Belyaeva Galina Serafimovna

LEGAL PROCEDURE: CONCEPT, FEATURES AND TYPES

No. 3, 2015

To date, in legal science there is a significant number of works devoted to the study of issues regarding legal means, and only one of them is directly devoted to procedural and legal means. In order to fill the gap in the study of procedural and legal means, this article discusses the main approaches to the definition of legal means, analyzes and determines their signs and grounds for their classification, characterizes the procedural means that form the basis of the mechanism of procedural and legal regulation: procedural norms, procedural relations, procedural acts. Various general scientific techniques and methods of logical cognition are used: analysis and synthesis, abstraction, modeling, system-structural, functional and formal-logical approaches. Private scientific methods are represented by formal legal, comparative legal and the method of interpreting the norms of law. Summarizing the features of procedural means, the author comes to the conclusion that procedural means are such legal instruments and acts that, when properly selected and used, create the most favorable environment for resolving legal cases. Procedural means contribute to the proper implementation of substantive norms and in their totality form procedural mechanisms and procedural regimes.

Polyakov Sergey Borisovich

FORM OF RIGHT OR ARBITRATION?

No. 3, 2015

In recent years, many scientific works have been written to substantiate such a form of law in the Russian legal system as judicial precedent and (or) judicial practice. It is substantiated by factors that can be denied only by turning a blind

eye to legal practice, the inevitability of judicial lawmaking and the actual creation of legal norms by the courts. At the same time, scientists who defend the judicial precedent as a form of Russian law do not put forward the idea of parallel lawmaking, and even more so the supremacy of judicial lawmaking over the legislative one, assigning it subsidiary significance to the normative legal form. Increasingly rare arguments against judicial lawmaking represent a negative assessment of specific judicial acts, cited as precedents, on the principle of "this should not be," but not a refutation of their actual regulatory significance for an indefinite circle of persons and repeated application. At the same time, the obvious fact is ignored: not a single body in the Russian legal system can revise judicial acts, which in fact change the norms of law established by law. The first approach, however, in order to validate the idea that has captured the mind, emphasizes only the positive importance of judicial lawmaking for the rule of law. It should be built into existence, but existence is not a must-Noe . As a result, the actual actual judicial lawmaking, which is not bound by any laws and authorities, does not receive adequate reflection in science. This article shows, firstly, the regulatory significance of judicial acts, and secondly, their regular and natural violation of the rule of law in modern conditions. This is a statement of the problem of limiting judicial lawmaking in the Russian legal system.

Tilman Bezzenberger

Marie France Nicholas as Magvin

Does the principle of abstractness make sense? Comparative analysis from the point of view of German and French law .

No. 3, 2015

The principle of abstraction in German civil law states that the transfer of title to an object (e.g. transfer of ownership of a thing) is carried out on the basis of an independent contract, the legal consequences of which arise regardless of

whether there is an effective basis of obligation (e.g. sales contract)). In this paper, this principle is examined in comparison with French law, in which there is no division into a contract of obligation and a contract for the transfer of property. The authors conclude that the practical benefits of the German abstract principle are very limited. Of course, this principle strengthens the security and reliability of legal circulation , and also provides clarity in property relations. However, when it comes to transferring ownership of a thing, French law succeeds by other means, at least as successfully. In the case of the transfer of claims and other rights, the German abstract principle has certain advantages, although they are not great.

Goetz Schulze

Moral imperatives in international civil law

No. 3, 2015

Moral claims define the ethical positions of values that are difficult to take into account in legal discourse. The first section of the article examines the moral implications of legal claims in the sphere of substantive civil law, which can be defined as “ minima moralia ” of civil law. Moreover, moral claims exist as a social phenomenon. They are characterized by the uncertainty of pursuing a fundamental goal that is considered good. In international civil law, the ethical axiom of mutual recognition takes on a specific meaning. In this case, recognition refers to the other's claim to recognition. At the same time, another in international civil law can be both an individual and a state. Claims for self-determination of states and individuals are given form by law. State law should be viewed as an achievement of culture. Consequently, in the presence of a strong connection with the facts, legal ethics requires the application of foreign law as a matter of respect for the state and the citizen. In addition to the legal ethics generated by the cosmopolitan consciousness, it is necessary to supplement the applicable law with cultural values. Legal “gateways” for these kinds of ethical aspects are general

conditions such as goodwill. Thus, the doctrine Jaime [Jayme] of "moral coordinates" acquires legitimacy by legal ethics. In addition, ethical virtues can be recognized in non-governmental agreements, such as the Washington Conference Principles on Nazi Confiscated Art. For rules that express the moral pretensions, without judgment enforceable legal consequences, Jaime [Jayme] developed the term " narrative rules." They balance conflicting moral positions and claims by offering compromise instead of rigorous all-or-nothing results. This can be illustrated by the decision of the court in Sachs (Sachs), associated with the return of Nazi-confiscated art posters.

