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Section 1. Civil Procedure

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RESOLUTION AND SETTLEMENT OF CIVIL DISPUTES

Abstract: the paper is devoted to the actual issues of participation of a judge in the procedure of conciliation procedure and issues of pre-trial, extrajudicial conciliation. The author focuses on the difference between the concepts of "resolution of civil dispute" and "settlement of civil dispute".

Keywords: civil dispute, mediation, conciliation, judge, compromise, conflict.

The Civil Procedure Code of Ukraine, adopted in the new wording, initiates a series provisions for civil justice in Ukraine. Among them, it should be noted the procedures of conciliation in civil proceedings, in particular, with the participation of a judge. Legislative consolidation also requires the possibility of conciliation procedures by a notary. This is a logical continuation of the implementation of the concept of conciliation both during the judicial proceedings and in the order of pre-trial, extrajudicial conciliation or settlement of a civil dispute. At the same time, it should be emphasized that the viability of such innovations requires understanding of its content characteristics, principles of activity, and, in our opinion, the most important place in the system of resolution and settlement of civil disputes.

The change of the modern world first of all occurs due to the evolutionary improvement of society, and therefore social in particular, legal relations. The mechanisms of self-regulation are of particular importance in this case. Provided to the subjects of the legal relationship certain independence in establishing, at their discretion, the rules of conduct and ensuring the control of their compliance is litmus in relation to the level of social justice and democracy. The highest level of legal consciousness of a society should be the maximum delegation of the state of its exclusive powers to civil society institutions.

Stability and a certain consistency in the departure of civil society from paternalism in the construction of social relations (lat. *paternus – parent*, denotes a built-in system of relations including legal, which allows to establish clear patterns of behavior of subjects of these relations, regardless of the public or private sphere of their existence) and maximum approximation to pluralism (lat. *pluralis – plural*), which in turn implies a plurality of views, the right to free choice, the existence of alternatives will ensure the development of an effective state apparatus in a democratic society.

The idea of introducing conciliation procedures as one of the priority areas for reforming national justice has been reflected in the new wording of the Civil Procedure Code of Ukraine.

It should be noted that the issue of judicial and extrajudicial conciliation procedures, procedural agreements, definition of the concepts of "dispute about the right", "conflict", "compromise", "form and method of protection", etc., paid attention by S. A. Kurochkin, I. V. Reshetnikova, M. V. Gvozdareva,

D. L. Davydenko, S. V. Bobrovnik, A. A. Brizhynsky, J. D. Pritika, A. O. Kot, N. A. Vlasenko, T. V. Chernyshova and others. At the same time, the definition of of the concepts "resolution" and "settlement" of the civil dispute, the issue of judicial pre-trial / extrajudicial resolution and settlement of civil disputes remain out of the note.

According to Article 1 of the Civil Procedure Code of Ukraine, the task of civil justice is fair, impartial and timely consideration and resolution of civil cases. In this regard, the purpose is precisely the protection of the violated, non-recognition, disputed rights, freedoms or interests of individuals, the rights and interests of legal entities and the interests of the state [1].

Therefore, the consideration and resolution of civil cases is the task of civil justice. At the same time, taking into account that such consideration and resolution of the case is carried out in order to protect the violated, non-recognition, disputed rights, freedoms, interests, we conclude that this category of legal cases contains a dispute about the right.

Every person has the right to protect his or her civil rights in case of violation, non-recognition or controversy. That is, the result of protection should be a minimum of restoration, recognition of civil law by other, in particular, the contracting party of our subject requirements.

At the same time, due to the contractual evolution of legal relations, should not exclude also a partial restoration or recognition of only a certain amount of rights that satisfies both parties and is a certain compromise between them. Therefore, in the event that the parties are prepared to compromise on their own claims to each other, consideration should be given to the possibility of *settling* this dispute.

In the wording of the Law No. 1401-VIII dated 02.06.2016 [2], the delegation of functions of courts, and also the appropriation of these functions by other bodies or officials is not allowed. At the same time, part 3 of the new wording of Article 124 of the Constitution of Ukraine does not limit the legislator to establish by law *obligatory pre-trial procedure for resolution a dispute.* The said norm of the Constitution of Ukraine provided the opportunity to transfer a significant number of civil disputes to the area of pre-trial or extrajudicial settlement, and also brought the matter out of the jurisdiction of the Constitutional Court of Ukraine of July 9, 2002 (Case N1–2 / 2002 N15-rp / 2002) [3].

The *resolution* of a dispute involves a complicated, multi-stage procedure aimed at eliminating the source of conflict between the parties, full or partial satisfaction of the rights and interests of contracting party in a situation where the parties not only do not contribute to one another in the successful resolution of the subject matter of the dispute, but rather make the most of efforts to delay the conflict or resolve it is solely in its own interests. In addition, the resolution of the dispute by the court, in particular, provides for a mechanism for the enforcement of a court decision in cases of refusal to voluntarily execute it.

In turn, the *settlement* of a dispute involves active actions of the parties aimed at reaching agreements on disputed issues, while such reconciliation should be voluntary. Settlement of dispute is a kind of compromise reached by the parties in order to prevent greater losses (emotional, material, human, time, etc.) as a result of delaying the conflict. It also provides for its accelerated voluntary execution (*in this case, we obviously do not take into account the apparent reconciliation in order to delay the time, abuse of the law, etc.*). Ignoring the consequences of unresolved conflicts leads to the fact that the parties deal not only with the dispute between themselves but also with the consequences of not settling it, which can be much more unprofitable than the dispute itself.

Therefore, the settlement of a dispute between the parties is possible either through direct negotiations between the parties, or through negotiations with the participation of a third party (person), a legally uninteresting participant, namely the mediator.

At the same time, it should be noted that mediation (lat. *mediation-intervention*) in private law is un-

derstood as a process of settling disputes in which the parties, through one or more mediators, negotiate disputes in order to reach an agreement [4].

Depending on the resolution or settlement of the dispute, we observe the most common in the classification theory, namely, jurisdictional and non-jurisdictional forms of protection. The exercise of powers to resolution, settlement a dispute by the authorized state agency belongs to a jurisdictional form. In turn, all other forms are considered non-jurisdictional. Therefore, in cases of resolution or settlement dispute between the parties but with the participation of a judge, it should be attributed to jurisdictional forms. Self-defense, including, today, mediation should be considered a non-jurisdictional form of settlement of a dispute.

It should also be emphasized that in cases of impossibility of volu ntary settlement of a dispute, its solution involves the possibility of a voluntary decision by a third party, in particular a court, which will be used to terminate the dispute and in most cases will satisfy only one of the parties.

In the light of the foregoing, if we are talking about *resolving a dispute*, it should be understood that the powers of the parties to such a relationship are limited in particular to the subject of the dispute, evidence gathered and investigated in support of their claims or objections, the dispute resolution process involves discretion and competition, as well as the right to compulsory execution of the decision provided the refusal to perform voluntary.

In turn, the *settlement* of a dispute is, first of all, a voluntary orientation of the parties to the dispute to resolve all contradictions with the least losses for each party. In this regard, the parties will try to make certain compromises even at the expense of issues that are not directly related to the subject matter of the dispute. If you speak, for example, the conclusion of a settlement agreement in court, it should be noted that, in contrast to the previous version of the Civil Procedure Code of Ukraine, the new wording of Article 207 of the Civil Procedure Code of Ukraine provides for the right of the parties to reach an agreement beyond the bounds of the subject matter of the dispute. In cases of failure to reach an agreement, the parties address to the state authorities upon its decision.

Consequently, the settlement of a dispute is a certain stage in its solution, while such a stage can become the only one for the parties.

Taking into account the above, it should be concluded that the concept of "resolution of civil dispute" and "settlement of civil dispute" are not identical concepts. At the same time, these concepts are compatible, where the notion of "settlement of civil dispute" is subordinated to the concept of "resolution of civil disputes".

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Section 2. International Criminal Law

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THE DOCTRINE OF SUPERIOR RESPONSIBILITY IN THE TRIALS OF INTERNATIONAL CRIMES: A COMPARATIVE STUDY OF THE INTERNATIONAL CRIMES TRIBUNALS OF BANGLADESH AND OTHER JURISDICTIONS

Abstract: This paper is to determine whether the judgments passed by the International Crimes Tribunals of Bangladesh have correctly applied the doctrine of superior responsibility. Furthermore, this paper also asks whether the principle of civilian superior responsibility has been correctly interpreted and applied by the ICTs of Bangladesh. This is achieved by analysing relevant judgments of the ICTs against judgements passed by other international judicial forums trying international crimes.

Keywords: International Crimes Tribunals of Bangladesh; doctrine of superior responsibility; international crimes.

Introduction

The doctrine of "superior responsibility" prescribes the criminal liability of those persons who, being a superior failed to control his subordinates or after committing any offense by the subordinates failed to punish them. Under international humanitarian law and customary international law, it is the duty of the superior to have effective control over his subordinates. The superior should be aware of the activities of his subordinates. And in case of any armed conflict the superior should control his subordinates and prevent them from violating any of the rules of war. The central question of this paper is to determine whether the judgments passed by the International Crimes Tribunals (hereinafter, ICTs) of Bangladesh have correctly applied the doctrine of superior responsibility. Furthermore, this paper also asks whether the principle of civilian superior responsibility has been correctly interpreted and applied by the ICTs of Bangladesh. This is achieved by analysing relevant judgments of the ICTs against judgements passed by other international judicial forums trying international crimes.

Although *article 28 (b) of The Rome Statutes of the International Criminal Court* 1998, states the provisions and conditions of civilian superior responsibility. This concept of "superior responsibility" does not differentiate between military officers and civilians placed in positions of command, since the duty of the both are to prevent and punish the offences of their subordinates. The duty of the superior to prevent and punish is well recognized in the field of customary international law as far back as the Leipzig trials following World War I. the modern formulation of this doctrine has found in many legal instruments, such as Articles 7, paragraph 3, and 6, paragraph 3, of the Statutes of the *International Criminal Tribunal for the former Yugoslavia*

(ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively, Article 28, paragraph 2, of the *Statute of the International Criminal Court (ICC)*, and *Article 86 of 1977 Protocol I additional to the Geneva Conventions*. At the evidentiary problems encountered in cases of superior responsibility: first, it must be proved that the superior was in a position of command and control which would have enabled him or her to prevent the crimes of his or her subordinates. Second, the superior must have known of these crimes or, at least, have deliberately remained ignorant of them. The latter issue is particularly controversial. Now my point of research is to find out the latter issue by analyzing the foreign laws and cases with the ICT Act 1973. By comparing foreign elements with sec 4(2) of 1973 Act, we can see how this sec is different from other jurisdictions. For instance, article 28 (b) of the ICC1998, talks about the element of "knowledge" whereas, sec 4(2) is silent about the part of knowledge. Moreover ICT act 1973 also has some dissimilarity with ICTY, ICTR and ICC. If we take the observation of the Celebici Case [22] *Celebici* Judgment of the ICTY that the doctrine of command responsibility refers to "vicarious liability" it follows that superiors will be criminally liable for the crimes of their subordinates regardless of their knowledge and subsequent action. If this were so, no person could escape such a strict liability test if subordinates overrode his/her best efforts to prevent and punish their actions. In the case of *Naser Oric* [41] the ICTY stressed that the possession of *de jure* authority does not result in a presumption of effective control; such a possession provides merely some evidence of effective control. Whereas in *Ghulam Azam* [26] case the prosecutor has argued that, superior responsibility under 1873 Act imposes "strict liability" to the superiors. some cases in which the defendants are found guilty for individual criminal responsibility or nor for the superior responsibility such as, Tokyo Tribunal as authorities for civilian superior responsibility, namely those of General Matsui, Prime Minister Tojo, and Foreign Ministers Hirota and Shigemitsu. They found guilty by direct liability. Other cases shows superior responsibility but the relationship remains unclear, such as, Trial of *Friedrich Flick* and five others, US military tribunal, Nuremberg, 1947; in *Germany v. Herman Roechling and Others*, this cases talks about the civilian superior responsibility but not clearly mentioned the civilian settings. Which we have to do in this research paper is to compare cases with our ICT cases and find the positive sides of this doctrine which is incorporated in 1973 Act. Not only cases but also we analyze several articles in which some of them support my view such as, superior responsibility by *Rene Vark,* superior responsibility by *Kai Ambos,* on the other hand some authors raise the question of legality and by challenging its provision hold its as controversial doctrine such as, "superior responsibility of civilians for international crimes committed in civilian settings" by Yael Ronen. It is very easy to proof the command responsibility but it is not so easy to proof civilian superior responsibility. Therefore, the main purpose of this paper is to find the differences which lies in *sec 4(2) of 1973* Act which deals with doctrine of civilian superior responsibility.

Alongside the central question this paper answers, the following questions are also explored:

1. For what exactly the superior is responsible?
2. Is this doctrine correctly incorporated in sec 4(2) of 1973 Act?
3. How far is Section 4(2) different from other international instruments functioning with the same objective?
4. Does superior responsibility transfer the actual criminal conduct from the subordinates to the superiors?
5. How was the Doctrine of Superior Responsibility applied in the case of *Prosecutor Vs. Professor Ghulam Azam* and other related cases?
6. Is it a separate crime for dereliction of a superior's duty to control, prevent or punish? Will this application contribute positively to the development of the doctrine in international criminal law?

