The Third International Scientific Conference on Private and Public Law

3rd September, 2014

«East West» Association for Advanced Studies and Higher Education GmbH, Vienna, Austria

Vienna
2014

«The Third International Scientific Conference on Private and Public Law». Proceedings of the Conference (September 3, 2014). «East West» Association for Advanced Studies and Higher Education GmbH. Vienna. 2014. 60 P.

ISBN–13 978-3-902986-36-8
ISBN–10 3-902986-36-0

The recommended citation for this publication is:
Orzechowska K. (Ed.) (2014). The Third International Conference on Private and Public Law. Proceedings of the Conference (September 3, 2014). Vienna, OR: «East West» Association for Advanced Studies and Higher Education GmbH, Vienna.

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Typeset in Berling by Ziegler Buchdruckerei, Linz, Austria.
Printed by «East West» Association for Advanced Studies and Higher Education GmbH, Vienna, Austria on acid-free paper.

Section 1. Civil procedure

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The right to court in the European Convention on Human Rights: questions of theory

The modern era is based on the realization of the higher values as freedom and equality of citizens of the planet, the right to life and dignity of everyone. They are based on the recognition of the value of law. The law and court are of particular importance when their best incarnation begins to acquire an international character. It happens especially when the national government and the legal system admit voluntary action of this law.

The second half of the XX century is characterized by the emergence and establishment of international legal institutions and organizations designed to embody the rights guarantees into real life. The results of the development of a single legal space in Europe have been the establishment of a number of international institutions which, in particular, are referred by the Council of Europe founded in 1949 and bringing together almost all the countries of the continent.

In the framework of this organization the European Convention on Human Rights and Fundamental Freedoms[1] (here in after – the Convention) was signed. Having ratified in March 1998, Russia joined the Convention to the European human rights protection mechanism including the obligation to obey the rights stated in the document. The Convention opens inalienable rights and freedoms for everyone and requires States to guarantee those rights to every person who is under their jurisdiction.

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[1] Конвенция о защите прав человека и основных свобод (Заключена в г. Риме 04.11.1950) (с изм. от 13.05.2004) (вместе с «Протоколом № 1» (Подписан в г.Париже 20.03.1952), «Протоколом № 4 об обеспечении некоторых прав и свобод помимо тех, которые уже включены в Конвенцию и первый Протокол к ней» (Подписан в г. Страсбурге 16.09.1963), «Протоколом № 7» (Подписан в г. Страсбурге 22.11.1984))//Бюллетень международных договоров 2001. № 3; 2004 № 1.

Moreover, the Russian Federation recognized the jurisdiction of the European Court of Human Rights (hereinafter – the European Court of Justice).

For example, Article VI of the Convention guarantees the right to a fair trial. In paragraph 1 of this Article establishes the rightof every person to a fair and public hearing of his case concerning civil rights and obligations, in the court of a Contracting State.

This Article with an additional protocol coincides with the Article VIII and X of the Universal Declaration of Human Rights and Freedoms[1] and the Article XIV of the International Covenant on Civil and Political Rights in its meaning and content[2].. These articles have a special place in the system of the norms on human rights and freedoms, because they are guaranteed the most reliable and effective mechanism for protecting the rights and freedoms granted – judicial protection mechanism[3].

The right to a trial in the sense of the Article VI of the Convention includes three elements:

1) an independent and impartial court should be established by law;

2) the court shall be competent to hear the dispute on Civil Rights;

3) everyone should have the access to justice.

The right of theaccess to court as a part of the right to trial means that the person concerned must be able to consider his case and it should not discourage excessive constraints expressed in legal and in another form.

The comments[4] to the Article VI of the Convention provide that in order to apply the Article VI, there are the following conditions:

– It is necessary to pass all the instances that have challenged the rights or duties, in accordance with the domestic law;

– In the outcome of the dispute must define these rights or obligations;

– Disputed rights or obligations should be civilian.

The first paragraph of the Article VI of the Convention is applicable to both civil and criminal proceedings. In connection with it we can distinguish two categories of cases: 1) "civil rights and obligations"; 2) criminal charge.

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[1] Всеобщая декларация прав человека (принята Генеральной Ассамблеей ООН 10.12.1948)// Российская газета 05.04.1995.

[2] Международный Пакт от 16.12.1966 «О гражданских и политических правах»//Бюллетень Верховного Суда РФ 1994. № 12.

[3] НулаМоул, Катарина Харби, Л. Б. Алексеева. Европейская конвенция о защите прав человека и основных свобод. Статья 6. Право на справедливое судебное разбирательство. Прецеденты и комментарии. – М: Российская академия правосудия, 2001.С. 5.

[4] Гротрайн Э. Статья 6 Европейской конвенции прав человека и основных свобод. Право на справедливое судебное разбирательство//Европейская конвенция о защите прав человека и основных свобод. Комментарий к ст. 5 и 6. – м.: Юрист, 1997. С. 95.

The Convention provides a mechanism for the protection of the rights declared by the Court, considering individual complaints of violations of the Convention.

Revealing the meaning of the term "civil rights and obligations" under the convention is possible by exploring the practice of the European Court.

Thus, S. F. Afanasiev concludesin his monograp[1] that the practice of the European Court identified three criteria by which you can define "civil rights nature" under the Convention.

1) considering the definition of the private affairs of the order, the European Court of Human Rights is based on the "content material consequences arising from the provisions of domestic law," and not on the established classification of domestic law;

2) any rights under the Convention are "private" and interpreted as "civil";

3) in the case when rights are considered "public" in appliance with the domestic legislation the determining role of "private" and "public" is taken into account, and where there is predominance of "private" such rights are recognized as civil.

As a result, we can say that the concept of "civil rights" in appliance with the Convention is interpreted broadly. To some extent, the same applies to a broad interpretation of the term "criminal charge" in this definition includecriminal law, criminal procedure and administrative penalties.

A fundamental element of the organization and conduction of the trial in compliance with the Convention is the right to access to justice and an effective remedy. In turn, ensuring the right to judicial protection and access to justice generate the obligations for States: 1) does not prevent the court to circulation; 2) access to a court to be practical and effective.

In the Art. XIII of the Convention states that everyone has the right to an effective remedy. The main focus of this article is on the domestic protection, i. e. States Parties shall ensure the proper functioning of state institutions whose remit includes the protection of human rights and fundamental freedoms.

The Article serves as a mechanism for the formation of legal protection in the State to ensure the harmonization of the different levels of legal protection offered by the states by demanding to meet certain international standards.

The Article XIII guarantees an effective remedy before a competent state authority to anyone who reasonably claims to be a victim of a violation of the rights and freedoms protected by the Convention. If the complaint is unfounded in the true sense of the word or the right cannot be guaranteed by the Convention, the court may omit the question of the art. XIII at this stage and on these grounds.But even after

[1] Афанасьев С. Ф. Право на справедливое судебное разбирательство: общая характеристика и его реализация в российском гражданском судопроизводстве. Саратов: Научная книга, 2009. С. 56.

the application was declared admissible, the conclusion, that none of the rights had not been violated does not exempt the court from the duty to raise the question of a possible violation of the Art. XIII. Actually, even if it is found no violation of rights and freedoms ultimately, the Contracting States are obliged to ensure the effective proceedings to identify the alleged violation.

The question of combining the Art. XIII with other procedural articles of the Convention on the Court's opinion has an unequivocal answer: in the case of a violation of a right consideration of the Art. XIII excluded. This attitude to the right to an effective remedy court explains that currently there is a broader understanding of the Article XIII, which is a key requirement of "due process" rights in the Convention.

The art. XIII refers to an effective remedy by referring to the "public authority", which may not be a "tribunal" within the meaning of paragraph 1 of the Art. VI. Moreover, an effective remedy has to deal with the violation of the rights guaranteed by the Convention, while the mentioned rules cover requirements relating to the first case to the existence or content of the "civil rights and obligations" or the definition of a criminal charge, and the second – to the legality of arrest or detention. It is important that these articles are not in the same area. The concept of "civil rights and obligations" are not a continuation of what is called "the rights and freedoms set forth in this Convention" (Article 13), even if there is some overlay.

The right to an effective remedy is important for media rights, fundamental freedoms and for the court. It is necessary to raise the standards of domestic remedies, because national institutions are more qualified than the treaty bodies, in order to offer an effective, affordable, fast and professional procedure that in cases of violation of the Convention rights must end with the actual recovery or compensation.

The decision of European Court are of particular importance for the interpretation of the Articles VI and XIII of the Convention. As D. Gomjen pointed out in his study[1] the supervisory bodies of Convention are bound by their decisions. In turn, I. A. Klepitsky pointed out that "the importance of the interpretation of the Convention by the European Court of Human Rights is due to the fact that the ability of any other is limited "[2].

T. N. Neshataeva [3] states that the European Court practice on approaching to the legal understanding of the specific rules of the Convention is very extensive, it is more than fifty years old. Furthermore, the European Court sticking the concept of

[1] Гомьен Д., Харисс Д., Зваак Л. Европейская конвенция о правах человека и Европейская Социальная Хартия: право и практика. – М.: ИМНИМП, 1998. С. 4.

[2] Клепицкий Л. А. Преступление, административное правонарушение и наказание в России в свете Европейской конвенции о правах человека//Государство и право. 2000. № 3. С. 59.

[3] Нешатаева Т. Н. Право на суд в решениях Европейского суда по правам человека// Российский правоохранитель. 2007. С. 3–8.

"evolving precedent" gradually renews the established approaches influenced by the changing social environment. Thus, the precedents of the European Court in relation to specific articles of the Convention are a complex phenomenon, multi aspect and changing.These characteristics of authoritative interpretations complicate the task of studying the European Court. However, the solution is currently possible as there is a free access to the European Cour[1]; there are serious works of foreign authors studying precedent decisions[2]. In connection with it we can talk about the important role played by the European Court.

By all the above we can say that the Convention, as a "constitutional instrument of European public order"[3] requires clarification of its content with the position of the evolutionary principle. In other words, the Convention "must be interpreted in the light of notions that prevail in democratic countries today "[4]. In this case the only limitation in understanding the meaning of the articles of this document is a result of the inability to create a new interpretation of the law not specified in the text of the Convention.

Thus, the "right to a court" within the meaning of the Convention has no specific detailed content. In general, it is understood under the definition of the mechanism (possible) public authorities to protect and restore in case of violation of the rights and freedoms of man and citizen. The protection of the right "is a means of ensuring the implementation of law, but only to the extent actually required for its implementation and in the manner prescribed by law"[5]. The mechanism of protection of the rights and freedoms can be defined as "jurisdictional activities of a state and public bodies, and in the cases specified in the law and the peopleentitled to coercive measures and methods to facilitate the implementation of a real recovery and violated or disputed rights and interests protected by law"[6]. Naturally, the mechanism of protection of the right would not be complete if the government did not ensure its implementation totally. During the implementation of State responsibility to protect human rights and freedoms, the view of the authority involved in the process at some point or another may vary, some authorities may change depending on the other stage of the process and the specific of powers.

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[1] Бюллетень Европейского суда по правам человека (выходит ежемесячно); Путеводитель попрецедентной практики Европейского суда (выпуск: ежегодно).

[2] Микеле де Сальвиа Прецеденты Европейского суда по правам человека. – СПб: Юридический центр пресс, 2004.

[3] Де Сальвиа М. Европейская конвенция по правам человека. – СПб: Издательство Р. Асланова «Юридический центр Пресс», 2004. С. 57.

[4] Там же. С. 69.

[5] Арапов Н. Т. Проблемы теории и практики правосудия по гражданским делам. – М, 1984. С. 63.

[6] Там же. С. 69.

The right of access to justice is an implicit right and from the general meaning of the provisions of the Article VI and XIII of the Convention, i. e. the access to justice is a condition of the proper implementation of the right to trial. The access to justice as a prerequisite of its implementation, the part of the content of the rightis supposed not to make the right to trial be of a declarative nature.

For the formation of a unified approach to the essence of the rights an analysis of decisions handed down by the European Courtis required.

Section 2. Civil law

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Right of operational management and other rights autonomous establishments on property property of the Russian Federation

The property of autonomous establishment isn't its property, thus it is worth paying special attention that it belongs to it on the right of operational management. On the basis of it there are certain restrictions according to the order the property, some property of establishment has the right to dispose independently, but with observance of the established requirements.

Autonomous establishment is created being based on the property which is in federal property, property of the subject of the Russian Federation or municipal property. Federal property carry property which belongs on the property right of the Russian Federation [1].

The Civil Code of the Russian Federation includes property in property of the subject, which belonging on the property right to the republic, a crab, areas, to the city of federal value, the autonomous region, the autonomous area. The municipal property includes property which belongs on the property right to city and rural settlements, and also municipal to an obrazovaniyam.sobstvennost of the Russian Federation.

The federal law of 03.11.2006 N 174-FZ «About autonomous establishments» provides two ways of management, possession, using property or is independent, or at a consent of the owner. And the way of possession in this situation will depend on that for whose account this property is acquired [2].

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[1] See: Korneeva I. L. Civil law of the Russian Federation: Studies. grant. M, 2005. Page 185.

[2] About autonomous establishments. The federal law of November 3, 2006 No. 174-FZ.

The property which got establishment at the expense of the profit got from activity carried out according to the charter, arrives in its personal order, except for its transfer to authorized capital of other legal entities. If autonomous establishment receives property from the founder or gets on funds which are allocated to it, in that case it has no right to dispose of property without consent of the owner [1]. Autonomous establishment is allocated with property as operational management. The right of operational management according to point 1 of article 296 of the Civil Code of the Russian Federation assumes management, possession, using and the order property in the limits set by the law, and according to the purposes of activity of establishment or with tasks of the owner of property and its appointment. And the owner of property the founder – the Russian Federation, the subject of the Russian Federation, municipality, depends it on on the basis of what property autonomous establishment is created [2].

• The right of operational management refer to the real rights which are characterized by the following properties;

• they confer to subjects of civil legal relationship powers of possession and using property, but limit the right for the order to it;

• by legal entity of operational management the property from others illicit possession can be claimed and elimination of violations of competences of using by the given property, including can be required from his owner; order to them;

• can belong to persons who aren't owners of this property.

