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Section 1. Administrative law

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On the definition of electronic administrative regulation

Abstract: The article presents the legal analyzes of the concept of electronic administrative regulations (hereinafter — EAR). The author considered the legal acts' provisions, which contain the various type definitions of administrative regulations. Based on the study results, author makes conclusions about the legal nature of such a complex phenomenon as the EAR and offer the definition of this term.

Keywords: electronic administrative regulations, government services, information, information technology, government.

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К вопросу об определении понятия электронного административного регламента

Аннотация: В статье проводится правовой анализ понятия электронного административного регламента (далее — ЭАР) в рамках информатизации деятельности органов власти. Автором были рассмотрены положения нормативно-правовых актов, которые содержат определения различных видов административных регламентов.

Исходя из результатов исследования, автор делает выводы о правовой природе такого сложного феномена как ЭАР и предлагает свое определение данного термина.

Ключевые слова: электронный административный регламент, государственные услуги, информационные технологии, органы власти.

В настоящее время, органами власти, в целях решения ряда задач, касающихся информатизации их деятельности, был принят пакет нормативно-правовых актов. Вместе с тем, законодательное регулирование в сфере закрепления порядка предоставления государственных услуг еще не достигло должного уровня развития, вследствие чего становится невозможным обеспечение необходимых условий для реализации прав, законных интересов и обязанностей граждан. Таким образом, развитие электронных административных регламентов в Российской Федерации является объективной необходимостью.

Следует отметить, что вопрос о правовой природе административных регламентов предоставления государственных и муниципальных услуг в их традиционном понимании, является также дискуссионным. В российском законодательстве предусматривается ряд определений административного регламента в зависимости от направленности административных процедур: регламенты федеральных органов исполнительной власти, административные регламенты исполнения государственных функций, административные регламенты предоставления государственных услуг. В соответствии с федеральным законом от 27.07.2010 г. № 210-ФЗ «Об организации предоставления государственных и муниципальных услуг», это нормативные правовые акты, устанавливающие порядок и стандарт предоставления государственной или муниципальной услуги [1].

Постановлением Правительства РФ от 16.05.2011 г. № 373 «О разработке и утверждении административных регламентов исполнения государственных функций и административных регламентов предоставления государственных услуг» введены определения таких понятий как регламент исполнения государственных функций и регламент предоставления государственных услуг. Так, под последним понимается, нормативный правовой акт федерального органа исполнительной власти или

Государственной корпорации по атомной энергии «Росатом», устанавливающий сроки и последовательность административных процедур (действий) федерального органа исполнительной власти, Государственной корпорации по атомной энергии «Росатом» и органа государственного внебюджетного фонда, осуществляемых по запросу физического или юридического лица либо их уполномоченных представителей в пределах, установленных нормативными правовыми актами Российской Федерации полномочий в соответствии с требованиями Федерального закона «Об организации предоставления государственных и муниципальных услуг» [2].

Однако в современном российском праве до сих пор отсутствует четко закрепленное определение ЭАР. Первая попытка раскрыть сущность ЭАР была предпринята авторами Концепции административной реформы, которые предлагали рассматривать ЭАР как административные регламенты, реализуемые посредством применения информационно-коммуникационных технологий на всех этапах выполнения соответствующих действий [3].

В юридической литературе отсутствует единый подход к пониманию такого правового феномена как ЭАР. Например, по мнению О. В. Буряги, под ЭАР следует понимать электронный формат публичной деятельности органов государственной власти по реализации своих полномочий, основанный на внедрении информационных технологий в области взаимодействия государственных структур, граждан и юридических лиц [4, 21]. Ю. А. Тихомиров определяет ЭАР как электронный формат публичной деятельности, составляющий основу функционирования единой электронной сети государственных органов Российской Федерации по выполнению возложенных на них функций [5, 623]. И. Н. Барциц предлагает рассматривать ЭАР как электронную форму административного регламента (форму реализации административных регламентов с помощью информационно-коммуникационных технологий), используемую для выполнения, анализа и контроля управленческих действий и процедур, обеспечивающих принятие исполнительным органом государственной власти управленческого решения или оказание государственной услуги в электронной форме [6, 10].

Необходимо подчеркнуть, что приведенные определения содержат указание на один из главных признаков ЭАР как некой формы реализации положений, закрепленных в административных регламентах. Отличительной особенностью регламентов данного вида является широкий ряд вопросов, на регулирование которых они направлены: деятельность государственных учреждений, органов, служащих, порядок предоставления услуг и осуществление государственных функций органами власти Российской Федерации [7]. В данном случае также нельзя отрицать важность современных технологий, которые, в свою очередь обеспечивают граждан и органы актуальной информацией, содержащейся в ЭАР.

Резюмируя вышесказанное можно прийти к выводу, что электронный административный регламент — это осуществляемая с использованием информационно-коммуникационных технологий, форма реализации нормативных административных актов (административных регламентов), устанавливающих общие правила организации деятельности органов власти, критерии, сроки и последовательность выполнения административных процедур (действий), а так же порядок взаимодействия между структурными подразделениями федерального органа исполнительной власти, организациями, в том числе при исполнении государственных функций и предоставлении государственных услуг.

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Section 2. Civil law

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Something about the process leading up to the contract on supply for state and municipal needs

Abstract: the author analyzes the pre-contractual status of participants. He examines in detail stages of prior to the conclusion of the contract on supply for state and municipal needs. He also tries to set the time when the parties do the offer and acceptance.

Keywords: contract, the supply for state needs, offer, acceptance, pre-contractual procedures, tender, auction.

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Немного о преддоговорной стадии заключения контракта на поставку товаров для государственных и муниципальных нужд

Аннотация: Автор статьи анализирует преддоговорной статус участников. Он подробно рассматривает этапы до заключения договора на поставку для государственных и муниципальных нужд. Он также пытается установить время, когда стороны сделать оферту и акцепт.

Ключевые слова: контракт, поставка для государственных нужд, предложение, принятие, преддоговорных процедур, конкурсной, аукционной.

Единство контрактной системы в сфере закупок товаров (работ и услуг) лежит в основе обновленной комплексной нормативной базы, регулирующей поставку товаров (выполнения работ, оказания услуг) для государственных (муниципальных) нужд. Данное положение является одним из принципов Федерального закона от 05.04.2013 № 44-ФЗ «О контрактной системе в сфере закупок товаров, работ, услуг для обеспечения государственных и муниципальных нужд» [1], а именно статьей 11 закона. Заключается этот принцип в том, что весь процесс осуществления закупки является непрерывным от стадии планирования и до окончательного исполнения контракта, включая мониторинг, аудит и контроль осуществления закупок, а также основывается на единых подходах и нормативной регламентации.

Важно отметить, что необходимость и целесообразность заблаговременного планирования закупок в несколько этапов (первоначальное составление единого плана закупок, затем на его основе плана-графика) на данный момент является дискуссионным вопросом в российской правовой среде. Связано это, прежде всего, с дублированием информации в выше обозначенных этапах планирования, затруднительность внесения изменений, и многое другое. Однако совершенно определенным является тот факт, что по завершении этапа планирования, у государственного (муниципального) заказчика появляется обязанность своевременного и неукоснительного исполнения данного плана, путем заключения государственного контракта на поставку соответствующих плану товаров. Этому результату предшествует длительная организационная процедура, которая реализуется в несколько этапов с соблюдением всех технически-юридических требований. Вместе с тем, из теории гражданского права следует, что заключение договора осуществляется после преддоговорной стадии, которая предполагает выражение воли каждой из сторон (волеизъявление) и ее совпадение. В связи с этим, относительно поставки товаров для государственных (муниципальных) нужд весьма неопределенным является вопрос: какие действия считать офертой со стороны государственного (муниципального) заказчика, и когда происходит акцепт?

Дело в том, что усмотреть признаки согласования воли и интересов сторон будущего контракта возможно в каждой из обязательных организационных преддоговорных стадий. Прежде всего сам процесс создания и опубликования

плана закупок (плана-графика) является публичным выражением воли государственного заказчика, направленной на заключение контракта, при этом с точным описанием своего интереса относительно объекта закупки (товара). Тем не менее, таким образом реализуется в большей степени информативная и прогностическая функции, чем направление на установление договорных правоотношений.

По нашему мнению, следующая за планированием организационная стадия содержит больше признаков оферты, и вызывает интерес в правовой среде. А именно, это стадия размещения в установленной законом форме и сроках извещения об осуществлении закупки либо направление приглашения принять участие в определении поставщика закрытым способом. Многие ученые считают эту стадию «отправной точкой» в возникновении правоотношений связанных с заключением контракта, путем проведения торгов [2, 59–62], но относительно правовой природы данного акта возникают разногласия. Так, по мнению В. В. Бейзбаха и ряда других авторов [3, 71–72], объявление о проведении торгов является односторонней сделкой, поскольку влечет возникновение прав для стороны, которой она адресована, и обязанностей в данном случае государственного заказчика. Иную точку зрения высказывал М. И. Багинский, считая извещение о проведении торгов офертой [4, 181–182]. Здесь стоит отметить, что извещение (приглашение) и документация о закупке практически полностью формируют содержание будущего контракта, за исключением цены, которая и будет устанавливаться на торгах, также обладает признаком безотзывности, то есть с момента официального опубликования (направления) невозможно отменить данный акт или изменить его условия, таким образом, соотнеся со ст. 435 Гражданского кодекса Российской Федерации, можно сделать вывод, что извещение (приглашение) соответствует большинству положений об оферте. Главное противоречие, на наш взгляд, заключается в том, что извещение о проведении закупки по своей сути является не предложением неопределенному кругу лиц заключить контракт, а приглашением принять участие в выборе контрагента по контракту на указанных условиях.

В соответствии с законодательством, после размещения в единой информационной системе извещения о проведении закупок, либо направление приглашения, в указанный срок любое правомочное лицо желающее принять участие в торгах подает заявку. В обязательный перечень документов, составляющих данную заявку, входит согласие участника торгов исполнить условия контракта, которое составляется в произвольной форме. Так же весьма интересным новшеством является тот факт, что вместе с заявкой на участие, соответствующее лицо в обязательном порядке вносит обеспечение будущего контракта (ст. 96 закона о контрактной системе в сфере закупок), что по нашему мнению, указывает на подтверждение серьезности намерений участников торгов относительно будущего контракта. На основании вышесказанного видится возможность рассматривать заявление на участие в торгах в качестве акцепта на предложение государственного заказчика, сформированное в документации о закупке. Однако в литературе существует и абсолютно противоположное мнение. Так, доктор юридических наук Ванин В. В. рассматривает заявку на участие в торгах в качестве оферты, «которую участник делает в ответ на вызов, опосредованный извещением» [2, 59–62]. То есть заявка здесь рассматривается как право лица стать участником торгов, а в последствии заключить контракт по предложенной им цене и относительно его товара, опосредованное обязанностью со стороны государственного заказчика эту заявку принять. Данная точка зрения представляется интересной и имеет право на существование, но в таком случае не ясным остается вопрос, что для такой оферты будет являться акцептом? Поскольку приятие заявки, это всего лишь допуск до участия в торгах. В таком случае единственным возможным акцептом, на наш взгляд, будет являться протокол об окончании торгов, поскольку он является логическим завершением преддоговорной стадии, в нем содержится вся информация о контрагентах и цене контракта, а также из его существа следует обязанность обеих сторон заключить государственный контракт. Единственное затруднение лишь в том, что протокол об окончании торгов не является как таковым волеизъявлением, это лишь следствие, технический документ, означающий завершение процедуры торгов и выбора поставщика, при всем этом подписывается он всеми членами комиссии по осуществлению закупок, а не сторонами контракта или их представителями. По той же причине, на наш взгляд, протокол об окончании торгов не может считаться предварительным договором, хотя соответствует большинству признаков последнего, если провести сравнительный анализ со ст. 429 Гражданского кодекса.

Подводя итог вышесказанному, необходимо отметить, что каждая из стадий, предшествующих заключению контракта, будь то планирование, выставление извещения о проведении закупки (или направление приглашения), оформление закупочной документации, направление поставщиками заявок на участие, или же сама процедура проведения торгов с последующим подписанием протокола, формально подпадает под офертно-акцептные правоотношения, но при этом относительно каждой можно привести аргументы против подобного сопоставления. Совершенно определенно можно сказать, что эти организационные стадии в совокупности образуют преддоговорные правоотношения по согласованию и утверждению существенных условий и участников заключаемого государственного контракта. При этом в отличие от других договорных правоотношений, нам видится невозможность вписать отношения по заключению государственного контракта на поставку товаров в рамки традиционной схемы:

1. преддоговорные контакты сторон (переговоры);
2. оферта;
3. рассмотрение оферты;
4. акцепт оферты.

На основании этого, можно сделать вывод, что предоговорной этап заключения контракта на поставку товаров для государственных нужд видится главной отличительной чертой этих правоотношений, что выделяет их из всего гражданско-правового института купле-продажи. Исключение составляет лишь осуществление закупки у единственного поставщика, где контракт заключается на основании выше представленной схемы.

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Triad property

Abstract: This article sets out the procedure for the emergence and development of the triad property. For example, the old civil right to express the concept of ownership to use the term "usus — use", complementing his words extraction of fruit — usufructus. Thus, in the course of managing a home on the property there is a third authority "dominium — domination", that is "the right order".

Keywords: ownership, use, disposal, triad property, settlement, label owner, civil right, domination.

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Триада собственности

Аннотация: В данной статье изложены порядок возникновение и развитие триады собственности. Например, старое цивильное право для выражения понятия владения пользовалось термином «usus — пользование», дополняя его словами извлечение плодов — usufructus. Таким образом, в ходе домашнего хозяйствования над имуществом возникает третье правомочие «dominium — господство», то есть «право распоряжение».

Ключевые слова: владение, пользование, распоряжение, триада собственности, поселение, метка собственника, цивильное право, господство.

Права владение, пользование и распоряжение кулуарах называют тремя правомочиями собственности. Если эти три правомочия не будут едины, право собственности лица на имущество не будут полными, что не даст возможности распоряжаться имуществом, а также вещными правами приравненные к право собственности. По этому поводу доктор юридических наук, профессор М. К. Сулейменов пишет: «*Эти три правомочия составляют так называемую триаду собственности. Только при наличии всех трех прав вместе лицо будет считаться собственником имущества*» [1, 19]. Напрмер, у субъектов, взявших в аренду собственность у владельца, будет право *владения и использования*, но только до срока, указанного в договоре. Следовательно у арендатора нет прав распоряжаться имуществом, то есть права продавать, менять либо использовать еще в каком-либо неразрешенном гражданском обороте, так как арендатор не является собственником имущества, потому что таковым является владелец собственности, сдавший имущество в аренду.

Единый генезис перечисленных выше триада права собственности владения, пользования и распоряжения определены основой континентального (романо-германского) права, используемого бывших странах СССР.

В римском частном праве есть выражение: «… *собственность на вещи произошла от естественного владения*» [2, 169]. Отсюда возникает вопрос когда и как

произошло слово «*владение*». Римские юристы Марк Антистий Лабеон и Юлий Павел, жившие в I веке нашей эры, «этимологически производили слово владение — possessio от sedere — сидеть, оседать, а самое владение описывали, как positio — поселение (на земле)» [2, 190–191].

Отсюда следует, что если «*земля — естественный объект*», то «*оседание на земле есть естественное овладевание землей*». А «*владение землей» есть получение продукта путем ее обработки*, результат же полученного от земли продукта определяет «… *происхождение вещной собственности из естественного владения*». Таким образом, первый признак либо правомочие собственности — «*владение*» основано на понятии «*оседания на земле, освоение земли*».

Эту мысль доктор юридических наук, академик С. Зиманов развивает следующим образом: «*Значение слова «земля» следует понимать как площадь в определенном пространстве (географическое понятие), так и территорию, дающую продукцию (производственное понятие). А собственность, как результат владения (обладания – А. Е.), относится ко второму определению*» [3, 105]. Следовательно, землю можно отнести к понятию *владение — possesio* путем обладания ею как «производственной», *fructus — дающей продукцию,* землей-территорией.

В казахском обычном праве понятие «собственности» возникло не от *владения — possesio* — оседания на земле, освоения земли, как в римском частном праве. Наоборот, собственность — *меншік* появилась от слова *"ен"* — метка собственника на ушах скота. В результате появилось *"ен-шік" – "меншік-собственность"*, перешедшее на землю с пастбищами и зимовками.

Доктор юридических наук, профессор А. Е. Еренов пишет об этом следующее: «… *возникновение и развитие права собственности на один объект (например, на скот – А. Е.) становится причиной перехода его (права собственности – А. Е.) на другой объект*» [4, 15].

С. Л. Фукс, исследовавший пути развития обычного права казахов, развивает эту научную идею: «… *сыновья с семьями, выходящие отдельно вместе со своими родовыми клеймами получали свои, независимые метки — «ен» (получали право метить – А. Е.), обозначающие их собственность. Эти метки представляли из себя надрезы на ушах скота. В результате имущество сыновьей, вышедших отдельно, от слова «ен» стало называться "енші", что дословно так и переводится «часть имущества, которая выдается сыновьям при отделении» (в результате которого развилось понятие собственность — меншік – А. Е.)*» [5, 63].

Что касается второго правомочия собственности на основе римского частного права — *пользования*, то «Старое цивильное (гражданское – А. Е.) право для выражения понятия владения пользовалось термином usus — *пользование*, дополняя его извлечением плодов — *ususfructus*» [2, 168].

Другими словами, получение выгоды путем овладевания — *ususfructus* образует второе правомочие — «*пользования*».

В ходе домашнего хозяйствования эти два правомочия — *владения, пользования — продуктом* приобретаеть третье правомочия «*dominium — господство*» над *вещью, имуществом* [2, 191], то есть «*право распоряжение*».

Таким образом, выясняется что, понятие «*собственности*» получило свое начало от «*понятие владение*», то понятие *распоряжение — как властное правомочие решающий судьбу объектов собственности* получило свое начало от понятие «*dominium — господство*». Как бы там ни было получается, что властное правомочие распоряжения вещью образовалась путем владения вещью и последующего господства над ней.

Говоря современным языком гажданского права, в любом случае распоряжение каким-либо лицом вещью, над которой лицо господствует на законных основаниях, предоставляет лицу вещное право «собственности» над указанной вещью.

Давайте сравним это положение с традиционным казахским понятием собственности. Во-первых, надрезметка на ушах стада овец *"тілік" – "ен"*, дает владельцу возможность получения права владения этим стадом — *ен-ші, ен-шік, м-еншік-собственность*.

Во-вторых, только то лицо, которое установило *метки,* имеет права *распоряжаться* данным стадом, то есть т. е., устанавливает властное правомочие над стадом.

В-третьих, все перечисленные основания дают указанному лицу возможность получения вещного права в виде собственности. Таким образом в казахском обычном праве основой понятия «собственности» — *м-еншік* стало слово «*ен*», что полностью соотносится с понятием римского частного права «*proprietas*», представляющее собой *право на вещь*, сохранившись до наших дней как «собственность-полное право на вещь или вещное право».

Метод определения кому принадлежит объект собственности в казахском обычном праве в случае когда вещь найдена либо узнанна, по словам доктора юридических наук, профессора К. Мами: «*Красноречивое выражение Толе би, решившее судебный процесс — Нашедший радуется, узнавший-забирает — в настоящий момент в том же значении стало прецендентной нормой института защиты частной собственности гражданского права*» [6, 65].

Резюмируя эту мысль римский реформатор II в. н. э. Юлиан развивает понятие *dominium-господство над вещью, in rem-вещное право.* Если же речь идет о *конкретном вещном праве*, то это понятие определяется как *собственность-proprietas* и называется *dominus proprietas — владелец частной собственности* [2, 191]. Из этого определения следует, что «*собственность — есть право на вещь, то есть вещное право*».

Кроме того, «к вещным правам наряду с правом собственности» [7, 115] указано в 195 статье Гражданского кодекса Рееспублики Казахстан. Исходя из этого профессор М. К. Сулейменов пишет, что в области цивильного права Казахстана «… *категория вещных прав обязана*

своим происхождением прежде всего отношениям частной собственности на землю» [1, 22].

В настоящий момент термин *собственность*, охватывающий сложившиеся в римском праве понятия *«владение, пользование и распоряжение»*, широко используется в имущественных отношениях на основе гражданского права.

Если объективно сказать многим юристам-цивилистам известно две юридические системы, регулирующие товарно-денежные, имущественные и личные неимущественные отношения. Одна из них — используемое в бывших республиках СССР романо-германское (цивильное) право, вторая — англо-американская единая правовая система. Цивильная правовая система решает гражданские (экономические) дела связанные с товарно-денежными, имущественными и личными неимущественными отношениями путем «применение гражданского законодательства по аналогии права и по аналогии закона» [7, 6].

Англо-американская единая правовая система в решении гражданско-экономических дел руководствуется судебным прецедентом. На мой взгляд, такой подход поддерживают оперативный экономический оборот связанные со срочным решением дел о собственности, принадлежащей физическим и юридическим лицам.

Боле того, в англо-американской единой правовой системе собственность, как в цивильном праве, не ограничивается тремя признаками или правомочиями — *«владением, пользованием и распоряжением»*. Из некоторых исследований видно, что *«… в англо-американской юриспруденции имеется одиннадцать правочии собственности*, каждое из которых *в различных значениях дает приблизительно полторы тысячи вариантов* собственности» [8, 21].

Такие изменения в признаках собственности скорей всего напрямую связаны с политическими и социально-экономическими изменениями в государственной системе власти. Например, в период существований СССР профессор Л. И. Дембо признавал: *«частная собственность на землю была ликвидирована, вследствие чего необходимо вместо правомочия владения землей внедрить правомочие государственного управления собственностью»* [9, 17].

Профессор Г. А. Аксененок предложил *«ввести четвертый признак управления — государственной собственности на землю с сохранением правомочия владения»* [9, 18–19]. В ответ на идею профессора Г. А. Аксененока доктор юридических наук И. В. Павлов и кандидат юридических наук А. С. Краснопольский остановились на концепции *«управление землей не является чем-то отличным от власти распоряжаться землей, это (управление) только один из видов распоряжения, признак управления сосбвенностью, полностью охватываемый правом распоряжения собственностью»* [9, 19]. Таким образом, возникновения три правомочии или триады собственности наталкивают на мысль о том что, не скончаемый человеческие фантазаии.

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Definition and legal status of producers' cooperatives

Abstract: This article discusses and analyzes the concept of the production cooperative, his legal status and place in the system of legal entities.

Keywords: Producers Cooperative, a legal entity, a commercial entity.

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Понятие и правовое положение производственного кооператива

Аннотация: в данной статье рассматривается и анализируется понятие производственного кооператива, его правовое положение и место в системе юридических лиц.

Ключевые слова: производственный кооператив, юридическое лицо, коммерческое юридическое лицо.

Статья 96 Гражданского кодекса РК закрепляет следующее легальное определение понятие «Производственного кооператива»: Производственным кооперативом признается добровольное объединение граждан на основе членства для совместной предпринимательской деятельности, основанной на их личном трудовом участии и объединении его членами имущественных взносов [1]. Проводя сравнительный анализ с Гражданским законодательством Российской Федерации, то можно отметить, что законодатель оперирует двумя понятиями — это производственный кооператив и артель. Артель форма кооперации, существовавшая в дореволюционной России. Поэтому можно сделать вывод, что возникновение и развитие производственного кооператива в России берет начало с дореволюционных времен и не является новым для гражданского законодательства Российской Федерации.

Производственный кооператив в Казахстане возникает и получает широкое распространение лишь в первой половине XX века, в советский период, в сфере производства (в особенности сельского хозяйства) и услуг.

На сегодняшний день в Республике Казахстан закрепляют правовое положение и регулируют деятельность производственного кооператива два законодательных акта: Гражданский кодекс РК (общая часть) принятый 27.12.1994 г. и Закон РК «О производственном кооперативе» от 05.10.1995 года.

Так, в соответствии со статьей 1 Закона РК «О производственном кооперативе» производственным кооперативом признается добровольное объединение граждан на основе членства для совместной предпринимательской деятельности, основанной на их личном трудовом участии и объединении его членами имущественных взносов (паев).

Как мы видим, расхождений в определениях производственного кооператива между двумя законодательными актами нет, но можно ли сделать вывод о том, что есть дублирование?

Далее анализируя понятие производственного кооператива, законодатель определяет производственный кооператив коммерческим юридическим лицом, участниками которого могут быть лишь физические лица. Однако для коммерческих юридических лиц основной целью деятельности является извлечение прибыли. Между тем у кооператива как сообщества, прежде всего людей, а не капиталов (независимо от их вида: производственные, потребительские) основная цель совсем другая. Она состоит в удовлетворении материальных и иных потребностей его членов [2, 14].

Достигается данная цель, безусловно, посредством прибыли, без которой, невозможно развитие не только производственного кооператива, но и потребительского общества, отнесенного ГК к некоммерческим организациям, хотя деятельность потребительского общества, не менее чем производственного кооператива, связана с прибылью, позволяющей удовлетворять потребности пайщиков в товарах и услугах (в сфере торговли, заготовок, переработки и т. п.).

Прибыль, получаемая любым кооперативом от его деятельности, используется на его развитие, вознаграждение членов соответственно их участию в делах, на жилищное строительство, повышение образовательного, культурного уровня членов, их социальное обеспечение и другие, предусмотренные уставом кооператива цели. Таким образом, для кооператива основная цель — удовлетворение материальных и иных потребностей членов, а прибыль — средство ее достижения [3].

По мнению Е. Н. Штанделя, одним из признаков кооператива является содействие культурному развитию его членов. Кооператив определяется им как «товарищество (добровольный союз лиц) с переменным составом членов и с переменным капиталом, учреждаемое для организации хозяйственной деятельности или труда своих членов на началах взаимопомощи, самодеятельности и самоуправления и имеющее своей целью удовлетворение нужд своих членов и содействие их культурному развитию» [4].

Сходным образом определяли кооператив А. И. Терехов [5] и Л. И. Поволоцкий [6], по мнению которого «кооперативами признаются добровольные объединения лиц с переменным личным составом и материальными средствами, организующие хозяйственную деятельность

или труд своих членов на началах взаимопомощи, самодеятельности и самоуправления, на основах равенства прав членов в управлении, имеющие целью содействие их материальному благосостоянию и культурно-общественному развитию и действующие на основаниях уставов, зарегистрированных в соответствующих органах».

Признак содействия культурному развитию своих членов не отвечает правовым признакам.

Г. М. Колоножников определил «следующие признаки кооперативного товарищества: 1) соединение, 2) под особой фирмой, 3) неопределенного числа, 4) лиц, 5) свободно вступающих и выходящих из него для достижения ими, 6) в качестве самостоятельного юридического лица, организованного, 7) на началах равенства и самоуправления, для 8) целей укрепления и воспособления их трудовым хозяйствам, 9) посредством соединения их общих усилий, 10) в области кредита, потребления и производства, а также 11) ведения культурно-просветительной работы» [2, 20].

Все указанные признаки в настоящее время являются общими для всех юридических лиц.

На основании вышеизложенного можно выделить следующий признак отличающий кооператив от других форм и видов юридических лиц, это удовлетворение потребностей членов кооператива как одна из целей создания и деятельности кооператива.

Исторически кооперативы существовали как форма объединения, прежде всего, людей, а не капиталов. В настоящее же время, как правильно замечено в юридической литературе, они являются объединением как труда (лиц), так и капитала, что отражает наметившуюся в последнее время тенденцию «персонализации капиталов и капитализации объединений лиц» [7].

Само существование кооператива немыслимо как без личного участия членов, так и без капитала. Наличие собственного капитала, обособленного от капитала его участников, по сути, является одним из важнейших признаков кооператива как юридического лица. В то же время самым важным качеством кооперации является перенесение внимания с интересов капитала на интересы членов кооператива [8]. «Кооперация всегда будет пользоваться капиталами, и очень большими капиталами, ибо без них в хозяйственной жизни обойтись невозможно; но не интересы этого капитала стоят в ней на первом месте, а интересы тех хозяйств, которые он обслуживает. В кооперации капитал — слуга, а не хозяин» [9].

Особая, по сравнению с другими организационно-правовыми формами, демократичность кооперативных правоотношений, которая проявляется в двух аспектах. Во-первых, все члены кооператива, как граждане, так и юридические лица, обладают одним голосом при принятии решений на общем собрании членов кооператива, независимо от размера пая, что является основным признаком, отличающим кооператив от хозяйственных обществ. Во-вторых, при распределении прибыли предпочтение отдается участию членов в производственной и иной хозяйственной деятельности кооператива, нежели участию в формировании его имущественной базы [2, 22].

Как отмечает В. А. Семеусов, «любой термин в наиболее краткой форме должен наиболее четко и точно выражать существо научного понятия. Многословие при изложении какой-либо нормы затрудняет ее восприятие» [10].

В гражданском законодательстве Республики Казахстан кооперативы делятся на производственные и потребительские. Производственные кооперативы относятся к коммерческим, потребительские — к некоммерческим организациям. Вместе с тем по общему для всех некоммерческих организаций правилу, потребительские кооперативы вправе осуществлять предпринимательскую деятельность лишь постольку, поскольку это необходимо для достижения их уставных целей.

Как уже указывалось выше, производственный кооператив, в отличие от других коммерческих юридических лиц, получая прибыль, использует его на развитие самого кооператива, вознаграждение за участие в делах и т. д. Имеет место предложение перевести производственные кооперативы из разряда коммерческих организаций в некоммерческие.

На практике это автоматически повлечет за собой ограничение дееспособности производственных кооперативов, запрет на занятие деятельностью, не соответствующей целям их создания [11].

Следующая точка зрения базируется на утверждении о том, что «в перспективе в Гражданском кодексе надо иметь самостоятельный раздел, который бы назывался «Кооперативы». И там следовало бы дать как общее для всех кооперативов, так и специфическое регулирование по видам, которых должно быть значительно больше» [12]. По мнению А. А. Тюкавкина-Плотникова такое выделение кооперативов в самостоятельную группу полностью разрушает критерий классификации организаций на коммерческие и некоммерческие [2, 27].

В то же время заметим, что концепция, предложенная Т. Е. Абовой, может быть реализована в случае выделения кооперативов в отдельную организационно-правовую форму, форму коммерческой организации. Деление же кооперативов на потребительские и производственные было бы в таком случае делением на виды в рамках одной формы [13, 73].

Объясняется это тем, что в действительности для большинства потребительских кооперативов основной целью деятельности является получение прибыли, само их существование становится возможным лишь благодаря осуществлению предпринимательской деятельности [14].

Если, например, на заре кооперативного движения в кооперативы объединялись для того, чтобы выжить всем и каждому, то в современной рыночной экономике деятельность кооператива принимает форму бизнеса, начинает носить все более предпринимательский характер. Некая общая «выгода» или цель «удовлетворения потребностей» трансформируется в настоящую экономическую

выгоду, в реально осязаемую в рыночном хозяйстве цель — получение наибольшей прибыли [2, 28]. В противном случае кооператив «не вписывается» в сферу рыночной конкуренции, а значит в рыночные отношения вообще [15]. Все высказывания о том, что «чистый доход, приносимый кооперативными учреждениями, является не капиталистической прибылью, а особой некапиталистической формой дохода» и подобные им носят в большей мере идеологический, а не экономический и уж тем более не правовой характер. «На современном этапе перехода к рынку, а также с позиций мирового опыта в рамках международного кооперативного альянса эти и другие аспекты теории кооперации требуют критического переосмысления» [15, 9].

Итак, различие между производственными и потребительскими кооперативами заключается не в разной цели (она одна — получение прибыли), а в специфике путей, избираемых для удовлетворения этих потребностей [16].

В производственном кооперативе цель достигается через личное трудовое участие членов кооператива в его производственной и иной хозяйственной деятельности. Произведенный в результате такой деятельности конечный продукт (работа, услуга) не потребляется членами кооператива, а реализуется на сторону [16, 81]. В потребительском кооперативе, в свою очередь, главная цель достигается именно благодаря потреблению продукции (вещей, работ, услуг), произведенной непосредственно кооперативом, либо в ином содействии хозяйственной деятельности кооператива (например, в предоставлении первичного сырья для его последующей переработки кооперативом) [2, 29].

Показательно, что именно прибыль, полученная кооперативом и распределенная между его членами, позволяет удовлетворить материальные потребности последних [2, 29].

Совпадение целей у потребительских и производственных кооперативов — получение прибыли — не означает совпадения способов достижения этих целей: потребительские кооперативы стремятся совершить операции по купле-продаже товаров, получению-выполнению работ (услуг) на наиболее выгодных для пайщиков условиях; производственные кооперативы нацелены на создании наиболее выгодных условий производства для своих членов, которые в числе прочих выражаются в более выгодных условиях реализации продукции собственного производства [2, 30].

Как было замечено, коммерческий характер деятельности характерен для большинства, но все же не для всех потребительских кооперативов. Особняком в этом ряду стоят жилищно-строительные, жилищные, гаражные, дачные, садово-огороднические потребительские кооперативы [17].

Думается, что перевод указанной группы кооперативов в числе прочих потребительских кооперативов из разряда некоммерческих организаций в коммерческие не только не ухудшит их правового положения, а наоборот улучшит его за счет расширения объема их дееспособности. Кроме того, если исходить из критерия деления юридических лиц на коммерческие и некоммерческие, согласно которому «основные цели деятельности некоммерческих организаций лежат за пределами рыночного оборота», где «их особый статус призван лишь обеспечить имущественную базу для осуществления их функций… », то выделенную группу потребительских кооперативов также нельзя безоговорочно отнести к числу некоммерческих. Наконец, можно сослаться на зарубежный опыт [16, 12].

Так, согласно Германскому Закону о производственных и хозяйственных кооперативах все кооперативы, в т. ч. «союзы по возведению жилья» (аналог отечественных ЖСК) являются коммерсантами, т. е. имеют в качестве основной цели деятельности получение прибыли [18]. Однако никаких сложностей для кооперативов их предпринимательский статус не вызывает.

Продолжая дальнейшее исследование, считаем необходимым, подвергнуть анализу понятия «кооператив» и «кооперация». Гражданское законодательство Республики Казахстан не содержит слова «кооперация», однако данное слово встречается в юридической литературе.

По мнению А. В. Чаянова, отмечавшим, что «приступая к определению кооперации, мы, по нашему глубочайшему убеждению, имеем перед собой не одно, а два определения», для каждого из которых должны быть сконструированы определяющие признаки. С одной стороны, это юридическое лицо, субъект хозяйственной деятельности. С другой стороны, мы, по его словам, имеем перед собой «широкое социальное кооперативное движение, или, точнее, движения, обладающие каждое свойственной ему идеологией и пользующееся кооперативными формами организации хозяйственных предприятий как одним из орудий (иногда единственным) своего конкретного воплощения» [16, 81]. Думается, что с правовых позиций кооперация должна, прежде всего, определяться именно как социальное движение, а не как организационно-правовая форма юридического лица [2, 30].

Из числа основных признаков производственного кооператива нужно выделить следующие:

– добровольное объединение на основе членства граждан для совместной хозяйственной деятельности (членство здесь является организационной основой формирования кооператива);

– в качестве основной цели создания любого кооператива выступает удовлетворение материальных и иных потребностей его членов; в качестве цели деятельности — получение прибыли;

– член производственного кооператива обязан, по общему правилу, принимать личное трудовое участие в деятельности созданного ими юридического лица;

– другая обязанность членов кооператива состоит в формировании его имущественной базы путем внесения имущественных паевых взносов, которые в совокупности составляют паевой капитал кооператива;

– члены кооператива несут ограниченную субсидиарную ответственность по его долгам, размер и условия применения которой должны предусматриваться в уставе кооператива;

– все члены кооператива обладают одним голосом при принятии решений на общем собрании членов кооператива;

– имеются ограничения на распределение прибыли кооператива [19].

По мнению А. Г. Быкова и С. А. Карелиной производственный кооператив представляет собой уникальную организационно-правовую форму предпринимательской деятельности; эта уникальность заключается в том, что он органически соединяет в себе такой объем прав, свобод и интересов гражданина, какой не свойственен более ни одной другой организационно-правовой форме предпринимательства; он одновременно является формой реализации гражданином многих конституционных прав [20].

По сути, производственный кооператив является воплощением идей о самоуправлении работников, чья жизнеспособность подтверждена многовековой историей его развития. Именно организационно-правовая форма кооператива в наибольшей степени способствует повышению роли человека в процессе производства — основному направлению современных форм и методов управления, в центре внимания которых находится человек как центр производства. «Творческая активность работника, его заинтересованность в результатах труда являются ныне одним из главных условий выживаемости и процветания компаний в конкурентном мире».

В современных работах, посвященных анализу правового регулирования предпринимательства, высказывалось мнение о том, что «… режим предпринимательской деятельности должен быть подчинен не только извлечению прибыли, но и удовлетворению общественных интересов, общему благу» [21, 4].

Другой особенностью кооператива как участника предпринимательской деятельности является тот факт, что прибыль для них — это, прежде всего, источник капиталовложений для дальнейшего расширения производства в целях содействия хозяйственной деятельности своих членов. Стремясь не к максимальной прибыли, а к наиболее полному обеспечению хозяйственных, социальных потребностей своих членов, кооперативы часто занимаются малорентабельными или даже нерентабельными видами деятельности, которые неприемлемы для прочих предпринимателей, но чрезвычайно важны для самого кооператива в лице его членов [22].

В то же время именно прибыль, получаемая кооперативом в процессе осуществления предпринимательской деятельности позволяет в наиболее полной мере обеспечить потребности своих членов. Другими словами, нацеленность деятельности кооператива на извлечение прибыли корректируется потребностями его членов, и в своем совокупном сочетании цель деятельности кооператива выступает как «извлечение прибыли с учетом … » [20, 28].

Если же говорить о месте производственных кооперативов, то это преимущественно малый и средний бизнес. Объясняется это прежде всего размерами кооперативов. Мировой, а также отечественный опыт (в области правового регулирования хозяйственной деятельности колхозов) показывает, что при численности членов кооператива свыше 150–200 принципы кооперативной демократии могут быть нарушены, поскольку возникают проблемы, связанные с участием членов кооператива в заседаниях общего собрания [23], ослабевает фидуциарный характер внутрикооперативных отношений. Указанные проблемы частично решаются путем проведения общего собрания в форме собрания уполномоченных. Однако представляется, что производственные кооперативы не должны замыкаться в себе, расширяя объемы производства исключительно за счет создания и развития своих структурных подразделений. Наоборот, для того чтобы сохранить конкурентоспособность артели должны вступать в союзы с другими кооперативами, причем не только производственными, но и потребительскими [24]. Ярким подтверждением сказанному служит опыт испанского объединения кооперативов «Мондрагон» [25], а также итальянских [26] и французских [27] кооперативов.

По этой причине необходимо юридически урегулировать механизм межхозяйственного кооперирования, опираясь на опыт специалистов в области колхозного права [28], а также учитывая специфику объединений кооперативного типа.

Одно из проявлений этой специфики выражается в том, что в объединении не должно быть зависимости одних кооперативов от других. Другой специфической чертой является то, что объединение кооперативов выступает по отношению к своим участникам — кооперативам не в роли «третьего лица», а в роли центра, консолидирующего, координирующего деятельность соответствующих кооперативов. В связи с этим отношения между участниками кооперативного объединения являются внутренними по отношению к самому объединению [2, 34].

Поэтому налогообложения результатов такой деятельности, по сути, не должно быть. В противном случае будет иметь место многократное налогообложение: при реализации продукции (выполнении работ, оказании услуг) одним участником объединения в отношении другого и при последующей реализации этой подвергшейся переработке продукции (результатов работ, услуг) либо другим участником, либо самим объединением. Кроме того, создание кооперативных объединений позволит им формировать собственную инфраструктуру рынка: кредитные, страховые организации, складские помещения, оптовые центры и т. п. [2, 35].

Следует заметить, что ведение кооперативами предпринимательской деятельности должно получать поддержку со стороны государства. Эта поддержка должна выражаться как в форме предоставления кооперативам льготного режима, так и в форме детального, системного урегулирования их деятельности [24, 110].

По мнению А. А. Тюкавкина-Плотникова, более целесообразным было бы не введение в хозяйственный оборот новой формы коммерческой организации, а выделение народного предприятия как вида (не формы) юридического лица (причем, не ограничиваясь рамками коммерческих организаций), по примеру правового регулирования деятельности малых предприятий [2, 36].

Кооперативное право за последние годы остается в неизменном состоянии, передаваясь по наследству из поколения в поколение. Если же мы хотим разработать более стабильную правовую форму кооперативов вообще, производственных кооперативов в частности, то от законодателя обязательно следует потребовать привести их законодательную базу в соответствие с требованиями времени, сделать ее более понятной и привлекательной для потребителя. Отношения внутри производственных кооперативов должны четче соответствовать уставу, а их внешние отношения оговариваться законодателем. Причем, прежде всего так, чтобы условия деятельности производственных кооперативов были бы существенно улучшены» [28, 114].

Далее рассмотрим категории «правовой статус» и «правовое положение» производственного кооператива. Согласно господствовавшей до 60-х годов прошлого столетия точке зрения правовой статус отождествлялся с категорией правосубъектности и не рассматривался в качестве самостоятельной категории [29]. Данная позиция обосновывалась тем, что, во-первых, и правосубъектность, и правовой статус возникают и прекращаются у субъекта одновременно и, во-вторых, оба эти свойства в равной мере неотчуждаемы. С последующим развитием юридической мысли, в 70–90-х годах, категория правового статуса получила более широкую разработку, в результате чего произошло ее формирование как одного из ключевых и дискуссионных понятий теории права [2, 12].

В настоящее время большинство ученых придерживаются мнения о том, что правоспособность, правосубъектность и правовой статус — суть разные явления и категории. При этом ряд исследователей рассматривают правовой статус в качестве одного из элементов правосубъектности наряду с право-и дееспособностью. По мнению других авторов, правовой статус более широкое понятие, нежели правосубъектность. «Он шире, богаче, структурно сложнее, выступает обобщающим, собирательным понятием» [30, 238].

В структуру правового статуса, по их мнению, кроме правосубъектности входят также такие элементы, как:

1) правовые нормы, устанавливающие данный статус;
2) основные права и обязанности;
3) законные интересы;
4) юридическая ответственность;
5) правовые принципы;
6) гражданство;
7) правоотношения общего (статусного) типа [30, 237].