General concepts of Superior Responsibility

Concept of civilian superior responsibility –

The doctrine of superior responsibility grew out of the military doctrine of command responsibility, and its evolution is informed by this origin Ronen [4]. Before analyzing its origin and history, first we have to understand the concept of 'superior responsibility'. The concept of command or better superior responsibility [1] makes the superior liable for a failure to act to prevent criminal misconduct of his or her subordinates. According to this doctrine the superior will be liable for lack of control and supervision of the acts done by his subordinates. Hence, the superior will be punishable for his own failure to intervene on the acts done by his subordinates. Therefore, it can be said that, on both way a superior will be punished; for his lack of control and commissions done by others. As a result, on the one hand, the concept of superior liability creates *direct* liability for the lack of supervision, and, on the other, *indirect* liability for the criminal acts of others. *Art 28 (b) of the Rome Statute of International Criminal Court 1998* stated that, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates which are:

- The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- The crimes concerned activities that were within the effective responsibility and control of the superior; and
- The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The ICC statute not only gives provisions for military commanders but also separately described the position of civilian superior or nonmilitary superiors. The responsibility of "superiors" is triggered, according to *Article 86(2)* of the Additional Protocol 1 of 1977 (Shany & Michaeli), [2]. "If they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." The important thing, which should be noted here that, this provision is not limited to military commanders although; it was interpreted primarily as to them. ICTR Statute *Article 6(3)* and ICTY Statute *Article 7(3)* contains a provision resembling *Article 86(2)* of the Additional Protocol 1: "*The fact that any of the acts referred to in. . . the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*" Both tribunals have interpreted their respective statutes as permitting the attachment of responsibility to both military and nonmilitary superiors [3].

Elements of Crime –

The doctrine of superior responsibility, known traditionally as command responsibility [4], is well established, although its precise nature and content remain controversial [5]. One jurisprudential line has been to treat it as responsibility of the superior for the crimes committed by his subordinates [6], whereas another has been to treat it as a separate offence of dereliction by the superior of his duty to properly supervise his subordinates [7]. Recent jurisprudence supports the latter interpretation [8]. Four elements must be proven for a person to be held responsible as a superior. In general terms, these are: [9] (1) an international crime has been perpetrated by someone other than the defendant; (2) there existed a superior–subordinate relationship between the defendant and the perpetrator; (3) the defendant as a superior knew or had reason to know that the subordinate was

about to commit such crimes or had done so, and (4) the defendant as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator [10]. Under the International Criminal Court (ICC) Statute, there is a further requirement of a causal link between the superior's dereliction of duty and the commission of the crime [11]. If we analyze the elements of crime then we can found that, both ICTY and ICTR Statutes do not distinguish between types of superiors, while ICC Statute Article 28 expressly provides for the responsibility of both military commanders (and persons effectively acting as military commanders) and other superiors.

Historical background of superior responsibility –

The conception of recognizing the responsibility of commanders for the actions of their subordinates is not something which is very new. The first recorded trial for the commission of war crimes was held 536 years ago and it ended with the beheading of Peter von Hagenbach by an ad hoc tribunal of the Holy Roman Empire [12]. This trail was the stepping stone of the doctrine of command responsibility as this trail was recognized as the first international recognition of commanders to act lawfully. The doctrine of command responsibility enjoyed in the jurisprudence of international criminal law at the trial of Hagenbach, war crimes trials in general remained a rarity in the 500 years or so that followed [13]. Therefore we need to go back a century find command responsibility in the 1899 and 1907 *Hague Conventions*. The phrase 'command responsibility' was first used in the Leipzig trial of Captain Emil Muller, who was responsible for the Flavy de Martel Camp. The charges brought against Muller following the end of the First World War included:

- failure to maintain a decent condition of the camp which had resulted in many deaths due to dysentery;
- failure to prevent the commission of crimes and to punish the perpetrators thereof;
- infliction of physical violence towards the prisoners of the camp [14].

The sentence imposed on Muller was only for a period of 6 months. Moreover, The Leipzig trial remained restricted to trying the 'small fish'. Lloyd George's [15] campaign to prosecute the Kaiser Wilhelm II [16] for war crimes remained unrealized due to the opposition of President Woodrow Wilson [17] who apprehended that such a prosecution would stunt the joining of Germany at the League of Nations. This trend was also prevalent at the Tokyo trials where Emperor Showa [18] and all the members of the Imperial Family enjoyed blanket exoneration as part of the design of sovereign immunity. The Nuremburg trials however stood out as an exception to the Leipzig and Tokyo trials where 24 of the most important captured leaders of Nazi Germany were tried by the International Military Tribunal of who 12 received the death sentence [18].

The power of the military in contrast to a civilian background was found at the identities of the captured German leaders. Geoffrey Robertson notes that with the completion of the trial of the Nazi leaders, 'interest in prosecuting underlings and accomplices waned' [19]. However, Alfred Krupp along with a few other industrialists received jail sentences [19].

It is worth mentioning that even the passage of fifty years did not relieve the liability of corporations such as Siemens, Volkswagen and I. G. Farben who had to compensate the surviving relatives of those Jews who were deliberately worked to death [19]. Finally with the initiation of tribunals of the likes of the ICTY and the ICTR that covered the holding of the 'big fish' liable for the crimes of their subordinates and also successfully increased the entrance to holding civilian superiors liable also. *ICTA*, '73 also accommodates the doctrine of command responsibility under Section 4(2) where commanders or *superior officers* are liable for the crimes [20] committed by their subordinates.

The status of superior responsibility in customary law –

"Under International Law and International Humanitarian Law (IHL) commanders have a duty to ensure that their troops respect that body of law

during armed conflict and hostilities [21] and failure to do so may give rise to liability of the superior. A mere "breach of duty," whereby the commander has not fulfilled the responsibilities expected of his rank, is usually dealt with through disciplinary action. However, where a commander fails to prevent or punish violations of IHL by subordinates, criminal proceedings are likely, and the punishment to be meted out will reflect the gravity and nature of the crime committed by the subordinate" [22].

According to the judgment of *Prosecutor vs Ghulam Azam* (para 311), from an IHL perspective, it took another thirty years or so to have these principles codified in a convention. By 1977 the doctrine of command responsibility was accepted as customary international law and was codified in the Additional Protocol I to the Geneva Conventions, relating to the International Armed Conflicts. Its status as customary law was confirmed with the explicit inclusion of command responsibility in *article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY)* and article 6(3) of the *International Crimes Tribunal for the former Rwanda (ICTR)* of the Statute of the International Criminal Court (ICC). It should be noted and also evident from several cases that international law recognizes the principle of command responsibility both in international and in internal armed conflict [23]. By the adaptation of this civilian superior responsibility in numerous international instrument and through volumes of judgments from international tribunals it has now become part of customary international law that the military doctrine of command responsibility is also applicable to civilians in the form of civilian superior responsibility.

How superior responsibility inserted in sec 4 (2) of ICT Act –

As per the amendment of section 3 of the Act of 1973, in 2009, the Tribunal now has jurisdiction to try and punish any non-military person [civilian], whether superior or subordinate, who has direct or indirect involvement with the relevant crimes. In other words, the Tribunal now has jurisdiction to try any accused who is a non-military person, including a civilian superior. *Sec 04 (2)* of this said Act which talks about the liability of the accused clearly stated that, "Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes."

In the case of *Muhammad Kamaruzzaman* the Tribunal notes that a civilian superior will be held liable under the doctrine of superior criminal responsibility if he was part of a superior-subordinate relationship, even if that relationship was an indirect one [24]. No formal document is needed to prove this relationship moreover, it may be well inferred from evidence presented and relevant circumstances revealed. The doctrine of superior responsibility is applicable even to civilian superiors of paramilitary organizations [25]. As a matter of policy, civilians should also be subject to the doctrine. The elements to be proven for a person to be held responsible under the theory of superior responsibility are (1) crime has been perpetrated (2) crime has been perpetrated by someone other than the accused (3) the accused had material ability or influence or authority over the activities of the perpetrators (4) the accused failed to prevent the perpetrators in committing the offence [25].

It is undisputed today that superior responsibility extends also to civilian political leaders, as Heads of State or party or Government officials or other civilians holding positions of authority [26, para 318]. The trial chamber of the ICTR in *Kayishema and Ruzindana* [27] judgment holds that … … *"The principle of superior responsibility applies not only to military commanders, but also encompasses political leaders*

and other civilian superiors in positions of authority. The crucial question is not the civilian status of the accused, but the degree of authority he or she exercised over his or her subordinates."

Hence after discussing *sec 4(2)* of this Act with relevance case references it can be said that, *sec 4(2)* not only applying to military superiors but also equally apply to civilian superiors.

A Comparative study

For better understanding the doctrine of "civilian superior responsibility" we need to analysis the cases; both ICT and Foreign judgments' based on this doctrine. If we make a comparative study then we will be able to justify the decision of ICT-BD based on doctrine of civilian superior responsibility.

The Prosecutor v Dario Kordic and Mario Cerkez & The Prosecutor v Nahimana Case

Let me first analysis the *The Prosecutor v Dario Kordic and Mario Cerkez case*. In this case, a political leader was for the first time found guilty of war crimes and crimes against humanity [28]. Kordic, one of the two accused in the case, had exercised considerable authority during the conflict in Bosnia and, contrary to the accused in earlier cases, he did not have a clear military position. Therefore, the case offers a good basis for elaborating on the doctrine of superior responsibility with respect to civilian superiors [28]. Moving back to the facts of the case, On 26 February 2001, the Trial Chamber delivered its judgment in the case of Dario Kordi and Mario Cerkez, two Bosnian Croats who played prominent roles in the conflict in the Lašva Valley in Bosnia in 1992 and 1993 [28]. The accused were found guilty of having participated in a widespread or systematic campaign of persecution of the Bosnian Muslims in that region, in the course of which a number of Muslims were either killed or wounded and their homes, villages and towns were destroyed therefore, the crime of persecution amounted to a crime against humanity [28]. Furthermore, the accused were found guilty of unlawful attacks on civilians, murder, willful killing, and inhumane acts and other crimes falling under Articles 2, 3 and 5 of the Statute, namely grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war and crimes against humanity [28, P. 305–309]. The accused had acted in two completely different positions. Kordic was a regional leader who, among other positions, held the position of Vice President of the HZ H-B, the Croatian Community of Herceg Bosna. This was a separate Croatian community or entity for the Bosnian Croats, covering the area of Central Bosnia, established with the intention that it should become part of the Republic of Croatia [28, para 5]. Cerkez, on the other hand, was the Commander of a local Brigade, the Viteška Brigade, and as such participated in the conflict in the Lašva Valley [28]. It was the view of the Prosecutor that Kordic had held offices and positions which gave him both political and military powers to influence and control the aims and operations of the Bosnian Croat organisations and organs. Among other things he issued orders, appointed and dismissed persons to or from various offices, had the power to arrest or release Muslims in influential positions, who had been detained by the HVO. Furthermore, travelling and freedom of movement in territories controlled by the HVO was authorised by Kordic, as well as the passage of relief convoys through checkpoints [28, para 10]. According to the Prosecution there was, as a result, enough evidence to establish the responsibility of Kordic under Article 7(3). The Trial Chamber did not uphold this view of the Prosecution, but found the accused guilty only under Article 7(1). Nevertheless, the Trial Chamber in its judgment gave thorough consideration to the issue of superior responsibility. The Trail Chamber found both of them guilty and after that they appealed in the Appeals Chamber where the Appeals Chamber sentenced Dario Kordic 25 years of imprisonment and Mario Cerkez was given a new sentence of six years of imprisonment.

Prosecutor vs. Nahimana –

In 2007, the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber confirmed the conviction of Ferdinand Nahimana for public and

direct incitement to genocide and crimes against humanity, and it sentenced him to thirty years imprisonment [29]. Nahimana, a former university lecturer and former director of the Rwandan Ministry of Information, was the founder and director of RTLM, the only private radio station operating in Rwanda in 1993–1994, which served as a platform for a genocidal media campaign against the Tutsi population in Rwanda [30]. Nahimana himself never broadcast on RTLM. He was convicted under the doctrine of superior responsibility for failing to prevent the broadcasters from inciting to genocide in their programs or to punish them for having done so [31]. In fact, despite repeated statements to the effect that civilian superior responsibility is an established doctrine in the *ad hoc* tribunals, (Williamson, 2002) the entire jurisprudence of the ICTY and ICTR prior to Nahimana offers only two instances of conviction solely on the basis of superior responsibility, both of which concern military or paramilitary persons (*Prosecutor v. Hadžihasanović & Kubura,* 2006). Nahimana is the first case in which either tribunal convicted a civilian solely (or even properly) on the basis of his superior responsibility in a purely civilian setting [32, P. 1044–52]. It basically demonstrates a leveling of the playing field between civilians and military personnel and has been hailed as a "giant leap forward" in the development of the civilian superior responsibility doctrine (Gordon, 2004).

