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COST–BENEFITS ANALYSIS IN PUBLIC LAW**

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The subject-matter of the research is economic analysis in public law. This method evaluates both costs and benefits of the regulatory measures. When assessing the alternatives, the judges in public litigation take into account their side effects. If an economically effective alternative is found, it should be ensured that it imposes a minimal burden on the right-holder or the costs to third parties.

The purpose of the research is to argue that the cost-benefits analysis should be limited primarily to the economic field. Otherwise, personal, political, and social rights can be conferred with the properties of goods (commodification).

The methodology of research is based on approaches of school "law and economics". Economic analysis of law makes it possible to construct a scale of constitutional values, albeit not uncontroversial, but universal. This scale offers the important advantage of introducing proportionality for seemingly disparate individual freedoms and public interests. The introduction of material and financial scales, including compensation even for irreparable intangible goods, represents a better solution than the available alternatives.

The main results of the research and the scope of their application. The above-mentioned method consists of assessing the costs and benefits both for the right-holders and for achieving the common good. It is necessary to analyse the costs and benefits of the challenged legal provision to individuals. Then, the governmental costs incurred in using alternative means should be reviewed. The public authorities should not incur excessive organisational or financial costs from a legal alternative that is humane to the individual. Due to the objective constraint on public resources, judges take into account future budgetary expenditures.

In constitutional adjudication and administrative litigation, cost-benefit analysis is most effective in the economic sphere. It is easier to ensure the measurability of judicial review, usually in monetary or other material terms. The preparatory works, including the financial and economic justification of draft laws or regulations, may serve as an informational source in reviewing the legislative provisions and administrative acts which entail material costs.

The cost-benefit analysis is applicable to non-material sphere. Although such costs generated by regulators are often difficult to assess in public law. A cost-benefit analysis is possible even in the political sphere. At the same time the judges usually restrain itself from assessing the political expediency of legislative decisions and administrative actions.

Conclusions. There is a danger of economic analysis being abused in public law. The disadvantages of using this methodology include the possible devaluation of values which are essential for democracy. The abstract common good and reducing public expenditure will prevail over individual freedoms.

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1. Introduction[1]

Russian civil lawyers are intensively implementing the economic analysis of law [1], and in public law, with rare exceptions, such studies are not carried out [2]. At the same time, the use of interdisciplinary methodology is justified in constitutional law [3–4]. Economic analysis is already being actively applied in antitrust disputes [5, 6]. Thus, economic methods are relevant in constitutional and administrative proceedings.

Cost-benefit analysis received a thorough development under the influence of the school "Law and Economics" in Anglo-Saxon law [7–11]. This method itself is defined as "an economic technique applied to public decision-making that attempts to quantify and compare the economic advantages (benefits) and disadvantages (costs) associated with a particular project or policy for society as a whole" [12, p. 404]. The importance of the method under consideration is evidenced by a separate scientific conference held in 1999 on the topic of cost-benefit analysis in adjudication [13-15]. Thus, in American doctrine, this method is derived from the necessity requirement. For example, Stanford University professor Alan O. Sykes understands necessity as "an alternative regulation unquestionably achieves a clearly stipulated regulatory objective at equal or lower cost to regulators while imposing a lesser burden on some other valued interest (free speech, free trade, or the like), the alternative is 'less restrictive'... A proposed alternative may be somewhat more costly to implement, for example, or slightly less effective at achieving the stated regulatory objective, yet still seem quite preferable if it is much less burdensome on the interest that is protected by the least restrictive means requirement" [16, p. 403].

In accordance with such approaches in Russia, the concept of necessity (Part 3, Article 55 of the Constitution of the Russian Federation[2]) can serve as a normative framework for applying the cost-benefit method in constitutional and administrative proceedings. This requirement is considered as an element of the general legal principle of proportionality [17]. In addition, the category of "necessity" is generally recognized in criminal and private law [18; 19].

