

GENERAL PROBLEMS OF APPROACHES TO THE LEGAL REGULATION OF RELATIONS IN THE GREEN ENERGY SPHERE

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The article reviews the range of problems of basic approaches to legal regulation of relations in the green energy sphere. The author casts doubts on the established opinion that the industrial activity of the human civilization based on the use of hydrocarbons is to blame for the increase in the temperature of the Earth's atmosphere, and thus challenges the corresponding legal regulation that is focused on combating this problem, both on the Russian and global scale. Cyclic changes in the climate of our planet (in both vectors) are mainly of natural character, and if the modern mankind can influence these processes, it is just to an insignificant extent. A truly serious threat to the humanity is now posed by waste of human activity, and green energy should be refocused on combating this problem by changing the legal regulation vector.

Keywords: energy law, green energy, legal regulation, anthropogenic factors.

For several decades, the central dogma in the energy sector of the economy has been a deeply-rooted conviction that the humanity on our planet is threatened by climate rapidly changing towards higher temperatures along with all the subsequent extremely negative consequences. And the main reason for this is the activity of the human civilization, primarily the activity of industrial enterprises that observe the natural requirements of environmental safety to an insufficient extent or totally neglect them.

A rather popular belief is that the sixth mass extinction of biota is coming on our planet, and if the previous five were of natural

character (not all living things became extinct in the end), the upcoming sixth one is not a result of the standard laws of nature (whatever that means) but a result of activities of the mankind that damages the environment. And the alarmists even claim that we have already passed the point of no return on this path. It comes to a point where Professor Gregory Okin from the University of California, blamed 160 million dogs and cats for 64 million tons of carbon dioxide emitted annually into the US atmosphere as they eat too much meat, and the processes associated with meat production entails the emission of the named volume of carbon dioxide comparable to the use

of 13 million cars per year. But our planet is home to about 400 million cats and 525 million dogs.

Accordingly, it is assumed that the legal regulation of relations in the field of ensuring the environmental safety of such activities of the human civilization does not create insurmountable obstacles to the deterioration of the climate on the Earth.

In other words, according to this dogma, the temperature on our planet is steadily increasing, and as a result, ice is melting, the level of the World Ocean rises (which threatens flooding of a number of densely populated lowlands of the planet), weather conditions are deteriorating in the broadest sense and everywhere, the level of atmospheric pollution with emissions of carbon dioxide is growing, ozone holes appear in the atmosphere and increase (although it's true that they are decreasing as well, but alarmists do not want to talk about it), and so on.

And it turns out that the industrial activity of the human civilization is to blame for all these globally threatening processes, and above all the activity associated with the production and use of energy resources. And, accordingly, both the energy sector of the economy and its legal regulation should bear their share of the blame for these processes along with the scientific support if we look broader and deeper.

It can be assumed that the natural reaction of the central authorities of our state to these alarming signals of representatives of the environmental science was the corresponding amendments to the Constitution of the Russian Federation of 2020. Thus, in accordance with Part 1 of Art. 114 of the Constitution of the Russian Federation, the Government of the Russian Federation now: “ensures the implementation of a single socially oriented state policy in the Russian Federation ... as well as in the sphere of ecology” (Clause c); “takes measures aimed at creating favorable living conditions for the population, reducing the negative impact of economic and other

activities on the environment, preserving the country's unique natural and biological diversity and forming a responsible attitude towards animals in the society” (Clause f5); “creates conditions for the development of a system of environmental education of citizens, the development of the environmental culture” (Clause f6). Not to mention that by virtue of Art. 42 of the Constitution of the Russian Federation (forming part of its inviolable Chapter 2 *Rights and Freedoms of Man and Citizens*), “everyone shall have the right to favorable environment, reliable information about its state and recovery of damage inflicted on his health or property by an environmental offense”.

The relevant legal and other regulatory acts aimed, *inter alia*, at ensuring the implementation of the named constitutional provisions are developed and adopted in various formats including program and strategic ones. For example, by Decree No. 666 of November 4, 2020, *On the Reduction of Greenhouse Gas Emissions*, the President of the Russian Federation obligated the Government of the Russian Federation to do the following for our country to implement the Paris Agreement of December 12, 2015 (i.e., more than five years from its adoption! — *M.K.*): a) by 2030, ensure the reduction in greenhouse gas emissions by up to 70 percent compared to the level of 1990 taking into account the maximum possible absorbing capacity of forests and other ecosystems and provided that the socioeconomic development of the Russian Federation is sustainable and balanced; b) develop and approve the Strategy for the Socioeconomic Development of the Russian Federation with a Low Level of Greenhouse Gas Emissions until 2050 taking into account the specifics of economic sectors; c) ensure the creation of conditions for the implementation of measures to stop and prevent greenhouse gas emissions as well as to increase the absorption of such gases. This Decree entered into force on the day of its official publication.