Rybakov Oleg Yurievich

Tikhonova Sofya Vladimirovna

LEGAL POLICIES AS A GOVERNMENT OF POSITIVE LAW:

NEW VERSION OF LEGAL POLICY THEORY

No. 3, 2015

The article is devoted to the development of a new version of the theory of legal policy. The authors put forward a new approach to the definition of legal policy, taking into account the diversity of historical forms, types and types of legal policy and, at the same time, meeting the requirement of applicability to the realities of modern political and legal life in Russia. The basic idea of the proposed approach is the interpretation of legal policy as the management of positive law. In the modern Russian state, the goal of such management is the subordination of positive law to natural law, however, from a historical perspective, there is a change in goal-setting, determined by the dominant legal thinking . Consideration of legal policy as a management of positive law allows us to reveal the essence of this phenomenon through emphasizing its conscious volitional nature, its focus on changing law and, thus, taking into account the conscious contribution of the subjects of legal policy to the development of the legal system. Legal policy is a

historically established form of organization of the legal development of society, thanks to which, through the sequence of formulating goals, the search for means, their application and assessment of the achieved result, i.e. through management, legal life is changing. It is the managerial nature of political and legal activity that provides legal policy with the status of an instrument for improving legal reality. Any states solve a number of administrative tasks in the legal sphere to ensure the modernization of law, bringing it in line with developing social social relations. The very existence of positive law presupposes the continuous work of a huge number of subjects, which cannot be chaotic and meaningless. On the basis of these ideas, the controversial problems of the theory of legal policy are considered in a new way: defining the circle of its subjects, substantiating the methods of its classification, highlighting its essential features. The authors come to the conclusion that the interpretation of legal policy as the management of positive law opens up prospects for the development of a new, holistic and universal approach to the phenomenon of legal policy that can serve as a reliable methodological basis for research on legal policy in all branches of legal science.

Eick Ubercher

About the development and future of economic mediation in Germany.

No. 3, 2015

Currently, mediation is already so firmly established in many areas of German law that, thanks to various standard projects, it even found its way into state justice. Since the end of the 90s of the last century in Germany, against the background of the German legal order, there has been an intense discussion about the place of mediation in the justice system. At the same time, such instruments established in German law as "amicable agreement" and "arbitration court" are not considered independent and effective mechanisms for resolving conflicts. Thanks to the successful internationalization of economic relations, the methods of

resolving conflicts through mediation, already entrenched abroad, have increasingly come to the attention of the interested public. However, the use of mediation in the German economy is still clearly limited. After the adoption of the European Directive on Mediation, the German legislator fulfilled its duty to transform the norms of European law and presented a draft German law on mediation (the Law on the Promotion of Mediation and Other Methods of Out-of-Court Resolution of Conflicts - Mediation Law). This bill is intended to compensate for the still existing legal deficit.

Baigusheva Yulia Valerievna

DECISION OF THE ASSOCIATION OF PERSONS ON THE GRANT OF AUTHORITY

No. 3, 2015

The article is devoted to the problematics of the decision of the association of persons on the issuance of powers. The author characterizes the decision and the issuance of powers envisaged in it as independent transactions that have different actual compositions and are aimed at causing different legal consequences. In her opinion, the decision to issue the authorization is a multilateral transaction consisting of the mutual expressions of the will of the participants in the association, most of whom voted with the value "yes", and the legal consequence of the decision is to form a common will of the participants in the association and to establish the obligation of each participant to the others. participants to the commission of an expression of will, which serves as an element of their joint authorizing expression of will; while the issuance of a mandate, as a general rule, is a unilateral transaction, the actual composition of which includes several parallel expressions of the will of the participants in the association addressed to the delegate and which is aimed at substantiating the right of the delegate to be a representative. In connection with the above, the prescriptions of Ch. 9 1 of the

Civil Code of the Russian Federation, from which it follows that the decision of the association of persons does not apply to transactions, as well as the prescription of paragraph 4 of Art. 185 of the Civil Code of the Russian Federation, according to which the decision to issue a power "contains" this power. In addition, the article examines the consequences of the issuance of a contested and void decisions, and the issuance of powers made in pursuance of an invalid decision is qualified as a voidable transaction.

Gracheva Yulia Viktorovna

Chuchaev Alexander Ivanovich

FIRST CRIMINAL LAW TEXTBOOK

(to the 200th anniversary of Osip Goreglyad 's textbook "The Experience of Outlining Russian Criminal Law")

No. 3, 2015

The article is devoted to the first Russian textbook of criminal law, published in February 1815 Authors beginning abrisno outline the state of the criminal law science at the end of XVIII - early XIX centuries, has had a corresponding impact on the views of OA. Goryaglyada reflected their "experience the mark of the Russian criminal law" then the structure of the publication is revealed, which has specificity both in the systematization of the material and in its division into paragraphs, which, in terms of their volume and content, resemble the definitions of criminal law concepts. Particular attention is paid to the content of the textbook, in particular, the analysis of issues related to crime and punishment, responsibility for the commission of an act, types of punishment, their classification and application, the operation of the law in a circle of persons.