Cost-benefit analysis is applicable in public law. By virtue of the name of the above-mentioned economic technique, the analysis of costs precedes their comparison with the benefits of regulatory policy. Due to the nature of constitutional and administrative proceedings, this method consists of assessing the costs and benefits both for the right-holders and for achieving the common good. Theoretically, it is necessary to analyse the costs and benefits of the challenged legal provision to individuals. Then, the governmental costs incurred in using alternative means should be reviewed. The public authorities should not incur excessive organisational or financial costs from a legal alternative that is humane to the individual. The obstacle to this is the objective constraint on public resources. Given the latter circumstance, the Constitutional Court of the Russian Federation will usually provide for a suspension of its final decisions. An example of such a suspension is Judgement No. 11-P of 5 March, 2020, which concerned losses incurred by owners of land plots in the case of their inclusion in a cultural heritage protection zone. The Constitutional Court, declaring the challenged legal provisions unconstitutional, held that "pending relevant amendments, the very existence of losses caused to owners of land plots by the restriction of their land rights by a governmental agency or local self-government authority due to the lawful establishment or modification of a cultural heritage protection zone shall constitute grounds for compensation for the losses caused by the lawful actions of that authority".[3] As such, the court had

[1] This paper is partly based on the author's unpublished doctoral dissertation for the degree of Doctor of Law (2022).

[2] Constitution of the Russian Federation of 12 December 1993. Rossiyskaya Gazeta [Russian Gazette]. 1993. December, 25. (In Russian).

[3] Judgement of 5 March 2020, No. 11-P "On the case on the review of constitutionality of Article 57, para. 1,

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filled the gap until parliamentarians could respond. At the same time, the judges take into account future budgetary expenditures.

There is rarely a comprehensive cost-benefit analysis in case-law. The necessity test is often reduced to a one-sided cost analysis. The applicant persuades that his or her burden is excessive. Representatives of public authorities argue the opposite point. The next step one assesses the benefits to the public good, assuming that rather than imposing restrictions on the individual, a more humane means will be used. If the public interests are not harmed or their protection is only slightly diminished by the application of less restrictive regulation, then the available alternatives can be explored. However, a benefit analysis may not be conducted at all.

2. Cost-benefit analysis in the economic sphere

In public law, cost-benefit analysis is most effective in the economic sphere. It is easier to ensure the measurability of judicial review, usually in monetary or other material terms. Besides, the use of this method in the field of economics and finance has a normative framework. According to Art. 105(1)(d) of the Regulations of the State Duma of the Federal Assembly of the Russian Federation, a draft law, the implementation of which would require material costs, shall be accompanied by a financial and economic statement[4] in a separate document. In one of the cases, the Constitutional Court of the Russian Federation interpreted the requirement for the initiator of a draft law to submit a financial and economic statement "as a specific demonstration of the implementation of the constitutional requirement for budgetary balance in the process of federal lawmaking consistent with the constitutional principles of the legislative process".[5] Consequently, such preparatory materials may serve as an informational source in reviewing the proportionality of the legislative provisions challenged in constitutional proceedings which entail material costs. A similar conclusion is possible with regard to the judicial review of the preparatory materials that served as the ground for the drafting by-laws and some administrative acts.

The case-law contains references to the financial and economic justification of draft laws. On the one hand, there is a direct reference to the document bearing this title in cases on corporate property tax[6], compensation from the budget to a bona fide purchaser of dwelling[7], and Russia's accession to the World Trade Organisation.[8] On the other hand, the courts could proceed from a substantive understanding of the financial and economic justification of the challenged legal provisions. This approach was applied in a case that concerned the non-provision of subsidies from the regional budget to a city to perform the functions of the capital of a constituent entity of the Russian Federation. The Constitutional Court of the Russian

subparas. 4 and 5 and para. 5 of the Land Code of the Russian Federation in connection with the complaint of I.S. Butrimova". Sobraniye zakonodatel'stva the Russian Federation [Collected Legislation of the Russian Federation] (hereinafter SZ RF). 2020. No. 11. Item 1639. (In Russian).