Analyzing the Chief Prosecutor vs Professor Ghulam Azam case –

From the submission of both the parties and evidenced produced before the Tribunal, it is an admitted fact that accused Ghulam Azam was the Ameer (Head) of the then East Pakistan Jamaat-e-Islami during 1969 to 1971 and it is also undisputed that the accused was a prominent member of the 140-member central peace committee [26, para 555]. who played a significant role in forming Militia Bahinis such as Razakar, Al-Badr, Al-shams and peace committees in collaboration with Pakistan occupation forces [26, para 556]. The evidence as to status of the accused leads the tribunal to hold that the accused became an indispensable person as well as *de facto administrator* to run the civil administration of the then East Pakistan by virtue of his civil superior status [26]. By this it appeared that, Accused Prof. Ghulam Azam as a defacto superior acted in such a manner which shows that his prime object was to annihilate the Bangalee nation in the name of protecting Pakistan. The accused was the head of East Pakistan Jamaat-e-Islami, but that stand did not give him licence to form Militia Bahinis with intent to attack upon unarmed civilians which resulted offences of genocide and crimes against humanity throughout the country in 1971 [26, para 386]. On scrutiny of the evidence on record, the Tribunal found that the prosecution has successfully proved the status of accused Prof. Ghulam Azam that he had superior responsibility over his subordinates but he failed to prevent them from committing atrocities as contemplated in *section 4(2)* which substantially aided and contributed to the commission of crimes against humanity, genocide and other class crimes as specified in *section 3(2)* of the Act during the War of Liberation in 1971 [26]. Therefore, the tribunal convinced to hold that Prof Ghulam Azam being a civilian superior is liable of offence done by its subordinates.

Analyzing the Chief Prosecutor v Motiur Rahman Nizami case

The disputed question which was raised in this case was, whether the tribunal has jurisdiction to try and pass decision regarding "civilian superior responsibility". In the opinion of the tribunal, in our jurisdiction, section 4(2) of the International Crimes (Tribunals) Act, 1973, provides that: *"4(2). Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them*

commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes." [33, para 372].

To solve the issue of jurisdiction, the tribunal observed after considering the sentence structure and wording of section 4(2) of the ICT Act, 1973 that, the intention of the legislators, it is for the tribunal to interpret whether section 4(2) of the Act imposes superior responsibility to the civilian superiors [33, para 373].

In the opinion of the tribunal, a civilian superior need not to be the official superior of the perpetrators rather a *de facto* command over the perpetrators' is enough to hold someone responsible [33, para 374].

Moving back to the *Nahimana* Case, The ICTR found that Nahimana had been a superior of the RTLM staff. It also found that Nahimana [30] knew or had reason to know that his subordinates at RTLM were going to engage in incitement to genocide. For these reasons, it convicted him on superior responsibility grounds for not having taken reasonable and necessary steps to prevent the incitement or punish its perpetrators.

The tribunal also opined that, in earlier cases, it was mentioned that the doctrine of command responsibility is also applicable to the political leaders and other civilian superiors in position of authority. The crucial question is not the civilian status of the accused but the degree of authority he or she exercised over his or her subordinates. It is also a settled position of law that civilian superior responsibility has now become a part of customary international law. So, there is no scope to raise any question upon holding a civilian superior responsible under section 4(2) of the Act, 1973 [30, para 381].

Finally, the tribunal is of the opinion that, the president of Islami Chhatra Sangha is no doubt a designated post and the person holding such post maintains an office for the purpose for supervising works of the members as his subordinates [30, para 382]. The accused Motiur Rahman Nizami as the president of ICS was the ex-officio chief of Al-Badr Bahini in 1971 and thus he was a civil superior officer in its true sense. Therefore, the accused as chief of both ICS and Al-Badr Bahini had a superior –subordinate relationship with the members of Al-Badr Bahini [30]. Hence under section 4(2) of the 1973 Act, he cannot neglect his liabilities as being a civilian superior.

Analyzing the Chief Prosecutor v Ashrafuzzaman Khan & Chowdhury Mueen Uddin Case

In the case of The Chief Prosecutor v Ashrafuzzaman Khan & Chowdhury Mueen Uddin, the tribunal opined that, since accused Ashrafuzzaman Khan and Chowdhury Mueen Uddin are proved beyond reasonable doubt that they had acted as 'chief executor' and 'operation-in-charge' of Al-Badar respectively and they had led the gang of Al-Badar men in picking up selected intellectuals on gun point they have been lawfully found to have participated the commission of abduction followed by killing of intellectuals, by leading and instructing the killing squad and also by virtue of their culpable position, and they had conscious knowledge about the plan and design in carrying out all the 'operations'. Therefore, they incur liability also under section 4(2) of the Act of 1973 which refers to the theory of civilian superior responsibility [34, para 444]. Hence the tribunal sentenced them with death penalty.

Analyzing The Chief Prosecutor Vs. Md Abdul Alim Case

In the case of The Chief Prosecutor vs Abdul Alim, the tribunal has correctly and clearly describes about "civilian superior responsibility." Here, the tribunal observed the decision of the ICTR Trial Chamber in the case of Zigiranyirazo which is as below:

"It is not necessary to demonstrate the existence of a formal relationship of subordination between the accused and the perpetrator; rather, it is sufficient to prove that the accused was in some position of authority that would compel another to commit a crime following the accused's order" [35, para 381].

The tribunal exemplifies the term authority. According to the tribunal, authority is that position which has the power to act. Position of power meant

it gives its holder an effective control over his subordinates, this authority includes, a right to command, suggest or pursue a situation by act or conduct. The word authority is used to give orders, support, and encouragement and influence people what to do. If one has authority, he or she is in control and able to make others listen. Synonyms of the expression 'authority' include 'command', 'domination', 'influence', 'permit' etc. [36, para 628].

Tribunal further notes that an individual is termed as a 'leader' when his activity involves establishing a goal and common purpose by sharing the vision with others so that they will follow or obey him willingly or seek his final decision to be executed [36, para 629] Leadership is a process by which a person influences others to accomplish an organizational objective. The 'knowledge' requirement is not needed to prove accused's superior position within the ambit of the Act of 1973. However an individual's superior position per se is a significant indicium that he had knowledge of the crimes committed by his subordinates. Additionally, 'knowledge' may be proved through either direct or circumstantial evidence [36].

The tribunal found the accused Alim guilty the under 'theory of civilian superior responsibility', as he was the local leader of Convention Muslim League, was the chairman/ influential leader of Joypurhat peace committee whose member did crime against humanity and genocide against the people of Bangladesh [36, para 630].

Now if we analyze the above cases, we can find some similarities and dissimilarities. Though ICT is a domestic law but the characteristics of the offence has an international character. ICYT, ICTR and ICC have applied this doctrine to civilian superior and the elements of crime are nearly same to ICT. However there are some difference lies in interpreting the Act. Through a comparative study, the slide differences between ICT act and other tribunals or jurisdictions will be visible. Thus, we need to go back to the elements of crime which has been discussed in 2.2 in chapter 2. Here three basic elements needed to be proved for a superior to be held liable under superior responsibility; these are; i) superior- subordinate relationship; ii) knowledge and; iii) failed to take the necessary and reasonable measures to prevent the criminal acts or punish the subordinates. First we will be discussing the element of superior subordinate relationship. The superior subordinate relationship may be established in two independent ways (1) *De-jure*: if the commander has structural authority over its subordinates and (2) *De Facto*: if the commander got no lawful or structural authority over the subordinates, but in reality got actual command and influence over the subordinates [36, para 313]. This means that the superior will be having "effective control" over his subordinates. At this moment the question may arise that who is a genuine superior? It is a crucial question because "only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility" [37]. The ICTY adopted a concept of "effective control over a subordinate" referring to a "material ability to prevent or punish criminal conduct, however that control is exercised" [38, para. 256]. This was taken over by the ICTR which emphasized that general influence is not sufficient to establish a superior subordinate relationship [39, para 415]. At the same time it is not necessary to show direct or formal subordination, but "the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator." [40, para 59]. Therefore both the ICTY and ICTR have underlined that an official position is not determinative for superior responsibility because it is the actual possession or non-possession of powers to control subordinates that may lead to conviction or acquittal [38, para 256]. In the case of *Oric*, the ICTY stressed that the possession of *de jure* authority does not result in a presumption of effective control; such a possession provides merely

some evidence of effective control [41]. *In Prosecutor v. Aleksovski* [42], and in *Prosecutor v. Delalic*, [43], the defendants were the *de facto* commanders of prison camps where combatants and civilians were detained. They were responsible for conditions in the camps, with de facto authority over the officers, guards, and detainees. In both cases, the defendants were held responsible for failing to repress crimes that their subordinates had committed because they had an effective control over their subordinates. On the other hand, The ICTY Trial Chamber found in both the cases of *Cordic and Boskosk*; that though they were civilian leaders but they did not have effective control over the direct perpetrators of the Crimes and thus both of them were acquitted of their responsibilities as superiors [26, para 327]. Conversely in the *Chief Prosecutor vs Ghulam Azam* case, it was held that, Golam Azam as leader of the political party, i.e. Jamaat-i-Islami that issued Identity Cards to *Razakars* members through which the party acknowledged giving them arms and ammunition to trained *Razakars* members, cannot easily escape from denying effective control over them and possessing the material ability to prevent crimes committed by them because it was his party that in fact gave arms and ammunition to *Razakars* members. From the above, it is therefore justify to infer a superior-subordinate relationship between Golam Azam and the *Razakars* because Golam Azam did have the material ability to prevent the commission of the crimes the *Razakars* committed because he possessed 'effective control' over them. By comparing the above cases it can be said that, for held a superior liable in ICT the tribunal rely upon the facts and evidenced adduced before the tribunal which shows that having de facto authority a superior can be held liable. The second element is knowledge, while the respective statutes of ICTY, ICTR and the ICC require the civilian superior to have knowledge of the commission of crime by a subordinate in order for liability to attach; under the ICT Act of 1973 there is no *mens rea* or mental state requirement (The Bangladesh International Crime tribunal observer, 17–21 March 2003, pg 3). Apparently *section 4(2)* is silent about the knowledge part of the superiors. But this tribunal thinks that the "Judges of the common law shall supply the omission of the legislatures." Therefore, it has been held that the Prosecution does not need to prove knowledge, whether actual or constructive, in order to establish that Gholam Azam is liable under the superior responsibility doctrine[26]. ICT Act codifies superior responsibility as a "strict liability" crime, which would mean that a superior would always be liable for the criminal act of his subordinate, regardless of his *knowledge* or intent vis-a-vis the subordinate's crime [26]. Whereas, The ICTY has frequently explained that superior responsibility is not a form of strict liability (the ICTR has concurred), i.e. a person is responsible simply because he is the superior [38, paras 226, 239]. As in the case of Yamashita [38, paras 228.–239] the superior has no "duty to know."

The mental element is "determined only by reference to the information in fact available to the superior" *Pavle Strugar*, [4]. However, it is not necessary to prove that the superior had specific information about the crimes.– even general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, is sufficient to prove that he "had reason to know." [38, para. 238] Third and last element is Omission on the part of the civilian superior. *Section 4(2)* of the ICT Act, 1973 provides that "*any commander or superior officer, who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes."* The noticeable part of this section is that, Section 4(2) of ICTA '73

speaks only of the failure on the part of the superior to prevent the commission of crimes. Nowhere is it mentioned that the portion or element which are mentioned in the ICC or other jurisdictions. According to sec 28(b) of the ICC statute 1998, the superior had failed to take all necessary and reasonable measures within his power to prevent or repress the crime or to submit the matter to the competent authorities [26, para 320]. Therefore the difference which lies here is that, ICT does not require the component of the punishment by the superior rather his failure to prevent the commission.

Conclusion

The basic question of this research paper is, the scope of *sec 4(2) of 1973* Act will be equally applicable for civilian superior or not. The requirements for the 'civilian or non-military' superior were laid out in *Prosecutor vs. Bagilishema*, where it was held that the doctrine of command responsibility "*extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders. For a civilian superior's degree of control to be 'similar to' that of a military commander, the control over subordinates must be 'effective' and the superior must have the 'material ability' to prevent and punish any offence. The exercise of de facto authority must be accompanied by the trappings of the exercise of de jure authority* [3, para 42].

Section 4(2) of *ICTA*, '73 is similar to the *ICTY* and *ICTR* provisions in this respect because it does not effectively distinguish between military and civilian commanders. It refers to the command responsibility of any 'commander or superior officer' [20]. The precedent and rationale behind *Bagilishema* may be utilized in this respect to incorporate the liability of civilian superiors within the framework of Section 4(2). Such would not be unreasonable because an amendment made to Section 3(1) of *ICTA*, '73 in 2009 widens the jurisdiction of the Tribunal by giving it the power to '*try and punish any individual … who commits … any of the crimes mentioned in sub-section (2)*' [44]. Therefore it is clear that sec 4(2) is equally applicable for civilian superior and it can also be said that the judgments given by the ICT on basis of this doctrine cannot be subjected to any questioned. Now if we analyze the whole research paper then we can see that, sec 4(2) is slightly different from ICTR, ICTY and ICC statute. Firstly the foreign statutes and tribunals said that, there has to be a sufficient evidence to proof the effective control of superior over his subordinates. Mere holding a position will prove that he is responsible for the commission done by the subordinates. *De jure* relationship has to be proven which we found in *Kordic* case. Unlike this, ICT 1 in *Ghulam Azam* case rightly pointed out that *De facto* authority will be enough to hold a superior liable. Moreover if we look at the knowledge part then we can see the major difference in elements of crime. ICC explicitly said that mens rea has to be proven and knowledge on the part of the superior is also a major part. On the other hand, in the Ghulam Azam case the tribunal passed a decision that as sec 4(2) is silent about the knowledge part of material state of superior therefore, there is no need of *proving mens rea* or mental state requirement. The omission on the part of the superior to control or prevent his superior is also an important part. The ICC statute also talks about the punishment of the subordinates by the superiors after knowing the commission of any offense. However the punishment portion is not mentioned in *sec 4(2)*. Only omission to prevent the subordinate is enough to hold a superior liable for the acts done by its subordinate. Hence, the verdict given by the ICT 1 in *Ghulam Azam* case was rightly passed and it opens the door punish the culprits and develop the international criminal law by the application of the doctrine of civilian superior responsibility.