Третья группа юристов придерживается взглядов, согласно которым понятие правового статуса ограничивается категориями прав и обязанностей. Все остальные элементы являются дополнительными, которые существуют либо как предпосылки возникновения правового статуса (например, правосубъектность), либо как элементы, производные от него (например, юридическая ответственность), либо как категории, далеко выходящие за пределы (рамки) правового статуса (например, правовые принципы) [30, 237].

Правовое положение юридического лица, как и любого субъекта права, характеризуется через анализ его субъективных юридических прав и обязанностей. В то же время предпосылками возникновения правового статуса юридического лица наряду с его собственной правосубъектностью являются: (1) правосубъектность и правовой статус его участников (учредителей); (2) организационная структура и компетенция его органов управления [31].

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Section 3. European law

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Effect of judgments of the European Court of Human Rights on the national laws of Member States of the Council of Europe

Abstract: An examination of the role of judgments of the ECHR on the national laws of Member States of the Council of Europe. Changes in legislation under the influence of pilot judgments of the ECHR.

Keywords: European Court of Human Rights, national law, interaction.

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Влияние постановлений Европейского суда по правам человека на национальное право государств-членов Совета Европы

Аннотация: изучение роли судебных решений ЕСПЧ на национальне законодательство государств-членов Совета Европы. Изменения в законодательстве под влиянием пилотных решений ЕСПЧ.

Ключевые слова: Европейский суд по правам человека, национальное законодательство, взаимодействие.

Одним из основополагающих документов в области прав человека является Конвенция о защите прав человека и основных свобод, подписанная в 1950 году всеми странами-членами Совета Европы. Безусловно, существуют международно-правовые акты, распространяющие свое действие на гораздо более значительное количество стран — стоит вспомнить хотя бы такие акты Организации Объединенных Наций, как Всеобщая декларация прав человека 1948 г., Международный пакт о гражданских и политических правах 1966 г. и Международный пакт об экономических, социальных и культурных правах 1966 г. В то же время только Европейская конвенция по правам человека обладает реально действующим механизмом защиты провозглашенных в ней прав — Европейским судом по правам человека.

В статье 1 Федерального закона от 30 марта 1998 года № 54-ФЗ «О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней» говорится о том, что «Российская Федерация в соответствии со статьей 25 Конвенции признает компетенцию Европейской комиссии по правам человека получать заявления (жалобы) от любого лица, неправительственной организации или группы лиц, которые утверждают, что они являются жертвами нарушения Российской Федерацией их прав, изложенных в Конвенции и указанных Протоколах к ней, в случаях, когда предполагаемое нарушение имело место после вступления в действие этих договорных актов в отношении Российской Федерации». Кроме того, следующий абзац гласит: «Российская Федерация в соответствии со статьей 46 Конвенции признает ipso facto и без специального соглашения юрисдикцию Европейского Суда по правам человека обязательной по вопросам толкования и применения Конвенции и Протоколов к ней в случаях предполагаемого нарушения Российской Федерацией положений этих договорных актов, когда предполагаемое нарушение имело место после их вступления в действие в отношении Российской Федерации».

Как показал опыт, граждане России, по всей видимости, извлекли большую «выгоду» от ратификации Конвенции, чем граждане остальных государств: огромное количество жалоб, поступающих в ЕСПЧ против РФ, является лишним подтверждением того, что ситуация с правами человека в стране является достаточно напряженной. В соответствии со статистическими данными, Россия стабильно входит в первую тройку стран — «рекордсменов» по общему числу жалоб: в частности, в 2013 году на рассмотрение суда поступили 12 330 жалоб против РФ. Учитывая же тот факт, что их рассмотрение занимает продолжительный период времени (ввиду загруженности ЕСПЧ), то по состоянию на начало 2013 года на рассмотрении находилось

более 29 000 (!) жалоб против России, что составляет 24 % от числа всех рассматриваемых жалоб [1, 49]. При этом нужно учитывать, что значительное число правонарушений допущено государственными органами, в том числе в вопросах, касающихся соблюдения конституционных норм.

Отсюда возникает очень важный вопрос: какова роль решений и постановлений Европейского суда по правам человека? Способны ли они оказывать значительное влияние на национальное право государства-члена Совета Европы и если да, то каким образом?

Во-первых, следует отметить, что национальные суды по традиции применяют Конвенцию с учетом решений ЕСПЧ, тем самым придавая им прямое действие во внутреннем праве. На сегодняшний день увеличивается количество примеров, в которых то или иное решение Европейского суда влечет за собой конкретные изменения не только в отдельных делах, находящихся на рассмотрении в судах, но и в общих подходах судов к толкованию национального права, иначе говоря, происходит изменение судебной практики [2, 15]. Во многом это объясняется прецедентным характером практики ЕСПЧ. Так, Конституционный Суд РФ при проверке соответствия законодательства Конституции РФ зачастую ссылается на решения ЕСПЧ в отношении других государств.

Во-вторых, очень важным является тот факт, что в соответствии с частью 1 статьи 46 Конвенции о защите прав человека и основных свобод «Высокие Договаривающиеся Стороны обязуются исполнять окончательные постановления Суда по любому делу, в котором они выступают сторонами». При этом государство, в отношении которого принято декларативное постановление о нарушении прав человека, должно не только выплатить определенную компенсацию, но и принять так называемые меры индивидуального характера по отношению к потерпевшему, чтобы «положить конец нарушению и устранить его последствия с целью восстановления, насколько это возможно, ситуации, существовавшей до нарушения» [3, 27], и, если это необходимо, меры общего характера, способные эффективно предотвратить дальнейшие нарушения Конвенции, подобные тем, которые уже были выявлены Судом.

Многолетняя практика деятельности Европейского суда по правам человека свидетельствует о том, что многие его постановления способны оказывать существенное воздействие на национальное законодательство стран, ратифицировавших ее. В подтверждение этого обратимся к опыту ряда европейских стран. Если говорить о Швейцарии, то, например, после вынесения судебного решения от 23 октября 1990 года по делу «Губер против Швейцарии» (в отношении г-жи Ютты Губер окружным прокурором был подписан ордер на ее арест; впоследствии Губер была оправдана) в Уголовно-процессуальный кодекс были внесены изменения, в соответствии с которыми решение вопросов о заключении подозреваемого под стражу решается исключительно судом. Немаловажную роль постановления ЕСПЧ сыграли и в Австрии. В связи с вынесением решения по делу «Патаки и Данширн против Австрии» в уголовно-процессуальном законодательстве появились нормы, ограничивающие срок досудебного задержания шестью месяцами. Более того, после состоявшегося в пользу Прамсталлера, Шамауцера, Пфармайера и Палаоро решения (по одноименному делу) к Конституции были приняты поправки, посвященные созданию административных судов. В Ирландии действие постановлений ЕСПЧ связано, прежде всего, с изменениями в брачно-семейном законодательстве. Так, решение по делу «Джонстон против Ирландии» явилось поводом для принятия закона, уравнявшего в правах внебрачных детей и детей, рожденных в браке [4, 125].

Да и в целом, масштабы воздействия решений Европейского суда по правам человека на правовую систему Соединенного Королевства, без преувеличения, огромны. В результате решения по делу Ирландия против Великобритании премьер-министр Соединенного Королевства в марте 1972 года официально заявил, что «пять методов» ведения допроса, которые впоследствии были признаны Судом нарушением статьи 3 Конвенции, не будут более применяться в стране. Под влиянием решения по делу Уэлч в Соединенном Королевстве принят в 1994 году новый Закон о преступлениях, связанных с незаконным оборотом наркотиков, в соответствии с которым действие распоряжения о конфискации не распространяется больше в обязательном порядке на все дела о торговле наркотиками. Вместо этого конфискация проводится по требованию прокурора или в случае, если суд принимает по собственному усмотрению решение об осуществлении таких действий [5, 69].

В данном случае мы говорим, конечно, о так называемых «пилотных» постановлениях Европейского суда, в которых Суд признает нарушение Конвенции о защите прав человека, а также, что самое главное, устанавливает массовый характер подобного рода нарушений вследствие структурной (или системной) дисфункции правовой системы государства-ответчика и предписывает этому государству предпринять определенный вид мер общего характера [6, 42]. Не секрет, например, что и принятие Федерального закона от 30.04.2010 «О компенсации за нарушение права на судопроизводство в разумный срок или права на исполнение судебного акта в разумный срок» не в последнюю очередь было вызвано рядом пилотных постановлений ЕСПЧ, к которым относятся решения по делам «Бурдов против России» (2009 год, касалось невыполнения приговоров российских судов) и «Ананьев и другие против России» (2012 год, касалось условий содержания в следственных изоляторах). В данном случае ЕСПЧ потребовал от России принять законодательные меры «по устранению длительных задержек судебных решений», пригрозив даже приостановлением членства России в Совете Европы. (Следует отметить, что многие проблемы, связанные с длительным неисполнением решений ЕСПЧ, разрешились после ратификации Протокола № 14 к Европейской конвенции по правам человека,

которым Комитету Министров Совета Европы были предоставлены дополнительные полномочия) [7, 7].

Среди других мер общего характера можно выделить и практические мероприятия, например, реконструкцию тюрем, увеличение судейского корпуса, обучение представителей полиции.

Вообще, прецедентная практика Европейского суда играет значительную роль в гармонизации национальных законов. В некоторых государствах даже создают специальные подразделения в органах власти, как, например, в Греции, при парламенте которой функционирует служба, осуществляющая контроль над соответствием принимаемых законов Конвенции. Чаще всего речь идет, как уже было сказано выше, о внесении изменений в процессуальные гарантии, особенно в сфере уголовного права и правил тюремного заключения. Значительные реформы, касающиеся уменьшения сроков судебного разбирательства были проведены, в частности, в Испании, Португалии, Италии и в ряде других стран.

Таким образом, на поставленный в самом начале настоящей статьи вопрос можно ответить следующим образом: роль постановлений ЕСПЧ в контексте их влияния на национальное право государств-членов Совета Европы трудно переоценить. Достаточно вспомнить хотя бы тот факт, что некоторые постановления Суда в свое время даже вызывали необходимость внесения изменений в конституции и что соответствующие изменения вносились, несмотря на существующее во многих странах требование о необходимости проведения в таких случаях референдума. Все это с неизбежностью порождает вопрос об «ущемлении» национального суверенитета международным судебным органом, решения которого зачастую известные политики называют политизированными и в связи с этим даже поднимают вопрос о возможном выходе из Совета Европы. Впрочем, это уже совершенно самостоятельная проблема, рассмотрению которой я посвящу одну из следующих статей.

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Section 4. History of studies of law and state

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The Soviet state of the policy period of "perestroika"

Abstract: The paper discusses the goals and methods of the policy of "perestroika" in the USSR. It is noted that the results of "perestroika" in the Soviet Union had the world-historical significance. It was carried out only part of the party elite. The results of the policy of "perestroika" have positive and negative effects.

Keywords: USSR, "perestroika", M. S. Gorbachev.

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Советское государство периода политики «перестройки»

Аннотация: В статье обсуждаются цели и методы политики «перестройки» в СССР. Отмечается, что итоги «перестройки» в СССР имели всемирно-историческое значение. Она проводилась лишь частью партийной элиты. Итоги политики «перестройки» имеют положительные и отрицательные последствия.

Ключевые слова: СССР, «перестройка», М. С. Горбачев.

Причины исчезновения с политической карты мира СССР еще многие годы будут волновать умы историков, юристов, экономистов и всех тех людей, которые интересуется политикой. Целью статьи является поиск ответов на вопросы: Что понималось под «перестройкой»? Какова была её цель? Каковы основные итоги перестройки? Ответы на поставленные вопросы позволят понять многие явления и процессы, которые произошли, происходят и произойдут в ближайшие годы в мире.

«Перестройку» в СССР необходимо связывать с внеочередным пленумом Политбюро ЦК КПСС 11 марта 1985 года, который избрал новым Генеральным секретарём ЦК КПСС М. С. Горбачева. 23 апреля 1985 года Горбачев созвал пленум ЦК КПСС, на котором провозгласил политику ускорения социально-экономического развития советского общества. Это был старт перестройки: радикальной экономической реформы и демократизации общественной жизни, расширение демократического социализма. Предшествующий период советской истории от Л. И. Брежнева до К. У. Черненко назвали временем «застоя».

В мае 1985 года в СССР началась борьба за трезвость, которая внешне имела привлекательные черты, но проводилась неграмотно. Потом началась «перестройка». Перестроечные процессы осложнила возникшая 26 апреля 1986 авария на Чернобыльской АЭС. В тоже время об аварии на Чернобыльской АЭС 26 апреля 1986 года М. С. Горбачев и В. В. Щербицкий (1918–1990) скрывали от населения 10 дней. До этого была демонстрация 1 мая в Киеве, ничего не знающие люди получали облучение. После сообщения об аварии из Киева началось массовое бегство. В поездах, которые отбывали из Киева, заняты были нижние и верхние места сидящими плотно людьми, а в проходах стояли стоящие люди. Некоторых людей впихивали в открытые окна вагонов. Скрытие факта аварии породили недоверие к центру в Украинской ССР, негативно отразились на экономике страны: прекратился рост национального дохода, выросли цены, возникли проблемы с поставкой некоторых товаров.

3 августа 1990 г. Верховный совет УССР принял закон «Об экономической самостоятельности Украинской ССР». На юге Украины возник комитет Демократического союза Новороссии и Бессарабии. В стране церковь получила больше прав. В Украине была легализована деятельность греко-католической церкви (УГКЦ), которая выступала за независимость Украины вместе с УАПЦ. В сентябре 1989 был организован Народный Рух Украины

за перестройку во главе с поэтом Иваном Драгом. В 1990 году появились новые политические партии. Экономический и политический кризис породили сепаратизм. Тем не менее, на референдум за сохранение СССР 17 марта 1991 г. проголосовало 70,5 % из 83,5 принявших участие в голосовании. В августе 1990 г. Был принят Закон «О печати и других средствах массовой информации», была введена свобода печати и отменена цензура. 24 августа 1991 г. Верховный Совет УССР принял Акт провозглашения независимости Украины, а 5 декабря 1991 г. Верховный Совет Украины принял обращение «К парламентам и народам мира», в котором было отмечено, что договор от 22 декабря 1921 г. о образовании СССР Украины в отношении себя считает недействующим.

В годы перестройки началось движение за национальную независимость. На этой волне развивается религиозное движение. В 1990 году весной была легализована Украинская греко-католическая церковь. В июне 1989 года в Украине действовало более 47 тысяч неформальных объединений. В сентябре 1989 года был создан Народный Рух Украины. 21 января 1990 года Рух организовал акцию «живая цепь» от Киева до Львова, посвященную образованию в 1919 году нового украинского государства, объединившего УНР и ЗУНР.

Осложнилась обстановка в Грузии, республиках Прибалтики и в Молдавии. В апреле 1989 года в Тбилиси при разгоне митинга оппозиции с участием армии пострадало несколько десятков человек, что привело к призывам к отделению от СССР. Президентом Грузии был избран З. Гамсахурдиа, который установил в республике националистический режим.

Отмена статьи 6 Конституции СССР о руководящей роли КПСС на III съезде народных депутатов СССР в марте 1990 года, а потом и в конституциях союзных республик привела к потере контроля ЦК КПСС компартий республик. Политическая система СССР лишилась сплачивающего её центра. Государственное управление ослабло, общество становилось все более расколотым идеологически, религиозно и экономически. Своей политикой Горбачев не модернизировал, а уничтожил идеологическую, политическую, правовую и экономическую системы социализма. С 1 ноября 1990 г. была введена карточная система и купоны. В апреле 1991 г. в два раза возросли розничные цены. С 1987 г. начался рост преступности. С принятием 12 июня 1990 года «Декларации о государственном суверенитете РСФСР начался распад СССР.

Составными частями перестройки были «гласность», «ускорение» и «самоокупаемость». На самом деле не было ни гласности, ни ускорения, ни самоокупаемости.

Январский 1987 года пленум ЦК КПСС провозгласил гласность основой политики. «Гласность» выражалось в том, что в СМИ появилась информация о событиях 1917 года, коллективизации, индустриализации, ГУЛАГах, голодоморе 1932–1933 годах на Дону, на Кубани, Ставрополье, Украине, Поволжье, репрессиях 1937 года, второй мировой войне 1939–1945 годов, штрафных батальонах. Политика «гласности» свелась к отказу от контрпропаганды, разрушению старой идеологии. Все недостатки, стихийные бедствия, катастрофы выставляли как недостатки экономической, политической, правовой и идеологической систем. С. Г. Кара-Мурза отмечал, что «гласность» привела к изменению общественного мнения. «… Всей программе гласности был присущ крайний антиэтатизм … После создания в обществе негативных стереотипов началась реформа органов власти и управления» [2, 497].

Июньский 1987 года пленум ЦК КПСС наметил программу реформ в управлении экономикой, расширил права предприятий, создание совместных предприятий с иностранным участием. Возникли новые задачи: развивать самоокупаемость и ускорение. На июньском 1987 года пленуме ЦК КПСС был взят курс на новое политической мышление, демократизацию политической системы. Началась замена первых секретарей ЦК компартий республик, крайкомов и обкомов. Писатели, поэты, артисты, журналисты и адвокаты в республиках стали выступать за развитие национальных культур, стали проявляться русофобские идеи, а их пропагандисты не пресекались правоохранительными органами. Активизируются правозащитные организации, издаются негосударственные газеты и журналы, которые быстро политизируются. В этих условиях власть взялась реформировать политическую и правовую системы. В июне–июле 1988 года состоялась XIX партийная конференция. На ней было предложено провести конституционную реформу. Демократии становилось меньше. Возросла роль Председателей Советов, было решено строить не коммунизм, а социалистическое правовое государство. В марте 1989 года состоялись выборы народных депутатов СССР. Партийные комитеты КПСС в избирательный процесс не вмешивались. Избранный в 1989 г. Верховный Совет СССР был первым за советское время, среди депутатов которого практически не было рабочих и крестьян. Большинство депутатов составляли ученые, журналисты и работники управления. Поправки к Конституции СССР 1977 года и новый избирательный закон были недемократичны, но общество безмолвствовало. На первом съезде народных депутатов СССР была образована Межрегиональная депутатская группа, которая начала с сентября 1989 года вести борьбу об отмене статьи 6 Конституции СССР о руководящей роли КПСС в советском обществе. В январе 1990 года было создано политическое движение «Демократическая Россия», которое действовало фактически на принципах антикоммунизма и паналигархизма в исполнительной власти.

В Львове начали проводить митинги за национальное возрождение. В 1989 году возникло Общество украинского языка имени Тараса Шевченко, которое добилось принятия Верховной Радой УССР закона «О языках в Украинской ССР». Закон этот был принят и закрепил государственный статус украинского языка и гарантировал равноправие языков всех народов республики. Противоречивость

закона была очевидна. Не могло быть равноправия языков, если один из них государственный. Это был удар по русскому языку, который в тот период знало практически все население УССР. Сам факт возрождения общества, которое возникло впервые в Львове в 1873 году — начало национального движения на Украине. Возобновление его деятельности в Львове в 1989 году свидетельствовало о налаживании контактов львовских политиков и интеллигенции с зарубежными диаспорами, где это общество функционировало с 1947 года. Литературное Общество имени Тараса Шевченко стало создавать свои филиалы в других городах республики. В других республиках СССР так же возникали националистические организации, которые по мнению С. Г. Кара-Мурзы стали готовить «почву для конфликта как с союзным центром, так и с национальными меньшинствами внутри республик» [2, 502].

В начале, М. С. Горбачев е его команда пытались строить социализм «с человеческим лицом» (1985–1987 годы). Потом на политическую арену вышли «народные фронты» в Прибалтике, общества в поддержку перестройки, националистические и другие организации, которые провозгласили антисоветские и антигосударственные лозунги. Народ увлекли массажами, сеансами психотерапевтов А. Кашпировского, А. Чумака и других.

Помимо обвинений М. С. Горбачова в недальновидной политике, которая привела к распаду СССР, в последнее время стали писать о том, что Горбачов и перестройка тут ни при чем. Причина в том, что еще в 1975 году Л. И. Брежнев по недальновидности принял «общеевропейские ценности» и подписал Хельсенское соглашение, которое подвело «черту холодной войне и попутно лишила СССР возможности бороться с внутренней антисоветской оппозицией» [4, 2]. 19 августа 1991 года по радио сообщили, что М. С. Горбачов по состоянию здоровья не может осуществлять обязанности Президента СССР и власть перешла в к ГКЧП. Разыграли политическую комедию, фабула которой была такова: Ельцин выступает за защиту Горбачева и Конституции СССР. На дачу к Горбачеву в Крыму прилетает вице-президент РСФСР А. В. Руцкой и премьер-министр И. С. Силаев, которые привозят его в Москву, а членов ГКЧП арестовывают по обвинению в государственном перевороте, но вскоре амнистируют. Отказавшийся от амнистии командующий сухопутными войсками генерал армии В. И. Варенников на суде был признан невиновным. Однако итогом августовского путча явились: запрет КПСС и Компартии РСФСР. В последние годы в научных журналах и изданиях все чаще пропагандируется информация о том, что развал СССР связан с падением цен на нефть на мировых рынках. «К середине 1980-х гг. СССР находился в глубоком системном кризисе, — писал киевский историк Ю. В. Латыш. — … А после шестикратного падения мировых цен на нефть ситуация стала угрожающей» [3, 629]. Так же считает московский историк В. И. Дашичев. По его мнению, «в самое критическое время перестройки, в 190–1991 гг., стараниями США и под их воздействием Саудовской Аравии цена на нефть на мировых рынках была сбита до небывало низкого уровня — 7–10 долларов за баррель» [1, 216]. С подобными оценками согласиться нельзя. При И. В. Сталине СССР нефтью торговал мало, а перед второй мировой войной в разы сократил экспорт нефти, но стал сверхдержавой.

Народ все меньше верил в возможность построения коммунизма в СССР, в преимущества экономической, политической и идеологической систем советского социалистического государства. В стране все больше ощущался дефицит хороших товаров. «Ускорение» в сфере научно-технического прогресса и социально-экономического развития свелась к самому настоящему застою. «Самоокупаемость» свелась к развалу плановой экономики. Ухудшилась международная обстановка с вводов советских войск в Афганистан в декабре 1979 года. В 1980 году США и их союзники бойкотировали летние Олимпийские игры в Москве, на которые были потрачены огромные средства. Многие народы государств восточной Европы не желали быть подконтрольными со стороны руководства СССР и иметь на своих территориях советские войска.

Почти во всех республиках СССР, кроме Белоруссии, были организованы инциденты с кровопролитием на национальной почве, в которых часто вовлекали Советскую Армию. Идею дальнейшего национального освобождения пропагандировали Г. В. Старовойтова, А. Д. Сахаров и другие.

Исчезновение в материалах XXVII съезда КПСС слова «контрпропаганда», курс на критику истории советского государства и права привели к снижению ценности советской идеологии, политической и экономической системы. СССР причастен к развалу СЭВ, военного блока Варшавского договора, а затем началось разрушение самого СССР.

Маргарет Тэтчер (1925–2013) отмечала в своих мемуарах: «Как учит история, нет большей опасности, чем когда распадаются империи, и поэтому я предпочла осторожность в нашей политике обороны и безопасности» [5, 720]. В 1981 году она заявила: «Советский Союз представляет собой «главную угрозу» образу жизни западных стран» [5, 9]. О контактах с Горбачовым М. Тэтчер писала, что « … неотступно оказывала ему поддержку и нисколько об этом не жалею» [5, 742]. О Ельцине еще менее высокое мнение. «В западных кругах сложилась тенденция воспринимать господина Ельцина не более чем позёра» [5, 743]. По её словам «перестройка задумывалась с той целью, чтобы сделать коммунизм более эффективным».

Конечно, причины развала СССР многочисленные. Среди них есть и объективные и субъективные причины, но главная все же — идеологическая.

Однако в период «перестройки» и в «постсоветское время» советская демократия, законность, самоуправление и прочие институты, созданные на протяжении десятилетней борьбы и развития, были легкомысленно отброшены

как простые политические заблуждения без всякого реформирования и преемственности, в одной только надежде на новую «лучшую жизнь, по западному образцу». Политический процесс в период 1980-х – начала 1990-х годов в СССР имел своим итогом разрушение советского государства. При отсутствии объективных и субъективных предпосылок в стране волевым путем в 1990 году был учрежден институт президентства, а в 1991 году — институт Президента РСФСР. Именно Президент СССР М. Горбачев подписал в нарушении действующего законодательства в 1991 году постановления о выходе из состава СССР Латвии, Литвы и Эстонии и тем самым умышленно развалил государство. Введение поста Президента в Российской Федерации первоначально не ограничивало статус высших представительных органов России — Съезда народных депутатов и Верховного Совета Российской Федерации, а Президиум Верховного Совета стал осуществлять лишь деятельность по организации работы Съезда и Верховного Совета РСФСР. В дальнейшем произошло противопоставление Президентской власти Верховному Совету и Съезду народных депутатов РСФСР. Причинами развала СССР явились: во-первых, «эпидемия» принятия деклараций о государственном суверенитете РСФСР от 12 июня 1990 года, во-вторых, раскол в советской правящей элите, в-третьих, незаконные акты Президента СССР. Период Перестройки в СССР продолжался с 1985 года по август 1991 года. Она проводилась частью партийной элиты. Причем одна ее часть делала перестройку сознательно, а другая бессознательно, стараясь сохранить своё привилегированное положение в обществе и государстве.

Итоги политики «перестройки» имеют положительные и отрицательные последствия. Положительным было следующее:

1. граждане получили больше прав и свобод;
2. выросли возможности творческой интеллигенции;
3. развитие предпринимательства.

Отрицательные последствия:

1. распад мировой системы социализма;
2. разрушение СССР;
3. сокращение числа социальных гарантий населения;
4. появление большого количества организованных преступных групп и сообществ; появление этнической организованной преступности;
5. уход из правоохранительных органов в 1989–1991 гг. квалифицированных кадров, которые стали получать небольшую зарплату и находились под критикой СМИ;
6. рост внутреннего и внешнего долга РСФСР, рост инфляции.

Иные последствия:

1. КПСС была отстранена от власти;
2. рост доходов населения при с одновременным сокращении товарных запасов в торговле, что привело к дефициту некоторых товаров: введение талонов на спиртное и сахар.

До сих пор нет ясного ответа на вопрос: чем была «перестройка» и каковы её истинные цели? Сам М. С. Горбачев в 1987 году называл «перестройку» революцией. Это была революция «сверху», которая представляла сменяющие друг друга периоды идеологического саморазрушения (отказ от контрпропаганды, государственной идеологии). Она имела всемирно-историческое значение в том плане, что мирным путем привела к разрушению социалистического лагеря (СЭВ, Организации Варшавского договора) и государственно-правовой формы России в XX веке — СССР. После этого начался новый передел мира, сфер влияния.

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Section 5. Constitutional law

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Phenomenon of rescuing victims of nazi regime under the Holocaust

Abstract: In this article problems devoted to participation of the local Ukrainian population at the rescue of Jewry — victims of the Nazi occupation regime is examined. Question of violation of human rights is analyzed and it is given description a concept «the phenomenon of rescuing». It was concluded on social and legal support rescuers Jewish people during the Second World War on the territory of modern Ukraine.

Keywords: Holocaust, the Second World War, genocide, Righteous among the Nations, memorial «Yad Vashem», phenomenon of rescuing, rescue of Jewry.

Urgency of theme. In history of the Ukrainian people events of the Second World War occupy the special place. Memory of war is spiritually-historical heritage of the Ukrainian people, creates bases of its self-sufficiency and originality. Official silence of many facts in Soviet times generated the great number of unsolved problems. One of these is the problem of determining the legal status of war veterans and victims of the Holocaust, their social protection for our country to obtain independence is becoming increasingly important.

The object of study in the article is the phenomenon of rescue victims of the Nazi regime and assists the Ukrainian population.

The subject of study is features of the phenomenon of rescuing.

Study of the problems of honoring Righteous Among the Nations — the saviors of the Jews, it is impossible without clarifying the definition of "Holocaust" and the implementation details of the occupation policy of the fascist German authorities on Ukrainian territory during the Second World War. Modern works of I. Pickerel, I. Arada, K. Berkgofa and other are devoted these problems. The study of the phenomenon of Righteous among the Nations in Ukraine works of Kostelyanets H., O. Kruglova, Y. Suslenskyi, N. Suhatskyi and I. Shchupak are devoted. Holocaust (translated from Greek — "burnt") is a systematic and organized destruction of the Jewish population during the Second World War. The victims of the Holocaust were 6 million. Jews (on the territory of the Ukrainian SSR there were 1.4 million). It was 63 % European and 36 % world of the Jewish population. There is not the unique point of view in relation to a division into periods of Holocaust. Some scientists specify on 1933–1945, others on 1941–1945 — that on the period of systematic mass elimination of Jews [11, 14].

However and the first, and the second agree that for a planet Holocaust became an enormous tragedy which above all things touched European Jews. Actually, it was and tragedy of all humanity which first saw and knew, as every concrete human life is little valued, and life whole, in this case — Jewish people, that Nazis wanted fully to destroy.

The Jewish capital played an important role in trade and industry of Germany and sometimes made a serious competition the German businessmen. The Nazis also accused the Jews of undermining German national traditions. All this gave Hitler an excuse to launch a broad promotion of the idea of "global Judeo-Masonic conspiracy theory," which was allegedly intended to provide mankind "Jewish domination" [6].

The theory of "World Jewry" was opposed by the Nazis "Aryan idea" – racial theory, which was based on the slogan: "The German people are people of the highest, the Aryan race — because it has dominion over other nations". Not surprisingly, the bitter results of the Shoah — the Holocaust — a catastrophe of European Jewry long have been the subject of close attention and deep study in many countries.

It is actually considered beginning of the Holocaust 1933. Anti-Semitism became the official policy of the Third Reich. Gradually, Jews were excluded from public and social life. This campaign reached its climax in 1935 after the adoption of the "Nuremberg Laws". They had the status of state and during the

Second World War spread to the entire territory of Europe. Jews in these racist laws was given a special place.

At night on the 9th–10th of November, 1938 by order of Goebbels there were Jewish pogroms which have become history of "crystal night" under the name that became the beginning of Shoah — accidents of the Jewish people.

The second stage of the Holocaust (1939–1941) began in day of invasion of Hitler's soldiers to Poland. Nazis forced Jews to carry special marks, collected them in a ghetto, sent in labour camp.

The third stage was begun with the attack of Nazi Germany on the USSR in June, 1941. Already on January 20, 1942 in Berlin a conference was held to discuss ways to "Final Solution of Jewish question", which included mass executions, the presence of extermination camps.

With beginning of the second and third periods position of Jews became worse considerably: after occupation of Poland it was begun to transmigrate them in a ghetto, where slave labour, hunger and illnesses, expected on them. Millions of Jews of Poland, Western and South Europe were under power of Nazis from the beginning of September, 1939.

War, world character and escalation took off it all ethics and political prohibitions. If in 1930th the purpose of Hitler was banishing of Jews from Germany, already at the beginning of war in 1939 such purpose was become by total elimination of whole people. The fact that the decision to mass extermination was made on the eve of the attack on the USSR, shows impunity of aggressors.

Shares of the extermination of the Jews in the occupied territories of the USSR, which lasted the entire period of occupation, divided into three periods:

1. From 22 June 1941 to the winter of 1942. During this time destroyed most Jews living in Lithuania, Latvia, Estonia, Moldova (Bessarabia, Northern Bukovina).

2. From spring until late 1942, when most Jews were destroyed on the western and eastern parts of Ukraine, Belarus and Russia occupied territories by the summer of 1942.

3. From the beginning of 1943 to retreat of Germans from the occupied territories of Soviet Union, elimination of all Jews who remained proceeded. The last murder occurred during the retreat of Nazi occupation [6].

In the occupied territories of the USSR destruction of Jews engaged aynzatsgroups (Einsatzgruppen) — operational groups, mobile police formations, designed to kill prisoners of war, of the shares to eliminate the population of the occupied territories. They allocated part of in the SS, SD, Security Police and obeyed major imperial security management (RSHA). Aynzatsgroups owe their existence specially created security service and agents of Gestapo. Before the invasion into the Soviet Union there were established four aynzatsgroups which shared the front each other geographically and they acted in the rear of Army as respective groups: Group "A" (Commander Walter Shtaleker later Yust (Yost) Akhamer-Pifrader, Pantsynher, Fuks) — Baltic; Group "B" (Commander Arthur Nebe, then Nauman, Hans Boehme, Erlshher, Zeettsen, Horst Beme) — direction of Minsk — Smolensk — Moscow; Group "C" (Commander Otto Rasch, then Thomas and Horst Beme) — Ukraine; Group «D» (Commander Otto Olendorf later Birkalen) — Southern Ukraine, Crimea, the Caucasus.

The structure of every aynzatsgroup included 1000–1200 persons, who were distributed between several aynzatscommands. Into structure aynzatsgroup entered approximately 350 SS members, 150 drivers and mechanical engineers, 100 members of Gestapo, 80 employees of ancillary police, who were represented by local inhabitants, 130 police officers of an order, 40–50 employees of criminal police, and also 30–35 employees SD. Stuff included the certain amount of translators, radio operators, telegraphers and others. Leading composition of group was formed from Gestapo, employees of SD and criminal police. In Ukraine of aynzatsgroups of «S», «D» destroyed about 200 thousand of Jews. However, their methods of mass extermination of Jews to "Final Solution of Jewish question" were found to be ineffective, and in summer 1942 the group was disbanded [3, 6].

Except for shooting, Jews were sent to ghetto and concentration camps. Concentration camps were created Nazis on the whole territory controlled by them. On territory of Ukraine the so-called labour camps were created for Jews. On this hard labour of «death factories» prisoners repaired roads, worked at factories, in stone quarries. Yanovsky camp in Lviv where it has been destroyed more than 200 000 prisoners [4] was one of the largest and most terrible such camps.

Ghettos, created by Nazis in Ukraine, were two types «opened» and «closed». The inhabitants of the «opened» ghettos lived in the apartments together with their relatives. Here Jews were transmigrated from other towns. These ghettos were temporal — from them Jews were sent to other ghetto, concentration camp, or place of shooting. To the «closed» ghettos, which were the isolated quarters or boroughs, all Jews were transmigrated from city or township.

The greatest ghetto on territory of Ukraine and the third in the world, after Warsaw and Lodzinsky was Lviv's one which the German authorities ordered to organise on November 8th, 1941. The history of the Lvov ghetto is a history of continuous destructions.

In that moment when the German troops occupied a city, the Jewish population of Lviv was counted by 150 000 persons. Opening out the company of liquidation of jewries, Germans began mass elimination of the Jewish population on territory of all Lviv prisons: Brigidok, prison in the street Lonckyi and military prison in Zamarstinivska. First, they forced Jews dug graves criminals and political prisoners executed in Soviet times. Jews who dug out tombs, Germans photographed near to corpses, adding to photos the signature: «the Jewish criminals near to the innocent victims» [5].

To beginning of 1942 more than 100 000 Jews were counted in a ghetto. The property of Jews was robbed, synagogues were burned, and Jews were sent on the forced works. During March of 1942 15 thousands people were taken out in Belzhets. Majority from them were old and religious people,

women and children. Officially it was named «by an action against antisocial elements». When on July, 27, 1944 soviet troops took Lviv there were less than 300 Jews who were hidden in the city sewage system.

Also a few thousand children were rescued by the activists of the Polish government agency of Zhegota (Zegota is council of help to Jews on the occupied territory of Poland). Also Jews from the Lviv ghetto were hidden in monasteries and churches of the Ukrainian Greco-catholic church. Mass destructions of Jews were across all Ukraine. So, in the Dnepropetrovsk area where before war 30 000 Jews were almost their third part was shot. In the official report of aynzatsgroup from November 19th, 1941 it was noticed that: «From 30 thousand Jews approximately 10 thousands were shot up on October 13, 1941 division, subordinated to the senior chief SS and police. Further one thousand more Jews were shot by aynzatsgroup». Researcher A. Podolskyi gives an extract from documentary sources: «On October 13th, 1941 by order of Gestapo in the city of Dnepropetrovsk on Charles Marx avenue under the threat of execution it has been collected 10–12 thousand persons — Jews at whom Hitler's soldiers, having collected all valuable things, having built in rows of 8 persons, columns, under the strengthened protection of bandits «SD» have sent on errands in a direction of Transport institute near which in a ravine all have been shot. Among them old men were shot up there. Nazi bastards snatched from the hands of fathers and mothers of babies and small children who were in the presence of parents were thrown alive into the ravine and dug into the land. Execution of Jews proceeded from 5 a. m. on October 14th till 5 p. m. on October 15th, 1941. For the purpose of concealment of the evil deeds fascist monsters, having filled a ravine with corpses, they covered from above with earth then on this place have made planting of trees» [9].

On August 15, 1941 Germans occupied a city Kryvyi Rih the Dnepropetrovsk area. In the report of aynzatsgroup shooting of 105 Jews of city in the first days of occupation was remembered. Fully Jews in Kryvyi Rih were exterminated in October of the same year [2, 259]. On the whole in times of occupation Ukraine lost to 60 % from the pre-war amount of the Jewish population. However the echo of Anti-Semitic practice and propagation of Nazis sounded among Ukrainians and during the post-war period. In 1944–1945 Jews returned to Ukraine from service in armies or evacuation camps of Tashkent and they saw that their relatives had been killed, apartments were occupied, and furniture and other property was plundered.

Attempts of Jews to return to the houses have caused a rage of Ukrainians who during war had occupied their habitation and asserted Jews who returned, had made nothing for a victory over Germans. Such disputes often grew into fights, and in Dnepropetrovsk and Kiev pogroms took place. In Dnepropetrovsk the violent crowd snatched on Jews, crying out: «Death to Jews! And Thirty seven thousand Jews have already been killed by Nazis, we will finish off others» [8]. Such explosions of violence and also returning of official anti-Semitism in all Soviet country and in all party establishments forced many Jews who had survived, to keep silence. New directions of current research on the history of the Holocaust are defined in international and national scientific conferences held under the auspices of organizations such as the All-Ukrainian Center for Holocaust "Tkuma" (Dnepropetrovsk), Ukrainian Center for Holocaust Studies (Kyiv), Kharkiv educational center "Holocaust." Questions about Holocaust on the territory of Ukraine also repeatedly raised at international conferences not only in Ukraine but also in Russia, namely at the annual international interdisciplinary conference on Jewish Studies Center "Sefer", at the International Conference "Lessons of Holocaust and Modern Russia". The attention of many researchers was involved with resistance problems to a Nazi genocide and collaboration.

In 1953 in Jerusalem by the decision of the Knesset — the Parliament of the young state of Israel research center and memorial to victims of the Holocaust of European Jewry — memorial "Yad Vashem" (literally — "memory and name") was opened. As said in a law about Yad Vashem, it was founded for immortalization of memory of six million representatives of the Jewish people, who perished death of martyrs from the hands of Nazis and their collaborators [7].

The special status was established by law for members of other nations which the noble motives and risking their lives saved or helped save Jews during the Holocaust. According to ancient Jewish tradition, these people are called "Hasidic ummot ha-Olam", which in Hebrew means "righteous among the nations" or take the short "Righteous among the Nations".

Therefore there is a line of research of the phenomenon as salvation feat. Most "feat" is treated as a heroic act, carried out in difficult conditions. Rescue is an operation that is carried out to rescue people who are or distress, providing emergency medical and other assistance and deliver them to safety.

Rescue of Jews during the Second World War took place in different ways:

1) hiding from the Nazis and collaborators;

2) providing false (true or others) or issuance of documents with the names changed by the Church;

3) organizing escape from the ghettos and camps;

4) transferring Jews to guerrilla groups and in a safe place. According to preliminary data, in Ukraine people of different nationalities rescued over 17 thousand Jews. Unlike Western territories occupation regime in Eastern Europe and the Soviet Union was much more violent in the punishment of those who had been accused of helping Jews. For concealment of the Jew invaders threatened with execution not only to rescuers, but sometimes and their families.

Estimated J. Honihsmana, only in Lviv region in 1943 the Nazis executed more than a hundred Ukrainian for asylum Jews. In Lviv 38 % all criminal cases of the extraordinary German court for the population of «Zondergerikht» were concerned persons who hid Jews or gave them some other help [7]. To according to Kovby, in Galychina from each ten locals (Poles and Ukrainians) «seven passively or actively were sympathizer

Jews». Among the rescuers of Jews often there were people of different political persuasions and representatives of different religious confessions. While there is no synthesis of research on the position of churches in relation to the Nazi "Final Solution of Jewish question" in Ukraine, but there is evidence in some regions [8]. Thus, Metropolitan of the Ukrainian Greek Catholic Church A. Sheptytsky personally gave refuge and saved life 150 Jews and 15 ravins. About 240 priests and monks helped him in this case. From data of the Polish researchers, 34 monasteries and catholic organizations took part in rescuing of Jews. They gave the prisoners of ghetto false documents and helped to escape to Hungary. Known cases of mass deliveries Jews of Lviv of false documents by priests Armenian Catholic Church of city, and also he hid of Jews. Archpriest Gnivani and Voroshylivky (now the town and village Tyvrivsky district, Vinnitsa region) for several months Volodymyr Dlozhevskyi gave refuge to several Jewish families. In Kirovograd region priests of orthodox temples christened Jews in large quantities, warning them about destruction threat. In Simferopol two priests (names are unknown) were arrested for delivery of certificates on a christening to Jews. In Kiev occupied by Nazis priest A. Glagolev's family which has much made for rescue of Jews [6] was known for the activity.

The grant of help and rescuing of Jews was carried out as by individuals — their friends, neighbours, business partners, colleagues, former class-mates, acquaintances, sometimes simply unknown, — so by the representatives of organizations, that needed application of certain administrative resources. Sometimes it was done by representatives of the lowest steps of occupational administration and local government — for example, the burgomaster of Kremenchug the Synytsya Verhovsky gave out to Jews fictitious inquiries on their "Aryan" origin because of what was executed by Germans.

