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Section 1. Civil law

Leonchik Dmity Olegovich,
student, the Faculty of Customs
Reshetnev Siberian State University
of Science and Technology,
E-mail: leonchik.dimka@mail.ru

Safronov Vyacheslav Vladimirvich,
Head of the Department of Law
Siberian State University of Science and Technology,
E-mail: pravo-sibsau@mail.ru

THE GUESTION OF MUTUAL INFLUENCE THE COLLECTIVE CONSCIOUSNESS AND JUSTICE CITIZEN

Леончик Дмитрий Олегович,
студент, факультет таможенного дела
Сибирский государственный Университет науки и технологии
имени академика М. Ф. Решетнева,
E-mail: leonchik.dimka@mail.ru

Сафронов Вячеслав Владимирович,
заведующий кафедрой правоведения
Сибирский государственный Университет науки
и технологии имени академика М. Ф. Решетнева,
E-mail: pravo-sibsau@mail.ru

К ВОПРОСУ О ВЗАИМОВЛИЯНИИ КОЛЛЕКТИВНОГО СОЗНАНИЯ И ПРАВОСОЗНАНИЯ ГРАЖДАНИНА

В зависимости от того, как коллективное сознание соотносится с общепринятыми нормами, требованиями к человеческой индивидуальности, так оно и будет формировать эти гражданские индивидуальности. Например,

если в обществе сознание коллективов полностью воплощает в себе требования гражданского общества к индивидуальности гражданина, то коллектив при помощи своих специфических средств будет внушать своим членам целесообразность творчески заниматься не только профессиональной, но и общественно-политической деятельностью, спортом, художественной самостоятельностью и т. д. С другой стороны, если в коллективе будет уделяться недостаточно внимания развитию других способностей, кроме узкопрофессиональных, то и формироваться индивидуальность будет односторонне. А если учитывать, что на гражданина оказывает воздействие коллектив, членом которого он является, то при отрицательном влиянии коллектив может сформировать из гражданина крайнего индивидуалиста.

Влияние людей друг на друга может быть как положительным, так и отрицательным. Наличие у гражданина таких качеств, как стремление работать на благо общества, целеустремленность, творческое отношение к труду или, наоборот, наличие карьеризма, стяжательства, корысти в характере всегда свидетельствуют о том, какого рода люди преобладают в ближайшем его окружении[1].

Определить роль гражданина в обществе можно в единстве и цельности аспектов, первое место среди которых занимает правосознание. Когда-то выдающийся американский исследователь Амбруз Бирс высказал убеждение, что «миром правит человек». Вполне возможно, что он и прав, но государством управляет лицо, находящееся в статусе «гражданин». При исследовании термина «гражданин» в общем, многоаспектном плане, можно выделить два его смысла. В широком смысле гражданин является лицом – носителем прав, свобод и обязанностей, который реализует права и свободы в своих интересах. В специальном смысле гражданин – должностное лицо, наделенное возможностью работать в качестве государственного служащего, которое применяет закон в интересах всего общества и государства. А в связи с эти соответственно можно выделить два смысла правосознания гражданина: общий и специальный. В данной работе понятие «гражданин» рассматривается в широком смысле, так как «правосознание гражданина» в специальном смысле является профессиональным, а изучение профессионального

[1] Сафронов В. В. Генезис правосознания гражданина: монография / В. В. Сафронов; Сиб. гос. аэрокосмич. ун-т. – Красноярск, – 2012. – 108 с.

правосознание не есть тема нашего исследования. Однако думается, что правосознание гражданина служит основой профессионального правосознания, так как чтобы лицо было профессионально подготовлено (в качестве судьи, прокурора, депутата и т. д.), оно должно обладать гражданским правосознанием с точки зрения его гражданской позиции. Сейчас в отечественную юриспруденцию вернулось разделение права на частное и публичное. Разница в том, что частое право имеет перед собой преимущество на интересы общества, государства. Данное разделение приблизительно, так как оно обусловливается повседневной деятельностью гражданина в обществе. Публичное право вбирает в себя прежде всего вопросы власти и управления. Поэтому «гражданин» в широком смысле слова также может принимать непосредственное участие в управлении делами государства. Так, роль правосознания гражданина в процессе реализации политических прав и свобод человека и гражданина по ныне действующему национальному законодательству.

Только признавая за гражданами право на участие в управлении делами государства, само государство может притязать на добровольное соблюдение гражданами его установлений. Указанное политическое право связано с обладанием гражданством. В ч. 2 ст. 32 Конституции РФ перечислен ряд прав, конкретизирующих право гражданин РФ участвовать в управлении делами государства. К ним относится право граждан избирать своих представителей в органы государственной власти и органы местного самоуправления, право быть избранным в эти органы, право участвовать в референдуме. В соответствии с ч. 4 ст. 32 Конституции РФ, граждане России имеют равный доступ к государственной службе. Принцип равного доступа к государственной службе означает равное право граждан на занятие любой государственной должности в соответствии со своими способностями и профессиональной подготовкой без какой-либо дискриминации. Ч. 5 ст. 32 Конституции РФ предусматривает право граждан участвовать в отправлении правосудия. Это право выражается в возможности быть присяжным заседателем (ч. 4 ст. 123 Конституции РФ).

Кроме того, согласно ст. 31 Конституции РФ, «граждане Российской Федерации имеют право собираться мирно, без оружия, проводить собрания, митинги и демонстрации, шествия и пикетирование». Право каждого гражданина на мирные публичные мероприятия и встречи является особым проявлением фундаментального конституционного положения

о свободе публичного изъявления требований и интересов, мысли слова, необходимой гарантией формирования демократического гражданского общества.

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Vozik Nikita Romanovich,
student, Saratov State Law Academy,
E-mail: n.vozik@mail.ru

Marchevskiy Nikita Vyacheslavovich,
student, Saratov State Law Academy,
E-mail: nikitamarchevskii@mail.ru

Gavrilov Vladimir Nikolaevich,
Supervisor: Ph.D, docent,
Professor of the Civil Law Department, SSLA
E-mail: vladimirrgavrilov@rambler.ru

INHERITANCE BY LAW: A COMPARATIVE LEGAL ANALYSIS OF THE LEGISLATION OF THE REPUBLIC OF AUSTRIA AND THE RUSSIAN FEDERATION

Возик Никита Романович,
студент, Саратовская государственная
юридическая академия,
E-mail: n.vozik@mail.ru

Марчевский Никита Вячеславович,
студент, Саратовская государственная
юридическая академия,
E-mail: nikitamarchevskii@mail.ru

Гаврилов Владимир Николаевич,
Научный руководитель: кандидат юридических наук, доцент,
профессор кафедры гражданского права
E-mail: vladimirrgavrilov@rambler.ru

НАСЛЕДОВАНИЕ ПО ЗАКОНУ: СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ ЗАКОНОДАТЕЛЬСТВА АВСТРИЙСКОЙ РЕСПУБЛИКИ И РОССИЙСКОЙ ФЕДЕРАЦИИ

Большинство европейских стран, в том числе и Россия, при формировании собственного гражданского законодательства опирались на опыт Германии и Франции. Однако не менее интересным представляется

возникновение и развитие гражданского законодательства Австрии, которое выразилось в создании Всеобщего гражданского кодекса Австрийской Республики (далее ВГК)[1]. Тем более, что в 2017 году в него были внесены значительные изменения, касающиеся наследственного права.

В настоящей статье мы проведем сравнительную характеристику правового регулирования некоторых спорных вопросов наследования по закону, опираясь на существующую в законодательстве обеих стран разницу в субъектном составе наследников.

Обратимся к субъектной составляющей наследования по закону, которая отражена в законодательстве каждой из стран.

Определение в законодательстве круга наследников и очередности их призвания к наследованию позволяют данным правоотношениям приобрести своего субъекта. Существуют разные точки зрения на то, чем должен руководствоваться законодатель при решении этого вопроса. Наиболее признанной является теория (доктрина) предполагаемой воли наследодателя[2]. Российская Федерация относится к романской (римской) системе наследования по закону, а Австрийская Республика использует систему парантелл (как и Федеративная Республика Германия)[3], несмотря на это, к наследованию по закону в обеих странах вначале призываются самые ближайшие родственники (как по крови, так и по свойству́) и так далее – по убывающей родственной связи. Это говорит о том, что законодатель как бы предполагает круг лиц, которых наследодатель вероятнее всего указал бы в последней воле, если бы составил завещание.

