth of their child, the father or mother shall register the child's birth; if the parents are unable to register their child's birth, the grandfather or grandmother or another relative or the individual or organization that is nurturing the child shall register his/her birth".

for this person did not fully meet the conditions to apply this form of sanction in accordance with the Law on Handling of Administrative Violations in 2012. On the contrary, if the Chairman of the People's Committee of Hiep Binh Chanh Ward had not conducted sanctions, it would have led to the omission in the violation.

Secondly, **competence** ***persons "arbitrarily" apply extenuating circumstances that are not prescribed by law to apply warning.***

Analyzing the regulations in Article 9 of the Law on Handling 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 to violators.[23] However, it should be noted that the person with sanctioning competence can only apply extenuating circumstances other than those specified in Article 9 of the Law on Handling Administrative Violations 2012 if the Decree prescribing the sanctioning of administrative violations in that domain contains new additional extenuating circumstances. On the contrary, they will not have the right to arbitrarily stipulate additional extenuating circumstances not yet stipulated by the Government to apply when conducting sanctions.

For acts of delayed submission of tax declaration dossiers, Clause 1, Article 7 of Decree No 129/2013/ND-CP of the Government stipulating the sanctioning of tax-related administrative violations and forcible implementation of tax administrative decisions prescribes that "*acts of*

[23] Khanh N.N. Extenuating Circumstances Administrative Liability in the Law on Handling of Administrative Violations of Vietnam. Kutafin University Law Review. 2020;7(1):49. https://doi.org/10.17803/2313-5395.2020.1.13.045-066.

delayed submission of tax declaration dossiers between 1 and 5 days later ***with extenuating circumstances***" shall be imposed with warning.

On May 10, 2017, Director of Hanoi City Tax Department issued Decision No 28986/QD-CT-KK&KTT to sanction administrative violations against SSI Fund Management Limited Liability Company for "*Late filing of personal income tax declaration, tax period April 2015 (2 days late submission)*" with warning. In the content of this sanctioning decision, the competent person applied the extenuating circumstance "*Organizations commit the administrative violation for the first time owing to the network system error that they could not submit the tax declaration*." Compared with the extenuating circumstances specified in Article 9 of the Law on Handling Administrative Violations 2012, there is no such extenuating circumstance. At the same time, when studying the entire contents of Decree No 129/2013/ND-CP, the author does not find that this document stipulates any additional extenuating circumstances other than those specified in the Law on Handling of Administrative Violations in 2012. Thus, it is possible to conclude in this case to fully satisfy the conditions for application of warning against administrative violations of SSI Fund Management Limited Liability Company, Director of Hanoi City Tax Department "arbitrarily" applied new extenuating circumstances "*Organizations commit the administrative violation for the first time owing to the network system error that they could not submit the tax declaration*" although this circumstance has not been prescribed by law. Therefore, the application of warning in this case also does not meet the provisions of the Law on Handling Administrative Violations 2012, so it has no legal value.

Through the analysis above, it can be seen that the second condition for application of warning, which is "*administrative violations with extenuating circumstances*", is causing a lot of legal obstacles. It is thought that the Law on Handling Administrative Violations 2012 needs to reassess the application of this condition in warning, thereby removing the legal difficulties as well as creating favorable conditions for the application of the law by the competent sanctioning subjects.

3.2. The relationship between warning and the sanctioning form of confiscation of material evidences and means used to commit administrative violations when sanctioning minors aged between full 14 and under 16

To ensure that administrative sanctioning activities comply with the legality and at the same time to achieve the objectives and requirements of state management activities, the Law on Handling Administrative Violations 2012 regulates the principles for sanctioning administrative violations in Article 3, including: "*The sanctioning of administrative violations must be based on the nature, seriousness and consequences of the violations,* ***the violating subjects*** *and the extenuating and aggravating circumstances*."[24] This principle requires that when sanctioning administrative violations, the competent person must have special attention paid to the violating subject, which is a sign of the subject in the elements constituting the administrative violation. Accordingly, the subjects sanctioned for administrative violations must be those with administrative liability capacity. In order to differentiate administrative responsibilities, competent people will base on the specific characteristics of violators to apply appropriate measures of administrative liability. From this perspective, the Law on Handling Administrative Violations 2012 designed administrative liability measures (including sanctions, remedial measures) for two groups of subjects: *Group 1:* violators are adult individuals (aged full 18 years or older) and organizations; *Group 2:* violators are juvenile individuals (from full 14 to under 18 years).