In the conclusion of the work, the significance of O. Goreglyad's "Experience" is shown for legislative work, in particular, the

compilation of the 1st section of the Code of Criminal Laws of 1832, for the further development of problems of criminal law in the textbooks of P. Gulyaev and G.I. Solntseva.

Oreshkina Tatiana Yurievna

SYSTEM OF CIRCUMSTANCES EXCLUDING THE CRIMINAL ACTIVITY

No. 3, 2015

The article provides arguments testifying to the inaccuracy of the title of Chapter 8 of the Criminal Code, since the norms included in it determine not only the situation, but also the parameters of human behavior, which, despite causing harm, is not recognized as a crime. It is proposed to replace the existing title of the chapter with “Permitted infliction of harm under circumstances precluding the criminality of the act”.

The differences between the circumstances excluding the criminality of the act and the circumstances excluding criminal liability are shown.

The provisions of Chapter 8 of the Criminal Code are considered from the standpoint of their consistency and completeness. The author identifies and analyzes the most typical features of the circumstances that exclude the crime of an act, which, according to the author, should be common, “model” for them. These include: the vesting of a person with the right to harm if there are certain grounds and the mandatory observance of the conditions contained in Art. 37 - 42 CC; harm caused by conscious and volitional behavior of a person; an indication that the harm is not criminal; the special social essence of behavior, which can be recognized as socially useful, since it is not only aimed at protecting the interests of the individual, society, and the state, but also really contributes to the salvation of these values, or is acceptable, expedient; having a special purpose.

With the help of the considered "model" signs, the lack of consistency of Chapter 8 of the Criminal Code is shown , the foreignness for it of provisions on irresistible physical coercion and the execution of an order.

The essence of irresistible coercion is analyzed, it is concluded that it should be attributed to one of the sources of irresistible force, which has not yet been consolidated in the Criminal Code.

The possibilities of supplementing Chapter 8 of the Criminal Code with new circumstances are considered, a conclusion is drawn about the desirability of including norms on causing permissible harm in the execution of the law and on the consent of a person to cause harm.

Nikolay Shchedrin

The new Criminal Code of Russia in the context of social management

No. 3, 2015

The article is based on the thesis that combating crime is a kind of social management, which is carried out through the use of two levers: incentives and restrictions. From this point of view, one of the key categories of combating crime is considered - criminal impact. Subsystems of criminal-administrative influence are highlighted, the hierarchy of their goals is expanded , the problems of the development of criminal law at the stages of criminal law-making, law enforcement are investigated .

In preparing the article, in addition to formal legal and comparative legal analyzes, synthesis, induction, deduction and other logical methods, the method of system analysis was used.

In the context of social management, the characteristics of such sub-systems as "measures of influence", "object", " subject" and "resources" are critically interpreted . Excessive criminalization and penalization leads to the

impossibility of processing the actual number of crimes committed, and, consequently, to the inevitably accompanying overload of abuse.

One of the conceptual ideas of the new Criminal Code of the Russian Federation is substantiated - the " four-track " model, according to which the types of criminal action are the sanctions of punishment, safety, restoration and reward. The author's version of the Section of the Criminal Code "Criminal Measures" is submitted to the reader's judgment.

Ustinova Tamara Dmitrievna

PUBLIC HAZARD AND ITS INFLUENCE (ACCOUNTING) WHEN DESIGNING THE STANDARDS OF THE GENERAL PART of the Criminal Code of the Russian Federation.

No. 3, 2015

The category of public danger used in criminal law is considered as the basis for the categorization of crimes, enshrined in Art. 14 of the Criminal Code of the Russian Federation. The content of public danger and the classification of crimes are analyzed from the standpoint of the current criminal law and the doctrine of criminal law, as well as in the historical aspect, taking into account the provisions of the Criminal Code of the RSFSR. Attention is paid to an insignificant act, as a result, proposals are made: on the addition of Art. 14 of the Criminal Code in terms of defining the concept of an insignificant act and the criteria underlying it; on bringing a person to administrative responsibility in cases established by law. Arguments are given about the need to supplement the category of grave crimes with reckless crimes that infringe on human life and are punishable for a term of more than five years. The expediency of returning to the initial definition of crimes of small gravity as acts punishable by no more than two years in prison is substantiated. Part 6 of Art. 15 of the Criminal Code of the Russian Federation,

from the standpoint of the consistency of the criminal law, the need for its exclusion from the Criminal Code is proved.