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The Use of the Category of "Legal Persons of Public Law" in Foreign Legal Instruments

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Abstract: Recent years have witnessed a new upsurge in the development of the European legislation on new organizational and legal forms of legal persons in Europe. The article deals with issues of the legal mode of their operation. Attention is given to the specifics of legal status of legal persons of public law in legislation of individual countries, France in the first place as a citadel of effective and carefully thought out administration. Subjected to analysis is the history of emergence of the theory a legal person in France. Specified is the system of outlooks on a legal person in the comparative legal aspect. Discussed are nuances of using the term "legal person of public law" in a number of current constitutions. Studied are the issues of spreading the legal construction of legal person of public law over the post-Soviet space. Argumentation is given for need to use the construction of public legal person. Based on analysis of legal experience of foreign countries a conclusion is made that in terms of legislative regulation the formation procedure, the legal status and the legal operating mode of legal persons of public law must be determined by public law legislation whilst some general provisions pertaining to realization of their legal capacity must be governed by civil law conventions.

Key words: Administrative legislation · European law · Code · Constitution · Legal person of public law

INTRODUCTION

The division of legal persons into public and private is now practiced virtually in all foreign countries. This applies, in the first place, to the European Union [1]. The emergence of new supranational institutions and establishments triggered the development of legislation on legal persons. The number of such organizations grows from year to year and their function and competence become increasingly diverse. The European Union's institutions retain the right to form joint ventures in economy, power generation, scientific research and other areas. The European Union's achievements in law as well as legislative drafts on various matters are, indisputably, interesting to science and practice of law. This is determined, in particular, by the possibility of using the European expertise for improving the national legislation in different branches of law as well as for developing the national legal doctrine on legal persons.

The study on the organizational and legal forms of legal persons in the European Union also plays an important role in the context of implementation of an Agreement on Partnership and Cooperation of 1994 between the Russian Federation and the European Union member states. In particular, at issue is implementation of the program-specified requirement of article 55 of the Agreement, according to which Russia must seek to gradually attain the compatibility of its legislation with that of the Union, including the matters of enterprises' legal status. All this determines the importance and significance of the issue of legal person of public law both in foreign [2-7] and Russian [8-10] jurisprudence.

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MATERIALS AND METHODS

To establish the common regularities of the institute of legal person of public law in different countries, a method of comparative law was used. Also, its varieties were resorted to, such as synchronous comparative analysis employed for spotting the typical features of the institute of legal person of public law in the modern world and a diachronic comparative analysis aimed at investigating the specific contents of an object.

For dividing the legal persons into public and private, this method uses criteria developed at one point in the French administrative law. Those include: a) basic institutions of public law and public initiative; b) rules of organization, function and control are established by public power; c) a public institution may receive public subventions and mandatory payments; d) public power has it prerogatives.

Also, it makes sense to discuss derivative criteria established using the claimed method. Those include, in particular: a) establishment of power bodies by the state's act that regulates their legal status and activities; b) the established institutions perform on behalf of the state and, simultaneously, on their own behalf, fulfilling some of the state's functions; c) being a legally isolated institution, they conduct state management in compliance with their private responsibility; d) they are vested with power for performance of state duties [11-13].

The Main Part: The theory of legal person of public law emerged in the administrative law of France, which, it is believed, rests on "three whales", i.e. legal persons of public law, public services and administrative jurisdiction [14].

The legal persons of public law in France include: the state per se, territorial formations, public institutions, associations for pursuing public interest, i.e. legal persons of public law including the subjects of public and private law vested with public functions and authorities. These subjects are designated as industrial and commercial state-funded establishments whose functions are limited by and differ from those of the state in terms of the legal mode. The state's managerial institutions are mainly controlled by the administrative law standards and their personnel normally have the same status as the state workers. Such institutions perform the traditional tasks of ensuring the functional independence of institutions, regulation of their activities, law enforcement, etc. [11].

At the same time, the state industrial and commercial institutions are engaged in the production, procurement and sale of products, i.e. in economic operations. In their functions they mainly rely on the standards of private law and their personnel abide by the norms of the Labor Code, which defines them as hired workmen in a private sector. Such institutions are engaged in commercial activities [15]. Thus in France categorized as a legal person of public law is, in the first place, the state itself in different institutions and establishments. As for the legal consciousness, it develops in the framework of a comprehensive managerial paradigm, increasing the scale of tasks in management, technical administration and, hence, coercion [16 Dufau].

The word combination "legal person of public law" is used mainly in juridical literature, primarily in the French speaking countries. It entered all the French language dictionaries, but only as a reference to certain examples. A. Giron, the author of "The Dictionary of administrative law and public law" points out that the local or territorial teams, as legal persons of public law, have the competence of managing local affairs, using the elected bodies for this particular purpose [17].