From the point of view of a legal regime of property within the uniform right of operational management autonomous establishment has an existence of different competences: order to them;

– concerning funds which are received from the budget, the mode, usual for establishment, which is fixed by standards of the budgetary legislation is applied order to them;

– concerning especially valuable personal and real estate which is received from the owner or acquired at the expense of his means, the mode more expanded at the expense of possibility of the order by this property with the consent of the owner is applied. If to close eyes to some nuances it it is possible to consider as a kind of the right of operational management;

– concerning an invaluable personal estate which is received from the owner or it is acquired at his expense, also property and income gained after implementation of "off-budget activity" autonomous establishment, the mode of the right of the independent order as one of a kind of the right of operational management is carried out. But there

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[1] Vlasova A. V. To discussion about real and liability laws//Jurisprudence. 2000. No. 2. Page 76.

[2] See: Kryazhevskikh K. P. Pravo of operational management and the right of economic maintaining on the Russian grazhkdansky law. M, 2003. Page 36–41.

are some restrictions, namely on introduction of such property in authorized capital of other legal entities, the consent of the owner, and for this purpose is necessary for commission with it large deals or transactions with interest, a consent of observation sovetaoperativny management[1].

The property of autonomous establishment which belongs to it on the uniform right of operational management, includes three types of this right are dependent on category. Though property rights of establishment aren't settled by the right of operational management.

It is possible will notice that in practice autonomous establishments have non-cash money on a liability law of the requirement, but not on the real right of operational management as things individually certain can only be object of the real right[2].

Same concerns also historical and cultural monuments, that is objects of cultural heritage, as well as natural resources limited in a turn or withdrawn from a turn. These objects usually use autonomous establishments also on a liability law, most often – аренд or free use.

The land plots, fixed to autonomous establishment, it is applied the rights of termless using. Besides receiving by autonomous institutions of the additional land plots on obligations by the nature the right of rent besides those sites with which each autonomous establishment has to be allocated for realization of the activity isn't excluded also.

As for objects of «intellectual property» created by their workers when performing an office task, for example, commercial designations, autonomous establishments can get only exclusive rights, but not the real.

Without consent of the founder Autonomous establishment has no right for the order real estate and especially valuable personal estate which is acquired by autonomous establishment at the expense of funds which were allocated by the founder for acquisition of this property or the founder fixed to it[3].

Especially valuable personal estate call property without which implementation of activity fixed by autonomous establishment by the charter will be complicated.

The founder, itself makes the decision on, whether to refer property to category of especially valuable personal estate. As for the rest property, autonomous establishment has the right for the independent order.

The head of autonomous establishment submits for consideration of the supervisory board the offer on commission of this or that transaction on the order by property with which autonomous establishment has no right to dispose independently. Such

[1] Kamyshansky V. P. Property right to real estate: questions of restrictions. Elista, 1999. Page 159.

[2] Kirillovykh A. A. Establishments: some questions of an order and consequences of transition to the autonomous status//Right and economy 2007. No. 12. Page 24–29.

[3] See: Ryzhenkov A.Ya., A.E's Chernomorets. Sketches of the theory of the property right (past and the present). Volgograd: Publishing house «Panorama», 2005. Page 122.

offer considers meeting of the supervisory board which is convoked by the head of autonomous establishment. Meetings are held in process of its need, but at least once a quarter. In case the transaction the urgent head has the right to demand from the chairman of the supervisory board to call his members for holding a meeting in a short space of time. If all members of council were informed on what place and times of carrying out meeting, and at the meeting was more 50%членов, meeting of the supervisory board can be considered as the competent. The supervisory board concerning the offer taken out by the head makes the recommendations[1].

The number of members of the supervisory board fluctuates from 5 to 11. Representatives of workers can also be a part of members of the supervisory board on condition that their quantity not to exceed one third of total number of members. For supervisory board everyone members at vote is available on one voice.

The founder of autonomous institution makes the decision on possibility of the conclusion of the transaction in relation to property with which the autonomous institution has no right to dispose independently only after consideration of recommendations of the supervisory board of autonomous institution[2].

The order of definition of types of especially valuable personal estate of autonomous establishment is approved in the Resolution of the Government of the Russian Federation of July 26, 2010 N 538 «About an order of reference of property of autonomous or budgetary establishment to category of especially valuable personal estate» As this Resolution designated criteria of reference of property to category of especially valuable personal estate. One of the main criteria is the balance cost of property. Analyzing the main norms stated in this resolution, the founder develops, for the subordinated establishments, the statutory act in which the list especially valuable movable the imushchestva.balansovy cost of property is established.

Comparing an order of definitions of lists of especially valuable personal estate of the budgetary and autonomous establishments, it is worth paying attention to some differences. At federal level lists of especially valuable personal estate in autonomous establishments are defined by his founder. At the level of the territorial subject of the Russian Federation it is carried out in the legislative order established by public authority of the territorial subject of the Russian Federation, and on the municipal – as it should be which is established by local administration. In the budgetary establishments at all levels of the public power lists of especially valuable personal estate are defined by that body which carries out functions and powers of the founder[3].

[1] Vavilova A. A. Autonomous establishments in system of the legislation. 2009. No. 24.

[2] See: Sidorov V. N. Autonomous establishment - an innovation of modern Russian civil law//the Bulletin of the Volga university of V. N. Tatishchev. Law series. Tolyatti: VUIT, 2007, Vyp. 65. Page 49–61.

[3] Grigorieva N. S. Autonomous establishments: creation, reorganization and elimination. 2011. No. 4. With 132–141.

Autonomous establishments, in difference from budgetary, possess property and economic and financial independence. Budgetary the income from use of property don't see as they are in the state or municipal ownership, and paid services which are rendered by the budgetary establishments, means of gratuitous receipts and other activity bringing in the income when the budget is formed, approved, executed and the reporting about its execution is formed join in structure of the income of the budget. The owner of property of autonomous establishment has no right to the income from use of activity and property of autonomous establishment.

Autonomous establishments in difference from the budgetary receive a task from the founder, and carry out activity, free of charge or partially for a fee for the consumer, on rendering services or works. Such activity from the relevant budget will be financed. In any form, not forbidding the law, namely subventions, subsidies, the state off-budget funds or other sources[1].

Summing up the result it is possible to tell that autonomous establishment it not a simple design, in essence and the preena an organizational and legal form familiar to us, but absolutely new type of the legal entity. Autonomous establishment, as well as budgetary, carries out significant functions for developing society, but are allocated with wide financial and economic and property independence in comparison with the budgetary establishment. It is the mixed type combining signs both commercial, and noncommercial organizations.

References:

1. About autonomous establishments. The federal law of November 3, 2006 No. 174-FZ.
2. Grigorieva N. S. Autonomous establishments: creation, reorganization and elimination. 2011. No. 4. With 132–141.
3. Kamyshansky V. P. Property right to real estate: questions of restrictions. Elista, 1999. Page 159.
4. Kirillovykh A. A. Establishments: some questions of an order and consequences of transition to the autonomous status//Right and economy 2007. No. 12. Page 24–29.
5. Korneeva I. L. Civil law of the Russian Federation: Studies. grant. M, 2005. Page 185.
6. Kryazhevskikh K. P. Pravo of operational management and the right of economic maintaining on the Russian grazhkdansky law. M, 2003. Page 36–41.
7. Muslyumova L. A. Comparative characteristic of a legal regime of property of the budgetary and autonomous establishments//Collection of postgraduate works. Kazan: Publishing house Kazan. the state. un-that, 2010. Vyp. 11.

[1] Muslyumova L. A. Comparative characteristic of a legal regime of property of the budgetary and autonomous establishments//Collection of postgraduate works. Kazan: Publishing house Kazan. the state. un-that, 2010. Vyp. 11.

8. Ryzhenkov A.Ya., A.E's Chernomorets. Sketches of the theory of the property right (past and the present). Volgograd: Publishing house "Panorama", 2005. Page 122.
9. Vavilova A. A. Autonomous establishments in system of the legislation. 2009. No. 24.
10. Vlasova A. V. To discussion about real and liability laws//Jurisprudence. 2000. No. 2. Page 76.
11. Sidorov V. N. Autonomous establishment – an innovation of modern Russian civil law//the Bulletin of the Volga university of V. N. Tatishchev. Law series. Tolyatti: VUIT, 2007, Vyp. 65. Page 49–61.

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Right of building: concept and distinctive features

Despite long history of development of legal relationship in the sphere of building of the land plots, the legal category "right of building" or "superfition" remains low-studied. Use of the state and municipal land plots for construction is one of the most profitable spheres of a civil turn therefore the perspective of regulation of the relations mediating the right of building, represents considerable interest for the civilian.

The right known in ancient Rome a superfition (superficies) represented the real, alienated, descended right of construction of a structure on others land plot and a right of use of this structure. The property right to a structure belonged to the owner of the land plot. In the Russian civil law the right of the building entered by the Law on July 23, 1912, was defined as the real right of urgent, hereditary, burdened and alienated possession by others earth for a payment[1].

The modern Russian doctrine defines the right of building as the real right of possession and using others land plot for construction on it and operation of buildings and constructions for a payment, transferred in a succession order.

The initial purpose of introduction of the right of building – to give opportunity to citizens to have own real estate on others earth irrespective of the rights of other persons. It the real relations of building differ from the contractual relations. Now the similar relations are regulated by different ways (by means of the right of rent, an easement or by means of investment contracts).

[1] Sinaisqi V. I. Russian civil law. – M, 2002. Page 244.

For detection of features of legal regulation of the relations between the builder and the owner of the land plot by means of a superfition, we will carry out its comparative analysis with adjacent institutes.

Distinctive features a superfition from an easement seem in the following.

1. The easement can be established for use of the land plot by concrete way (for example, pass or journey through others land plot). On the contrary, the right of building doesn't limit freedom of the builder in a choice of ways of use of a site for construction and operation of the constructed object.

2. According to point 3 of article 274 of the Civil Code of the Russian Federation the easement is established by the agreement of the parties, and in case of dispute by court in the claim of the person demanding establishment of an easement. On the contrary, the only basis of buying of building is the contract with the owner of the land plot. The bases to force the owner to provide to the interested person the right of building aren't provided by the law[1].

3. The easement can be provided as paid, so gratuitously. The right of building is provided only on paid conditions. The size and payment procedure are included in number of essential terms of the contract about providing the right of building.

4. The right of the user of an easement can't independently be alienated to the persons which aren't the owner of property for which ensuring use the easement is established. On the contrary, the right of building is transferred as succession, according to the employment contract and can be a pledge subject.

5. At the time of establishment of an easement it is impossible to define term of its action. On the contrary, the minimum and maximum periods of validity of the right of building are defined by the law – from 50 to 100 years.

6. The provided distinctive characteristic allows to carry out distinction between the right of an easement and the right of building on character of the relation of the subject of the limited real right to its object. In the servitutny relations the owner treats the provided thing as to others, though for satisfaction of own needs. On the contrary, the owner a superfition treats the provided land plot and structures erected on it, as the. On the other hand, the rights of the owner of the object burdened with an easement, are limited only to its duty to allow other persons to using a thing with preservation of own rights. On the contrary, competences of the owner of the land plot provided under building, mostly can't be implemented.

Detection of distinctive features of an easement and superfition allows to prove established by the legislator in relation to the right of building a rupture of unity of

[1] According to some authors, in some cases, when the owner of the land plot refuses the contract on providing the right of building, the interested person has the right to appeal to court with the requirement about establishment of a land easement//Oskina I., Loopoo A. Superfitsy as alternative by easement// Lawyer. 2012. № 10.

the rights to the land plot and the structures erected on it. As in Russia, and abroad, the situation when the structure belongs on the property right to one person, and the land plot – to another is widespread. The task of the legislator in these cases consists in development of the mechanism of regulation of the developing relations between the owner of the land plot and the owner of a structure. Thus in literature the position is proved that the developing relations carry proprietary, instead of obligations character[1]. The real rights mediate the relations between the authorized subjects which interests are satisfied with own active actions on possession, using and the order property. On the contrary, liability laws, including rent, mediate the relations in which interests of the authorized person are satisfied at the expense of redistribution of material benefits between the authorized and obliged subject that significantly limits possibility of the user – not owner to use the provided property for satisfaction of the requirements. In this regard the example German "the building law of succession" (Bauwerk), representing burdening foreign land plot alienated and inherited right of construction of a structure on it is interesting. According to classical norms § 93 and 94 BGB the immovable thing is considered only the land plot, and being on it real estate are considered only as its components, instead of independent objects of the rights (that takes place and in English common law). To keep property on a structure for the builder, having at the same time left in inviolability the property right to the land plot, paragraph 1 § 12 Regulations on the law of succession of building of 1919 (since 2007 works in the form of the Law on the building law of succession) the legal fiction is established: the structure is considered by it as a component of the called real right (instead of as a component of an immovable thing – the land plot). Therefore in Germany the builder is obliged to pay "percent" (rent) for using the land plot, getting "in exchange" the full-fledged real right to a structure[2].

Passing to detection of differences of the right of building from the right of rent it is necessary to remind that as the initial purpose of introduction of the right of building the legislator defined replacement of an existing order of granting the state and municipal land plots in rent under building. Thus the content of the limited real right to the land plot and the key signs, allowing to distinguish the right of building from the right of rent, neither in the doctrine, nor in practice aren't developed so far. As it is noted in many researches, complexity consists that while the real or obligations nature of the right of rent finally isn't defined[3].

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[1] Guseva M. A. Some controversial questions of a uniform real estate object //Business, management and right.. 2013. № 1.

[2] Sukhanov E. A. Comparative research of possession and property in English and in the German right//The Messenger of civil law. 2012. № 6.

[3] Ershov O. G., Polezhaev O. A.. Right of building of the land plot or right of rent//Right and economy. 2013. № 2.

Estimated differences seem in the following.

1. The volume of competences of the builder as subject of the real right allows it to own and use the land plot, and also to dispose of the erected object of any not forbidden law in the way during term of the right of building. On the contrary, competences of the tenant as subject of a liability law are limited to terms of the contract.

2. The rent relations assume return by the tenant after term of rent of subject of the contract that in relation to the land plot, properties and which qualities will be changed as a result of the erected structure, it is objectively impossible. The relations a superfition assume that the builder erects a real estate object for himself and the considerable period of time uses the land plot and a structure, covering the enclosed investments. In turn the owner of the land plot upon termination of period of validity of the right of building gets the property right to a new thing – the erected structure.