[4] See: Resolution of the State Duma of the Federal Assembly of the Russian Federation of January 22, 1998, No. 2134-II SD (as amended on December 15, 2020) "On the Regulations of the State Duma of the Federal Assembly of the Russian Federation // SZ RF. 1998. No. 7. Item 801. (In Russian).

[5] See: Judgement of 29 November 2006, No. 9-P "On the case concerning the review of constitutionality of Paragraph 100 of the Rules of the Government of the Russian Federation". SZ RF. 2006. No. 50. Item 5371. (In Russian)

[6] See: Judgement of 12 November, 2020, No. 46-P "On the case on the review of constitutionality of Article 378.2, para.4, subpara.1 of the Tax Code of the Russian Federation in connection with the complaint of the Open Joint Stock Company 'Moscovskaya Shersteprydilnaya Fabrika'". SZ RF. 2020. No. 47. Item 7624. (In Russian).

[7] See: Judgement of 4 June, 2015, No. 13-P "On the case concerning the review of constitutionality of the provisions of Article 311 of the Federal Law "On State Registration of Rights to Real Estate and Deals with It" in connection with the complaint of V.A.Knyazik and P.N.Puzyrin". SZ RF. 2015. No. 24. Item 3548. (In Russian).

[8] See: Decision of 2 July, 2013, No. 1055-O "On the refusal to accept for consideration the request of a group of deputies of the State Duma to review the constitutionality of the Federal Law "On the ratification of the Protocol on the Accession of the Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization" dated April 15, 1994 of the year". SZ RF. 2013. No. 30 (Part II). Item 4190. (In Russian).

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Federation emphasised that a regional legislator, "when reducing the amount of budgetary funds allocated to a municipality, shall have a financial and economic substantiation for this purpose and ... while balancing constitutionally relevant values and regional and local interests, shall minimise the possible negative consequences of the decision on the exercise of the rights of local authorities".[9] In this case, the judges attempted to balance the costs incurred by the local community as the holder of the right to self-governance with the benefits of regional authorities given the lack of budgetary resources. Based on this case, cost-benefit analysis can be considered as part of balancing test. This approach is often found in constitutional doctrine [20, s. 658]. In regard with the sharp criticism of the judicial balancing method [21–24], the argument of making a clearer distinction between these two elements of proportionality in case-law deserves support [25].

However, the above-mentioned case does highlight an important characteristic of necessity. The Constitutional Court of the Russian Federation points to the advisability for the right-holders to minimise the costs incurred as a result of legislative measures. In particular, it was noted that "the cuts in the co-financing of expenditures by local self-government bodies for the exercise of the functions of the administrative centre (capital city) of a constituent entity of the Russian Federation, especially given the fact that the expenditure of budget funds intended to meet municipal needs occurs, among other things, through the due procurement of goods, works and services from third parties, may entail adverse consequences for the performance of the obligations they assumed as parties to the relevant contracts"[10]. This draws attention to the analysis of the costs incurred by third parties whose interests are not directly affected by the challenged provisions.

Hence, the question of attributing the benefit-cost analysis method to the test of necessity or test of balancing is mainly a theoretical one. In practice, this question does not have any relevance unless the court is strictly consistent in testing the four elements of proportionality. At the same time, a cost-benefit analysis of the balance of interests is vulnerable to the problem of moral neutrality of judges [26]. In simple terms, combining weighting of interests with an economic analysis of law runs the risk of justifying interference with fundamental rights in order to achieve economic efficiency.

Case-law demonstrates the relevance of cost-benefit analysis in the field of economics and finance. This explains the approach of limiting economic analysis of law to economic rights adjudication [27, p. 86, 89]. Russian researchers tend to place greater emphasis on cost-benefit analyses in cases involving cadastral value of real estate[11], subsidised flights for children[12], civil liability of entrepreneurs for copyright[13] or antitrust violations[14], and so on. This emphasis can be explained by the measurable costs incurred by the economic right-holders and related alternatives.

An interesting example of the cost analysis is

[9] Judgement of 18 July, 2018, No. 33-P "On the case on the review of constitutionality of Item 3 of Article 242 of the Budgetary Code of the Russian Federation in connection with a complaint of a municipal entity – the urban district 'the City of Chita'". SZ RF. 2018. No. 31. Item 5063. (In Russian).