ВГК закрепляет четыре линии наследников по закону. К первой относятся дети наследодателя и их потомки по праву представления. Ко второй – родители и его братья и сестры и их потомки по праву представления. Третья линия включает бабушек и дедушек умершего и их потомков

[1] «Всеобщий гражданский кодекс Австрии» от 01.06.1811 (ред. 14.11.2017) [Электронный ресурс]. Режим доступа: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 свободный (дата обращения: 19.11.2017).

[2] Петров Е. Ю. Наследственное право России: состояние и перспективы развития (сравнительно-правовое исследование) [Электронное издание]. – М.: М-Логос, – 2017. – 152 с. – (С. 11).

[3] «Гражданское уложение Германии» от 18.08.1886 (ред. 20.06.2017) [Электронный ресурс] Режим доступа: http://www.gesetze-im-internet.de/bgb/index.html#BJNR001950896BJNE186902377 свободный (дата обращения: 19.11.2017).

(братья и сестры родителей наследодателя и их потомков). В четвертой линии закреплены только прабабушки и прадедушки. В отличии от Гражданского кодекса Российской Федерации (далее ГК РФ) [1], где супруг закреплен в числе наследников первой очереди, ВГК выделяет отдельный параграф, закрепляющий право законного наследования супруга. Вместе с детьми супруг (или зарегистрированный партнер) получают 1/3 имущества, 2/3 вместе с родителями умершего, а в других случаях – все имущество [2]. Если один из родителей наследодателя умер, его доля переходит супругу или зарегистрированному партнеру.

Наследование по закону в Российской Федерации осуществляется в порядке очередности. Если наследник вышестоящей очереди принимает наследство и не является недостойным наследником, то он отстраняет от наследования всех нижестоящих (с соблюдением правил об обязательной доле). ГК РФ посвящает наследникам по закону первых трех очередей отдельные статьи (ст. ст. 1142–1144 ГК РФ). Ст. 1145 ГК РФ «Наследники последующих очередей» закрепляет перечень наследников с четвертой по седьмую очередь. Помимо этого, выделяется восьмая очередь (п. 2 и 3 ст. 1148 ГК РФ), а так же, так называемая «скользящая» («плавающая»), и последняя очередь — это наследование выморочного имущества, при котором наследственная масса переходит в собственность государственных образований [3].

Выделение российским законодателем такого беспрецедентного количества очередей наследников по закону встречает разные оценки у цивилистов. Многие поддерживают его, ссылаясь на то, что это позволяет сократить случаи перехода имущества в государственную собственность как

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[1] «Гражданский кодекс Российской Федерации (часть третья)» от 26.11.2001 N 146-ФЗ (ред. от 28.03.2017) // СПС КонсультантПлюс [Электронный ресурс]. – Режим доступа: http://www.consultant.ru/document/cons_doc_LAW_34154/28b69c1b0575fc227871cd98a34f5d30896f4b11/свободный (дата обращения: 19.11.2017).

[2] «Всеобщий гражданский кодекс Австрии» от 01.06.1811 (ред. 14.11.2017) [Электронный ресурс]. Режим доступа: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 свободный (дата обращения: 19.11.2017) (§ 744).

[3] «Гражданский кодекс Российской Федерации (часть третья)» от 26.11.2001 N 146-ФЗ (ред. от 28.03.2017)//СПС КонсультантПлюс [Электронный ресурс]. – Режим доступа: http://www.consultant.ru/document/cons_doc_LAW_34154/28b69c1b0575fc227871cd98a34f5d30896f4b11/свободный (дата обращения: 19.11.2017).

выморочного. Но существует и другая точка зрения: по мнению Н. А. Владимировой целесообразно уменьшить количество очередей наследования. Автор считает, что наследники четвертой очереди фактически никогда не призываются к наследованию. Что же касается пятой и шестой очередей, то основная проблема заключается в сложности подтверждения родственных отношений. Наталья Анатольевна предлагает сократить число очередей наследования до трех, но при этом включить в число наследников третьей очереди отчима, мачеху, пасынков и падчериц[1]. За сокращение очередей наследования также выступал В. Н. Гаврилов, который еще в своей работе 1999 года доказывал необходимость оставить в законодательстве только три очереди наследников[2].

В данном вопросе мы разделяем мнения ученых-цивилистов, которые считают целесообразным сократить количество очередей. На наш взгляд, это будет отвечать современной тенденции ослабления семейных уз и позволит уменьшить нагрузку судов по выявлению родственных связей.

Как и в законодательстве большинства стран, в ГК РФ и ВГК Австрии закреплен институт «недостойных наследников». Наследственное право обеих стран закрепляет случаи признания наследника недостойным. Общим для данных стран является то, что принцип свободы завещания позволяет наследодателю простить недостойного наследника. Исследовав правовое положение недостойных наследников, стоит отметить, что по австрийскому законодательству, потомки тех, кого признали недостойным права наследования, призываются к наследованию на его место, даже если он пережил наследодателя[3]. Российский же законодатель не разрешает потомкам недостойных наследников наследовать по праву представления[4].

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[1] Владимирова Н. А. О необходимости сокращения очередей наследников: Статья. СПб., – 2013. – 33 с.

[2] Гаврилов В. Н. Наследование в условиях проведения правовой реформы в России. Дисс… канд. юрид. наук. Саратов. – 1999. – 198 с.

[3] «Всеобщий гражданский кодекс Австрии» от 01.06.1811 (ред. 14.11.2017) [Электронный ресурс]. Режим доступа: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 свободный (дата обращения: 19.11.2017) (§ 542).

[4] «Гражданский кодекс Российской Федерации (часть третья)» от 26.11.2001 N 146-ФЗ (ред. от 28.03.2017)//СПС КонсультантПлюс [Электронный ресурс]. – Режим доступа: http://www.consultant.ru/document/cons_doc_LAW_34154/28b69c1b0575fc227871cd98a34f5d30896f4b11/свободный (дата обращения: 19.11.2017).

Мы не согласны с тем, что дети должны отвечать за поступки своих родителей. Допуская наследование по праву представления, факт того, что родители наследника были признаны недостойными, не должен иметь значения[1]. Считаем возможным внести в российское законодательство норму закона, разрешающую потомкам недостойных наследников наследовать по праву представления, оценивая положительный опыт Австрийской Республики по данному вопросу.

Рассмотрев круг вопросов, относящихся к наследованию по закону, стоит отметить, что есть различия в законодательстве Австрийской Республики и Российской Федерации. Это объясняется, разными условиями исторического развития. Нами были выявлены положительные и спорные моменты в правовом регулировании наследования по закону, и перспективы развития отечественного законодательства в рамках наследственного права.

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Tymoshevska Iryna Petrovna,
Doctor of Law,
assistant of the Department of Civil Law No.2
National Law University
the name of Yaroslav the Wise
E-mail: Coldsmell@gmail.com

RECOGNITION OF INSURED CONTRACT OF INSURANCE

Тимошевська Ірина Петрівна,
Кандидат юридичних наук,
асистент кафедри Цивільного права № 2
Національного юридичного університету
імені Ярослава Мудрого
E-mail: Coldsmell@gmail.com

ВИЗНАННЯ НЕДІЙСНИМ ДОГОВОРУ СТРАХУВАННЯ

Розвиток економічних реформ в Україні сприяв розширенню сфери застосування договору як засобу регулювання та опосередкування товарно-грошових відносин в суспільстві, зокрема у сфері підприємницької діяльності. Це зумовило збільшення кількості недійсних договорів в цій сфері, вчинених з порушенням вимог закону, що призводить до їх недійсності з відповідними негативними правовими наслідками. Розгляд таких справ становить для судів значні труднощі, обумовлені необхідністю правильного застосування численних різнорідних правових норм та об'єктивного виявлення невідповідності договору вимогам закону тощо.

Договір страхування повинен відповідати загальним вимогам, додержання яких є необхідним для чинності правочину. Договір страхування є нікчемним або визнається недійсним у випадках, установлених ЦК України.

Для оцінки дійсності договору страхування можна керуватися підставами для визнання правочинів недійсними, передбаченими статтями 215–236 ЦК України. Враховуючи ці норми, договір страхування буде вважатися недійсним у випадках:

1) невідповідності актам цивільного законодавства, а також моральним засадам суспільства;

2) фіктивного та удаваного характеру правочину;

3) укладення договору з недієздатною фізичною особою;

4) укладення договору під впливом помилки, обману тощо.

