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ENTREPRENEURSHIP AS AN OBJECT OF LEGAL MODELING

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Abstract

The paper examines the process of formation of theories of legal regulation of entrepreneurial activity in various states and entrepreneurial law in Russia, as well as the ways of importing foreign experience into these institutions of Russian law since the 90s of the XX century. It is shown that the main sources of the formation of institutions of business law were the provisions of civil law. The current model of the global economy and an ever-expanding trade turnover between states and legal entities necessitate the study of international and private law regulation and unification of legislation on entrepreneurial activity. It is proved that at the present time in the formation of Russian legal and economic legal institutions it is advisable to increasingly use the experience of relevant foreign countries. The reasons for the active mutual borrowing of the provisions of the legislation on entrepreneurial activity at the level of states and intrastate entities are highlighted. Various approaches to the study of the business law of foreign countries by Russian scientists are highlighted. The general provisions and features of business law and legislation of the USA, Germany, Venezuela, Russia, Japan and other states, as well as some features in the legal regulation of business in these states are shown. Particular attention is paid to the formation of Russian business law. Conclusions in the article are proposed on the basis of the analysis of foreign and Russian legislation and comments on it, scientific and educational literature.

Keywords: Entrepreneurship, entrepreneurial law, entrepreneurial activity.

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1. Introduction

Starting in the 1990s, Russia has been actively importing both theory and legal institutions of business law. The main source of borrowing is the commercial or commercial law of foreign countries. In this regard, at present, the emphasis is shifting toward comparative studies of existing legal and economic institutions of Russia with similar foreign institutions. The model of the “global economy” that has developed in the modern world provides opportunities for the active development of transnational economic relations, which actualizes the study of the practical aspects of entrepreneurial activity and entails the need for unification of legislation on entrepreneurial activity.

All this led to numerous international conferences and the publication of legal studies both on the general problems of business law (Chernov, 2014; Ishutin, 2002), and on private issues of its implementation in foreign countries (Vasiliev, 2012).

The model for conducting reforms in Russia in the 90s of the XX century was developed and called the "market" economy of Western Europe and the United States. An analysis of the legal regulation of entrepreneurial activity in the Eastern world shows that “entrepreneurial freedoms” have become a civilizational value (Ulyakhin, 1988). Despite the geopolitical confrontation between the countries, the rapprochement of social models of Russia and European states began. The Constitution of the Russian Federation, and then a number of international agreements, enshrined the previously called “bourgeois” rights and freedoms of Russian citizens, including business. The recognition of the right to entrepreneurial activity should be considered not only as an economic, but also as a political event, testifying to the recognition by Russia of the values of Western civilization. According to the order of entrepreneurship, the accessibility of certain resources for economic activity, the administrative impact on business, the economies of foreign countries are evaluated. Russia, with the adoption in 1993 of the Constitution of the Russian Federation, in Art. 34 recognized the possibility of assessing the current government from the standpoint of ensuring “entrepreneurial freedoms”. Consequently, one can speak of the competitive advantages of the state where the freedom of economic activity is ensured in the best way, which is reflected in the PMI business activity index.

The importance of entrepreneurship for modern society is also manifested in the unification of business law models of various states. Of course, certain features will always be preserved, explained by cultural, geographical or other reasons, however, in the context of the globalization of the world economy, the main elements of business law institutions will tend to become increasingly identical. This allows researchers to describe the entrepreneurial law of different states according to the same model (Bezbach & Puchinsky, 2004; Demeneva, 2006; Pilyaeva, 2017; Popondopulo, 2004; Pyatin, 2010).

2. Problem Statement

The problem under research is determined by the absence, until recently, in Russian law of an independent branch of entrepreneurial (commercial, commercial) law. Private law in Russia was represented exclusively by civil law. There were no historical reasons for the formation of entrepreneurial legislation. The basis of a legal democratic state is a free market and a variety of forms of ownership, legal reforms and economic transformations, which sets the legal system the task of creating effective

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legal mechanisms that can guarantee stable development for society and the state, while respecting the rights and legitimate interests of citizens.

3. Research Questions

The subject of the article is entrepreneurial activity, as a subject of legislative regulation in various foreign countries and in Russia.

4. Purpose of the Study

The purpose of the article is to identify the specifics and significance of entrepreneurial activity in various states; the study of regulatory laws and objects of legal modeling in their historical development; their impact on the development of entrepreneurship and the formation of business law in Russia.

5. Research Methods

Analysis of the provisions of the current Russian and foreign legislation governing business and related legal relations, the results of scientific studies of Russian and foreign scientists.