Relevant strategic acts have also been adopted by a number of foreign states but it is commonly known that not by every state, among them there are some industrialized states, which, according to the logic of the Paris Agreement, are to a great extent guilty of emissions of carbon dioxide into the atmosphere (such states have neither signed nor ratified the Paris Agreement).

But we have signed, ratified this Agreement and intend to strictly observe it. What is assumed is a tough procedure for ensuring compliance of the states with the provisions of the Paris Agreement (by legal means) and, in a broader sense, ensuring of sustainable socioeconomic development on our planet taking these provisions into account. These particular problems were discussed among other ones at the Valdai Discussion Club on December 3, 2020. It is proposed to develop green financing instruments and a concept for creating a special system of global climate justice (following the example of the international sports justice system) in order to create a framework for climate regulation in Russia. It is assumed that the leaders will be the states that will be the quickest in switching to operations through green industry and green energy.

Similar measures are being taken in some foreign countries. French President Emmanuel Macron, for example, announced in December 2020 at a meeting with members of the Convention on Climate Change (a body consisting of 150 randomly selected volunteers representing more or less equally different layers of the society, age groups, genders actively working on proposals for improving the environmental situation in France) that he was going to submit to a referendum an amendment to the Constitution, which would make it mandatory to protect the environment and combat climate change.

However, it should be noted that the Paris Agreement replaced the Kyoto Protocol on climate. And it was far from transparent

and straightforward, including in the green energy sphere. For example, soon after the adoption of the Kyoto Protocol, fraudsters of an international level specializing in green energy financing appeared. According to K. Dozmarov, partner of the Kulik & Partners Law.Economics consulting firm, certain persons appeared in Russia in 2014 and presented a bunch of contracts similar to investment ones concluded with regional gas companies alleging that they would carry out isolation works worth billions of rubles and receive emission quotas for them, which they could profitably sell to European buyers at the appropriate market. A little later, it turned out that a number of “strategic” assets of a gas holding served as the basis for the contracts and the beneficiary investor behind this scheme was connected with the US authorities; while the proceedings were in progress, the USA sent letters demanding to stop twisting the American investors’ arm, otherwise sanctions would follow. It was a major fraud, in fact: some works were carried out, but far from the volume corresponding to the declared billions. K. Dozmarov says, “if the planned transformation of traditional energy into green energy begins to take place, then, in my opinion, this will strike a mortal blow on the energy intensive economy of Russia”. [1]

And what concerns CFC refrigerators, it seems that there was organized a large-scale fraud with the aim of ousting them from the consumer market using non-competitive methods. There were other characteristic signs of the erroneous goals of the Kyoto Protocol. The task of our state is not to run into the same trap by signing the Paris Agreement.

That is, the central dogma described above does not seem so categorical anymore. And the solution of the problems of green energy, in principle, and accordingly the legal regulation of relations associated with it, requires going beyond the limitations traditionally studied in science.

Thus, the most important segment of the foundation of the problem reviewed here is the question whether it is correct to consider the raw hydrocarbon reserves including those that have not yet been discovered by geological exploration, which now cause damage to the environment (and will continue doing so in the future, though, of course, to a lesser extent) and are a serious basis for the sustainable socioeconomic development of the entire Earth's civilization, belonging only to the current generation? From the constitutional law standpoint, the current generation of our citizens can be viewed as a legal subject. However, the situation gets more complicated if we look at the ownership of natural resources, including raw hydrocarbon reserves not yet discovered by geological exploration.

Until December 12, 1993 (the date of the adoption of the Constitution of the Russian Federation presently in force), all natural resources were public property as proclaimed by the previous constitutions of the USSR and the RSFSR, which made it possible to consider them belonging to such constitutional law subject as the people.

Although the Constitution of the Russian Federation of December 12, 1993, proclaimed in Part 1 of Art. 9 that "land and other natural resources shall be used and protected in the Russian Federation as the basis of life and activity of the people living in the corresponding territory", Part 2 of the said Article of the Constitution contains considerable ambiguity with respect to the ownership of natural resources: "Land and other natural resources may (?! — *M.K.*) be in private, state, municipal and other forms of ownership".

That means that if natural resources, including raw hydrocarbons, including those not yet discovered by geological exploration, were exclusively owned by the state and constituted public property by form and in essence before December 12, 1993, which was strictly regulated and protected by law, then on the morning of December 13, 1993, the state

and the people lost this exclusive right. And it is well known how the state public property was privatized.

But today, almost 30 years later, the restoration of the exclusive state ownership of natural resources is half the battle, and success in this matter is not obvious. A more significant issue lies in the stratigraphic legal field. [2]

Several components of the stratigraphy of the legal field have been identified, but in this article, it will be enough to concentrate on two chronological vectors of the development of our state: the past and the future based on the problems reviewed in this publication.