3. The rent relations on interrelation of the authorized and obliged subjects include only the rights and duties of the lessor and the tenant. Involvement of the third parties in these relations isn't supposed. Now in practice it generated such negative situations when owing to dishonesty of the builder the lease contract is terminated or nullified (for example, owing to construction of the structure which isn't corresponding to purpose of the land plot, violation of terms of a rent, etc.). Consequence of cancellation of the contract is recognition of the erected structure by unauthorized construction. Thus the third parties who have enclosed own means in construction, have no other opportunity to protect the interests otherwise, except how to claim damages from the builder that is almost impossible. On the contrary, the real right of building covers the relations between the builder and an unlimited circle of the third parties. Thus violations by the builder of terms of the contract about building, including led to death of the constructed object, don't stop its right of building and don't exempt it from a duty erect an appropriate real estate object. We believe that this situation will serve as an additional guarantee of observance of interests of citizens – participants of share construction.

4. The person having the right of building, having the right to alienate in property to the third parties of the room in the erected building. Purchasers from the moment of the state registration of the property right to the room admit participants of the right of building (except for cases when they get a share in the right of the general property on the land plot). Thus now there is not clear a question of the rights of purchasers of rooms upon termination of period of validity of the right of building. As O. G. Ershov fairly noticed, such position of the legislator calls into question benefit of the builder and other purchasers of rooms in the constructed object. If as the builder the citizen acts, members of his family after the termination of the right of building lose a right of use of a structure. Also there are no guarantees of that the municipality after

the termination of the right of building will transfer the released premises to needy citizens, instead of will transfer them to uninhabited fund. From there is a question of that, why to enter institute of the right of building which is unprofitable to the builder, but is attractive to the decision in the subsequent public tasks. It is obvious that here it is necessary to look for balance of private and public interests[11].

We believe that this problem should be resolved as methods private-law, and public regulation. By means of public regulation, at the level of the land and housing legislation the state and municipal owners should consolidate norm about a ban to change purpose of the real estate object created on the basis of the contract on the right of building.

By means of private-law regulation, it is necessary to provide the legislative mechanism allowing purchasers of rooms to continue to own and use this room after periods of validity of the right of building on other lawful basis. For example, to purchasers of rooms in an apartment house, after its transition to municipal housing stock, it can be offered to remain to live in the acquired rooms on terms of the contract of social hiring. Thus it is represented that the right of building has to be provided under construction of socially significant real estate object.

References:

1. Gusev M. A. Some controversial questions of a uniform real estate object//Business, management and right. 2013. No. 1.
2. Ershov O. G. The obligations accompanying construction of a structure: Monograph. – M, 2013. 790 pages.
3. Ershov O. G., Polezhaev O. A. Right of building of the land plot or right of rent//Right and economy. 2013. No. 2.
4. Oskina I., Loopoo A. Superfitsy as alternative by easement//The Lawyer. 2012. No. 10.
5. Sinaisqi V. I. Russian civil law. – M, 2002. 638 pages.
6. Sukhanov E. A. Comparative research of possession and property in English and in the German right//he Messenger of civil law. 2012. No. 6.

[1] Ershov O. G. The obligations accompanying construction of a structure: Monograph. – M, 2013. P. 323.

Section 3. Constitutional law

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Enforcement of decisions of constitutional (charter) courts of the subjects of the Russian Federation

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Обеспечение исполнения решений конституционных (уставных) судов субъектов РФ[1]

Актуальной проблемой теории и практики конституционного правосудия является проблема исполнения решений органов конституционной юстиции. Конечно, можно привести немало примеров их своевременного исполнения, но встречаются факты и другого рода: явное игнорирование, неоправданное затягивание с исполнением, попытки преодоления их юридической силы повторным принятием норм, аналогичных признанным неконституционными.

Примером формального исполнения решений конституционного суда субъекта Российской Федерации может служить решение Конституционного суда Республики Коми от 15 сентября 2000 г. по делу о проверке конституционности пункта 10 ст. 3 и примечания 2 к пункту 6 ст. 12 Закона Республики Коми «О едином налоге на вмененный доход для определенных видов деятельности» по жалобе акционеров ООО «Комиссионные товары». В решении отмечалось, что в п. 10 ст. 3 данного закона излишне широко толкуется понятие «розничная

[1] *Статья опубликована при финансовой поддержке Российского гуманитарного научного фонда (проект № 14-23-23001).*

торговля», включая в него и комиссионную деятельность, позволяя тем самым относить лиц, осуществляющих комиссионную торговлю, к плательщикам единого налога, что противоречит российскому законодательству. Государственному Совету Республики Коми было предложено внести изменения в Закон республики «О едином налоге на вмененный доход для определенных видов деятельности», приведя его в соответствие с федеральным законодательством.

15 ноября 2000 г. Государственный Совет Республики Коми принял Закон Республики Коми «О внесении изменений и дополнений в Закон «О едином налоге на вмененный доход для определенных видов деятельности», которым пункт 10 ст. 3 исключил. Однако этим же нормативным актом ст. 12 Закона дополнена частью 6, устанавливающей коэффициент на базовую доходность для исчисления налога на добавленную стоимость для торговли по договорам комиссии с физическими лицами. Таким образом, размер налога на добавленную стоимость для комиссионных товаров не изменился[1].

В качестве примера игнорирования решений органа конституционного правосудия можно привести Постановление Уставного суда Свердловской области от 23 мая 2000 г., которым были признаны не соответствующими Уставу области положения Устава муниципального образования «Нижнетуринский район», устанавливающие в нарушение требований федеральных и областных законов порядок досрочного прекращения полномочий депутатов выборного органа местного самоуправления не путем проведения голосования избирателей по их отзыву, а посредством проведения референдума. Такие же неуставные нормативные положения содержались в уставах 20 муниципальных образований. После опубликования Постановления Уставного суда, по данным его председателя В. И. Задиоры, изменения были внесены только в уставы 9 муниципальных образований[2].

Исполнение решений конституционных (уставных) судов требует активных действий со стороны законодательных (представительных) и исполнительных органов государственной власти, органов местного самоуправления, других судов

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[1] См.: Гаврюсов Ю. В. Проблема исполнения решений Конституционного Суда Российской Федерации и конституционных (уставных) судов субъектов Российской Федерации//Проблемы исполнения федеральными органами государственной власти и органами государственной власти субъектов Российской Федерации решений Конституционного Суда Российской Федерации и конституционных (уставных) судов субъектов Российской Федерации: Материалы Всерос. совещания, Москва, 22 марта 2001 г. /Под ред. М. А. Митюкова, С. В. Кабышева, В. К. Бобровой, С. Е. Андреева. – М.: Формула права, 2001. – С. 226–227.

[2] К проблеме исполнения решений конституционных (уставных) судов субъектов Российской Федерации (Гусейнова Д. Г. -Р., Пирбудагова Д. Ш.)//Государственная власть и местное самоуправление. – 2007. – № 9.

и правоприменителей[1]. Чтобы говорить о способах, позволяющих принудить правоприменителей активно исполнять решение органа конституционного контроля, необходимо выявить причины неисполнения решений.

«Причины неисполнения или ненадлежащего исполнения актов конституционной юрисдикции различны. Это, как считает Л. Лазарев, и сохраняющийся в обществе, во властных структурах правовой нигилизм, неуважение к закону и правопорядку, противоречивые процессы во взаимоотношениях федерального центра и регионов, и ущербность процессуального механизма исполнения актов конституционной юрисдикции, а порой и несовершенство самих этих актов – усложненное изложение их содержания, приводящее к недопониманию исполнителями»[2].

Как подчеркивает Н. В. Витрук, «слабость, неэффективность исполнения решений Конституционного Суда Российской Федерации и конституционных (уставных) судов субъектов Российской Федерации во многих случаях обусловлена не только общей недооценкой роли и значения конституционного правосудия в обеспечении правовой стабильности, в упрочении конституционного строя, особенно в условиях качественной трансформации общественного строя (отсутствие достаточных материально – финансовых ресурсов и средств, правовой нигилизм, низкая правовая культура населения), недооценкой роли и значения конституционного правосудия, отсутствием достаточного опыта молодых конституционных судов, невысоким престижем судов, неустойчивостью позитивных тенденций в переходный период, но и незавершенностью законодательной регламентации этой стадии конституционного судопроизводства, механизма доведения решений Конституционного Суда Российской Федерации до логического конца, до реализации, отсутствием реальной конституционно-правовой ответственности за неисполнение решений конституционных судов»[3].

Несомненно, одна из основных причин неисполнения решений органов конституционной юстиции состоит в явном неуважении к этим решениям со стороны общества. Проблема состоит в том, что до сих пор законодательно не установлено, что же представляют собой решения Конституционного Суда РФ и конституционных (уставных) судов: прецеденты, нормативные правовые акты, акты нормативного характера, акты, имеющие силу закона, – и какое место они занимают среди источников права. Поэтому складывается двойственное отноше-

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[1] См.: Витрук Н. В. Форум: Исполнение решений конституционных судов//Конституционное право: Восточноевропейское обозрение. – М., 2002. – № 3 (40). – С. 41.

[2] Лазарев Л. Статья: Исполнение решений Конституционного Суда РФ//Российская юстиция. – № 9. – 2002. – С. 19.

[3] Витрук Н. В. Форум: Исполнение решений конституционных судов//Конституционное право: Восточноевропейское обозрение. – М., 2002. – № 3 (40). – С. 40.

ние к указанным актам. С одной стороны, их юридическая сила очень велика, однако ни один нормативный правовой акт в Российской Федерации не определяет, что представляют собой решения органов конституционного правосудия и какое место в правовой системе Российской Федерации они занимают. Е. В. Колесников справедливо указывает на то, что «вывод об отнесении решений Конституционного Суда Российской Федерации, конституционных (уставных) судов к источникам права должен быть не доктринальным или полуофициальным, основанным на мнении высоких судей или политиков, а нормативно закрепленным» [1].

Все-таки основной причиной игнорирования актов органов конституционного контроля, как уже было отмечено, является несовершенство нормативно – правового регулирования. В законодательстве федерального и регионального уровней отсутствует как таковой институт конституционно-правовой ответственности с соответствующими санкциями. В Федеральном конституционном законе «О Конституционном Суде Российской Федерации» в статье 81 «Последствия неисполнения решения» закреплена следующая норма: «неисполнение, ненадлежащее исполнение либо воспрепятствование исполнению решения Конституционного Суда Российской Федерации влечет ответственность, установленную федеральным законом». В законодательных актах субъектов указанные положения федерального конституционного закона дублируются.

В Законе «О Конституционном суде Республики Башкортостан» (в редакции от 8 декабря 2003 г.) содержится специальная статья «Обязанность государственных органов и должностных лиц по приведению законов и иных нормативно-правовых актов Республики Башкортостан в соответствие с Конституцией Республики Башкортостан в связи с решением Конституционного суда Республики Башкортостан» (ст. 83) [2]. Согласно этому Государственное Собрание – Курултай Республики Башкортостан в течение шести месяцев после опубликования решения Конституционного суда республики отменяет признанный неконституционным закон Республики Башкортостан, постановление Государственного Собрания – Курултая Республики Башкортостан, принимает новый закон, новое постановление или ряд взаимосвязанных законов, постановлений либо вносит изменения и (или) дополнения в закон, постановление, признанные неконституционными в отдельной их части. Правительство Республики Башкортостан не позднее трех месяцев после опубликования решения Конституционного суда республики вносит в Государственное Собрание – Курултай республики проект

[1] Колесников Е. В. Постановления конституционных судов как источник российского конституционного права//Изв. высших учеб. заведений. Правоведение. – 2001. – № 2. – С. 36–37.

[2] К проблеме исполнения решений конституционных (уставных) судов субъектов Российской Федерации (Гусейнова Д. Г. -Р., Пирбудагова Д. Ш.)//Государственная власть и местное самоуправление. – 2007. – № 9.

нового закона Республики Башкортостан или ряд взаимосвязанных проектов законов, либо законопроект о внесении изменений и (или) дополнений в закон, признанный неконституционным в отдельной его части. Указанные законопроекты рассматриваются Курултаем Республики Башкортостан во внеочередном порядке.

Президент, Правительство Республики Башкортостан не позднее месяца после опубликования решения Конституционного Суда Республики Башкортостан отменяют нормативный правовой акт соответственно Президента республики или Правительства Республики Башкортостан, принимают новый нормативный правовой акт либо вносят изменения и (или) дополнения в нормативный правовой акт, признанный неконституционным в отдельной его части. Органы местного самоуправления также обязаны в течение трех месяцев отменить акт или его отдельные положения. В следующей статье Закона республики говорится, что если субъекты, к которым относится решение, по истечении указанных сроков не исполнят его, то к ним применяется механизм ответственности, предусмотренный федеральными законами и законами республики[1].

В Уставном суде Свердловской области имеется положительный опыт по решению данной проблемы. С целью безусловного исполнения его решений, в особенности связанных с выплатами соответствующих пособий и компенсаций гражданам, было налажено тесное взаимодействие с органами прокуратуры. Так, в ходе рабочих встреч с представителями прокуратуры Свердловской области была достигнута договоренность об осуществлении контроля с ее стороны за исполнением решений Уставного суда. Проработан вопрос о привлечении к различным видам ответственности должностных лиц органов государственной власти и местного самоуправления, в том числе за нецелевое использование бюджетных средств, выделенных на реализацию прав граждан, защищенных решениями Уставного суда. Учитывая, что Положение о Министерстве юстиции Российской Федерации[2] предусматривает проведение мониторинга правоприменения решений Конституционного Суда РФ с Главным управлением Министерства юстиции РФ по Свердловской области проработан вопрос взаимодействия по поводу исполнения решений Уставного суда Свердловской области[3].

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[1] См.: Гошуляк В. В., Ховрина Л. Е., Геворкян Т. И. Конституционное правосудие в субъектах Российской Федерации. – М., 2006. – С. 133–134.

[2] П. 4.1 ст. 7 Положения о Министерстве юстиции Российской Федерации, утв. Указом Президента РФ от 13 октября 2004 г. N 1313 «Вопросы Министерства юстиции Российской Федерации»//Собрание законодательства РФ. – 2004. – № 42. – Ст. 4108.

[3] Пантелеев В. Ю. Актуальные вопросы модернизации и повышения эффективности работы конституционного правосудия в субъектах Российской Федерации//Конституционное и муниципальное право. – 2012. – № 3. – С. 46–51.