Comparison of normative acts of various historical periods and different states, a comparative analysis of Codes, Commercial Codes, Summary of Commercial Codes and comments thereto. Modeling the features of the legal regulation of entrepreneurial activity in Russia.

6. Findings

In the publication “Commercial Law of Foreign Countries” (Popondopulo, 2004), the main trade institutions of such states as the USA, England, Germany, France, China and Japan are presented through chapters containing a list of 7 to 10 paragraphs. Each of the paragraphs marks an element of the general legal model of entrepreneurship, filled with its own content in a particular state:

1. Sources of commercial law;
2. Entrepreneurs (include paragraphs on individual and collective entities);
3. The insolvency of entrepreneurs;
4. Sales office;
5. Entrepreneurial agreements (trade transactions);
6. Property rights of entrepreneurs;
7. Settlement of economic disputes;
8. Regulation of the securities market;
9. Competition law (antitrust regulation).

As you can see, the entire list presented, to one extent or another, is included in the subject of regulation of civil legislation in Russia. Obviously, this determines the structure of the chapters of this publication. In the absence of a commercial and commercial codification in the modern Russian legal system, researchers actively use the concepts and system of civil law for their purposes. Accordingly, it

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seems that all the elements of foreign business models find their place in the subject of civil law, which, of course, is not so.

In the textbook of professors Bezbach and Puchinsky (2004) devoted to the civil and commercial law of foreign countries, the authors successfully avoid the use of the concepts of business law (they still cannot completely do this, and the authors use the concept of "commercial enterprise"), calling the entrepreneur a "businessman". The work examines not only civil, but also family, labor law of various states, international public law. Particular attention is paid to trade agreements between different states establishing unified rules for conducting foreign economic activity, in particular, Mercosur (Andrade, Silva, & Trautwein, 2005; Basnet, & Pradhan, 2017) and NAFTA (Cherniwchan, 2017; Kondonassis, Malliaris, & Paraskevopoulos, 2008; Lahrech & Sylwester, 2013; Robinson & Thierfelder, 2018)

The inclusion of interstate agreements in the legal model of foreign business is justified where significant international trade is taking place. For "internal" entrepreneurship, this element is redundant; cultural traditions or customs are more important here (Saidumov, 2005). At the same time, trade codifications of foreign states inevitably mention them, and Incoterms has been operating in international trade since 1936. This silence is connected with the need to study "business practices" or "business customs" at the level of ethnography and culture of foreign countries. For example, the Commercial Code of the Bolivarian Republic of Venezuela in Art. 9 points to "trading habits (usances)", Art. 1-205 of the United States Commercial Code—"trading habits" and "established order".

An additional source of information is the commercial or trade codes of countries with the accepted dualism of private law. The German Commercial Code entered into force in 1900 in conjunction with the Civil Code, drawing up general legislation on business. The Commercial Code exists along with the Civil Code as special legislation in relation to the general. The trade code consists of 5 books and the Introductory Law, consisting of 4 sections. Books have internal structural units (sections, subsections, chapters) and combine a total of 905 named articles. As part of the Code, it is difficult to unambiguously single out the general part, which, in our opinion, comprises the first sections of the first four books: "Trading Estate", "Trading Partnerships", "Trading Books" and "Trading Transactions". The fifth book, Overseas Trade, obviously should be assigned to a special part. The first chapter of the Code begins with the definition of "merchant", and in Art. 2 "The merchant by necessity" already refers to the "entrepreneur". The Code is aimed at determining the subjective characteristics of a merchant, and not at qualifying his activity as "trading". Species of merchants and their characteristics are paid much more attention than qualifications of commercial transactions. The publication of the German Commercial Code is accompanied by separate laws on the types of legal entities (commercial companies) and an indication of the implementing directives of the European Union (Introductory Law).

The legal model of entrepreneurship in Germany is based on the specialization of civil law norms in professional trade, which reflected the interest of that part of German society, which was called the "trading class" during the adoption of the Code. In our opinion, the allocation of a codified act of trade was rather a political step, because the concepts and mechanism of legal regulation were fully provided by civil law.