ЦК України (ст. 998) та ст. 29 Закону України «Про страхування» передбачають також особливі випадки визнання договору страхування недійсним. Договір страхування визнається судом недійсним, якщо:

1) Його укладено після настання страхового випадку.

Настання страхового випадку позбавляє договір страхування такої істотної умови, як страховий ризик (ч. 1 ст. 8 Закону «Про страхування»). Отже укладений після настання страхового випадку договір страхування може бути визнаний недійсним в судовому порядку за позовом страховика або іншої заінтересованої особи. В деяких випадках, прямо встановлених законом, договір страхування може бути укладений і після настання страхового випадку. Так згідно із ст. 252 КТМ договір морського страхування зберігає силу, якщо навіть до моменту його укладення можливість збитків, що підлягають відшкодуванню, вже минула або ці збитки вже виникли. Однак, якщо страховик під час укладення договору морського страхування знав або повинен був знати, що можливість настання страхового випадку виключена, або страхувальник знав або повинен був знати про збитки, що вже сталися і підлягають відшкодуванню страховиком, виконання договору страхування не є обов'язковим для сторони, якій не було відомо про ці обставини.

2) об'єктом договору страхування є майно, яке підлягає конфіскації на підставі судового вироку або рішення, що набрало законної сили.

Поняття конфіскації міститься у ст. 354 ЦК, відповідно до якої конфіскацією є позбавлення права власності на майно за рішенням суду як санкція за вчинення правопорушення. Покарання у вигляді конфіскації майна передбачене також ст. 59 Кримінального кодексу України. Якщо суд прийняв рішення про конфіскацію майна, таке майно не може бути застрахованим під загрозою визнання договору страхування недійсним. Наслідки недійсності договору страхування визначаються загальними правилами про наслідки недійсності правочинів (ст. 216 ЦК).

Наслідком визнання правочину недійсним не може бути його розірвання. Застосування наслідків недійсності оспорюваного правочину можливе лише за наявності рішення про визнання такого правочину недійсним.

Слід зазначити, що сама по собі класифікація порушень договірних зобов'язань є доволі актуальним питанням як у вітчизняному, так і в зарубіжному цивільному праві. На підставі вивчення, зокрема, зарубіжного досвіду у цій сфері можна стверджувати, що сучасна світова практика

переважно не ділить порушення договірних зобов'язань залежно від ступеня їх виконання та відповідності такого виконання положенням договору, а виходить із концепції єдності порушення договірного зобов'язання.

Таким чином, враховуючи загальні принципи цивільного права, правочини не повинні суперечити положенням законів, галузевих законодавчих актів та нормативно-правових актів, прийнятих відповідно до Конституції.

Згідно з ч. 1 ст. 215 ЦК недодержання сторонами або стороною в момент вчинення правочину вимог, встановлених частинами 1–3, 5, 6 ст. 203 ЦК, як правило, має наслідком визнання правочину недійсним. З огляду на ч. 2 ст. 215 ЦК підстави недійсності правочину, встановлені нормами ЦК та інших законодавчих актів, повинні мати імперативний характер. Тому за такими вимогами є неприпустимим укладення мирових угод як таких, що суперечать законодавству.

При розгляді позовів про встановлення нікчемності правочину з посиланням на ст. 203 ЦК необхідно враховувати, що ця стаття передбачає загальну підставу для визнання нікчемності правочину і застосовується лише в тому випадку, якщо в ЦК немає спеціальної підстави (норми) для цього.

Дискусійним є питання, чи може суд застосовувати наслідки недійсності правочину в разі відсутності вимог про це у позові. Очевидно, що так, оскільки у ст. 216 ЦК зазначено, що недійсний правочин не створює юридичних наслідків, крім тих, що пов'язані з його недійсністю, тому для захисту майнового права, з урахуванням принципів добросовісності, справедливості та розумності, наслідки, визначені в законі, повинні застосовуватися незалежно від того, чи наведені вони у позовній заяві.

Вважаємо, що суд з власної ініціативи не може застосовувати такі правові наслідки недійсності правочину:

– передбачені іншими (спеціальними) статтями ЦК (моральна шкода тощо);

– ті, що не були зазначені у позовних вимогах та не були досліджені в суді.

Таким чином, для застосування наслідків недійсності правочину як одного зі способів захисту порушеного цивільного права необхідно встановити, що правочин, який було вчинено сторонами та в подальшому виконано, є недійсним. У частині застосування правових наслідків недійсності оспорюваного правочину суперечок практично не виникає, оскільки відповідно до положень ст. 204, ч. 3 ст. 215 ЦК України оспорюваний

правочин наділений рисами, притаманними для дійсного правочину, проте за позовом однієї зі сторін правочину чи іншої заінтересованої особи в судовому порядку визнається недійсним. У випадку визнання оспорюваного правочину недійсним у судовому порядку відповідно до положень чинного законодавства та позиції Верховного Суду України мотивувальна частина рішення суду міститиме щонайменше два пункти: вказівку про визнання правочину недійсним, а також вказівку про застосування наслідків недійсності правочину, передбачених ст. 216 ЦК України. При цьому також слід враховувати, що згідно з ч. 1 ст. 236 ЦК України недійсний правочин (тобто оспорюваний правочин, який у судовому порядку визнано недійсним) є таким з моменту його вчинення, а тому застосування наслідків недійсності правочину розпочинається з моменту його вчинення.

Невідповідність договору страхування вимогам закону тягне за собою визнання такого договору страхування недійсним. При цьому недійсним він вважається з моменту його укладення. Наслідком визнання договору страхування недійсним є обов'язок кожної із сторін відшкодувати іншій все отримане за договором страхування.

Khurtsidze Tamila Shalvovna,
Doctor of Law,
Associate professor of Akaki Tsereteli State University, Kutaisi,
The Faculty of Business, Law and Social Sciences
E-mail: Tamunakhurtsidze@mail.ru

THE PRINCIPLE OF SUBROGATION AND INSURANCE OF DAMAGE

Summary

The article deals with issues related to compensation for damage caused by a third party in case o sf damage, with an emphasis on the subrogation principle given in Article 832 in the field of personal insurance, since it does not apply to the principle of similarity, is given in comparison with the regression and the session. My vision is to show that subordination of subrogation as an unreasonable battle against the unfoundedness of the path in which the road is the most optimal to ensure that the goal of the legislative power allows to achieve unjust enrichment of a person. The work is related to the textual drawback of the second part of Article 832 of the article, the incorrect legal results expected in practice.

The principle of subrogation is based on the doctrine of reparation, as well as other principles established in the field of insurance of damage[1]. The term subrogation (Latin subgate) is a Latin origin and literally one subject entity[2]. It is referred to as "Cessio law" in the countries of continental Europe, which means the law to refuse the request of Sierra Caesar or the force of law. The Georgian legislator does not use this term, but it will be significantly strengthened in Article 832 of the Civil Code.

The adoption of the subrogation principle does not depend on the consent of the parties. Undoubtedly, Article 832 of the Civil Code of Georgia is a special rule that is inserted into insurance coverage and applies only to damage related to insurance. The difference in personal insurance is applicable. Subrogation is not used in personal insurance. The practice of the United States Court is analogous to this position. Here, personal insurance is considered an investment agreement, in which the principle of subrogation is rare. This is given in one of

[1] Cannar, Essential Cases in Insurance Law, Woodhead-Faulkner, Cambridge, – 1985. – 9 p.

[2] MJB Gardin Dumesnil, Latin synonyms, with their difference values and examples taken from the best Latin authors, London, – 1825. – 530 c.

the court decisions in the case– Cityof Birmingham v.[1] Subordination does not change the existing responsibility, only the creditor subject changes, the right to require that the insurer is transferred to the insurer, the insurer changes the insured person in the exercise of the right to demand compensation. In other cases, the insured may claim damages from the damage and the insurer concurrently with the subrogation, the Supreme Court explains that the request is a defense to prevent unreasonable enrichment[2]. We will discuss this issue later.

Compare subrogation institution with such civil law institutions as regression and cess.