Conclusion

Superior responsibility is the mode of liability where it is difficult to impose the liability upon the superior that the superior participated in the commission of crimes, but where it is clear that he played an indirect role in enabling their commission or creating favorable conditions by inactivity. The superior is not directly liable for the crimes done by his sub-

ordinates rather he is liable for the omission done by him such as failure to control and prevent the commission of his subordinates. This doctrine has applied in our war crime tribunal. The Tribunal is a domestic judicial mechanism set up under national legislation and it is meant to try internationally recognized crimes and that is why it is known as 'International Crimes Tribunal'. Despite the fact that ours is a domestic Tribunal set up under International Crimes (Tribunal) Act, 1973, a domestic legislation, the Tribunal shall never be precluded to seek guidance from the universally recognized norms and principles laid down in international law and International Criminal Law with a blend of national law, in trying the persons responsible for perpetration of crimes enumerated in the Act of 1973. This doctrine helps to catch the "big fish" or head of the groups who played an important role against our liberation war. By giving the accused punishment Bangladesh sets an exceptional example in the world.

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Section 3. International law

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SOME OF THE PROBLEMS OF UN PEACEKEEPING AND SECURITY

Abstract: the article presents the analysis of the effectiveness of UN peacekeeping. Analyzed some examples of this activity. Puts forward proposals to improve the methods of peacekeeping. Analysis discussion of possible reform of the UN Security Council.

Keywords: public international law; peacekeeping operation; the UN reform; the maintenance of peace and security.

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НЕКОТОРЫЕ ПРОБЛЕМЫ ДЕЯТЕЛЬНОСТИ ООН ПО ПОДДЕРЖАНИЮ МИРА И БЕЗОПАСНОСТИ

Аннотация: в статье дается анализ эффективности миротворческой деятельности ООН. Анализируются отдельные примеры данной деятельности. Выдвигаются предложения, по улучшению методов миротворческой деятельности. Анализируется дискуссионность вопроса возможного реформирования Совета Безопасности ООН.

Ключевые слова: Международное публичное право; Миротворческая операция; Реформа ООН; Поддержание мира и безопасности.

2015 год ознаменовался 70-й юбилейной сессией Генеральной ассамблеей ООН, на которой были приняты основополагающие документы, касающиеся развития мирового сообщества в ближайшем будущем. Вместе с тем, в рамках проходящей 70-й сессии прозвучали предложения по реформированию ООН, а именно изменению подхода к применению права вето. С данной инициативой выступил глава МИД Франции Л. Фабиус в своей статье в Le Monde. По его словам, пять постоянных членов Совбеза должны добровольно отказаться от права вето «в ситуациях, когда совершаются массовые зверства, такие как геноцид, преступления против человечности или военные преступления, совершаемые в массовых масштабах». Противоречивость данной инициативы

отметил постпред России при ООН В. Чуркин. Он подчеркнул, что в международном праве отсутствует определение «массовых зверств», исходя из необходимости предотвращения которых представители Франции и предлагают добровольно принять ограничение права вето. «Трагедии случаются не только тогда, когда право вето используется, но и в целом ряде случаев, когда оно не используется. Могут, скажем, внести предложение, что для того, что бы справиться с теми или иными ситуациями, надо оккупировать страну или свергнуть правительство» [1]. Кроме этого, в 2014 в очередной раз были выявлены случаи проявления сексуального насилия со стороны представителей миротворческих сил ООН, размещенных в ЦАР, охраняющих лагерь беженцев, в столице Центральной Африканской республики, г. Банги [2]. В 2013 г. миротворцев ООН, размещенных в Чаде, обвиняют в стрельбе на городском рынке, в результате которой погибли около 30 человек. Вместе с тем, миротворцев обвиняют также в том, что в ходе ликвидации землетрясения на Гаити, произошедшего в 2010, «голубые каски» из Непала заразили холерой более 700 тыс. человек, 8 тыс. из которых скончались. При этом ООН отказалась платить компенсацию пострадавшим на основании «Общей конвенции о привилегиях и иммунитетах ООН» от 13.02.1946 г., дающей иммунитет организации от подобных претензий в любой части мира [3]. Данные инциденты демонстрируют актуальность данной работы в контексте осмысления и четкого правового определения операций, проводимых силами ООН, в рамках используемого термина, впервые введенного в 1965 г., «операции по поддержанию мира» (pease-keeping)[4]. Все вышеназванные проблемы высвечивают со всей ясностью неоднозначность дискуссий, касающихся реформирования структуры ООН, регулирования применения силы в рамках операций по поддержанию мира и со стороны региональных организаций (таких, например, как Лига арабских государств).

Говоря о необходимости реформирования ООН, на сегодняшний день под ним чаще всего подразумевают реформирование Совета Безопасности ООН как органа, в котором происходит смешение права и политики, и где очень часто, в угоду политической конъюнктуре, происходит манипулирование нормами международного права. Не оспаривая необходимости конструктивного диалога по вопросу реформы Совбеза, необходимо говорить о ступенчатом реформировании ООН, начиная с механизма миротворческих операций, а также правозащитного механизма ООН.

Обусловлено это тем, что фактически одно из первых смешений политики и права в части умаления роли ООН в разрешении международных конфликтов произошло в преддверии Шестидневной войны, третьего арабо-израильского конфликта, в длинной череде ближневосточных войн. В мае 1967 года Египет требует от ООН вывести войска ООН, патрулировавшие линию прекращения огня 1948–1956 гг. Генсек ООН У Тан пытается убедить правительство Египта отказаться от требований эвакуации войск. Кроме этого, он обратился к Израилю с просьбой разместить войска ООН с израильской стороны, однако получает отказ от обоих правительств. И уже 18 мая египтяне приказали отряду из 32 солдат ООН, занимавших наблюдательные посты в Шарм-эш-Шейхе, эвакуироваться в течение 15 минут [5]. Фактически именно эти действия стали первым прямым вмешательством в миротворческую деятельность ООН со стороны стран, представленных в Совбезе. В дальнейшем такое вмешательство, либо полное игнорирование роли ООН в поддержании мира станет обыденностью. Таким образом, необходимо поставить вопрос: «Насколько обоснованно полагаться лишь на ООН, в качестве основной силы, способствующей мирному урегулированию конфликтов?». Практика показывает, что все чаще ООН делит свое участие в миротворческих операциях с региональными силами, либо с другими международными объединениями:

– Смешанная операция Африканского союза-Организации объединенных наций в Дарфуре (ЮНАМИД). 31 июля 2007 г. Совбез санкционировал создание смешанной операции Африканского союза. Организации Объединенных Наций в Дарфуре. Действуя на основании главы VII Устава ООН, Совет уполномочил ЮНАМИД принимать необходимые меры для поддержания процесса Мирного соглашения по Дарфуру, а также для защиты своего персонала и гражданских лиц «без ущерба для ответственности правительства Судана».

– Миссия ООН в Центральноафриканской Республике и Чаде (МИНУРКАТ). 25 сентября 2007 г. Совбез одобрил развертывание в Чаде и Центральноафриканской Республике при взаимодействии с Европейским союзом многокомпонентной структуры с целью создания благоприятных условий для добровольного, благополучного и планомерного возвращения беженцев и перемещенных лиц.

– Миссия ООН в Судане (МООНВС). 24 марта 2005 г. Совбез единогласно проголосовал за направление в Южный Судан 10000 военнослужащих и контингента гражданской полиции численностью более 700 человек для содействия выполнению мирного соглашения между правительством Судана и Народно-освободительным движением Армией Судана.

– Интегрированная миссия ООН в Тиморе-Лешти (ИМООНТ). В конце 1999 г. помощь ООН потребовалась в Восточном Тиморе (Ныне Тимор-Лешти). Здесь после проведенного под руководством ООН референдума об интеграции с Индонезией начались погромы и беспорядки, в связи с чем встал вопрос о создании нового государства. ООН наладила эффективное управление, содействовала возвращению беженцев, помогла организовать работу общественных институтов и социальных служб. В 2005 г. миротворческая миссия была преобразована в миссию по оказанию помощи и миростроительству.

– Миссия ООН в Сьерра-Леоне (МООНСЛ). ООН оказала содействие в разоружении и демобилизации 75000 комбатантов. Миротворцы прокладывали дороги; ремонтировали и строили школы, больницы, восстанавливали инфраструктуру. Кроме этого, МООНСЛ помогла Сьерра-Леоне обеспечить полную защиту прав ее граждан, предать правосудию лиц, совершивших нарушения международного гуманитарного права, с помощью Специального суда для Сьерра-Леоне. В 2007 г. Совбез учредил новую миссию – Объединенное представительство Организации Объединенных Наций в Сьерра-Леоне (ОПООНСЛ) [6].

Таким образом, можно видеть, исходя из приведенной выборки, что довольно часто ООН координирует свои действия с международным объединением стран. Или же происходит тесная интеграция с местными властными структурами, при определении лиц, виновных в нарушении международного гуманитарного права (например, в случае организации Специального суда по Сьерра-Леоне). Также следует отметить, что необходимость дифференциации полномочий при миростроительстве между органами ООН и различными региональными организациями, такими как Африканский Союз, Лига Арабских Государств. Между тем, необходимо отметить, что при распределении компетенции между региональными организациями и ООН необходимо точное определение полномочий по применению силы, так как любая деятельность по поддержанию мира в отдельных регионах (Ближний Восток, Африка), должна требовать точной регламентации и координации между органами ООН и ранее упоминаемыми региональными организациями. Как нам представляется, за время, прошедшее с образования ООН, было сделано немало для нивелирования роли данной организации. Таким образом, сложившаяся действительность позволяет говорить нам о том, что неправомерно предъявлять требования лишь к ООН, как основному

арбитру в разрешении гуманитарных кризисов. На наш взгляд, необходима разработка правовой базы на основе уставных документов организаций регионального уровня, позволяющая воздействовать на урегулирование локальных гуманитарных кризисов за счет участия соседних государств при непосредственном участии и контроле со стороны ООН. Кроме этого, говоря о нарушениях международного гуманитарного права, нельзя не отметить, что основные документы, связанные с этим – Женевские конвенции и протоколы к ним 1949 г., разработанные с целью недопущения нарушений норм международного гуманитарного права во время военных конфликтов, на сегодняшний день не в полной мере отвечают современным реалиям ведения войны. Принятые после Второй мировой войны, они в большей мере адресованы классическим сторонам конфликта – двум армиям воюющих государств. Тогда как сегодня участниками войн и столкновений становятся террористические группировки, наемники и подобные им формирования, не проявляющие заинтересованности в соблюдении элементарных гуманитарных норм. Если говорить о компетенции региональных организаций, то необходимо отметить, что Устав ООН, в соответствии с п. 1 ст. 52, не препятствует существованию региональных соглашений и органов для разрешения вопросов, относящихся к поддержанию международного мира и безопасности. Хотя в статье и говорится о региональных соглашениях и организациях, однако на практике речь идет в первую очередь о региональных организациях общей компетенции, таких например, как Организация американских государств (ОАГ), Лига арабских государств (ЛАГ). Ныне поставлена задача, чтобы региональные организации, которые обладают потенциалом в части предотвращения вооруженных конфликтов, стали частью обеспечения системы международной безопасности. Согласно Итоговому документу Всемирного саммита 2005 г. государства-члены ООН намерены налаживать тесную связь не только с региональными, но и с субрегиональными организациями в соответствии с гл.VIII Устава ООН. Какие основные требования предъявляются к региональным организациям в соответствии с главой VIII Устава ООН? Эти требования можно сформулировать следующим образом:

– Такие региональные организации должны являться подходящими для региональных действий;

– Деятельность таких организаций должна быть совместимой с целями и принципами ООН;

– Никакие принудительные действия не предпринимаются такими региональными организациями без полномочий от Совбеза ООН;

– Государства-члены ООН, участвующие в таких региональных организациях, должны приложить все свои усилия для достижения мирного разрешения местных споров при помощи таких региональных организаций до передачи этих споров в Совет Безопасности ООН;

– Совет Безопасности ООН должен быть полностью информирован о действиях, предпринимаемых или намечаемых такими региональными организациями для поддержания международного мира и безопасности. Какую юридическую силу имеют вышеперечисленные положения? Согласно ст. 103 Устава ООН, в том случае, когда обязательства государств-членов ООН по Уставу (включая гл.VII) окажутся в противоречии с их обязательствами по какому либо другому международному соглашению, включая региональные соглашения, преимущественную силу имеют обязательства по Уставу ООН (в том числе по гл.VII) [7].