The adoption in 1952 of the Uniform Trade Code of the United States, in a certain sense, was a compromise between the constitutional rights of individual states and the Federal Government. However,

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the ends justified the means, because in the conditions of wide rule-making freedom of the states, a situation of "instability in the regulation of property and especially trade ties that go beyond one state" was created. The Code consists of 10 sections, in which 1 section “General Provisions” is of a general nature, the last 2 sections are introductory to the Code, the remaining 6 sections can be recognized as a special part devoted to individual trade law institutions. The division of the special part occurs according to the "institutional" principle, where each chapter is devoted to a separate legal institution, mainly – types of securities. The relative “poverty” of the Code by the trade institutions characteristic of other national law and order indicates the regulation of this sphere at the state level. This circumstance also determined the purpose of adopting the Code, which was not to regulate relations, but to simplify, modernize, clarify and unify existing legislation. This Code represents the next, highest level of systematization of commercial legislation in comparison with European, including domestic, legal orders. Setting such a goal defined the content of the Code. The general part is devoted specifically to legislation, the procedure for its application and the legal concepts used. An analysis of the basic concepts indicates their practical rather than theoretical nature. The legislator, despite the existence of a special definitive norm in the Code (Articles 1-201), in some cases simply collects those values that are already used in the legislation. This approach was also chosen with respect to the subjects of trading activities, which are recognized by both the corporation, the government, and the "business trust" (paragraph 28 of article 1-201).

Thus, the Uniform Trade Code of the United States is a special form of systematization of commercial law, in the framework of which the issues of application of legislation are mainly regulated, and trade institutions are not fixed. In this sense, the ETK uses private international law methods, harmonizing state laws, and not the interests of merchants directly.

The Commercial Code of the Republic of Venezuela in 1919 consists of the Introductory Section “General Provisions” and 4 books, the general part (book 1 “On Commerce in General”) and the special part (3 books “On Merchant Shipping”; “On Delays and Insolvency”, “On Commercial Jurisdiction”). Books are divided into sections, chapters, paragraphs with titles, and anonymous articles, totaling 1120 articles. The code is presented in a translated version and practically does not contain “entrepreneurial” concepts with the exception of “enterprise”. The main subject of regulation is trade operations and commercial transactions (Article 1), however, the concept of “commercial activity” is also used in the text of the Code (Article 15). When disclosing the concept of “commercial transaction”, the Code uses both a description of the actual transactions (purchase and sale of a commercial enterprise), and objects of rights (production and construction companies, workshops, warehouses, etc.). Obviously, the transaction can be completed in relation to the object, the object itself (enterprise) cannot be a transaction. Merchants are recognized as "those who, having the opportunity to conclude a deal (i.e., legal capacity, N.N.), make commerce their daily business" (Article 10). Commercial companies are also classified as businessmen. No general principles for carrying out commercial activities have been established; in cases not regulated by the Code, the Civil Code is applied, the use of “trading customs” is allowed.

Based on this, the Venezuelan Commercial Code could rightfully be called commercial, as it uses mainly commercial terminology. The legal model of entrepreneurship reflected in the code is quite close to the Russian model. Either the chapters of the Civil Code of the Russian Federation or individual federal

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laws correspond to all parts of the Venezuelan Commercial Code. Judging by the main provisions of the Venezuelan Commercial Code, we see that, in theoretical terms, the subject of regulation is being clarified by detailing the characteristics of a commercial transaction and excluding those actions that are not recognized as commercial.

The Japanese Commercial Code is similar in structure and content to European commercial codes. The Code consists of 4 books with a distinguished common part (Book 1 "General Provisions"), and books on "Trading Partnerships", "Trade Transactions" and "Maritime Trade". Books are divided into chapters, sections, subsections and 851 articles. The numbering of the structural units of the Code is end-to-end, all of them are named. The first chapters 2 and 3 of the books are also called "General Provisions" and are included in the general part. Book 2, as special provisions, considers the system of commercial legal organizations and the responsibility of their officials. Book 3 deals with specific types of obligations. As we see, almost all issues of the special part are regulated in Russia by civil law. In accordance with Art. 4 of the Commercial Code of Japan, a merchant is a person engaged in entrepreneurial activity on his own behalf. The features of entrepreneurial activity by minors, guardians, small traders and some other categories of citizens are established. Definitions of trading activities are not given, nor are any economic principles for the implementation of these activities. As a subsidiary of applicable law, the "trade customs" and the Civil Code of Japan are established.

The provisions of the current Russian legislation allow recognizing the duality of the subject of legal regulation of entrepreneurship:

1. Entrepreneurial activities;
2. Property, personal non-property and corporate relations with the participation of entrepreneurs (Article 2 of the Civil Code of the Russian Federation).