Scientific studies of motivation of rescuers were begun with 1980th. Not only historians but also sociologists, psychologists are interested in the question. Trying to allocate law in saving actions enough a heterogeneous group of persons on social composition, and also to recreate the generalized image of the rescuer, researchers enter socially-psychological interpretations of a phenomenon of Righteous among the Nations. According to researcher Nehamy Teck, who studied the rescue phenomenon in occupied Poland, the actions of lay rescuers no friendly relations with saved before the war, not religion or even family ties and personal trait, which it defines as "autonomous altruism" inherent "marginal", i. e. willingness to help selflessly without fear to enter into a confrontation with the environment and society. Psychologists Samuel and Pearl Olinery distinguish three groups of social psychological rescuers: people with a developed sense of empathy, "norm centrists" (who proved superior sense of duty to "reference group") and "axiom centrists" (who are primarily guided by moral principles matter who needed help). There are other interpretations. More possibly, it is necessary to speak more likely about a certain complex of motives which intertwined and supplemented each other [10].

With regard to the circumstances of the Holocaust in Ukraine the following number of reasons can be selected:

1) sympathy;
2) family education;
3) family relationships and dating;
4) religious and ethical factor;
5) paternal senses are dissatisfied (when saving children);
6) rejection of the invaders and their actions;
7) already exists for other reasons threat of death;
8) loneliness;
9) assistance of Jews in the previous period;
10) reproaches of conscience are for other accomplished acts;
11) identification of victims of their own destiny in the past (e. g. Pre-war repression);
12) empathy;
13) hope for similar support in a future hard times;
14) feelings of affection or love;
15) demand for labor or specialists;
16) involvement in a common cause (in case of a large team of rescue;
17) compensation for omissions;
18) the need to prove yourself or others their importance, etc. [1].

In the case of rescue Jews generally there are several reasons, but one of them is dominant. There are two sides need to salvation: material and spiritual. In this case, the material side was the desire to undergo the least possible risk for help and facilitate a condition of salvation that is a natural desire to survive, but nevertheless assist. However, thanks to morality and spirituality people risked their lives in the name of high human ideals, based on integrity and humanistic principles.

Having a recognition and social security in the world, unfortunately, in Ukraine Righteous among the Nations have no own fixed legal status in a legislature of the state. Therefore, it is advisable to make authored this article draft Law of Ukraine "On the commemoration of the Holocaust" for public discussion and then submit it to the legislative body — the Parliament of Ukraine.

During the last years attempts of revision of results of the Second World War, the justification of crimes against the world and mankind, connivance to these negative phenomena, unfortunately, have become frequent from separate political forces.

Absence of the normatively fixed principles of activity on prevention of displays of rehabilitation of Nazism in the different spheres of public and state life is required acceptance legislative acts in relation to position-finding rescuers of victims of Holocaust and their social status in national parliaments of countries which suffered from fascist aggression in the Second World War.

Draft Law "On commemoration of the Holocaust" is the goal of perpetuating the memory of the Holocaust, and is the first attempt at legislative fix in Ukraine legal status saviors of the Holocaust — "Ukrainian Righteous Peace", which will be an example for many other countries of Central and Eastern Europe at the national level appropriate legislation.

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Section 6. International law

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Ban on hijabs in Russian schools: traditional values and the realization of the right to education

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Abstract: In October 2012, in the Stavropol region of the Russian Federation was a scandal associated with the wearing of Muslim religious headscarves (hijab) in several rural school pupils. The school director forbade girls to wear the hijab while studying. Due to the fact that the girls wearing the hijab is not admitted to the classes, the main question was whether the ban on wearing headscarves in schools violates the right to education, and whether it was possible to consider the ban as gender discrimination in the implementation of the right to education.

Keywords: human rights, right to education, right to conscience, traditional values, hijab, religion.

Two years ago Russia has faced a problem that Western Europe has solved 10 years ago. It concerns banning Muslim girls wearing Muslim religious headscarves (hijab) in schools. In October 2012, in the Stavropol region of the Russian Federation was a big conflict related to the wearing of the Muslim headscarf (hijab) by several rural school pupils (girls). The school director forbade girls to wear the hijab in the classroom. As a result, girls wearing the hijab were not allowed to attend classes.

Due to the fact that girls in hijabs are not admitted to the classes, the main question is to whether the ban on headscarves in schools violated the right to education, and whether it was possible to consider the ban as gender discrimination in the implementation of the right to education.

First of all, it is necessary to determine the legal basis of non-discrimination based on gender in the field of education at the international level and in the Russian Federation.

At the international level, there are a number of documents, recognizing the right to education [9, 31–40] and the prohibition of discrimination in education.

Thus, the prohibition of discrimination in education is set in the UNESCO Convention against Discrimination in Education 1960 [1], which enshrines the general provisions on the measures that States Parties undertake to adopt in order to combat discrimination in education. In accordance with Article 1 of the Convention the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on sex, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular of depriving any person or group of persons of access to education of any type or at any level (1 a).

Furthermore, under Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women 1979 [2], all States Parties "shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure".

As Party of this Convention the Russian Federation has to fulfill this obligation.

At the national level, according to the Constitution of the Russian Federation 1993 (art. 43):

"1. Everyone shall have the right to education.

2. Guarantees shall be provided for general access to and free pre-school, secondary and high vocational education in state or municipal educational establishments and at enterprises" [3].

Therefore, in Russia for everyone without discrimination must be guaranteed and secured the right to education, including free access at all levels except for higher education.

A free higher education in state educational organisations must be guaranteed for everyone without discrimination on a competitive basis (art. 43 (3) of the Constitution).

This is also confirmed by the provision of Article 2 of the Constitution of the Russian Federation, which states that "the recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State".

The basic general education is compulsory. Parents shall enable their children to receive a basic general education (art. 43 (4) of the Constitution). This provision means that parents have a duty to provide education for all children (boys and girls).

The relevant provisions are also contained in the Federal Law "On Education in the Russian Federation" [4]. Article 3 establishes the right to education for everyone and the principle of non-discrimination in education (1 (2)). Thus,

we can say that at the legal level set all the guarantees for the elimination of discrimination in education based on gender.

Analyzing the conflict in Stavrapolsky region, it should be noted that the Russian Federation is a multinational and policonfessional country. But the main religion is Orthodox christianity. It is important for taking into account a society's reaction to comply with certain traditions associated with traditional values, which are based on religious values. Note that covered head of woman is one of the mandatory provisions of religious practice not only for Muslims but also for Christians.

As the school director Marina Savchenko said, girls are not allowed to lessons in Muslim headscarves, because it conflicts with the charter of the school, which requires wearing of the same form of clothes for all pupils. "We did not insist on the fact that they do not put on hijab at all, but offered to replace it with a headscarf during the time that the girls were in the classroom" [10].

It is in such headscarves girls were coming to school from the beginning of the year (since 1st september), so it did not cause any objections from the school administration. In October, parents of Muslim girls have decided that the girls should go to school in religious headscarves (hijab). In this regard, the school administration banned the wearing of religious headscarves in school.

It should be noted that in the Islamic tradition clearly states that the woman's head should be covered, but it is not specify what kind of headscarf should be. Interpreters of texts say only that it should cover hair and neck. Thus, the headscarf — hijab, who steadfastly associated with Islam, is a traditional headscarf in certain states professing Islam, excluding Russia.

The conflict could have been resolved quickly as it was the case before, but the girls' parents did not agree. Moreover, a following proposal came not only from the school administration, but also from the Stavropol Mufti Muhammad Haji Rakhimov, who encouraged participants to find a compromise. He said: "We are always must protect our believers. But we understand that we are in a secular society, where schools have their charters". Conflict can be resolved as follows: Muslim girls must come to school in accordance with the rules of the school, and in order not to violate the Islamic traditions, it suffices to wear an ordinary headscarf [8].

Thus, we can hardly say that the school director has forced girls and their parents to a violation of religious traditions. There were more than 300 pupils. The most of girls who practice Islam, were always wearing headscarves in school, what corresponded to their religious traditions and school charter [8].

The Ministry of Education of the Stavropol Territory supported the position of school director, because the school charter approved the form of clothes for all pupils.

As parents insisted on their own position, then the public authorities took the appropriate measures.

The Government of Stavropol Territory took the decision to ban girls from Muslim families to come to school wearing the hijab — religious headscarves.

The parents appealed this decision to the court, including the Supreme Court of the Russian Federation.

The Stavropol Regional Court declared the decision of the Government of Stavropol Territory lawful. And then, the Supreme Court of Russia on 10 July 2013 agreed with the Government of Stavropol Territory banning girls from Muslim families to come to school wearing the hijab — religious headscarves.

Thus, the Court found no violation of the right to education and gender discrimination in education in a ban on the hijab.

It should be also noted that Russian President Vladimir Putin supported the decision. On the issue of the wearing of religious headscarves (hijab) in schools, he said: "There is nothing good. There are, of course, the national peculiarities in the national republics. But it is a demonstration of the well-known relationship to religion. In our country and in the Muslim regions had no such tradition" [11].

This case has influenced the public policy in education. For example, in April 2013 a bill on school uniforms for all pupils in the educational state organisations was introduced in the State Duma (Inferior chamber of Russian Parliament).

Under the bill, each region had to set requirements for clothing for school. As noted by the State Duma deputy Olga Timofeeva, "We enable the regions to establish uniform requirements for the clothing of pupils, taking into account local circumstances, wishes of schools, students and their parents". Requirements should be established in order to provide pupils with a comfortable and aesthetic clothing, shaping their sense of belonging to the educational organization, improve mental attitude of pupils at the school, securing the secular character of education, eliminate the signs of social status, wealth, and religious differences among pupils, strengthen their unity and discipline [7].

It should be noted that Article 4 of the Federal Law "On Freedom of Conscience and Religious Associations" № 125-FZ of 26.09.1997 states: In accordance with the constitutional principle of separation of religious associations from the state, the state provides a secular education in state educational organizations [6].

Since 1 September 2013 in the Russian regions were introduced mandatory requirements for pupils' clothing.

At the federal level also have been adopted uniform requirements for the appearance of pupils and school uniforms. Uniform requirements apply to all regions, but each of them takes a normative act, detailing the federal provisions, taking into account the climatic characteristics and traditions of a particular locality in the development of requirements for school uniforms.

It is important to note that these requirements apply only to schools and do not apply to universities.

And finally, on 4 June 2014 was adopted the Federal Law of 04.06.2014 N 148-FZ "On Amending the Federal Law" On Education in the Russian Federation", so called "law on school uniform" [5].

Thus, article 38 of the Federal Law "On Education in the Russian Federation" was adopted in the new edition: "Pupils' clothes. Uniforms and other clothing and equipment (outfit) of pupils".

Under this article:

«1. Organizations engaged in educational activities, have the right to establish requirements for clothing of students, including the requirements for its general appearance, color, style, a type of clothing students, insignia, and the rules of wearing it, unless otherwise provided by this Article. Appropriate local normative act of organization engaged in educational activities, shall take into account the opinion of the Board of the students, of the Board of the parents, as well as of employees' representative body of the organization or of its students (if any).

2. State and local organizations engaged in educational activities on educational programs of primary general, basic and secondary education, must establish requirements for clothing of pupils in accordance with the standard requirements, approved by the authorized bodies of state power of subjects of the Russian Federation… ».

Thus, the situation found its final completion. Pupils in public schools are required to abide by the rules established by the school.

For the children of those parents who feel the need to wear religious clothing, there are four options to choose the type of education: family, part-time, evening form, externship. It is also possible to send their children to a private school.

It should be noted that the same kind of decision was made in France in 2004. The law N2004–228 on 15 March 2004 banned wearing of religious dress in public schools at all levels.

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Section 7. Organization of law-enforcement activities

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Police crisis negotiations in the UK and the USA: comparative analysis

Abstract: This article examines the essence of police crisis negotiations and the structure of a crisis negotiation team. The differences between British and American negotiators are discussed as well as the role of profiling during crisis negotiations with mentally ill hostage takers.

Keywords: police crisis negotiations, barricade situations, barricade subjects, crisis negotiation team, mentally ill hostage takers, crisis intervention skills, hostage taker profiling.

Crisis negotiations are "highly successful at resolving crisis incidents without the loss of life or the use of tactical force" [10, 347]. Statistically, over 90 % of the negotiating incidents resolve peacefully [9, 14] because the main task of a negotiator is "to develop a reason for the subject to talk to the police and to surrender" [10, 347]. However, even if the ultimate goals remain the same in both the USA and the UK, there are visible differences between the American approach and the British approach to negotiations in general.

Crisis Negotiation Team

The history of crisis negotiations started with the "Munich massacre", "an eye-opening hostage event" [7, 38] that took place during the 1972 Summer Olympic in Munich, Germany. Then some members of the Palestinian organization called "the Black September" captured Israeli athletes, coaches, and officials in their apartments. They all were killed a few days later. This incident made NYPD Detective and psychologist Harvey Schlossberg, "the father of police psychology in USA" [7, 3], realize the need for trained negotiators. Schlossberg and Simon Eisdorfer, "the commanding officer of the NYPD Special Operations", were "a part of developing the first US Hostage Negotiation Team", which "became reality in the spring of 1973" [7, 38–40] and tested in a high-profile standoff at a Brooklyn sporting store. At present, the Crisis Negotiation Team (CNT) is "a fixture of the police department" [7, 40] and law-enforcement agencies in the USA as well as many other countries.

Normally, in the USA, the CNT consists of, at least, five people since "crisis incidents are not solved by any one person" [10, 347]. The first member of the team is the CNT commander, or the Team Leader, who "monitors team and implements liaisons with on-scene and SWAT commander" [13, 59], "assign team roles and makes the initial decision on any demand issues, trades or items to provide the subject" [10, 348]. The second member of the team is the primarily negotiator, who "listens and talks to a subject" [13, 59], and "develops strategies and tactics for resolving the incident" [10, 348]. The third member of the team is the secondarily negotiator, who "monitors negotiations and the primarily negotiator, listens to a subject, provides the primarily negotiator with potential topics for discussion, controls access to them, and relieves the primarily negotiator" [13, 59]. The fourth member of the team is the intelligence officer, who "gathers intelligence regarding the incident, information about the subject, hostages, victims, and any information that may be needed and useful for incident command and tactical personnel" [10, 348]. The fifth member of the team is the mental health professional, a forensic psychologist or a clinical psychiatrist, who "provides a variety of services to the team" [8, 85] as, for example, "an assessment of the subject's mental and emotional state and potential for violence" [10, 348]. There may be more people in the CNT or less. Most police department 'teams' in the United States, according to Strentz [13], include only one person because many department does not understand completely that "a crisis negotiator, like the tactical response or command staff, must work as a member of a team". On the other hand, the roles in the CNT as well as the titles of those roles may vary with the local specificity.

In the UK, the team consists of four individuals, but sometimes it may be presented by three persons. The different titles of team roles and their functions take its place. For instance, there is not such a member of the team as the coordinator in the USA, which exists in the UK, and the team leader performs his functions. The intelligence officer and the mental health professional are absent from the team structure in the UK. Besides, American negotiators as opposed to British negotiators normally do not combine being police crisis negotiators with another job within their law-enforcement agencies. The team members are not interchangeable in the USA, but they are in the UK. However, the principles of negotiations are the same, it is always the resolution of a crisis incident peacefully by developing for a subject the reasons to talk to the police and

surrender at the end of the day, with the exception of what may be called 'the style of negotiating'. The Americans seem to be much more proactive and result-oriented, aiming for solving the problem fast and effective at most, while the British tend to be much more oriented on the subject's well-being despite the time that might be wasted on dealing with him, and more conversation-oriented.

Barricade situations

There are two types of crisis incidents needed a negotiated response — hostage events, and barricade situations. The main difference between them is demands of a subject. There are two type of demanding issues — 'instrumental', and 'expressive'. Usually, instrumental needs are something easy to talk about with a stranger, and, as a rule, they are voiced first. It may be food, water, to call police officers off, and so on. Expressive needs typically emerge later, "they can be very personal, and the subject's shift from instrumental needs to them may indicate the development of trust" [8, 99]. In case of hostage situations, a hostage taker demands from the police "to secure freedom, money, rights, privileges; in prisons — more recreation, better food or safety" [10, 347] and uses hostages, which "have to be persons who held by force and cannot leave of their own volition" [10, 46] as the 'bargaining chips'. In case of barricade situations, a barricaded subject does not want to have anything to do with the police because "he has created a crisis incident because he does not know how to cope with and adapt to traumatic events in his life" [10, 351].

Barricade situations may be divided into two groups, differing from each other. The first group is 'hostage barricade' when "barricade subjects are persons threating to harm themselves, and sometimes others by their actions, but have no hostages" [10, 346]. The second group is a situation when a barricade subject has victims. Such incidents are extremely typical for "domestic situations where one parent threatens family members", and, technically, these members "are not hostages, they are victims of their parent's actions" [10, 346]. However, it does not mean that they may not be in danger, "there are plenty of examples of the barricade subject killing" hostages because "one of the main threats in these situations is 'If I cannot have them, no one will' [10, 346]. The American theoretical sources and the British negotiators do not describe the barricade situations identically. In the USA, it is accepted to divide barricade situations in two groups — 'hostage barricade events', when a subject actually has hostages and threatens to harm himself or hostages, or else wants to die in one way or another, and 'barricade situations', when a subject has victims, who are his family members, children, current or former inmates, and do not wait for the police to intervene. In the UK, both situations are barricade situations.

Mentally ill barricade subjects

Supposedly, about 50 % of the hostage takers are mentally ill [7, 41], and their condition is often blurred by drugs or alcohol, or both at once. According to Lanceley [8], antisocial personality disorder along with paranoid personality disorder and borderline personality disorder are common among barricade subjects, what explains attention paying to methods of negotiating with them in American academic sources. However, it does not mean that other personality disorders are rare, it means that, apparently, these disorders are typical for what may be called 'subjects population' — people experiencing difficulties in abiding by social rules or laws, and establishing relationships with their family members are most likely to become barricade subjects. It should be mentioned here that mentally ill subjects tend to create barricade situations spontaneously, in order to express their inner crisis for getting help or stop being repeatedly ignored. This makes them extremely "unpredictable and prone to violent emotional outburst" [10, 346] and increases "the importance of 'rapid' profiling" [5, 392] because an individual's traits defined by mental illness the barricaded subject suffers from are able to explain his 'expressive needs' or demands.

Thus, if the crisis intervention skills of a negotiator are enough for successfully resolving hostage barricade situations, then barricade situations "are often resolved using a heavy dose of psychologists, social workers or psychiatrists" [10, 346]. The main reason of it is that "knowing the type of mental disturbance allows a negotiator to understand the motivation and perceptions of the hostage taker and to predict the response to the negotiator's words and the tactical team actions" [11, 119]. There are official guidelines of how to negotiate with mentally ill subjects in accordance with their diagnosis and case studies of the past incidents available for researchers in the USA, but not in the UK where they are classified for safety reasons. On the other hand, it also may be connected with the phenomena called 'repeated subject': when a subject creates crises regularly using in next events experience in interacting with negotiators derived from previous events. If those individuals had free access to this information, it would affect dealing with them.

Profiling during police crisis negotiations

Lanceley [8] wrote that "as with any profile, the following is a generalization"; therefore, a negotiator needs to "keep in mind that each person and situation has unique qualities". So, first of all, information about a number of subjects, location, involvement of innocents, weapons, another ammunition, drugs or alcohol engagements, stance, and substantive demands of the subjects, are necessary to obtain for profiling a type of a siege. Then, since "from a practical standpoint it would likely be impossible for a negotiator to have an understanding of every disorder within DSM–V" [14, 75], negotiators in the USA tend to get mental health professionals involved in the negotiation process as consultants or profilers to have information about motivation and a state of mind of subjects. As a rule, this decision proved its value in the most negotiated incidents.

Although there are no procedures of profiling a subject during negotiations specifically designed in both concerned countries, there are differences in how the British and the Americans do it. In the UK, any team member may play the role of a profiler, and, in fact, it is a more collective task that

an individual job. In the USA, it is a duty of that team member who is a trained mental health professional, typically — a forensic or clinical psychologist. Besides, the Americans tend to pay more attention to the external factors connected to a crisis in whole as a location of an incident, any weapon presence, involvement of innocents, and alcohol and drugs intoxication. The British negotiators are more interested in a subject's state of mind, motivation, and demands. Availability of a mental health professional in the CNT might be the reason for it since there are the recent researches in the USA dedicated to using such an expert in police crisis negotiations despite it may lead to what the British negotiators call 'putting people in the box'. Thereby, its remains unknown, which is better — to have or not to have a psychologist in the team, and each considered country has its own valid answer to this question. As regards to the tools employed in field profiling, negotiators in the USA and the UK both resort to the help of law-enforcement and national databases as well as various recording and writing equipment for making notes.

Negotiators in both countries have the same complications with getting information, such as human factor, and 'lost in translation moments', but in the USA, the problem of wasting time during obtaining information, which is actual for the British negotiators, does not exist so long as there is an intelligence officer, who is to do. Nevertheless, in both countries, it is for negotiators to decide how to use the profile — they think up a strategy to negotiate with a subject and implement it. In America, profiling seems to be more scientific and psychiatric, whereas in the UK, it is more close to daily life; it is more about a subject than his mental issues. In other words, the final goal of profiling in the UK is to help negotiators to find the way to resolve an incident, while in the USA, it is to identify the problem and create the solution based on its key characteristics. Whichever way negotiators in both countries do it, it is, seemingly, always helpful, informative, and giving ideas for conversation, excluding the fact that profiling is not an exact science and cannot be an answer to all questions.

In conclusion, it should be said that any academic research about negotiations in the UK is limited by requests from the police to take into consideration that strategies and tactics of crisis negotiations are classified and supposed to be assessable only within law-enforcement agencies. This do not allow comparing USA's and UK's official guidelines of how to negotiate with subjects depending on a type of mental disturbance they suffer from more closely and deeply.

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Section 8. Political culture and ideology

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The idea of Europe as a nodal point of the Albanian ideology

Abstract: The Albanian ideology in the last two decades of post-socialism has played a crucial role in the legitimation and reproduction of the current social formation. Its nodal point, which has integrated different political discourses, has been the idea of Europe constructed imaginarily as a counterpoint of Islamism and communism.

Keywords: Ideology, hegemony, nodal point, field of discursivity, Europe.

This essay aims at critically analyzing the Albanian ideology of the last twenty years, understanding it as a discourse, used in the public sphere from intellectuals, political elite and reflected to common people discussions, which aims at hegemonizing the field of discursivity by constituting a centre (nodal point), which in our case is embodied in the idea of Europe, as an idea that embraces both the cultural-civilisational and the political-institutional aspects. This idea is not the sole element of the ideologically transformed Albanian political discourse, but nonetheless its importance can be spotted in its potential to explain and legitimate other ideological elements like the West, Free Market, Democracy etc.

If we refer to Laclau-Mouffe's critical approach to discursive hegemony, the concept of ideology can be defined as the constitution of the nodal points of a discourse, which hegemonizes the field of discursivity through marginalizing and silencing alternative discourses. "Any discourse is constituted as an attempt to dominate the field of discursivity, to arrest the flow of differences, to construct a centre. We will call the privileged discursive points of this partial fixation, nodal points" [1]. Any discourse tries to hegemonize the field of discursivity, but what distinguishes an ideology is the definitive outcome, which does not mean that one discourse is the most important temporarily, but is one when one discourse almost totalizes and permeates the whole field of discursivity, leaving other discourses in the margins. So even if any discourse tries to hegemonize, only the ideological one achieves, or at least creates the impression of permanent success. But which is the mechanism of the ideological reduction of the field of discursivity? A discourse does not hegemonize by placing itself in the terrain of some kind of metaphysical objectivity, but by transforming the ontological relativity of the nodal point to meet the metaphysical criteria of self-foundation, self-sufficiency and auto-reference. More concretely, Slavoj Žižek, referring to the nodal point (although in his Lacanese he prefers the French *point de capiton*), claims that it is an empty signifier, or to put it in other words, a signifier without a signified, whose importance is structural "In itself it is nothing but a 'pure difference': its role is purely structural, its nature is purely performative — its signification coincides with its own act of enunciation; in short, it is a 'signifier without the signified'" [2, 109]. It exists in a discourse as a kind of fantasy, whose absence would mean the other elements of ideology will lack coherence and co-identification.

In this perspective, the idea of Europe expresses the nodal point of the Albanian ideology, which in-itself means nothing (in the sense of a direct relation to a fixed content), but exactly the nothingness enables it to function as a node where the other elements are intertwined, and whose relation to each-other otherwise would be either contradictory, or inexistent. So, ideology can transform what is contradictory or paradoxical into coherence. In the Albanian political discourse the characteristics of Europe are expressed so that they could harmonize ideas which would otherwise be non-relational or contradictory. For example, Europe is viewed as the embodiment of superior values which should be categorically imitated by others, and in the same time as the political space where every system of value is acceptable, or at least tolerable; it is what is massively trendy, and at the same time what urges towards authenticity; it is the terrain where the collective emancipation is understood in terms of the cult of the individual; it is the understanding of democracy and popular engagement through the paternalism of the elites; it is the intermingling of welfare for all and the economic triumph of the few; it means the tolerance towards the Other and the hygienisation of its presence; it is the acceptance of equality for all and the cultural, and sometimes even racial, superiority of the Europeans. The Albanian political discourse shows its ideological traits in the process of the public harmonization in an organic whole of the above-mentioned elements through building the common roof of the signifier without the signified named Europe. And when an open conflict explodes inside this common roof, as in the case of serious conflicts between the major political actors of Europe

that even threaten the continuity of Europe politically, the response of the representatives of the Albanian ideology takes the form of melodramatic plea for unity so that the phantasmic coherence of the signifier Europe could persist.

In the perspective of the "sense-autonomy" of the ideology's nodal point, it must be said that the latter should not be understood as an illusion or a "priestly lie" for the purpose of subjugating the people. Its complexity, which on its part influences the longevity of ideology, is grounded in the fact that ideology does not say a lie that conspiratorially masks the reality, but in an constructive way, it structures reality through a fantasy (nodal point), and in doing so, it gives a real response to an unreal problem "The fundamental level of ideology, however, is not that of an illusion masking the real state of things but that of an (unconscious) fantasy structuring our social reality itself" [2, 30]. Ideology constructs reality by reducing the concept of truth to instrumentality, and in so doing it can hegemonize the field of discursivity by marginalizing any non-instrumental, critical or even revolutionary conception of truth. This is why ideology does not mean the wrong answer to the right question, but the right answer to the wrong question. Inside the ideological strait jacket, every subject of discussion is built by presupposing uncritically what we are aiming at or what is the society's point of arrival, and in so doing it reduces thinking to a mere function of finding the right answer about the shortest way to reach the predetermined goal. So, the Albanian ideology takes it for granted that the goal of each Albanian is to be like the imaginary or phantasmic Europe not only culturally, but even politically in being integrated into the EU institutions. In doing so, the question it asks does not concern the critical inquiry about how and why the goals are important, but only the velocity of the arrival date. This leads to the answers being correct or describing "the reality", as long as according to the way questions are asked or problems are posed the social and political reality of a society is built. The ideological reduction not only suffocates the critical power of thinking which does not take anything for granted, but also channels the society's energies in finding the *pharmakon* to a phantasmic disease, which in the case of the Albanian political discourse means accepting unconditionally and uncritically whatever the ideology means as the idea of Europe.

The instrumentality of thinking is completed when the field of discursivity is reduced due to the rigidity of the categories of understanding. In this way, ideology seeks to naturalise and eternalise what would otherwise be considered a process of historical development. So, the Albanian ideology interprets the entire Albanian history as a natural flow which emerges from the authentic European roots of the Albanian people. According to it, those roots can be spotted in the ancient Pelasgian-Illyrian identity of the Albanians, which means that the Albanians are autochthonously Europeans, and that every political and historical movement is understood in terms of affirming this natural European essence, or otherwise as a temporary and correctable historical deviance from this *telos*. The goal can be found in the origins, so that the point of arrival merely designates the completion and the enrichment of born characteristics. This enables the Albanian ideology to present the history of Albania as a popular belonging and trend towards Europe, a long walk that starts from the dark beginnings of time, and which is thwarted continuously by unnatural subversive deviances. In this context, historical agents like Skanderbeg, the patriots and romantic poets of the XIX century, and other contemporary pro-Europeans are viewed as confronting subversive trends and agents, often of doubtful national origins, like the pro-Ottomans, "Haxhiqamilists, Zogists, Hoxhaists". Haxhi Qamili is a political figure of the first years of the Albanian independence who led a local uprising against the newly formed Albanian state, asking for rejoining the Ottoman Empire. Ahmet Zogu was the Albanian head of state and then king for fifteen years before the Italian invasion in the brink of the WWII. From his critics he was often accused of being Oriental-minded [3], Orientalists etc. Ideologically, these subversive and pathological elements could delay, even for centuries, the Albanian political *telos*. But the naturalness of the way and the providence of the European "magicians", which have the magical power of attaining the goal despite the hurdles mentioned above, can definitively guarantee the success in the last instance, so that the people should humbly bow to them for enabling what the Albanian Prime Minister, referring to the Albania's entrance in NATO, once called "the miracle of freedom" "Miracles are the *asses' bridge* leading from the kingdom of the idea to *practice*" – Marx K. Engels F. "The German ideology: including Theses on Feuerbach and introduction to The critique of political economy".

The concept of naturalness leads to understanding history as an unchangeable flow, where the future is magically written in the immutable essence of the past. That is why the Albanian ideology presents the Albanian road map towards the Europeanization as the sole and well-deserved alternative, despite the pathological hurdles. So, the integration into the EU is not considered as an alternative among others, but as a historical necessity. Nonetheless one could say that what distinguishes ideology in general, and specifically the Albanian ideology, is the fact that it receives legitimacy not in the sense of utopian or messianic promise of some bright future, but as the unavoidable determinism of what is happening and what is going to happen. In doing so, even the perception of the problematic actuality is not based only on some absolute ground of the gap between the Albanian actual conditions and the quasi-perfect Europe, but on a comparative scale which aims at avoiding the radical evil of the Other of Europe. Although from time to time ideology uses the utopian hope of some future paradise, its inherent characteristic is the creation of the politically fatalist perception that there is no highest good, or whatever the latter might be theoretically, it always leads through some kind of dialectical reversal to the evilest regime like the totalitarian utopias it criticizes. But whatever one can put on the negative records of utopias,

it should be admitted that utopias have the characteristic of seeding the collective political resistances of tomorrow, which are unavoidable as long as the gap between the promise and actuality is unbridgeable. So, if we refer to the Hoxhaist ideology, the latter fails at shaping definitively the collective consciousness of the people because of its insistence to ask loyalty in the name of the future utopia. This promise can play a successful ideological function in the days of political resistance or in the first years of the newly-formed political regime, but when the utopia seems unreachable, some kind of political schizo emerges which feeds itself from the gap between what is promised and what is delivered. That is what led to the political overthrow of the Hoxhaist regime in Albania in the early nineties. In this way, utopia, even when it is used ideologically, bears the seeds of the future reversal of the ideological status-quo. In this sense, the less and less utopian character of the Albanian ideology does not point to a kind of a way out of ideology, but on the contrary, by silencing any messianic hope and confronting everybody with the lesser evil/radical evil dichotomy, it neutralizes any serious political and theoretical engagement, which is stigmatized as a step towards utopian terrorism.

Meanwhile, ideology tries to give a self-referential, closed and non-relational sense to the categories of political judgement. For the Albanian ideology, Europe as a nodal point is understood as being a unitary, unbreakable, unchangeable and self-referential entity. Being European does not admit any internal or essential plurality of contradiction, or at least every conflict is considered as marginal or such that it cannot alter the above-mentioned essentialism. On the other hand, the concept of being European is not constructed through a critical and dialectical relation with its Other, but is viewed as self-constituted and in terms of identity a closed one. So, for the Albanian ideology, being European means having a set of self-made values, created in isolation from the world, which has the characteristic of being a political lighthouse to every other culture or people, but nonetheless accepts inside itself only the chosen ones — those whose natural and ahistorical essence belongs to the same category. And it goes without saying that in the perspective of the Albanian ideological discourse, the Albanians are among those who deserve to be part of this large family of chosen people.

Nevertheless, the most politically alienating aspect of ideology, other than the marginalizing of the critical consciousness, is its trend to "integrate" socially almost everything, which leaves aside, disregards or properly speaking silences the ontologically political and economical contradictions of the society. If we refer again to the Žižekian and Laclau-Mouffeian perspectives, we will find that contradictions or conflictuality designates the traumatic Real of a society, the latter being able to affirm itself as a unitary entity only on the condition of eliminating or sublimating ideologically the conflict. In this sense Žižek says that: "Ideology is not a dream-like illusion that we build to escape insupportable reality; in its basic dimension it is a fantasy-construction which serves as a support for our 'reality' itself an 'illusion' which structures our effective, real social relations and thereby masks some insupportable, real, impossible kernel (conceptualized by Ernesto Laclau and Chantal Mouffe as 'antagonism': a traumatic social division which cannot be symbolized). The function of ideology is not to offer us a point of escape from our reality but to offer us the social reality itself as an escape from some traumatic, real kernel" [2, 45]. In this sense, the Albania ideology can build the social coherence of the sole European goal only by silencing the unavoidable socio-economical (Žižek) or political (Laclau-Mouffe) antagonisms. By not confronting the traumatic Real of antagonism it tries to build a phantasmic unity of the common path towards Europe, where, once there, every contingent actual conflict will be resolved magically. In this sense, every political and discursive tentative to awake or put forward antagonisms or touch the traumatic kernel of the Real faces the quasi-insurmountable difficulty of confronting an ideologically structured reality, whose coordinates urge people to think and act accordingly. On the other hand, in the perspective of the ideologically hegemonic discourse, any dissident voice is put between the Scylla of being disregarded as a harmless utopia and the Charybdis of some diabolical totalitarian plot, because in the ideological cognitive map any alternative is either unrealistic, or heretical.

Another aspect of ideology is its claim of universality, which analysed critically, reveals its exclusionary founding act. The ideology's universality is none other than the confinement of the field of discursivity and the self-proclamation as an all-inclusive entity, which tries to forget its particular place in the political ontology. To refer again to Žižek, ideology "… consists in detecting a point of breakdown heterogeneous to a given ideological field and at the same time necessary for that field to achieve its closure, its accomplished form… every ideological Universal — for example freedom, equality — is 'false' in so far as it necessarily includes a specific case which breaks its unity, lays open its falsity" [2, 16]. So, the universality of ideology is false because it affirms its truth being uncontradictable and in the same time it defines its adversaries. In the case of the Albanian ideology, the universality of Europe can be found in the fact that, according to it, every Albanian deserves to be European, except… everybody that does not like to be European, which leads not to their being different kinds of Albanians, but simply essentially non-Albanians. So, the universal categories of Albanians and Europeans found themselves on the exclusion of everyone which cannot be included in neither of these categories, leaving them only the political space of unnatural monsters.

The above-analysed elements make it possible to determine the socio-political functions of ideology. Whatever its exclusionary strategy, ideology tries to draw a constantly changing line that separates what should be permanently excluded, which empirically is constructed as an empty place to be filled in a situation of serious threat, from what should be dominated through integration. If we refer to the interpretation Ricoeur makes of Weber, "… while ideology serves…

as the code of interpretation that secures integration, it does so by justifying the present system of authority" [4]. In this sense, the idea of Europe serves the Albanian ideology for the delaying of the socio-political contradictions until the bright common European future will conquer all antagonisms, at least all which escapes some devilish undefined Other, in the eternal peace of integration. In this retroactive perspective of the future every current socio-political conflict would seem like childish skirmishes, taking away in this manner any trace of tragedy.

The above-analysed functions of ideology are performed through tactics that try to hide its particular content and dominating actuality, and on the other hand through trying to weaken the otherness by some kind of soft integration, without excluding it permanently. As Žižek again puts it, "ideology appears as its own opposite, as non-ideology, as the core of our human identity underneath al the ideological labels" [5]. It can present itself in this way as long as it has the capacity to hegemonize the field of discursivity by transforming its elements in unfalsifiable truths. As long as the conceptual lexicon tends towards conforming to the ideological necessities, the truthfulness of the ideological judgements seems unfalsifiable. In the Albanian context, the idea of Europe as a civilisational superiority and an unavoidable destiny looks towards claiming its non-ideological status as long as its premises present themselves as self-evident truths. Also, ideology yields domination not just by eliminating otherness, because its total absence would threaten it like the Communist Manifesto's ghost, but by integrating it within its soft and changing borders. As Žižek puts it, "… ideology is not simply an operation of closure, drawing the line between what is included and what is excluded/prohibited, but the ongoing regulation of non-closure" [6]. This characteristic provides it theoretically and socially with the necessary flexibility to engulf the possible resistances. Ideology hegemonizes not by excluding totally and definitively, but by integrating the contradiction so that the latter can play the well-prepared function of legitimating the longevity of the ideological domination. This is what happens in the case of the idea of Europe, whose performance does not include the legal or public lynching of the opposing perspectives, but necessarily entails the reduction of those perspectives to mere entities that serve as a dichotomic pole that legitimates through its moral and political evilness the superiority of this nodal point. That is why every critical perspective is either laughed at as infantile anarchism, or is accepted only on condition that it deactivates its revolutionary potential that aims at repluralising the field of discursivity. E. g. only on a European society one can have the right to behave or think unEuropeanly; of course on condition that these acts of theoretical and practical resistance do not threaten the predetermined road map.

In conclusion, one might assert that ideology aims at transforming the people in a passive recipient of systematic truths, so that it always already disables their subversive potential. Social and political passivity of the written destiny is supplemented by the fetishist misrecognition, according to which the European identity is not only self-referential and self-sufficient, but also by not considering the relational character of the theoretical concepts and social actors, it reduces the latter in an outcome and not in the cause of collective action. Ideology fetishises because it can stabilize a socio-political situation in which the people are not considered as agents of their own self-transformation, but through its *camera obscura*, their potentiality is viewed upside-down. As Marx put it in a footnote of the *Capital* considering the social meaning of power and its representatives: "For instance, one man is king only because other men stand in the relation of subjects to him. They, on the other hand, imagine that they are subjects because he is king" [7]. This means that what the Albanian ideology misrecognizes is the relation between the Albanians and Europe. The latter has no importance in itself, but only as far as the Albanians as a people are politically destitute, and being so, they are in the need of a point of reference, whose function is played by the nodal point of the ideological discourse. If we refer to Lacan, according to whom the king who takes himself as a king is no less crazy than the crazy man who pretends to be a king, one could reach the conclusion: If Europe, in the context of its ideological self-reference and self-sufficiency, takes itself seriously as Europe is no less crazy that the crazy man who pretends to be a king.

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Section 9. Political problems of the international relations, global and regional development

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The Eurozone crisis and European identity

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Abstract: The purpose of this paper was to examine the relationship between the Eurozone crisis and EU identity. The Eurozone crisis erupted in 2009 and highlighted the European identity, which was vulnerable to the Eurozone crisis due to the contradiction between the European identity and the national identity of the EU member states. However, an analysis of Eurobarometer surveys in this paper shows that the Eurozone crisis had little effect on the European identity, and the European identity may not have obviously influenced the behaviors and attitudes of citizens living in the Eurozone on the EU. The contradiction between the European identity and the national identity has always existed, but the identities may be compatible. The Eurozone crisis could be a good opportunity to construct and reinforce a European identity. A more democratic and transparent ruling institution would reinforce European identity, and the importance of media should not be ignored because being informed of what is going on is also vital for people to be engaged.

Keywords: Eurozone crisis; European identity; national identity.

Introduction

The Eurozone's debt crisis is an ongoing that has been continuously upgrading since it started in 2009. It is a fiercely discussed issue all over the world, particularly in Europe. EU countries are in different situations. Whereas countries such as Germany, Finland and Holland are maintaining a steady economic development, countries such as Greece, Spain and Italy are suffering from the Euro Crisis [1, 1]. When the wealthier countries, such as Germany, decided to hold its relief measures, both Europe and the rest of the world wondered: Will the EU really act like a 'state'? Will there ever be a common European Identity? Some Euro skeptics have argued that the lack of an identity commitment is a factor of economic crisis, and the present situation is verifying their opinion [2, 3]. Some have held the view that the financial crisis showed that the EU integration caused more nationalism [3, 16–18]. The "nation state"— the European Union, which was created by Europe — is facing the challenge of European identity.

There is a need to understand the relationship between the Eurozone crisis and the EU identity. Was the EU identity problem highlighted by the Eurozone crisis? Was the European identity affected by the Eurozone crisis? The analyses in this paper are based on the data of Eurobarometer [4, 61–81], which are surveys conducted by the European Commission.

European Identity During the Eurozone Crisis

Most EU countries, including Germany, did not receive a unanimous agreement from all voters. Policymakers firmly believed that people would accept the new currency when they saw a more prosperous and united Europe brought by the euro. However, euro is now associated with pain, fiscal retrenchment, and debt; inevitably, the solidarity of Europe was much further away from the initial expectations [5, 1]. In addition, German Chancellor Angela Merkel has rejected the idea of distributing Eurobonds (the bond supported by all euro countries). She was aware that Germany would not agree to provide a debt guarantee to all EU countries, particularly to Southern Europe; moreover, there was no clear end to bearing this risk. In Northern Europe, Finland and Holland (two other creditor countries) rejected the idea of Eurobonds more resolutely. Nonetheless, other countries suffering from financial retrenchment, such as Greece, Spain and Italy, feel angry about the indifference of those creditor countries [6, 1]. For example, the EU planned to provide Greece with 130 trillion euros, but Greece had to accept the intervention of a national budget. The premier of Greece rejected the offer and said that Greece would not accept any help, sacrificing the national reputation. He said that Greece objected to this type of insulation.

As noted by a working paper from The European Institute [7, 1–2], Europe is now facing a decreasing of 'European identity' commitment among many Europeans who are supposed to attach affection to this supranational polity. According to research from the Pew Research Center, 59 % of Germans agree that their country has benefited from the integration of Europe; in all other member countries, less than half of people agree that their countries have benefited from the integration of Europe. The most negative result is from Greece, in which 70 % say that European integration has hurt them, followed by the French, with 63 % [6, 1].