Только в 2011 г. в Уставный суд поступило более двух десятков обращений граждан о неисполнении органами власти решений Суда, затрагивающих их права. Отвечая на обращения граждан, Уставный суд не ограничивается разъяснением гражданину его права на защиту органами прокуратуры или судом общей юрисдикции. По каждому подобному обращению гражданина от имени Уставного суда в соответствующие органы и прокуратуру направлялись письма по контролю обеспечения надлежащего исполнения решений Суда и оказанию содействия гражданам в реализации их прав. Все это позволило добиться эффективного исполнения решений Уставного суда, в том числе связанных с необходимостью реального выделения денежных средств гражданам для реализации социально значимых услуг.

Практика взаимодействия с органами прокуратуры существует и в Республике Марий Эл. Так, постановлением Конституционного суда РМЭ от 1 августа 2013 г. пункт 2 постановления администрации городского округа «Город Йошкар-Ола» от 10 августа 2012 г. № 1964 «О внесении изменений в постановление мэра города Йошкар-Олы от 30 января 2007 г. № 113 и отнесении участка автомобильной дороги к автомобильным дорогам необщего пользования» был признан не соответствующим Конституции Республики Марий Эл и в силу ее пункта 6 статьи 95 утратил силу. В целях защиты конституционных прав и свобод граждан председатель Конституционного суда республики А. М. Баранов обратился с официальным письмом к прокурору города Йошкар-Олы с просьбой принять необходимые меры по контролю за действиями подразделений администрации городского округа «Город Йошкар-Ола» по приведению участка дороги по улице Волкова в соответствие с требованиями, установленными для дорог общего пользования. Данное решение было исполнено, дорога для граждан Республики Марий Эл открыта.

С целью обязательного исполнения решений суда возникла необходимость оказания юридической помощи гражданам, обратившимся в суд с заявлениями, касающимися вопросов по уже принятым решениям. И здесь основная роль по отслеживанию исполнения решений суда, по разъяснению заявителям дальнейшего порядка их возможных действий и взаимодействия с государственными органами, ответственными за исполнение решений, ложится на секретариат, который уполномочен в предварительном порядке рассматривать обращения, а также анализировать практику исполнения решений.

Исходя из вышеизложенного в целях обеспечения исполнения решений конституционных (уставных) судов, прежде всего, должен быть использован механизм конституционно-правовой ответственности органов государственной власти субъектов Федерации и органов местного самоуправления, предусмотренный Федеральными законами от 6 октября 1999 г. N 184-ФЗ «Об общих принципах

организации законодательных (представительных) и исполнительных органов государственной власти субъектов Российской Федерации» и от 6 октября 2003 г. N 131-ФЗ «Об общих принципах организации местного самоуправления в Российской Федерации» [1].

Затем необходимо будет внести изменения в региональное законодательство. Например, законом Республики Дагестан от 25 апреля 1996 г. «О Конституционном суде Республики Дагестан» [2] предусмотрено, что «Конституционный суд имеет право налагать штрафы на должностных лиц и граждан, проявивших неуважение к Конституционному суду». Основанием для наложения штрафа за неуважение являются неисполнение, ненадлежащее исполнение или воспрепятствование исполнению решения Конституционного суда. Закреплены и его размеры: для граждан – до 10 минимальных размеров оплаты труда, для должностных лиц – до 50 МРОТ. А исполнение решения о наложении штрафа производится в порядке, предусмотренном действующим законодательством. Тем не менее, остается неясным вопрос о том, каким образом будет взиматься штраф с соответствующего органа государственной власти или должностного лица.

Конституционный Суд РФ, не обладая полномочиями в области непосредственного исполнения решений, принятых им при отправлении конституционного правосудия, включается в пределах собственной компетенции в работу по обеспечению их исполнения. Законодательной основой названного механизма являются положения Федерального конституционного закона от 21 июля 1994 г. N 1-ФКЗ «О Конституционном Суде Российской Федерации» (ст. 79–81, 87 и др.), дополняемые нормами иных актов. По мнению одних авторов, необходимо принятие отдельного закона об исполнении решений [3].

Представитель Президента РФ в Конституционном Суде РФ М. В. Кротова на заседании Конституционного Суда РФ в 200 году отметил, что нужно принимать специальный закон об исполнении решений Конституционного Суда РФ. При принятии данного закона можно было бы попутно разрешить также проблему исполнения конституционных (уставных) судов субъектов Федерации. Попытки принятия такого акта были предприняты в 1992 году, но дальше первого чтения в Верховном Совете РФ законопроект не прошел.

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[1] Бурмистров А. С. Юридическая сила и механизм реализации решений конституционных (уставных) судов в России//Государственная власть и местное самоуправление. – 2011. – № 4. – С. 10–14.

[2] Пирбудагова Д. Ш. Институт конституционного контроля и охрана конституционной законности в Республике Дагестан: вопросы истории, теории и практики. – Махачкала, 2003. – С. 344.

[3] Кокотов А. Н. Исполнение решений Конституционного Суда Российской Федерации// Журнал российского права.– 2013. – N 5. – С. 90–101.

Представляется, что создание механизма исполнения решений конституционных (уставных) судов субъектов Федерации требует комплексного подхода к решению данной проблемы. Само законодательное урегулирование становится возможным при совместном сотрудничестве в законотворческой деятельности Конституционного Суда Российской Федерации и представителей конституционных (уставных) судов путем создания объединенной комиссии, к числу первоочередных задач которой следует отнести разработку проекта Закона «Об исполнении решений Конституционного Суда Российской Федерации, конституционных (уставных) судов, иных органов конституционного контроля субъектов Российской Федерации», в котором содержались бы процедуры конституционно-исполнительного производства, механизм конституционной ответственности за неисполнение, ненадлежащее исполнение решений органов конституционного контроля, конкретизировались бы основания, возможные санкции. Роль основного гаранта исполнения решений Конституционного Суда РФ и конституционных (уставных) судов надлежит отвести Президенту Российской Федерации и его полномочным представителям в федеральных округах, соответственно[1].

В свою очередь, изложенное обусловливает необходимость наделения органов прокуратуры Российской Федерации полномочиями по осуществлению прокурорского надзора за своевременностью и полнотой исполнения подобного рода решений, соблюдением законодательства в данной сфере. На Министерство юстиции и соответствующие территориальные органы исполнительной власти России необходимо возложить функцию мониторинга нормативно-правовых актов, признанных неконституционными соответствующими органами конституционного контроля, а также и мониторинга подзаконных нормативных актов на территории Российской Федерации, в частности, тех актов, которые основывались бы на признанных неконституционными положениях федерального законодательства и законодательства субъектов Федерации[2].

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[1] См. подробнее: Овсепян Ж. И. О взаимодействии органов государственной власти РФ в сфере исполнения решений, принимаемых Конституционным Судом Российской Федерации и конституционными (уставными) судами субъектов Российской Федерации//Проблемы исполнения федеральными органами государственной власти и органами государственной власти субъектов Российской Федерации решений Конституционного Суда Российской Федерации и конституционных (уставных) судов субъектов Российской Федерации. Материалы Всероссийского совещания (Москва, 22 марта 2001 г.)/Под ред. М. А. Митюкова, С. В. Кабышева, В. К. Бобровой и С. Е. Андреева. – М., 2001. – С. 149–158.

[2] Гусейнова Д. Г. -Р., Пирбудагова Д. Ш. К проблеме исполнения решений конституционных (уставных) судов субъектов Российской Федерации//Государственная власть и местное самоуправление. – 2007. – № 9.

Конечно, в рамках одной статьи разрешить поставленную проблему невозможно. Однако следует заметить, что автор не ставил перед собой такой задачи, а попытался лишь предположить возможные варианты ее решения.

Section 4.
Criminal science

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Legal problems of compulsory carrying out separate investigative actions in Russia

In investigative practice take situation place when suspects or accused persons refuse to be plunged to survey or to provide biological models of activity of the organism. In this regard there is a need for implementation investigative actions forcibly.

Survey is investigative action and can be carried out, according to the article 179 Criminal Procedure Code Russian Federation, at the initiative of the investigator or, according to Art. 290 of the Criminal Procedure Code of the Russian Federation, be carried out at the initiative of court. The part 1 of the article 290 Criminal Procedure Code Russian Federation regulates that survey is made on the basis of definition or the court resolution in the cases provided p.1 by Art. 179 of the Criminal Procedure Code of the Russian Federation, and by part 2 of the article 290 Criminal Procedure Code Russian Federation is defined that survey of the person, being accompanied its exposure, is made in the certain room by the doctor or other expert by whom the survey statement then the specified persons come back to a hall of a court session is drawn up and signed. In the presence of the parties and the examined person the doctor or other expert reports to court about traces and signs on a body examined if they are found, answers questions of the parties and judges. The act of survey joins materials of criminal case.

The part 2 of the article 179 Criminal Procedure Code Russian Federation fixes that the investigator takes out the resolution which is obligatory for the testified person. At the same time the part 5 of the article 56 Criminal Procedure Code Russian Federation is regulated "by the witness can't be forcibly subjected to survey, except for the cases provided by part one of the article 179 Criminal Procedure Code Rus-

sian Federation". Thus in the Criminal Procedure Code of the Russian Federation there is no direct instruction on possibility of compulsory survey. Therefore, the order of compulsory survey needs accurate and unambiguous settlement by the legislator. Otherwise the investigator won't decide on carrying out the specified investigative action forcibly, realizing that to it can charge subsequently not only violation of the rights of participants of criminal trial on protection, integrity of human beings, but also excess of office powers, in connection with violence and the address humiliating human dignity or creating danger to life and health of the person. Absence of unambiguous standard and legal base on considered standard of the Criminal Procedure Code of the Russian Federation – procedures of compulsory survey is a gap in the current legislation.

Therefore possibility of compulsory survey should be fixed unambiguously the code of criminal procedure, and the court has to consider a question of expediency and an admissibility of carrying out investigative action forcibly in relation to the specific participant of criminal legal proceedings, in case of refusal the participant of criminal legal proceedings to pass survey voluntary.

Receiving samples for comparative research as investigative action having auxiliary character[1], proceeding from the analysis of domestic literature[2] can forcibly be carried out also. Thus, many authors subdivide experimental samples into two groups: the first are samples which can't forcibly be received (for example, examples of handwriting, a voice, a path of traces[3], etc.), the second – samples which at observance of some conditions (for example, all measures of belief for voluntary receiving samples are settled, impossibility of receiving free or conditional and free samples), it is necessary to receive forcibly.

In too time, investigators have to consider the constitutional guarantees of the rights and freedoms of the person and the citizen (the provision of article 9 and part 2 of the article 202 Criminal Procedure Code Russian Federation) forbidding when receiving samples to apply methods to comparative research, life-threatening and health of the person or humiliating his honor and advantage. So, authors of the comment to the Code of criminal procedure of the Russian Federation believe that the decision of the investigator on receiving samples for comparative research is obligatory for

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[1] Rossinskaya E. R. Judicial examination in civil, arbitration, administrative and criminal trial. M, 2005. P. 36.

[2] Bayev O. Ya. Malts D. A . The comment to the Code of criminal procedure of the Russian Federation (on - the uchno-practical edition)/Under a general edition of V. V. Mozyakov, G. V. Maltsev, I. N. Bartsits. M, 2003. P. 695; Kalnitsky V. V. investigative actions: Manual. Omsk, 2003. P. 54.

[3] Ryzhakov A. P. Receiving samples for comparative research. The comment to Art. 202 of the Criminal Procedure Code of the Russian Federation//Access from legal-reference ConsultantPlus system.

accused or suspected. This situation is explained to the corresponding participant of process. In case of refusal from cooperation the samples, which nature of receiving it allows the last, can be received forcibly (in necessary cases after consultation with the doctor) [1]. Other number of scientists considers that compulsory receiving samples for comparative research as the article 202 Criminal Procedure Code Russian Federation belongs, as a rule, to cases of receiving waste products of an organism and demands participation in this investigative action of the expert – the judicial physician or the doctor replacing him [2]. E. R. Rossinskaya claims that in exceptional cases at refusal to provide samples that from them which character it allows, can be received forcibly. However, according to part 2 of the article 202 Criminal Procedure Code Russian Federation, when receiving samples methods shouldn't be applied to comparative research, life-threatening and health of the person or humiliating his honor and advantage [3]. It is represented to A. G. Filippov and A. S. Shatalov that the resolution on receiving samples obligatory for execution by persons concerning whom it is taken out, and that in case of refusal the suspect or other person voluntary provide samples they can be received forcibly. Certainly, receiving samples contrary to will of the interested person is possible only in extreme cases, at observance of certain requirements [4]. Thus specified positions don't contain explanations about procedure and concept of compulsory sampling for comparative research. Lack of interpretation of compulsory receiving samples leads to various understanding of the matter from theory and practice positions. For example, if the person refuses to provide voluntary models of activity – blood, a saliva, etc., shows resistance to compulsory actions to law enforcement officers – in this case coercion is impossible without violence application, including physical force. Use of physical force is interfaced to violation of security of person, humiliation of honor and dignity of the person, whose experimental samples it is necessary to receive (imprisonment of actions before receiving samples, application of methods of self-defense for overcoming of active or passive physical resistance).

Therefore, in our opinion, compulsory receiving samples for comparative research, proceeding from contents of the article 202 Criminal Procedure Code Russian Federation, will be violation of the principles enshrined in chapter 2 of the Code of criminal procedure of the Russian Federation.

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[1] The comment to the code of criminal procedure of the Russian Federation/Otv. edition of V. I. Radchenko//Access from legal-reference ConsultantPlus system.

[2] Criminalistics: The textbook for higher education institutions/Under the editorship of the honored worker of science of the Russian Federation, the prof. R. S. Belkin. M, 2007. P. 640.

[3] Rossinskaya E. R. The comment to the Federal law «About the state judicial and expert activity in the Russian Federation». M, 2002. P. 128.

[4] Criminalistics: The textbook/Under the editorship of A. G. Filippov. M, 2004. P. 342–343.

Certain authors express other opinion on a problem of compulsory receiving samples for comparative research. So, A. V. Smirnov K. B. Kalinovsky, acknowledging the possibility of receiving samples for research in a voluntary or compulsory order (except experimental examples of handwriting and a voice), conclude «restriction of corporal inviolability, including by compulsory withdrawal at the person of samples for medicolegal researches as well as arrest, it has to be allowed, in our opinion, only by a court decision»[1].