С учетом вышеописанного алгоритма действий, может возникнуть вопрос — если существует такая детальная регламентация, есть ли недавние примеры подобного взаимодействия? Время продемонстрировало, что когда в международные отношения не вкрадывается политическая подоплека, ООН способна предотвратить кризис руками заинтересованных региональных организаций. Речь идет о конституционном

кризисе в Гамбии зимой 2016–2017 гг. В ходе прошедших выборов 01.12.16 г. действующий президент Гамбии Яйя Джамме потерпел поражение. Победу одержал лидер оппозиции Адам Бэрроу. Первоначально, правивший с 1994 года, Джамме признал поражение, однако спустя восемь дней он отказался уходить в отставку по результатам данного голосования. Джамме обратился в Верховный Суд страны с целью отменить результаты голосования. Международное сообщество очень негативно отнеслось к подобному демаршу. Экономическое сообщество западноафриканских стран (ЭКОВАС) направило делегацию в Гамбию, дабы убедить президента подать в отставку [8].

Позднее, в связи с обращением страны-члена ЭКОВАС Сенегала, был созван Совет Безопасности ООН, который единогласно санкционировал интервенцию в Гамбию, Сенегала и Нигерии. 19.01.2017 г. началась интервенция в Гамбию. Однако, уже 20 января контингент приостановил военную операцию с целью «дать шанс Яйя Джамме на мирную передачу власти». Позднее выяснилось, что перед тем, как принять условия ультиматума, Джамме украл почти 11 миллионов долларов, вывез из страны грузовым самолетом несколько дорогих автомобилей.

На данном примере можно констатировать поразительное единодушие всего международного сообщества перед перспективой еще одной, в череде многих, гражданской войны в Африке. Механизм взаимодействия в кризисных ситуациях работает, и действует в целях предотвращения вооруженных конфликтов. Вместе с тем, необходимо обратить внимание, что ЭКОВАС начал интервенцию лишь после подтверждения легитимности данных действий единогласно, всеми членами Совбеза ООН. Давно ли мы могли наблюдать такое единодушие в подобных вопросах, т.е. вмешательство во внутренние дела государства другими региональными державами? Представляется, что нет, и вместе с тем, с сожалением, вынуждены констатировать, что причина единодушия довольно очевидна. В том случае, когда реализации норм международного права не мешают конъюнктурные политико-экономические интересы (например, заинтересованность США в контроле нефтедобывающего региона стран Персидского залива), то международное сообщество в состоянии применить адекватные и соразмерные меры для предотвращения возможного локального вооруженного конфликта. Таким образом, необходимо констатировать важность отграничения различных конъюнктурных вопросов от вопросов международного публичного права. Подобные противоречия на сегодняшний день являются неустранимыми. Но вместе с тем, необходимо находить возможность договариваться со всеми заинтересованными сторонами. Наиболее ярко вышеназванные противоречия видны при дискуссии о реформировании ООН. Прежде всего, стоит упомянуть, что большинство возникших ныне противоречий связано с развалом стран социалистического лагеря. Вызвано это тем, что если во время конфронтации между различными блоками речь шла о идеологических разногласиях, сейчас, чаще всего, конфликты связаны с политико-экономическими интересами. С одной стороны, часто упоминают необходимость расширения числа постоянных членов Совбеза ООН, в том числе с включением туда Германии и Японии[9]. Кроме этого, высказывались фантастические проекты, во время предвыборной гонки 2008 г., республиканцем Дж. Маккейном, о необходимости создания параллельной структуры, вместо ООН. По мнению Маккейна, эта организация должна объединить все «демократические режимы, без России и Китая». Абсурдность подобных проектов очевидна.

В заключении необходимо отметить, что несмотря на огромное количество вариантов реформирования ООН, нужно констатировать невозможность полноценных и масштабных реформ ввиду неразрешимых противоречий между

постоянными членами Совбеза ООН. Вместе с тем, необходимо подчеркнуть, что ООН является безальтернативной организацией для урегулирования международных споров и их предотвращения на стадии возникновения. В то же время, необходимо подчеркнуть важность поиска точек соприкосновения и необходимости конструктивного диалога между членами Совбеза.

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Section 4. Political culture

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THE LEGAL BASIS OF MORAL NORMS IN THE ACTIVITIES OF HEAD

Abstract: This article refers to the establishment of the legal foundations of the moral principles and the rules in an efficient and conscientious performance of their official duties by employees of State and local authorities.

Keywords: State, society, governance, government, citizen, law, spirituality, head, justice, patriotism, interests, morality.

Since the Independence periods until now there has been a great attention paid to the concerns of leadership attitudes and responsibilities, during analyzing the critical and beneficial experiences of the leaders acted in different spheres, understanding of the goodness, depends on the attitudes of leadership has been lighted in. Especially, the first president of the Republic of Uzbekistan Islom Karimov had emphasized too much to the problems related to the leadership and its morality since the first days of our Independence, said: "Firstly, mentality and comprehension is required from leader, as being mentally comprehensive leader, leader person should have strong will, belief and need to be diffident at the the same time" [2, 188]. Obviously, the moral aspect of the issue has found its expression in those opinions. However, if the leader becomes negligent to the tasks given to him and does not feel their responsibility, it demonstrates that the person with those attitudes may be morally disable. Moreover, ethics can act as a criteria signing and emphasizing leadership rules.

In Independence years, over establishing the governance of national state as in the developed countries, organizing it related to the applying improvements in the Republic, there has been a significant results achieved, the specific specialists has been training accordingly. This requires development of practical and theoretical means that can respond to those kinds of necessities, as well as using applied factors in daily routine. Therefore, what is the problems in our implementations on this way and in what kind of things, the reality and general aspects of them has been presented? Through choosing leader personnel and creating their reserve, training, recommending, organizing services for them, learning problems in order to form moral world outlook of them, as well as, developing related rule, norms, regulation, and sufficiently modern scientific-methodical handbooks, it requires to develop scientific and theoretical basics of usage of intellectual resources intelligently. Accordingly, this means that there is an exact system is being organized to motivate and control the functions leader personnel obeying moral norms who is working under the State service [5, 34].

Improvement of social processes is creating a need to fully investigate new problems, develop-

ing methods accepting relationships of the era and manufacture. As to this, adopting of "moral-ethical norms of the State ruling deputies and local legislative authority deputies' personnel" [3, 94-article] under the Cabinet of Ministers of the Republic of Uzbekistan on the second of March, 2016, with the number of 62 means the strengthening of legal basics of demanding requirements from modern personnel. The main purpose of those regulations is to approve principles and norms of morals and ethics of State ruling deputies and local legislative authority deputies' personnel, create opportunities for them to do their tasks honestly and effectively, overcome negligent attitudes in the State service.

Those moral norms of State authority and local legislative authority deputies' employees regardless their job positions, consist of accumulation of basic rules of moral aspects of them during their duty and general principles of job regulations and norms of State authority and local legislative authority employees.

While committing democratic improvements, State employees should do their job according to the principles built on those moral–ethical norms.

Moreover, acting of State authority deputies personnel during their duties according to principles definitely, such as, legitimacy, civil rights, freedom and strengthening of legal interests, love for homeland and devotion to duty responsibility, faithfulness to the State and social interests, loyalty, honesty and neutrality, overcoming colliding of personal interests, it determines legal basics of bringing loyal governance. Therefore, Abu Nasr Farobiy had stated in his thoughts about organizing of state authority and loyal governance that, importance of ruling the state with the persons who are capable in all spheres and gathered humanitarian features themselves. Therefore, he highlights his concept about an ideal and capable community in all spheres that leads the people to the knowledge. Forobiy had claimed that leaders naturally should have twelve features [6, 55].

Therefore, it has been adopted in following rules strictly that State employees are obligatory to those below. Firstly, during implementing their duty tasks, State employees should follow State principles and requirements strictly, doing their duty tasks honestly, committing in higher professional level, completing decrees on time with quality that have been adopted by higher State deputies and higher ranked persons under their powers, implementing their duties according to the their reputation power approved in law documents and internal documents, not to make a favor with someone, groups, organizations and not to surrender to them during doing their tasks, being independent from their influences, accepting civil rights, obligations and their legal priorities, not allowing discrimination situations, ending activities related to influences of some personal, property and other interests that disturb doing their duty responsibilities, obeying to prohibitions and bans that are written in norms and regulation documents and administrative documents, doing their tasks uninterruptedly, overcome any opportunity that effects in order to commit their duty tasks, respecting customs and traditions of nations of the Republic of Uzbekistan and other countries, accepting cultural and other specificities of different ethnic, social groups and confessions, supporting of social stability, international peace and peace between confessions, refraining themselves from attitudes that can create doubts in order to do their duty tasks honestly, not allowing situations that are able to harm their reputation and state deputy's reputation, not using the State deputies, organizations and their higher ranked personnel to illegally impact activities of the citizens, following approved norms while presenting information and task information to the State deputy [3, 94-article]. Activities of State employee and leader person based on above moral-mental principles that bring formation of loyal authority is not only nowadays, but also was important in history.

According to the National governance, High experienced commander Amir Temur during his duty had ruled the State based on the principle "Power is in Loyalty". He had settled governance following to

the twelve rules below: being based on local traditions in that time, ruling the society with dividing it to the twelve positions, cooperating in every work, obeying only to the regulations while governance, commanding the State employees with an encouragement, satisfying citizens, respecting the nation's promoted persons, working courageously, be cautious always about citizen's situation, appreciating the active persons while their duty, not forgetting the works of good persons, sufficiently settling the supply of the army [7, 74–48]. The main purposes of those norms include only civil priorities. Great commander Amir Temur had stated, "Unless the state is not built based on law and order, this empire will lost its power, reputation and stability" [3, 94-article].

Leader person should be an example to the employees under his command with being more professional, honest, and loyal, not to require the employees under his command to do the tasks that are out of their responsibility, as well as not to coordinate them to do illegal acts. The relationships of leader person and employees should be based on moral norms above is very important. Moreover, during ruling, being informed about the employees' plans of leader person, to estimate to them properly, as well as proper setting of the communication to observe their knowledge and activities, firstly, helps to provide strong organization, secondly, not allowing improper acts to appear that do not suit to leader, eases the management. Leader person that is not accepting the employee's existed characteristics and spiritual aspects, sometimes can create conflicts between leader person and employee. Therefore, regardless how strong leader person's requests and requirements are, being the leader person- restrained, active and honest will provide effectiveness of communication.

Leader person should not allow situations such as choosing employees due to objectives of relative relation, native relation and personal trust. They should strictly overcome the image of sectionalism, localism and favoritism, as well as, negative factors during implementing their duty tasks; otherwise, it may cause moral conflict while ruling performance. One of the main reasons of causing of moral conflicts in governing system is dependent on its regard as social institution of specifications and characteristics of its internal relationships. Adaptation of government personnel to the State requirements and norms usually becomes experienced with much complicated moral conflicts. As being special core of social experience, leadership function is based to supply general national preferences and depends on high ethical responsibility. In order to adopt orders at social status, convene of government and responsibility at one point, moral selection process will get complicated and as the result of it, there will be an increase in moral conflicts and tension.

While committing their duty, leader person should take measures on time in order to maintain collapse of personal interests and regulate them, taking steps to overcome corruption, commanding employees effectively, approach to the property and financial funds that are entrusted to them, carefully and economically. Leader person is responsible for not taking measures in order to overcome acts of employees under their command who are breaking ethical principles and laws in duty. One of the main problems in leadership function is the problem of conflicts. It is rather important to determine the condition and factors that may cause conflicts in leadership than overcome the conflicts. Reasons of causing the conflicts are that there is not order and norms in community and opportunity for not obeying of members to it and finally they have been caused as the result of weak moral-ethical condition. As to the experience, more the personnel will be satisfied with their activity, the atmosphere will be healthy. Leader's role is very big to form healthy atmosphere in the community. If leader person obeys to those moral norms and can apply them to the daily job activity of employees, not only increases the healthy atmosphere, but also effectiveness of production will be higher. Sometimes, conception of leader of being strict will tighten the atmosphere in community, cre-

ates stress, everlasting tiredness, disbelief among them, not being hopeful, significantly cause big conflicts.

During their duty, State employees must be open minded, polite, well behaved, cautious, become patient to the relationship with citizens and their colleagues, and respect them. State personnel should not be rude to the employees under their command and citizens, must not discriminate people's honor and price, not to allow conditions that can effect physiologically and physically to them baselessly. While implementing duty tasks, physical appearance of State employees depending on forms of working conditions and task events should help citizens to deal with respectful relationship with State deputy.

Nowadays, implementation of improvements is becoming dependent on how leader personnel dealing with their responsibility. According to this, President of our country Sh. Mirziyoyev has said: "Critical estimation, strict order and regulation and personal responsibility should be daily norms of leader activity" [1, 6]. To conclude, having leader persons of moral-ethical features above can be a foundation to create loyal governing system and to supply improved life standards of the nation.

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Section 5. Public law

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PRACTICES ON BUILDING ETHICS OF PUBLIC AFFAIR IN SEVERAL COUNTRIES AND ITS VALUES TO VIETNAM

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Abstract: Based on the specification of concept of public affairs ethics, analysis of current practices on building ethics of public affairs in several countries such as: Singapore, Japan and France; from achievements of these countries, the article will point out values for building and perfecting the recent ethics of public affairs in Vietnam.