In addition, most Europeans believe that countries such as Greece are to blame for the euro crisis because they borrow money from other EU countries without regard for the new European fiscal policies. The euro, as a single currency, provided an umbrella for them to act on old national impulses [5, 1]. However, not everyone in the EU would like to save others from financial crisis unless they identify themselves as a family; however, the situation in the EU is the opposite now. There was a huge divergence between EU countries in terms of supporting Greece. IFOP conducted a survey about whether France, Germany, Italy, England and Spain should give financial support to Greece in March 2010. The results showed that 58 % of respondents disapproved of giving finical support to Greece in the interest of maintaining the European solidarity. There are statistics that show attitudes of respondents from each of the five countries. Respondents from England and Germany showed the least support, just 22 % and 24 %. Approximately half of respondents from the other three countries were willing to support Greece, 53 %, 55 %, 67 %, figures that were much higher than that of England and Germany but still not enough to support Greece [8, 2]. Some politicians and scholars even thought that the EU should have taken measures in the early phase of the euro crisis that might have prevented the situation from worsening; nonetheless, it failed to do so due to the lack of common commitment. Therefore, this Eurozone crisis indeed highlighted the European identity problem.

The Possible Effect of the Eurozone crisis on the European Identity — By the Analysis of the Eurobarometer

According to the data mentioned above, it seems that the Eurozone crisis broke out in 2009 exposed the lack of EU identity commitment. Because citizens living in the Eurozone feel less like a family, they were reluctant to support others when crisis occurred. The Eurozone crisis posed significant challenges to European unity and identity. However, five years after the crisis' occurrence, things may not be that dim.

In this section, we will study the possible effect of the Eurozone crisis on the European identity based on Eurobarometer surveys. To select appropriate data related to the European identity, first, we have to know understand the concept of this identity. Richard Herrmann and Marilynn Brewer attempted to clarify the concept of European identity, which is a conscious identification with Europe, an awareness of Europe, attitudes related to Europe and participation in European elections [9, 1113]. The European identity is a type of collective identity that consists of common concepts that make people feel similar. These concepts can be embodied by interactions between people or by shared symbols, which arouse an identity commitment and a sense of belonging. Therefore, we selected five groups of surveys related to aspects of identity, trust and support on the EU and Euro.

Every year, the European Commission conducts Eurobarometer surveys in all EU member states and asks questions about the EU. One of the frequently asked questions is "Do you see yourself as … ?". The answers include "national citizens only", "national and European citizens", "European and national citizens", "European citizens only", "none", "refusal" and "do not know". According to the Eurobarometer [4, 73–81] surveys conducted from the 2010 to 2014, most respondents identify first as national citizens and then as European citizens at an average level of (46.8 %). The proportion of respondents who identify first as European citizens and then as national citizens stays at a very low level. When comparing the sense of European identity to that of national identity, people tend to identify with their national identity more. However, we can also see that, after the Eurozone crisis, the number of people identifying only as national citizens decreased, and the number of people identifying first as national citizens and then as European citizens increased. In other words, although people living in the Eurozone still have a stronger national identity, the sense of being European to some degree has been strengthened instead of decreased due to the Eurozone crisis (Fig. 1).

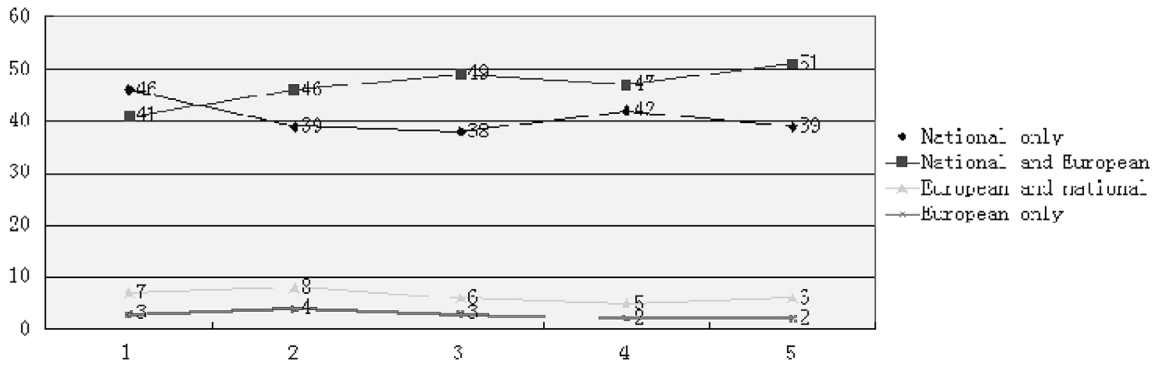

Fig. 1. Eurobarometer survey of the question "Do you see yourself as European or national?" conducted from 2010 to 2014

According to the Eurobarometer [4, 81] surveys, respondents were also asked the question "Who do you think is best able to take effective actions against the effects of the financial and economic crisis?". Based on the statistics published every September from 2009 to 2014, more respondents thought that the EU was best able to take effective actions. The percentages of respondents who chose the EU stayed at an average level of approximately 23 %. However, we cannot ignore the fact that the national government closely followed the EU. Moreover, particularly after the Eurozone crisis, the percentage of respondents who chose the national government increased rapidly to 19 % in 2010 from 12 % in 2009, and the gap between the EU and the national government grew even closer (Fig. 2).

The two groups of data mentioned above show that most people living in the Eurozone still mention national first and then European.

However, data of Eurobarometer [4, 61–81] surveys also show that the support of citizens living in Eurozone for the EU stayed at a relatively stable high level. Another standard question is "Do you think the euro is a good or a bad thing for the EU?". According to the Eurobarometer surveys conducted from 2007 to 2014, nearly 70 % of the respondents thought the Euro was a good thing for the EU. However, after the Eurozone crisis occurred, the percentages of supporters in 2009 and 2010 declined by 1 % and 2 %, they still stayed at high levels (Fig. 3).

Another Eurobarometer [4, 61–81] survey asked, "Do you support the euro?". According to the surveys conducted from 2004 to 2014, the average percentage of respondents supporting Euro was approximately 67 %, with small fluctuations. However, since the year of 2009, the number of respondents supporting Euro has declined, the percentages still stayed at a high level (Fig. 4).

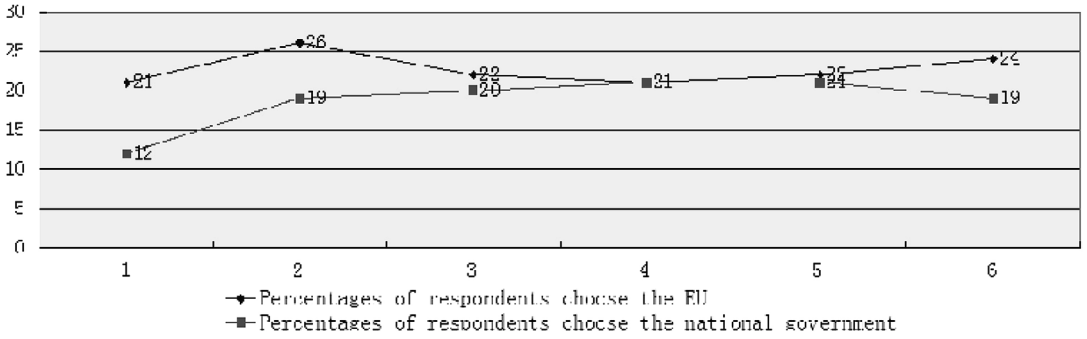

Fig. 2. Eurobarometer survey of the question "Who do you think is best able to take effective actions against the effects of the financial and economic crisis?" conducted from 2009 to 2014

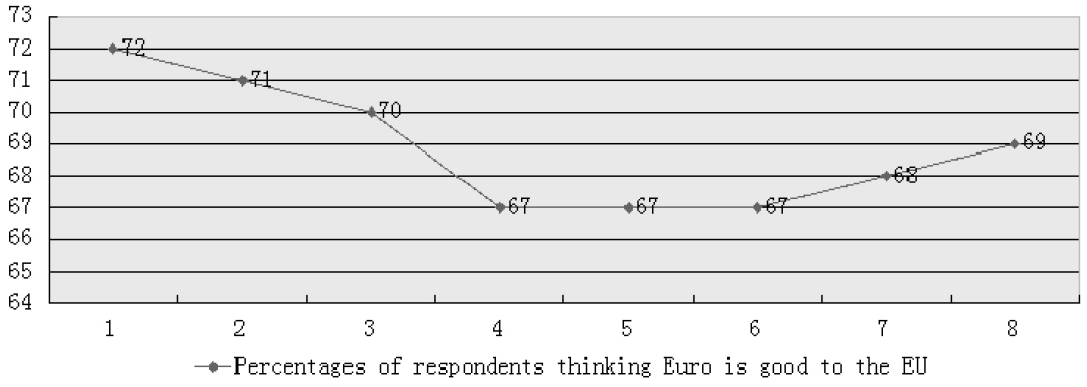

Fig. 3. Eurobarometer survey of the question "Do you think the euro is a good or a bad thing for the EU?" conducted from 2007 to 2014

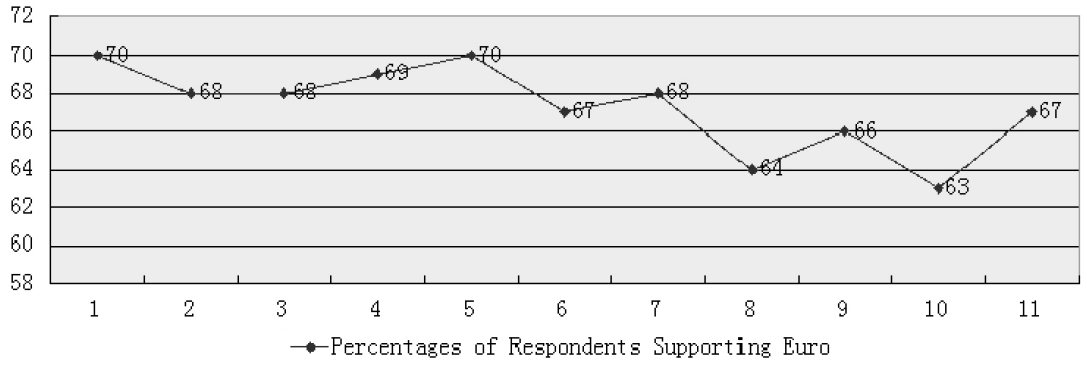

Fig. 4. Eurobarometer survey of the question "Do you support Euro?" conducted from 2004 to 2014

Comparing these groups of data, it seems that the Eurozone crisis had little impact on the European identity. And we can also learn the low European identity of citizens living in Eurozone may not obviously influence their behaviors and attitudes on the EU. Although people do not feel more Europeans than national citizens, actually they enjoyed being Europeans and are willing to support the EU. Just as Thomas Risse thinks it is overstated that European identity is not necessarily incompatible with national identity [9, 1113–1114]. And we can also see that people living in the Eurozone feel more and more Europeans instead of being affected negatively by the Eurozone crisis.

European Identity and National Identity

The European identity has gradually formed during the constant constructions of the EU integration process. From 1952 until the 1970s, the EU integration primarily focused on the development of the economy and technology. In 1973, the European identity was proposed during the Copenhagen Summit. In 1991, the Treaty of Maastricht explained the concept of European identity, which was to establish the common citizenship among the EU and adopt common diplomatic and security policies. This attached the supranational feature to the EU [10, 381–382]. In 1997, the Treaty of Amsterdam stressed that the aim of European identity was to make people living in the Eurozone feel more European and proud of being Europeans.

However, European countries do not share the same language, and there is no common media. Even the very traditional aspect of Christianity has faded in modern times. The EU is attempting to set up bonding in different member countries by empowering economic benefits, such as freer transferring, easier trade and immigration [7, 2]. In addition, deploying subsidies from wealthier countries to the relatively poorer countries is also a point being considered. Therefore, it is not difficult to understand that people may be more loyal to their national identity than to their European identity and that they may retain individual national identities rather than call themselves "Europeans" as a result of the Eurozone crisis and economic fallout.

It seems that the European identity problem is rooted in the contradiction between state sovereignty and the EU and the national identity and the European identity. The EU is easily described as a threat to the national identities of EU member countries. Wilson noted that many groups of people in the member nations perceive the EU as a political organization that has diminished national state sovereignty, and these groups resist the EU's efforts to create a 'European identity', seeing it to be directly at odds with their own superordinate national identities [11, 208]. This contradiction has existed since the establishment of the EU. The EU integration process needs member states' commitment to the European identity and to gradually give up their sovereignty to obtain more benefits. However, the national identities of the EU member states have formed after a long history, which are the essences of nations. As said by Calhoun and McNeil, the nation-state not only remains the primary unit of Western societal organization; it also continues to shape collective identities to an extent that is not likely to be overshadowed by any form of European identification in the foreseeable future [11, 36].

Fortunately, from to the analysis above, we may see that although the contradiction between the European identity and the national identity has always existed, it does not have significant negative effects on the development of the EU. Thomas Risse's empirical findings even prove that national identity and European identity can coexist instead of replacing each other [12, 1–5]. Committing to the European identity does not mean that people have to make a choice between seeing themselves as national and seeing themselves as European. Jeroen Moes even optimistically thought that the potential emergence of a European identity may provide us with the exciting opportunity to witness the birth a "new type" of identification that may well shape our social reality in the decades to come [11, 4].

Although the European identity problem did not have significant influence on the Eurozone crisis, this could also be a good opportunity to construct and reinforce a solid European identity. Only when people identify themselves as part of a community will they be willing to be devoted to the community and sacrifice their own interests when necessary. The importance of European identity has been realized by EU leaders, and the leaders of the EU member states understand the essence of common commitment. The European Commission published the "EU 2020 strategy" in 2010, which put forward its development focuses and objectives in the next 10 years. Strengthening cohesion is one of the three development focuses.

Possible Measures to Be Taken

More democratic and transparent ruling institutions would reinforce European identity among EU countries. Some scholars claim that the only way to prevent returning to monetary nationalism or to a state of permanent euro crisis is to start the process of moving towards a political union, and the first phase begins from the 17 core EMU member countries. A nation is an imagined community where people identify themselves as a union, sharing the same interests and values. It is usually accompanied by a convincing regime; however, for the EU, an invented 'state' without a powerful regime it is more difficult and also more important to construct a commonly committed identity. Setting the right position between a European identity and a national identity is not impossible. As noted by a historian Lana Colley, identities are not like hats. Human beings can and do put on several at a time.

However, a European identity would not be constructed artificially. It is a long distance to cover, and it requires participation. From the perspective of the institution, it is essential to share more democratic power with the people and distribute more power to the European Parliament [13, 3]. Some people criticize that the executive has gained too much

power and the Council and the Commission were not scrutinized by parliament. This essay will not discuss the details regarding conducting democratic process within EMU in this essay; nevertheless it is vital to grant authority to ordinary people and make them feel respected. Only in this way would they devote part of their identity to the European Union or, in circumstances such as the ongoing euro crisis, be willing to sacrifice parts of their interests to rescue other parts of the EU.

Apart from accelerating a more democratic and transparent institution within the EU, the media is playing an important role in constructing European identity, and it is supposed to reinforce the democratic process within the EU. The media provides information about the EU to Europeans, and being informed is the essence of democracy. The framework of current European news and media presentation is thought to be based on national interests, or one news source would be broadcasted by different genres of media. Consequently, it seems that Europe has only one voice, and the broad public does not perceive that information [13, 5]. Many audiences have commented that the news is boring, whereas many audiences have shown their willingness to obtain more information and express their own ideas simultaneously; they are also expecting more evolvement and interaction. Therefore, a news report diversified in terms of content and genre seems to be crucial.

In the meantime, authentic negative reports should not be eliminated because coverage of non-positive news will not necessarily cause the demobilization of EU citizens. To the contrary, a certain amount of negative news coverage would prompt the interests and engagement of citizens, who are more likely to vote when they feel self-engaged, according to Semetiko [13, 6]. Then, it is natural that one would identify as part of a community and want to a difference in that community.

Conclusion and Discussion

In summary, the Eurozone crisis, which was a fiscal problem of Europe, indeed highlighted European identity. Although the European identity problem did not have significant influence on the Eurozone crisis, it cannot be denied that European identity is a more deep-rooted problem. Strengthening European identity could improve the settlement of the Eurozone crisis and the process of the EU integration. Only when people identify as part of a community will they be willing to devote themselves to the community and sacrifice their own interests when necessary. This could also be a good opportunity to construct and reinforce a solid European identity. As discussed above, a more democratic and transparent ruling institution would reinforce European identity. Second, the importance of media should not be ignored; being informed of what is going on is also vital for people to be engaged. These measures are supposed to reinforce European identity. Therefore, although a lack of commitment to European identity is a major cause of the euro crisis, it could nonetheless be a good opportunity to construct and reinforce a European identity.

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Regionalization in Europe: view through the prism of theoretic concepts

Abstract: The article reviews the main theoretical and conceptual models of regionalization developed and implemented in Europe against the background of formation of the EU member states regions as further more active participants of political processes.

Keywords: theory, Europe, European Union, regions, regionalism, regionalization, "Europe of the regions", "multilevel governance", "third level of governance".

Actuality. In the context of the advancement of the regionalization processes in Europe that lead to the transformation of regions into important players of the European political field and regional governance level — into one of the important decision making levels in the structure of the European polity, the issue of scientific comprehension of these trends becomes of particular importance. Analyses of the main theoretic models and concepts allow to better understand the logic and prospects of regionalization and to determine new ways of scientific understanding of the new political and administrative realities of Europe.

Methodology. In the basis of this article lie the directions of the systemic analyses, principles of objectivity, validity and usage of verified materials, as well as the use of the instruments of analyses and synthesis.

Bibliography. Topic of European regionalization and relations between regional, national and communautaire level of governance are reviewed in the studies of Leopold Kohr, Denis de Rougemont, Gary Marks, Liesbet Hooghe, Guy Héraud etc.

"Europe of regions" is an important concept that served as a basis for the whole series of regional strategies in Europe and helps to better understand the positions, strategy and politics of regions of the individual European countries.

The very idea (or from another view a complex of close ideas, united in the framework of this general "umbrella" notion) "Europe of regions" emerged on the basis of a number of idealistic concepts of the post-war reconstruction of Europe. The leading motive of these concepts, their key imperative became the search of such formula of reorganization of European relations that would allow to create reliable forewarning for the repetition of the world or European wars and to lay down the guarantees to preserve peace and democracy in the "Old War in the future". It is necessary to underline the existence of the theoretical link between these two concepts and the intellectual trend of European federalism. A significant number of the thinkers (Alexandr Mark, Henri Brugmans, Denis de Rougemont, Guy Héraud) belonged to the supporters if the "European federation"; taking part in the Federalist Movement started in 1946, they actively worked on laying the conceptual foundations of a such vision of Europe, that would be based on recognition of a special role of subnational level of policy development and decision making in the structure of the European system. Others (like, for instance, L. Kohr) not seeing perspectives of formation of the federal European association, nevertheless, asserted the possibility of ensuring peace through regionalization.

Leopold Kohr became one of the influential thinkers who provided the theoretical basis for the concept of the European regionalization. According to his vision, the main cause of war is a critical amount of power accumulated by social organizations (states). The greater is the potential (power) of a state and the larger is its size the more acute is a threat of sliding into a conflict with serious damaging consequences. Therefore, in order to prevent war and preserve peace existing states have to be disaggregated as much as possible, reducing them to a sum of smaller "natural" units (basic ethnically, religiously, culturally and geographically separated communities). The same is accurate for Europe — it should become a space, where a key actor is not nation-state as before, but its subnational components — regions [1].

Theorists federalists, in particular Denis de Rougemont and Guy Héraud recognized a region to have its special role in constructing post war European federation of the future. Thus, theoretic concepts of the federalism supporters attached to the region or territorial community a function of basic element of the European federal system [2]. European region rises in the works of federalists as a ground territorial unit that unites the features of an autonomous economic system and a space of consciousness gives an individual an optimal chance for self-fulfillment (in the dimension of cultural, linguistics, identity) [3].

Stemming from academic dimension on the wave of active strengthening of the European integration in the mid 1980-ies, the concept "Europe of the regions" quickly transformed from a theoretical definition into a widely used term, which was adopted by a significant number of scientists, researchers, journalists and politicians. Notwithstanding the constant change of the demand dynamics of this concept it had a substantial impact not only on scientific and communauttaire political discourse, but also on the practical realities of the EU development, becoming one of the ideological pillars of the

regionalization policy and European strategies of particular regions (for example — federal regions of Germany).

Speaking about the theoretical and conceptual dimension of the regionalization as a whole and the acquisition by the EU regions of the "European role", institutionalization of their status as of participants of the EU policy development process, it is particularly necessary to mention the concept of the multilevel governance.

The very notion of "multilevel governance" emerged in the context of the advancement of the European integration process and in the context of change in the relations within the European Community at the extent of evolution of the European Economic Community/European Union from the international organization to the further more influential supranational center of power. Scientific thought of the late 1980-ies – early 1990-ies in fact was leaving aside an important stratum of facts of European life in political dimension. For instance, according to a number of researchers, the main scientific views and visions in the European political domain, that dominated in the early 1990-ies, were marked firstly with polarity, secondly — with fragmentariness and thirdly — with limitedness. In particular, the rise of the regions as of European actors was studied mainly within the theory of "Europe of regions", which brought the region to the analyses foreground; activity of the European states in the euro integration dimension was studied mainly from the position of "intergovermentalism" and, first and foremost, liberal interstate theory; development of the communauttaire dimension as a whole was viewed through the conceptual prism of neofunctionalism [4]. None of these theories, focusing on the least important aspect of European processes did not give a complete answer to all the main questions regarding the relations inside the EU and did not allow to formulate a comprehensive picture of the EU political and administrative landscape in the context of European integration.

In this context the paradigm of multiple levels, ascertaining the emergence of the qualitatively new political reality in Europe, served as a "synthesis point" for different trends in the scientific thought. The concept of multilevel governance filled the theoretical and conceptual gap that emerged against the background of the political processes that followed creation of the European Union.

So, this notion introduced by the researchers Gary Marks and Liesbet Hooghe was called firstly to reflect the new political and administrative realities of the post-Maastricht Europe, which was characterized with the emergence of the supranational decision making level and delegation to this level of the administrative authority from the member-states and, secondly, to offer the answer to the challenge faced by political sciences against the background of comprehension of the European processes through introduction of the new interdisciplinary paradigm at the junction of political science and theory of international relations.

According to G. Marks, multilevel governance — is «a system of continuous negotiation among nested governments at several territorial tiers», practical action of which leads to «supranational, national, regional, and local governments are enmeshed in territorially overarching policy networks» [5]. Theory of the multilevel governance conceptualizes governance in the EU as a flexible, dynamic system of complex network interactions of authorities, where several main levels concentrating managerial powers can be identified: supranational, national and regional ("third level of governance"), while the multitude of levels is formed as a result of centrifugal process, in which the decision-making competence is dispersed in two directions from the national governance level — to supranational (communauttaire) and to regional levels.

L. Hooghe and G. Marks have identified two types of "multilevel governance" — I and II model types. Apart from the "general" model (I type), within which subnational actors perform different tasks, one entity cannot be a part of several structures, their number in the state is clearly determined and all of them have the same structure, authors propose to review another possible model of multilevel governance (II type), in which the competence area of subnational structures is determined by their tasks, one entity can be a part of different subnational structures, number of such structures, number of subnational levels and their internal structure in this model are also different [6].

Thus, types of multilevel governance are viewed depending on the subnational structures, their structure and interaction with the structures of the national and supranational levels.

Concept of the "third level of governance" became the next step in the development of the multilevel theory, which was described in detail in the context of regionalization. According to the view formulated under this concept, regions act first of all not as real political subnational actors, that struggle for power with the central government, but as elements of a wide pan European policy — governance framework, within which regions perform their functional role of a basic administrative level, alongside with the national and communauttaire levels. "Power dispersion" directed from the national level to the levels of the EU and the regions is an objective process caused by the very nature of the European integration that causes not only strengthening of the regional level, but also conglomeration of the vertical communications and influences which run through all level of authority in in the EU, and this creates prerequisites for direct dialogue of regions with communauttaire institutions [7].

This concept, apart from theoretical and methodological, also had an important applied, political meaning. Ideas voiced in the framework of the development of the concept "third level of governance" were adopted by a number of regions of the states which took active part in the development of the regionalism in Europe. For instance, federal regions of Germany and autonomous regions of Spain used the ideology of the "third level of governance" in promoting its own "European role" and trying to obtain leverage to influence the formation of the European policy, federal

regions of Germany and autonomous regions of Spain used the ideology of the "third level of governance". Concept of the multilevel governance and encouragement of the system's "third level" development was also used by the European regions for substantiating the need for expansion of their powers both in the internal matters of their countries and in the field of formulating of the European policy at the communauttaire level of authority.

Some institutions of the united Europe also continue to be guided by the vision outlined in the terms of "third level of governance". In particular, EU Committee of Regions' activity is based upon the theory of multilevel governance, considering European political field as a systemic unit which unites three levels of governance and draws the line for strengthening of the regional institutions as a third level of this multilevel system.

Conclusions. New realities in Europe determined in particular by the strengthening positions of the regions as more and more important actors of the political field, consolidation of the political and administrative potential of communauttaire institutions and erosion of the traditional monopoly of the nation state for power have created a demand for scientific comprehension and the rationale of the respective processes. European scientific thought has offered a range of concepts (the first and foremost — "Europe of Regions" and multilevel governance), which not only allowed to find theoretic explanation of the nature and logic of these processes, but also served as a basis for specific political efforts of a number of EU states regions aimed at assertion of its political role at the national and communaittaire level, as well as formed the ideological and methodological basis for activity of a range of EU institutions, in particular, Committee of the EU Regions.

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Section 10. Family law

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Features of legal regulation of relations on guardianship Kazakhstan

Abstract: This article describes the problems of legal regulation of relations in the sphere of guardianship and trusteeship.

Keywords: guardianship, foster care.

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Особенности правового регулирования отношений по опеке и попечительству в Казахстане

Аннотация: в данной статье рассматриваются проблемы правового регулирования отношений в сфере опеки и попечительства.

Ключевые слова: опека, попечительство, опекун, попечитель, патронат.

В течение многих десятилетий законодательство об опеке и попечительстве практически не менялось. Формирование нового казахстанского гражданского законодательства в начале 1990-х гг., изменившее наши представления о многих институтах гражданского права, в том числе о характере правового регулирования опеки и попечительства, тем не менее положений об охране прав и интересов недееспособных или не полностью дееспособных лиц практически не затронуло [1].

В Республике Казахстан нормы регулирующие отношения по установлению, осуществлению и прекращению опеки и попечительства как в отношении взрослых, так и в отношении детей закреплены в Кодексе о браке и семье (глава 15).

Нормы, регулирующие отношения между опекуном (попечителем) и взрослым подопечным, наряду с семейным правом регулируется также и гражданским законодательством, на них распространяется метод равенства участников регулируемых отношений.

Юридическое равенство проявляется при возникновении отношений по опеке и попечительству, когда будущий опекун (попечитель) не состоит в подчинении органа опеки и попечительства, а формирует свою волю на принятие опеки и попечительства свободно, без какого бы то ни было принуждения [2, 65].

Опека и попечительство должна основываться на сугубо добровольных началах, и показательна тем, что в ней проявилось одно из основных начал гражданско-правового регулирования общественных отношений: граждане — физические лица — осуществляют свои права своей волей и в своем интересе.

Юридическое равенство также должно проявляться при прекращении опеки и попечительства по инициативе любой из сторон, для которой такой интерес утрачивается. В настоящее время принцип добровольного и свободного принятия на себя гражданином обязанностей по опеке и попечительству и свободного отказа от их исполнения не отрегулировано законодательством на должном уровне.

Вполне закономерной представляется в аспекте применения метода юридического равенства договорная природа регулирования указанных отношений между физическим лицом и государством, в чем бы проявилась солидарность их интересов, основанная на их взаимозависимости [2, 66].

Правда, в ГК РК прямо не была предусмотрена возможность заключения договора об осуществлении опеки и попечительства, однако для этого уже была создана надлежащая правовая база: во-первых, в нормах гражданского законодательства была предусмотрена возможность участия государства в гражданских правоотношениях на равных началах с другими субъектами; во-вторых, в качестве одного из основных начал гражданского законодательства был провозглашен принцип свободы договора, в том числе свободы выбора партнера в договорных отношениях.

К числу произошедших перемен могут быть отнесены: появление правил о доверительном управлении имуществом подопечных, устранение понятия «опека над имуществом».

Ст. 26 ГК РК позволяет сделать вывод о том, что основная задача опекунов (попечителей) состоит в совершении юридических действий в пользу подопечных, тех действий, которые смогут восполнить их недостающую дееспособность. Таким образом, данная норма рассматривает опеку и попечительство как вид правовой помощи, оказываемой нуждающимся в ней физическим лицам.

Между тем далее, определяя круг обязанностей опекунов (попечителей), Кодекс о браке и семье РК меняет подход к роли этих лиц и фактически возлагает на их плечи все бремя забот о подопечном (за исключением попечительства над гражданином, ограниченным судом в дееспособности в порядке ст. 27 ГК РК) — о питании, содержании, медицинском уходе, воспитании (для несовершеннолетних). Такой характер статуса опекуна (попечителя) позволяет назвать опеку и попечительство формой устройства физических лиц [3].

Итак, законодатель с помощью института опеки и попечительства выполняет задачу определения судьбы недееспособного или не полностью дееспособного лица, перемещая «центр тяжести», бремя основных забот с органов государственной власти или местного самоуправления на соответствующее физическое лицо. Данный способ не нов, обладает целым рядом преимуществ и вполне оправдывает себя в условиях гармонично развитого общества, стабильной экономики и обеспеченности каждого определенным минимумом материальных благ. В этом способе соединены все преимущества межличностного общения, сохранения душевного и телесного здоровья подопечного, полноценного воспитания (для ребенка) [2, 68].

Однако очевидно, что в современном Казахстане, при условии безвозмездности исполнения опекунами и попечителями своих обязанностей государством фактически эксплуатируется (и весьма активно) определенный интерес лица, пожелавшего стать опекуном или попечителем. В большинстве случаев (к счастью) этот интерес расположен в рамках закона и носит неимущественный характер. Речь идет о стремлении лица удовлетворить потребность в общении, заботе о ближнем, в особенности — удовлетворить потребность в поддержке родственника, в исполнении отеческого (сыновнего) долга.

Потребность человека в заботе о ближнем сегодня должна культивироваться обществом, поощряться всеми возможными способами и, безусловно, «эксплуатироваться», но, разумеется, в пределах допустимого. Это означает, что законодатель должен найти способы поддержки тех граждан, кто отважился взять на себя заботу об инвалидах или детях, и стимулировать тем самым остальных сограждан к подобному поведению. В то же время должны быть закреплены и соответствующие меры контроля за действиями опекунов (попечителей), гарантирующие осуществление прав и интересов подопечных лиц [2, 69].

Таким образом, природа и цели института опеки и попечительства с принятием ГК РК позволили наметить направления дальнейшего совершенствования его правового регулирования, из которых основными являются: изменение норм частно-правовой и публично-правовой принадлежности. Причем центральное место в реформировании данного института должна занимать корректировка положений гражданского законодательства, что вытекает из сущности центральных отношений опеки (попечительства) — отношений опекуна (попечителя) и подопечного лица.

В целях дальнейшего совершенствования правового регулирования опеки и попечительства необходимо в главе 15 Кодекса о браке и семье РК внести изменения следующего характера: упорядочить нормы об опеке и попечительстве; четко определить полномочия государственных органов по опеке и попечительству, определить задачи и принципы их деятельности; определить основания установления и прекращения опеки и попечительства, разграничить юридическую ответственность государства и опекунов (попечителей) в данных отношениях; регламентировать правовой режим имущества граждан, нуждающихся в опеке (попечительстве), права и обязанности государственных органов по опеке и попечительству и опекунов и попечителей по его охране.

Немаловажным является закрепление норм, касающихся системы мер государственной поддержки опеки и попечительства, надзор и контроль за деятельностью как опекунов и попечителей, так и органов опеки и попечительства.

Контроль осуществления деятельности по опеке и попечительству должен быть одним из основных принципов государственного регулирования данных отношений. Но, пожалуй, ведущим принципом их государственного регулирования является принцип обеспечения защиты прав и законных интересов подопечных. Уместно заметить, что названное положение является не только принципом, но и задачей государственного регулирования опеки и попечительства и как главная цель самой опеки (попечительства).

Вряд ли это можно отнести к недостаткам закона как с содержательной, так и с юридико-технической точки прения. Такое сочетание в одном и том же положении различных аспектов правового регулирования общественных отношений встречается нередко. Так, в цивилистической доктрине начало юридического равенства экономически самостоятельных субъектов гражданско-правовых отношений именуется как принципом, так и методом гражданского права [4].

В числе задач государственного регулирования опеки и попечительства называет также: обеспечение своевременного выявления лиц, нуждающихся в установлении над ними опеки или попечительства и их устройстве; обеспечение достойного уровня жизни подопечных; обеспечение исполнения опекунами и попечителями, а также органами опеки и попечительства возложенных на них полномочий; обеспечение государственной поддержки физических и юридических лиц, органов исполнительной власти и органов местного самоуправления, осуществляющих деятельность по защите прав и интересов подопечных, и стимулирования такой деятельности.

Правительством РК утверждены правила осуществления функций государства по опеке и попечительству (Постановление Правительства Республики Казахстан от 30 марта 2012 года № 382). Правила осуществления функций государства по опеке и попечительству разработаны в соответствии с Кодексом Республики Казахстан от 26 декабря 2011 года «О браке (супружестве) и семье» [5].

Кодекс Республики Казахстан «О браке и семье» определено, что опека и попечительство устанавливаются в отношении недееспособных и не полностью дееспособных граждан и прекращаются при приобретении или восстановлении в полном объеме гражданской дееспособности.

Следует отметить, что при разработке раздела 4 «Об опеке и попечительстве» авторы использовали положительный опыт зарубежного законодательства — нормы об опеке и попечительстве, содержащиеся в праве Германии, Франции, Швеции, канадской провинции Квебек, Китая, Японии, Латвии, Азербайджанской Республики, республик Беларусь, Украина и других государств [2, 70].

Вместе с тем, в разделе 4 «об опеке и попечительстве» указанного кодекса имеются некоторые замечания.

1. Кодекс РК «О браке и семье» предлагает практически только две формы устройства детей, оставшихся без попечения родителей, сопровождающиеся обязательной передачей в семью законного представительства: усыновление и опеку (попечительство). Тем самым практически уничтожены активно развивающиеся формы распределения прав и обязанностей по защите прав ребенка между семьей, органами опеки и социальными патронатными службами.

Так пункт 2 статьи 122 «Опекун или попечитель может быть назначен только с его согласия. Если это не противоречит интересам подопечного, преимущественное право на назначение опекуном или попечителем имеют супруг, родители, родственники или другие лица, близкие к подопечному. Допускается назначение одного опекуна или попечителя для нескольких лиц, если нет противоречий между интересами подопечных».

В Кодексе на наш взгляд существует некая неясность относительно того, что если допускается назначение одного опекуна для нескольких лиц, то почему изначально не указано, что опекуном может быть, лишь одно лицо и для одного подопечного? Также возникает вопрос, может ли быть несколько опекунов для одного подопечного?

Не ясно, почему в таком случае нельзя разграничить законное представительство между физическим и юридическим лицами (как это предлагается в патронатном воспитании) и что как раз и несет защитную функцию, гармонично сочетая возможности и семьи и учреждения.

2. Не ясна ситуация, кто же именно является законным представителем ребенка в случае «временного помещения ребенка в учреждение». В этом случае не ясны и права и обязанности учреждений, которым под надзор будут временно передаваться дети. Права и обязанности в отношении ребенка возникают лишь у учреждений в случае помещения ребенка на постоянной основе), без прекращения каких бы то ни было прав опекунов и законных представителей детей.

3. Нереалистичны сроки и процедуры описи имущества ребенка (трехдневный срок), и вызывают сомнение все вопросы связанные с условиями использования опекуном имущества и жилья подопечных, в особенности оплата услуг опекуна за счет средств подопечного.

4. Законопроект закрепляет гражданско-правовой характер отношений в опекунских и приемных семьях. В то время как все опекуны, приемные семьи требуют признания значимости их труда и сохранения трудового стажа. Некоторые специалисты считают что характер отношений в таких семьях, в семьях патронатных воспитателей больше всего похож на труд надомников.

5. Вызывает тревогу фактическое упразднение приемной семьи и замена ее опекой по договору. Эта мера в правовом смысле оправдана, но несвоевременна. По статистике Комитета по охране прав детей Министерства образования и науки — в патронатных семьях воспитываются 1531 казахстанских детей [6]. Т. е. тысячи опекунов должны будут ВСЕ документы оформить заново. Сотни тысяч бабушек захотят получать вознаграждение — за свои труды. Не ясно, за счет каких средств пойдут эти выплаты и предусмотрены ли эти средства в бюджете.

6. Кодекс РК «О браке и семье» оперирует понятием «дети, оставшиеся без попечения родителей», в то время как и на республиканском и на региональном уровнях должна решаться и фактически решается другая задача: помощь детям, оказавшимся в трудной жизненной ситуации. В связи с этим необходимо оперировать единым понятием детей, нуждающихся в помощи государства. Кодекс не предлагает никаких мер по организации помощи таким детям. Таким образом, младенец, сиротство (или

социальное сиротство) которого официально не установлено, не может быть передан в семью, в то время как именно в первые месяцы жизни он особенно нуждается в семейном уходе.

7. Как самих детей, так и все функции опекунов и попечителей, в том числе полномочия по законному представительству, планируется передавать не только воспитательным учреждениям для детей-сирот и детей, оставшихся без попечения родителей, либо специализированным организациям систем здравоохранения и социальной защиты населения, но и иным организациям, оказывающим образовательные, социальные и иные услуги.

Неясно, о каких иных услугах идет речь, не обозначен даже примерный перечень организаций, которым можно передавать детей, не определены хотя бы примерные требования, которым должны отвечать эти организации, не говоря уже о необходимости лицензирования специализированной деятельности по опеке и попечительству. Более того, таким организациям разрешается временная передача детей в семьи граждан, при этом на них не возлагается даже обязанность проверять условия жизни такой семьи, удостоверяться в личной безопасности ребенка и — благоприятных условиях его пребывания в такой семье. Таким образом, на такие организации, особенно при временной передаче детей в семьи граждан, и на принимающих граждан не возлагается никаких обязанностей, соответственно они не несут никакой юридической ответственности, от них не требуется никакого профессионализма.

8. Итак, функции государства в лице органов опеки и попечительства как органов исполнительной власти по существу сводятся к функциям менеджера: выявить детей и взрослых, нуждающихся в опеке и попечительстве, рассмотреть документы, распределить подопечных, особенно детей, назначить опекуна (попечителя), заключить договор, выплатить вознаграждение. Таким образом, функции органов опеки превращаются в сугубо административную деятельность, в которой отсутствует помогающая, социально-реабилитационная компонента. Судьба подопечных, особенно детей, снова окажется в руках чиновников, которые могут и не видеть ребенка и будут определять его дальнейшую жизнь исключительно на основании документов.

9. Отсутствует система критериев отбора приемных родителей, государственными органами по опеке и попечительству в силу рабочей загруженности, которые не в силах определить степень социально-психологической адаптации ребенка, его психологической защищенности в чужой семье. Они могут определить лишь формальные показатели, прежде всего, отражающие содержание ребенка в семье и его образование (оценки в школе). Таким образом, функция по мониторингу семей, взявших на патронатное воспитание детей, не реализуется в полном объеме [1, 8–10].

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Section 11. Theory and history of state and law

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Some questions of legislative providing of functioning of rural medicine in the USSR in 1920–1930

Abstract: In this article some questions of legislative providing of functioning of rural medicine in USSR in 1920–1930 are considered. The research is conducted for the legal politic, state control in a sphere of rural medicine and for it realization in difficult political and economic situation.

Keywords: rural medicine, health protection, medical legislation.

The rural medicine was, apparently, the most problem sphere of health protection with which Bolsheviks faced. The peasantry practically hasn't access to the qualified medical care before the revolution, disregarding a number of regions where Zemstvos developed a vigorous activity in this branch. In the first years of the Soviet Power the situation amplified even more. The huge mass of doctors was mobilized to the front, others left the village, having lost financial guarantees. There was an inevitable reduction of a medical network. Seeking to rectify somehow the situation which is developed, the PCH dispatched the circular letter to regions on the 10th of August in 1920, having suggested health departments to take part in a "week of a peasant" which is directed on a laying of new medical institutions, opening of a day nursery, baths, sanitary and educational work and sanitary inspection of villages [1, 68].

At the I All-Ukrainian congress of health departments which took place on June 27–28 in 1920 in Kharkov, the need of granting advantage for service to workers, to the labor peasantry serving and to their families was noted. But thus it was emphasized that the anti-epidemic and first emergency aid has to be provided to everybody smoothly. In the village the Soviet Power put a carrying out task to a number of actions for the improvement of working conditions and life of country people, providing it with free, public, qualified medical care, and first of all farm laborers, poor people and middling persons. For this purpose it was planned to strengthen and expand a local network. At the I All-Ukrainian congress of the organization of the medical aid in June in 1921 they refused agrarian type of medical sites, and made the decision concerning the organization of volost one. Landowner estates and monasteries were used for their expansion [28, 17].

From the beginning of the New Economic Policy, medical institutions which existed, after their transfer to local financing came to be on the verge of accident: there weren't drugs, food, medical personnel didn't receive a salary. From 1922 problems concerning providing with dressing and the most necessary medicines again increased. On the III All-Ukrainian meeting of managers of province health departments which took place in May in 1922, it was offered to bodies of health protection to be engaged in creation of own additional budgets [7, 681]. In this regard some health departments or managers of hospitals began to enter a payment for the maintenance of patients. Due to the instability of monetary currency and the lack of monetary units at local population, it was established in grain units and increased according to increase in prices for medicines. The decision was thought over about the prohibition of the paid providing medical care in the Soviet medical institutions on the general meeting of All-Ukrainian Central Executive Committee, RNC and chairmen of province executive committees, in July in 1922. Then, in 1922, All-Ukrainian Central Executive Committee established accurately for the first time norms of functioning local network of the USSR. One hospital bed, including infectious, had to fall to 750 persons of country people, and the existence of just 28 thousand was provided. The quantity of medical districts was established behind the number of volosts — 1989. One out-patient clinic with staff in 6 units had to serve 10 thousand of population, and policlinic with 20 units of staff — 30 thousand of population [28, 26–27]. At this PCH was obliged to have a district doctor in each volost center. Medical assistant's stations were liquidated.