[10] Ibid.

[11] See: Decision of December 19, 2019, No. 3465-O "On the refusal to accept for consideration the complaint of citizen Goryainov Alexander Yuryevich about the violation of his constitutional rights by paragraph 1 of Article 568 of the Land Code of the Russian Federation". URL: http://doc.ksrf.ru/decision/KSRFDecision448183.pdf (last visited: 01.07.2021). (In Russian).

[12] See: Judgement of 20 December, 2011, No. 29-P "On the case concerning the review of constitutionality of the provision of Sub-Item 3 of Item 2 of Article 106 of the Air Code of the Russian Federation in connection with complaints of the Closed Joint Stock Company "Aviatsionnaya Companiya "Poliot" and Open Joint Stock Companies "Aviacompaniya"Sibir'" and "Aviacompaniya "YuTair". SZ RF. 2012. No. 2. Item 397. (In Russian).

[13] See: Judgement of 13 December, 2016, No. 28-P "On the case concerning the review of constitutionality of Sub-Item 1 of Article 1301, Sub-Item 1 of Article 1311 and Sub-Item 1 of Item 4 of Article 1515 of the Civil Code of the Russian Federation in connection with requests of the Court of Arbitration of the Altai Territory". SZ RF. 2016. No. 52 (Pt. V). Item 7729. (In Russian).

[14] See: Judgement of 24 July, 2020, No. 40-P "On the case on the review of constitutionality of Article 1515, para. 4, subpara. 2 of the Civil Code of the Russian Federation in connection with the request of 15th Arbitration Appeal Court". SZ RF. 2020. No. 32. Item 5362. (In Russian).

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Decision of the Constitutional Court of the Russian Federation of 5 March, 2013, No. 413-O. The case concerned the issue of writing off advance customs payments unclaimed within three years to the budget. On the one hand, majority of judges concludes that "an opportunity unlimited in time for persons who have paid advance payments to decide on their return... would mean imposing on the state an excessive burden to indefinitely record and control unclaimed amounts of money transferred to the Federal Treasury accounts, as well as to bear the additional financial burdens it entails".[15] On the other hand, judge K.V. Aranovskiy indicated the shortcomings of such reasoning because it is not clear "what exactly the financial burden is, whether it exists and whether it is actually connected with accounting and control of unclaimed sums... usually the availability of money in the accounts does not burden, but on the contrary, gives advantages, especially to financial organisations, such as the Federal Treasury".[16] To put it simply, in this case, the costs to the government were low and in fact greatly outweighed by the available benefits of private money.

3. Cost-benefit analysis in the non-material sphere

The economic method under consideration is applicable to non-material issues. For example, according to Luzius Mader, the concept of costs in the broad sense "includes not only the direct financial consequences of compliance with the applicable legal provisions; intangible elements such as psychological or emotional distress, as well as all adverse impacts of a legislative act, shall also be taken into account" [28]. Certainly, the non-material costs generated by legislative and regulatory decisions are often difficult to assess.

However, there are examples in the case-law of cost-benefit analyses in the non-material field. For example, such an analysis in relation to personal rights can be found in a case which concerned the deportation of foreigners for a single instance of failure to report their residence in federal cities (Judgment of 17 February, 2016 No 5-P).[17] The text of the judgement does not contain any economic analysis of costs and benefits. This method was applied by judge K.V. Aranovskiy, who in a dissenting opinion emphasised that "...maintaining a notification-based migration registration relieves foreigners of direct and continuous management of their behaviour by the Russian Federal Migration Service and leaves them free to move and choose their place of stay and residence, the state is freer to impose quotas on their admission (more foreign citizens), and Russian citizens in principle are able to afford a comparatively compact and inexpensive migration service... [otherwise] we will either have to tolerate unaccounted masses of inept people humiliated by corruption, masters, deprivation of rights and destitution, alien and hostile to local environment, involved in crime and extremism... In the end, the alternative is either the total compliance of migrants with notification-based registration conditions, ensured by deportation for violations, or its disruption bearing dangerous implications".[18] The dissenting opinion draws attention to the organisational costs for the administrative agencies, including possible staff costs while introducing less restrictive means. The benefit of restricting the personal rights of foreigners, according to the judge, is the achievement of the social objectives of preventing irregular migration while preserving their personal freedom.