The right of regressive demand and subrogation is based on the law, but the essential difference is that in one case, relations are terminated and new, completely independent relationships, and in the second case, the subject-creditor of the relationship changes during subrogation, but the content of the relationship does not change, it usually lasts. What is the difference between regression and subrogation? The Supreme Court (No. 581–549–2011) in one of the resolutions gives us an explanation that "there is no change in the existing obligations of the person, but in this case, the connection is completed and a new obligation arises. During the repetition, one of the obligations changes the other, and in the case of subrogation, the ratio only changes the creditor, the obligation itself remains unchanged. This distinguishes subrogation from a regressive obligation resulting from the performance of another obligation (termination) and, thus, the receipt of a new independent obligation. A new obligation does not arise during subrogation, but the basic obligation between the insurer and the successor performs. Such persons are obliged to change persons in accordance with the law"[3]. Article 832 sets out the law of the claim requirement, and in the case specified in article 199 of the Civil Code, the claim is still made, but under the transaction. This fact is a significant difference between the two institutions. The legal consequence of the concession is the requirement that the request be transferred to the new creditor, taking into account the legal loan obligations at the site of the original creditor. The latter will be transferred to the new creditor, as in the hands of the original creditor[4].

[1] Walker (Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mysteryof Insurance Subrogation, Missouri Law Review, – Vol. 70. – 2005. – 730 c.)

[2] Supreme Court of Georgia – No. 6–663–624–2011 of February 17. – 2012.

[3] Supreme Court of Georgia, – 2011. – No. 9. – P. 581–54.

[4] Zurab Chechelashvili, "Demand and Debt Relief" (Comparative Legal Study), – Vol. –

The request is concluded by agreement between the owner and a third person, in which case the original owner is a third party, and the consent of the debtor is not required. In the first case, an insured event occurs, the insurer may claim damages to the taken person returns, and there is no need for the insurer's consent, it is not clear from the insurer that it can refuse damage to that person request, but the insurer is exempted from the obligation to compensate, necessary time for the creditor or third party agreement. This time moving to the right of the transaction and are not based on law.

The regressive right to use certain prerequisites: the norm, according to the request passes to the insurer, if he compensates the insured damage.

It is interesting to prohibit the use of subrogation rights. According to the norm, "if the right to an insurer is associated with the family members residing with him, the right to move is excluded if the family member caused damage"[1].

In the legal literature there is no doubt that there is normally a technical error by Bob on. In particular, the second part of Article 832 is amended as follows: when a family member has not intentionally caused damage. The lawyer believes that the insurer's right to subrogation is unreasonable on the grounds of damage caused through negligence on the part of the family member of the insured.

Subrogation is seen as a means of preventing unreasonable enrichment[2].

In accordance with Article 832 of the Civil Code of Georgia, subrogation is defined as follows: "If the insurer can demand compensation for damage to third parties, this requirement is transferred to the insurer if it reimburses the insurer". Consequently, the norm is established in the right of claim. It is noteworthy that the use of the subrogation right does not depend on the consent of the parties, if necessary, it automatically shortens the relationship and forces the other person to replace each other.

If the applicant is a relative of the victim, the relative, friend, victim informs the company that in the absence of an insurance contract he would not have presented his claim against this person. The insurer in all cases has the right to subrogation, but if the insurer does not give him the right to use this right,

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2004. – P. 35–36.

[1] Tsisakadze, Commentary on the book IV, Volume II, Ketevan Iremashvili 832 Comme ntary on the article.

[2] Johnston D., Zimmermann R., (eds.), Unjustified Enrichment: Key Issues in Compa rative Perspective, Cambridge University Press, – 2002.

the insurance company will be completely released from the insurer's liability from the insurer or if it has already been issued, it requires a return from it. In this case, the insurer is released from the company, but in the amount that he incurred to file a claim, attorney or audit service, etc. These expenses will be deducted by the insurance company.

As explained in the new comment of the Civil Code of Georgia, we should outline two aspects of using the Subrogation Institute: first protect the insurer from unreasonable enrichment, and the second – equal participation of persons involved in insurance relations, the insurer and the insurer[1]. First of all, we must closely monitor our place and role in the Civil Code system, since subrogation is exposed to the risk of damage, it is indisputable that this is a special rule and is only related to the legal relations in this chapter. In case of damage to the insured, the insurer shall assess the amount of damage caused during the insured event and within the limits of the insurance fee, the damage will always be reflected in specific indicators.

The regressive right to use certain prerequisites: the norm, according to the request passes to the insurer, if he compensates the insured damage, the third party insurer the right to demand damages the same time.

As stated above, the goal of the legislative branch to attract the Subrogation Institute did not allow the injustification of the person to be unfairly incurred. Absolutely the approach of the fair is that the norm in the absence of the insurer caused the damage compensated by the insurance company, as well as causing harm to the person and it is unjustifiably rich, therefore from the comments of the Civil Code, in accordance with subrogations, the insured person is entitled to compensation for damage to client demand, law[2], but here is another worthy transaction, since the insurance contract is a valuable transaction in exchange for insurance risk provided by the insurer's contract, periodically receives insurance remedy from the insurer, while the insurer is obliged to reimburse his harm.

Impeccable demand for the law. Compensation for damage will be insured by the insurer on the basis of unreasonable enrichment of the insurer. This question also matters in this case and is a rather controversial issue. One of them is indisputable – damage must be caused by losses, but the question is,

[1] URL: http://www.gccc.ge

[2] Ibid.

who has the right to receive this reward? What will be the optimal solution at present, so as not to compensate for the interest of any party?

In this case, the damage to one party, the responsible person insured by the other party who has already received compensation from the insurance company and the third party insurer, who in turn periodically accepted the insurance premium from the insurer in exchange for insurance, issued insurance payments. Compensate losses. It is difficult to say which subject is really an authorized insurer or an insurer for receiving compensation from losses. If we look at the issue with the fact that the insured to ensure that compensation has been received and the insurance pays for it again returns to damage, the same can be asked the same question in the case of the insured company that it periodically takes Contract insurance premiums. It will be more fair, equally divided between the insurer and the insurer in the amount of removal from the damage, in this case there is no doubt about the unreasonable enrichment of either party.

The above-mentioned example is the decision of the Supreme Court[1]. which states that "when an insurance policy insured by legal relations is insured, the person is insured with double demand. However, the insurer has no right to issue an insurance premium and further injuring the tort claims of the amount of the obligation. Accordingly, Article 832 as a normative norm of special relations can not be applied by analogy, since this explanation of the norm is not related to the objective objectives of the law".

Civil Code 858. Article of the law of recourse means an exception in which a number of shortcomings, since regression instead of being recourse, so this article is a subrogation ban train, private insurance lawmaker to control the policyholder insurer for replacement, and the reason for this is that head of regulated relationships, like for non-life insurance, it directly depends on the amount and, therefore, when the insurance company, the insurer reimburses the damage, it automatically replaces t it because the legislature can not allow the insured to receive compensation for double compensation, as well as to the private insurer, insurer, and policyholder in the legislature, to balance the introduction of subrogation rights.

Finally, it can be said that the subrogation institution has not been completely eliminated by any of the parties using unprofitable wealth, but it should

[1] Supreme Court of Georgia, – No. 663–624. – 2011.

be noted that the above proposal is the best way in which neither side will have the right to compensation for damage.

Important issues related to the Civil Code of the Russian Federation 832-p, in the second sentence, according to which, if the insurer is lowered by a third party in respect of its claim or its demand for the right to provide, the insurer shall be exempt from damages in the amount of the obligation to compensate, he can have his expenses and expenses implemen in relation to shouting or demand.

I share the opinion of k.iremashvilis of the fact that the insurer has the right to demand from a third party, but the law allows the insurer to decide, the third person who will be responsible and repair the damage or not. The insurer may refuse to compensate a third party for the damage, the insurer is not entitled to fully compensate it. Iremashvili – 832 Haheli comments on CCG, 2016 In this case, such a solution to the problem will damage the insurer, so he must make a choice.

It is interesting to learn about the limitation of this rule.[1] The Supreme Court, the decision of the court when considering the complaint, the policyholder of the transportation of cargo requires compensation for damage caused as a result of the limitation period, it is used incorrectly is RC-128, 3 of the following: in the case of claims brought by non-shipping violation of the rights of the relationship, but 832-items in the centuries properly, the insurer's regressive compensation claims are based on, and, since this article does not provide for the insurer's right of recourse restriction on the period, that I used RC Co. Article 128 (3) of the Criminal Code of Georgia Illuminated general limitation period.