For juvenile violators, the Law on Handling Administrative Violations 2012 stipulates three types of administrative sanctions that can be applied to these subjects: *i. Warning; ii. Fine; iii. Confiscating material evidences, means of administrative violation used to commit administrative violations*.[25] In terms of applicable value, warning and fines can only be applied as a main sanctioning form; while confiscating material evidences, means of administrative violation used to commit administrative violations may be applied as a main sanctioning form or an additional sanctioning form. Particularly for minors who commit administrative violations are those from full 14 years old to

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

[25] Law on Handling Administrative Violations 2012, Art 135 (1).

under 16 years old, the Law on Handling Administrative Violations 2012 stipulates that only two sanctions are applied that warning and confiscation of material evidences, means of administrative violations without applying the form of fines.[26] This is a reasonable regulation and in accordance with the provisions in the working age specified in the Labor Code. Persons from full 14 years old to under 16 years old — meaning children, cannot participate in labor relations or wage work.[27]

Logically, warning and confiscation of material evidences and means of administrative violations can all be applied as a main sanctioning form. However, the Law on Handling Administrative Violations 2012 stipulates that all administrative violations committed by persons aged between full 14 and under 16 subject to warning (Article 22) should have indirectly removed the possibility of applying the sanctioning form of confiscation of material evidences and means of administrative violations as a main sanctioning form. In other words, warning is always applied as the main sanction for all administrative violations committed by persons aged between full 14 and under 16, and sanction for confiscating material evidences and means of administrative violations, if applicable, it can only be applied as an additional sanctioning form, not as a main sanctioning form.

Through the above analysis, it can be seen that the provisions of the Law on Handling of Administrative Violations in 2012 have narrowed the scope and conditions to apply the sanction of confiscation of material evidences and means of administrative violations. Consequently, the above provisions may be taken advantage of the illegal purpose of employing persons aged full 14 to under 16 to commit administrative violations. When discovered, this subject will only be given a warning and cannot be imposed with the confiscation of material evidences and means of administrative violations if the law does not provide for the application of this form of sanction as an additional sanctioning form.[28]

[26] Art. 134 (3) of the Law on Handling Administrative Violations 2012 stipulates: "In case of persons aged between full 14 years old and under 16 years old who commit administrative violations, not applying form of fines".

[27] Cao Vu Minh, Shortcoming in the Sanctions to Juveniles for Administrative Violations, 5 Legislative Studies 41 (2019).

[28] Cao Vu Minh, Shortcoming in the Sanctions to Juveniles for Administrative Violations, 5 Legislative Studies 51 (2019).

3.3. Legislative techniques in the Decrees on sanctioning administrative violations in warning

The first, the contents of the Decrees on sanctioning administrative violations do not have unity in warning.

As stated, the Law on Handling Administrative Violations 2012 is a general document on sanctioning for administrative violations, while the regulations for administrative violations, sanctioning forms, levels, and remedial measures for each act of administrative violation; sanctioning competence, specific fine levels for each title and competence to make records of administrative violations in each state management domain will be decided by the Government through the promulgation of Decrees on sanctioning administrative violations. When sanctioning a specific administrative violation, the competent person shall base on the Decree prescribing the sanctioning of administrative violations in that domain to conduct sanctions.

Generally, the Government develops a Decree on penalties for administrative violations with a 4-part structure. Part 1 provides general regulations (including the scope of adjustment, subjects of application, explanation of words, sanctioning forms, remedial measures, statute of limitations for sanction, etc); Part 2 stipulates violations, the form of sanctions and remedies for specific violations (which can be designed into one or more chapters); Part 3 provides the authority to sanction administrative violations in that field; Part 4 provides the provisions for implementation. In order to create a solid legal basis for sanctioning, the contents of the Decree on sanctioning of administrative violations must ensure the uniformity to implement the principles of formulating and promulgating legal documents according to the provisions of the 2015 Law on Promulgation of Legal Documents as follows: *"Ensuring the constitutionality, legality and* ***uniformity*** *of legal documents in the legal system."*[29] The uniformity of the legal system requires the elimination of conflicts, duplicates or overlaps within the system itself, in each law branch, each legal institution, and among legal norms. If the legal system is inconsistent, there are inadequacies and contradictions

[29] Law on Promulgation of legislative documents in 2015, Art. 5 (1).

between legal norms, it cannot create comprehensive, uniformed and effective legal adjustments.[30]

Surveying the Decrees on sanctioning administrative violations in the field of state management which stipulates warning, the author has discovered a number of cases where the regulations are not uniform, which reduces the regulatory effect of the law.