So, V. L. Zhbankov writes that as the legislator didn't establish responsibility for refusal of giving samples, the investigator has no right to withdraw samples forcibly in such cases[2]. Having agreed with this position, it should be noted, what not existence of a measure of responsibility, and violation of the established constitutional laws and freedoms of the person and the citizen is criterion of legality of compulsory receiving samples for comparative research. In article 21 of the Constitution of the Russian Federation it is fixed: «The dignity of the personality is protected by the state. Nothing can be the basis for its derogation. Nobody has to be exposed to tortures, violence, address another cruel or humiliating human dignity or punishment», «Everyone has the right for freedom and security of person» (part 1 of article 22 of the Constitution of the Russian Federation). At the same time, in part 3 of article 55 of the Constitution of the Russian Federation it is fixed: «The rights and freedoms of the person and the citizen can be limited to the federal law only in that measure in what it is necessary for protection of bases of the constitutional system, moral, health, the rights and legitimate interests of other persons, ensuring defense and safety of the state»[3]. Because, security of person of the citizen of Russia can be limited only in cases which are defined by the federal law, compulsory receiving samples for comparative research has to be carried out according to the criminal procedure rule of law which is directly regulating a judicial order of obtaining permission to production of investigative action forcibly.

Therefore, procedure of compulsory receiving samples for comparative research needs accurate and unambiguous settlement by the legislator. It is necessary to reflect in article 179 Criminal Procedure Code of the Russian Federation that the resolution of the investigator is obligatory for the testified person. In case of refusal persons voluntary to undergo survey, investigative action can forcibly be carried out on the basis of the judgment made in the order established by article 165 Criminal Procedure Code of the Russian Federation. It is necessary to fix the following in article

[1] Smirnov A. V. Kalinovsky K. B. The comment to the Code of criminal procedure of the Russian Federation (itemized)/under a general edition of A. V. Smirnov. 5th prod. reslave. and additional. M., 2009//Access from legal-reference ConsultantPlus system.

[2] Zhbank of VA. Receiving samples for comparative research. M., 1992. P. 14–15.

[3] Constitution of the Russian Federation. (in an edition of 30.12.2008 No. 6-FKZ, of 30.12.2008 No. 7-FKZ)//Russian newspaper. 1993 . 25 Dec.; Russian newspaper. 2008 . 31 Dec.

202 Criminal Procedure Code of the Russian Federation that receiving samples for comparative research on behalf of an opposite sex if this receiving is interfaced to an exposure of the participant of criminal legal proceedings, the investigator has no right to be present. In this case investigative action is made by the doctor. If the person objects to be bared and refuses to provide samples for comparative research voluntary, the investigator excites before court the petition for production of investigative action forcibly, including with participation of the forensic scientist or doctor. In article 202 Criminal Procedure Code of the Russian Federation it is required to state that the resolution of the investigator is obligatory for the person at whom receive samples. In case of refusal faces to provide samples for comparative research voluntary, they can be received forcibly on the basis of the judgment made in the order established by article 165 Criminal Procedure Code of the Russian Federation. The part of article 29 Criminal Procedure Code of the Russian Federation should be added the second with point that the court is competent to make decisions on production of compulsory receiving samples for comparative research at failure of a face to provide samples voluntary.

Section 5.
International private law

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Application of foreign law according to conflicts regulation of the Republic of Kazakhstan

Application of norms of foreign law in the territory of the Republic of Kazakhstan for regulation of private law relations, complicated by the foreign element, cannot be considered as a violation of sovereignty because such application is sanctioned by the current legislation and it's foundations are: a) conflict rules of the Republic of Kazakhstan, which can refer to foreign law through the collision bindings contained in norms; b) norms of the international treaties ratified by the Republic of Kazakhstan; c) the parties' choice of foreign law as applicable to their relationship.

There is no direct application of foreign law overseas. However, under current conditions, within certain limitations the interests of the international civil circulation presses for application of law of one State on the territory of other[1]. Along with this, in the legislation of almost all countries there in various combinations are fixed norms that limit the use and effect on its territory each of private international law and foreign law. The legislation of the Republic of Kazakhstan also contains a number of such restrictions, in particular, which include: the public policy clause; provision of binding norms that regulate appropriate relationship, regardless of the subject to applicable law; norm of law evasion and its consequences.

The need to impose restrictions as means of legal regulation is a subject of social and legal tasks and is determined by specific of those relations, which are the subject to restrictions[2]. In order to mitigate the negative effects of business it is necessary to

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[1] Mengliyev Sh. M. Mezhdunarodnoe chastnoe pravo [International private law]. Dushanbe: "Devashtich", 2002. part I. 199 P.

[2] Kubits E. L. K voprosy o ponyatii "ogranicheniya prava" [Revisited concept of "limitation of right"]//Aktualnye problemy prava Rossii i stran SNG [Current law issues of Russia and CIS countries] – 2006: Proceedings of the VIII International scientific and practical conference, March 30–31, 2006. – Chelyabinsk: "Poligraf - Master" LLC Publishing house, part II. P128.

have public and legal standards, enabling the State, in certain cases and in a certain degree, to intervene in private legal relationships[1]. Such kind of restrictions set limits of freedom and permitted behavior for subjects to ensure proper legal regulation of social relations, complicated by foreign element.

The first such limitation is the public policy clause. It should be noted that the most frequently deal in the literature on the problems of private international law is just a question of public policy[2], but despite this, the combination of the words "public policy" still has not found any unified definition. Over the years since the introduction to the theory and practice of international private law the public policy clause and its content has been interpreted in different ways.

It is indicated in the Anglo-American doctrine that a public policy rule (ordre public) has historically developed earlier in the Anglo-Saxon law, rather than continental. But, nevertheless the range of application of the public policy clause is more narrow in modern Anglo-American law[3]. The legislative consolidation of the meaning of "public policy" was first noted in the Napoleonic Code[4]. We can say that all attempts to determine content of public policy originate from this moment.

Doctrine, in turn, is reflected in the legislation of almost all States formed in the form of two concepts of public policy: negative (German) and positive (French). In the first case, we say that application of norms of foreign law is subject to restrictions as it due to some of its inherent features is incompatible with the public policy of State, where norm of foreign law should be applied. According to second concept, the properties of foreign law are not considered at all, and great importance is laid on

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[1] Isaykin D. A. Grazhdansko-pravovoe regulirovanie offshornoi deyatelnosti [Civil law regulation of the off-shore activity]. Abstract of a thesis for a degree of candidate of legal sciences. Almaty: 2005. P. 26.

[2] Belov A. P. Publichnij poryadok: zakonodatelstvo, doktrina, sudebnaya praktika [Public policy: legislation, doctrine, judicial practice]. Pravo i ekonomika [Law and economics]. 1996. No. 19–20. P. 85–92.; Morozova Yu. G. OgovoRepublic of Kazakhstana o publichnom poryadke v mezhdunarodnom chastnom prave: ponyatie i sovremennyy poryadok primeneniya [Public policy clause in the international private law: concept and current usage procedure]. A thesis for a degree of candidate of legal sciences. M.: The Russian Presidental Academy of Public Administration, 2001. 158 P.; Muranov A. I. Nekotorye aspekty ponyatiya "publichnyy poryadok" primenitelno k mezhdunarodnomy arbitrazhu Rossii [Some aspects of the concept of "public policy" in respect of the Russian International commercial arbitration]. International law, 2001. No. 5. Bogatina Yu. G. OgovoRepublic of Kazakhstana o publichnom poryadke v mezhdunarodnom chastnom prave: teoreticheskie problemy i sovremennaya praktika [Public policy clause in the international private law: theoretical problems and current practice]. – M.: Statute, 2010. 408 P. and etc.

[3] Selected readings on Conflict of Laws. Compiled by the Committees on Selected articles on Conflict of Laws of the Association of American Law Schools/edited by Maurice S/Gulp, St. Paul, Minn. West Publishing co, 1956, P.221.

[4] Ispayeva G. B. Ponyatie "publichnogo poryadka" v mezhdunarodnom chastnom prave [Concept of "public policy" in the international private law]. Pravo i gosudarstvo [Law and state]. 1999. No. 2. P. 72.

the national super or ultra super binding norms, which as a result of their particular situation do not permit the application of foreign law. However, by strengthening the public policy clause, in practice no countries specify its content. In each State by the fact that is contrary to public policy can be understood as different legal and social phenomenon which is perceived as quite normal and is due to differences in culture, legal system and different political approach.

The division of public policy clause according to negative and positive concepts has been reflected in the legislation of the Republic of Kazakhstan. For instance, if article 1090 of the Civil Code of Republic of Kazakhstan, that fixes the public policy clause is drafted in accordance of the negative concept, then article 1091 of the Civil Code of the Republic of Kazakhstan, determining the application of binding norms (so-called as ultra binding norms), establishes a positive concept of public policy.

After analyzing the content of article 1090 of the Civil Code of the Republic of Kazakhstan, it is important to point out that the public policy clause should be directed not against the foreign law and the system in the whole, it must be purported to exclude in the territory of the court action only one rule that is defined as applicable, but as a result of the application which can lead to negative consequences for this country (of the court), i. e. the public policy clause should be aimed only at a certain rate of foreign law. Furthermore, it is necessary to indicate out that the application of clause should not start from the norm itself of foreign law or foreign court/arbitration decision itself, but the consequences of such application, or performance, which may cause harm to the society.

The second case of restrictions is binding norms (the positive concept of public policy is enshrined in the article 1091 of the Civil Code of the Republic of Kazakhstan). The theory of positive public policy is linked with the name of the famous representative of the Franco-Italian school of legal thought, Pascal Mancini, who in the second half of the XIX century, developing the ideas of F. Savigny of "strictly positive norms", proclaimed the existence of a special category of norms, which are according to Mancini, is a positive expression of the fundamental principles that constitute the public policy of the court and, therefore, should be applicable regardless of the presence of the foreign element in the legal relationship[1].

Legislation of practically every State has a specific set of substantive norms set out in an imperative manner. These norms may include as the direct norms of private law as public law. However, the binding norms – are not any kind of norms, but norms that have the highest importance for the proper functioning of civil turnover, for the

[1] Zhilsov A. N. Primenimoe pravo v Mezhdunarodnom kommercheskom arbitrazhe (imperativnye normy) [Applicable law in the International commercial arbitration (binding norms)]. A thesis for a degree of candidate of legal sciences. Moscow.: MGIMO, 1998. P.59.

observance if the rights and interests of persons who are low protected party in the contract and etc.

In theory, binding norms (peremptory norms) are defined as precept of internal law (both public and private), being particular interest to the national community. They are directly applicable, i.e, without the mediation of conflicts norm. They reflect the scope of the public interest, which does not tolerate the interference of foreign laws[1]. Indeed, in our view, the question of the effect of binding norms preceded the decision of conflicts question. Therefore we can say that norms of foreign law are restricted mediately through suppression of the effects of domestic conflicts norm. Thus, the effect of binding norms of law negates effect of conflicts regulation as a whole, i. e. binding norms generally exclude any conflicts regulation issue. And if binding norms regulate issue no matter which law is subject to the application of this legal relations, then the question of determining the applicable law does not arise and the norms are applied that regulate relationship regardless of the law applicable.

In this case, binding norms should be distinguished from the norms of public policy. We believe that these concept are closely related. However, the concept of "public policy" is broader than the category of "binding norms" as public policy in the broad sense includes negative and positive formulation. In addition, both binding norms and norms of public policy are the tools to protect the interests of the State, the rights of its citizens. But, in fact, on the contrary, they are two faces of the same phenomenon, different in content. The public policy clause restricts the foreign standards, and the use of beyond binding norms restricts the overall conflicts regulation. Question about each of these concepts arises, in our opinion, at different stages of application of the norms of private international law. But one denominator for them is that both of these categories are aimed to protect the interests of the State and society. Each of them carries a regulation on its own. Thus, at each stage the State "secure" themselves from the undue influence of the norms of foreign law and it is normal for any sovereign State. Another thing is that these cases constitute exceptions to the rule, therefore, these limit cases should not be eliminated from the scope of the general principles of private international law. Therefore, the binding norms restrict the effect of the conflicts regulation, and the public policy clause – the effect of foreign norm which shall be applied in accordance with the reference of the conflicts regulations or in accordance with the autonomy of the parties. Ultimately, both cases lead to the application of the law of the Court State.

The next restriction is the norms prohibiting the evasion of the law. In the article 1088 of the Civil Code of the Republic of Kazakhstan the invalidity of agreements and

[1] Issad M. Private International Law: translation from French./Revision and an afterword by M. M. Boguslavskiy; Note by L. R. Syukiyaynen. M.: Progress, 1989. P 65.

other actions of the participants of private relations is enshrined, aimed at bypassing rules on the applicable law relevant to subordinate relationship to another law. In this case, the applicable law to be applied in accordance with Section VII of the Civil Code of the Republic of Kazakhstan. There is a category of norms (forming norms of autonomy of parties will), which allows the parties of treaty relationships at the conclusion of the contract or at any other time select the law to govern their agreement relationship. With the presence of such phenomenon as the "autonomy of will" closely linked with legal phenomenon "evasion of law." According to paragraph (1) of the article 1112 of the Civil Code of the Republic of Kazakhstan the contract is governed by the State's law, by selected agreement, unless otherwise provided by legislative acts of the Republic of Kazakhstan. The Civil Code of the Republic of Kazakhstan in establishing the principle of autonomy of the parties' will, gives a certain degree of freedom to the parties of treaty relationships, including in the choice of the applicable law to these relations. At the same time, the autonomy of the parties is one of elements of freedom of contract (paragraph (1) article 2 of the Civil Code of the Republic of Kazakhstan), which has its reasonable limits (article 8 of the Civil Code of the Republic of Kazakhstan). For example, and section VII of the Civil Code of the Republic of Kazakhstan in addition to the non-mandatory norms contains binding norms, derogation from which is to be regarded as a violation of "evasion" of law.

When compulsory legal norm prevents the achievement of the objective pursued, stakeholders often try to evade this norm by creating any abnormal way of such actual composition of the Republic of Kazakhstan to which this rule does not apply and which, nevertheless, provides the economic or social outcome which these people mean[1]. And then bind to the state's law is artificially created by those wishing to avoid the application of their legal relationship of coercive laws that are subject to this relationship. Thus, evasion of law arises from the fact that the law of one State provides more severe conditions, and the law of another is less demanding. Consequently, the parties choose the most favorable conditions for themselves. Moreover, the parties for the purpose of evading the law "artificially" create conflict binding and thus subordinate their legal relationship to the norm of law, which is not allow to regulate these relations. Therefore, under the evasion of law is to be understood as conscious subordination of agreement parties of its legal norms of the law, which under normal conditions (when there is no bypassing) should not regulate those relations.