Court of Cassation Definition:

In the event of a dispute, it is important to separate the transfer of the right to claim compensation from the insurer against a regressive obligation. The Court of Cassation mentions 832. Article in the centuries, and explained that this article does not provide for any recourse of the obligation, but also the opportunity during which the insurer moves the right to claim, which insured the damage from the person liable, and that the transfer is made by the insurer for the insurance contribution inside. Such a shift to the right of claim is known as the principle of subrogation. In this case, the insurer changes the insurer

[1] Decision of the Supreme Court. N-hundred-581–549–2011.

with the right to claim damages. Without compromises, the content of existing obligations – legal relations do not change, no requirement arises from the content of legal relations with the corresponding obligation. The demand will be transferred to the new creditor, as in the hands of the original creditor.

If it becomes clear that the claim of the insurer concerns damage caused by the damage, the insurer will also be older. The change in the creditor does not cause a change in the statute of limitations and the calculation rule. The appellate court also explained that in such circumstances the applicant, the issue of withholding will be decided in the provision of some regulation, regulating the client and injuring the relationship between them, in this particular case, which will be used to deliver the rules.

I think that issues related to the limitation period are not a problem, and this is absolutely the right approach if we consider the problem on the basis of specific specifications.

Resume

The purpose of this article was to show my vision of subrogation as a means of preventing unreasonable enrichment. The goal of the legislator is to resolve the unjustified enrichment of a person, I believe that the proposed method will be more secure and the basic principle of civil law – equality will be ensured. It will be more fair, equally divided between the insurer and the insurer in the amount of money extracted from the damage, in this case there is no doubt that any of the parties is unreasonably enriched.

The paper also focuses on the textual breakdown of the second part of Article 832, which significantly changes the content of the norm. In order to ensure a correct understanding of the law and eliminate shortcomings, this work is an attempt to interpret the content that should actually be obtained from this article. Ultimately, this gap is not excluded, which in practice leads to a wrong legal effect.

References:

1. Georgian Civil Code, – 2017.
2. Law of Georgia on Insurance, – 1997.
3. Tsisakadze. Commentary on the book IV, – Volume II, Ketevan Iremashvili 832 Commentary on the article.
4. Giorgi Amiranashvili, The right to subrogation is inadmissible, Student Legal Journal, – 2011.

5. New comments of the Civil Code of Georgia, – 2016.
6. Johnny C. Parker. The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mysteryof Insurance Subrogation, Missouri Law Review, – Vol. 70. – 2005. – 730 p.
7. Zurab Chechelashvili, "Demand and Debt Relief" (Comparative Legal Study), – Vol. – 2004. – P. 35–36.
8. Johnston D., Zimmermann R., (eds.), Unjustified Enrichment: Key Issues in Comparative Perspective, Cambridge University Press, – 2002.

Decision of the Supreme Court:

1. Decision of the Supreme Court. No-581–549–2011.
2. Supreme Court of Georgia No. 6–663– 624-20-11, February 17, – 2012.

Section 2. Land law

Shansharbaeva Botakoz Seydalyevna,
Kazakh Academy of Labour
and Social Relations, Kazakhstan
E-mail: aidanabg17@gmail.com

ISSUES OF THE STATES REGULATION OF THE LAND RELATIONS IN THE CONTEXT OF APPLICATION OF THE ADMINISTRATIVE AND LAW ENFORCEMENT MEASURES

State regulation in the sphere of land relations is the purposeful exercise of functions by state agencies, which is aroused from land ownership and territorial rights regulated by the State within the territory of the country.

The main task of the land relation by the state is the organization of rational land use and their protection via the economic, administrative and legal systems. At the same time a significant attention should be paid to the human rights and freedoms in the sphere of land relations. Therefore, from our point of view, the state regulation in the sphere of land relations is a necessary condition for organized land use and efficient land protection, and the provision of state influence in the implementation and protection of the landowners and land users rights on the land.

A. H. Hadzhyev rightly claims: "Land relations regulated by government are the basic function of the state. It is aimed to achieve the proper ordering of the land relations, economic expediency and no defective land resources use, in order to have stability and dynamics of socio-economic development of the country. The content, methods and means of state regulation of land relations are changed based on the development and changes of the land relations. Therefore, government regulation of the land relations acquires new dimensions and quality, reaches higher levels of mediation and impact.

The land relations transformation in accordance with the laws of the market economy led to the necessities to the further strengthening of state regulation in this sphere"[1].

At the same time, the implementation of all state-legal activity in the sphere of land relations, performing a regulatory function, it is unthinkable without respect for certain land law principles are recognized in the theory of law as the fundamental ideas reflecting the mean and content of the practice of law enforcement and the theory of land relations in the context of the Incarnation in the life of the theory of the Institute of realization and protection of land rights and interests of the land owners and land users. On the basis of the methodological orientations should be indicated that the Constitution of the Republic of Kazakhstan as the Basic Law acts as determination of particular institute implementation and the protection of land rights, which has supreme legal force and supersede on all existing legislative acts in the Republic of Kazakhstan. In particular, these rules say that the Constitution proclaimed the principle of private property on the land, the principle of equal legal protection of public and private property, the principle of rights priority, freedoms and legal interests, life and health of citizens and etc. All these and other constitutional provisions are the essence conditions based on which all kinds of land relations, including in the area of the orbit of the legal acts of the Institute of realization and protection of land rights are built[2].

Meanwhile, there exist different points of views in the land and legal science in matters of state regulation of the theory and management of land relations, which sometimes diametrically differentiated from each other. Thus, for example, the well-known Kazakh scholar S. T. Kulteleeva believes that "There are no fundamental differences for the intended purpose between governance and government regulation"[3]. We share and fully agree with this point of view.

Professor Zharikova Y. U. treated the concept of governance as an "state agencies activity on law enforcing", where the legislative and administrative

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[1] Hajiyev A. H. 1 Land Law of the Republic of Kazakhstan (General part): Textbook / Ed. Doctor of Law, Professor. Mukhitdinova NB 2nd Edition, Revised. and ext. – Almaty: LAWYER, – 2002. – 367 p.

[2] Rahmetov E. S. Theoretical and legal problems of institute of realization and protection of land rights in the Republic of Kazakhstan // Diss. Doctor of Law – Almaty, – 2010. – 267 p.

[3] Kulteleev S. T. Environmental Law of the Republic of Kazakhstan. – Almaty, – 2003. – 328 p.

(executive) state activity forms part of the general concept of "state regulation of land relations"[1].

The leading experts in the field of administrative law, such as A. P. Alekhine, A. A. Karmolitsky and Y. M. Kozlov believe that the government regulation generally regarded as "an indispensable element of the state-administrative activity"[2]. That is, in our point of view, the government regulation is the concept of a complex combining different methods of governance, including state coercion.

Other authors describe the government control as a "direct and immediate intervention of the state … using administrative methods", government regulation is considered as more capacious concept encompassing "a wide range of tools and instruments, including the methods and means of indirect market relations regulation. At the same time invited to "talk about the impact of the state … that includes the concept of government control with its inherent rules, legislative techniques impact on the regulated relations and the concept of state regulation, using indirect methods of influence"[3].

In the context should be indicated that in the works of many contemporary lawyers traced the idea that in modern conditions of legal relations the administrative-command methods of social relation regulation should be abandoned, which we cannot fully agree with and believe that this kind of views are premature and are temporary postulates of total liberalism hobbies which may lead to undesirable consequences, particularly in the sphere of land relations.

However, in today's conditions, a departure from the administrative-command of land relations management of the Soviet times does not mean the complete failure of the administration, the imperative method of regulation of land relations in the present. Just the last stops to be sole and exclusive type of administrative regulation. Earlier, in conditions of a planned, administrative directive economy, anything and everything was determined from above: what, where, when and how to sow; when and how to harvest; the number of harvest; mandatory planned supply of agricultural products on a strictly fixed price;

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[1] Agricultural and environmental legislation in Russia and the CIS. The comparative legal analysis. – M., Norma, – 1999. – P. 76–77.

[2] Alekhin A. P. Karmolitsky A. A., Kozlov Yu Administrative Law of the Russian Federation. – M., – 1998. – 20 p.