Both chronological vectors of our state are now recognized in the Constitution of the Russian Federation. Due to the innovations of 2020, Part 1 of Art. 67.1 directly proclaim that "the Russian Federation is the legal successor of the USSR in its territory..."; and Part 2 of the same Article proclaims that "the Russian Federation united by a thousand-year history, preserving the memory of ancestors who passed on to us the ideals and the faith in God as well as continuity in the development of the Russian state, recognizes the historically established state unity". This is the vector of the legal capacity of the state directed towards the past.

And the preamble of the Constitution, which has remained intact since the adoption proclaims that "We, the multinational people of the Russian Federation, united by a common fate on our land, ... proceeding from the responsibility for our Fatherland before the present and future (! — *M.K.*) generations...". This is the vector of the legal capacity of the state directed towards the future represented by future generations of our country.

Thus, the stratigraphic method of studying the legal field of the application of provisions in the green energy sphere will consist (using a non-monochronological approach) in the study of the layers of interdependent, interacting and interrelated provisions of the today's layer of provisions and the layer of

provisions of the recent past as a naturally determined precursor of the layer of today's provisions as well as the future provisions.

It is obvious that the true effectiveness of the stratigraphic method for studying the legal field will appear in the transition beyond the monochronological (linear) approach, at to the theoretical development of polychronological vectors of the legal reality and law enforcement, which is especially important. In other words, the task is to substantiate theoretically the approaches to the study of the legal field of the past (rather distant) and the future of our society in general and the energy sector of the economy in particular. And in order not to consider these approaches to be scholastic theorizing, it is imperative to identify the real practical value of the approach to the problems of today. This practical value is seen in posing the question of ownership in general, and ownership of oil and gas reserves, in particular, and it should be reviewed (and studied, of course) in both chronological vectors.

It seems worthy to carefully study the vector directed not at the past that clearly demonstrates the radical proposal to declare all the productive capital formed by the labor of previous generations as the national property of Russia and to provide each of the citizens of Russia with a registered income-bearing security (share) that yields a part of the economic use of national property guaranteed by the state. Anyway, the answer to the question who owned oil and gas reserves in Russia in the past, and, accordingly, who owns (or rather should own) them in the present day Russia, should be searched here.

And the vector directed towards the future allows posing a similar question from a different angle: what makes us think that raw hydrocarbon reserves belong to the current generation of Russians (the entire federal state or one way or another an isolated group of citizens, etc. In this case, it does not matter whether we are taking about a purely chronological aspect). In other words, are such

fundamentally new legal subjects as the future generations of Russians also the owners of oil and gas reserves in our present day country?

And if the future generations of Russians are viewed as a legal subject, and this subject is incorporated into our laws, first of all, into the Constitution of the Russian Federation, the fundamental legal framework for the sustainable development of Russia will appear. And this is what can be called the practical result of using the stratigraphic method for studying the legal foundation of the energy sector of the economy.

If we take into account the achievements of anthropological, let alone geological research, it is obvious that the climate on our planet has changed many times over the thousands and millions of years, and to a great extent, obviously without any intervention (impact) of the mankind. Moreover, it is obvious that even today the achievements of science are not enough to create climate weapons (with the exception of local ones), which means that the modern humanity (moreover, by efforts of the previous generations) is not guilty of (global) climate change on the Earth at present.

And what climate changes have objectively taken place on the Earth at least over the past fifty years? Very insignificant ones, although, according to the prophecies of some scientists (are they really scientists?), the humanity should have already perished more than once. Could it be that these prophecies (forecasts) have been inspired by opportunistic considerations?

Today we are witnessing strong criticism of oil, gas, coal; neutral attitude towards hydro and nuclear energy; and tremendous admiration for wind and solar power. But the latter are not as safe as they seem, neither from the point of view of the process of their creation, nor from the point of view of their exploitation (complaints from citizens living in their proximity about a harsh deterioration in their well-being during the period of their

operation are far from groundless); nor, even more so, when they need to be disposed of.

However, a serious threat in the form of the introduction of a carbon tax by the European Union looms ahead for our economy irrespective of its aspirations to get “greener” in the near future (and this is not an instantaneous phenomenon). In practice, that means setting the limits on greenhouse gas emissions during the manufacture of various types of our products exported to the EU member states, including carbon. Tax will be charged, if the limits are exceeded, which, according to the calculations of specialists, may be over 4 to 5 billion US dollars per year. [3]

Several fundamental conclusions can be drawn.