Recognition of this duality does not free it from fair criticism. As Andreev (2010) notes,

> under the influence of constitutional provisions in the Civil Code of the Russian Federation, entrepreneurial activity was included as a subject of regulation, but it did not receive any independent regulation, being obscured, and sometimes simply replaced by the category of "property relations. (p. 20)

In our opinion, the influence of "constitutional provisions" is somewhat ambiguous. Otherwise, the Civil Code of the Russian Federation would take the whole constitutional concept with an indication of the ability to do business and the disclosure of the key concept of "economic freedom". However, the Civil Code of the Russian Federation only secured a contradictory, but independent private-law concept of entrepreneurial activity. This concept in its essence has not so much constitutional provisions as a dispute arising in the bowels of Soviet legal science between supporters and opponents of the economic and legal theory, and constitutional law creates "creates the necessary value-regulatory basis for entrepreneurial relations" (Belykh, 2009, p. 102).

The contradiction in the conceptual framework has led to the fact that entrepreneurial activity, as the subject of legal regulation in Russia, still does not have its own system of legislation. Under these conditions, with the numerous acts emanating from administrative structures, the Civil Code of the Russian Federation could become the only counterweight. However, according to the justified opinion of

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Andreev (2010), “the norms on entrepreneurial activity are not developed according to the rules contained in the Civil Code of the Russian Federation” (p. 25).

We see with the example of the powers of the authorities that various "entrepreneurial" issues are met in the competence of most of them, being directly enshrined in decrees of the President of Russia and resolutions of the Government of Russia. Researchers directly point out, “that in the current law and order, the regulatory material that we attribute to private law is also being developed with the direct participation of public authorities” (Saidov & Yastrebov, 2015, p. 10).

Another destabilizing factor in the legal regulation of entrepreneurship is the intersection of the concepts of business law and the economy. Entrepreneurship, as a concept of economic life, falling within the framework of legal structures, immediately changes its purpose, becoming a "subject of regulation", i.e. management. However, the prevailing economic processes do not always fit into the current rule of law. Government bodies have broad competence in the regulation of certain business issues. In a systematic way, all these issues constitute the subject of business law, since it was them which received their detailed legal consolidation.

Consideration of entrepreneurial activity as “economic freedom” refreshes the issue of the volume and content of these freedoms. In our opinion, the translation of constitutionally established, but not substantively disclosed “economic freedoms” into sectoral legal guarantees would allow creating an adequate model of legal regulation of entrepreneurship.

Entrepreneurship is mentioned in the Constitution of the Russian Federation as a type of economic activity, which immediately distinguishes it at the industry level as an atypical subject of regulation. Economic activity has not yet been determined normatively. However, there is an official document used for statistical purposes—the All-Russian Classifier of Economic Activities. In accordance with the definition of “Economic activity occurs when resources (equipment, labor, technology, raw materials, energy, information resources) are combined into a production process aimed at the production of products (provision of services). Economic activity is characterized by the cost of production of goods (goods or services), the production process and output (provision of services)." This definition describes exclusively objective characteristics of activity, there is no indication of the subject of activity and its actions (except for “labor force” as such subject). In this sense, entrepreneurial activity is the kind of economic activity that can only be performed by a person personally, because the enterprise cannot have any “own abilities”. Meanwhile, the Classifier mentions in the description of certain types of economic activity of entrepreneurs, entrepreneurial communities and associations. However, these references are not intended to highlight the types of entrepreneurial activity, we are talking about specific features of economic activity. In most cases, the Classifier mentions the types of economic activity that an entrepreneur can carry out without any indication of the subject. In our opinion, the economic activity presented in the Classifier cannot be unambiguously considered as that referred to in Art. 34 of the Constitution of the Russian Federation.

Various legal forms of independent economic activity are known to the practice of legal regulation, which received various names in the legislation (craft, business, artisanal, individual labor, etc.). The process of identifying various types of economic activity that allows it to be legally identified and included in the subject of legal regulation has not been completed. So, already in modern Russia,

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"peasant-farming activity" was distinguished and the concept of "self-employed" citizens was put into circulation.

7. Conclusion

1. Commercial (trade) codifications existing in states with an adopted dualistic system of law do not cover all legislation on entrepreneurial activity. In all cases, civil law is involved in the legal regulation of entrepreneurial activity.

2. The qualification of an activity as entrepreneurial is carried out either by subjective (characteristics of a person) or by activity (characteristics of a transaction) criteria.

3. The content of commercial codifications demonstrates various goals that were achieved by systematization of legislation on entrepreneurial activity.

Features of improving the legal regulation of business in Russia:

1. The difference in the concepts of entrepreneurial activity enshrined in the Constitution of the Russian Federation and the Civil Code of the Russian Federation.

2. The absence in the current legislation of Russia of a well-formed approach to the regulation of economic activity in general and its “personal” types.

3. The presence of the duality of the subject of civil law regulation of entrepreneurship as a “relationship” and as an “activity”.

Inconsistency of the basic concepts of business law used in various legal acts.

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