[3] Gubin E. P. State regulation of the economy and the right // In.: The State and Law at the turn of the century. – M., – 2001. – 265 p.

a ban on the alienation of free products. Nowadays, the government defines only the basic parameters and the economic conditions on the earth: for use in accordance with the purpose; compliance of the earth securing requirements and etc. Beyond this, there is the principle of management freedom. Economic, business interest of the owner (land user) determines the structure, type of agricultural production. Governments of the Agriculture industry can advise about the type and structure, terms of crops, the sale of products. However, the ultimate right of choose on the business entity, as soon as he become the subject of the possible benefits or risks of their business activities.

Unlimited right of intervention is gradually transformed into the right of regulation with the definition of all its required parameters, on the site exclusively administrative method of exposure the principle of combination of the public and private methods to streamline land relations are approved. Thus, N. B. Mukhitdinov by analyzing trends in modern management relations pays attention to the search for "the best combination of contractual and administrative and legal principles in the regulation of specific relations" [1].

Therefore, at the present stage of Kazakhstan development, the processes of improvement of the legal activities of the state in the sphere of organization and settlement of land relations require a more detailed specification of the legal concept of administrative activity of the state agencies which are capable to use not only the potential of the law, but also the potential all other means of social impact, aimed to build a democratic, legal, secular and social Kazakhstan highest values of which are individuals, their life, rights and freedom.

However, todays, there is enough number of sufficiently large and small conflicts which impede of the idea realization. The history of the development of modern land relations shows many negative factors that occur in these types of social relations requiring application of the administrative enforcement measures. In this case, for example, we are talking about the land owners and land users who systematically violate the administrative norms on the Code of the Republic of Kazakhstan, bringing various administrative and legal sanctions against violators of land legal norms. For example:

– The demolition of illegally constructed buildings;

– The release of illegally occupied lands;

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[1] Gubin E. P. State regulation of the economy and the right // In.: The State and Law at the turn of the century. – M., – 2001. – 265 p.

– Recovery of arrears;

– Imposition of a fine in the case of non-payed taxes, compulsory payments and fees, etc.

In support of this proposal, we present examples from the case of the sensational religious dispute "Hare Krishna." Thus, according to the court, members of the "Hare Krishna" construction is found as unlawful, since in garden plots, instead of lodges the building were built by the Hare Krishnas as dormitories and for meetings of members of society. Furthermore, in these areas without title documents the religious community members began to build a farmhouse temple, half of the barns of the farm were converted into a catering department, storage, dining room, also in the same area was built a special site for the service and etc.

In addition, acquiring new dachas, Krishnas demolished all suburban buildings and built new houses, hotels to 40, 20, 18 seats on these areas, which means they used the suburban area not for the intended purposes. They illegally fenced their territory, taking more foreign territory and etc.

As it turned out in the course of the trial, all of these structures have been carried out without authorization, i. e. without basic licensing documents. Moreover, in the course of the trial, the court identified other cases of gross violations of Kazakhstan legislation:

– Members of the "Society for Krishna Consciousness" conducted mass religious holidays without the consent of the local authorities of the executive branch on the provided suburban areas;

– Many members of this religious community has been lived in this territory illegally or in violation of passport and registration regimes.

As a result of the collected materials, written and physical evidence, the court decided to demolish all illegally constructed buildings and structures and forced seizure of illegally captured land, with all the consequences of these facts.

In this case, for the objectivity of the decision taken by the court, in different biased minded individuals, as the case was a public outcry, there were and there are negative opinions about the bias and injustice imposed solutions of the court. In this regard it should be noted that the members of the "Society for Krishna Consciousness" legally have 15 country sites in Eltai rural district of the same Karasai district of Almaty region, which they use freely. It was found that there were no arbitrary actions by the state authorities to seize land from the members, on the contrast, todays the state authorities use the most

civilized judicial procedure to resolve the land dispute, during which ensured equality of the parties.

Based on the foregoing, the principles of administrative compulsion applied to violators of the rule of land and law should be determined taking into account the place of these activities in the system of a measure of the counteraction of administrative right violation, which is proceed in different directions, using different means and methods, but reflects a single entity state policy to combat with right violation. In such cases, the decision to withdraw may be accepted not only the courts, but also by public agencies exercising control the economic activities of individuals and legal entities (standardization bodies, price control, etc.). Of course, to challenge the validity of the state bodies' activities is problematic, as they are compliance with the current legislation.

However, in the practice, the law enforcement activities of the state power had cases of administrative coercive measures which are not associated with the property compensation. These cases are the results of particular consequences, expressed in the form of issuance of state power bodies of illegal disposal in violation of the rights and freedoms of individuals and legal entities that is when the offender is a specific administrative body is a public authority. In these cases, compulsory administrative authorization sanctions are a restorative abolition of unlawful orders, which are procced on the cause of the administrative action in order to restore the violated rights and freedoms of individuals and legal entities. In such cases, the measures of administrative and reductive nature applied by executive are mixed with the procedural form of dispute resolution in civil procedural law.

In another case, the results of the unlawful disposal of public authorities is expressed in the fact that in this case the set of rules (rights)can be broken, the mandatory requirements related to architecture, urban planning, maintenance of sanitary, water protection zones, natural areas intended for public recreation, natural landscapes and etc[1].

Moreover, one of the main functions of legal coercion is its human rights function, the purpose of which is to create a special legal mechanism capable of protecting the individual from the arbitrariness of state bodies, examples of which are particularly numerous in the history of our state.

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[1] Mukhitdinov N. B. Theoretical and legal problems of some grown right. – Ed. 2nd, ext. – Almaty, – 2011. – 430 p.

Thus, the apparatus of public authority is not intended to reflect the interests of any individual or community of people of some corporations, and is intended to act in the general interests of the state and the people inhabiting its territory. Here, the most significant is that the apparatus of public power in the official measure has a monopoly on coercion, as an integral part of public administration until the violence over the whole territory and was subject in relation to the total population. Especially because one of the main functions of law enforcement is its advocacy function, the meaning of which is an establishment of a special legal mechanism that can protect a person from an arbitrariness of state bodies, numerous examples of which are noted in the our country's history.

Therefore, the level of legal "saturation" state coercion is caused by the extent to which it:

a) is the subject of the legal system's general principles;

b) because of its features it is a unified, universal throughout the country;

c) is the legal regulated because of its content, limits and application conditions;

d) acts through the mechanism of the rights and duties;

e) is equipped with advanced procedural forms[1].

The concept of governance is used in the broad and narrow senses. In a broad sense the governance is overbearing influence of the state to the social system (Atamanachuk G. V., Uvarov V. N.), organizing activities, organizing the executive and administrative activities of the state bodies (A. E. Lunev, B. P. Kurashvili). In a narrow sense, governance refers the "the law, legally imperious activity of executive and administrative organs of the state"[2].

Summing up the results of the above, it should be concluded that the essence of state regulation in the field of land fund management is disclosed in the process of organizational and administrative activities of the system of general and special competence and is manifested through certain functions. At the same time to the core functions of public administration in the sphere of land relations should be included:

– The implementation of land monitoring;

– Land management;

[1] Serikbaev M. J. Forced administrative recovery: theory and practice // Diss. Ph. D. – Almaty, – 2008. – 120 p.

[2] Alekseev S. S. 9 General Theory of Law. – M.: Legal Literature, – 1981. – T. 1. – 359 p.

– Maintenance of the state land cadaster;

– Definition of functional target structure of the land fund;

– Planning, land use and protection;

– The disposal of land fund (distribution, redistribution of land through their provision and exemptions);

– Control over land use and protection;

– Enforcement of the land legislation (resolution of land disputes, liability for violations of land legislation);

– The formation and protection of the land market and land rights.

All these government functions in the sphere of land relations are provided by measures of state protection, where the prevailing values are given to the institution of administrative law enforcement for violation of land legislation.