Keywords: Vietnam, Singapore, building, ethics of public, management for public

1. Ethics of public affairs

For the public affairs, it is firstly strongly emphasized definitions of public affairs in term of large coverage and importance of values for the state administration. The public affairs cover the policies of public affairs, public officers (officials), government organization and agencies…The public affairs is a type of power and legal labor executed by the public affair officers for implementation of government policies in process of entire management of social activities or the public affair is considered as a type of social service mainly executed by the officials. The public service is managed by the government policy to implement government obligations and functions for government benefits and compliances of government power and sake. In the dictionary: "*Pratique du Francais* 1987" it is defined that "the public affairs is the work of official". Researchers of Michigan University, America state that the public affairs is "a general conception describing officers recruited by the Government as the officials based on their working functions. Officials are recruited based on current basis, periodically evaluated according to their results of conduct, leveled up based on their performance score and ensured about their work". Doctor Jeanne- Mariecol, America also stated that the public affairs meaning the officials working in accordance with their profession and managed by laws and regulations. The law of public affairs of Russian Federation consider the public affair as the professional work to ensure the authority execution of government agencies. Generally, definitions of public affairs almost state the importance of public affairs in extremely govern and affect the management effectiveness and effect of Government, especially in current innovation of country. A good public affair industry can govern and affect 6 following sectors of the government management: public administration, public goods production and service, economic and social policies, management of project and budget, financial stability and empire development.

Thus, the public affairs is a type of operation in the sake of government power (public power) in accordance with regulations of law and protected by

laws for civil and social benefits. With these values, any nation has to build a public affair industry effectively and especially responsibility of public affairs. The public affair industry of each nation shall be compatible with the applicable political system and government organization. Nations with different political systems and government organization shall define operations of public affairs differently. However, on top of it, it has the same core and objectives. As the above mentioned analysis, for the issue of public affairs, many nations have same concepts that the public affairs is the power operation including executors and their appointed works.

It can be seen that the ethics of public affairs is firstly accumulated by the ethics of officials. Based on personal knowledge, the official as well as other citizens must be the paragon citizen

Firstly, the officials are people building the frame of laws and deeply understand "the root of value" of regulations under laws.

Secondly, the officials are also people conducting implementation, applying the root of values" of laws into the social life.

Thirdly, the official are the citizen and consequently they have to comply general regulations of laws in any position.

The ethics of public affairs is also accumulated from the social ethics of officials.

The social ethics is the paragon of values of each stage of social development and in close connection with various social types.

The officials executing government appointed works are required both personal and social ethics at positive trends and accepted by the socials, on other hand, they must have the ethics of profession according to each specific type of profession.

Due to the officials' special positions, there operations is tightened by high level regulations as well as regulations of laws applied to them and their appointed works.

The ethics of public affairs for the officials must be cover three factors: personal and social ethics; profession ethics; specific regulations of laws for operations of public affairs.

Works covered by the officials is the importation operations of government in world nations. These are operations helping Government building and conducting policies on national development as well as provision of services to the citizen… The official take their responsibilities to their managers and high level managers, and thus, they must take responsibilities to National Assembly and the people.

On other hand, the official conducting government works shall take pressures from relevant interest groups. Thus, core values of public affair operations by the officials are to ensure their operations do not conflict with the benefit.

Based on specific conditions, world countries build for their own criteria on showing core values of the ethics of public affairs. For example: the Law of Public Affairs, UK regulates the ethics of public affairs for the officials:

– Integrity: put preference on top of personal interest.

– Fidelity, truthfulness: must be truthful and public.

– Objectivity: any proposal and recommendation must be based on detail analysis of event, evidence without subjectivity.

– Impartialness: the action should be headed to the benefit of country, but not serviced for any political party and parties have to be mutually fair.

Canada laws of values and ethic of officials also point out 4 groups of criteria on the core values of public affairs, as follows:

– Democracy
– Specialization
– Behavior standard
– People values

The operation of public affair is the implementation of government works by the officials. The view of core values is due to specific conditions of each country. Basis to define the core values may be different between countries, but same in term of general

standards such as: democracy principles and profession standards.

2. Practices on building the ethics of public affairs in several world countries

2.1. Singapore

Singapore is a parlimentary republic country with the main power held by the prime minister and the cabinet. Singapore has more than 114.500 public officials, holding about 5.23% of the labor forces.

For Singarpore – one small island country with its total area equal to Hanoi (Vietnam), the public adminnistration was somehow earlierly set up. From 1970s, the goverment encouraged the officials to give out their innovation on reforming operations of state administrative agenecies. In middle of 1980s, the goverment raise the movement "heading to the innovation" which mainly focused on reommendation to solutions on reforming administration policies positively with the innovation. Up to 1991, the goverment gave out the programe of public affairs named "The public affair indutry of XXI century", with objectives to build the public affair industry effectively, the official should prefer the integrity, devotion and high quality services.

Singapore is one of leading developed and civilized countris in the world. One of main reasons making Singapore developed which should be mentioned is the important role of goverment, managment, excution by the public affair industry with outstanding manager staff. In stradegy of public affair building and development, Singapore centralize on training the leader staff systematically and bassically by the application of modern and scientific training method, especially esteeming young leaders. Singapore also pay attention to the harmony of national labor source, putting the execellent leader, officials in overall balance, developing the talent man nationally; it means that it is to attract and keep the talented man for sectors of enterprise, production, business and social economical fields. The Singapore policies on management and usage of officials are more innovative and revolutionay than European countries, "cronism: is not accepted, which create opputinities for equality, equity, veracity, effectiveness in organization and operation of public affairs, contributing to build the clean and strongly stable state goverment with spirit of impartial and hearty works for the country.

It can be stated that Singapore is a country building and conducting principles and rules for officials earlier and more effectively than other countries of ASEAN. Singapore already issues Laws on ethics of public affairs in order to ensure the integrity of public affair operations, including two main groupds.

Firsly, a group of ethic obligations for public affair operations: neutralist, protection agains the security of country, corruption, ensurement of public affair principles.

For political issues, the officials have their own rights to vote or become a member of a political party. However, the officals are not allowed to take part in political activities or work as a politician if he are still working for the state administrative agencies.

As being appointed as an official, he or she has to committee to keep secrets of official information. If breaking this regulation, the manager or official shall be puished and possibly gon on trial.

Reguluations on anti corruption ensure the integrity of public affair operations. The officials are prohibited to require or receive any gift or reward to mobilize them fỏ their helps in gaining any contracts or cancel contracts or any article bringing benefits to others. The law also cleary define the regulations to stop any mercenary behaviors in public affair services: money, gift, bonus, valuable objects and other properties or joint capital on any propertie; recruited position or other respobsilities; promotion or preference. The officials are not allowed befefit theirselve by the offical information or their positions. They are not allowed to performa in any cases to reduce the prestige of public affair industry or backbite the Government.

The official are not allowed to have a second job, unless the official works outside the public affair indutry withoud enough profession skill. However,

the officials can do addtional lectures or teach extra working hourse in limitation of 6 hours/week.

Secondly, the group of obligations regulation prohibit the officials to receive any gift, participate in business investment activities, statement of properties is also stricly regulated for prevention of behaviors against the laws on the ethics of public affairs.

These regulations prohibit the official from receiving gifts under forms of cash, objects, free travelling or other personal benefits from the citizen, and not allowed to receive any gift from low level official or receive the party invitations from the citizen. In cases the gift can not be refused or it is impolite to return back gift, the offical must take the gift to the chief account for assessment, then, the official is allowed to keep the gift and pay the money to the chief accountant with the amount equal to the value of gift.

One of the same regulation as in Vietnam, the Singapore offcial must state their properties. The statement of properties is conducted regularly at the early year and when an official is newly appointed.

The officials are not allowed to borrow money from their underauthorized people and people in connection with works of official and to make loan for interest. The officials are not allowed to make any business investement to any enterprise in Singapore without being listed in the stock market.

2.2. Japan

Japan is a constitutional monarchy, of which the executive power is weilded chiefly by the Prime Minister under supervision of two houses of national assembly and Supreme Court to prevent any anti-constitutional devisions of government (http://vi.wikipedia.org/wiki/)

The selection method of offcials in Japan is conducted via the examination by the indepent state agency, the Academy of human sources conduct the test annylay at high rate (1/50). Japan evaluates the officials by prefering the selection of well skilled people based on their ethics, team working skills, dedicating for reputation and benefits of agencies; the evaluation of official's archivement is by the whole archivement of collectives, agencies where they work; especially for the leaders; via the truthfullness of the same level officials inside and outside the agencies; visa the planning on cycling in order to train the outstanding officials with the three standards: highest ability, large experience and long term service. The regime and policies of Japanese officals is seriously recognized. The main income of officials includes the salary and allowances, bonus [17].

The Law on public affair of Japan denite the objective to ensure the reliability, truth of the people for the public affair industry, avoiding the suspection and inbelive from the peoplw, since the officials are public servant of the people, the obligations of officials is to conduct duties authorized by the people.

The authorization is emphasized for the purpose that the officials understand their positions (public servant) and their source of power (authorized by the people)) [10, 26].

The law also specifizes the allowed and unallowed works of officials, the obligations and duties of Japanese officials are as follows:

As working as representatives of the Goverment, the officials are not allowed to work as a collective strike. During working hours, they have to give their whole mind to their works.

The officials are not allowed to require or receive any money collected by the people or other benefits from political parties servicing political purposes. The officials are not allowed to participate in political activities a part from the election right [13].

The officials are not allowed to be candidates for pulic officers via vote.

The officials must undertake works in accordance with laws, command, principle and rules.

To ensure the integrity, the state officials are not allowed to keep any positions of enterprises and to establish any enterprise.

The establishment of officials in Japan has its own specific culture, creating a source of officials appreciating their own honour, self-respection, good ethics,

outstanding abilities in accordance with requirements of Japanese official operations [17, 101].

2.3. France

France is a presidential republic, paying the serious attention to build and conduct the public affair industry, officials, especially Laws on public affairs and Laws on public officials.

In France, the official is considered as the people recuited and appointed to work in state agencies, public services organization managed by the goverment centrally and locally.

The Laws on public officials of France was amended and added in 1983, 1985 and applicable up to now, of which emphasizes: 1. To ensure the independence of officials as excution of public affair: the official must totally dedicate their proffession activities to their appointed works. The officials are not allowed to take advantage of their profession for their own befenits from personal behaviors under any form. The officials are not allowed to get benefits directly or Indirectly from enterprises under the supervision of or in connection with their agencies, otherwise it will negatively affect on the independence of offficials.

The public affair ethics of French officials also present the communication approach. The Law on public affairs of France regulate 15 behaviors considered as non reputation on keeping the discreet. It means that beside keeping their reputation of positions, they should involve their principles of communication based on their levels and the neutrality of public service; avoiding the extreme and the cruising critic or wrong facts. The remaining of the reponsibility of official is suppervised by the administration court, in case of violation, they can be punished according to the penalty frames.

The French officials at any level with violation of public affair ethics shall be punished by pending their position, especially their violations in public affair excution, excluding punishment frames according to regulations of the criminal law. The position pending of official shall be conducted within 04 months. If it expire the deadline without any decision by authority, the officials shall return their positions, unless they are brought into court under the criminal law.

For Unrighteous profit of French officials as they supervise, manage, make payment, cleary stated as follows: In cases the official power authorized by the state or being responsible for a public service, including a person voted by the citizen, takes, receives or keeps (directly or indirectly) any profit of an enterprise or public affair activity shall be 5 years jailed and 0.5 millions fran fined [18].

In France, all public affair fields and private fields are restricted. The France Government strongly support actions enhancing the transparency and responsibility of public services. One of these actions is that France has been building the draft of Laws on profession ethics and rights, obligations of officials. The Draft includes 03 main objectives:

+ To enhance roles of values and profession ethics.

+ to modernize rights and obligations of officials.

+ To reconfirm the obligation: setting an example of leaders.

Main content of the draft:

+ To avoid the conflict of interest: solutions on protection of officials as their conductions; increasing obligations of crisis officials; protection of official as their warning obligations.

+ To prohibit many concurrent positions.

+ The Committe of profession ethics control strictly the leave from the offical affairs to private sectors (Jean FrancoisFrancois Verdier, Former General Director of the Department of Administration and Public Affairs, France, currently General Financial Controller, Ministry of Finance and Economy, France).

3. Values to build and enhance the ethics of public affair in Vietnam

3.1. Values to build the public affair ethics of the officials

One thing can be reliazed that the form and method of building the ethics of public affair in many

countries are various. The buillding and conduction of public affair in each country are due to the nature, social performance, socio-economic development level, cultural practice,... Even the experience and innovation of regional and internaltional countries are to enhance the ethics of public affairs such as Singapore, Japan, France.. have some different points, but also same points and valuable references for Vietnam. Vietnam can research, study, inherit, selectively accept, creatively apply to the process on building and enhancing the public affair ethics of officials.

Firstly, for the cognition, many countries clearly define the critical role for the public affair industry is the official and the public affair ethics for the develoment of each country. To heighten the public affair ethics is to purge the goverment organization. The values of Vietnamese offical together with the offical of international countries are truthfullness, respobsibility..., as shortly name the integrity. This issue is summarized by President Ho Chi Minh in four words: hard work, savings, integrity and straightforwardness in pubic affair excution.

Secondly, Most of countries clearly define principles of public affair activities for the officials. The principle on the ethics of official as excution of public affair is always heightened, consider as the gold princile of officials.

Thirdly, the official is the leader with the brigh expample. As in an agency, the behavior, reponse of the leader is an mirror for the official to orient. If a leader prefer going to work in time, if the leader is a mirror of ethics of reponse everday, most of officials are interested in the ethics of public affairs. Regulations on the ethics of public affairs are alway recalled in many meeting, but how it is performed actually. The behavior of leader is tolarant or firm for cases of public affair violation. The education on the ethic of public affair is to improve the attitude and behavior of leader and manager levels firstly. As in a summary report on the ethics of public affair and anti-corruption, an Singapore officer many international friends released disappointingly to him that, "in my country, there are enoug agencies such as: Parliament, anti-corruption agency, state audit agency, full coverage of law regulations, procedure regaluation, but the corruption problems are existing in everywhere".