With the end of the civil war the temporary hospitals were liquidated which were intended for the isolation of infectious patients and respectively were considerably reduced the quantity of beds [10, 27].

The rural local network was unsatisfactorily provided economically and medicamentally. Except the need of the solution of material problems, the question of providing districts

with the medical personnel was important. The characteristic feature of policy of the Soviet Power was a "fight with doctor's assistant" in the first half of the 1920th. At this time in rural areas began to carry out the work on the protection of motherhood and childhood and fight against social diseases.

In 1922, despite of the menacing distribution of syphilis in the village, the PCH could only provide medical and sanitary property for venereal groups. Then, as experiment, the first 3 venereologic stations were created. The experience of their work showed that such form of the organization of aim yielded positive results [27, 22].

With the beginning of the creation of collective farms, one of the prime tasks of bodies of health protection was a providing overwhelming medical care of those stratums of the peasantry which united in collective farms [28, 36].

In January in 1925 at the All-Ukrainian meeting of province health departments M. G. Gurevich made the report "About the work in the village" [15, 115] in which the organization was admitted necessary, at first as trial, preventive sites. Their structure had to include: out-patient clinic with separate offices for the reception on the main specialties, including stomatological; hospital for granting special types of help: therapeutic, surgical, obstetric and gynecologic, eye, anti-venereal and anti-tubercular; tubercular clinic or station, depending on character and intensity of impression of the population of the area tuberculosis; a venereologic clinic or point, depending on distribution of venereal diseases; consultation for pregnant women and babies; constants and temporary day nursery; regional sanitary and school doctor; council of the social help [12, 102].

In 1925 a special attention was paid to the rural medicine that was reflected in the operational plan of the PCH for 1925/26 [6, 119]. On November 30 – on December 5 in 1925 the IV All-Ukrainian congress of health protection was conducted which was almost completely devoted to this subject [4, 177]. A condition of a rural network, its supply, a question of health protection of children, prophylactic and sanitary maintenance of sites, organizations of help to the insured population, in the village, fight against tuberculosis and venereal diseases, a working condition and life of the medical personnel and so forth were considered on it [21, 4].

Medical sites gave stationary help to the population depending on type of hospital. Considering the frequent misunderstanding because of refusals of hospitalization, the PCH defined accurate indicators in 1926. Smoothly accepted on hospitalization of patients skin out, return and belly typhus, dysentery, diphtheria, scarlet fever, erysipelas, cholera, natural smallpox, glanders, Siberian plague, epidemic encephalitis in a sharp stage, with strokes, bleedings because of abortion at sorts, all cases which need emergency aid or surgery, namely burns, poisonings, gunshot and other wounds, hard blows, fractures, impassability of guts, appendicitis and so forth. Conditionally patients belonged to hospitalization who needed it, but, depending on dwelling conditions, could receive treatment at home. For example, persons with croupous and catarrhal pneumonia, pleurisy, sharp articulate rheumatism, malaria, syphilis and tuberculosis, in stages which didn't need isolation treated this group. Everybody with chronic forms of diseases which didn't give to hope for full cure, those who needed long and special treatment, with functional nervous breakdowns and epilepsy wasn't subject to the hospitalization [20, 2].

In 1925–1926 also such shortcomings as an unsatisfactory equipment and supply of medical institutions were noted. Along with it in connection with the educational activity the need of the population for the qualified medical care considerably increases [25, 133]. In the conditions of the village sorcery came to the rescue. The Soviet Power was negative to such practice and tried to destroy it [3, 2]. At the same time actions were made for the increase in number of the medical personnel. By the decree of RNC of the USSR of May 19 in 1925 «About the completion of the village by the qualified medical personnel» it was provided a number of privileges to the rural doctor, among which and providing with free housing rooms and utilities. But in reality it wasn't carried out. At best the monetary compensation of 4–15 % of a salary was given which is provided by the collective agreement, but it didn't cover expenses behind this purpose. Rather often because of a lack of living space of the province the medical qualified personnel wasn't invited at all [14, 230].

The commission on the use of jobless doctors was created for the improvement of a situation in Katerinoslavsk, Kiev, Odessa and Kharkov. There was a list of the unemployed or who worked not behind the specialty. Everybody was brought to it obliged to hold free positions which most often were available in the village. Thus behind them within the 6th months there had to be a living space in a place of former dwelling and if the family didn't leave — for all the time. Only disabled people and temporarily disabled were released [8, 2–3].

In the second half of the 1920th the Soviet Power returned to the solution of problems of service of different categories of the population. In 1926 liquidated a difference in reception insured and the labor peasantry in local establishments. The same rights were granted and went to urban medical institutions [16, 11]. According to the resolution of RNC of the USSR of January 15 in 1926 the PCH began to take measures concerning providing the uninsured male hired labourers with medical care and female hired labourers occupied with work in small agriculture [9, 1087]. According to the instruction dispatched to district health protection they were served by all-civil medical institutions whenever possible first of all, and under departure conditions to a working medical network, had advantage in comparison with other uninsured. The same it occurred and during the direction to resorts or in sanatoria, providing the help in consultations, places in a day nursery. They did them discounts in self-supporting drugstores, as well as insured. In March in 1927 the PCH approved the list of diseases which gave the grounds to break off employment contracts about the wage labor in country farms to each of the parties [17, 2].

Medical and sanitary care of teenagers from orphanages was carried out by the district inspectorates of protection of motherhood and childhood [18, 2–3]. The nearest hospitals to a child, or out-patient clinics registered him. Depending on the presence of the personnel, the regional doctor of health protection of children, the doctor of consultation or the district doctor, checked before the departure sanitary living conditions, and twice for a year a state of a child.

Medical and sanitary service of going out peasants who went for crafts, was carried out by the correspondent points created by PCP [19, 3]. There they were examined, did anti-epidemic inoculations and carried out sanitary and educational work. Patients were isolated or hospitalized.

In the second half of the 1920th changes took place in a sanitary and epidemic condition of the country. The number of patients with skin out and return typhus, cholera, natural smallpox considerably decreased; a typhoid, malaria, dysentery, — remained almost at the same level; and the cases of scarlet fever, diphtheria, measles, whooping cough, began to fix more. In the same time to epidemic diseases reckoned trachoma and itch. The improvement of life of country people which substantially would provide incidence reduction was one of the main tasks of the Soviet Power [11, 105].

The government began to pay special attention to medical care of members of collective farms. Collective farms were attributed to the nearest medical institutions, and first-aid stations opened in the biggest farms or medical first-aid kits with assignment of a duty from providing help were sent them to one of workers prepared by the doctor. Carrying out periodic sanitary inspections, reviews of all employees of collective farms and members of their families, broad expansion of actions but health protection of children was provided. It was required from health departments and medical institutions to draw attention of peasants to questions of the prevention of diseases by means of medical boats, representations, supply with posters, literature; in collective farms sanitary cells were surely created. It was ordered to educational bodies to hold events to strengthen work from promoting of physical culture in the village, and to bodies of health protection — gradually to enter the elementary medical review and hygienic education of members of rural circles of physical culture, and also sanitary inspection, behind places of classes on physical culture.

In spite of the fact that the Soviet Power tried to allow the paid help in the limited sizes, it appeared not only in the cities, but also in villages [5, 4]. The practice of service of the population which developed in the 1920th, was officially approved in November in 1929 when the PCH of the USSR developed and adopted the provision on the principle of providing medical care to inhabitants of villages, settlements and non-staff cities. The whole labor population which isn't enough a vote could use it free of charge. First of all — agricultural workers, farm laborers and other, rural poor people, the collectivized peasantry, insured. In the second turn was other population of the village which wasn't deprived of electoral rights. In addition, the listed categories received a discount in 15 % in drugstores. The unearned population of the village deprived of electoral rights for receiving medical care received the corresponding coupons in the Village Council. The money for medical care raised from it was considered as special means of treatment-and-prophylactic institutions for the improvement of high-quality statement of medical care.

In 1930 the PCH of the USSR issued the additional instruction about an order of service of country people. First of all needs of workers and employees of state farms and industrial enterprises were satisfied which were in the village, and also woodcutters and farm laborers, in individual and collective farms; in the second turn — members of the families insured, members of communes and committees of poor peasants; in the third — members of artilleries, CJTG and their families. In the last turn other population was served, and a part of rich men–is exclusive for a payment [28, 55]. Thus, in the second half of the 1920th years the Soviet Power began to pay more attention to the organization of medical care of the population in rural areas. But a real increase of the level of rendering of services didn't take place.

It was offered to take measures to providing the medical personnel to all necessary, and territorial authorities of the power — to opening of first-aid stations in state farms, at tractor columns for the purpose of the acceleration of construction of hospitals, out-patient clinics, medical stations, a day nursery and preschool child care facilities, in collective farms, the organizations who managed state farms. Money for carrying out noted actions was allocated except the budget, from funds of assistance to construction and the equipment of cultural and community institutions in the big collective farms formed at the State Bank of the USSR and its regional (regional) and republican offices. Besides, it was allowed to form special fund in collective farms which means, in particular, were spent for the maintenance of day nurseries [24, 232].

Considering shortage of the medical and sanitary personnel in the village, territorial authorities of health protection carried out the special companies concerning providing peasants with medical care, especially during sowing and harvesting. Additional temporary day nursery beds were opened, first-aid posts or collective farms, were attached to the next first-aid posts, public health inspectors watched the preparation and reception of food in kitchens and in dining rooms, plans of providing peasants with water, medicines, first-aid kits were approved, specially created medical crews went to places from the cities and working settlements. Among urban doctors and the average medical personnel the movement for a trip for 2–3 years for work in collective farms was developed, sanitary minima was carried out, institutions of RSRC organized clubs of first aid. In practice some forms of the organization of providing medical care were established. If peasants worked compactly in the field, the medical aid station opened there. When the labor was sprayed, members were attached to separate groups of workers of health — centers or circles of first aid which gave the necessary help to patients and in case of need promoted their transportation in medical institutions.

Also the brigade and ring method was applied; crews traveled over villages once a decade; the duration of departure made no more than four days. It is remarkable that the personnel of medical aid stations which organized directly in the field, carried out the professional duties not always qualitatively. For example, one woman was long treated for a headache, without having found its reason: the progressing syphilis [22, 7–8]. Similar cases speak not only low qualification of the medical personnel, but also impossibility, in derivative conditions properly to adjust the process of diagnostics and treatment.

At the end of the studied period a number of the important regulations is also adopted, directed on the improvement of rural medical part. In 1937 agricultural immigrants were granted the right for medical care, and expenses of collective farms on medical and sanitary construction were charged to the state budget [23]. On April 23, 1938 RNC of the USSR approved the resolution «About Strengthening of a Rural Medical Site» [13, 132]. Young specialists to rural areas didn't hurry, much from them «settled down» in kitchen gardens at artificially created positions or working with loadings. The responsibility for it RNC of the USSR put on the PCH of the USSR and personally on the people's commissar of health protection Mitirev, having requested from him to complete with doctors all rural medical sites till May 1, 1941 and to forbid the translation of doctors from rural areas without the permission of the republican PCH and without simultaneous replacement to release the doctor by another [25]. In 1940 1728 rural medical sites had no doctors. On the basis of solutions of the PCH of the USSR 1850 experts were sent there, reached 1650, thus, 78 sites remained incomplete only till March 12, 1941.

The unwillingness of physicians to work in rural areas is explained by a variety of reasons. There were severe conditions of work, and the lowered salary rates. Besides, the provision of rural medical institutions and health workers in the 1920–1930th was rather difficult, there were difficulties with material support, medical supply, the lack of hospital beds, sanitary transport, and so forth was observed. Physicians faced backwardness, and sometimes the hostile relation of peasants, especially in national areas. Medical institutions were badly provided with food, medicines, linen [2, 16–17]. Thus in other states the situation wasn't better at all. It is remarkable that achievements of the USSR in the field of rural medicine even caused the admiration in foreign scientists and practicians.

Trying to realize the program of the adjustment system of medical care of the population, the power faced a number of objective and subjective factors. It is necessary to refer to the first a shortage of financial and other material resources, a lack of the equipped medical institutions and unevenness of an arrangement of establishments and the personnel in the territory of Ukraine, almost a total absence of medical and sanitary base at the time of coming to power by Bolshevik. The unwillingness of most of physicians to work at the village on attention of the lowered rates of a salary and severe conditions of work were subjective factors, and also leaders of a country position who demanded from the PCH in a priority order to provide with medical care urban proletariat. But it is possible to tell that despite all this, both all-Union bodies and republican in the interrelations, reached the considerable results, trying to adjust the state administration of rural medicine.

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Section 12. Criminal law and criminology

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Some legal aspects of personal injury according to criminal law

Abstract: This article discusses some of the legal aspects of injuries in the criminal law of the Republic of Kazakhstan.

Keywords: criminal law, criminal code, injury.

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The right to the highest attainable standard of health is one of the fundamental rights of every human being irrespective of race, religion, political belief, economic and social status [1].

The development of History of State and Law takes an important place in the development of concept of crimes against the health of the individual. This can help to understand the current situation in the field of criminal law.

As early in the ancient world crimes against the health of the individual were considered as one of the most serious. The State exercised blood feud practices, although some countries followed such idea as a cash ransom.

For example, in Ancient India, caste society played an important role. Class and caste nature of law in ancient India is observed when considering responsibility for crimes against the person. In this case, if the offender and the victim belonged to the same varna, causing injuries was subject to money penalty while serious injury or fracture was subject to expulsion.

A prominent contribution to the development of law was made byAncient Greece and Rome. They classified crimes against the person, which in addition to murder, included the infliction of injuries, beating, slander and insult.

In the early middle ages, both in Russia ("Russkayapravda") and Western Europe (Salic law (Kingdom of the Franks), "Coutumes de Beauvaisis" (France), "Survey of Saxon Law" (Germany), "Survey of Swabian Law" (Germany), "Law of pandects" (Germany), "Carolina" (Germany), "Common law" (England), "Law of equity" (England) specified bailout for the personal injury.

In later centuries, the injury was considered a criminal offense, with punishment from flagellation to prison.

The Constitution of the Republic of Kazakhstan establishes the right of citizens to health protection and medical care [2]. So the current state of legal regulation in terms of infliction of harm to the health of man and citizen is specified in the following article.

The crime itself against the health of the individual can be divided into the following categories:

– intentional infliction of harm (serious and moderate, light, beatings, torture, threat of injury, compulsion to removal of organs, infection with venereal diseases or AIDS);

– unintentional injury (in the heat of passion, when exceeding the limits of necessary self-defense, by negligence);

– medical (illegal abortion, lack of medical care, the illegal occupation in private medical practice or private pharmaceutical activities);

– failure to give assistance to persons in mortal danger;

– indirect, which may cause harm to the health of the individual (inducement to use narcotic drugs or psychotropic substances, violation of sanitary-epidemiological rules, withholding of information about the circumstances which provide a risk to the life or health of people, the production or sale of goods, performance of works or rendering of services which do not meet safety requirements etc.).

Among them a special attention is given to intentional infliction of harm to health which constitutes a special social danger. Intended infliction of harm to the individual refers to intentional infliction of harm, health risks and infection with sexually transmitted diseases and AIDS.

"Intentional infliction of serious harm to health" states that the infliction of serious bodily harm specifies the infliction of grave damage dangerous to human life, which results in a loss of vision, speech, hearing or any organ or loss of its function, abortion, mental disorder, drug addiction or substance abuse, as well as disfigurement of the face, or causing significant permanent disability not less than one-third or complete loss of working ability. All of these actions shall be punished by imprisonment for the term from three up to seven years.

The same acts committed in aggravating circumstances, such as:

1) in relation to the person or his relatives who carries out official activities or social duty;

2) with particular cruelty, abuse or torment to the victim being helpless;

3) committed in a dangerous way;

4) committed by contract;

5) from molester motives;

6) motivated by ethnic, racial, religious hatred or enmity;

7) in order to use organs or tissues of the victim;

8)committed by a group of persons, upon previous concert or by an organised crime group;

9) against two or more persons–which shall be punished by imprisonment for the term from five up to ten years.

Acts stipulated by the first or second part of article 106 of the Criminal Code of the RK which by negligence result in death of the victim, or committed by a criminal group shall be punished by imprisonment for the term from eight up to twelve years [3].

Intentional infliction of grievous bodily harm is the most dangerous crime that infringes the safety of human health. The health in this case is considered to be the natural state of an orga-nism characterized by the absence of any pathological changes.

Current criminal code rejects using the traditional term of "bodily injury", which stands fordistortion of the anatomic integrity of organs and tissues or their physiological functions resulting from exposure to environmental factors.

Replacement of the term "bodily injury" to "damage health" the criminal Code is quite reasonable in some cases. Not every injury, even if it results from exposure to environmental factors can be regarded as a bodily injury. The term of "injury to health" covers also a harm that is not associated with the distortion of the anatomic integrity of organs and tissues or physiological functions of organs and tissues.

This are such disorders as responsive mental and neurological conditions resulting from adverse mental effects on the victim, or infectious diseases where one person passes the culture of pathogenic microbes to another. Besides, it can be professional or venereal diseases, poisoning, mental disorder, drug addiction or substance abuse, etc.

However, according to the original developers of the draft Criminal Code, the use of the term "bodily injury" did not mean a General rejection of the term "bodily injury" in cases where damage to health was associated with disruption of anatomic integrity or physiological functions of organs and tissues (there is no reason to abandon practically approved-regulations of forensic determination of the severity of injuries). "Bodily injury" was supposed to consider, mainly as a generic term, and in some cases, the term "other impairment of health" as a "addition" to "bodily injury".

Therefore the draft Criminal Code of the Republic of Kazakhstan specified the intended infliction of heavy harm to the health as an intended bodily harm, dangerous to life or which resulted in certain grave consequences to health of injured person, as well as infliction of other harm dangerous to life or which caused the consequences mentioned above.

In the final version of Part 1 Article 106 of the Criminal Codethe term «bodily injury» is not used, sincethere is tautology, which may cause serious difficulties for the practical application of the specified regulation. Originally it states «intended infliction of harmdangerous to life of a person» or resulted in certain grave consequences, on the other hand it refers to «other harm to the health, which is dangerous to life», as if it is not the same. The only way out of this situation is to make corresponding changes in the Article 106 of the Criminal Code by recovering the draft version of the Criminal Code.

Article 107 "Intentional infliction of moderate bodily harm" Part 1 states that the intentional infliction of moderate harm which is not dangerous to human life and doesn't have consequences referred to in Article 106 of the Criminal Code, but which caused long-term health disorder or significant loss of working ability to less than one third shall be subjected to restriction or imprisonment for a term not exceeding two years.

The same acts committed in aggravating circumstances, such as:

a) against two or more persons;

b) in relation to the person or his relatives who carries out official activities or social duty;

c) with particular cruelty, abuse or torment to the victim being helpless;

d) committed by a group of persons, upon previous concert or by an organised crime group;

e) from molester motives;

f) motivated by ethnic, racial, religious hatred or enmity;

g) more than once, — subject to restriction or imprisonment for a term up to three years.

Intentional infliction of moderate bodily harm as opposed to grievous harm is characterized by the fact that it is not dangerous to human life, and does not cause consequences specified in Article 106 of the Criminal Code. However, it causes long-term impairment of health of the injured person or a significant permanent loss of workingability to less than one-third, or both.

The object of crime under the Article 107 of the Criminal Code, form social relationships which ensure the security of citizens health.

The objective aspect of the crime in question is illicit infliction of moderate bodily harm to another person.

The objective part is specified by the following:

a) socially dangerous act (action or failure to act);

b)criminal consequences in the form of moderate damage to human health;

c) causal relationship between the criminal act and mentioned criminal consequence.

The moderate injury is considered to be causing the victim long-term health disorder, as well as a significant permanent loss of ability up to less than one-third.

Long-term health disorder refers to temporary loss of ability (disease, disability etc.) directly related to injury. The significant permanent loss of general working ability to less than one-third refers to the loss of such a ability from 10 to 30 % inclusive.

The moderate injury includes, as an example, cracks and fractures of small bones, one or three ribs on one side, dislocations of small joints, constant difficulty in speech, loss of a finger or toe, moderate concussion of the brain, etc. [4].

Bodily harm is considered to be short-term health disorder, as well as light permanent loss of ability. The short-term health disorder should be related to the injury for the period of not more than three weeks (21 days).

Insignificant loss of working ability meant refers to permanent loss of general labor ability to 5 %.

The infliction of light bodily harm includes, as an example, the loss of the finger (except the thumb and forefinger), impaired vision and hearing, related to permanent loss of general labor ability, multiple bruises and scratches, etc. [5].

The abovementioned crimes are considered to be crimes against the health of an individual. The right to health, unlike other human rights, just recently have been stipulated in the Constitution of many countries. The constitutions of XVIII–XIX centuries did not specify the right to health, although other human rights were proclaimed. Internationally, the human right to health was recognized in 1948: "Everyone has the right to a living standard which includes food, clothing, housing and medical care and the necessary social services, adequate for the health and well-being of himself and his family".

Great importance of such benefits as life and health, give place to their full protection and care.

Today, one of the most important tasks of the state in the field of law is the protection of citizens, including their health, as a component part of the general policy of the state to strengthen the society.

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Cruelty to animals in Kazakhstan: moral and legislative aspects

Abstract: This article discusses the issues related to animal cruelty. Some problems of the moral side of such acts. Particular attention is paid to the legal aspects in the Republic of Kazakhstan in the field of animal protection, as compared with foreign countries, we have it developed quite weak.

Keywords: morality, assault, fighting, prevention.

The problem of cruelty to animals in Kazakhstan is not paid so much time and effort as it should be, especially compared with other countries where animal rights are protected quite efficiently. Many people underestimate the importance of the moral aspects of the problem of cruelty to animals, and in fact treatment of animals is reflected in the moral and ethical, economic and social aspects of life in any society and affects the feelings and interests of many people. Cruelty to animals forms among offenders a sense of indifference to the livings beings suffering, as well as the seeds of violence and aggression towards the people around them. These actions have an impact on the consciousness of those who commit acts of cruelty to animals and to people who witnesses such acts. It is especially dangerous for young children to witness such acts, as it may impose a negative impact on the rest of their life, as well as affect the attitude of the children to violence in the

future. Modern criminology and psychology clearly show the direct connection between cruel acts against animals and violent crimes against people [1].

Animal cruelty generally falls into two categories: neglect, or intentional cruelty. Neglect is the failure to provide adequate water, food, shelter, or necessary care. Examples of neglect include: starvation; dehydration; inadequate shelter; parasite infestations; failure to seek veterinary care when an animal is in need of medical attention; allowing a collar to grow into an animal's skin; confinement without adequate light, ventilation, space or in unsanitary conditions.

Using deception to mask abuse: Perpetrators of animal cruelty often portray themselves as kindly animal lovers, making it difficult for people to believe them capable of abuse. From the "friendly" neighbour who mistreats his pets behind closed doors, to the "respected" community member who operates a puppy mill or substandard zoo — there is no one identifying feature that marks a person as capable of committing such unfathomable crimes. Abuse of any animal is upsetting, not only for the pain and suffering inflicted on the animal, but for the fact that animal abuse is often a precursor to human-directed violence and an indicator of family crisis [4].

In today's world the problems of the relationship between man and animal has ceased to be arguments about the moral principles of human activity. Opposition to animal cruelty became, in our opinion, one of the important issues and factors of social, political and economic life of the Republic of Kazakhstan, in spite of little attention paid to this issue on the part of the Kazakh society and of the state as a whole.

First of all, the specificity of the problem of cruelty to animals causes patchy information about the facts of the wrongful conduct and at the same time, latent component of this type of crime which is high enough. In Kazakhstan, as well as in foreign countries it rates higher than those officially taken into statistics account. And, if you rely on these statistics, the proportion of crimes against animals in Kazakhstan remains stable. One aspect of the infringement in the case of animal cruelty is the morality of society, and, in our opinion, morals must be the object of criminal law protection, as it is human value which suffers primarily with crimes against animals [3].

Based on the general problem of cruelty to animals in the Republic of Kazakhstan, we would like to focus on a special law "On the treatment of animals" as one of the ways to solve this problem. This bill should, in our opinion, provide first general requirements for the treatment of animals and should pay attention to the following points:

– pet owner must take care of their animals and provide them with all necessary living conditions;

– any person who is obliged to refrain from causing suffering to an animal, regardless of its origin;

– the use of animals in scientific experiments or in the educational process is allowed only if there is no possibility of an alternative replacement;

– the use of animals in various activities for profit is permitted only with special permission;

– during animal breeding using genetic engineering techniques is not allowed to change the appearance and nature of animals, in case this may lead to animal suffering.

Secondly, we consider it necessary in this bill to establish direct prohibitions on improper uses or treatment of animals. More specifically, to make bans on:

– the use of traumatic methods and techniques in the capture of animals from the cells;

– sports, entertainment events, including fighting animals;

– hunting, trapping and other forms of extraction of wild animals having young animals who are not capable to exist independently;

– carrying out hunting in the form of entertainment, built on the persecution and killing of animals;

– the use of animals with the suffering infliction on them as live bait while training, hunting, trapping them and other forms of wild animals extractions [2].

As part of the means of specially-criminological prevention and to develop effective measures against crime, interaction between the legislative and executive authorities, local governments, law enforcement agencies and public organizations in the field of animals protection is required. It is necessary to create the Coordination Council for Prevention of Cruelty to Animals in the subjects of the Republic of Kazakhstan. The priority tasks of creation and activity of these councils could, in particular, be the followings:

– to develop measures of counteraction to cruelty to animals; to develop the principles and procedures of interaction between different bodies, institutions and organizations, including the public ones, in terms of sharing necessary information about the relevant facts of unlawful acts against animals;

– to promote international and interregional relations in order to study, analyze and implement best practices for the prevention of cruelty to animals;

– to participate in the preparation of annual reports on the state of animal protection in any region, as well as conferences and seminars on the organization and ensure animal welfare protection;

– to organize regular research on this issue with the appropriate funding [1].

In conclusion, we would like to note that the necessary measures of specially-criminological preventive nature, in our opinion, are:

– the organization of preventive conversations with people who are potentially able to commit such crimes;

– active involvement in the process of detecting animal cruelty facts the members of the public who are able to immediately notify the related authorities to take the necessary response measures.

Kazakhstan needs a unified law on animals, it is the law, rather than regulation or rules for the treatment at the local level that each regional administration can formulate and interpret as it is convenient for them. This law must be efficient

and effective, according to which every person maltreating defenseless living creature would be justly punished.

In such cases, the facts of indifference are unacceptable If a person has witnessed the mistreatment of animals, he must not remain on the sidelines, even morally. Cruelty to animals deserves careful and serious attitude from the part of society in all aspects.

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The problems of fighting against terrorism in the Republic of Kazakhstan

Abstract: the Article is sanctified to the conceptual aspects of fight against terrorism in Republic of Kazakhstan. An authors conducted the analysis of counterterrorist legislation of Republic of Kazakhstan (Criminal code of Republic of Kazakhstan, Law "On counteraction to extremism", Law "On counteraction to terrorism", Government Program of counteraction to religious extremism).

Keywords: terrorism, terrorist acts, terrorist activities, terrorist crimes, extremism, extremist organization; ideology of violence.

Events of 2011 that took place in Atyrau, Zhambyl, Aktobe regions of Kazakhstan, indicate that there is international terrorism in our country. The country has received almost all possible forms of anti-state and anti-human terror: it's the holding of hostages, demonstration murders of law enforcement officers. At the same time, the commission of terrorist acts against law enforcement officials is a feature of terrorism in Kazakhstan. A major role in these processes has been brought by global trends in terrorism as a political weapon of the struggle for world power.

In order to protect national security field work is conducted to identify those who involved in extremist and terrorist activities within the territory of Kazakhstan, and hiding in our country from pursuing of law enforcement agencies of foreign countries for terrorist crimes outside of Kazakhstan. However, despite the taken measures, the extremist and terrorist activities is becoming more organized every year and new faces are involved in the ranks of such groups under the influence of external forces. In particular, the international extremist and terrorist organizations that hide behind religious rhetoric are trying to form radical views and beliefs in Kazakhstan society.

Their purposeful impact on the consciousness of individuals leads to a loss of a sense of patriotism and national identity, cultural, moral and family values. To undermine the foundations of the constitutional system international extremist and terrorist organizations, spreading radical ideas, provoke antisocial mood, making plans and intentions to commit acts of terrorism within the territory of Kazakhstan [1].

European countries are fighting terrorism in four main areas. The first is to identify and block financial flows that feed terrorism. The second is related to the development or updating of legislation and the conceptual framework in this area. The third direction is improvement of cooperation between law enforcement agencies of individual countries. The fourth area is to improve the interjudicial cooperation [2].

To date, the fight against terrorism in the Republic of Kazakhstan is conducted in all four directions. At the same time, great importance is given to legal support of terrorism prevention. However, a comparative legal analysis of existing legal acts shows the limitations of the conceptual framework in this area and, therefore, the lack of vision for the fight against terrorism and extremism.

The most serious shortcoming in the fight against new challenges and threats in the Republic of Kazakhstan was the lack of a legal interpretation of the concept of "extremism". Developer of the law "On Countering Extremism" did not see the difference between the concept and classification of extremism. So, in section 5, Article 1 of the Law of the Republic of Kazakhstan "On Countering Extremism" there was specified classification of this phenomenon on the political, national and religious instead of the definition of "extremism". With vague idea of extremism, it is difficult to prosecute extremist organizations. The conclusion is very simple: we must begin the fight against extremism and terrorism from the definition of what is terrorism and extremism [3].

In the future the situation in some way has been fixed. Thus, according to section 5, Article 1 of the Law of the Republic of Kazakhstan "On Countering Extremism" (as amended on February 13, 2012) extremism has several meanings. By extremism the law mean:

1) organization;

2) commission:

– by an individual and (or) legal entity, association of individual and (or) legal entities actions on behalf of organizations duly recognized as extremist;

– by an individual and (or) legal entity, association of individual and (or) legal entities actions pursuing the following aims:

• forcible changing of the constitutional order, violation of the sovereignty of the Republic of Kazakhstan, integrity, inviolability and inalienability of its territory, undermining of national security and defense of the state, violent seizure of power or forcible retention of power, creation, management and participation in an illegal paramilitary forces, organization of armed rebellion and participation in it, incitement of social, class hatred (political extremism);

• incitement of racial, ethnic and tribal hatred, including which is associated with violence or proclivity for violence (national extremism);

• incitement of religious hatred or enmity, including which is associated with violence or proclivity for violence and the use of any religious practice that causes a security threat, danger to life, health or morality or the rights and freedoms of citizens (religious extremism) [3].

The said definition of extremism is clearly blurred, which causes some difficulties in the law enforcement activity. In turn, considered definition can be the cause of the distortion of statistical data on the phenomenon under consideration.

As the legislator did not understand the relationship of the terms "extremism" and "terrorism", the series of collisions were formed in the Criminal Code of the Republic of Kazakhstan. Before proceeding to examine them, you must first establish the relation of the concepts.

In the Explanatory Dictionary of Russian language by S. I. Ozhegov extremism is understood as the adherence to extreme views and measures [4]. Based on the foregoing, extremism is not only a criminal ideology, but also committing extreme measures, which can be the committing of terrorist acts. Therefore, in some situations, extremism is an ideological basis of terrorism, as well as its final phase. Thus, the concept of "extremism" is broader than the concept of "terrorism". The number of legal scholars also hold this point of view.

However, the legislator to extremist crime include the following acts provided by articles 174 — Incitement of social, national, ethnic, racial, class or religious hatred, 179 — Propaganda or public appeals to seize or retain power, and equally seizure or retention of power or forcible change the constitutional order of the Republic of Kazakhstan, 180 — separatist activities, 181 — armed rebellion, 182 — creation, Guide extremist group or participating in its activities, 184 — sabotage, 258 — the financing of terrorist or of extremist activity and other assistance terrorism or to extremism, 259 — recruitment or preparation any armed persons for the organization of of terrorist or of extremist activity, 260 — the passage of terrorist or extremist preparation, 267 — illegal paramilitaries organization, 404 — creation, management and participation in the activities of illegal public and other unions (Part 2 and 3) and 405 — the organization of and participation in the activities of a public or religious association or other organization after the court decision banning of their activities or elimination in for their exercise of extremism or terrorism of the Criminal Code (Art. 3 para. 39 of the Criminal Code).

A terrorist crimes are acts punishable under articles of 170 — mercenaries, 171 — creation of base (of camps) preparation of mercenaries, 173 — an attack on of persons or organizations enjoying international protection, 177 — attempt on the life of the First President of the Republic of Kazakhstan — Leader of the Nation, 178 — attempt on the life of the President of the Republic of Kazakhstan, 184 — diversion, 255 — an act of terrorism, 256 — propaganda of terrorism or public appeals to commit of an act of terrorism, 257 — creating, directing a terrorist group and participation in its activities, 258 — the financing of terrorist or extremist activity and other assistance terrorism or to extremism, 259 — the recruitment or training of any armed persons in order to organize of terrorist or of extremist activity, 260 — the passage of terrorist or extremist preparation, 261 — hostage taking, 269 — the attack on buildings, means of transportation and communication, or a seizure and 270 — theft, as well as the seizure of aircraft or vessel or railway rolling stock of the Criminal Code (Art. 3 p. 30 of the Criminal Code) [5].

Study of considered crime components allows you to see the traditional illogic and the absence of any conceptual approach in their design in terms of consolidation in a particular part of attributes of different types of threats.

In this connection it is necessary to unify the language of threats in the criminal law. The terms "terrorism" and "extremism" are very multifaceted, resulting in blurred the line between law these concepts.

In 2013 the Senate approved the bill "On amendments and additions to some legislative acts of Kazakhstan on combating terrorism". It is offered to review the key concept of the term "terrorism". Modern terrorism, by general repute of experts, should be regarded not as a specific criminal act, but as a complex social and political phenomenon. Therefore, the bill provides a new definition of terrorism as an ideology of violence and practices of impact on decision-making by public authorities, local governments or international organizations, by committing, or threats of violence or other criminal acts involving the intimidation of the population and aimed at serious personal injury, society and the state" [6].

Later, in section 5, Article 1 of the Law of the Republic of Kazakhstan dated July 13, 1999 "On Combating Terrorism" terrorism is defined as "an ideology of violence and practices of impact on decision-making by public authorities, local governments or international organizations, by committing, or threats of violence or other criminal acts involving the intimidation of the population and aimed at serious personal injury, society and the state" [7].

In our opinion, based on the analysis of the legal interpretation of the term "terrorism", it follows that today considered definition completely absorbs the definition of "extremism". Thus, the fight against new challenges and threats has not so far a proper legal framework in the Republic of Kazakhstan. In other words, the anti-terrorism legislation of the Republic of Kazakhstan has blurred the concept of counter-terrorism.

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Procedural activity of the court in adversarial criminal proceedings

Abstract: In the article the general rules of judicial activity of court are analysed in contention criminal procedure. An accent is done on the changes brought in criminal procedure by a new legislation. Tasks and plenary powers are examined ships following from principle of contentionness. The terms of establishment of equality of rights of parties are analysed in the Kazakhstan criminal trial. A comparative analysis is conducted with a former legislation.

Keywords: criminal procedure, court, judicial activity, justice, contentionness, judicial control, inquisitional judge.

The Constitution of the Republic of Kazakhstan proclaims principles such as justice in the Republic of Kazakhstan shall be exercised only by the courts, the judges are independent and subject only to the Constitution and laws, jurisdiction is based on the equality of the parties. It is not possible to further judicial reform in Kazakhstan without improving the criminal procedural law. As a strategic objective defined development of an independent judiciary able to reliably protect the rights and freedoms of man and citizen. As the key challenges placed, improving judicial order, overcoming accusatory of courts, the eradication of judicial red tape and fraud during the pre-trial, trial production, improvement of adversarial proceedings, the improvement of pre-trial proceedings in criminal matters, etc.

The implementation of these tasks is impossible without taking into account the requirements of international legal standards and practice of the European Court of Human Rights. Thus, the study of procedural activities of the court and its legal status as a major participant in adversarial criminal proceedings in a radical transformation in the country is of particular relevance. There is no doubt that the adopted July 4, 2014 a new Code of Criminal Procedure of the Republic of Kazakhstan has secured a democratic principle as the implementation of the proceedings on the basis of equality of the parties, and the legislature has defined the role and importance of the court in it. However, regulation of such an important principle in the criminal process has generated a lot of questions related to the mechanism of its implementation, as representatives of law enforcement, in particular judges, prosecutors can not break away from the stereotypes of the past, "inquisitorial" process. The spread of the principle of "adversarial" only in the judicial stage of the criminal process, as time has shown, does not give the expected result due. The predominance of elements investigative process in pre-trial stages and a lack of judicial control creates a lot of problems in the field of human rights, freedoms of citizens involved in criminal proceedings.

In this connection, is required to investigate the most important and urgent problems arising in the course of procedural activities of courts in adversarial criminal proceedings. The most relevant are presented for the following tasks: based on the study of the genesis of the procedural activities of the court to investigate the subject and methodology of judicial activity; clarify the status of the court in adversarial criminal proceedings; clarify the procedural functions of the court in adversarial criminal proceedings; develop proposals to improve the regulation of the court in the pretrial and trial stages of the criminal process in order to further strengthen its competitive started. The new Criminal Procedure Code defines a new subject of criminal proceedings — "investigating judge", marked the new powers of the investigating judge in pre-trial proceedings, proposed solutions to a number of controversial issues related to the activities of the court in the trial of criminal cases. However, further analysis needs not only the conceptual and categorical apparatus, but also the issues of interaction of the court by the prosecution and defense, as well as other participants in the criminal process, the ratio of the concept of justice and judicial review, the court procedural status at certain stages of the criminal process. A retrospective analysis of the origins of the teachings and beliefs of the procedural activities of the court in an adversarial criminal trial shows that the legislators of all countries regardless of the form of government, state government, political regime and legal system are its values and to this day. Moreover, mankind has not invented a more advanced and civilized model of criminal procedure, as adversarial, where the court is the guarantor of a balance between the interests of the individual, society and the state. In adversarial criminal trial court takes a leading position and acts as an independent arbiter, which aims to organize and ensure equal competition parties, by establishing, studies obtained evidence in a criminal case, as well as creating conditions for the realization of the rights and obligations of parties to the proceedings. Court is in adversarial criminal trial function of administration of justice and judicial control. Justice is an activity of the court to review the criminal case on the merits and the decision to recognize the person guilty or not guilty of statutory procedural form. Judicial review — this is a test carried out by the court to establish the legality and validity of actions (inaction) and decisions of the investigator, the prosecutor in the manner prescribed by law and initiated by parties to the proceedings. As a rule, it includes the following powers of the court:

- monitor the application of coercive procedural measures;
- control of the legality of investigative actions affecting the constitutional rights and freedoms of individuals involved in criminal proceedings;
- legalization and deposition data collected by the parties during the investigation as evidence, that is acceptable for use in legal proceedings;
- consideration of complaints and petitions of the parties and participants in the criminal process steps, decisions of the investigator, prosecutor;
- approval of procedural agreements, such as plea bargain, procedural cooperation and conciliation.

The active participation of the court in the collection, verification and evaluation of evidence must be preserved for the court, as it affects the goodness of the trial, since the knowledge of the circumstances of the criminal case — a direct duty of the court. Such knowledge can be carried out only by proof, namely, for the formation of inner conviction and the further study of the judicial final decision in the criminal case. But it is necessary to observe the court some of the requirements:

- a manifestation of activity in passivity of the defense, prosecution and other stakeholders;
- preventing the indictment or other bias;
- the establishment of objective truth in the case;
- evidence of active vessels within reason and within the limits of the charges.

It is interesting to provisions governing the pre-trial proceedings in criminal procedural law of Ukraine, where an institution of the investigating judge. In accordance with the provisions of Chapters 3 and 9 of the Code of Criminal Procedure, the investigating judge has five supervisory powers: taking steps to ensure the production of, and authorizes individual conducts investigations, authorizes the most covert investigative actions, considering the complaints of the prosecution at the pre-trial stage of the process. By examining actions performed by the investigating judge are:

- examination of the witness, the victim and the deposition of these indications for the main trial;
- authorizing a search of the home or other possessions;
- the appointment of expertise. Moreover they may be initiated by both parties.

In criminal proceedings in France during the preliminary investigation, the investigating judge is involved, which at the end of investigative inquiry conducted under the supervision of the prosecutor, initiate an investigation.

In Germany under investigation participates coroner that the investigation does not hold, and deal with complaints about the actions of the inquiry, authorizes actions restricting constitutional rights and freedoms and to legalize the evidence.

The appearance of the procedural figure of the investigating judge with the relevant procedural powers to exercise control over the legality of pre-trial creates real opportunities parties to compete on equal terms. So far, the district court judges had certain powers, but real control over the investigation had not. How figuratively put D. K. Kanafin — "judges have become Keeper of the Seals", their activities snaps authorization of arrest [1]. Moreover, if all leave in the previous form, then there would be a lot of problems related to ensuring the independence, impartiality and fairness of the judicial activities in general. For example, long remained an open question about the participation of a judge authorizing the arrest, in the further consideration of the criminal case on the merits. Legislator in circumstances eliminating the judge from the case, did not provide for such a case. Although the court giving consent to the arrest of the accused, should not participate in the subsequent stages of the criminal process. The name "investigating judge" already means that his powers are terminated with the transfer case to the court in a criminal case on the merits.

The new Code of Criminal Procedure has already provided disqualification of a judge, if he was involved in the case as investigating judge, and also deal with complaints and protests against the decision of the investigating judge.

One of the international experts G. Zh. Suleimenova noted that "It should be recognized that in general the idea of creating such a subject process deserves unconditional support, since it is a first step towards institutionalizing the Institute of judicial review. This step is determined by the official responsible for the administration of this function are specified not only by his powers, but also the procedure of interaction with him the other participants in the process. Occurs even if preliminary, are not yet clear, but the separation of the functions of justice of the function of procedural control of law and respect for human rights" [2].

However, the introduction of the institution of the investigating judge continues to raise many questions. For example, what about the prosecutor's supervision, in which the court should be the investigating judge, logistics, distribution and other loads.

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"Fight" or "mechanism to counter"

Abstract: The article analyzes the relationship between the concepts "fight against crime" and "mechanisms for combating crime". The practice of the fight against crime and its scientific basis suggest the appropriateness of using along with the term "crime control" and the phrase "a mechanism to crime", which indicates the possibility of using as to affect the crime of different tools and techniques and their relationship together. In addition, it emphasizes the sequential progress of their application in order, it is adequate as a crime as a whole and its individual species.