In the field of customs, according to Decree No 127/2013/ND-CP, warning is applied in two cases. The first case prescribed in Clause 1 Article 6 of this Decree is as follows: "*A warning or a fine of between VND 500,000 and 1,000,000 for one of the following acts: a) Submitting the customs dossier behind schedule; b) Submitting the documents in the customs dossier, the submission of which may be delayed, behind schedule*." The second case prescribed in Clause 1 Article 10 is as follows: "*A warning or a fine of between VND 500,000 and 2,000,000 for acts of arbitrarily erasing, editing documents in registered customs dossiers without affecting the payable tax amount or not affecting the commodity policies*."

Subsequently, on May 26, 2016, the Government issued Decree No 45/2016/ND-CP to amend and supplement a number of articles of Decree No 127/2013/ND-CP. One of the key points of the Decree No 45/2016/ND-CP is the abolition of the application of warning of these above cases in Decree No 127/2013/ND-CP and the only major form of sanction for such violations is a fine.[31]

Therefore, with the above amendments and supplements, all administrative violations in the field of customs will no longer apply warning. However, inadequacies arise in spite of the exclusion of the application of warning for specific administrative violations in the field of customs, but the Decree No 45/2016/ND-CP amended and supplemented with other regulations that mentioned warning. Specifically, for the general provisions on sanctions applied in the customs field in Clause 1 Article 4 of Decree No 127/2013/ND-CP amended by Decree No 45/2016/ND-CP stipulates: "*For each administrative violation in the field of*

[30] Cao Vu Minh, The consistency of the Law on Inspection in 2010 with other legal documents in the Vietnamese legal system, The conference record on summarizing 6 years enforcement Law on Inspector 57 (2017).

[31] Decree No 45/2016/ND-CP, Art. 1 (3, 7).

*customs, organizations and individuals subject to one of the main sanctioning forms are **warning** or fine*."[32] Regarding the sanctioning competence in the field of customs, the Decree No 45/2016/ND-CP still retains the provisions on the competence for applying warning of the titles specified in Decree No 127/2013/ND-CP. On the other hand, it has added sanctioning competence to apply warning to new titles such as the Border Guards and the Coast Guard.[33] Consequences of the amendment and supplement of Decree No 45/2016/ND-CP are the general provisions that stipulate sanctioning forms applying warning (Part 1) and the sanctioning competence (Part 3) applying warning, but in the specific administrative violations (Part 2), there are no violations sanctioned with warning, thereby creating internal contradictions in this Decree.

In the forestry sector, regulations on sanctioning administrative violations in this field are applied according to Decree No 35/2019/ND-CP issued by the Government on April 25, 2019. In particular, the general provisions on the sanctioning form in the forestry in Clause 1 Article 4 stipulating the application in warning: "*For every administrative violation in the field of forestry, organizations and individuals must be subject to one of the main sanctioning forms, which are **warning** or fine*." Articles 26 to 33 of Decree No 35/2019/ND-CP stipulating the sanctioning titles in the forestry sector also specifies these entities the authority to apply warning. However, researching specific administrative violations in the field of forestry sanctioned from Article 7 to Article 24, the author has not found any violations applied warning. Thus, Decree No 35/2019/ND-CP continues to "follow the same path of failure" of Decree No 127/2013/ND-CP (amended and supplemented by Decree No 45/2016/ND-CP) since the provisions of warning in this Decree conflict together.

Through analysis, it can be seen that some Decrees do not have consensus among the provisions when applying the sanctioning form of warning in the same document. From the author's perspective, the Government needs to overcome the limitations in the legislative

[32] Decree No 45/2016/ND-CP, Art. 1 (1).

[33] Decree No 45/2016/ND-CP, Art. 1 (15, 16).

technique in warning in the Decrees stipulated sanctioning administrative violations in the field of state management in order to create uniformity in the contents of legal documents.

The second, a number of Decrees of the Government that stipulate the application in warning with other sanctions have not been logical about the nature and severity of violations.