Fourtly, public and impartial implementation of administrative prodecures; the rights and obligations of officials in each sector, contribute to reduce and come to remove multivalent and troublesome behaviors. Additionally, the express and communication media also participate in excavating behaviors violating the ethics of officials and respecting the mirrors on the ethics of officials, largely contribute to the education on the ethics of public affairs for the officials.

Fifthly, it is neccessary to enclose the ethics of public affairs together with actions agaist negative issues, especially the anti-corruption action.

3.2. Values in training, recruiting in orientation of enhancing the ethics of public affair excution for the offcicials

Recruiting, training, developing the official is a not simple work. How to train the officials with enough awareness and matching requirements on hard work, savings, integrity and straightforwardness in the public affair execution? From the experiences of the above countries, each country has its own social economic condition, the different political system and their methods of government conduction and organization are not totally identical, but these countries have some same views and approaches on training and developing the officials oriented to the good profession skills and ethics, as follows:

Firstly, the theory of "forever learn" is applied for the training and development of the officials.

Secondly, one of the selected leading officials is talented, outstanding students with the excellent study results from local and international big universities.

Thirdly, the quality of entry is one of the factors critical to the professional and ethic officials. Candidates shall pass over difficult test and meet strict standards: all tests are publicly and seriously conducted. These tests are independently held by one state agency.

Fourthly, To be an official or a manager, he has to do practices via recycling, transferring different positions and even by the practice training in different authority levels.

Fifthly, training course not only include professions prefer to each position of leader, manager, but also skills of leading, management and circumstance handling.

Sixthly, the method of training is the proficient combination between theoretical training and practical training on handling circumstances practically happened in state agencies.

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Section 6. Theory and History of State and Law

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FORMATION OF LEGAL CONSCIOUSNESS AS A PRODUCTIVE MEANS OF PASSING THE LEGAL SOCIALIZATION OF JUVENILES

Abstract: The problem of formation of legal awareness of minors is not only dictated by our theoretical interest, but also by the demands and needs of society in the process of their successful legal socialization. Therefore, the starting point of this article was the analysis of peculiarities of formation of legal consciousness of minors in the mechanism of legal socialization.

Keywords: consciousness, legal socialization, legal nihilism, sense of justice.

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ФОРМИРОВАНИЕ ПРАВОСОЗНАНИЯ КАК ПРОДУКТИВНОЕ СРЕДСТВО ПРОХОЖДЕНИЯ ПРАВОВОЙ СОЦИАЛИЗАЦИИ НЕСОВЕРШЕННОЛЕТНИХ

Аннотация: Обращение к проблеме формирования правосознания несовершеннолетних продиктовано не только нашим теоретическим интересом, но и запросами и потребностями общества в процессе их успешной правовой социализации. Поэтому, отправным пунктом настоящей статьи стал анализ особенностей формирования правового сознания несовершеннолетних в механизме правовой социализации.

Ключевые слова: сознание, правовая социализация, правовой нигилизм, правосознание.

Формирование правосознания несовершеннолетних не может существовать без обретения в общей системе знаний, знаний и представлений о нормах и принципах самого права. А знания о праве и его нормах, в свою очередь способствуют тому, что в сознании личности право предстает в виде правовых явлений, выражающих отношение людей и социальных групп к праву и правопорядку. Исходной основой правосознания является отражение осмысления и усвоения правовых знаний, выступающих его органической частью, и выработка практических умений и навыков по

их реализации. Последнее обусловлено самой сущностью и характером требований, выдвигаемых процессом правовой социализации к индивиду, с целью вырабатывания у человека представлений о своей социальной роли и месте в обществе.

В этой парадигме правовая социализация, как важный механизм адаптации индивида в области права, направлена на решение не простых, а сложных задач, включая и практические задачи, приводящие индивида к объективизации деятельности. Этот процесс возможен при воссоединении правосознания и правовой социализации.

Более того, органическая взаимообусловленность правосознания и правовой социализации характерна для реальной деятельности индивида и служит в качестве практического инструмента его самоопределения в социально-правовой действительности. В этом механизме правосознание выполняет присущую ему функцию регулирования поведения человека, на что, в целом, направлены функции, и в чем состоит назначение процесса правовой социализации.

С другой стороны, в самом механизме формирования правосознания процесс правовой социализации занимает подчиненно-зависимое положение. И это объясняется тем, что правосознанию присуще выполнение ролевой и нормативной регуляции поведения индивида в социально-правовых реалиях. А правовой социализации свойственно вхождение индивида в социально-правовые практики, что невозможно без соответствующего уровня правосознания.

При таком подходе в центре внимания находится отражение правовых явлений и процессов в сознании индивида, которые были накоплены в процессе целенаправленной воспитательной работы субъектов. Именно это обстоятельство вынуждает нас рассматривать правосознание в качестве продуктивного средства для прохождения успешной правовой социализации несовершеннолетних, а также высказать свое мнение по поводу существующих научных определений правосознания. Для раскрытия поставленного вопроса целесообразно также рассмотреть понятие «сознание».

Сознание – это продукт общественно-исторического развития, психическое отражение внешнего мира (предметного, понятийного) и мира внутреннего (мира чувств, телесных ощущений, мыслей, самосознания), [27, 9] но оно и главный регулятор человеческой деятельности, чем и обусловлена специфика и функционирование правосознания, как самостоятельной формы общественного сознания. В свою очередь, общественное сознание является многокачественным явлением, [16, 192] выраженным в языке, в науке и философии, в произведениях искусства, в политической и правовой идеологии, в морали, религии, мифологии, в народной мудрости и социальных нормах, в представлениях различных классов, социальных групп и человечества в целом. [25, 38]

По словам В. Л. Васильева, «правосознание – это одна из форм общественного сознания, отражающая общественные отношения, которые регулируют или должны быть урегулированы нормами права, чье содержание и развитие обусловливается условиями существования общества». [5, 141] Последнее становится для человека регулятором поведения, своеобразной формой реализации права и, соответственно, способом его исполнения. Точнее, вне сознания человека невозможно регулирующее воздействие права, его функционирование также не может быть оторвано от сознания, что и предопределяет его ценностную характеристику, как регулятивного феномена.[21, 54] В силу этого, правосознание – это регулятивный феномен, который рассматривается как совокупность психического отображения права.[23, 950] Право – один из важнейших социальных регуляторов в условиях государственно-организованного общества, вследствие чего и правовое регулирование – один из важнейших видов социального регулирования.[28, 122] В са-

мом общем значении правосознание – это отношение людей к праву,[1, 64] так как оно влияет на развитие права и формы его реализации.[2, 114] Именно по этой причине в механизме правового регулирования роли правосознания отводят первое место [18, 333].

Подобный подход к проблеме правосознания представляется важным, так как правосознание не просто отражает содержание права, правовые идеи и ценности, а является его важнейшим элементом, своего рода несущей конструкцией всей его модели. Ведь только проходя через правовое сознание, политические, экономические и другие социальные факторы, воплощая норму права, становятся юридически обязательными и всеобщими формами регуляции поведения. Отражение права в сознании индивида является необходимым условием для оценки правового сознания как регулятивного феномена.

Конечно, правовая социализация несовершеннолетних непосредственно связана с различными факторами и общественными преобразованиями. Эти факторы либо создают объективные условия для успешного прохождения правовой социализации, либо нет. Однако, наряду с объективными условиями, на формирование правосознания непосредственно влияет и целенаправленная деятельность по изучению права. Но и в этом процессе также проявляется правовая социализация, посредством которой происходит укрепление правовых норм и кристаллизация ценностей в сознании личности и социальных групп [29, 30]. Данный вывод объясняется тем, что деятельность по овладению правовыми знаниями немыслима без участия сознания, так как объектом воздействия этой деятельности является правосознание. [24, 144] Что касается его развития, то оно зависит от материальных условий существования общества [6, 130]. Как отмечает В. С. Нерсесянц, его уровень зависит от нравственности, уровня экономического развития страны, материального благосостояния народа [22, 385].

В этой связи, в «Большом юридическом словаре» и в «Юридическом энциклопедическом словаре» понятие правосознания определяется как «сфера общественного, группового и индивидуального сознания, [3, 468] связанная с отражением правозначимых явлений и обусловленная правозначимыми ценностями, правопониманием, представлением должного правопорядка». [30, 314] Поэтому, некоторые исследователи рассматривают правосознание как форму общественного сознания, связанную с отражением представлений о праве. Схожую формулировкупонятия правосознания в своем учебнике «Юридическая психология» предлагает М. И. Еникеев: «Правосознание – сферасознания, связанная с отражением правозначимых явлений, совокупность взглядов и идей, выражающих отношение людей, социальных групп к праву и законности, их представления о должном правопорядке, о правомерном и неправомерном» [11, 25]. При этом важность и значимость феномена правосознания обусловливает его рассмотрение в качестведуховного компонента, определяющего поведение и внутреннюю жизнь человека. Как сложное духовное образование, оно складывается из представления людей о праве (прошлом, действующем, желаемом в перспективе), из субъективного, эмоционального оценочного отношения к правовым явлениям и готовности действовать в юридическизначимыхситуацияхв соответствии с нормами права (или вопреки им) [12, 32]. Между тем, с точки зрения В. В. Касьянова и В. Н. Нечипуренко, «правосознание – это объективносуществующий набор взаимосвязанных идей и эмоций, выражающих отношение общества, групп, индивида к праву – этому целостному социальному институту, его системе и структуре, к отдельным законам и характеристикам правовой системы» [17, 280]. Аналогичныедефиниции можно встретить и у А. Б. Венгерова, который считает, чтоправосознание– это «объективно существующий набор взаимосвязанных идей, эмоций, выражающих отношение общества, групп индивидов к праву… »

[7, 375–376]. Или у А. С. Ибраевой, которая пишет, что«правосознание есть система чувств, эмоций, взглядов, идей, теорий, традиций, переживаний и других духовных проявлений, выражающих отношение граждан как к действующему законодательству, юридической практике, правам, свободам и обязанностям граждан, так и к желаемому праву» [13, 167]. Из этих определений следует, чтоотражение правовых идей и эмоцийв сознании индивида является не только важным, но и необходимым для его познанияправа и реализации этих знаний на практике, посредством выраженияего отношения, как к отдельным законам, так и к действующей правовой системе общества в целом.

Более того, правовые идеи и эмоции связаны с мотивационно-побудительной системой личности, как непосредственным двигателем ее сознательной деятельности, которая может оказывать заметное влияние на выбор формы поведения. И это закономерно, так как правосознание – это совокупность рациональных и психологических компонентов, которые не только отражают осознание правовой действительности, но и воздействуют на нее, формируя готовность личности к правовому поведению [19, 18]. Это означает, что правосознание в той или иной мере выполняет свойственную ему функцию – регулировать поведение человека. А в нем отражается отношение (одобрительное или негативное) к существующему праву и правовая система в целом.В этом свете правосознание предстает как важный канал воздействия права через призму мотивацию, эмоции, сознание, на поведение людей, на формирование общественных отношений [7, 376]. Следовательно, правосознание, как элемент правового воздействия, характеризуется как:

1) нематериализованный элемент правового воздействия, действующий через волю и сознание людей;

2) универсальный элемент правового воздействия, существующий на всех этапах правового регулирования;

3) источник права, отражающий объективные потребности развития общества [26, 7].

Иной подход к определению правосознания у В. С. Бредневой, по мнению которой«правосознание – это не только совокупность правовыхвзглядов, идей, представлений, убеждений, оценок, настроений, чувств, правовых установок, но испецифическаяфункция особым образом организованной материи (человеческого мозга) отражать явления правовойдействительности и целенаправленно регулироватьсвое взаимодействие с ней» [4, 25]. Это определение отличается от другихтем, что его автор обращается к человеческому сознанию, как кключу для определения действительных границ того мира, в котором освоение правовой действительности и его смысловая значимость для человека предметно определены. Подобное определение правосознанию дает и А. В. Мелехин, которыйпишет, что «правосознание – это совокупность идей, представлений, чувств, переживаний, выражающих отношение людей к правовым явлениям общественной жизни (законам, законности, правомерному и неправомерному поведению, правам, обязанностям, правосудию)» [20, 473]. Данное определение правосознания ближе к жизни, так как оно отражает необходимость активного отношениячеловека к нормам права и правоотношений, а это – не что иное, как отражение правовых явлений правосознанием, когда совокупное влияние обстоятельств на сознание человека, требуетот негоопределённого поведения и активности. Это краткое обобщение показывает отношение человека к правовым явлениям и ценностям, которое воспроизводятся его правовым сознанием.