Keywords: criminology, crime, fight against crime, mechanism to counter crime.

In criminology uses various terms to describe the activities of the state aimed at neutralizing such negative socio-legal phenomenon as crime. The most common of these is the term "struggle". In etymological terms it means the desire of certain persons in conflict with the opposing party, destroy it and defeat. In this case, this kind of process involves overcoming numerous obstacles, the resistance of the opposing side, which is actively pursuing its interests. This gives the fight shade of permanent conflict that has lasted until the moment when one of the parties to the maximum is not winning, but at a minimum — establishes control over the stranded weaker opponent.

Supporters of the projection of the term "struggle" believe that, firstly, the warring parties are the state, relies on the assistance of various kinds of non-state entities and individuals, as well as representatives of the criminal environment,

acting both independently and in the form of complicity [1, 14–15]. In this respect, it is interesting position, including criminal groups in the form of a cohesive organized criminal groups of people and political persuasion, created for committing grave or especially grave crimes, the political system of the state, which stresses the undoubtedly high level of social danger of this component of the criminal environment, really opposing state [2, 426–431].

Secondly, the fight against crime is realized by the means and methods of influence on it. They take the form of various measures. Therefore, the latter differentiate the economic, political, legal, psychological, organizational, technical, and others [3, 50–51].

Third, it is determined that the totality of the above measures is intended to provide a solution specific range of problems, leading eventually to the strategic goal: to prevent social disruption due to the establishment of control crime as a socio-legal phenomenon [4, 102–116].

In this case, you must make a reservation, that the objectives of the impact of crime on the individual to understand the various criminologists. Thus, it is possible to share the view of Inshakov S. M., who believes that the purpose of the impact on crime is to overcome its threshold parameters [5, 90–91]. When this really solves the problem, according to this scientist, is to overcome the first threshold in the form of ridding society of a crisis state crime, leading to a crisis, the shift state leaders, the revolutionary upheavals and the loss of national independence.

In the above postulates, detailing such a thing as the fight against crime, it applies to the scientific problem it is important to formulate the concept of the fight against crime.

However, it seems appropriate to point out the fact that a number of scientists subjected to critical analysis and evaluation of the negative aspects of the paradigm of "fighting crime", which, in their opinion, puts to the state, society, criminal justice agencies insipid purpose, for example, holds enforcer hostage criminal statistics and brings all his work to the infamous "struggle" for performance and does not require a thoughtful and in-depth analysis of the crime situation [6, 17].

In addition, target setting to fight the war against crime contains a potential danger of a return to the already traversed path punitive criminal policy.

In this regard it should be noted that the term "struggle" in essence reflects the conflict between the warring parties. On this basis, it is possible to allocate certain aspects.

Firstly, it is the practical side, which is connected with the activities of the special terms of criminal justice, authorized by the state to identify, disclose, to prevent and suppress unlawful acts. Practical implementation of their powers — the inevitable object of criticism, because their activities related to the use of coercive measures. Impact and direction of the state, including legal, policy in this area of social relations based on the specific realities. Nevertheless, the existence of a community crime inevitably requires the use of means and methods to influence it.

Second, the task of legal science in any period of time is to generalize the practice of law enforcement activities and to formulate in this regard theoretical and practical recommendations. If we talk about the outer side of the problem, it is quite acceptable to use along with the term "crime control" and the phrase "a mechanism to crime". This is possible because as the term indicates the possibility of using to influence crime various means and methods, as well as their relationship. In addition, it emphasizes and consistent course of their implementation in a manner consistent with standards possible as crime in general and its individual species.

Based on the meaning of the term "mechanism" in the definition of "mechanism to counter crime" seems correct to talk about unity naturally arranged and interconnected elements defining the procedures of the state and non-state actors to counter such negative socio-legal phenomena as crime.

Analysis of the terms used in the theory of criminology to indicate activity of the state aimed at neutralizing the crime, the study of the term "crime control" in the context of his positive perception and critical analysis by criminologists, lead to the conclusion that the "struggle" for essentially reflects the conflict between the warring parties, which should highlight the specific aspects.

First of all, it is a practical side in the form of a special range of activities of criminal justice officials, authorized by the state to identify, disclose, to prevent and suppress unlawful acts.

Second, the theoretical aspect, which consists in the fact that generalize the practice of law enforcement agencies and to formulate theoretical and practical recommendations.

The practice of the fight against crime and its scientific basis suggest the appropriateness of using along with the term "crime control" and the phrase "a "mechanism to counter crime"", which indicates the possibility of using as to affect the crime of different tools and techniques and their relationship together. In addition, it emphasizes the sequential progress of their application in order, it is adequate as a crime as a whole and its individual species.

With regard to the mechanisms to counter specific types of crimes that would mean that its components will be the appropriate means and methods that are implemented in the framework of well-defined law enforcement functions: operational and investigative activities, inquiry, preliminary investigation of the compliance with the criminal law.

This mechanism is applied to counter, for example, crimes related to trafficking in narcotic drugs and psychotropic substances will include, first, a series of functions of criminal justice; Second, a set of law enforcement activities to ensure control over the legal trafficking in narcotic drugs and psychotropic substances, and pre-trial proceedings in cases of crimes and offenses, excited by the results of this monitoring, the presence to the legitimate reasons and grounds and, thirdly, a group of measures of a preventive nature.

Model of the mechanism will function effectively conditional on the implementation arrangements that determine

the subjects of these functions, as well as legal measures, providing them the appropriate authority. With the help of organizational and legal measures under review mechanism is primarily formed, and then operates. In the presence of certain conditions to the mechanisms for combating crime upgraded.

Considering the nation-wide measures to fight crime and their relationship with the mechanism of combating crime, should recognize their basic nature of the functioning of the mechanism as the nation-wide reaction to crime in general. This is achieved by the proper implementation of its own political, economic and social measures to prevent the crisis state of society, as well as by deliberate action on the organizational and legal measures by which mechanism is formed by combating crime.

In general, the mechanisms for combating crime should be understood as a set of interrelated functions of law enforcement focus, the contents of which are the appropriate means and methods of influence on these social-negative phenomenon. The subjects of these functions are defined in the legal order. As a result, it creates and updates a model of an appropriate mechanism, the effectiveness of the work depends on the measures that are national in nature.

Mechanisms for combating crime are formed by carrying out organizational measures related to the definition, modernization or the creation of new government agencies, designed to resist crime. At the same time of special importance to determine their goals and objectives, and then the corresponding system and structural devices, form of organization, interaction with other law enforcement agencies and other entities whose activities are focused on the implementation of anti-crime activities.

No less important for optimal combating crime legal action, creating a legitimate basis to combat crime. These lead to the effective legislation in the sphere of combating crime.

For example, criminal law and criminal procedure law is considered only in relation to the problem of combating crime, representing only one of the tools of resistance. This is the mechanism of differentiation of social conditions, relationships, activities into two classes: the permissible without requiring exposure of the state, and those who exercise of this right are defined as unacceptable as requiring coercive state action.

In fact, the role of the criminal law is not limited to only the tasks to crime. It has a significant influence on the processes that underlie outside the criminal sphere. Solving optimization problems of legal relations shows that the right serves as a link between the criminal and the other processes in the society.

On the one hand, the impact on the criminal process modifies the system of social relations. Change and evaluation activities, change of activity, behavior change and social processes. On the other hand, the very legal space is determined by the states and processes in a variety of public relations. Changes in social relations outside the crime and causing changes in the field, makes change, amend the system of combating crime.

Today, it is clear that we need not fight against crime, and such an organization of social relations, which will optimize the crime, to put it in an environment in which the costs of combating crime and loss in the amount of crime is minimal.

Organizational and legal measures create the preconditions for direct law enforcement agencies to detect, detection and investigation, prevention and suppression of unlawful acts. There is an important application time because due to the criminal law, criminal procedure, search operations is the process of implementation of the criminal policy to combat crime.

Organizational measures aimed at creating a mechanism for combating crime in criminology individual scientists associated primarily with the structural maintenance of combating crime. Others view organizational measures to combat crime in a broader sense, believing that they are intended to contribute to neutralize or minimize the criminogenic effects of unprofessional management and organizational activities. In particular, according to Burlakov V. N., among organizational will include measures to improve the management of migration processes of the population, to test the efficient and financially secure mechanism for social adaptation of persons released from prison, etc. [6, 183].

There is a point of view that organizational measures to combat crime are criminological forecasting and programming of the fight against crime, ensuring interaction between law enforcement agencies, increase management efficiency in the fight against crime, etc. [7, 32].

It seems appropriate to share the view of Borodin S. V. and other criminologists, in particular, of Malkov V. D., Maslov S., Pleshakov V. A., Tokarev A. F., who believe that the elements of the organizational framework for the prevention of crimes are appropriate functional and structural information and analytical support for preventive activities of law enforcement body, criminological forecasting, planning and programming, as well as the organization of internal and external cooperation in the field of preventive work [8, 95–187].

This indicates that the responses to crime and manifestations of social pathology, is based on a system of interrelated organizational elements. In this case, the organization may have to crime and national and regional, as well as develop appropriate, in the activities of state bodies and public organizations.

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Judges — carriers of the judiciary, legal status and legal regulation

Abstract: The article clearly defined problems in the system of law enforcement bodies of the Republic of Kazakhstan. One of the branches of government is the court, designed to administer justice. Justice in the Republic of Kazakhstan shall be exercised only by the court for the purpose of considering and resolving various social conflicts, which are based on actual and alleged violation of the rights of subjects. Courts hear civil, criminal and administrative cases in the procedural forms prescribed by law.

Keywords: the judiciary, the judge's independence, the legal status of the law.

"The judge is independent, but its independence is clearly regulated by law, t. e. "limited", outlined the legislative, normative legal acts, which the judge strictly subordinate".

The Constitution of the Republic of Kazakhstan in 1995 proclaimed the separation of the judiciary from the executive and legislative authorities, highlighting it as an independent branch of government. Purpose of the judiciary is to implement the protection of the rights, freedoms and legitimate interests of citizens, state bodies, organizations, enforcement of the Constitution of the Republic of Kazakhstan, laws and other normative legal acts, international treaties of the Republic. Thus plays the role of the judiciary in the first place, the arbitrator to resolve all conflicts and disputes about the law, and, secondly, — body providing performance and adherence to the rule of law in the state.

The judge is a person appointed or elected in accordance with the law as a judge working in the appropriate court and exercise its powers in a professional manner.

The legal status of judges includes independence and tenure of judges, as well as its integrity. Independence means that judges are independent and subject only to the Constitution. Nobody has the right to interfere in the administration of justice and to exert any influence on the judge. The judge is not obliged to give any explanations concerning the discussed or put in the production of cases (Art. 25 of the Constitutional Law on the Judicial System and Status of Judges).

The legal status of judges is governed by the legislation on the judiciary in the Republic of Kazakhstan, which is a system of normative legal acts determining the order of formation of vessels, the principles of their organization and activities, the judicial system, the composition, structure, competence of each court level, and the legal status of judges.

The main documents regulating the activities of the courts and the status of judges is the Constitution of the Republic of Kazakhstan and Constitutional Law № 132-II dated December 25, 2000 "On the Judicial System and Status of Judges of the Republic of Kazakhstan".

In accordance with Article 77, paragraph 1, of the Constitution of the Republic of Kazakhstan and Art. 25 of the Constitutional Law on the Judiciary judge with justice shall be independent and subject only to the Constitution and the law. The judge in the exercise of the powers vested in them by law are not subject to any authorities and officials of the executive and legislative branches of government and accountable to a higher tribunal.

"The judge is independent, but its independence is clearly regulated by law, ie. E. "Limited", outlined the legislative, regulatory legal acts, which the judge strictly subordinate."

Casework court is not bound by the opinion of participants of the trial, he did not favor either the prosecution or the defense. The judge in proceedings must be impartial and make decisions on their inner conviction, based on an assessment of the evidence and considered to be guided in this case only the Constitution and the law.

He independence of judges is protected by the Constitution and laws, and is provided by:

1. the statutory procedure for the administration of justice;
2. the prohibition under threat of prosecution of whatsoever interference in his work on the administration of justice;
3. the establishment of liability for contempt of court;
4. establish procedures for the selection, appointment, termination and suspension of powers of a judge, his right to resign;
5. provision of judges by the State of contents and social security appropriate to their status.

One of the branches of government is the court, designed to administer justice. Justice in the Republic of Kazakhstan shall be exercised only by the court (Article 75 of the Constitution of Claim 1) to consider and resolve various social conflicts, which are based on actual and alleged violation of the rights of subjects. Courts hear civil, criminal and administrative cases in the procedural forms prescribed by law.

Judicial power is exercised on behalf of the Republic of Kazakhstan and is intended to protect the rights, freedoms and legitimate interests of citizens and organizations for ensuring the observance of the Constitution, laws and other normative legal acts, international treaties of the Republic.

Everyone is guaranteed judicial protection against any unlawful decisions and actions of public bodies, organizations, officials and other persons that infringe or restrict the rights, freedoms and legitimate interests under the Constitution and laws of the republic.

No one may be deprived of the right to a hearing in compliance with all requirements of law and justice, competent, independent and impartial tribunal.

The judges in the administration of justice are independent and subject only to the Constitution and the law. Not allowed the adoption of laws or other normative legal acts that would impair the status and independence of judges.

What is interfering with the activities of the court of justice is prohibited and punishable by law. On specific cases not under reporting.

Judicial decisions and the requirement of judges in the exercise of their powers are binding on all public authorities and their officials, individuals and legal entities. Failure to comply with court decisions and requirements of the judges entails liability under the law.

According to the Constitution (Article 79 item 3) and the Decree of the President having the force of constitutional law of 25 December 2000 "On the Judicial System and Status of Judges of the Republic of Kazakhstan" judges may be:

- A citizen of the Republic of Kazakhstan.
- Reached the age of 25 years.
- A higher legal education.
- Impeccable reputation.
- Experience in the legal profession for at least two years.
- Passed a qualifying exam.
- Has successfully completed an internship.
- Have received positive feedback plenary session of the court.

Superior court judge must be a citizen, meet the above requirements, having experience in the legal profession for at least 5 years, of which, as a rule, at least two years by the judge.

The judge is obliged to:

– Strictly observe the Constitution and laws of the Republic of Kazakhstan.

– In carrying out its constitutional responsibilities for the administration of justice, as well as during off-duty respects with the requirements of judicial ethics and avoid anything that could discredit the authority and dignity of a judge or raise doubts as to its objectivity and impartiality.

– Oppose any attempts of unlawful interference with the administration of justice.

– To preserve the confidentiality of judicial deliberations.

The office of judge is incompatible with a deputy's mandate, holding other paid offices except teaching, research and creative activities, engage in entrepreneurial activity, enter a governing body or a supervisory board of a commercial organization.

Judges may not be in parties, trade unions, to advocate for or against any political party.

Thus, the law, in addition to citizenship, sets the age, educational, professional and moral qualifications. This is due to the nature of the judicial activity that requires not only sufficient theoretical knowledge and practical experience of presence, which usually comes with age, but also moral perfection. The judge must be honest and well-mannered man, be not an evil character in all cases be dignified. Impatience, irritability, inability to listen patiently to the parties and other participants in the process prevent the imposition of impartiality and rightly solutions. According to the "Basic Principles on the Independence of the Judiciary", candidates for judicial office shall be individuals of integrity and ability.

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The discretion of a law enforcement official exemption from punishment in connection with the change of situation

Abstract: the Article is devoted to the discretion of the authority in the Institute of exemption from punishment in connection with the change of environment. Presents arguments allowing to judge about the expansion interpretation of the content standards for exemption from punishment in connection with the changing situation and proposed solutions aimed at narrowing judicial discretion in applying the exemption from punishment in connection with the change of environment.

Keywords: discretion of the authority, exemption from punishment in connection with the change of situation, a person who has committed a crime of small or average gravity, loss of public danger, the situation, change the situation.

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Усмотрение правоприменителя в освобождении от наказания в связи с изменением обстановки

Аннотация: статья посвящена усмотрению органа в институт освобождения от наказания в связи с изменением среды. Приводятся аргументы, позволяющие судить о расширительном толковании содержания нормы для освобождения от наказания в связи с изменением ситуации и предлагаются решения, направленные на сужение судейского усмотрения при применении освобождения от наказания в связи с изменением ситуации.

Ключевые слова: усмотрение органа, освобождение от наказания в связи с изменением ситуации, человек, который совершил преступление небольшой или средней тяжести, потеря общественной опасности, ситуация, изменить ситуацию.

Усмотрение правоприменителя как правило связано с толкованием норм уголовного закона, которые предоставляют выбор того или иного варианта решения соответствующей проблемы. Оно представляет собой

деятельность правоприменительных органов, в том числе и при реализации освобождения от наказания в связи с изменением обстановки.

Освобождение от наказания в связи с изменением обстановки, содержится в ст. 80.1 Уголовного кодекса РФ «Освобождение от наказания в связи с изменением обстановки». Такое освобождение на сегодняшний день возможно лишь по решению суда. Следовательно, круг субъектов правоприменения в этой части ограничен, что, несомненно, является положительным аспектом рассматриваемой проблемы, поскольку в ранее действующем законодательстве помимо суда принимать решение по данному вопросу могли суд, прокурор, а также следователь и дознаватель с согласия прокурора. Это отчасти способствует ограничению возможных злоупотреблений правоприменителями. Однако, если обратить внимание на содержание ст. 80.1 УК РФ то можно прийти к выводу, что ее реализация не всегда позволяет правоприменителю осуществлять верное толкование данной нормы, в связи с чем на практике возникают различного рода сложности.

Так, ст. 80.1 УК РФ регламентирует следующее: лицо, впервые совершившее преступление небольшой или средней тяжести, освобождается судом от наказания, если будет установлено, что вследствие изменения обстановки это лицо или совершенное им преступление перестали быть общественно опасными. Из ее токования вытекает следующее: лицо должно впервые совершить преступление, которое должно быть небольшой или средней тяжести. Лицом, впервые совершившим преступление по уголовному закону, признается лицо, не совершавшее его либо ранее совершавшее, но судимость за него была снята или погашена в установленном законом порядке. Преступления небольшой тяжести представляют собой умышленные и неосторожные деяния, за которые максимальное наказание, не превышает трех лет лишения свободы. Преступления средней тяжести это умышленные и неосторожные деяния, за совершение которых максимальное наказание, не превышает пяти лет лишения свободы, и неосторожные деяния, за которые максимальное наказание, превышает три года лишения свободы. В этой части рассматриваемая норма содержит положения закона являющиеся понятными и их применение не подлежит расширительному толкованию. Сложность представляет оставшаяся конструкция. Законодатель закрепляет, что при наличии этих оснований лицо освобождается судом от наказания, если будет установлено, что вследствие изменения обстановки это лицо или совершенное им преступление перестали быть общественно опасными. Из чего следует, что если лицо впервые совершило преступление небольшой или средней тяжести, его освобождают от наказания, при соблюдении двух следующих условий: утрата общественной опасности лицом и утрата общественной опасности преступлением. Уголовный закон в этом случае презюмирует, что лицо само по себе обладает общественной опасностью, вне зависимости от совершенного им преступления. Эта позиция не верна и крайне опасна, поскольку возвращает нас в далекое прошлое, когда осуществлялись научные разработки позволяющие говорить о «врожденном преступнике», сейчас же можно вести речь, о том, что общественная опасность лица не может существовать самостоятельно, она возникает лишь в связи с совершенным преступлением. Второе условие предполагает, что возможна утрата общественной опасности преступлением, такая ситуация вполне реальна, в подобного рода случаях посредством реализации методов уголовной политики можно говорить как о декриминализации в целом, и о прекращении уголовного дела в связи с отсутствием в действиях лица состава преступления, а не об освобождении от наказания в связи с изменением обстановки. Очевидно, что правоприменение в этой ситуации осложняется самим содержанием нормы, которая игнорирует как положения действующего законодательства, так и теоретические разработки, имеющиеся на этот счет. Существует еще одна проблема, которая позволяет часто усомниться в справедливом усмотрении при принятии решения об освобождении от наказания в связи с изменением обстановки. Так, УК РФ определяет, что утрата общественной опасности может происходить вследствие изменения обстановки. Относительно понятия обстановки нет единого подхода в науке уголовного права, поскольку это явление как правило включает различные составляющие, и в теории уголовного права воспринимается в разных вариациях. Определяя правовую природу обстановки в науке уголовного права представляют различные мнения, в основном относительно составляющих обстановки. К примеру, обстановка охватывает широкий круг явлений и включает общую историческую и социально-политическую обстановку и конкретные условия жизни и деятельности коллектива, в котором было совершено преступление [1]. Обстановка это условия совершения какого-либо деяния [2], совокупность взаимодействующих обстоятельств, при наличии которых совершается преступление [3], объективные условия, в которых происходит событие преступления [4]. Обстановка — это состояние явления, характеризующееся политическими, экономическими, идеологическими и иными свойствами, в определенном месте и на определенный отрезок времени, влияющими на категорию и степень выраженности общественной опасности совершенного преступного деяния и лица, его совершившего. Не вдаваясь в дискуссию относительно данного понятия, отметим, что как правило, обстановка это конкретные обстоятельства (условия), в которых происходит какое-либо событие. Можно согласиться с тем, что обстановка может влиять на степень выраженности общественной опасности уменьшать, или наоборот повышать ее. Если обстановка может влиять на степень выраженности общественной опасности преступления, то возникает серьезная проблема связанная с тем, что может ли ее изменение (обстановки) влиять на утрату общественной опасности. Ее изменение

связано с изменением внутренних составляющих. Разрешить данную проблему помогает сам законодатель исходя из толкования ст. 9 УК РФ «Действие уголовного закона во времени» и ст. 10 УК РФ «Обратная сила уголовного закона». Где речь идет о том, что временем совершения преступления признается время совершения общественно опасного действия (бездействия) независимо от времени наступления последствий, а преступность и наказуемость деяния определяются уголовным законом, действовавшим во время совершения этого деяния. Правила обратной силы уголовного закона устанавливают положение согласно которому уголовный закон, устраняющий преступность деяния, смягчающий наказание или иным образом улучшающий положение лица, совершившего преступление, имеет обратную силу и утрата общественной опасности возможна только в связи с принятием нового уголовного закона устраняющего преступность деяния, а не вследствие изменения обстановки. Толкование такого основания как «изменение обстановки» в судебной практике в полном объеме ложится на правоприменителя, поскольку теория уголовного права не дает однозначного ответа на этот вопрос, то же самое имеет место и в УК РФ, где это понятие отсутствует. Расширительное токование изменения обстановки в этом случае однозначно выступает в качестве негативного явления. О чем свидетельствует имеющаяся практика реализации. Так, исходя из анализа уголовных дел мы пришли к выводу о том, что часто освобождение от наказания в связи с изменением обстановки подменяется иными видами освобождения от уголовной ответственности и от наказания, что явно неприемлемо и это является следствием неверной трактовки «изменение обстановки». Например, на практике это связывают с последующим позитивным поведением виновного и признаками деятельного раскаяния, в том числе возмещения ущерба и примирения с потерпевшим, с наличием у лица различного рода заболеваний, призывом на военную службу, увольнения с работы, смены места жительства и т. п. Все перечисленное вряд ли свидетельствует о том, что происходит вследствие изменения обстановки утрата общественной опасности.

Следовательно, с учетом изложенного можно констатировать, что содержание нормы предусматривающей освобождение от наказания в связи с изменением обстановки позволяет правоприменителю принимать решения основанные не на законе и уголовно-правовой доктрине, а исходя из своего внутреннего убеждения, что не всегда свидетельствует о ее правильной и законной реализации. В связи с тем, что ст. 80.1 УК РФ противоречит как доктрине, так и действующему законодательству ее нужно исключить из УК РФ.

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Criminal-legal nature of exemption from punishment in connection with the lapse of time of conviction court of the Russian criminal law

Abstract: the article is devoted to the criminal nature of exemption from punishment in connection with the lapse of time of the conviction of the court. The criteria help to distinguish between release from punishment due to the expiration of the period of limitation court's judgment of conviction and release from criminal liability in connection with the expiration of the limitation period. Presents the Foundation of the application of this exemption, defined categories of persons in respect of which the application of the exemption from punishment in connection with the expiration of the accusatory sentence is inappropriate.

Keywords: exemption from criminal punishment, release from punishment, release from punishment due to expiration of Statute of limitations conviction court, grounds for exemption from punishment in connection with the lapse of time of the conviction of the court, the expiry period.

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Уголовно-правовая природа освобождения от наказания в связи с истечением сроков давности обвинительного приговора суда по российскому уголовному законодательству

Аннотация: статья посвящена уголовно-правовой природе освобождения от наказания в связи с истечением сроков давности обвинительного приговора суда. Выявлены критерии позволяющие различать, освобождение от наказания в связи с истечением срока давности обвинительного приговора суда и освобождения от уголовной ответственности в связи с истечением сроков давности. Представлены основания применения такого освобождения, определены категории лиц, в отношении которых применение освобождения от наказания в связи с истечением сроков давности обвинительного приговора суда нецелесообразно.

Ключевые слова: освобождение от уголовного наказания, основания освобождения от наказания, освобождение от наказания в связи с истечением сроков давности обвинительного приговора суда, основания освобождения от наказания в связи с истечением сроков давности обвинительного приговора суда, течение срока давности.

Освобождение от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда представляет собой один из видов освобождения от уголовного наказания, который наряду с другими сосредоточен в главе 12 Уголовного кодекса Российской Федерации «Освобождение от наказания». Освобождение от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда регламентируется ст. 83 УК РФ, она закрепляет следующее:

1. Лицо, осужденное за совершение преступления, освобождается от отбывания наказания, если обвинительный приговор суда не был приведен в исполнение в следующие сроки со дня вступления его в законную силу:
   а) два года при осуждении за преступление небольшой тяжести;
   б) шесть лет при осуждении за преступление средней тяжести;
   в) десять лет при осуждении за тяжкое преступление;
   г) пятнадцать лет при осуждении за особо тяжкое преступление.

2. Течение сроков давности приостанавливается, если осужденный уклоняется от отбывания наказания. В этом случае течение сроков давности возобновляется с момента задержания осужденного или явки его с повинной. Сроки давности, истекшие к моменту уклонения осужденного от отбывания наказания, подлежат зачету.

2.1. Течение сроков давности приостанавливается, если осужденному предоставлена отсрочка отбывания наказания. В этом случае течение сроков давности возобновляется с момента окончания срока отсрочки отбывания наказания, за исключением случаев, предусмотренных ч. 3 и 4 ст. 82 и ч. 3 ст. 82.1 УК РФ, либо с момента отмены отсрочки отбывания наказания.

3. Вопрос о применении сроков давности к лицу, осужденному к смертной казни или пожизненному лишению свободы, решается судом. Если суд не сочтет возможным применить сроки давности, эти виды наказаний заменяются лишением свободы на определенный срок.

4. К лицам, осужденным за совершение преступлений, предусмотренных ст. 205, 205.1, 205.3, 205.4, 205.5 УК РФ, ч. 3 и 4 ст. 206, ч. 4 ст. 211, ст. 353, 356, 357 и 358 УК РФ, а равно осужденным за совершение сопряженных с осуществлением террористической деятельности преступлений, предусмотренных ст. 277, 278, 279 и 360 УК РФ, сроки давности не применяются.

Вопрос об уголовно-правовой природе освобождения от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда в науке уголовного права ставился крайне редко, на первый взгляд это свидетельствует о том, что основания и условия, данного вида освобождения вполне четко сформулированы законодателем и кроме того, данный вид освобождения носит императивный характер его применение судом является обязательным при соблюдении требований закрепленных в законе. Однако, если обратить пристальное внимание на уголовно-правовую сущность данного вида освобождения от наказания, то можно прийти к выводу о том, что в теории она связывается с разноплановыми явлениями. Например, с нецелесообразностью применения освобождения от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда, с утратой общественной опасности личности осужденного, а также с различными критериями, отражающими содержание данного вида освобождения (тяжестью совершаемых преступлений и самих сроков давности в их непосредственном сочетании). Не оспаривая данные позиции следует отметить, что освобождение от отбывания

наказания в связи с истечением сроков давности обвинительного приговора суда вряд ли имеет связь, с утратой общественной опасности личности осужденного, поскольку общественная опасность это объективная категория, которая не зависит от сознания и воли человека и является неотъемлемой характеристикой преступного деяния. Но как видно из содержания нормы, с деянием за определенные давностью сроки ничего не происходит, следовательно связывать сущность этого вида освобождения с утратой общественной опасности вряд ли уместно. Общественная опасность преступления по прошествии определенного срока не изменяется. Ее изменение может иметь место лишь при прекращении существования преступления как такового, ибо категория «общественная опасность» определяется именно на момент совершения лицом преступления и сопровождает его до момента декриминализации. Нецелесообразность применения освобождения от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда не является правовым понятием, не регламентируется действующим законодательством, и не смотря на то, что ей оперируют в науке уголовного права понятийный аппарат, данного явления не раскрывается, вообще, да и в отношении рассматриваемого вида освобождения в частности. С позицией о том, что давностные сроки должны сочетаться с тяжестью преступных деяний, увеличение срока от менее тяжкого к более тяжкому, можно согласиться. Эта позиция давно представлена в теории уголовного права и ее суть отражена в уголовном законе. Однако утверждать о том, что это правило отражает сущность освобождения от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда, с полной уверенностью вряд ли можно, поскольку это лишь один из аспектов правовой природы рассматриваемого вида освобождения.

Из толкования ст. 83 УК РФ можно отметить, что формальным основанием применения освобождения от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда выступает срок прошедший между вступлением приговора в законную силу и его исполнением, период которого зависит от тяжести совершенного преступления. Законодатель выделяет следующие сроки:

а) два года при осуждении за преступление небольшой тяжести;
б) шесть лет при осуждении за преступление средней тяжести;
в) десять лет при осуждении за тяжкое преступление;
г) пятнадцать лет при осуждении за особо тяжкое преступление.

Позиция законодателя в этой части основывается на том, что сроки давности непосредственно увязаны с тяжестью совершенных преступлений. Неисполнение приговора в данной ситуации происходит по обстоятельствам, не зависящим от поведения осужденного, а, как правило, по вине судебно-следственных органов (некомпетентность сотрудников, в части исполнения приговора, утрата уголовного дела, либо вследствие непреодолимой силы и т. п.).

По логике законодателя, применение уголовного наказания по истечению указанных сроков, является бессмысленным, поскольку цели наказания в отношении этого конкретного осужденного уже достигнуты, что и выступает сущностью рассматриваемого вида освобождения. По сути, речь идет о том, что у лица сформировалась посткриминальная позитивная позиция, направленная на воздержание от совершения преступления и соблюдение закона. О восстановлении социальной справедливости можно в таких ситуациях говорить отчасти. Поскольку сущность этой цели является противоречивой сама по себе. Но и в данном случае по прошествии значительного периода времени у потерпевших от преступлений меняется отношение к совершенному деянию и лицу его совершившему. То есть, достигнуты цели исправление без реального применения уголовного наказания, а также предупреждение преступлений и восстановление социальной справедливости. Однако это не касается случаев, когда лицо умышленно уклоняется от отбывания наказания. Если осужденный уклоняется от отбывания наказания, то течение сроков давности приостанавливается. Возобновляется с момента задержания осужденного или явки его с повинной. Сроки давности, истекшие к моменту уклонения осужденного от отбывания наказания, подлежат зачету.

В теории уголовного права давно ведутся дискуссии о давности исполнения дополнительных наказаний, на законодательном уровне этот вопрос до сих пор не урегулирован. В науке в такой ситуации предлагается применять общие правила давности исполнения обвинительного приговора.

На сегодняшний день на усмотрение суда оставлен вопрос относительно применения сроков давности к лицам, осужденным к смертной казни или пожизненному лишению свободы, при отрицательном решении эти виды наказаний заменяются лишением свободы на определенный срок. Также существуют категории преступлений за совершение которых применение давности исключается преступления террористической направленности и преступления против мира и безопасности человечества.

На основании изложенного можно констатировать, что уголовно-правовая природа освобождения от отбывания наказания в связи с истечением сроков давности обвинительного приговора суда неотъемлемо связана с достижением целей уголовного наказания, а также следует учесть, что данный вид освобождения требует законодательной корректировки в части урегулирования вопроса связанного с давностью применения дополнительных наказаний.

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Practice and the legitmate use of rehabilited grounds for termination criminal case

Abstract: This article describes the issues of the Institute of termination of criminal proceedings in the criminal procedure law. There is a detailed characteristics of the rehabilitating grounds for refusal to initiate criminal proceedings.

Keywords: criminal, criminal proceedings, identification.

Under the base of the termination of criminal cases are understood law circumstances that preclude prosecution or by the prosecution of evidence exclude the possibility of criminal sanctions and measures of social influence, or allow us to apply instead of criminal punishment measures public impact. — Scientists protsessualists were different formulations of the concept of "termination of the criminal case". N. V. Zhogin and F. N. Fatkullin understand beneath Procedure Act (act), which expresses the decision authorized by the officer of the absence of the required prerequisites for the criminal proceedings and to waive further reference [1]. A. L. Dubinsky noted that the termination of criminal proceedings "... department, where the final stage of the investigation, which authorized state body … sums up the case of manufactured paper analyzes and evaluates the totality of the evidence collected and on the basis of the decisions formulated the impossibility of further proceedings in connection with the presence of the circumstances provided for by law, and also resolves all issues arising out of the decision on the merits" [2]. S. A. Shafer calls the termination of criminal cases procedural safeguards against unwarranted criminal prosecution [3]. Thus, the termination of criminal proceedings, multifaceted phenomenon, and in the theory of criminal procedural law is viewed from different sides. Termination criminal cases — non-uniform shape of the preliminary investigation and this heterogeneity should be considered when designing definition. V general it can be concluded that the termination of criminal proceedings — this is the end of the preliminary investigation without sending the case to the court in establishing the grounds for excluding a person from criminal responsibility or circumstances precluding further criminal proceedings. Procedural activity in the case of fully finished and further progress of the case precluded if the decision to terminate has not been canceled in accordance with the law. Refusal to initiate criminal proceedings and termination of the Republic of Kazakhstan is possible only on the grounds specified by law. At the Institute of failure to prosecute assigned specific tasks: a) prevent illegal and unwarranted initiation of criminal proceedings; b) prevention of procedural costs, unnecessary suspicions of citizens, criminal prosecution of innocent persons; c) providing compensation for material damage caused by the offense; d) identification of the causes and conditions that contributed to the commission of offenses and the prevention of such acts. Depending on the possible legal consequences of criminal procedural grounds for refusal to institute criminal proceedings in the theory (Efimichev S. P., Stepic V. G., Szymanowski V. V., A. L. Khan, Sarsenbayev T. E.) and practice of criminal proceedings are divided into rehabilitating and non-rehabilitating. However, the practical application is still cause some problems and questions. Because the study of the practical application of exemption from criminal liability for rehabilitating grounds is an actual problem for modern jurisprudence.

By exonerating circumstances precluding criminal proceedings are those that indicate the absence of the substantive preconditions for the beginning of the criminal procedure and did not entail criminal law or criminal procedural consequences. This means that contain messages and other materials collected absence of a crime (signs act) pointed to by the applicant, or they do not have evidence of a crime. In this context, the legislator in the first part of Art. 39 Code of Criminal Procedure indicates erroneously as rehabilitating grounds for refusal to institute criminal proceedings on items 5, 7, 8 of the first part of Art. 37 Code of Criminal Procedure.

In view of the different legal consequences (eg, concerning the right to compensation in civil proceedings) for the theory and practice of criminal trial is set to the question of the precise delimitation of circumstances indicating the absence of any evidence of a crime or the lack of corpus delicti (Nos. 1, 2 of the Art. 37 Code of Criminal Procedure). Detailed description of each of these exculpatory grounds to refuse to initiate criminal proceedings, has practical value for the prosecuting authorities.

All other circumstances listed in Art. Art. 37 and 38 of the Code of Criminal Procedure (except for the absence of corpus delicts and events), are non-rehabilitation. They indicate the presence of certain procedural obstacles for initiating and criminal investigation. In other words, while the crime took place, and in fact, but for various reasons, the Criminal Procedure Act, further production has no future. For example, failure to face the time of the offense the age at which criminal responsibility is not regarded as a lack of (subject) crimes, and other ground — if you must use it to compulsory educational measures in view of the increased danger to society acts and negative personality characteristics.

In contrast to the circumstances of the adoption of rehabilitating procedural decisions on other circumstances depends on the discretion of the preliminary investigation, agreed with the position of supervising prosecutor. In case of refusal to institute criminal proceedings on the grounds of non-rehabilitation of the applicant retains the right to bring a civil action in civil proceedings.

From a legal point of view can be divided grounds to refuse to initiate criminal proceedings on unconditional (eg, no complaint of the victim in cases of private and private-public prosecution, the person at the time of committing the act has not reached the age of criminal responsibility) and due to certain factors (in particular, the preparation consent of the person against whom the procedural decision, or the existence of conditions expressly provided by law, for example, the act of amnesty). In depending on the subject of legal regulation of grounds for refusal to institute criminal proceedings are traditionally divided into two groups: the substantive and procedural (Lupinskaya P.A., Davydov P.M., Mir D.A.). In our opinion, an indication of the rules of substantive law, not given in the article. 37 Code of Criminal Procedure, should result in a descriptive-motivational part of the decision on refusal to initiate criminal proceedings. The resolution of this procedural act necessary to refer to para. 12), the first part of Art. 37 Code of Criminal Procedure [4]. We believe that as a condition of the decision to dismiss the criminal case are:

- Availability of rehabilitative procedural grounds, uniquely entailing exclusion of criminal prosecution;
- The presence of the will of certain actors in the law that allows not to prosecute;
- There is agreement supervising prosecutor.

In the latter two cases, the grounds for refusal to criminal charges related to non-rehabilitation and appropriate procedural decision for criminal prosecution bodies is not mandatory, and depends on the discretion of the investigator, the investigator, the body of inquiry, the prosecutor. It is unacceptable to refuse to open a criminal case for lack of participation in the commission of a crime, even if there are sufficient data about the event and the crime or investigator of doubt arose in his involvement in the act of [5]. In this case, the criminal prosecution body is obliged to perform all possible in the criminal case proceedings and investigations necessary to refute or confirm the finding of guilt face. Only after that can follow a final decision on the termination of criminal proceedings on the basis of the second part of Art. 37 Code of Criminal Procedure in view of the absence of proof of a crime.

Thus, in those circumstances preventing the implementation of prosecution can distinguish two groups of non-rehabilitation reasons used:

- For refusal to institute criminal proceedings, and for the termination of criminal proceedings (Art. 37 and 38 of the Code of Criminal Procedure);
- Only to stop the criminal case as the pre-trial, because the trial stage of criminal proceedings (Art. 38 Code of Criminal Procedure). Po our opinion, the refusal to initiate criminal proceedings with exemption from criminal responsibility (pp. 3–8, 10, 12 pieces the first Art. 37 Code of Criminal Procedure), contrary to Art. 77 of the Constitution of the Republic of Kazakhstan, Art. 19 Code of Criminal Procedure, according to which a conviction does not fall within the competence of the prosecuting authorities, and is the exclusive competence of the court. To resolve this contradiction decision of the prosecuting authorities should authorize sudom.V due to the fact that under Art. 37 Code of Criminal Procedure range of circumstances that prevent criminal charges, is not exhaustive. Based on the analysis of other laws, international legal acts, regulations, we can conclude about the inadmissibility of a criminal case in respect of:

1) a person to refuse to testify against themselves, their relatives or spouse (Sec. 2, Art. 77 of the Constitution of the Republic of Kazakhstan);

2) a lawyer, notary public, and certain other persons having privileges of testimony and refused to disclose information under interrogation that have become known to them in connection with their professional or official duties (Part Three Art. 15 of the Law of the Republic of Kazakhstan "On Advocacy"; Part Three Art. 18 of the Law of the Republic of Kazakhstan "On Notary");

3) a person who, because of their young age or physical or mental disability is not able to correctly perceive the circumstances relevant to the case, and give them evidence (p. 4 the second part of Art. 82 Code of Criminal Procedure);

4) a witness, victim, expert or interpreter who volunteered during the inquiry, preliminary investigation or trial before the court verdict said the falsity of their testimony, conclusions or wrong translation (Note to Art. 352 of the Criminal Code);

5) judges — about the circumstances of the criminal case, which became known to him in connection with participation in the criminal proceedings, as well as during the discussion in the conference room issues raised by adjudication (n. 1, hr. 2, Art. 82 Code of Criminal Procedure);

6) of the victim, civil plaintiff, civil defendant and their representatives, as well as an expert witness, who called from another state in accordance with the rules of international legal assistance in criminal matters in connection with their testimony or Imprisonment As experts in the case, which is the subject of the proceedings (the first part of Art. 9 of the Convention on Legal Assistance and Legal Relations in

Civil, Family and Criminal Matters, ratified by the Law of RK March 10, 2004, Art. 526 Code of Criminal Procedure);

7) the person who caused the harm interest only commercial or other organization that is not a state-owned enterprise, in the absence of application of the leader or his consent (Art. 35 Code of Criminal Procedure). Rol prosecutorial supervision in enforcing criminal protsessualls rules governing the refusal to initiate criminal proceedings, in our opinion determined by the following factors: firstly, the prosecutor supervises the legality not only of the decision not to institute criminal proceedings, but all proceedings during the investigation to check and secondly, the prosecutor, having a significant amount of procedural rights in comparison with Chief of Investigations, Chief of the inquiry body is obliged to ensure the quality of departmental procedural controls; thirdly, the characteristics of the prosecutor's supervision in Kazakhstan is that the prosecutor promptly respond to unreasonable decision not to institute criminal proceedings than court. Prosecutor within 24 hours sent a copy of the decision to refuse to initiate criminal case, he is entitled to request and examine the materials before the investigative audit. The legality of the grounds for termination of the criminal case guarantees the constitutional right of every citizen.

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Some issues of execution of criminal punishment in the form of a fine

Abstract: This article discusses issues related to the execution of criminal punishment in the form of a fine, some execution problems of punishment in a fine, ways of how to solve problems have been reviewed. Particular attention is paid to the new criminal legislation of the Republic of Kazakhstan, where the punishment by a fine has become another kind.