In theory, there are two polar points of view: about the evasion of conflict of norms and the evasion of substantive norms. In our view, the evasion of law holds in the case

[1] Wolf M. Private International Law: English translation by S. M. Rapoport, with edition and introduction by Professor L. A. Luntz. – M .: state legal publishing house of foreign literature, 1948. P. 159.

where the parties violate binding conflicts norm which is without clauses points to the law as applicable.

As for the consequences of the evasion, the acts committed as a result of the evasion does not have any legal consequences and to the circumstances of the case applied the norm which should be applied under binding conflict norms. We believe that in case of the evasion of law paragraph (8) of the article 157 of the Civil Code of the Republic of Kazakhstan should be applied, according to which the invalid transaction does not entail legal consequences except those associated with its invalidity and invalid from the moment of the transaction.

It should be noted that in the literature the negative attitude to the phenomenon as "evasion of law" is stated and is quite common proposal to replace the norm prohibiting "evasion of law" by the public policy clause and binding norms[1]. In our view consolidation of all these three categories listed above is equally necessary, and each of them has its place, as in the law and in the process of application of norms of private international law.

The norms prohibiting the evasion of law can not be replaced subject to public policy and binding norms. Binding norms and evasion of law is closely connected with the concept of the autonomy of parties will. But in the case of binding norms good faith of the parties is not discussed. When it comes to binding norms, it is assumed that there are norms of particular importance that regulate the ratio regardless of the applicable law. In the case of evasion of law assumes that the parties deliberately (and even inappropriately) conquered its legal relations to the law, which should not regulate it. The public policy clause defends the basic principles and foundations of society and the State from the actual adverse of the effects of foreign law. They represents a "filter", so binding norms restrict the effect of the conflicts norm; the norm prohibiting evasion of law restricts the effect of norm of law, which is selected by the parties as applicable; application of the public policy clause restricts the effect of foreign substantive norm. At the same time, all three categories can be the basis for application of norms of the Court State.

In this way, cases of restriction on the use of norms of private international law and foreign law, enshrined in the legislation of the Republic of Kazakhstan, are appeared to us as necessary measures applied by States to protect the interests of society, the

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[1] Muranov A. I. Problema "obkhoda zakona" v materialnom i kollizionnom prave [Problem of "evasion of law" in substantive law and conflicts of law]. A thesis for a degree of candidate of legal sciences. M.: MGIMO, 1999. 247 P.; Morozova Yu. G. OgovoRepublic of Kazakhstana o publichnom poryadke v mezhdunarodnom chastnom prave: ponyatie i sovremennyy poryadok primeneniya [Public policy clause in the international private law: concept and current usage procedure]. A thesis for a degree of candidate of legal sciences. M.: The Russian Presidential Academy of Public Administration, 2001. P.65–66.

State, individuals, and to avoid distortions in the regulation of private law relations, complicated by a foreign element. The above mentioned cases can be considered as "filters" or "safety valves." At the same time the widespread use of these restrictive cases in law enforcement practice should not be allowed.

References:

1. Belov A. P. Publichnij poryadok: zakonodatelstvo, doktrina, sudebnaya praktika [Public policy: legislation, doctrine, judicial practice]. Pravo i ekonomika [Law and economics]. 1996. No. 19–20. P. 85–92.
2. Bogatina Yu. G. OgovoRepublic of Kazakhstana o publichnom poryadke v mezhdunarodnom chastnom prave: teoreticheskie problemy i sovremennaya praktika [Public policy clause in the international private law: theoretical problems and current practice]. – M.: Statute, 2010. 408 P.
3. Wolf M. Private International Law: English translation by S. M. Rapoport, with edition and introduction by Professor L. A. Luntz. – M.: state legal publishing house of foreign literature, 1948. 702 P.
4. Zhilsov A. N. Primenimoe pravo v Mezhdunarodnom kommercheskom arbitrazhe (imperativnye normy) [Applicable law in the International commercial arbitration (binding norms)]. A thesis for a degree of candidate of legal sciences. Moscow.: MGIMO, 1998.
5. Isaykin D. A. Grazhdansko-pravovoe regulirovanie offshornoi deyatelnosti [Civil law regulation of the off-shore activity]. Abstract of a thesis for a degree of candidate of legal sciences. Almaty: 2005. P. 30 (34).
6. Ispayeva G. B. Ponyatie "publichnogo poryadka" v mezhdunarodnom chastnom prave [Concept of "public policy" in the international private law]. Pravo i gosudarstvo [Law and state]. 1999. No. 2. P. 72–74.
7. Issad M. Private International Law: translation from French./Revision and an afterword by M. M. Boguslavskiy; Note by L. R. Syukiyaynen. M.: Progress, 1989. 400 P.
8. Kubits E. L. K voprosy o ponyatii "ogranicheniya prava" [Revisited concept of "limitation of right"]//Aktualnye problemy prava Rossii i stran SNG [Current law issues of Russia and CIS countries] – 2006: Proceedings of the VIII International scientific and practical conference, March 30–31, 2006. – Chelyabinsk: "Poligraf – Master" LLC Publishing house, part II. 584 P.
9. Mengliyev Sh. M. Mezhdunarodnoe chastnoe pravo [International private law]. Dushanbe: "Devashtich", 2002. part I. 328 P.
10. Morozova Yu. G. OgovoRepublic of Kazakhstana o publichnom poryadke v mezhdunarodnom chastnom prave: ponyatie i sovremennyy poryadok primeneniya [Public policy clause in the international private law: concept and

current usage procedure]. A thesis for a degree of candidate of legal sciences. M.: The Russian Presidental Academy of Public Administration, 2001. 158 P.
11. Muranov A. I. Nekotorye aspekty ponyatiya "publichnyy poryadok" primenitelno k mezhdunarodnomy arbitrazhu Rossii [Some aspects of the concept of "public policy" in respect of the Russian International commercial arbitration]. International law, 2001. No. 5.
12. Muranov A. I. Problema "obkhoda zakona" v materialnom i kollizionnom prave [Problem of "evasion of law" in substantive law and conflicts of law]. A thesis for a degree of candidate of legal sciences. M.: MGIMO, 1999. 272 P.
13. Selected readings on Conflict of Laws. Compiled by the Committees on Selected articles on Conflict of Laws of the Association of American Law Schools/edited by Maurice S/Gulp, St. Paul, Minn. West Publishing co, 1956.

Section 6. Family law

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Conditional obstacles to marriage according to the Canon law

В соответствии с каноническим правом существует два типа препятствий к заключению брака: абсолютные и условные. К условным препятствиям к браку относились следующие:

1. Близкое родство между женихом и невестой. Это относится и к внебрачным детям.

В «Эклоге» содержится запрещение браков между двоюродным и троюродным братом и сестрой[1]. Константинопольский Собор 1168 г. повелел безусловно расторгать браки между лицами, состоящими в 7-й степени бокового кровного родства. В России эти греческие нормы хотя и признавались законными, но не соблюдались буквально. Статья 14 Устава князя Ярослава (Краткая редакция) карает брата и сестру за вступление в половые отношения. Законе Судном людем нет конкретной статьи о связи брата с сестрой, а есть лишь общая норма о запрете так называемых кровосмесительных связей: «Кровь месящий в свою кровь, сватьбу деють, да разлучаться»[2].

Очевидно, что в этой норме нет указания ни на казнь, ни на «епитимию». Такие указания содержатся в других главах Закона Судного людем, например, в главах, карающих духовных родственников, вступающих в половые отношения: гл. 8 карает кума и куму; гл. 9 — крестного отца и его крестную дочь. Можно было бы предположить, что, по Закону Судному людем, кровосмесительные связи родственников карались так же, как и связи духовных родственников: казнью

[1] Эклога. Византийский законодательный свод VIII века. М., 1965. С. 44–45.

[2] Российское законодательство X–XX вв. в 9-ти томах/Под ред. Чистякова О. М. Т. 1. М., 1984. С. 154.

в виде отрезания носа и епитимией. Но ст. 14 Устава кн. Ярослава вряд ли может указывать на членовредительную казнь, причем сам же М. Н. Тихомиров оговорил это во введении к Закону Судному людем.

На какой же закон делается ссылка в ст. 14 Устава? Под законом может пониматься Пятикнижие Моисея. Но, согласно третьей книге Моисея, брат и сестра подлежали истреблению уже за то, что они увидели наготу друг друга (Левит, гл. 20. ст. 17). Ясно, что в ст. 14 под законом имеется в виду не Библия, если кроме казни здесь говорится еще и об епитимий. Вероятнее всего, закон — это покаянные правила, именуемые церковным законом и в Законе Судном людем. Эти правила содержались в апостольских посланиях, в постановлениях Вселенских соборов, в епитимийниках типа Правил Василия Великого и в других канонах и своеобразно перерабатывались на Руси. В «Заповеди святых отець ко исповедающимся сыном и дщерем» — памятнике, приписываемом митрополиту всея Руси Георгию (1072–1073), Правила Василия Великого (архиепископа Кесарийского, IV в. одного из так называемых отцов церкви) изложены в смягченной форме. В частности, за блуд с сестрой по Правилам Василия Великого следовало не причащать (не камкати) в течение 15 лет, все это время следовало «поститися и плаката», но митрополит Георгий смягчает епитимию: «Мы же 3 лета камкати же не повелеваем, но сухо ясти 12 час, и поклоны на день 500, аще ли обленится —15 лет творить».

При заключении брака долгое время простым народом не учитывались нормы, посвященные данным ограничениям, однако многие авторы признавали, что это касалось и привилегированных сословий. Никольский В. Н., отмечал: «Так мы знаем, что баки заключались в близких степенях родства не только народом, но и самими князьями» [1].

Статья 15 Устава князя Ярослава (Краткая редакция), подобно ст. 14, предусматривает наказание за вступление в половую связь близких родственников, но, очевидно, здесь имеются в виду уже не брат и сестра, поскольку о них специально говорится в предыдущей статье. В Уставе не расшифровывается понятие «ближний род», но вероятно, в него следует включать такие пары, как племянник и тетка, племянница и дядя, двоюродные брат и сестра. За вступление в половую связь Устав предписывает их разлучить и подвергнуть епитимий и штрафу, правда, в несколько меньшем размере, чем предусмотрено в ст. 14.

2. Условным препятствием к браку являлось наличие свойства между женихом и невестой. Он возникают из сближения двух родов через брак их членов. Свойство приравнивалось к кровному родству, ибо считалось, что муж и жена одна

[1] Никольский В. Н. О началах наследования в древнейшем русском праве: историческое рассуждение. М., 1859. С. 290.

плоть. Для определения степени свойства складываются обе родственные линии, а между мужем и женой, связывающими их степени не существует, следовательно, теща и зять состоят в 1-й степени свойства. Статья 19 Устава князя Ярослава (Краткая редакция) карает свойственников за вступление в половую связь.

3. Следующее препятствие к браку — духовное родство. Духовное родство возникает в следствии воспринятия новокрещенного от купели Крещения. Еще император Юстиниан запретил брак между восприемником и воспринятой. Эклога прямо говорит «Запрещается же сочетание браком тем, кто соединен между собой узами святого и спасительного крещения, то есть крестному с его [крестной] дочерью и ее матерью, так же как его сыну с подобной [крестной] дочерью и ее матерью… »[1].

Один из разделов Устава князя Ярослава (Краткая редакция) (ст. ст. 12, 14, 15, 19, 21. 22), содержит санкции за половые сношения в кругу кровных родственников, духовных родственников и свойственников. Кум и кума — крестный отец и крестная мать, как бы духовные родители крестника, воспринимающие его от купели. Но церковь рассматривала духовное родство как препятствие к браку и строго карала кума и куму за вступление в половую связь. В данной статье предусматривается случай внебрачной половой связи, да еще и с квалифицирующим признаком. В качестве такого квалифицирующего признака расценивался выход за пределы церковнообрядовой роли: восприятие ребенка от купели вводило мужчину и женщину в роль как бы отца и матери, но церковь возлагала на них обязанность воздерживаться от роли мужа и жены. Устав кн. Ярослава не раскрывает, в чем заключалась епитимия. По Закону Судному людем, за блуд куму и куме. 0 трезали носы и, кроме того, подвергали «по церковному закону» епитимий в виде 15-летнего поста. Возможно, что аналогичная епитимья применялась и на Руси, так как «церковный закон», упоминаемый в Законе Судном людем, являлся общим для православной церкви епитимийпиком. Но не исключено также, что епитимья смягчалась в соответствии с заповедями митрополита Георгия.

4. Следующим препятствием к заключению церковного брака было наличие, так называемого гражданского родства — отношений по усыновлению. В Византии, входя в семью через усыновление лицо не могло вступить в брак с ближними родственниками усыновителей. Это связано во многом с тем что в Византии была церковная форма усыновления.

В России усыновление производилось в гражданском, а не церковном порядке, и, следовательно, формально не считалось препятствием к браку. Но как отмечал профессор А. С. Павлов, отсюда поспешно было бы заключать о совершенном не существовании такого препятствия. Уже простое нравственное

[1] Эклога. Византийский законодательный свод VIII века. М., 1965. С. 45.

чувство запрещает усыновителю вступать в брак с усыновленной дочерью или усыновленному сыну с матерью или дочерью усыновителя. В этом объеме родство по усыновлению признается безусловным препятствием к браку в законодательстве всех христианских народов.

5. Принуждение к браку и отсутствие согласия брачующихся выступало препятствием к заключению брака Взаимное согласие вступающих в брак, также являлось обязательным условием его заключения.

6. Препятствием к заключению брака выступало также отсутствие единства религии жениха и невесты. В России строго запрещались браки православных не только с не христианами, но и с инославными.

Русская церковь препятствовала заключению браков с иноверцами: «Иже дщерь благоверного князя даяти замуж в ину страну, иде же служат опреснок и сквернoедению не отметаются, недостойно зело и неподобно правоверным сотворити своим детей сочетание: божественный устав и мирский закон тоя же веры благоверство повелевает поимати» [1]. За преступную связь с иноверцем «русска» (так называет женщину Устав князя Ярослава) наказывалась насильным пострижением в монашество; позже в ряде земель наказание ограничивалось штрафом. Этот запрет не распространялся на великих княжон, многие из которых были выданы замуж за иностранных королей. Статья 51 Устава князя Ярослава (Пространная редакция) запрещала даже сожительство с представительницами нехристианских вероисповеданий. Санкция здесь предусмотрена следующая: виновный платит штраф в 12 гривен и отлучается от церкви.