Следует отметить, что правосознание – это многоаспектный правовой феномен, включающий в себя его понятие, субъекты, объекты, виды и способы его формирования и т.д. В юридической литературе отмечается и его многогранность. Так, по словамА.В. Грошева, правосознание – это «способ: а) осознанияс точки зрения

общественных потребностей, интересов (классовых и общественных) необходимости в правовой регламентации определенных общественных отношений, установления правового режима в обществе; б) отражения общественных отношений, урегулированных нормами права и нуждающихся в правовом регулировании, а также юридических норм, правоотношений и других правовых явлений, связанных с действием права и составляющих правовую надстройку общества; в) регулирования поведения людей – участников общественных отношений, выступающий, с одной стороны, источником права, а с другой-средствомпсихологического воздействия на сознание граждан».[10, 11–12] Из этого определения следует, что правосознание – это способ, и в зависимости от воздействия на него, происходит осознание и отражение права. Его регулятивные свойства предназначены упорядочивать поведение людей в сфере отношений, регулируемых правом. Более того, как способ отражения, оно предназначено для накопления норм и ценностей права, и по-иному его можно назвать правовым багажом человека. В связи с этим, данный автор предлагает рассматривать правосознание в качестве источника права, а активным механизмом воздействия на него –воспитание правосознания, правовую пропаганду и правовую социализацию.

Кроме того, правосознание в духовном смысле воспринимается как важнейшая форма освоения мира. Этого взгляда придерживается Е. М. Гавриш, который считает, что «правосознание есть важнейшая форма духовного освоения мира. Как интегральный феномен, играющий роль важнейшего источника правотворчества и значимого фактора правоприменения, оно отвечает за возможности соизмерять правовую действительность с назревшими общественными потребностями» [9, 209]. Эта формулировка приближена к предметной направленности содержания правосознания, которое, как важный компонент духовного освоения мира человеком, играет важную роль. Учитывая это свойство правосознания, известный ученый И. А. Ильин называет непременной составляющей правосознания «силу духа», и так формулирует его проявление: «я есть личность с духовным достоинством и правами; я знаю, что мне можно, должно и чего нельзя; и такую же свободную и ответственную личность я чту в каждом другом человеке. Человек, имеющий здоровое правосознание есть свободный субъект прав; он имеет волю к лояльности (законопослушанию), он умеет блюсти и свои, и чужие полномочия, обязанности и запретности; он есть живая опора правопорядка, самоуправления, армии и государства. Человек, лишенный правосознания, подобен зверью и ведет себя, как волк. Человек, способный к повиновению только из страха, превращается в волка, как только отпадает страх. Человек без чувства ответственности и чести не способен ни к личному, ни к общественному самоуправлению, а потому не способен и к демократии» [15, 31]. В то же время, автором отмечается, что «поэтому нормальное правосознание есть, прежде всего, воля к цели права, а потому и воля к праву; а отсюда проистекает для него и необходимость знать право и необходимость жизненно осуществлять его, т.е. бороться за право. Только в этом целостном виде правосознание является нормальным правосознанием и становится благородной и непреклонной силой, питающейся жизнью духа и, в свою очередь, определяющей и воспитывающей его жизнь на земле» [14, 158].

В целом, в научных работах проблемы правосознания рассматриваются с разных сторон: общефилософской, религиозной и антропологической, классовой, отражающей определенные экономические отношения и отношение людей к праву и т.д., что имеет важное теоретическое и практическое значение. Однако здесь важно понять, что правосознание выступает первоначальным фактором правовой социализации человека, выполняющего функции своеобразного канала передачи информации от правовой системы к субъекту, без которого

невозможно существование правовой системы, правотворчество и реализация права. [26, 7] Главное, что оно исполняет роль не только в регулировании поведения, но и в удовлетворении внутренних и внешних потребностей человека.

Таким образом, для того чтобы человек мог выстраивать свои отношения с реальной правовой действительностью, ему следует пройти все этапы и процессы формирования правосознания, непосредственно связанные с деятельностью социальных институтов воспитания. Также в этом процессе важны ориентиры личности, неразрывно связанной с социально-правовыми условиями и установками общества, которые составляют содержательную основу правосознания, что никто не будет оспаривать, так как правосознание – составной компонент общественного сознания. Оно аккумулирует социально-правовые идеалы общества, основные нормы и принципы права, основы овладения правовыми знаниями, навыками и практическими умениями, продуцирует правомерное поведение, чувство юридической ответственности за соблюдение законности и правопорядка.

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THE HISTORICAL ASPECT OF CORRUPTION AND STRUGGLE AGAINST IT

Abstract: This article analyzes the reasons for the sustainability of the phenomenon of corruption to attempts it eradicate, assesses the effectiveness of various methods of fighting corruption, and predicts the conditions under which anti-corruption legislation will have a positive effect and a stable dynamics of the fight against corruption.

Keywords: corruption, image of the country, anti-corruption legislation, bribery, corruption prevention.

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ИСТОРИЧЕСКИЙ АСПЕКТ ВОЗНИКНОВЕНИЯ КОРРУПЦИИ И БОРЬБЫ С НЕЙ

Аннотация: в данной статье анализируются причины устойчивости явления коррупции к попыткам его искоренения, оценивается эффективность различных методов борьбы с коррупцией и прогнозируются условия при которых антикоррупционное законодательство даст положительный эффект и устойчивую динамику борьбы с коррупцией.

Ключевые слова: коррупция, имидж страны, антикоррупционное законодательство, взяточничество, профилактика коррупции.

Коррупция издревле входит в число наиболее острых проблем любого государства – высокий уровень коррупции ухудшает имидж страны, её инвестиционную привлекательность, способствует ее экономической и политической изоляции. Хозяйствующие субъекты вынуждены учитывать в договорной работе коррупционные риски, в том числе и при заключении предварительных договоров, предметом которых являются обязательства сторон по заключению договора в будущем.

Явление коррупции (взяточничество, подкуп и др.) известно человечеству с древних времен. Об этом говорят, в частности, дошедшие до нашего времени письменные документы из архивов Древнего Вавилона, знаменитые законы Хаммурапи, Законы двенадцати таблиц, античные труды древнегреческих философов Платона и Аристотеля.

Другими словами, история коррупции не уступает по древности известной нам истории человеческой цивилизации, где бы она ни творилась: в Египте, Риме или Иудее. Еще Аристотель утверждал, что: «Самое главное при всяком государственном строе – это посредством законов и остального распорядка устроить дело так, чтобы должностным лицам невозможно было наживаться» [1].

Аристотель также называл коррупцию важнейшим фактором, способным привести государство «если не к гибели, то к вырождению». Понятие коррупции в Древней Греции имело в большей степени морально-нравственную окраску, в Древнем Риме имело юридическое значение. В то же время, в Японии и Китае государство рассматривалось как «большая семья», где подарки «старшим» – это норма поведения и своеобразная традиция.

В средневековой Европе коррупция считалась дьявольским соблазном и в то же время процветала торговля индульгенциями, церковными санами – что в настоящее время считается коррупцией. Борьба с коррупцией отождествлялась с борьбой с искушением, что было обусловлено религиозными представлениями того времени.

В период Нового времени, с появлением в Европе централизованных государств, появилась торговля государственными должностями, «парламентская» коррупция, которая в дальнейшем продолжает свое развитие. В это время зарождается представление о коррупции, близкое к современному пониманию этого явления. Макиавелли относил явления коррупцию к процессам, которые «постепенно уничтожали добродетель граждан. В трудах Руссо, Монтескье коррупция была показана как социальная болезнь, мешающая нормальному функционированию и развитию государства и общества.

В XX веке коррупция рассматривалась как «поведение, отклоняющееся от преобладающих в политической сфере норм и обусловленное мотивацией получения личной выгоды за общественный счет». В дальнейшем многие исследователи понимали под коррупцией девиантное поведение политических элит, влияющее негативно на общество в целом.

Конвенцией Совета Европы понятие коррупции сведено к подкупу, при этом коррупцией считается подкуп государственных служащих, частных управляющих, иностранных должностных лиц и служащих международных организаций. В конвенции ООН коррупция не сводится к подкупу, и включает в себя широкий перечень корыстных служебных злоупотреблений.

Коррупция – социальная болезнь общества, которая обусловлена наличием противоречий между индивидуальными целями членов общества и целями общества. Можно отметить, что все исследователи видят суть коррупции как социального явления в разложении государственной власти.

Широкое распространение получила коррупция в российском государстве – процветанию мздоимства способствовала система «кормления». Понятие взятки («посула») упоминалось еще в Псковской Судной грамоте (1397). Первые ограничения коррупционных действий ввел Иван III, затем Иван Грозный ввел смертную казнь за чрезмерность во взятках (1550), отменил систему «кормлений». Наказание за взятки представляло собой временное или бессрочное тюремное заключение.

Борьба с коррупцией велась Петром I, когда он ввел Воинский устав, где определялась ответственность за получение взятки, нарушение служебного долга и преступления, совершенные за взятку – от вечной ссылки с вырыванием ноздрей и конфискации имущества до смертной казни.

Александр III (1884) установил правила, запрещающие совмещение государственной службы и предпринимательской деятельности.

В Советской России, после революции (1917), взяточничество и покушение на него каралось лишением свободы и принудительными работами на срок от 5 лет. В СССР не признавалось наличие коррупции, и не было специального антикоррупционного законодательства. Однако это не может свидетельствовать об отсутствии в этот период коррупционных проявлений. Исследователи констатируют большое разнообразие форм и видов проявления коррупции в постсоветском обществе [2].

Подводя итог вышесказанному можно констатировать, что, изначально коррупция воспринималась обществом как злоупотребления с точки зрения моральных и этических норм, а по мере становления правового общества ее начали оценивать с точки зрения права. Социальный аспект коррупции подразумевает под этим понятием разложение власти на основе корыстных мотивов. Правительство большинства стран внедряют антикоррупционные меры, к ним относятся различные нормативно-правовые акты и надзор за их выполнением, а также пропаганда антикоррупционного поведения. Таким образом государство мотивирует граждан соблюдать антикоррупционное законодательство.

Однако, несмотря на предпринимаемые антикоррупционные меры, Россия, по итогам 2016 года, заняла 131 место в рейтинге по индексу коррупции, который ежегодно составляет международная организация TransparencyInternational. На одном уровне с Россией в этом списке находятся Иран, Казахстан, Непал и Украина.

В 2016 году в России было выявлено свыше 325 тысяч коррупционных правонарушений, почти каждое четвёртое из выявленных нарушений связано с предоставлением государственными и муниципальными служащими неполных или недостоверных сведений о доходах. Хотя в ФЗ «О противодействии коррупции» говорится о квалификационных требованиях, в современной России часто приходится сталкиваться с тем, что должность муниципального государственного служащего занимает человек без диплома о высшем образовании или с «купленным» дипломом.

Это указывает на слабую эффективность антикоррупционных мер, применявшихся до последнего времени. Нужно напомнить, что еще в 1999 г. Россией была подписана Конвенция Совета Европы, в 2006 г. ратифицирована Конвенция ООН против коррупции. За последующие несколько лет произошло основательное реформирование законодательной базы, сформирована твердая нормативная основа для осуществления мер по борьбе коррупцией, которая ведется по всем направлениям.

В 2008 году был подписан указ Президента Российской Федерации «О мерах по противодействию коррупции» от 19.05.2008 г. В соответствии с ним в России был создан Совет при Президенте Российской Федерации по противодействию коррупции, утвержден Национальный план противодействия коррупции. В нем говорилось о межведомственной координации антикоррупционных действий, а также о профилактике коррупции, в частности, через развитие общественного и парламентского контроля над соблюдением антикоррупционного законодательства. План, рассчитанный на два года, обновлялся в 2010, 2012, 2014 и 2016 годах.

В декабре 2008 года принят пакет антикоррупционных законов, в том числе Федеральный закон «О противодействии коррупции». Согласно статье 1 закона № 273-ФЗ, коррупция – это «злоупотребление служебным положением, дача взятки, получение взятки, злоупотребление полномочиями, коммерческий подкуп либо иное незаконное использование физическим лицом своего должностного положения вопреки за-конным интересам общества и государства в целях получения выгоды в виде денег, ценностей, иного имущества или услуг имущественного характера, иных иму-

щественных прав для себя или для третьих лиц либо незаконное предоставление такой выгоды указанному лицу другими физическими лицами».

По новому законодательству было ужесточено регулирование коммерческой деятельности бывших чиновников, а действующих обязали сообщать о фактах склонения их к коррупционным действиям. Уголовная ответственность устанавливается УК РФ, это ст. 201 «Злоупотребление полномочиями»; ст. 204 «Коммерческий подкуп»; ст. 285 «Злоупотребление должностными полномочиями»; ст. 290 «Получение взятки»; ст. 291 «Дача взятки». КоАП России дополнен ст. 19.28 «Незаконное вознаграждение от имени юридического лица».

На сегодняшний день в законе существует множество составов правонарушений, непосредственно связанных с проявлениями коррупции. На основе тяжести ответственности коррупционные правонарушения в сегодняшнем законодательстве РФ можно условно разделить на 4 группы: уголовно-наказуемые, административно-наказуемые, гражданско-правовые и дисциплинарные.

Это во многом перекликается с тем, что для улучшения антикоррупционного климата международные организации рекомендуют принять законы о лоббистской деятельности, о защите заявителей о коррупции, об обязательном реагировании правоохранительных органов на результаты общественных и журналистских расследований, принимать участие в международном сотрудничестве по возвращению активов и установлению бенефициарных собственников, принять меры по обеспечению независимости хозяйственной деятельности судов от органов власти, исключить влияние органов власти на избирательный процесс.

Предполагается, что эффективное применение действующего антикоррупционного законодательства в тесном взаимодействии с активной пропагандой антикоррупционного поведения должно способствовать положительной динамике искоренения явления коррупции в России.

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Contents