One of the important principles of sanctioning administrative violations is that *"The sanctioning of administrative violations must be based on the nature, seriousness and consequences of the violations, the violating subjects."*[34] Therefore, Decree No 81/2013/ND-CP (amended and supplemented by Decree No 97/2017/ND-CP) stipulates that the decision on administrative sanctions and rates of fines for each administrative violation must be based on: *i. The nature and the severity of the infringement of administrative management order of the violations; ii. The income and living standards of the people in each period; iii. The educational meaning, reasonability, and feasibility of the sanctions*.[35] This requirement is very significant in differentiating the level of administrative responsibility and ensuring fairness in sanctioning administrative violations.

The provision of sanctioning forms suitable to the nature and degree of danger of violation acts has also an important role in the struggle and prevention of administrative violations. However, studying how to stipulate sanctions in the Decrees on administrative sanctions in the fields of state management of the Government, the author found a number of cases which warning shall be applied with other sanctions for the same administrative violation, while these sanctions apply to administrative violations with different nature and level of danger, leading to inconsistencies in the application of sanctions.

For example, Decree No 36/2020/ND-CP prescribes a household business who acts as "*developing a mine status quo map or cross-section drawing of the licensed mining area which contains inadequate or incorrect information about the mining situation*" shall be imposed

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

[35] Decree No 81/2013/ND-CP (amended and supplemented by Decree No 97/2017/ND-CP), Art. 2 (2).

warning (the main sanctioning form) and the form of suspending the mineral exploration for between 2 and 4 months (additional sanctioning forms).[36]

Article 22 of the Law on Handling Administrative Violations 2012 stipulates that warning shall only apply to "*non-serious administrative violations*." Meanwhile, Article 25 of this Law stipulates that the form of suspending the mineral exploration shall apply to "*serious administrative violations*." Therefore, the question is that once it is determined that it is a "non-serious" administrative violation to apply warning as a main sanction, would such an act be a "serious" violation and require additional sanctions to suspend the mineral exploration? From the author's point of view, the Government has had inaccuracies in assessing the nature and severity of the society's danger of administrative violations, thus leading to the unreasonable way of designing sanctions.

The Law on Handling Administrative Violations 2012 and its implementing documents does not provide a basis for determining the nature and severity of violations. This is an unreasonable thing and needs to be supplemented and improved in the future. According to the author, lawmakers need specific guidance on what is "non-serious administrative violations" and "serious administrative violations". On that basis, Government will design appropriate sanctions, avoiding the situation of developing sanctions that are intrinsically contradictory to the nature and severity of violations.

3.4. The competence to issue warning is invalidated by the competence to apply additional sanctioning forms and remedial measures

The Law on Handling Administrative Violations 2012 stipulates: "*The administrative sanctions includes application of sanction forms, remedial measures with respect to individuals, organizations committing acts of administrative violations, according to the provisions of law on administrative sanctions which are implemented by the*

[36] Decree No 36/2020/ND-CP, Art. 40 (4.a, 9).

competent persons."[37] This means when sanctioning an administrative violation, the person who sanctions must have the competence to apply all sanctioning forms and remedial measures to this violation. If this person lacks one of the two kinds of competence, they will not have sanctioning competence. Regarding regulations on handling administrative violations in the Decrees issued by the government, there are many cases where the persons with sanctioning competence cannot issue warning because of lacking the competence to apply additional sanctioning forms and remedial measures.

Firstly, the competence to issue warning is invalidated by the competence to apply additional sanctioning forms.

According to Article 10 (1.a) of Decree No 185/2013/NĐ-CP (amended and supplemented by Decree No 124/2015/NĐ-CP), those who "*sell prohibited goods valued under 1.000.000 dong*" will be issued a warning or fined from 500.000 dong to 1.000.000 dong; the material evidence may also be confiscated. Regarding the sanctioning competence in this field, although some persons have the competence to issue warning (for example, market controllers, policemen, border-guard soldiers, marine policemen who are on duty, inspectors and persons assigned to perform specialized inspection tasks who are on duty), they do not possess the competence to apply the additional sanctioning form of confiscating the material evidence of administrative violations. As a result, they cannot sanction administrative violations detected by them and documents related to these violations must be transferred to persons with higher competence. This slows down the process of sanctioning administrative violations. The principle according to which "*Administrative violations* ***must be sanctioned swiftly***" is therefore sometimes violated.

Secondly, the competence to issue warning is invalidated by the competence to apply remedial measures.