Со временем церковь стала более благосклонно относится к бракам православных с иноверцами, а в с XVIII века смешанные в этническом и конфессиональном отношении браки были объявлены не только «дозволенными», но и «похвальными», так как они «клонются ко благу государства» [2].

Проанализировав условные препятствия к заключению брака, можно прийти к выводу, что часть из регулировались как каноническим так и гражданским законодательством, часть регулировались только церковным правом.

References:

1. Никольский В. Н. О началах наследования в древнейшем русском праве: историческое рассуждение. М., 1859.
2. Пушкарева Н. Л. Частная жизнь женщины в доиндустриальной России. X — начало XIX в. Невеста, жена, любовница. М., 1997.

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[1] Цыпин В. А. Церковное право: курс лекций. М., 1995. С. 89.

[2] Пушкарева Н. Л. Частная жизнь женщины в доиндустриальной России. X – начало XIX в. Невеста, жена, любовница. М., 1997. С. 73.

3. Российское законодательство X–XX вв. в 9-ти томах, под ред. Чистякова О. М. Т. 1, М.: 1984.
4. Цыпин В. А. Церковное право: курс лекций. М., 1995.
5. Эклога. Византийский законодательный свод VIII века. М., 1965.

Section 7.
Criminal law and criminology

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Legal description of the crime of fraud

What is happening with the 90-ies of XX century in Russia reforms in the political and social-economic spheres has led to the development of new market relations, providing for the demonopolization of the state and establish the multiplicity of forms of property, the freedom of enterprise and other economic activities. This process was not only difficult and economically unstable, resulting negative impact in socio-economic terms[1], but also significant growth ordinary violent, economic, organized, corruption and other crime, including crimes against property.

Crimes against property in modern conditions in the structure of the crime of Russia covers about half of all crimes. So, in 2012 just registered 2302,2 thousand crimes, including 48,7% … of all registered crimes are theft of another's property[2], and for 2013–2206,2 thousand crimes, including 46.7% of thefts of another's property[3] and moreover the pace and extent of their distribution are one of the factors that adversely affect the socio-economic and moral-cultural development of the country[4].

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[1] Zhadan V. N. About the current criminal situation in Russia, and law enforcement//Young scientist. 2013. № 8. P. 290.

[2] Zhadan V. N. Criminal situation in Russia, its importance for citizen safety//Problems of modern science: collection of scientific works: issue 8. Part 1. Stavropol: Logo, 2013. P. 223.

[3] The state of crime in Russia, January-December 2013 [Electronic resource]. URL: http://mvd.ru/Deljatelnost/statistics/reports/item/1609734 (date of access: 11.07.2014).

[4] Zhadan V. N. To the question about the analysis of the causes and conditions of juvenile delinquency and youth in Russia//the Role of science in the development of society: materials of IV (XLIV) of the International scientific-practical conference on the philosophical, philological, legal, educational, economic, psychological, sociological and political Sciences (Ukraine, , Gorlovka, 24–25 April 2014). Gorlovka: Phil Pantyh Û. F., 2014. P. 54.

In recent years the tendency of decrease of registered crimes in General, and crimes against property. These figures are in no way reduce the social danger of the crimes of this category and their impact on national security, and economic and social development of Russia.

The analysis of the legal characteristics and investigation of economic crimes, including crimes against property in the legal literature devoted a lot of publications [1]. To some extent studied criminal-legal characteristic, the methods of investigation of separate kinds of crimes against property, which include crimes of fraud [2]. At the same time it is not impossible for us to continue consideration of some issues in law (criminal law) characteristics of the crime of fraud.

Among such questions of criminal-legal characteristics of these crimes include: what are the design features of the criminal law on fraud; what features characterize the elements of fraud and qualifying features; what ways are committed fraudulent acts; what new types (special formulations) of the crimes of fraud?

In the Criminal code of the Russian Federation (the criminal code) [3] Chapter 21 «Crimes against property» envisages not only the traditional (senior 158–159, 160–162, 165, 167–168 of the criminal code)and «new» crimes (senior 159.1–159.6, 163–164, 166 of the criminal code). While the Federal law from 29.11.2012, no 207-FZ [4] (hereinafter — the Law of 29.11.2012, no 207-FZ) introduced new types (structures) of fraud provided Art. 159.1–159.6 of the criminal code.

In the literature concerning crimes under Art. 159–159.6 criminal code uses the terms «crimes fraudulent character», «crimes of fraud», «the core and new types of fraud», «crimes of fraud», «crime-fraud» and others. Not believing in this situation it is important to discuss about the content of these terms and about the concept

[1] See: V. V. Erofeev Criminological and criminal-legal characteristic of economic crimes ...: Avtoref. dis. Cand. a throne. of Sciences. Irkutsk, 2008. 24 p.; Forensic methods of investigation of separate kinds of crimes: a manual in 2 parts. PM 2:/Ed. by A. P. Rezvan, M. V. Subbotina. M: EMC GUK the Ministry of internal Affairs of Russia, 2002. 232 p.; Lysak V. V. Crimes against property: Monograph. Domodedovo; VIPK the Ministry of internal Affairs of Russia, 2006. 136 p. and other.

[2] See: Alexandrova I a New criminal law on fraud//Legal science and practice: the Bulletin of the Nizhniy Novgorod Academy of the Ministry of internal Affairs of Russia. 2013. № 21. P. 54–62; V. N. Zhadan. Actual issues of criminal-legal characteristics of fraud//Young scientist. The 2014. № 10. P. 313–319; Criminalistics (Privoznova E. V.) methodology for the investigation of crimes against property [Electronic resource]. URL: http://www.be5.biz/pravo/k010/62.htm (date of access: 11.07.2014); Nudel S. L. Features qualification of fraud in the sphere of lending//Russian investigator. 2013. № 13. P. 18–21 and other.

[3] Criminal code of the Russian Federation of 13.06.1996 № 63-FZ (as amended on 28.06.2014 № 195-FZ)//Sz RF. 1996. № 25. St. 2954.

[4] Federal law of the Russian Federation from 3.12.2012 no 207-FZ «On amendments to the criminal code of the Russian Federation and separate legislative acts of Russian Federation»//Sz RF. 2012. № 49. St. 6752.

of the crime of fraud, and we will proceed from the doctrinal provisions in the Russian criminal law Association socially dangerous acts on the basis of similarity generic, species, and direct objects of a criminal assault.

Based on this, the criminal law on the crime of fraud is United on the basis of similarity of the immediate object of the legal protection, and therefore the use of the term «crime-fraud» in a greater degree corresponds to the name in the criminal code, section VIII, «crimes in the sphere of economy» and Chapter 21 «Crimes against property». With that said, we offer the following definition of the crimes specified category.

Crimes in sphere of fraud is provided in Chapter 21 «Crimes against property» (Art. 159–159.6 criminal code) socially dangerous acts (actions)committed intentionally in the form of theft of another's property or acquisition of the right to someone else's property by deception or abuse of trust in various areas of property rights and harmful or threatening to harm the legitimate interests of citizens, state and society in General.

As the analysis of law enforcement practice in Russia annually on the grounds of the acts provided by senior 159–159.6 criminal code excited thousands of criminal cases against specific individuals, quite many such materials are submitted, the decision to refuse to initiate criminal proceedings or acts in the sphere of fraud qualify under other articles of the criminal code.

In Art. 159 of the criminal code «Fraud» defines fraud as the theft of another's property or the acquisition of rights to someone else's property by deception or abuse of trust.

Before we proceed to the analysis of criminal-legal characteristics of fraud, it is advisable to determine the content used by the legislator terms as «theft», «alien», «property», «right to property», «deception and abuse of trust».

So, in note 1 to the senior 158 of the criminal code «Theft» is defined that under the theft in the articles of the criminal law refers committed with mercenary motives illegal uncompensated seizure and (or) circulation of another's property in favour of the perpetrator or of other persons causing damage to a proprietor or another owner of this property.

This definition implies that the theft involves action to seize another's property without providing a counter indemnity. At the same time in favor of whom originated in the seizure of the property of the perpetrator or another person, including not established a consequence, the criminal law does not matter. Matters is the fact of seizure of somebody else's property.

In turn, the sign of gratuitousness for the qualification of action as theft is fundamental. Assume that the withdrawal of another's property was accompanied by a full or partial reimbursement (payment), in this case the actions of the perpetrator as theft criminal legal grounds do not form.

To qualify guilty as theft, you must also install the presence of damage caused to the owner or another legal owner of the property (for example, the legitimate user and others). Thus required to prove that of confiscated property has value to its owner and is rightfully his. Suppose that property is stolen from a person who, in turn, illegally using (for example, previously abducted and others), in this case as well, the criminal-legal qualification of actions as theft.

The subject of fraud is another's property or the right to it. Under the property is understood things and other objects of the material world, as well as money and securities, and in all cases are foreign to the perpetrator, which is not in him is no law. In turn right on the property rights of the owner or the rightful owner in respect of the property that has some form of expression outside: donation for a car or an apartment, a plastic card, personal savings accounts, etc.

In criminal law science is the main scientific approach, according to which the object of all crimes are public relations mediated by certain benefits, the interests of the people, and public and state interests. This species object fraud, as crimes included in Chapter 21 of the criminal code of RF and are a public relations defining the property rights between concrete persons about material goods. In turn, the direct object of the fraud are existing in Russia are different forms of property that are protected by law in equal measure. For additional classification the main object of fraud are the social relations associated with the property relations, regardless of its form, and the property of a specific person or the right to property.

The objective side of fraud characterized the action as the theft of another's property or the acquisition of rights by cheating or abuse of confidence. Thus, during the preliminary investigation to determine such indicators objective side of the composition of these crimes, which characterize the methods[1] of fraud, and those are the deception and abuse of trust (i. e. two ways).

First, fraud, which involves informational influence on the victim, in which he misled, undertaken in order to force the victim to transfer the perpetrator does not belong to him another's property or the right to other people's property. There are three types of deception: the distortion of the truth, including a complete lie (active deception), and the default of truth (passive deception and fraud action.

Secondly, abuse of trust, which provides for the use guilty to illegally take somebody else's property special relationship of trust between him and the victim: guilty of failure to return assets received under the contract of hire; non-payment or assignment of goods received guilty of credit; obtaining money or property in debt and assign

[1] ZhadanV. N. Some features of qualification of tax offences//the law and order in the modern society: materials of the IX International scientific conference/edited S. Chernova. Novosibirsk: LLC «Agency «SIBPRINT», 2012. P. 178.

them; the receipt of advance payment for the work that the offender is not going to follow; obtaining and assignment of prepayment on any contracts, etc.

The Plenum of the Supreme Court of the Russian Federation dated 27.12.2007, no. 51 «On judicial practice in cases of fraud, misappropriation and embezzlement»[1] (hereinafter — the resolution of the Plenum) are given many explanations, including the methods and forms of fraud, when the fraud is recognized over etc.

We consider it possible to particularly pay attention to the end of fraud. Thus, according to p. 4 of resolution of the Plenum of the «fraud is recognized completed as of the moment when someone's property received in illegal possession of the perpetrator or of other persons, and they have a real opportunity (depending on the consumer properties of this property) to use or to dispose of them at its discretion. If the fraud committed in the form of the acquisition of another's property, the crime is considered completed from the moment of occurrence of the guilty person legally binding capacity to enter into the possession or control of another person's property as his own (in particular, from the moment of registration of the property right to the property or other rights to property subject to registration in accordance with law; from the time of conclusion of the contract; since the Commission thereon (endorsement) on the exchange; the date of entry into force of the court decision for a person recognizes the right to property, or from the date of adoption of another legal decisions by competent authorities or the person misled regarding the availability of the guilty person or other persons legal grounds for possession, use, or disposition of property)».

According to p. 5 resolution of the plenary session in the cases when a person gets another's property or acquires the right to him, not intending to fulfill obligations related to the conditions of the transfer of the said property or rights, resulting in the victim caused material damage, their actions should be qualified as fraud, if the intent aimed at the theft of another's property or the acquisition of rights to property belonging to others, arose from a person to obtain another's property or the rights to it».

The subjective side of fraud is characterized by deliberate form of guilt with direct intent. While the perpetrator is aware of the social danger of his actions, aimed at the theft of another's property or the acquisition of rights by deception or abuse of trust, foresees the possibility or inevitability of occurrence of consequences in the form of damage to the proprietor or other owner steal property and wishes of their occurrence. It should also be noted that the offender is guided by selfish motive and the objective, illegal extraction of profit at the expense of somebody else's property.

The subject of fraud may be a sane physical person who is under 16 years of age.

[1] The resolution of the Plenum of the Supreme Court of the Russian Federation «On judicial practice in cases of fraud, misappropriation and embezzlement» from 27.12.2007 № 51 [Electronic resource]. URL: http://www.garant.ru/products/ipo/prime/doc/1685377/(accessed on 11.07.2014).

The main (common) structure of fraud also includes qualifying features (skilled trains), including the Commission by a group of persons upon a preliminary collusion, or with the infliction of considerable damage to the citizen (including 2 item 159 of the criminal code); particularly qualifying features (especially qualified trains), including its committed by the person with use of his official position or in large quantities (including 3 tbsp. 159 of the criminal code) and committed by an organized group or in especially large size or involving the deprivation of the right of the citizen to the place of residence (including 4 items 159 of the criminal code).

As it was we noted above, the Law of 29.11.2012, no 207-FZ substantial amendments to the criminal code, including supplemented by six new species (special trains) fraud (senior 159.1–159.6 of the criminal code). Thus, introduced criminal liability for fraud in the sphere of lending (senior 159.1 of the criminal code), fraud in obtaining payments (senior 159.2 of the criminal code), fraud with use of payment cards (senior 159.3 of the criminal code), fraud in the field of entrepreneurship (senior 159.4 of the criminal code), fraud in the insurance industry (senior 159.5 of the criminal code) and fraud in the sphere of computer information (Art. 159.6 of the criminal code). These types of crimes in the sphere of fraud require a separate study.

We are in solidarity with the scientific position that this story from the point of view of criminalization of fraud brought nothing in the content of the criminal law. Thus it is necessary to speak not about the criminalization of new crimes, and about differentiation of objective and subjective features of the main (common) structure of fraud provided for in senior 159 of the criminal code. Essentially new types of fraud previously covered by total norm senior 159 of the criminal code.