The science abroad uses the term "legal person of public law" much more often, the users being administrative workers who resort to it on the growing scale. The French author Ph. Terneyre notes that "public persons" can be legal persons of public law. In his opinion, the persons of public law are not always created by the state. The creators can also be other organizations, including local teams (according an amendment to the Constitution of 2003, these are the so-called territorial teams. i.e. 20 regions, 100 odd departments, over 36 thousand communities plus public institutions). It should be noted, however, that Ph. Terneyre does not consider the issue of other organization, e.g. public associations. Sometimes, instead of the term "legal person of public law" Ph. Terneyre uses the word combination "administrative legal person" [15].

Using the definition "legal person of public law" together with the word combination "administrative legal person", A. Mahiou gives a wider list of legal persons of public law: the state (in Algeria these are territorial teams at the regional level), communes, public institutions and public offices [18].

Some authors assert that the territorial teams and corporations are a certain type of legal persons of public law [19-21].

Some types of legal persons participating in public and legal relations (parties, "public institutions", 'territorial teams") were studied in detail by the Russian scientists, but the issue of the status of legal persons of public law was not raised [22-23]. A.V. Kondrat'ev treats of the recognition of legal persons of both private and public law by the European Union [24-25].

Some countries' legislature, for instance the French Constitution of 1958, uses the word combination "territorial team". In 2003, a constitutional amendment was made concerning the regulation of such teams' legal status.

The constitution of Spain declares that a province is a local formation enjoying the rights of a legal person, as specified in parts 3 and 4 of article 20 and part 1 of article 23 of the Austrian Community Constitutional Law that specifies communes as corporations of public law.

The legal persons of public law got much coverage in most constitutions of South America, for example, article 27 of the Constitution of Brazil, 1988 [26-29].

Article 17 of the Constitution of Greece, 1975, treats of the legal person of the state's law. Article 4 of the Constitution of Cyprus of 1960 contains the term "legal persons of civil law and public organizations". The constitutions of Greece and Cyprus do not mention any specific examples of persons of public or state law. Other constitutions do have such examples, but they relate to the general notion of legal person and do not illustrate the word combination "legal person of public law", which is missing altogether in the texts of those constitutions.

Using a particular example of legal persons, the German author K. Schmidt notes that in Germany there are private-legal and public-legal foundations [30].

The juridical construction of the legal person of public law already gained currency in the post-Soviet space, e.g. in the Ukraine, Georgia, Moldova and the Baltic republics. The Ukrainian Constitution of 2004 contains no institute of law of managerial conduct and operative management, but stipulates, in part 2 of article 395, that the law may establish other material rights to alien property and introduces the division of legal persons into legal persons of public and private law.

Such a division is also established in Georgia. In addition to state organizations, the Constitution of Georgia, categorizes as legal persons of public law also non-governmental organizations created in compliance with legislation. In that country a special law is accepted "On legal persons of public law". In accordance with this legislation, the legal persons of public law are not only the state-controlled agencies, but also higher education institutions, political parties, religious associations, etc.

The legal construction of the legal person of public law also became widely used in Moldova. In compliance with its Civil Code of June 6, 2002, recognized as a legal person is an organization that has an isolated property, meets demands, made of it, on the basis of this property and is able, on its behalf, to acquire and exercise proprietary and personal non-proprietary rights, bear the responsibility and perform as a plaintiff and a respondent in court instance. Based on the code's article 57, the legal persons are divided into legal persons of public law and legal persons of private law. So the legal persons of private law, not seeking profit, can be created only in three forms, i.e. association, foundation and institution, each of which envisions only voluntary membership.

The legal persons of public law in the Republic of Moldova are the state and administrative-territorial formations involved in civil legal relations on an equal basis with other subjects of law. The functions of the state and administrative-territorial formations in such relationships are performed by their agencies in compliance with their competence. This classification of legal persons of public law makes it possible to build a national system characterized by its own national specifics. As an element of such specifics it is possible to single out the commitment to the classical doctrine that determines the legitimate definition of exclusively state legal persons of public law [31].

CONCLUSIONS

This article attempts to consider the development of the concept of legal person in public law as it is used in legislature and legal practice of some foreign countries. The results of the analysis can be summarized as follows:

- As legislative regulation goes, the foreign experience shows that the establishment procedure, the legal status and the legal operating mode of legal persons of public law must be determined by public legal legislation whereas the general provisions pertaining to realization of their civil legal capacity must be governed by standards of civil legislation.
- The notion "legal person of public law" is used in juridical literature mainly via appellation to the legal experience of France and French speaking countries. Here rated as a legal person of public law is the state as such. The legal consciousness is developed in

the framework of the total managerial paradigm, giving priority to the tasks of management and technical administration. Actually, the very theory of public legal person emerged in the administrative law of France.

- In most foreign constitutions, the notion of "legal person of public law" is not used though there are examples of using the general idea of legal person. This is explained by doubts caused, on the one hand, by permanent use of the notion of "legal person of private law" and, on the other hand, by the risky realization of the legal mode of the public law legal persons' activities (which could be the public power agencies).
- In this context, any recognition of the construction of public legal person is one of the most difficult problems in legal science and practice. Therefore, it must adequately rely on the notional analysis of the rule of legal persons of public law whether or not the legislator introduces or rejects the category of legal person of public law in dedicated regulations.

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