Keywords: punishment, fine, execution, problem.

According to the article 41 of the Criminal Code of the Republic of Kazakhstanfine is a monetary penalty, appointed within the limits prescribed by this Code, in the amount corresponding to a certain number of monthly calculation indices established by the legislation of the Republic of Kazakhstan and in force at the time the criminal offense, or in the amount times the sum or the cost of bribes [1].

The problem of punishment in the form of a fine is quite versatile. It includes not only the penal and criminal law, but also socio-economic issues associated with defining the nature of punishment, as well as defining the boundaries of its application and the overall prospects of its development. The fine has the ability to bring revenue to the state, and therefore, state authorities are showing interest in this punishment and its application is not without reason. The fine has less repressive than other punishments. The fine is instant punishment, where the application of the repair is excluded, for this reason, the imposition of a fine shall be determined in the first place, not the category of the crime and the degree criminal prevalence of the person who committed this. More effectively, fine will affect first-time offenders than those who had been previously convicted.

The amount of the punitive impact of the fine is directly related to its size. Moreover, this is the most difficult question resolved by the court in the verdict. The amount of the fine is determined by the court taking into account the gravity of

the crime, property of the convicted person and his family, as well as with regard to the possibility of obtaining future salary or other income. If the amount of the fine will not match the severity of the crime, it would violate the principle of justice, and the punitive impact on the offender to be insignificant. If the size of the assigned fine will be less damage, it is hardly possible to speak about the achievement of the preventive purposes of punishment. It is important to determine the amount of punishment that it was feasible to pay, and not become a means of destruction of the convicted person [2].

Humanization of criminal punishment in light of the adoption of the new Criminal code of the Republic of Kazakhstan is an important but not the only factor behind the interest penalty at the present stage. The penalties has social conditionality:

1) the mechanism of execution of the fine is less costly for the state than any other punishment;

2) charged fines — additional source of replenishment of the state budget;

3) application of fine eliminates the loss of the convict socially useful links, which has a positive effect on his future behavior, eliminates the problem living and working device, the further criminalization of the individual;

4) sentenced to a fine not withdrawn from the field of social production, which allows to solve the problem of labor resources in the state. On the other hand, it is possible to identify the factors adversely affecting the judicial practice of the imposition of a fine. First of all it is the imperfection of the legislation governing the imposition of a fine, as evidenced by the numerous publications on the problems of its application. Judicial practice in recent years have provided confirmation of their availability.

The penalty may be assigned as the primary punishment, as well as an additional penalty, if this is specified in the approval of the articles of the Special part of criminal code of the Republic of Kazakhstan.

If we talk about the issues, many lawyers in different countries were in favor of lowering the minimum amount of the fine. The extension framework for fine will make it simultaneously repressive and feasible for the payment of persons with different levels of wealth [2].

As was shown by various studies, the courts avoid imposing a fine of criminals with irregular income. The proportion of unemployed among the convicted to a fine is much less than among all prisoners. Courts rarely prescribed fine for underage criminals, since the law was established as mandatory conditions that they have an independent source of income or property. According to court statistics, significant parts of the juvenile offenders are persons, nowhere students and not working. Will a statistical case study of the Russian Federation. Therefore, from 472 teenagers convicted in 2002 in the Ryazan region, 47 % have never studied and did not work. Among all convicted only five teenagers was appointed as punishment fine. In the Kaluga region in 2003, sentenced 648 minor and only two assigned as punishment fine (0.3 %). A similar pattern was observed in recent years in the whole country. This legislative restriction led to the violation of the principles of equality of citizens before the law, justice and humanism. Required its removal [2].

In General, the Republic of Kazakhstan judicial practice on the appointment of the fine depends on the level of economic development of the region. In industrialized regions, large cities, courts often prescribed fine as a punishment, because the convicts have more opportunities to find a job, the higher the level of wages and life, and consequently more opportunities for the offender to fulfill the requirement of a judicial sentence. In rural areas, the courts rarely prescribe as a penalty a fine. The solution of the above socio-economic issues at the state and regional levels have a positive influence on the expansion of judicial practice on the appointment of material sanctions, and in the first place, fine [3].

It is well known the impact of socio-economic factors on crime, its qualitative characteristics. Obviously the influence of these factors on judicial practice, which is confirmed by statistical data on the structure of a conviction in the Republic of Kazakhstan in recent years. In my opinion, socio-economic factors have a significant impact on the practice of punishment in the form of a fine in the modern period. Such socio-economic problems as unemployment, lack of a permanent and legal work for a considerable number of prisoners, the low level of welfare of these individuals, the lack of valuable property, not allow many convicts to make timely payment of the fine on a voluntary basis and to implement the requirements of the court decisions in the enforcement of punishment. This implies that social factors determine in practice the execution of penalties such negative processes, such as the low level of collection of fines, massive violation of the terms of compulsory execution of this punishment, the presence of a significant number of unsold writs to enforce penalties.

In accordance with the classification of the fine belongs to the group punishment not related to imprisonment. Punishment of this group have in common is that, although different in nature, they are not associated with the isolation of the convict. Sentenced to this punishment is not deprived of fundamental benefits of freedom, they do not become detached from family, work, school or other socially useful activity. Volume restrictions is relatively small.

Thus, summing up the fine becomes significant alternative to imprisonment, and execution more efficient [3].

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Realization of the right to personal integrity in the application of coercive procedural measures

Abstract: The article examines the legal nature of the principle of inviolability of the person as a fundamental guideline and start the criminal process of the Republic of Kazakhstan.Actualized need for further improvement of legislation defining the legal regime of personal immunity in criminal proceedings.An analysis of the legal guarantee of the principle of inviolability of the person during the arrest of the suspect.

Keywords: the principle of inviolability of the person, criminal procedure, guarantee the detention of the suspect, coercive measures.

Acute problem of restrictions on the freedom of the individual becomes in an environment where it becomes a party to the criminal proceedings and is covered by there strictions, statutory rules of procedural coercion. It is in this area a person acquires a specific criminal -procedural status and matching the most "severe" penal system of state coercion. To the recognition of the accused guilty of a crime latter subject to measures of criminal-procedural coercion by which the amount of his personal liberty severely curtailed.

Right direction restrictive en force ment in criminal proceedings follows from the general axioms of state coercion, which is regarded as a physical or mental effects by causing personal, material and moral constraints in order of submission requirements of the state. It is easy to note that in this definition as the main goal of coercion were exclusively the public interest. It seems that this definition not fully expresses the essence of coercion, because the shadow is his right regulatory nature. We agree with the Kazakhstan scientists Ahpanov AN, believes that "state coercion follow regarded as one of the methods of regulation of social relations. Such an understanding of the essence of coercion allows to allocate it the most characteristic and basic quality, combines both the target and the instrumental purpose of coercive measures". Under the earmarking author understands "the set of problems that can be solved with the help of state coercion. Instrumental purpose determines the choice of coercion and manipulation of specific means and method sav ailable to achieve objectives" [1, 34].

Fora full definition of the status of the person, "sufficiency" of the freedom it referred to the Constitution and other international instruments are needed "certain limits" for that individual freedom is inviolable, even in circumstances where it is involved in criminal proceeding sand is under going compulsory restrictions. These "limits" outlines legal, and above all, constitutional guarantees of the rights and freedoms of the individual. The rules of criminal-procedural law guarantees are specified in relation to the specifics of the criminal process and procedural measures of coercion.

For example, the Constitution of the Republic of Kazakhstan inviolability of the person protected by legal guarantees in the application of arrest and detention.

The most concise content of these opposing principles (coercion, freedom of the individual, guarantees the rights and freedoms) we find the normal of the Constitution. In Part 1 of Art.16 established thate very one has the right to personal liberty [2]. In the content of personal freedom legislator puts "inalienable and absolute right a rising by virtue of the nature of then atural man". Personal freedom is "the highest social values and principles, which serves as a criterion of human progress" link of the rights and freedoms of the individual [3, 15]. Constitutional guarantees the inviolability of personal freedomin the application of measures of state coercion used in criminal proceedings in the Republic of Kazakhstan, in accordance with Art. 16 are:

- The sanction of the court (on house arrest and detention);
- The right to appeal (court approval);
- The period of detentionis 72 hours (without a court order);
- The right to counsel (from the moment of detention, arrest or indictment) [2].

To date, protection of the individual in criminal proceedings, the inviolability of its constitutional and procedural freedoms is an issue of national importance, built in compliance with the rank of constitutional legality in the Republic of Kazakhstan. Based on the general social, moral, psychological and trends etc, we can also talk about the restriction of freedoms of those entities-parties to the proceedings, which, in accordance with the rules of criminal-procedural law enforcement measures are not applied. For example, the person performing the pre-trial investigation, attracting pursuant to Art. 197 Code of Criminal Procedure to participate in investigative actions provided for by the law of persons obliged to explain their rights and responsibilities, as well as the order of investigative actions [4]. Here citizens fall in to bodies with public authority and in case of default of its procedural obligations investigator, are "victims" official arbitrariness. In this case, we mentioned the rights of suspects, defendants, which correspond numerous duties of investigation and inquiry, the scope and content of which determines the warranty rights and freedoms of these persons. For example, in accordance with Part 3 of Art.14 Code of Criminal Procedure every detainee be immediately communicated to the grounds for detention, as well as the legal qualification of the offense of which he is suspected or accused. The basis of this warranty contains the norm p. 3 art. 18 of the Constitution of the Republic of Kazakhstan, which establishes that the state bodies, public associations, official sand the media must provide every citizen the opportunity to get acquainted with concerning his rights and interests of the documents, decisions and other sources of information.

Thus, we are talking about legal guarantees, which are implemented by rules of law, based on the principles which are, in turn, the core of the whole industry legislation of the Republic of Kazakhstan. There fore, actualizing the issue of the rights and freedoms of the individual in criminal proceedings the legislator has built a strict system of basic provisions characterized by a certain warranty and compliance. These provisions are determined by the governing and democratic, humane, the corresponding socio-economic conditions of development of society; the construction of the criminal process. It is, of course, the principles of the criminal process, including the principle of inviolability of the person took a firm stand.

The basis of the principle of the inviolability of a remedial order of restriction of freedom in the criminal process, which is carried out through the use of measures of criminal-procedural coercion: detention, detention; forensic and judicial-psychiatric examination at the forced placement not being held in custody in a medical institution; compensation for damage caused to citizens as a result of illegal deprivation of liberty, detention in conditions dangerous to life and health, ill-treatment.

Under the right of inviolability of the person, according to I. N. Shortto be understood "state-guaranteed personal security and freedom of the citizen, as well as any man in general, consists in preventing, combating and blameworthiness attacks on life, health, bodily integrity and sexual freedom (the physical integrity of the person); honor, dignity, moral freedom (moral integrity); psyche (mental integrity); individual freedom of man, namely, providing him the opportunity to have any in its sole discretion to determine the place of residence (personal safety)" [5, 10].

Inviolability as the legal line-up of individual human rights and freedoms, and the protection of their warranty in the state. In relation to criminal proceedings security of the person has inherent refraction, but is not limited to ensuring the rights that are enshrined in Art. 14 Code of Criminal Procedure. Thus, in particular, Art. 15 is general in nature and absorbs Art.14, since calls the subject of legal protection of the rights and freedoms of citizens involved in criminal proceedings (and includes the right to security of person). However, Art. 14 does not even include a reference to Art. 16, 17,18, Code of Criminal Procedure, despite the fact that the meaning of these articles is the principle of inviolability of the person.

In this case, on the face of the costs of legislative technique: as a result of the fact that the same problem legislator decides to become law actually absorbing each other's rules on compensation for damage, as well as on the safety of participants in the process, for example, repeated almost word for word.

The principle of inviolability of the individual is the basic construction of the beginning of the criminal process; This means that a person who was in the sphere of criminal proceedings is initially endowed with criminal-procedural rules guarantees immunity.

Analyzing the criminal procedure relations Kokorev L. D. and Lukashevich V. D. rightly pointed out that "in criminal proceedings some subjective rights of the individual – is a guarantee of other subjective rights". For example, the right to appeal against actions of the investigator head of the body of inquiry, in fact, acts as a guarantee of the right of a suspect accused of inviolability [6, 67].

These authors refer to the procedural safeguards and principles of criminal justice. In this issue we consider it necessary to understand because principles and guarantees have completely different meanings. Principles and guarantees – it's really different legal categories. Guarantees-it means security; and principles-fundamental, guiding legal basis. However, in some cases, actually principles act as guarantor. So, for example, the principle of the rule of law acts as a guarantor of the implementation and enforcement of the rights and legitimate interests of citizens.

Enum erating guarantee the principles of criminal procedure by different authors are different lists. Petruhin I. L. identifies three aspects:

1. control of the court of the legality of detentions and arrests.
2. Institute of admissibility of evidence as a way to protect the rights of the individual.
3. limits restrictions on fundamental rights and freedoms of individuals [7, 60].

A. N. Ahpanov system guarantees the rights and lawful interests of individuals in the field of procedural coercion refers to as the totality of the following elements:

a) regulatory settlement principles and the general conditions of application of criminal-procedural compulsion (procedural rules protecting the rights and freedoms of interested persons in the case of their arbitrary restrictions); rights and responsibilities of participants in the process (or their procedural status) in the area of enforcement: fixed in the rules of criminal procedure law procedure (procedure) the application of certain procedural enforcement;

b) the reasons for decisions on the application of coercive procedural measures, which manifests it self in the requirement of objectification – in terms of procedural decisions of the arguments and considerations, by virtue of which evidence is imparted such a value, is recognized to be applied the law;

c) the right to judicial protection of their rights and freedoms and to receive qualified legal assistance; right of appeal, including the court of the measures of procedural coercion decisions and actions of persons conducting the criminal proceedings in an accessible, not too complicated and operational form; the duty of the prosecuting authorities and the courts to clarify the rights of participants in the process and provide real conditions for their implementation;

d) the system of departmental procedural control, prosecutorial and judicial oversight of the preliminary inquiry and further investigation on the use of criminal procedure compulsion;

e) measures of responsibility of officials and leading criminal prosecution for illegal and unwarranted use of procedural coercive measures, base less and a violation of the restriction at the rights and freedoms of citizens (criminal-legal norms of the Criminal Code, providing for sanctions for unlawful detention, arrest and etc.; civil-legal, disciplinary – on the basis of representations of disciplinary proceedings prosecutor, private court orders, criminal - procedural-return for further investigation of criminal cases, cancellation or modification of illegal and unreasonable decisions related to the measures of procedural coercion and et al.) [1, 15].

Given the specificity of institutions of criminal proceedings, these guarantees can be modified, supplemented, etc. For example, in the manufacture of arrest and detention as an additional safeguard duty of inquiry serves to notify the family of relatives detained, arrested.

Criminal-Procedure Code literally "stuffed" guarantees the inviolability of which the ordinary citizen is not aware. Especially this problem is acute because of the fact that the accused, the suspect limited freedoms and actions that he might send to his own defense. In our opinion, this is an important statement of the issues around legal education and professional competence of investigation and inquiry, which in turn implies a special training of professionals.

Thus, determining the safeguards systemas an essential link Kazakhstan's criminal trial and their role in the realization of the rights and legitimate interests of citizens involvedin criminal procedure, we can say that the legal guarantees - this isthe most important legal instrument for the implementation of the rules and principles of law. Fundamental guarantees established in the Constitution of the Republic of Kazakhstan. The absence of such legislation gives legal guarantees a declarative nature, the implementation of which has a very dire consequences. Turns of legal reforms have also shown that the practice of lawenforcement and formal rules should closely interact and relate. The rule of law only has a complete and logical view of the faithful when it is supported by a guarantee of implementation - the root cause of her life.

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Handwriting of the person and «graphology»

Abstract: This article discusses the issues of graphology.
Keywords: the criminalistics, graphology, tests, graphic, documents.

In one of sections of the criminalistics which is engaged in technical and criminalistic research of documents, handwriting of the performer of the letter is considered as the component which is subject to research of the contents of the hand-written document. Studying of a structure of handwriting, its general and private signs is carried out by handwriting examination, generally for the purpose of its identification. From the criminalistic point of view, handwriting is habitual and steady system of movements, peculiar for each person, at written fixing of the speech.

The letter is the thought of the person recorded by means of graphic signs and rules of their combination. The semantic and graphic parties differ in it. The concept of a semantic aspect covers the contents, style and a manner of a statement, lexicon and other features. Handwriting — the system of the developed movements serving for the image of letters, words, figures, signs belongs to the graphic party. At research of the letter both of its parties — semantic and graphic — are considered in their unity and interrelation.

Here is how it is told in the textbook of criminalistics: "handwriting in criminalistics is understood as individual and dynamically steady program of graphic equipment of the letter which is based on the visual and motive image of implementation of the manuscript, realized by means of system of movements. It should be noted that such essential properties of handwriting as identity and stability, are a studying subject only of criminalistics".

Except the criminalistics such science as a graphology is engaged in studying of handwriting.

Graphology — the doctrine about handwriting as reflection of properties of character and mental conditions of the person, is told in the explanatory dictionary of Russian language of Ojegov S. I. and Shvedova N. Yu.

Studying an origin and development of the analysis of handwriting, the history testifies that the graphology in that look in what we know it now, arose no more than three centuries ago. At the same time there are many mentions of this subject in many ancient documents. So, in the letter of the emperor Neron it is told: "I am afraid of this person because his handwriting shows that he has a treacherous nature". In Confucius's works it is told: "Be afraid of the person which handwriting reminds the movement of a reed, waved by a wind". The first book which is specially devoted to a graphology was published in 1630 and was written by the Italian professor Camillo Baldo. Its long name said "Tratto come una letra si cognoscano la natura e qualita del scrittore", that is "How to learn the nature and qualities of the person, having looked at a letter which he wrote". That book made a certain impression on the reading public, but no more because at that times people considered that it is necessary to have the gift of clairvoyance or intuition to understand character of the person on his handwriting.

Approximately in two hundred years, people in France returned to a subject of handwriting when the scientific churchman abbey Flandrin became interested in Baldo's book. The abbey decided that it deserves serious discussion and the analysis. He created a group which participants dealt with an issue and subjected classifications handwritings of the people differing from each other on interests and by the nature of occupations. Participants of research developed rules which formed the basis of the modern analysis of handwritings.

Two Greek words — "grapho" (to write) and "Lagos" (science), designated this new branch — a graphology.

Flandrin's pupil abbey Mishon developed graphological researches more intensively and surpassed the teacher. In 1872 he wrote the book "The system of a Graphology". So the word "graphology" was used for the first time. Approximately in 1880 Mishon's work gained further development in Krepye-Zhamen's researches in which more accurate methods of classification of various traits of character which were revealed by the analysis of handwriting were applied. People became interested in a graphology at first in Germany, then in England where many intellectuals devoted a lot of time to improvement of the analysis of handwriting. Amateur handwriting experts were the prime minister — the minister of England Disraeli and the American writer Edgar Allan Poe.

At the beginning of the XX century the doctor Ludwig Klages (Germany) created a large scientific work on definition and justification of the principles of a graphology, methods of its application and interpretation. Modern researchers of handwriting consider doctor Klages as the father of a modern graphology. Since the XIX century there were graphological societies in various countries. In Europe the graphology is considered with due consideration and takes a worthy place in work of the psychologist and psychiatrist.

The graphology is the interesting and valuable way allowing to understand and learn the nature of other people. In the countries of Europe the graphology is applied in testing of the specific person directed on knowledge of lines of his character agrees the source given the Internet long ago, since recent time it gained official recognition in the USA.

Use of the samples of the letter of the patient received under hypnosis became one of the new and most important directions in research of handwriting. At suggestion to adults of that they — at children's age, their handwriting changed that gave the chance to analyze change of handwriting during all life, and, as a result, to track development of the person from children's to an adult state. Other interesting experiments are connected with detection of specific diseases which are shown in nature of handwriting.

These tests are carried out by professional handwriting experts in cooperation with hospitals. Though so far these researches are at an experiment stage, insurance companies treated them rather seriously and give to handwriting experts essential financial support. However a graphology — is not panacea from all troubles and not a miracle. The handwriting expert isn't able to change characters of people, his task is reduced only analyzing handwriting signs. On the basis of this analysis of people I understood the abilities and I managed to use them in the best way, I tried to adapt the personality for persons of other people to derive the greatest benefit in any of spheres of the human relations: personal relations, social, study, business life.

Ability to analyze handwriting is also not gift with which the person is born. The graphology is based on certain rules which have to be observed accurately to come to reasonable conclusions.

If to speak in brief, the analysis of handwriting opens internal traits of character of the person which are expressed in writing of letters. Handwritings of people are so various, as well as their individual qualities as their fingerprints. The analysis of handwriting has certain limits of opportunities. First, it is impossible to tell, whether handwriting belongs to the man or the woman if the text isn't signed. The dear granny possessing strong and aggressive nature can appear the author of the large, wide letter which was written at first sight by the man. Often small letters with easy pressing which were written to all appearances by the woman, actually were traced by the timid man with tendency to sentimentality. The handwriting expert can't define a sex of the writing person.

Secondly, handwriting doesn't show also age of the author of the letter. Can seem that handwriting of the teenager belongs to the senior citizen because mind of the teenager ripened not on age, and the letter of the old person can look childish because it kept youthful enthusiasm. Therefore the letter opens intellectual, but not chronological age. Certainly also, whether that the handwriting expert won't be able to give the answer to a question the person is married or is single as marriage doesn't change the main traits of character. Therefore, it is impossible to determine by handwriting, whether there are at the author of the letter children or not. It is impossible to learn a work sort, nature of occupation or hobby of this or that person as many people are engaged in affairs for which they initially aren't suitable on handwriting, but successfully cope with them thanks to the mind or ability to adapt to various circumstances or owing to need. At the same time handwriting can open existence of competitive spirit, ability to think clearly, to work accurately, show persistence on achievement of the purpose, presence of a financial thrift, and also other qualities which help the person to succeed. It is impossible to guess on handwriting, whether people belong to the same family because handwritings don't possess family similarity. Even in case people are similar to such an extent that their own parents hardly can distinguish them from each other, their handwritings can show existence of absolutely different lines.

So, as it was already told, it is important to mean that the analysis of handwriting doesn't allow to guess or tell the fortunes of the person. The handwriting expert can tell the person about his character, his tendencies and temperament that will allow it to direct the actions. How it uses knowledge of lines of the personality to define the life in the future, doesn't enter competence of the handwriting expert. All that the handwriting expert can make is to point to existence strong and weaknesses of the examinee, and the last can use information in every possible way to strengthen the advantages and to minimize the shortcomings.

Stopping on possibility of carrying out the analysis of handwriting, it is possible to tell that the ideal example of handwriting has to be on the big sheet of the usual white paper which isn't ruled and without fields. For the text it is better not to copy something from the book or the newspaper, but to suggest the person to write that comes to his mind. In this case handwriting will be more natural. It is desirable to receive also the signature of the person because the signature differs from other text. Besides an example of the handwriting received directly for the analysis, existence of a sample of the letter prepared earlier, when the examinee didn't know about the analysis of his handwriting, is desirable. If for a sample the letter consisting of several pages is chosen, pay attention to the last page as the author doesn't make conscious efforts for the end of the letter any more in order to write more beautiful letters. On the last page handwriting is most natural. The analysis of handwriting is carried out equally regardless of the floor writing.

In order to consider hyphens and hooks which often appear before a letter or in its end with the maximum care, it is recommended to use a magnifying glass.

It is necessary to emphasize that any line has no absolute value on the basis of which it is necessary to investigate each handwriting. Various traits of character shown in handwriting have to be considered individually before the adjusted total is summed up. Let's say that writing of one letter can testify to tendency of the person to slowness, but, considering an example of handwriting in general, we can see that the person wrote the same letter in a different way or in his letter there are other signs which don't allow to claim about sluggishness. In this case a single indicator which isn't confirmed with other data, it is possible not to consider.

The skilled professional handwriting expert quickly catches various variations and compares various signs, reaching the correct decision. Often opponents of a graphology give as argument about insolvency of this science that all children at school are trained to write equally. However we should notice that people don't keep further this uniformity. Subsequently, through a certain period of time, most of pupils start writing variously and thus show individual traits of character and mind. Development of mind and change in character inevitably causes corresponding changes in writing of letters. It's also remarked that people of one profession don't write equally. The answer here follows: "Work doesn't build up character. The teacher can be generous and avaricious, modest and aggressive, but it doesn't mean at all that he isn't suitable for teaching work. The doctor can have a sense of humor or he can be serious, he can be the romantic or the rationalist, but from this doesn't follow that he can't be the good doctor".

It is possible to hear also statements that the letter is simple a muscle work. But it is not so. Handwriting is an external manifestation of mind and other parties of the personality. If handwriting was only result of a muscle work, it wouldn't open human emotions. There were cases when the person injured the right hand, and he had to be trained to write with the left hand. Though at first sight the words written by the left hand differ that are written right, the same main lines which are obvious in writing of words this hand open. People who lost both hands, are trained in use of feet for the writing and even in these cases the same regularities of character are shown.

It is necessary to notice that it is impossible to give a certain answer to a question: "Is handwriting good or bad?". The handwriting expert analyzes character, but doesn't take out judgments concerning it. Each handwriting is individual for the expert and he has to specify the main lines of the personality which are shown in handwriting, but not to take out judgment. It is possible to tell that there is the share of bad and good lines in each handwriting, but for one can be advantage, for another can be a shortcoming or weakness.

As a matter of fact there is no party of human life where the graphology couldn't find fruitful application. It is extremely useful in the relations between the chief and the subordinate, between the teacher and the pupil, between the husband and the wife, between the parent and the child.

Not all professional handwriting experts use the same receptions in the analysis of handwriting. Some of them begin with analysis of separate letters and fine details. Others prefer to begin with a general view of the page, and then pass to analysis of various factors and eventually all of them come to identical results. All of this only proves a graphology solvency as separate science which opportunities are extremely wide. The graphology — is objective, its rules work irrespective of desire of the person, therefore graphological testing is one of the most well-tried remedies on the way of knowledge of the personality.

That the experience developed by handwriting experts for many years of persistent work is more valuable. Presently, when old methods give way to new, more modern theories, the graphology has excellent chances of becoming one of the most important methods of personal testing.

Apparently from the aforesaid, results of the analysis of handwriting, are output by handwriting experts on the basis of the general and private signs of handwriting. So, such private signs of writing of separate elements of letters and signs, an inclination of strokes, dispersal, features of performance of separate elements of letters and signs are used in criminalistics in investigation of hand-written documents. Thus carrying out the analysis of handwriting, its assessment, as it was already noted above, is possible to be, owing to such concepts as identity and stability of handwriting of each person and no more than that. Of course, studying of handwriting from the criminalistic point of view doesn't give the grounds to do any conclusions concerning character and other personal properties of the performer of this manuscript. Such task was assumed by the branch discussed in article under the name "graphology" but as the data used in a graphology, scientifically aren't proved and aren't confirmed with practice, therefore perhaps they can have advisory nature, subjective value.

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Some legal, theoretical, social and economic preconditions of developments of the current legislation of the Republic of Kazakhstan

Abstract: The article explored the issues of formation and improvement of penal policy in the Republic of Kazakhstan. The authors have paid special attention to the analysis of the criminal laws of the state. The authors believe that the most important element of legal policy of the state should be criminal policy, the improvement of which should be carried out by an integrated, interrelated correction of criminal law, criminal procedure law and criminal-executive law, as well as law enforcement.

Keywords: Criminal policy; criminal law; humanization; criminal law legislation; Criminal Code of the Republic of Kazakhstan; criminal liability; punishment; law enforcement system; crime.

The current state of the fight against crime, the imperative of our time, as well as international trends in the development of the legal system, point at the need for the humanization of the law in force, on the other hand to strengthen criminal liability for certain types of crime. In this regard, the importance for the modernization of modern criminal law was the development and adoption of the new draft of the Criminal Code of the Republic of Kazakhstan (May, 2014) [1, 53–54].

As approved by the Presidential Decree of August 24, 2009 № 858 "Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020", it was noted that the most important element of the legal policy of the state is criminal policy, the improvement of which is carried out by an integrated, interrelated correction of criminal law, criminal procedure law and criminal-executive law, as well as law enforcement [2].

It is no coincidence, in the development of this provision in the President of the Republic of Kazakhstan — Leader of the Nation Nursultan Nazarbaev to the people of Kazakhstan "Strategy "Kazakhstan — 2050": new political course of the held state" it was entrusted to the Government together with the administration to start the reform of the Criminal and Criminal procedural legislation in 2013.

Emphasis should be placed on further humanization, including decriminalization of economic crimes. It is necessary to prepare and submit a draft 4 of the Code to Parliament: Criminal Procedure, Criminal, and Criminal Executive Code and the Code of Administrative Offences. The adoption of these key legislative acts conceptually modernize the criminal procedure system and bring our right to a standard that allows you to adequately respond to current challenges [3].

The adoption of new criminal and criminal-executive legislation of the Republic of Kazakhstan, which entered into force on January 1, 2015 significantly affect the law enforcement practice, however, a number of problems, which we mentioned earlier were not reflected and require further study.

Adverse changes of quantitative and qualitative characteristics of modern crime, costs of law enforcement activity, aggressiveness and determination of government policy in the fight against crime, require new approaches to the understanding of law and law enforcement, to understanding and rethinking the existing criminal legislation of the Republic of Kazakhstan.

Availability of crime tensions in society caused by the crime indicates a problem of criminal law of methodological order, which together determine the low efficiency of criminal legal regulation of social relations.

Solution of the problem involves a set of interrelated problems of social and legal order, imperfection of the norms of criminal law, the problems of qualification of crimes, the combination of lawful and reasonable fairness in the selection and assignment of punishment.

In general, there is the lack of foundation of criminal responsibility, and therefore, there is a fair conclusion about unexplored of the legal nature of the crimes in full.

In this context, the relevance of the offense to the position of a definition of public danger of crimes is not in doubt, such as it is directly related to the modern comprehension of the doctrine of crime components, designing of structures in a single act of law enforcement, general and special issues of improvement of legal regulation.

It should be noted that the theory of criminal legal thinking in public and state life has been given lack of attention,

despite the fact that it directly determines the principle of construction, maintenance and system of criminal legal policy in conjunction with the political regime, the balance of political forces, as well as with the state, dynamics and the structure of crime.

Doctrinal innovations of consideration of new approaches to crime prevention at the present stage consists in the that the traditional subject of criminal law and criminal law regulation reasonably expands due to the achievements of modern philosophy, sociology, criminal anthropology.

It should be noted that uniform policy in the area of legal consciousness has not been formed in the law enforcement environment up to the present moment, and there are many problems in the investigative and judicial practice in the application of the criminal law.

It should be offered the idea in the modern concept of law allowing to increase the efficiency and quality of law enforcement agencies activity in combating crime issues in Kazakhstan. However, the imperfection of the current criminal legislation and law enforcement practice does not allow to use the whole potential of the fight against crime in full.

In addition, uniform judicial practice in criminal legislation enforcement and its application has not yet fully formed in Kazakhstan. These circumstances necessitate deeper theoretical understanding of the problem, from a position of the object of the crime.

Problems in the theoretical aspects of criminal legal rethinking of law enforcement activity are closely related with the content of the criminal law.

Here are some examples.

For example, today it has developed that many of the provisions of the current Criminal Code of the Republic of Kazakhstan has long been outdated and in need of radical revision. However, if you compare the contents of the new Criminal Code with the current Criminal Code of the Republic of Kazakhstan, the most of the articles of both general and the special part gradually moved to the new edition of the Criminal Code of the Republic of Kazakhstan.

Available erratical correlation of types of punishments in the Criminal Code under which the most basic kind of punishment provided in sanctions by the articles of the Criminal Code, has not changed in the new draft of the Criminal Code, but also unnecessarily adjusted in favor of the prevalence of this form of punishment as imprisonment.

In second place is a fine — 341. Third place is such type of punishment as restriction of freedom — 332. Than it follows deprivation of right to hold specific posts and profess some activity (223), corrective work — 166, community service — 76, the custody in the guardhouse — 43, limitation in military service — 16, life imprisonment — 19 the death penalty — 16.

In the Criminal Code, which has been successfully ordered last discussion in the Parliament of the country dominated such kind of punishment as imprisonment — 744, than follows a fine — 471, than it is corrective work — 468. Limitation in service — 342, confiscation of property — 264, community service — 152, seizure — 150, the death penalty — 12 [4].

That is a fair conclusion suggests that the installation of the head of state in terms of the humanization of the current legislation announced in Address to the Nation of Kazakhstan on January 29, 2010 by the President of the Republic of Kazakhstan N. A. Nazarbayev are not implemented in full.

So, the President specified that the fines represent less than 5 %, corrective work — 0.4 %, community service — 0 % in our system of punishment. But the main form of punishment is imprisonment. Nobody deals with the rehabilitation of people released from prison. As a result, they add to the number of offenders [5].

If we look at the history of sovereign Kazakhstan, the development of the Criminal Code accrue to the second half of the nineties. It was a very difficult time. The collapse of the Soviet Union, the declaration of sovereignty, the collapse of the socialist way of production and the transition to a market economy, rampant crime and chaos in the economy. Therefore, the Criminal Code of the Republic of Kazakhstan adopted on July16, 1997 and entered into force on January 1, 1998, was a transitional document and its mission to stabilize the difficult situation in the country has successfully completed [6, 45].

In developing the new Criminal Code it is necessary to proceed from the fact that the criminal law should be tough, even cruel in relation of ardent criminals, repeatedly convicted of crimes, committed the crimes intentionally and their presence in society is an increased danger to others. They should, of course, be isolated from society.

At the same time, the criminal law should exhibit the humanity with relation to people who are the first-time offenders, especially when it comes to crimes committed by negligence.

As you know, the legal regulation in the field of law enforcement has social consequences.

Firstly, there is a constant process of intensive increase of "prison" population.

On average, since 2004 such kind of punishment as imprisonment invokes by the courts annually in Kazakhstan against 17–18.5 thousands of people who are in correctional institutions [7].

Thus, according to Deputy Secretary of the Security Council of the Republic of Kazakhstan K. Zhanburshina 1.2 million people condemned since independence. If we consider that each family on average has four people, it turns out that about 5 million Kazakhs were involved in the criminal environment. The man who served time in prison comes back as a broken and afflicted person, not a reformed person [8].

According to the Committee of the correctional system of MIA RK more than half a million people have passed through the correctional system since independence of our country as of January 1, 2014 [9].

Secondly, when we place the criminal in an institution, first of all, it means the physical isolation of the convict from his usual society (it is subject to people who are the first-time

condemned to imprisonment). In addition to this fact imprisonment has increased repressive, as associated with the laying on of the convicted defined and sufficiently serious legal limitations: freedom of movement, the possibility of choice to work, work and leisure time, communicate with friends and relatives, etc.

Thirdly, the conviction of a person to prison is a tragedy not only for the convicted person (social isolation, loss of contact with friends, colleagues and even relatives), but also for his close relatives and friends (negative assessment of the neighbors, colleagues, spouses, classmates and etc).

Especially when it comes to top-ranking person of the former Minister, Deputy Ministers or regional akim. Such examples in Kazakhstan, unfortunately became not uncommon.

Fourth, according to well-known scientists, being generally the positive tool for influencing the criminal, such punishment as imprisonment causes certain negative effects, often little-dependent from law enforcement officers. I.e, a serious deformation of the person of the convict is influenced by various factors during his staying in prison.

Famous Russian scientist G. F. Hohriakov said: " Common sense guides us to suppose that the task of reformation and rehabilitation in isolation from society … unattainable. Indeed, the aim is to adapt to life in human society, it is separated from the society; wanting to teach him useful activity behavior, contain in an environment where each step is painted that produces passivity; thinking to replace bad habits by useful in the human mind contain it among his own kind that promotes cross-contamination, etc." [10, 74].

Fifth, the stay of persons in prisons contributes to the criminalization of society.

This problem has economic consequences.

If we take considered problem, the direct costs of the state to implement this type of punishment as imprisonment are very large. Thus, the content of one of the convicted person is 613 thousand tenge per year paid by the state. During 10 years in Kazakhstan costs of the prison system increased by 4.5 times and in 2014 they amounted to 47.5 billion tenge [11].

And nobody counted how much cost is required for the maintenance of ex-convicts after their release from prisons, but they are also large. For example, 19 thousand cleared from the penitentiary institutions in Kazakhstan in 2012; 15 thousand people cleared in 2013; in 2014 are about 13 thousand people [11].

High costs of detention of prisoners caused by their living conditions.

In addition, you must learn and put into practice positive foreign experience of penitentiary organizations for the purpose of that the convict after his release will not become another burden for the state, and having their savings obtained while serving their sentences, easily entered into a new life for him.

It should be reviewed the procedure of prisoners parole. So, instead established in Article 72 of the Criminal Code parole from punishment [4] mandatory deadlines of sentence not less than one-third of a sentence for a minor crime or crime of average gravity, at least half of a sentence for grave offences; not less than two-thirds of the sentence imposed for the high crimes, not less than three-quarters of a sentence for the offenses referred to in paragraphs 3 and 5 of the third paragraph of Article 120; paragraphs 3 and 5 of the third paragraph of Article 121 of the Criminal Code; at least one third of a sentence for a grave crime, or at least half of a sentence for a high crime, in the case when all the conditions of procedural agreement will be implemented by the convicted it should be charged up to 1 year for a minor offenses, up to 2 years for the crimes of average gravity, up to 3 years for the grave crimes, up to 4 years for the high crimes.

This will provide an opportunity to stimulate sentenced to corrective and significantly reduce the prison population and at the same time to increase the responsibility of prison officers, as well as significantly reduce the costs on the applicable punishment. There are practical cases where the person deserves parole, unreasonably deprived of this right by the legislator.

Moreover the employees of the correctional system with their experience may well deal with the personality of each convict who deserves parole, or who cannot be released before the court sentence becoming in the judgment.

Another equally important issue is the proper organization of training programs for convicts by post-secondary and higher education, as well as training and retraining of workers through the narrow specialties. Forms of learning may vary daily, correspondence and distance. The current system of education in prisons designed for those who has no primary education.

When amends to existing criminal legislation by type of punishment, we should also pay attention to the possibility of a maximum limit of the number of persons sent to correctional institutions. It is about minimizing the involvement of citizens in the field of criminal justice, the creation of conditions for wider application of criminal law measures not connected with isolation from society.

In criminal law, the state determines their attitude to commit crimes and enforcement.

In order to strengthen the criminal law of the Republic of Kazakhstan, it would be advisable to take advantage of the Law "On crime prevention" [12] to bring together all the agencies and the public to create a new ideology in society in crime prevention. We should create permanent coordinating body for the implementation of this law within the country at the national, provincial, city and district levels. We should involve all agencies and public organizations, citizens to implement the Message of the President of the Republic of Kazakhstan to the people of Kazakhstan, Leader of the Nation Nursultan Nazarbaev "Kazakhstan-2050": The new political course of held state about adherence of state to the principle of zero tolerance to disorder [3]. We should use the potential of the country at the highest level (may be the presidential administration or the Security Council).

While organizing the crime prevention it should be taken into account the views of the famous scientist criminologist G. A. Avanesov, he says that crime is generated by the conditions of social life, but it is itself part of these conditions [13, 18].

It would be useful to consider the process of crime prevention not only as the impact on crime and as a negative component of society, but also on society, which generates this crime.

This process should involve a broad and large-scale events, the implementation of which would contribute not only liquidation of specific causes and conditions of crime, but would include the impact on the healthy, law-abiding part of society. This will reduce the use of the criminal law, and thereby minimize the process of engaging citizens in the area of criminal law relations.

Thus, it is necessary to strengthen the preventive orientation of the state and its agencies, as well as an effective fight against crime is directly related to national security.

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Importance of international partnership in prevention of international crime

Abstract: This article discusses the issues of international cooperation in the field of crime prevention.

Keywords: prevention, international crime, criminology, International terrorism, Trafficking in drugs and psychotropic substances.

Today all humanity defining its future in a new age passes its way through the sieve of reflection. The world community has the great achievements in Science and Technology, Culture and Art including different fields of industry. But they are in a low level in the sphere of social politics particularly in international relations. Failing to establish a good order in this field all effects in the history come at a price for the humanity.

If now East and West were not oppose, bipolar, they would be divided into two groups — highly developed countries and low developed countries. Despite this causing the opportunity for stability covering the entire globe this process increases the distance between the world poles today. From one side this is the pole of welfare and from the other side it is the pole of low social standards of living and high level of crime.

The president of the RK N. Nazarbaev made a pointed reference in the UN Millennium Summit (2000, September 8): "If the achievements of globalization will be a priority only for the highly developed countries it could lead to even more big social cataclysms than those experienced in the past 100 years"[1].

Problems of crime and its prevention attract attention not only of experts but general public. This issue enters the jurisdiction of criminology. Criminology characterizes crime as a social phenomenon in the aggregate of crimes committed in a state or in a particular field of activities committed in a certain time interval. Crime is a phenomenon changing at every time, that is it appears at a certain stage of development in the society and it undergoes changes of social and economic structures and historical particularities of certain political systems. What is the role of a state in crime prevention? Generally it is performed in preventive, repressive, educational character and domestic measures. But such measures are insufficient for obtaining good results. Partnership between states plays a great role in crime prevention. Improvement of international Criminal law, institutions and principles are based on the growth of crimes at state and international levels.

To determine the field of crimes of international character is the one of the main directions to control crime in the cooperated countries and the aim of their joint measures. The term "Crimes of international character" was coined by Professor I. I. Karpen in 1977 [3].

Capitalization of legal relations causes particularly serious type of crimes and actions, their international legal contradictions were shown in the corresponding conventions, they can be classified according to the level of danger to society and reverse effects to the international interests.

The first group includes crimes affecting usual international relations, they are:

- Hijacking (taking in hostages), actions violating the integrity of civil aviation;
- International terrorism.

The second group consists of crimes affecting social and cultural development of countries and states. They include:

- Trafficking in drugs and psychotropic substances;
- Production of forged securities and counterfeit money;
- Environmental damage;
- Injury to the objects of national cultural heritage.

The third group includes crimes affecting private and state properties, general human and moral values:

- Human trafficking (slave trade, trade in women and children);
- Slavery;
- Piracy.

The forth group are the crimes of international character and others. They include:

- Sea cable damage or underwater pipeline damage;
- Failure to provide care in a collision of ships [4].