According to Decree No 138/2013/NĐ-CP, teachers who "*teach 1 to 4 periods less than what is required in the curriculum*" will be issued

[37] Law on Handling of Administrative Violations in 2012, Art. 2 (2).

warning. The remedial measure of "*teaching the periods that have not been taught*" can also be applied.[38]

Compared to Article 28 (1) of Decree No 138/2013/NĐ-CP relating to the competence sanction in the field of education, Chairmen of the commune-level People's Committees have the competence to issue warning, fine up to 5.000.000 dong for each violation and confiscate the material evidence and means used in the commission of administrative violations. According to this article, regarding the violation of "*teach 1 to 4 periods less than what is required in the curriculum*", Chairmen of the commune-level People's Committees only have the competence to issue warning and do not have the competence to apply the remedial measure of "*teaching the periods that have not been taught*." This means that Chairmen of the commune-level People's Committees cannot sanction this simple violation and have to transfer related documents to Chairpersons of district People's Committees who have the competence to apply the remedial measure of "*teaching the periods that have not been taught*."[39] Therefore, in this case, the regulation on remedial measures indirectly invalidates the sanctioning competence of Chairmen of the commune-level People's Committees. This prolongs the sanctioning process and makes it less effective.

IV. Conclusion

The first, when modifying the Law on Handling of Administrative Violations in 2012, lawmakers should exclude the criterion of "*administrative violations with extenuating circumstances*" when applying warning because of its drawbacks as analyzed above. Moreover, Decrees on sanctioning administrative violations in the fields of state management issued by the Government should not stipulate that the sanctioning forms of issuing warning and fine can be applied simultaneously for one violation. This is due to the fact that the criteria for issuing warning instead of imposing fines and vice versa are not clear enough for persons with sanctioning competence to apply the law correctly. Specifically, if lawmakers consider an administrative

[38] Decree No 138/2013/ND-CP, Art. 11 (2.a, 9.a).

[39] Decree No 138/2013/ND-CP, Art. 28 (2).

violation to be not serious and therefore it is unnecessary to fine on the violator, the sanctioning form should only be issuing warning, not imposing a fine. This not only makes the process of sanctioning administrative violations with extenuating circumstances easier, but also is in accordance with the regulation "*for simple violations that are not serious, the sanctioning form shall be issuing warning*."[40] In contrast, if lawmakers suppose that it is necessary to impose a fine on violators to deter them, competent persons should not be allowed to apply warning.

The second, to establish the uniformity in the understanding and application of the law, the Law on Handling Administrative Violations 2012 needs to have more specific regulations on the sanctioning forms imposed on persons from 14 to under 16 years old committing administrative violations. Therefore, the regulation should be added to Article 135 (1) of the Law on Handling Administrative Violations 2012 as follows:

"*The sanctioning forms for persons from 14 to under 16 years old include warning, confiscation of the material evidence and means used in the commission of administrative violations. Warning is always the main sanctioning form; the confiscation of material evidence and means used in the commission of administrative violations can be applied as an additional sanctioning form.*"

The third, regarding law-making techniques, in some decrees, regulations regarding warning are contradictory. Therefore, concerning this form of sanctioning, the Government needs to fix the errors regarding law-making techniques in decrees to achieve uniformity in different legal normative documents.

The fourth, when building regulations for administrative violations, sanctioning forms, sanctioning levels and remedial measures in decrees on sanctioning administrative violations in the fields of state management, the following factors need to be taken into account: Administrative management order, the ability to educate and deter the violator, the reasonableness and feasibility of the forms and levels of sanctioning. This can help maintain the good governance that has been ruined by

[40] Decree No 81/2013/ND-CP (amended and supplemented by Decree No 97/2017/ND-CP), Art. 2 (2.a).

administrative violations. Therefore, to combat, deter, prevent and sanction administrative violations, the Law on Handling Administrative Violations 2012 and the Decree on sanctioning administrative violations in all domains need to be uniform regarding the competence to issue warning, additional sanctioning forms and remedial measures. This can help persons with sanctioning competence sanction violations swiftly, promptly, and within their competence and the law.