A). There are no global climate changes on the Earth that may lead to the death of the mankind, even on a limited scale, although the general history of our planet witnessed periods of climatic changes of enormous amplitude. Thus, the oldest long-term glaciation in the history of the Earth is considered to be the Huronian glaciation, which began and ended in the Paleoproterozoic Era (2.4 to 2.1 billion years ago), it was caused by an excess of oxygen in the planet’s atmosphere. Small ice ages occurred in the period of the man’s existence on the Earth; it is known that there were several of them in the Middle Ages in Europe and in Russia. Whatever their reasons may be, the industrial activity of the mankind has nothing to do with it, including in situations of the change of these small ice ages to the opposite ones. Contrary to the alarmist assertions of some climate researchers about a sharp and steady warming of the climate on Earth, the climatic swing seems to have recently changed the direction, and it is the recent warming, which has led to a slowdown in the Gulf Stream, that is to blame, and this entails cooling of the climate for Europe. It has not been the industrial activity of the mankind that led to this process, and, at least for now, we cannot influence it. And legal means are even more fruitless despite the attempts

of individual Russian scientists to establish climate law, which, upon close examination, “can hardly be characterized” either as an independent legal institution or a branch of law (nor even a branch of legislation). [4]

B). Fluctuations in the amount of hydrocarbon in the Earth’s atmosphere, both increase and (hypothetically) decrease, depend insignificantly on the industrial activity of the mankind, which, however, does not mean that it is harmless on a local scale, it is enough to consider the smog over some of our (and foreign) cities with high concentration of industrial enterprises. For some reason, the main “blow” is aimed at emissions of hydrocarbons into the atmosphere, which can really be released a lot when the permafrost thaws from the rise in the temperature on the planet (twice the amount of carbon dioxide currently contained in the atmosphere), but the problem of possible emission of methane into the atmosphere is practically swept under the carpet, although methane is much more poisonous and can form ten times more powerful greenhouse effect. Maybe it is hushed up because the human civilization “produces” carbon dioxide, but not methane. Well, during the thawing of glaciers, there is a danger of thawing of some viruses, microbes, bacteria that are dangerous for the humanity.

C). Although the industrial activity of the human civilization is not definitively “guilty” of the next increase in the content of carbon dioxide in the Earth’s atmosphere, it quite seriously threatens the humanity in a different vector, the pollution of the living space of the earthlings by industrial and other human activity waste. What we already have are huge islands of debris on the surface of the oceans, plastic particles in the gills of deep-sea creatures, etc.

The issue of a nationwide approach to the problem of garbage is also interesting. Even the current generations of citizens of our country remember the announcements of various “garbage” reforms, both in relation to household and technological waste. And not

so long ago, S. Ivanov, Special Representative of the President of the Russian Federation for Environmental Protection, Ecology and Transport, called garbage the third renewable energy source along with the sun and the wind: “The amount of garbage in the world will only grow, so it can be called the third renewable energy source along with the sun and the wind”. [5]

If said by an “ordinary” person concerned with the problems of the destruction of the ever-increasing waste of human activity, it would be understandable and would not entail any consequences. But this was said by a “state” person, which means that an appropriate reaction to these words should follow, including and above all, in the sphere of legislative activity, which determines regulation in the green energy vector.

Meanwhile, it is obvious from an environmental point of view that only a small part of waste can be considered a renewable energy source, when destroyed. This means that the costs of energy obtained from non-renewable sources and required to destroy this share of garbage is less than the energy received from this destruction. But the costs of energy to destroy the largest part of garbage should be higher, sometimes significantly higher for polyethylene, food waste, packaging, etc., than the costs of oil and gas (non-renewable resources) spent for their production; and in some cases, garbage is extremely difficult and very costly to destroy (textiles made of synthetic

fibers, glass...). And the ovens of incineration plants (our country plans to build 25 such plants, and the cost of their construction will reach RUB 1.3 trillion) for destroying polymer and other similar waste emit a lot of carbon dioxide referred to greenhouse gases that ruin our climate (as is believed within the framework of the above mentioned central dogma).

Thus, it can be assumed that the attribution of waste disposal to renewable energy is only a political decision (it is not clear why), and it should not obtain a legal form without an appropriate environmental and economic justification.

On the other hand, the problem of garbage as waste of the human civilization is extremely significant today. The Russian media notes that 4.5 million hectares are occupied by garbage dumps in Russia (the size of a small European country) and we simply do not use this land; [6] and I do not want to imagine what who live near such dumps people feel. Therefore, it seems advisable to concentrate the efforts of legal regulation in the green energy sphere (both on the Russian frontier and internationally) not on reducing carbon dioxide emissions, not on mitigating the greenhouse effect, but on combating garbage as the main threat to the modern mankind. Of course, the corresponding efforts of the legal science are urgently needed here. It seems that this situation in general requires a new scientific and legal algorithm for solving the indicated problem. ■

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