Up to this day crime problems are considered as domestic matters in each country.

But condition of crime prevention at the national level not only in a given country complicating by the increase of crimes causing danger to all humanity requires united struggle of the countries and everyday partnership. A number of factors are required for such cooperation.

Firstly, steady growth of international crime, international terrorism, crime in air transport, drug trafficking, arms smuggling — all this increases rapidly.

Secondly, there are some difficulties for a single state to solve crimes as they are made by skilled techniques.

Thirdly, there appeared international criminal organizations not limited by boundaries. They are well organized, they have representatives in every country, well-funded and have technical means, and they established criminal contact with the human rights bodies.

With the development of human society the objective necessity in international partnership arises in the field of criminal law. It is evident that in the international relationship the structure and the rate of development of international crime are changing though it is distant.

New types of international crimes such as ecocide, genocide, violation of human rights are appeared in great number.

In accordance with this it is important for countries "in international relations to review prevention of international crime through the strengthening and development of law and order; to develop international crime law, meet obligations in full coming from the international treaties in this field in order to ensure the conformity of the national law to the requirements of the international crime law".

According to P. Panov to justify the concept of the legal branch it is necessary to identify the object of legal regulation. What are the components of the object of international criminal law?

Firstly, the partnership in the prevention of crimes in a specific order as they are provided in the international treaties and partnership in investigation and punishment. Secondly, to consider as crimes single actions that can be dangerous to the international law regulations, to define court proceedings and jurisdiction, give law assistance in cases of crime, arrest criminals, duties of the international organizations in the field of crime control and other issues of partnership.

Fair judgment, fixation of basic standards, giving talks with the criminals and grouping of criminal law may be also included in the object of legal regulation

The UN is the coordinating center for governments and international organizations in the prevention of international crime. This function is performed by way of preventing of crimes as well as through educational activities aimed to

direct persons having committed an offence at honest way. This direction of the United Nations started to function in 1950 as a result of the reorganization of the International Penal and Penitentiary Commission organized in 1872.

The work of the United Nations in this field is determined by several factors:

- Considering crime as an objective specific social phenomenon, the necessity of exchange with the gained experience in crime prevention.
- Fact causing concern about criminal activities of terrorist organizations in the world community.
- Organized crime causes tremendous harm to society — they are an integral part of criminal cases in all countries.
- For a number of countries drug trafficking, hijacking, human trafficking and other crimes are a significant problem [5].

For half a century the United Nations are resolving conflict situations as well as promoting solidarity worldwide. Also the important role play subsidiary bodies of the UN, such as the UN Security Council, the Special Committee on the Administration of Justice, the Special Committee on Peacekeeping Operations, and others.

Any action from the part of the countries directed to prevent crime should be based strictly on the rules of international solidarity as well as on the principles such as:

1. The principle of equality of countries in decision-making.
2. Do not interfere in the internal affairs of another state.
3. The maintenance of peace and harmony, as well as supporting of security in the world.

By the president of the RK Nursultan Nazarbaev in his Appeal "Stability and security of the country in a new century" there was given the evaluation of the development opportunities in this field and there was shown the ways of elimination of the threatening danger to the national security in our country. From the day of obtaining independence Kazakh people has implemented the ways of the national security not only through the strengthening of the military forces but through the domestic policy of piece, participation in the international organizations and agreements directed to strengthen security. Kazakhstan determined 300 international conventions and agreements in its way of democratic development and strengthening authority in the world community.

Firstly, this is the policy of keeping peace and territorial stability by the participating countries of the Customs Union. For instance, during collisions in Ukraine our country acted as a bridge of peace between East and West in addition to humanitarian assistance.

Secondly, it is the policy of international security of Kazakhstan and disarmament in CIS area.

Thirdly, presiding of our country in OSCE, participation in the program of NATO "Friendship for peace" and disarmament Convention.

And all this can be considered as a new model of security and relationship activities and this can prove that Kazakhstan has opportunities to keep independence and peace. History teaches that it is important to gain independence and freedom and to keep and transmit them from generation to generation as well.

The United Nations entities dealing with crimes and their prevention and the issues of association with the lawbreakers perform discussion and lynch law out-of-court. The UN believes that only verdict which came into force is a direct legal basis for prosecution.

The states aiming effective prevention of crimes stand for international partnership. And organizations have great role here. Particularly the UN conventions and Interpol are highly evaluated.

Speaking about objective consent on social phenomena caused by crimes of international character we can state that Kazakhstan makes great contribution in guarantying global security and international partnership. Keeping peace in a whole world the UN takes an active part in the leading international organizations including Interpol.

In conclusion I would like to quote the words by great German poet Goethe: "It is not important where we are stay now, it is more important which direction we move on". Strengthening independence in our country, moving on the way of the constitutional country, pursuing a policy to enter the top of 30 competitive states it is greatly important to give more possibilities to talented, capable and intelligent young people.

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Problem of the expansion of judicial control at the pre-trial stage of criminal proceedings

Abstract: In the article analyzed possibility of expansion of judicial control within the framework of criminal trial. Proceeding possibility of introduction of new position is examined within the framework of the court.

Keywords: judicial control, expansion of judicial control, criminal trial, department judicial, pre-trial production, judicial reform, functions of justice, legality, court, criminal procedure, inquisitional judge, law and order, criminal case, justice, Law, office of public prosecutor, Supreme court, plenary powers of court, Constitution, rights and freedoms, complaint, reform, state, investigation, investigation, crime, citizen, investigator, organs of inquest.

At its substantive purpose judiciary is a specific form of state activities in their respective spheres of society. The need of the state in the judiciary is defined as the necessity to resolve recurrent disputes and the necessity to protect the constitutional order, rights and freedoms, the legitimate interests of man and of civil society.

The Constitution of the Republic of Kazakhstan as a key priority determines the rights, freedom and legitimate interests of man and citizen, thus perpetuating the importance of judicial protection, one of the mechanisms which is judicial control.

As a general rule the essence of judicial control is to verify compliance with the objectives of monitoring results: the courts verify that the activities of state bodies and their officials and the laws of their tasks; record deviations from the goals and ways to achieve them; take measures to prevent and bring to responsibility the guilty persons.

Judicial control is primarily aimed at improving the efficiency of criminal investigations, as well as raising the level of citizens' rights protection in criminal procedures, which provide optimal conditions for the investigator to perform the main functions, consisting in the prevention and investigation of crimes.

It is believed that the expansion of judicial control at the pre-trial stage of the criminal process in the proposed form would serve a greater enforcement of constitutional rights guaranteed by the investigating authorities, which generally serve to strengthen the rule of law in the Republic of Kazakhstan [1].

The current Criminally-Remedial Law of the Republic of Kazakhstan in art. 139 CPC RK has determined that a preventive measure is elected to prevent the possibility to the accused person to escape from the inquiry, preliminary investigation or trial, to prevent the objective investigation and trial proceedings, to continue to engage in criminal activities and, to ensure its execution after sentencing. The list of mentioned circumstances in the theory either called "misconduct" or purpose, which is achieved by the institute of preventive measures.

In accordance with Art. 140 CPC RK, the Preventive measures are the following: recognizance not to leave and proper conduct; personal surety; placing a serviceman under the supervision of the commander of a military unit; the return of the minor under the supervision; pledge; house arrest; detention [2]. Before turning to the issue of arrest sanctioning, it is necessary to find out what the arrest is a preventive measure.

Detention is the strictest kind of procedural measures of restraint. Preventive measures are a form of coercive measures that apply to a person involved in the commission of a crime, in order to ensure his presence in the criminal process. Preventive measure is to limit the personal freedom of the accused approved by the prosecutor or the court decision by placing it in the pre-trial detention in the course of criminal proceedings Detention as a preventive measure — it is not a criminal offense the accused (alleged criminal). In this case it does not have punitive value and it has only preventive tone, it applies not to the guilty but to the accused (in exceptional cases — to the alleged). Detention creates optimal conditions for the participation of the accused in criminal proceedings, to suppress his opposing to the normal course of an investigation or proceedings before a court, in order to prevent the defendant attempts to hide from the inquiry, investigation, trial, to prevent the establishment of truth on criminal case, re-engage in criminal activity, as well as to ensure the execution of the sentence.

The principal direction of the current criminal procedural legislation is to further the implementation of the criminal justice system of additional procedural means and mechanisms to ensure the rights, freedom and interests of the individual. A number of theorists and practitioners believe that one of these mechanisms could serve as a further extension of judicial control over the pre-trial activity. However, the expansion

of judicial control should not limit the prosecutor's control in this area, since one of the main functions of the Prosecutor's Office is a control function.

Nowadays, in the scope of further expansion of judicial control the notion is expressed about the transfer of prosecutor's power on authorizing a number of proceedings to justice that limit the constitutional rights of man: arrest authorizing, house arrest as a preventive measure, the extension of detention and others. Proponents believe that adjudgement allows conduction of these proceedings, to a greater extent take into account the legitimate interests of citizens than prosecutor's sanction, amenable for uncovering of crime and performing prosecutorial functions.

Inconsistency of this point of view, in which they try to present the prosecutor not as a guardian of the law, whose aims are to provide accurate and consistent implementation and enforcement of the law, but as a person who is primarily interested in the indictment result of the investigation, first of all, the prosecutor is not the person amenable for uncovering of crime

Uncovering of crime and crime investigation is the immediate task of inquiry and preliminary investigation. The Prosecutor's Office, in the framework of its supervisory powers, shall not be obliged to establish the circumstances, subject to proof in a criminal case; it only provides procedural guidance for the preliminary investigation, which, in particular, is expressed in giving instructions to a preliminary investigation, authorize a number of legal proceedings, participation in the production of certain investigative actions, in the abolition of unlawful decisions of junior detective, Investigator, head of the body of inquiry and the investigation department in consideration of complaints about their actions and decisions and the implementation of other powers stipulated by law.

Secondly, an indication that the prosecutor performs only prosecutorial function is incorrect and wrong. In the theory of criminal proceedings the indictment (indictment activities) means a series of actions that expose a person committed a crime and enforce punishment to him.

In accordance with Art. 62 Code of Criminal Procedure of the Republic of Kazakhstan, the prosecutor is the official body, performing oversee legality of operational and investigative activities, inquiry, investigation, adjudgement, as well as criminal prosecution at all stages of the criminal process within its competence. Specifying the powers of the prosecutor in the preliminary investigation stage, Art. 197 Code of Criminal Procedure states that the prosecutor conducts criminal prosecution and supervision of legality in criminal matters [3]. Law of the Republic of Kazakhstan "On Prosecutor's Office" refers oversee legality of the inquiry and investigation and prosecution to the main activities of the prosecution [4]. These two activities are different forms of prosecutor's execution of basic constitutional function, which is to oversee legality. Therefore, prosecutor's supervisory activity is the main mean, and the charge is just one of the diverse means by which the prosecutor follows the law, and in particular to ensure that in the course of criminal procedure the rights, freedom and interests of the individual were not violated

The conclusion is that the statement of court meets legitimate interests and rights of citizens, than the prosecutor is initially incorrect.

Judicial control and public prosecutor's supervision in pretrial proceedings are two independent methods aimed at ensuring the rule of law in the activities of inquiry and investigation, which should be used together, but not to be canceled out. Judicial review can not replace the public prosecutor's supervision. As the confirmation of this we can cause a number of reasons:

1. Prosecutor performs procedural aspects by investigation. Realizing their powers to ensure the legality of the preliminary investigation, the prosecutor overseeing the investigation, and it helps him to take the right decision in the case, particularly, in arrest authorizing. Court procedural guidance for the investigation does not perform. Respectively, it is more complicated to court to take the right decision in a criminal case in pre-trial proceedings.

2. The supervising prosecutor performs oversee investigation of a particular criminal case. He receives all necessary information on this case. Incoming information gives to prosecutor more or less complete picture of the produced investigation, which helps to make the right decision. Carrying out judicial control over pre-trial proceedings, it is not necessary to the same judge resolve all the questions arising from the one criminal case. In connection with the existing order of actions appeal and decisions of the criminal prosecution, the complaint by one and the same case may be subject to review even by different courts. Undoubtedly, all this will affect to the quality of judicial control in the pre-trial proceedings, and particularly, to the use of detention as a preventive procedure. Since not having understood the essence of a criminal case, the court (judge) unreasonably can withheld or on the contrary, allow to apply arrest as a preventive measure.

3. Judicial control due to the specifics of judicial activity can be carried out only occasionally: when considering complaints against actions and decisions of the prosecution or when authorizing certain procedural actions (eg, arrest). Prosecutorial supervision is carried out in the pre-trial proceedings since the initiation of criminal proceedings till the direction of the finished production criminal case to the court or a decision to discontinue criminal proceedings, which contributes to timely detection and prevention of law violations.

4. Prosecutorial response to the questions, emerging in connection with the investigation are always quicker comparing to justice. This is due to the fact that supervision is the main content of the Prosecutor's Office. Judicial control is not related to the main function of the court to which the law imposed a difficult and demanding task of administration of justice. Therefore, in spite of everything, others, except for the administration of justice, the functions of the court will act in the background.

Court, that is the subject designed to protect the rights and freedoms of citizens to administer justice in the state is not

burdened with an accusatory manner, it is equally interested in respecting the rights of each party. In contrast to the prosecutor's office, among other tasks responsible for the confrontation of crime, the court has no common with the prosecution of procedural interests. In the administration of his power, he is guided only by the law and conscience (unfortunately, the legislator does not give an official interpretation of the concept of "conscience"). However, the transfer authorization of arrest fully within the competence of the judiciary is fraught with some serious problems. Like the prosecutors who are in mutual departmental depending on judicial impartiality can also affect the position of "investigative" judge, who gave consent for the use of the accused's arrest as a preventive measure.

If to provide the right to authorize the arrest and detention only to the court, so in this case position will not be implemented p. 2, Art. 16 of the Constitution of the Republic of Kazakhstan to authorize the prosecutor's arrest and detention. Ignoring this constitutional provision will mean a violation of one of the most important legal principles — constitutional law, binding the legislator to the Constitution means that the existence of laws that are in contradiction with — inadmissible.

Thus, analysis of the Criminal Procedure Code of the Republic of Kazakhstan, in terms of implementation in the criminal justice figures investigating judge, demonstrates the importance of this institution, but at the same time the Constitution of the Republic of Kazakhstan has supreme legal force in the territory of the Republic of Kazakhstan and it is the fundamental law of our state; the authorization of decisions and actions that restrict the rights and freedoms of citizens, is not peculiar to the legal nature of the court, because the sanctions for detention will give the court accusatory character; by authorizing judge bind himself with the accepted decision at the investigation, this would violate the principle of objectivity and impartiality of the administration of justice.

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Procedural status of victim in criminal proceedings

Abstract: The purpose of this article is to highlight the procedural status of the victim as a party to criminal proceedings in accordance with the criminal procedure legislation of the Republic Kazakhstan.

Keywords: rights, criminal proceedings, procedural law, the criminal Procedure Code.

The Constitution of the Republic of Kazakhstan contains provisions, concerning the inalienable human rights, security and legal protection of individuals, whichare belong to everyone from birth, and recognized as absolute and inalienable; everyone has the right to recognitionhis personality and has the right to defend their rights and freedoms by all means not contradicting the law including self-defense [1, 5].

It all comes down to the fact that any person in the case of risk of harm is criminal, having a minimum volume of rights and freedoms which established in the Constitution of the Republic of Kazakhstan, have the right to require judicial protection of their violated rights and freedoms, when applying to the relevant public authority. Since the judgment when a person is recognized as injured body, the criminal proceedings, the person whose rights and freedoms have been violated by criminal act and caused some damage, becomes an active participant in the criminal proceedings, namely the victim and begins to have a set of rights and obligations enshrined in the criminal Procedure Code of the Republic of Kazakhstan (v. 75).

The rights and duties of the victim determine its procedural status in criminal proceedings. During appearance of victim in his procedural status was different. In general, the procedural status of the victim is determined by such factors as the level of economic development, public-political regime, form of government, and more. With the development of democratic principles in the country, the procedural position of the victim expands; he turned from a passive participant of the criminal process to an active participant. He was endowed

with additional rights, which were mostly brought to life in the law enforcement and vital.

On the basis of the link between the criminal and criminal procedural law of the development of individual institutions of criminal procedural law should take into account not only the procedural, but also the material law. In particular, for full defining concept of the victim we should analyze not only the norms of procedural law, but also the specific offense.

Criminal Law, referring to the victims, in many cases, does not define this concept. This concept is defined in Art. 75 of the Criminal Procedure Code of the Republic of Kazakhstan, which states: "The victim is a person in respect of whom there are grounds for believing that he directly offense suffered moral, physical or property damage".

Because of the close relationship of the criminal and criminal procedural law the notion of victim should recognize the same for these two branches of law. However, criminal-law notion of victim and criminal procedural notion of victim, which being united in principle, cannot be the same for two reasons. Firstly, the real victim can not be recognized as such (for example, if the crime remains unknown) and therefore does not become a party to the criminal proceedings. Second, victims may be the person who has suffered harm or not suffered, but not as a result of the crime (eg, as a result of actions deranged). In this case, the victim in the substantive sense is absent, despite the presence of the appropriate procedural figure.

We should note the various functions of the concept of the victim in criminal law and criminal procedure. In The Criminal Procedure Law this concept is necessary in order to highlight the victim among other participants of the proceedings, give it special rights and responsibilities to achieve the objectives of criminal proceedings.

Criminal law has other important notion of victim. First, it necessary for determine the scope of criminal liability and, secondly, for differentiation and individualization of criminal responsibility.

Analysis of Art. 75 of the Criminal Procedure Code of the Republic of Kazakhstan make it possible to formulate the basic provisions relating to the concept of victim in criminal procedure law:

- Victims may be considered a natural person, but in the event of financial or moral harm — even a legal entity.
- The harm of crime can be moral, physical or property.

For participation to proceedings as the victim and by the totality of the rights granted to this member of the process, a person must be recognized as a victim of crime in accordance with the law.

According to the Criminal Procedure Code of the Kazakh SSR victims recognized the person to whom the offender suffered moral, physical or property damage. Pointing to the infidelity of this formulation, Ya. O. Motovilovker noted that victims should not recognize the person, who established that he suffered harm, but the person against whom there is sufficient evidence giving rise to the recognition of him certain procedural rights [2, 64].

This point of view was supported by many other scholars, and was reflected in the Code of Criminal Procedure of Kazakhstan, which takes the victim as a person in respect of whom there is reason to believe that he was suffered some harm of crime.

Such a definition of victim is correct because it clarifies the distinction between the two concepts of the victim: procedural and material. R. D. Rahunov indicates: "Allowing the victim to the proceedings means only recognition him certain procedural rights, but not recognition established fact of causing harm, just as engaging as the accused person does not signify his conviction. Recognition of the harm is possible only in the judgment of the court" [3, 107].

V. P. Bozhyev in his dissertation draws attention to the fact that criminal law notion of victim and criminal procedural notion of victim has a connection, although there is no identity. In the criminal law sense, victims can be both physical and legal persons, the procedural law recognizes victims capable person [4, 18]. It should be noted that this view is not in accordance with the criminal procedure law.

These issues are worthy of approval in the renewed criminal procedure legislation of Kazakhstan, according to which, in the case of financial or moral harm, victims can be recognized as a legal entity. Earlier, before the entry into force of the Criminal Procedure Code of the Republic of Kazakhstan, according to the Criminal Procedure Code of the Kazakh SSR the legal entity, in the case of causing criminal damage to property, acted in the process not as a victim but as a civil party and used all the rights of the latter, which put legal person in an unequal procedural position of the victim – physical person. The civil claimant is not allowed to testify as victim. All claims of civil plaintiff took the form of plaint, the essence of which is to specify what specific causes property damage and what is its monetary value. Authorities, which conduct the criminal proceedings, deprived important source of information that could be presented by the organization, enterprise, institution.

In addition, a crime organization could be caused not only property, but also non-pecuniary damage. The former law recognition of non-pecuniary damage left without procedural safeguards, while inflicting physical person or property or moral damage is caused by the recognition of his victims.

Criminal procedural law not only corrected the discrepancy in determining the procedural position of individuals and legal entities, but also contributed clarification to the concept of the victim at all.

In cases of crimes, the consequences of which were the death of the person, the rights of the victim carried close relatives of the deceased.

This question is the subject of debate among scholars in the legal literature.

Ratinov A. [5, 32] expressed that these persons can not be allowed to participate in criminal proceedings as victims. Criminal procedural law otherwise decided this issue by providing that in cases of crimes, the consequences of which was the death of the victim, the victim's rights carried its close rela-

tives (Art. 75 of the Criminal Procedure Code of the Republic of Kazakhstan).

V. M. Sawicki and I. I. Poteruzha consider that the relatives of the deceased person involved in the process as his representatives, and can not be recognized as the victims, because between the crime and the alleged injury to the relatives of the deceased person has no immediate direct link. They believe that the rights of family members in this case are not violated, since the victim and his representative are in the process of equal rights. This is not entirely correct. Representative of the victim, as opposed to the victim, do not use one essential right: the right to have a representative in the process. If the relatives of the victim, in the case of his death, will be involved in the process as a representative of the victims, it would oblige them personally always act in the process and to deprive them of the opportunity to have their representatives.

Relatives of the deceased can not be regarded as his representatives, because the basis of representation (except the representation of disabled) should be based on the parties' agreement, but this is not the case here.

Close relatives of the deceased person, if they were dependent on him, suffered material damage. But when they are not suffered material damage but suffered heavy pecuniary damage, which is much harder experiences of others who are not close relatives of the deceased, they should be recognized as a victim of a crime and them should be submitted all the rights of the victim.

After the death of the victim, harm can be caused to some of his relatives. Do they all have to be recognized as a victim? This right can belong to several close relatives. If close relatives of the deceased suffered material damage, they all must be recognized as the victims and them must be explained the right to bring a civil action, because each of them can claim independent plaint and be recognized as a civil plaintiff. If the relatives of the deceased person suffered a pecuniary damage they should be recognized as victims. But if by any of the other relatives of the deceased received an application for recognition him as victims, this request should be granted. In this case, in the process will involve multiple victims.

Thus, covering all aspects of the concept of the victim, the notion of victim in criminal proceedings can be formulated as follows:

"If an individual or a legal entity suffered moral, physical or property damage, he recognized as victim. Also, the victim is a person in respect of whom the preparation of or attempt to commit a crime, he was put under threat of such harm. Moreover, with respect to an individual, all three types of harm are possible, but in respect of the legal entity only two types- material and moral damage".

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Use of innovative technologies in criminalistics

Abstract: This article discusses the use of innovative technologies in forensic science.
Keywords: biometric, security, identification, security.

The development of information technologies and their application in medicine, science, industrial sphere forever changed modern society. The laws of society must obey and to acquire the data changes. Since PIN-codes, passwords, identification photographs, credit cards and magnetic signatures are an integral part of modern life, and the problem of information security one of the most urgent. Currently greatly increased interest in the topic of digital identity that is accepted as associated with the growing threat of international terrorism, increase the volume of trade transactions conducted via global computer networks, particularly the Internet.

Digital identification of individuals using the consolidation of the single person's unique system number, a feature of which is that it is being taken even without any additional information was itself encrypted bears some critical information about a person (such as the date and place of birth gender, the body, where this number was generated). Despite the fact that the automated system code of the person are stored in the memory, the basis for the digital identity are long used techniques biometrics, namely, a technology that uses a unique physiological parameters of the subject (fingerprints, iris, and so on. D.). Obviously, biometrics provides the most reliable and stable information about a person, such as fingerprint fingers and iris does not change throughout a person's life [1].

Under biometrics understood area of science that studies the methods for measuring the physical characteristics and behavioral traits of the person for identification and authentication of identity. Biometrics man called his measured physical characteristics or personal behavioral traits, which in the process of comparison with similar previously registered biometrics human identification procedure is implemented.

The first steps of mass use of biometrics can be attributed to Alphonse Bertillon, who in the 90s of the XIX century, working in the files of the Paris police, came to the conclusion that the combination of 14 units of measurements (height, length and head circumference, length of the upper body and etc.) adult chance coincidence on the theory of probability is infinitely small (of the order $3{,}5 \times 10^{-9}$) and if the produce carefully measuring each offender and accurately record the results in the personal card will be possible unambiguously identifying. After a number of major cases, this system of identification was "taken up by the" French police. In place of the identification by the sum of the measurements came fingerprinting. In the early XX century Englishman Edward Henry proposed a method by which the identification of a print takes a few minutes. After 10 years, the system prints began to practice in all of Europe.

Today the word "biometrics", which is firmly established in our everyday language, and its value is almost no one in doubt. Biometric identification, biometric scanner, biometric passports — everyone understands that we have in mind here. More recently, the term has a much broader interpretation and was used mainly where it was a question of the methods of mathematical statistics, applicable to any biological phenomenon. Now under biometric technologies often realize automatic or automated methods of recognizing a person's identity by its biological characteristics or manifestations [2].

Any biometric system consists of a biometric scanner — a physical device which can measure a particular biometric characteristics, and comparing the measured characteristics of the algorithm with previously registered (biometric template).

There are two possible modes of operation of the system — verification (one to one comparison) and identification (one to many comparison).

In verification mode the user enters their name, password or PIN, shows an electronic card or other means to announce the system, "who he is". Her task in this case — check "truthfulness" of the information received, ie verify the conformity of the measured biometric with a previously recorded pattern claimed individual.

In the identification mode, the user simply "makes biometrics", and the task of the algorithm — to decide whether the user belongs to a number of well-known individuals, and if you belong to, then — who he is. In this case, the measured biometric characteristics compared to a database of previously recorded patterns of all "known" system of people.

The main biometric techniques currently used in practice are:

Biometric security on demand fingerprints. This — the most common static method of biometric identification, which is based on the uniqueness of each human figure papillary patterns on the fingers. A fingerprint image obtained by using a special scanner, converted into the digital code and compared with a previously entered template (reference) or the set of templates (in the case of authentication) [3].

Biometric Protection for recognizing hand shape. This static method is built on the recognition of hand geometry, is also unique biometric characteristic of man. Using a special device, allows to obtain a three-dimensional image of the hand (some manufacturers scanned form multiple fingers), obtained measurements necessary to produce a unique digital convolution identifying the person.

Biometric security in pattern of the iris. This method is based on the recognition of the unique pattern of the iris. For the implementation of the method requires a camera provides images of the human eye with sufficient resolution and specialized software, allows you to select from the resulting image iris pattern on which to build a digital code for human identification.

Biometric security on the spectral characteristics of the voice. Currently, the development of one of the oldest technologies has accelerated since assumed its widespread use in the construction of intelligent knowledge. There are many ways to construct a code of voice identification, usually a combination of different frequency and the statistical characteristics of the person.

Biometric protection based on handwritten handwriting. Typically, this dynamic method of human identification using his signature (sometimes writing code word). Digital identification code is generated by the dynamic characteristics of the writing, that is, to identify construction convolution, which includes information on the graphic signature parameters, timing of application signatures and dynamics of pressure on the surface, depending on the capabilities of the hardware (graphics tablet, the screen handheld it. d.).

Biometric protection on keyboard handwriting. The method generally similar to that described above, but instead it uses a signature certain codeword and from the equipment only requires a standard keyboard. The main characteristic, which is based on the convolution for identification — the dynamics of the set of codewords.

Biometric protection by thermal drawing, create a structure of blood vessels. This approach to the problem considers the thermal pattern generated by the structure of blood vessels face, hands or other body parts. Another approach, also based their work on the system of blood circulation, drawing explores the veins and arteries on the back of the hand of man.

Biometric Protection for recognizing facial appearance. One method, which won considerable popularity — recognition of facial appearance. People easily recognize each other as individuals, but to automate such identification at all easy. Most of the work in this area is related to image processing using photo or video. This static method is based identification of two- or three-dimensional image of the human face. With the camera, and specialized software image or set of images of faces are contours eyebrows, eyes, nose, mouth, and so on. Computed distance therebetween, and other parameters, depending on the algorithm used. On these data is based the image to be converted into digital form for comparison. Moreover, the number, quality and variety (different angles of rotation of the head, changes of the lower face in the pronunciation of key words, and so on). The read images may vary depending on the algorithms and functions of the system implementing the method.

Biometric security by smell. Currently also working on the creation of "electronic nose". If the dog can distinguish people by smell, why not do it with the help of biometrics.

If analyze the factors that influenced the development of biometrics for the past 10 years, significantly increased the number of different biometric parameters used for identification. Identification of the voice, face, hand, eye in the amount surpasses the classical system fingerprint identification, which, in turn, use different principles for fingerprint image, namely, optical scanners that work on the effect of total internal reflection of light (we can say that with them, and began the modern biometrics), capacitive CMOS chips, fiber optic chips and teploregistriruyuschie chips. Increase in the number of companies engaged in biometrics and accordingly increased the number of areas in which biometric systems are real application, of which by far the most widespread are mobile, the passport system and credit card (cash payments) [4].

Events of September 11 have significantly changed the attitude to the world of biometrics. At the moment, it is known that 11 terrorists — organizers attacks on the United States were known and the FBI sought by US authorities, but the terrorist use of false documents and bureaucratic mechanism of registration of foreigners have made possible the implementation of the attack. Furthermore, the absence of biometric security in managing the aircraft as not to interfere with the plans of terrorists, although the use of a simple fingerprint scanner, blocking the transfer of control of the aircraft to another person, it could significantly reduce the consequences of a terrorist attack. All this helped to increase the popularity of the global biometric solutions among US citizens, only 10 % of which supports the idea of biometric passports before 11 September 2001 and 75 % after. However, the presence of many different solutions of biometric passports and lobbying by several large companies, their fundamentals approaches to solve this problem at passport market (IBM, Polaroid, Oracle, Microsoft) makes it difficult to adopt a single decision, and numerous local biometric systems are not compatible in the parameters and likely prevent the establishment of a global network of biometric than contribute to its creation. A similar situation exists in the field of biometric security credit card only as independent states, and services are the major card companies Visa, Master Card, American Express, their affiliates and certain banks. However, if the term "threat of international terrorism" is the most popular phrase in the mouths of modern statesmen, banks and financial companies, primarily interested in reducing their costs, maximizing profits and are not ready to implement the relatively expensive biometric solutions. Therefore, despite the fact that the banking sector is technically ready for the introduction of biometric security credit cards, no one wants to take on additional costs for biometric protection, and prefer to hide losses from unauthorized access, up to a hundred million USD per year [5].

Thus, despite the technical readiness, in the near future should not expect wide capture of said mass application of biometric solutions. However, the more distant the forecast is little doubt regarding the biometric passports population. The trend of political development is that the biometric passport system may be virtually the only protection for both the developed nations and individual citizens against crime and terrorism, and many frequent military conflicts beginning of the XXI century can only accelerate the adoption of a joint inter-state solution.

Expansion of measured and analyzed biometric parameters leads to a natural extension of the range of issues addressed by biometrics. Another most promising direction of biometrics is the analysis of psychophysiological state, known as a "lie detector". Determination of the true thoughts and purposes of human task is not less ancient than his identification. One of the basic principles of psychophysiological detectors is the relationship between the amount received from the test data and test time. Naturally, to obtain reliable results, it is necessary to increase or testing, or the effectiveness of reading biometric information. For classical polygraphs used measurement of several biometric parameters (usually a pulse, ECG, galvanic skin response), having a capacity of approximately 100–200 samples per second, and the test time is several hours of use of modern techniques of voice psychophysiological research allows for the testing time in a few minutes during performance of about 10,000 cps [6].

Foreign experience of biometric systems suggests the following development of human identification using biometric technologies: most countries of the world community will have a biometric identity card which information is stored in government databases, combined in a global international identification system; reality will become not only the identification of the individual, but also the identification of the thoughts and intentions. When crossing the borders of the state, or in access to certain objects people will be automatic

psychophysiological testing during real time. In the future reality will not only pervasive and instantaneous identification of the person, but also the identification of intentions and motivational structure of the psyche. Become possible suppression planned, has not committed crimes using automatic psychophysiological testing human cross borders or entering the building. That is the future, experts predict biometrics.

Thus, in the fight against crime in modern criminology has significant potential associated with the widespread introduction of biometric identification technologies.

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Section 13. Finance law

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The measures against tax havens and unfair tax competition

Abstract: This paper focuses on the issue of tax havens and unfair tax competition. It presents the OECD definition of a tax haven, and in the next section it gives an overview of the fight of the OECD, the Financial Action Task Force and the European Union against tax havens and against the lack of a tax transparency and unfair tax competition.

Keywords: Tax havens, the OECD, the European Union.

Introduction

"*Civilisation works only if those who enjoy its benefits are also prepared to pay their share of the costs. People and companies that avoid tax are therefore unpopular at the best of times, so it is not surprising that when governments and individuals everywhere are scrimping to pay their bills, attacks are mounting on tax havens and those that use them*" [1].

Capital is accumulated where taxes are low and where are low regulatory concessions. Tax havens have increasingly competed for the attention of international investors. Taxation and fiscal legislative activity and state financial control are directly related to the state sovereignty. A state is entitled to tax jurisdiction as a result of its sovereignty. Tax sovereignty reflects the inseparable relation between the sovereign state and its inherent prerogative to levy taxes within its territorial jurisdiction, as recognised by international law [2, 58]. As a result of the sovereignty recognized by international law, a state enjoys a significant liberty to determine the extent of its tax jurisdiction with regard to foreign companies and entrepreneurs on own territory [3, 3]. In the context of a tax competition, states may offer to foreign companies and entrepreneurs to become domestic tax resident. The issue of tax havens is primarily a problem of an international law (bilateral international agreements) and the regulation of relations between Member States of international or global organizations. The paper describes the institutional and legal fight of two major international organizations — the OECD and the European Union — against tax havens and unfair tax competition.

1. Criteria of tax havens

In 1998 the OECD Member countries published the report entitled *Harmful Tax Competition: An Emerging Global Issue*. That report focused on geographically mobile activities, such as financial and other service activities, including the provision of intangibles. It developed criteria to identify the harmful aspects of a particular regime or jurisdiction. It set on four criteria [4, 4–5] in particular:

– no or nominal taxes in the case of tax havens and no or low effective tax rates on the relevant income in the case of preferential regimes;

– the lack of effective exchange of information;

– the lack of transparency;

– no substantial activities, in the case of tax havens, and ring fencing, in the case of preferential regimes.

Still, it is necessary to distinguish between activities: an activity that is known as "tax optimization" and leads to "paying little taxes", is a legal activity to minimize taxes paid, and involves the use of all active legal exemptions.

On the other hand, tax evasions are always illegal. These include denial of property, reporting fictitious expenses, etc. Only moving the headquarters to a tax haven falls under the category of "tax optimization" and it is not forbidden neither in the Czech Republic, nor in other European countries.

The definition of a *tax* haven in Oxford Advanced Learner's Dictionary [5] is a place where taxes are low and where people choose to live or to officially register their companies because taxes are higher in their own countries. A tax haven is a country or an area that exempts foreign investors to hold bank accounts or to set up companies in its territory because of a low taxes.

The main actions have been aimed at putting pressure on the governments of tax havens seeking to limit their confidentiality laws and bank secrecy. This is currently being done through various international organizations, usually under the banner of combating terrorism, drug trafficking and money laundering networks. The OECD and the Financial Action Task Force (FATF), the G20 and the EU are the most active bodies in this field [6].

2. The OECD

According to the OECD "The lack of effective exchange of information is one of the key criteria in determining harmful tax practices" [6].

In 2002, the OECD Global Forum Working Group on Effective Exchange of Information developed a legal instrument that is beeing used to establish effective exchange of information

called *Tax Information Exchange Agreement* (TIEA). The model TIEA represents the standard of an effective exchange of information for the purposes of the OECD initiative on harmful tax practices. This Agreement contains two models for bilateral agreements. A number of bilateral agreements have been based on this Agreement, e. g. the bilateral agreements between the Czech Republic and the San Marino, the Isle of Man, Jersey, Bermuda, and the British Virgin Islands. A model template for requests of information under Tax Information Exchange Agreements has been designed to assist competent authorities of TIEA partners in making requests for information [7].

The OECD is at the forefront of efforts to improve international tax co-operation between governments to counter international tax avoidance and evasion. In furtherance of these goals, in 2004 the OECD set up the ATP Steering Group to act as a centre of knowledge and expertise on international tax planning. The Steering Group began with membership of G7 countries and now has grown to a full working party of the OECD countries and G20 countries. The OECD's work focuses on identifying trends in international tax planning and helping governments to respond more quickly and effectively to emerging risks.

The OECD provides a forum for countries to exchange information on tax planning schemes, detection methods and response strategies. The *ATP Directory* is a secure database of aggressive tax planning schemes. Access to the database is limited to the government officials from countries that are members of the Expert Group on the ATP Directory. The Directory contains a database of more than 400 tax planning schemes and a section on hybrid mismatch arrangements with tables that compare the tax treatment of entities and instruments in various countries in order to facilitate the detection of hybrid mismatch arrangements. The purpose of the Directory is to allow government officials from member countries to share information on aggressive tax planning trends. Timely sharing of information on ATP schemes helps member states in understanding new tax planning techniques, facilitates their detection, enables countries to rapidly adapt their risk management strategies and to identify appropriate legislative and administrative responses. A review undertaken by the Secretariat in 2012 showed that the information on the directory had assisted some countries to avoid substantial potential revenue loss (up to EUR 1.5 billion) through the early identification of previously unknown ATP schemes [8].

3. The Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) is an intergovernmental body established in 1989 by the Ministers of G7 countries. It is an international organization affiliated with the OECD. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring national legislative and regulatory reforms in these areas. The FATF has developed a series of *Recommendations* that are recognised as the international standard for combating of money laundering and the financing of a terrorism and proliferation of weapons of mass destruction. They form the basis for a coordinated response to these threats to the integrity of the financial system and help ensure a level playing field [9].

4. The European Union

In the European Union, the tax havens seek to limit and regulate mostly Germany and France. These countries are the most affected by the departure of their business to the tax havens. The work in the EU on improving tax cooperation reflects many of the underlying principles of the OECD fight against harmful tax competition. Against an unfair European tax competition, The European Union provides a set of rules which are binding both for the economic agents — the taxpayers — and the Member States themselves. Here we find specific legal instruments which define the limits to the fiscal and economic behaviour of the Member States and their citizens and their entrepreneurs on the European Common Market.

The power to levy taxes is central to the sovereignty of the Member States. The European Union has assigned only limited competences in this area. The legal basis for it are Articles 110–115 of the Treaty on the Functioning of the European Union (TFEU). The EU efforts to pursue harmonisation in this area are therefore mainly focused on indirect taxation. Alongside these efforts, the EU is stepping up its fight against tax evasion and avoidance, which constitute a threat to fair competition and are the cause of a major shortfall in tax revenues. According to the Treaty, tax measures must be adopted unanimously by the Member States. Tax policy is greatly influenced by the case-law of the European Court of Justice [10].

According to the EU Bodies, The Member States' need for a mutual assistance in the field of taxation is growing rapidly in a globalised era. There is a tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalisation of financial instruments, which makes it difficult for Member States to assess taxes due properly. This increasing difficulty affects the functioning of taxation systems and entails double taxation, which itself incites tax fraud and tax evasion, while the power of control remains at national level. It thus jeopardises the functioning of the internal market.

According to the Commission of the European Union (at *Promoting Good Governance in Tax Matters*) globalisation, or the increasing economic integration of markets that is being driven by rapid technological change and policy liberalisation, is providing great opportunities in the world. In a world where money moves freely, tax havens and insufficiently regulated international financial centres that refuse to accept the principles of transparency and information exchange can facilitate, or even encourage tax fraud and avoidance, negatively affecting the tax sovereignty of other countries and undermining their revenues [11].

A tax policy issue which ranks high on the EU agenda is the fight against tax evasion and avoidance. In the EU, around 1 trillion euros in a tax revenue is lost each year to the tax evasion and avoidance, constituting a threat to a fair competition

and a huge loss of state incomes. The European Union has taken a number of measures in different areas to ensure adhere to good governance principles in the tax area [12]:

– *Council Directive 2010/24/EU* of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures;

– *Council Regulation (EU) No 904/2010* of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;

– *Council Directive 2011/16/EU* of 15 February 2011 on administrative cooperation in the field of taxation; this Directive provides clearer and more precise rules of governing administrative cooperation between Member States where it is necessary, in order to establish, especially as regards the exchange of information, a wider scope of administrative cooperation between Member States. Clearer rules should also make it possible to cover all legal and natural persons in the European Union in particular, taking into account the ever increasing range of legal arrangements, including not only traditional arrangements such as trusts, foundations and investment funds, but any new instrument which may be set up by taxpayers in the Member State;

– *Council Directive 2011/96/EU* of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States;

– *Council Regulation (EU) No 389/2012* of 2 May 2012 on administrative cooperation in the field of excise duties;

– *Commission Decision (2012/C 198/05)* of 3 July 2012 setting up the EU VAT forum;

– *Communication Com (2012/351)* of 27 June 2012 from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries;

– *Commission Recommendation C (2012/8805)* of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters;

– *Commission Recommendation C (2012/8806)* of 6 December 2012 on aggressive tax planning.

Conclusion

The European Union and the OECD Member States face serious challenges in addressing the latest economic and financial crisis. The crisis raised concerns about the sustainability of tax systems in the face of globalisation.

About 3.4 % of Czech companies (with 17 % of total capital of Czech companies) have a tax domicile in the tax havens. To tax havens over 13,000 Czech companies have relocated, most of them to the Netherlands (over 4,200 companies), to Cyprus (over 2,000 companies), to Luxembourg (about 1,100 companies) and to the British Virgin Islands (over 400 companies) [13]. In the Czech Republic, the tax treatment of income derived from business activities is almost alike for natural and legal persons. The starting point for computing the taxable profits is the profit before tax disclosed in the accounts. Taxation is the subject of adjustments under the Income Tax Act (no. 586/1992 Coll.). The current rate of corporation tax is 19 %, the current rate of dividend tax is 15 %. The main reasons why the Czech businessmen move are corruption, bureaucracy and quickly changing laws. They don´t leave because of high taxation, because in Netherlands, current rate of corporation tax is 25 % (for gross profit before tax under 275,000 euros is current rate 20 %).

It is a challenge for states and their tax systems to be effective, fair and advantageous for companies, so entrepreneurs are not forced to leave to places with better conditions for them.

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Contents