In the system of government activity, a significant place for land use and protection is given to the activities of state control. Officials of state control for land use and protection are responsible for the timely detection and prevention of crime plots, for the completeness and objectivity of the control measures. To ensure the proper implementation of duties within the established competence, they have rights:

a) Send materials to the relevant authorities about the violations of land legislation to address the issue of bringing the perpetrators to justice;

b) Draw up reports (acts) of violations of land legislation and transfer them to the appropriate officials to bring the perpetrators to administrative responsibility;

c) Visit freely the organization, explore the owned and used land, and the land occupied by the military, defense and other special objects with taking into account the established regime of their visit;

d) Give land owners and land users obligatory instructions to land protection, the elimination of violations of land legislation;

e) In the case of a land owner or land user rejection to the right to the ownership or land use (check-out, long-term non-use of the site, etc.), this land is registered as ownerless property;

f) Upon expiry of the fixed period, during which the land owner or land user has not taken the necessary measures to use the land for its intended purpose or if land violation is not eliminated using the land, prepare the materials:

– The return to state ownership of land taken on the account as ownerless property;

– To withdraw from the land users of land not used for its intended purpose or used in violation of the law;

g) Involve experts in the prescribed manner for examination of land, examinations, inspections of the implementation of measures for land protection;

h) contribute the proposal for suspend the civil and other construction to the proper authorities, development of mineral deposits, of agronomic, forest reclamation, exploration, prospecting, geodetic and other works if they are procced by violation of the land legislation, which is established in a regime of land use and may lead to destruction, pollution, contamination or deterioration of topsoil, development of erosion, salinization, waterlogging and other processes, reducing soil fertility, as well as if the work is procced on the projects that have not passed environmental impact assessment.

Land monitoring should be implemented in a certain order and inherent legal forms. Therefore, land legislation contains in its structure the necessary regulations defining the procedural aspects of the implementation of land control. So the state land control is implemented during the inventory, survey of lands, as well as the performance of work in order to control the observance of land legislation, development schemes and projects related to land use, conducting the state cadaster and land monitoring.

Under current law, the procedural forms of response to land violations include:

– An order to eliminate violations of land legislation;

– Provisions on the suspension of the work being conducted in violation of the land legislation;

– Provisions on the termination of financing the construction or operation of facilities, negatively affecting the condition of land;

– A protocol on violation of the land legislation;

– The decision on the imposition of an administrative penalty.

The law also provides for specific deadlines for performing procedural actions to detect and prevent violations of land[1].

[1] Uvarov V. N. The theory of governance. Part 1. Methodological governance framework. – Almaty: Kazakh State University, – 2000. – 320 p.

Section 3.
Criminal science

Roshi Uarda,
Phd., Candidate
E-mail: uardaroshi@hotmail.com
Naim Mecalla Prof. As. Dr.,

INNOVATIONS OF ALBANIAN CRIMINAL JUSTICE CODE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME

Abstract: Protection of the rights of juvenile victims and/or witnesses, prevention of second victimization and re-victimization, as well as social integration take particular importance in the criminal justice system. The legal provisions concerning the minor until recently, were distributed in many codes and laws. The adoption of the Criminal Justice Code for juveniles enabled the creation of a comprehensive legal framework conceived according to international acts through which is sought a more effective approach to justice, remedies, education and rehabilitation for minors. For the first time this code foresees the juvenile's avoidance from the traumatic trial process, as well as how justice organs should bring or treat a minor as a victim or witness. In this optics are foreseen the general principles that will govern all proceedings with juvenile victims and/or witnesses. For a specific category of offenses such as sexual crimes, due to their sensitive character, special rules for interviewing minors and their validity in court proceedings are provided.

The adoption of the Code has contributed to the improvement of the legal infrastructure in the area of criminal justice of juveniles in many aspects, such as the right to participation and information, the right to understand procedures, the right to respect the private and family life, integrity and the dignity of the minor. In general, the Code provides for a more friendly justice with children victims or witnesses of a criminal offense.

1. Introduction

The juvenile victim and/or witness have a particular importance to the criminal justice system, not only because it represents a vulnerable category, but also because it enables the information, data and evidence that are crucial to the proceedings of law violators. In order to have a justice system that functions effectively, this category should be sure and confident with the justice bodies. Such a result is achieved only through the creation of the legal infrastructure and the institutional framework, with roots in a friendly approach that regulates the right for protection and takes into account the needs and individual opinions of the minor. The need for a special protection of the juveniles arises not only from his physical, psychological, emotional and social development, but also for his treatment in particular, in investigative procedures, prosecution, trial proceedings or when the juvenile is a witness and/or victim of a criminal offense.

Significant progress has been made in the improvement of the criminal justice system since 1990, and the alignment of Albanian legislation with international standards. However, legal provisions concerning the minor until recently, were distributed in many codes and sub-legal acts. Adoption of the Criminal Justice Code for Minors Law no. 37/2017 enable the creation of a comprehensive legal framework through which a friendly and effective approach to juvenile justice is sought. The Criminal Justice Code for Juveniles is a separate law because of its substantive and procedural content[1].

Experience has shown that the creation of a support system for juvenile witness/victim has been accompanied by important advantages both for juveniles themselves and for the criminal justice system in general. These advantages include:

– Strengthening public confidence in the criminal justice system;

– Strengthening the credibility of the independence/efficiency of the judiciary;

– Increasing the number of reported criminal offenses;

– More qualitative evidence provided by juvenile victim/witness;

– Proper preparation of the victims to send the case to court and give full and qualitative evidence.

[1] The Code summarizes all provisions referring to the juvenile in the Criminal Code, the Criminal Procedure Code, the Law «On the Rights and Treatment of Prisoners" etc.

2. Legal Standards and International European Policies

In the international arena, the reflection of world consensus in this field has long been reached with the adoption of a whole range of instruments in the EC, UN and EU. From their comparative reading, it is noticed that despite the international organization the established principles and standards are unique. These instruments are governed by the highest interest of the minor, aiming for a friendly approach by the justice authorities, enabling the minor to participate and express himself freely. In summary, they place the emphasis on:

– The well-being of a minor in society;

– Social integration of minors and re-establishing a constructive role in society;

– the necessity of a qualified and trained staff in all parts and components of the system;

– The importance of preventing juvenile delinquency;

– Protecting juvenile witness rights and victims.

Regarding the juvenile justice, a special importance is presented by the CJCJ, in particular Articles 37, 39 and 40. Meanwhile, awareness about the victims of crime and their fundamental rights was achieved in the early 1985's, when two important documents were adopted:

1. United Nations Declaration on the Fundamental Rights of Victims of Crime and Abuse of Power of 1985[1];

2. Recommendation No. (85) 11 on the Position of Victims in the Criminal Law Framework, and the Penal Procedres, regulating the position of the victim from the moment of affliction, during the first interrogation and its protection at all stages of the criminal procedure[2].

The statement is also of particular importance because it does not have binding force, for that it sets minimum standards for the treatment of crime victims and it is considered to be a magna carta of the international victim movement[3]. The statement grouped the basic principles of justice for victims of crime in the following categories:

– Access to the justice system, fair and impartial trial;

– Return and Compensation;

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[1] Juvenile Justice Strategy – 2017–2020. Ministry of Justice, – 10 p.

[2] Recommendation – No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure – 1985.

[3] Juvenile Justice Strategy – 2017–2020. Ministry of Justice, – 10 p.

– Assistance and support[1].

In 1985 the Recommendation was also an important step in the long-term campaign of the Council of Europe to improve the position of victims in criminal and procedural law. Their content has been enriched continuously with the adoption of a number of important instruments among which we mention:

– Recommendation of the Council of Europe (2006) on support for crime victims[2];

– EU Directives defining the standards and minimum rights, support and protection of crime victims[3].

These directives essentially provide that victims are treated with respect; experts in justice organs trained to work with minors, victims have the right to be kept informed of their case in a clear and understandable way; victims may participate in the procedure and should be assisted to participate in the trial; states need to identify vulnerable victims, such as victims of a particular category of criminal offenses, sch as sexual abuse, helpless victims or children.

The Juvenile Justice System consists of laws, policies, guidelines, customary norms, professionals, special treatment institutions for the juvenile in conflict with the law[4]. The drafting of the Juvenile Justice Code[5] enabled the creation of a single legal system for juveniles and constitutes an important progress in terms of adapting domestic legislation to the spirit of European and international instruments. However, the application remains as the most delicate matter where emphasis should be placed on continuous basis.

When it comes to regulating the position of juvenile victim and/or witness in the legal aspect, it is necessary at first to determine exactly who is

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[1] These principles are also set out d in the treaty establishing the International Criminal Court, the Rome Statute.

[2] The Council of Europe has adopted a growing number of recommendations and conventions and has promoted scientific studies and research in this field.