A cost-benefit analysis is possible even in

[15] Decision of 5 March, 2013, No. 413-O "On the refusal to accept for consideration the complaint of the limited liability company "EFKO Food Ingredients" on violation of constitutional rights and freedoms by part 2 of Article 122 of the Federal Law "On Customs Regulation in the Russian Federation". Vestnik Konstitutsionnogo Suda of the Russian Federation [Bulletin of the Constitutional Court of the Russian Federation] (hereinafter – VKS RF). 2013. No. 6. (In Russian).

[16] VKS RF. 2013. No. 6. (In Russian).

[17] Judgement of 17 February, 2016, No. 5-P "On the case concerning the review of constitutionality of the provisions of Item 6 of Article 8 of the Federal Law "On Legal Status of Foreign Citizens in the Russian Federation", Sections 1 and 3 of Article 18.8 of the Administrative Offences Code of the Russian Federation and Sub-Item 2 of Section 1 of Article 27 of the Federal Law "On Procedure for Exit from the Russian Federation and Entry into the Russian Federation" in connection with the complaint of M. Ţurcan, citizen of the Republic of Moldova". SZ RF. 2016. No. 9. Item 1308. (In Russian).

[18] VKS RF. 2016. No. 3. (In Russian).

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the political sphere. The Constitutional Court of the Russian Federation usually restrains from assessing the political expediency of statutes or administrative decisions. However, a comparison of costs and benefits in the political sphere is a prerequisite for the proportionality principle. An attempt to use the economic method in question was made in a case involving the rescheduling of elections to the State Duma. The Constitutional Court of the Russian Federation indicated that "the federal legislator may decide to change the date of the elections entailing a certain shortening of the actual term of the State Duma of the current convocation only if the costs of such a decision are sufficiently compensated by the significance of the goals pursued, which, although belonging to the sphere of legislative discretion, shall be constitutionally justifiable and other legal means of achieving them are absent or are not, in the balance of constitutional values, comparable". [19] In this case the costs (restriction of electoral rights) and benefits (achievement of public objectives) were duly mentioned. However, the alternatives had not been analysed. This case, in terms of its implications, demonstrates a weakness of the economic analysis of law. There is a problem of incommensurability between the rights of private persons and the public interests that oppose them [29]. If the provision on the supreme value of the human being and his or her rights (Art. 2 of the Constitution of the Russian Federation) is seen not only as a beautiful ideal, there is a clear danger of misusing economic methodology in constitutional and administrative litigation. In this scenario it is worth noting the opinion of the prominent German philosopher Jürgen Habermas: "as soon as the deontological character of basic rights is taken seriously, they are withdrawn from such a cost-benefit analysis" [30, p. 260]. An opposite approach leads to the devaluation of interests which are essential for democracy. The abstract common good and reducing public expenditure will prevail over individual freedoms. This logic underpins the popular argument for abolishing elections in favor of other ways of forming public authorities in order to save budgetary resources.

4. Conclusions

One should not overemphasise the capability of the costs and benefits analysis. The most appropriate area of application of this methodology is the economic field. At the same time, attempts to commodify individual rights (conferring on them the qualities of merchandise) in other areas run considerable risks. Reducing the scope of personal, political and social rights to mere quantitative equivalents would inevitably produce a utilitarian approach and a devaluation of the value of a human being. For all the undeniable merits of legal realism, the constitutional ideals that are difficult to achieve in practice cannot be dismissed.

[19] See: Judgement of 1 July 2015, No. 18-P "On the case concerning the interpretation of Articles 96 (Section 1) and 99 (Sections 1, 2 and 4) of the Constitution of the Russian Federation". SZ RF. 2015. No. 28. Item 4335. (In Russian).

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