At the same time, not all types of fraud are reflected in the current criminal law. If the legislator took the path specification of types of fraud, it is possible to Supplement and other socially dangerous crimes of fraud taking place in other branches of national economy (for example, in the defense industry, space industry, construction and repair of real estate, agriculture, medical or pharmaceutical industries, and so on). Moreover, if we follow the logic of our legislators, in the nearest future we can see new articles in the criminal code under the title, such as «Fraud in the defence industry», etc.

Thus, this study can be understood as the analysis of the existing articles of the criminal code and judicial-legal act, doctrinal provisions in criminal law science-related crimes in the sphere of fraud, as well as scientific approaches and the author's understanding of some questions of criminal-legal characteristics of these crimes.

Section 8.
Philosophy of Law

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Rule of law and human rights

Society today, as before, is divided on the officials of different ranks and everyone else. Officials, and higher, and lower rank, often make arbitrary decisions. Such decisions are, at times, extremely, violate the rights of citizens. When many perturbations, in comes into law. The law, as lawyers, universally affects members of all levels of Government. Moreover, they believe that in addition to the universal laws any other kinds of law no. True stories of law known to the right natural-life, family, lineage, property. And there are even the right divine, the deceased on their veneration, as well as flowers, wreaths, monuments to their graves. These rights at all times representatives of the Earth are in addition to the sanctions law. Because the attitude of the people in the decisions of the officials is based not only on law but on an invisible conflict of law with the natural and Divine law. This is evident in citizens of a number of legislative gimmicks that will be addressed in this article. Particularly interesting in terms of study, artificially constructed a series of laws concerning the ways to protect people's rights. Looking at this series of standards, I to correlate between two different positions: the originator of the laws and the natural human opinions. As a source will be made by legislation of different countries at different times. But the story of their application will not be considered. Important-a typological similarity of the legislation. It will be the subject of study.

Usually, the legislator says: the right to freedom of speech in the form of a petition to representatives of State authority is perfectly legal. It is "in no case may be cancelled, suspended or restricted"[1]. While legislator could, for example, insult those people who apparently don't like the actions of government institutions. Outrage people can

[1] The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957. P. 333.

turn into a dangerous mass. And this mass willing to directly address the Government. The law will stand up immediately and categorically denies it, that in no case shall "the rights of peaceful assembly and to petition the Government to correct wrongs"[1]. The legislator does not prescribe simply and clarify the unthinkable in the Government: many public affairs. So the same petition, petition, the petition to move to the door of the legislature[2].

For this purpose between the protest and Parliament need to advise the legislator by individuals-to form a barrier. That is, write in the Act: "no petition may not be submitted to the House in person (visitors), but only through the Office, in writing, with all signatures"[3]. Then raging mass will repay their energy to fill the sheets of paper. Very useful-teaches a legislator, is to expand the circle of relatives, say, up to a hundred thousand people[4]. Then it will be even harder to arrange a lot of worried people that all they have been able to approach the tables with lists. And for insurance-legislator-guides to include an additional condition: the petition must be signed in several dozen cities. Then the organizational troubles protesters can stretch out for many months.

The spatial and temporal with any protest heat gradually goes down to zero degrees. The people, however, can be taken in hand: the petition is not the stanza on a neighbor, be it based on a particular form. For lawyers who know their job, the word "form" like a Balsam for the soul. In this kind of impersonal frame you can cram a lot of good-quality restrictions. For example, this: in a collective application must not be "questions taken from valid subjects of petitions"[5]. That is, the crowd at a rally before the meeting with the lawyer believes that everything is permitted. No such luck, instructs the legislator: the first, to inquire what you really are, and what is forbidden. Yes, the people need specialist shove his advises the legislator, not a dangerous stranger. This specialist has provided the people not familiar with the law, thousands of obstacles, which, allegedly, overcome was forbidden. Then again, there is a long stretch of time, and the gradual fading of energy.

But in the Parliament a petition or petitions, even if they are in the Netherlands, sent to the new censorship, in the relevant Committee. But the fact is, the right to accept or reject[6]. Given that the pressure of human usually measures the Committee of Parliament can detect in their mail many petitions. Committee of the Parliament, naturally, once studied every prositel'nuû paper. Because it is to the Parliament a report

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[1] United States: the Constitution and legislative acts. M. 1993. P. 40.

[2] Ibid. P. 54.

[3] The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957. P. 473.

[4] General theory law of the man. M. 1996. P. 54.

[5] United States: the Constitution and legislative acts. M. 1993. P. 82.

[6] The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957. P. 473.

on the petitions "in the form of a general survey"[1]. This move, said the legislator, is remarkable: a) the specificity of complaints shall be extinguished; b) review may be the most abstract. And once again receive the formal unsubscription complainers. In addition, the report of the Committee on Petitions to Parliament is scheduled only once a year[2]. But a year of expectations-beneficial calming measure for any rebels.

Finally, the legislator is excellent point for which the complainants were exquisitely directed by the Executive in Parliament. The uniqueness of this procedural actions, is that Parliament virtually incapacitated. And complainers, breaking, complex network limitations, discover a complete futility of its initiatives. Because their precious petition, lost in a generalized report of the Parliamentary Committee, disappears when the Parliament is a summary of orders of the Governor. A summary of the highest royalty, in turn, has no binding force[3].

If people continue to insist on a more formal hook. The petition, they say, must submit to the senior government lawyer[4]. That is, adds significant time to the delivery of the petition in his Office and on admission to such attorney. A senior lawyer will need expertise to examine the legality of the petition. After the petition will need to straighten, and each letter. Edit the procedure itself can be a portion. Applicants have corrected, and they again returned the petition for reconsideration. And so a few times. Then again, good time stretching. Finally, on the set of formal order errors (what is a try, demonstrate!) petition, with great regret, lawlessness in General can be dismissed.

And because the legislature once again advise people: If the petition is a dead-end, serve the written complaint to his superiors on the illegal or improper actions of government agencies[5]. Truly patient people will encourage the legislator: If someone has abandoned concern of higher authorities and went to his superiors, they name the will be party to the management process[6]. People peacefully filed petition, the legislator gives additional guarantees. If those using the powers declare themselves "with the aim of creating obstacles in dealing with complaints and statements, they can get behind a grid of three months to three years"[7]. That is why-joking aside: If the official concerned was the complainant, so follow it with honor. There are, of course, can be tricky. The complaint seems to consider, and six months later, the injured person will be expelled from their tyranny with work. Such hypocrites for an act of revenge

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[1] Khokhlov E. B. Economic management and employment law. LSU. 1991. P. 250.

[2] Ibid.

[3] Ibid. P. 73.

[4] United States: the Constitution and legislative acts. M. 1993. P. 82.

[5] The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957. P. 501–502.

[6] Khokhlov E. B. Economic management and employment law. LSU. 1991. P. 80.

[7] The Socialist Republic of Vietnam. The Constitution and legislative acts. M. 1988. P. 205.

by the legislator of the deprivation of liberty for a term from 6 months to 6 years[1]. To not even think officials aggressively treat powerless people. However, for unrighteous acts with the supplicant, typically to any official of the Court do not attract. Moreover, in the market economy you can dismiss any, citing staff cuts.

While the complainants legislator in turn confided guides: since you went to his own superiors, it must file a written complaint about his illegal actions to him[2]. The complainant will be embarrassed and disgusted, but legal form would be perfect. Head, they say, the man experienced, knowledgeable, calming the legislator. He may find that the complaint is manifestly not thoroughly. Or head to understand that committed a faux pas, — assures the legislator, and then agree with the criticism of the slave. In any case, he said, would be followed by written information to the complainant of its decision and reasons[3]. Luckless people can persevere, do not agree with the decision of the Chief. Then, "agreed legislator, a higher authority or in court. And there is study the complaint and answer to the petition, the course is repeated[4].

Not very friendly person may, of course, to get an appointment with her complaint to the Minister, who, of course, will try to listen to it carefully[5]. A person who does not have any brakes, dares to reach out and to the Office of the Prime Minister. Finally, the person/fellow tramples all decorum, yet is entitled to-gently alludes legislation to address their wishes and complaints directly to the monarch or President[6]. However, mindful of the complainers servant of the law very harshly warns: the right to lodge petitions often use to distort the truth, to lie on the solid rough officials. In such cases, no quarter will be given. The complainant is a false imprisonment from three months to three years[7].

People can become aware of the meaninglessness of data action, and start to grumble or openly resent. For this purpose the legislator invites the other strategic party-the figure of the Ombudsman, how would this advocate of human rights. This looks very imposing figure, present in many countries of the world. Yes, and it is the most significant activity for people to monitor violations of the rights of the people by the administrations[8]. The importance of the Ombudsman in the eyes of the people really enhances his powers even ministerial activities[9]. Enlightened professionals among

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[1] The Socialist Republic of Vietnam. The Constitution and legislative acts. M. 1988. P. 205.

[2] The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957. P. 501–502.

[3] Ibid.

[4] The Socialist Republic of Vietnam. The Constitution and legislative acts. M. 1988. P. 200.

[5] Ibid. P. 201.

[6] The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957. P. 501–502.

[7] The Socialist Republic of Vietnam. The Constitution and legislative acts. M. 1988. P. 205.

[8] Spain. The Constitution and legislative acts. M. 1982. P. 47.

[9] Ibid. P. 63.

the citizens rejoice: returned to present the Institute stand defending the interests, as in ancient Rome, each people's tribes[1]. The modern Ombudsman — they explain to people — is very similar to the "emergency power to inspect all State car in favor of a lower class"[2]. And our public defender-dreams of some of them-will be able to resist any arbitrariness, even arbitrary dictators. And thus will be able to cope with the administrative arbitrariness in General[3].

The Ombudsman is ready to give people hope. Here he is vigorously seeking information on those or other features of the control[4]. At the same time he referred to public administration memoranda, observations, recommendations. And diligently waiting on all the mailing lists may be, answer Members and representatives of the authorities[5]. This expected quarterback even sends other people's complaints to the Prosecutor's Office to corrected deficiencies in the work of the judiciary. And if it's not with the Prosecutor's Office will file for copies of complaints already on the Panel of judges to the Supreme Court[6]. Especially has been gratifying to the people's war correspondence with the Attorney General's Office. Its many complainants he hints: the Prosecutor General himself informs me about passing your affairs through a responsible authority[7]. Take-off power of over might indeed very hopeful. In Congress and the Senate Commission, which are officially required to read his message. But his main subject of care-the people-the Defender can even mention at plenary session of Parliament[8]. The protective power of the guardian seems, at times, even enormous. If some bureaucrats have not noticed, for example, his paper messages, it can publicly talk about it in Parliament, once a year, in a special report[9].

Some people really begin to think that the Ombudsman in fact is the most important of the shapes. After all the measures in the list of the powers of an official. For example, it is charged with overseeing the activities of the military administration, as if it is equal to the military prosecutor's Office. Although this, of course, supervision is conditional[10]. It really affect the offending Attorney nobody will allow.

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[1] Zeller M. Roman governmental and legal history. M. 1893. P. 172.

[2] Ibid. P. 55.

[3] Ibid. P. 172.

[4] Italy. The Constitution and legislative acts. M. 1988. P. 246.

[5] Spain. The Constitution and legislative acts. M. 1982. P. 171.

[6] Ibid. P. 164.

[7] Ibid. P. 169–170.

[8] Ibid. P. 159.

[9] Ibid. P. 166.

[10] Ibid. P. 164.

In General, if you think about it carefully, the case of the Ombudsman are like an endless carousel. The official, for example, he received a written complaint from a man. The Defender does not use any sanctions, and only accesses this officer with questions. He sends a complaint to his superior. And the Chief Ombudsman sends your request: explain, they say, are motivated, why is human in my complaint to the harsh response to this complaint, your official submits a new complaint against you? And you somehow, instead of monitoring the main complaint, consider only the slave of the complaint[1].

Quick-witted management people understands perfectly well that menacing messages how would Ombudsman-hurry to defuse the protest of tension. Well, what' can one person respond to millions of daily emerging conflicts and conflicts? Even if his Office a small number of people to send emails. Even if in specific territories of his service there are small missions. Do not save and replace one of the Ombudsman to a group of public defenders in the form of the College[2]. After all, these resources are not commensurate with a well-developed network of investigative bodies, judicial and directorate organs. And Yes, in principle, will not be able to resist the Ombudsman huge State any reactor, radiant energy is enormous power. It of insignificance of its legal status, may not be enough force even to defend himself. Because the acts and decisions of this incomprehensible figures "are not legally binding, and are based only on its credibility[3].

However, management of the people is not going to destroy the other. His term as the normal 5-year managers[4]. Along with all the nobles he has strong immunity: no you cannot detain or arrest, nor fined[5]. Complaints it disposes of at its discretion: can give them up, or may reject it[6]. In General, it is clear officials people. As for criteria for the Ombudsman is exactly from their circle. Roman Tribune, for example, were called so, as expected, officials[7].

If you evaluate the role of defender of the people for their legal protection in General, it will turn out that the Ombudsman is significant, perhaps, merely for the sake of action. Equally clear grand total proposed in article examples and reasoning: numerous people in reality are covered by an extensive network of legal tricks and tweaks. That no one not simply would not have been able to achieve genuine implementation of the right, and stopped to think about it at all.

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[1] Spain. The Constitution and legislative acts. M. 1982. P. 168.

[2] Glushchenko P. P. Socio-legal protection of constitutional rights and freedoms of citizens. St. Petersburg. 1998. P. 107–108.

[3] Ibid. P. 109.

[4] Spain. The Constitution and legislative acts. M. 1982. P. 158.

[5] Ibid. P. 161.

[6] Ibid. P. 165.

[7] Zeller M. Roman governmental and legal history. M. 1893. P. 177–178.

References:

1. Glushchenko P. P. Socio-legal protection of constitutional rights and freedoms of citizens. St. Petersburg. 1998.
2. General theory law of the man. M. 1996.
3. Khokhlov E. B. Economic management and employment law. LSU. 1991.
4. Spain. The Constitution and legislative acts. M. 1982.
5. Italy. The Constitution and legislative acts. M. 1988.
6. The Constitution and laws of bourgeois States XVII–XIX centuries. M. 1957.
7. The Socialist Republic of Vietnam. The Constitution and legislative acts. M. 1988.
8. United States: the Constitution and legislative acts. M. 1993.
9. The Federal Republic of Germany. The Constitution and legislative acts. M. 1991.
10. Zeller M. Roman governmental and legal history. M. 1893.

Contents