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THE IMPLEMENTATION OF THE WADA CODE IN GREECE THROUGH LAW 4373/2016

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Introduction

With winning being the sole motive of top level sport competitions, athletes tend to exhibit anti-athletic behavior by using prohibited performance-enhancing substances to reach their goals.[4] Such actions not only harm contestants' health, but also devastate the concept of sport ethics and values.[5] Doping is forbidden as contrary to the fundamental principles of Olympic spirit, fairness and medical ethics.[6] The World Anti-Doping Code since its very first edition in 2003 aims to organize and contextualize the fight against this growing phenomenon by

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obliging national sport bodies to comply with its provisions. To the same way, the UNESCO member states of at the 33rd Session on October 2005 agreed to comply with the Code and ensure its effectiveness.[7] In the Greek legal order the first legislative action was taken with the Greek Sport Law 2725/1999, the provisions of Law 3057/2002 and the ratification of the UNESCO convention by virtue of the provisions of the Greek Law 3516/2006. This paper examines the implementation of the WADC (World Anti-Doping Code) and its harmonization through the provisions of the recent Greek Law 4373/2016. For the purposes of the study, there is an analysis of exemplary decisions that were delivered from national sports jurisdiction bodies after the adoption of Law 4373/2016.

Doping and Strict Liability

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.[8] From this perspective, the principle of strict liability[9] that is established in Article 1(g) Law 4373/2016 is implemented as follows: "The rule stipulating that, pursuant to Articles 2.1 and 2.2, in order to establish an anti-doping rule infringement does not need to be demonstrated by the ESKAN the fault of use by the Athlete." (ESKAN is the Hellenic National Council for Combating Doping listed in the anti-doping organizations complied by WADA). Moreover, according to Article 11.2.1 Law 4373/2016, the preeminent sanction for doping

[7] International Convention against Doping in Sport (2005, 19 October). URL: http://www.unesco.org.

[8] Article 2 of the WADA World Anti-Doping Code 17–21 (2015).

[9] Strict liability: The principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) are found in bodily specimen whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. (URL: www.wada-ama.org).

violation is a four years period of ineligibility with the possibility of eliminating or reducing the exclusion period due to non-compliance with fault or negligence.

Doping Cases in Greece

1. ESKAN Decision No 2/2017 — CAS 2017/A/5357

The athlete tested positive in the metabolitesbenzylecgonin ("BZE") and methylecogonine ("EME") of cocaine after underwent an in-competition anti-doping control at the end of the Women's Greek Basketball Cup Final game on March 2017. According to the Greek Law 4373/2016, the competent authority dealing with doping cases in Greece is ESKAN, and thus, the First Instance Disciplinary Committee of the ESKAN provisionally suspended the athlete. Specifically, in July 2017 the ESKAN First Instance Disciplinary Committee held a hearing, where the athlete claimed that the provisions of Articles 11.4 and 11.5 of Law 4373/2016 should be applied in the case at hand. These provisions predict the elimination of the ineligibility period where there is no fault or negligence (Article 11.4) and reduction of the period of ineligibility based on no significant fault or negligence (Article 11.5). Athlete's request was based upon her allegations that the findings came from a passive contamination of the substance the afternoon before the game. In order to deliver the decision the ESKAN Disciplinary Committee took the following under consideration:

a) Article 1 (32) (33) Law 4373/2016, which defines when an incident is considered "in-competition",[10]

b) Article 11.2.3 Law 4373/2016, according to which anti-doping rule violation (ADRV) resulting from an adverse analytical finding of a substance which is only prohibited "in-competition" shall be rebuttably presumed to be not "intentional" if the substance is a specified substance and the athlete may establish that the prohibited substance was used "out-of-competition",

c) The provisions of Article 1 and Article 5.2.2 Law 4373/2016, according to which for the application of Article 11 which states that

[10] "In-Competition" means the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition. (WADA Code, p. 135).

the anti-doping rule violation does not involve a specified substance, unless the athlete or other person can establish that the anti-doping rule violation was not intentional, then the ineligibility period is between zero to two years,

d) Article 11.4 Law 4373/2016, which establishes that if an athlete or other person establishes in an individual case that he or she bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated, and

e) Decision No 34912/2011 of the Greek Minister of Health and Social Solidarity — Culture and Tourism, Chapter B: Prohibited Substances and Methods "in-competition", and the WADA Code International Standard Prohibited List of January 2017, in which cocaine is included in substances the use of which is punishable only if "in-competition".

The Disciplinary Committee also pleaded the anti-doping control result of the athlete's both samples that reported the existence of "cocaine", which according to the WADA S6 list of is stimulant and forbidden. Moreover, the athlete filed an expert opinion on toxicology, where it is stated that the result of the sample analysis shows that only metabolites from the substance were located and not the substance itself, and thus there has been at least 15 hours gap between the use and the doping test. According to this opinion, the use was "out-of-competition". Furthermore, it is presented that a person could be exposed to this substance as a passive contaminator in case a third person smokes the substance. In any case, the athlete claimed to never consume cocaine (active contamination). In the light of the foregoing, the Disciplinary Committee took under consideration the fact that cocaine is identified as a specified substance and that the use was "out-of-competition" and unintentional, overturned the decision which imposed on the athlete the penalty of exclusion from competitions.

Related to Article 14.1.3 Law4373/2016, "WADA does not have to exhaust its internal remedies when it has itself a right of appeal under Article 14 and no other party has appealed against the final decision of the ESKAN First Instance Disciplinary Committee proceedings. In this case, WADA may appeal the decision directly to the CAS." As a result, WADA filed a statement of appeal to the CAS, against ESKAN and the athlete. Subsequently, FIBA asked to intervene. Upon submissions, all the parties and chiefly the arbitration panel accepted the application

of the Greek Law 4373/2016 in the case at hand and develop their argumentation upon its provisions. By these means, this case was dealt by the CAS and upon the incapability of the athlete to prove her innocence, the ESKAN decision was reversed and the athlete was banned from competitions for four years.

This case is the example of the implementation of the WADA Code through Greek Law 4373/2016, not only at the Greek level but also at the international one, since WADA, Fédération International de Basketball (FIBA) and Court of Arbitration for Sport (CAS) accepted the application of the Greek Law in the abovementioned case. However, at the second instance delivered the decision based on the provisions of the Greek Law 4373/2016.

2. ASEAD Decision No 14/2018 [11]

The athlete tested positive to LGD — 4033 after a doping control that took place two days after her participation in an international competition in France, where she qualified for the upcoming Olympic Games in Rio and was notified of the results of the test a month later, while she was already in Rio. For the above violation the ESKAN First Instance Disciplinary Committee banned the athlete from competitions for four years. According to Article 14 Law 4373/2016: "Decisions which are issued pursuantly to the Code may be subject to appeal", furthermore par. 2 of the Article mentions that decision of doping violations, or related to the imposition or not of penalties can be subject to appeal according to the provision of the Law. Thus, the athlete appealed the ESKAN decision of to ASEAD. However, Article 14 Law 4373/2016 also states "Appeals for international level athletes or international sporting events, when participating in international sporting events or in cases of international level athletes, are dealt exclusively before the CAS" (Article 14.2.1). Therefore, as the athlete is an international level athlete if she was competing international sporting events regardless where the doping control took place ASEAD rejected the appeal and consider the appeal as inadmissible, since the competent body in the second instance for international athletes is CAS.

[11] According to Article 124 Law 2725/1999 as it is in force, ASEAD is the High Council for Sports Disputes Resolutions in Greece.

3. ASEAD Decision of No 34/2018

In this case, the athlete tested positive to LGD — 4033 after a doping control that took place at the National Para-Athletics Championship. The ESKAN First Instance Disciplinary Committee banned the athlete from competitions for four years. The athlete appealed the decision to ASEAD to overturn or amend the decision according to Article 14 of the Greek Law 4373/2016. The Disciplinary Committee dismissed the appeal filed by the athlete because according to Article 14.2.1 Law 4373/2016 the only competent jurisdictional body to deal with cases where the involved parties are international level athletes is CAS.

Concluding Remarks

The above study reveals that the decisions of the Lex Sportiva jurisdiction bodies system, such as ESKAN and ASEAD in the Greek legal order and CAS internationally, mostly work in its favor. The decisions of the abovementioned bodies show that the legislator of the applied regulations of Lex Sportiva, as well as the provisions of the Greek Law 4373/2016, have been rendered mainly according to sport contest and its ultimate moral dimension, which at one point is totally reasonable, putting in the center of the judicial review the strict liability of the participating athlete. However, the sport bodies mentioned above seem to be incapable — in doping cases — to examine fairness from the angle of the controlled part, which is the athlete, who has the right to prove its innocence regardless strict liability doctrine. This gap is filled by jurisprudence and primarily by the implementation of the rules of law, namely the principle of counter-evidence, in order to bend the strict liability of the involved party, and proves either his innocence or his guilt. Therefore, there is a need for the creation of a systematic regulatory framework for the fight against doping with implementation of substantive and procedural principles of law, for the true “fair trial”, not only for the moral idealization of the games, but also for the satisfaction of those involved, in the sporting and athletic action, sense of justice.

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