[3] Directive 2011/93/EU of the European parliament and of the council of 13 December – 2011 on combating sexual abuse and sexual exploitation of children, and child pornography; Directive – 2011/36/EU of The European Parliament And Of The Council on preventing and combating trafficking in human beings and protecting its victims; Directive 2012/29/EU of the European parliament and of the council of 25 October – 2012 establishing minimum standards on the rights, support and protection of victims of crime.

[4] Manual on the Measurement of Juvenile Justice Indicators, edition of United Nations, Office on Drugs and Crime and UNICEF, New York – 2006.

[5] Criminal Justice Code for Juvenile, next CJCJ.

considered to be so. Juvenile Justice Code, Article 3 defines a ***"minor victim"*** as any person below the age of 18, who has been subjected to moral, physical or material damage as a result of a criminal offense, while "a minor witness" as any person below 18 years of age, who may have information regarding the criminal offense.

The consequences of a criminal act affect the child in different ways. The minor may suffer all material, moral, physical and psychological damages. These consequences are the result of a primary victimization. Moreover, this category, due to age, psycho-physical development or the nature of the crime, is particularly exposed to second victimization and in some specific cases to re-victimization. Second victimization[1] is the intensification of primary victimization, as a result of the negative reaction of the social environment or the inadequate and ineffective response of the justice organs. Re-victimization[2] is a repeated victimization due to criminal behavior, which is often associated with the absence of a supportive system for juvenile victims, and it is specifically linked to a particular category of offenses such as sexual crimes or domestic violence.

3. The novelties of the juvenile criminal justice code

The Juvenile Justice Code foresees a comprehensive legal framework that the mechanisms will have procedures and qualified individuals to serve to the juveniles effectively by raising awareness and providing information to them. The CJCJ provides a set of guarantees for the juvenile victim/witness of a criminal offense, ranging from the right to prompt and effective information, emotional support, and the assistance of experts of various profiles, legal, psychological, psychiatric and material compensation. To prevent and reduce the second victimization for this category, it is anticipated emotional support before, during and after the court session, as well as making detailed and understandable information available on the procedures and their rights.

A. Fundamental principles in cases involving juvenile victims and/or witnesses

The CJCJ represents a synthetic instrument where the main principles for the protection of juvenile rights are comprehensively included, as well as the basic standards for the enforcement of criminal justice for juveniles. Among

[1] Juvenile Justice Strategy – 2017–2020. Ministry of Justice, – 10 p.

[2] Law – No. 37/2017. Criminal Justice Code for Juvenile, Article 3, paragraph 2, "Revisiting" is causing the damage of the juvenile victim of the offense as a consequence of a new offense related to the first.

the most important principles in cases involving juvenile victims and/or witnesses we mention[1]:

i. **Highest interest of children**:

ii. **Dignity:**

iii. **Protection from discrimination:**

iv. **Access to justice and information:**

v. **Protecting the private life of a minor victim and/or witness.**

B. The access of juvenile victims and/or witnesses to court and court proceedings[2]

As subjects of the law, minors should have equal access to legal remedies and legal mechanisms. Access to minors in criminal justice relates not only to their age, but also to their social status as well as their mentality and cultural perceptions. The European Commission Progress Report on Albania (2014) notes that access of children to justice is hampered by court fees[3]. Albania ranks 155th, granting access to justice for only 59.4% of children[4].

Minors have less knowledge, fewer financial resources and they are generally less able to understand the complexity of the justice system in all its forms. The CJCJ stipulates that juvenile victims and witnesses should be provided with detailed and prior information in order to understand the procedures and to access freely all the support services they need. In particular, victims should be informed where and when to file a complaint if they their rights will not be respected. Victims and witnesses should be informed with up-to-date information at any trial stage. The information must be complete and include, the protective measures available to the juvenile, the restorative justice programs available and their functioning, access to health, psychological, social, financial and legal services.

Victims and/or juvenile witnesses are often traumatized and encounter difficulties in abstaining the information. For this reason, it would be more

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[1] Juvenile Justice Strategy – 2017–2020. Ministry of Justice, – 10.

[2] Access to the criminal justice system by juvenile or juvenile witnesses includes a whole range of rights: the right to address the court; the right to free legal aid; the right to a fair and open trial; the right to participate in the trial; the right to be heard by the court; the right to contact the court and the lawyer; the right to be informed and to receive notice of all the proceedings; the right to be consulted and to have all the facilities to prepare for trial; the right to have a final decision by the court.

[3] Juvenile Justice Strategy – 2017–2020. Ministry of Justice, – 10 p.

[4] Ibid.

efficient to make the information available in written forms and by specialized people for this purpose.

Institutional framework

Victims and/or witnesses should be guaranteed emotional, practical, administrative, and legal support. For this purpose, the CJCJ provides a whole set of competences of the unit for the protection of children's rights regarding the juvenile witness and/or victim. The purpose of the work of the unit is to protect children against any form of abuse, neglect, social exclusion, exploitation, trafficking and other phenomena that affect the development and well-being of children. Among other things, these units are empowered to support the juvenile throughout the criminal process, assessing on a case-by-case basis, whether professional counseling is necessary by providing information to the juvenile about all supporting mechanisms, their rights, procedural actions, deadlines and where they take place. These structures maintain close links with the juvenile defender and engage in the realization of the highest interest of the minor, requiring the taking of protective measures or special measures. In cases of minors under 14 years old, the unit representative, if appointed as a procedural representative, issues the consent of the juvenile to give evidence. However, the practice will show whether an appropriate co-ordination between the chains of the system will be realized, with the purpose of their operationality and flexibility in the protection of children's rights.

C. Participation of a minor victim and/or witness in the criminal process

Criminal cases involving juveniles are difficult not only because of their delicate position as a victim and/or witness to a criminal offense, but also because they are often unable to understand complex procedural actions due to their age. Moreover, this category experiences stress and fear of participating in the trial as well as providing testimony and proofreading. These factors have a significant impact on the quality and veracity of the given evidence. For this reason, the creation of supportive mechanisms, to which professional trainees are trained in the field of children's rights, becomes an immediate necessity. Through these mechanisms, the aim is to avoid traumatic experience from the juvenile while contributing to the speeding up of the court process. In this regard, the CJCJ provides that the juvenile in the judicial process must always be represented by the defense counsel, legal representative, and if possible by a trusted person. However, it should be noted that only procedural acts can be performed by the legal representative in the name of the minor, while the

latter should be present in the making of personal declarations. For this reason, in order to facilitate the procedures for juvenile witnesses and/or victims of the criminal offense, special rules are anticipated, that aim to guarantee the reflection of the opinion of the juvenile which we can classify on the basis of the following criteria:

I. Specific rules of the question depending on the age group and the psycho-physical development of the juvenile

In juvenile delinquency, the competent authorities ensure the avoidance of confrontation of the juvenile victim with the accused in all the premises where the process is being conducted and guarantee the conduct of the closed court hearing. The CJCJ provides that in cases where the giving of evidence may place the minor at serious risk to life or health, the judge, in accordance with the age, guarantees at the trial[1]:

a) The question of the juvenile witness/victim using devices that change the appearance and/or the voice of the witness/victim or distance interrogation;

b) the question of the juvenile witness/victim before the start of the court session with the participation of the juvenile defender and the video recording of the juvenile's question;

c) prosecuting the juvenile's case and the question where possible and appropriate by the same persons and limiting as far as possible the timely interrogation.

In juvenile delinquency there is one the principle of the speed of the judicial process is essential, in order to avoid the reactivation of the juvenile victim.

A. Specific rules on the question of juvenile victim/witness 14 –18 years old[2]

For a minor over 14 years of age, the testimony is done without the presence of the defendant. In this case, the judge orders the temporary removal of the defendant from the courtroom, providing the mandatory participation of the defender's defendant in the court session. However, the minor is entitled to seek the defendant to be present. If the minor asks for this, the court immediately assesses the claim, based on concrete circumstances, the maturity of the juvenile, the risk of re-victimization and secondary victimization, and decides on the claim.

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[1] Juvenile Justice Strategy – 2017–2020. Ministry of Justice, – 10 p.

[2] Law – No. 37 / 2017. Criminal Justice Code for Juvenile, Article 40.

***B. Special rules on the question of a juvenile victim/witness under 14 years of age*[1]**

Unlike current practice, the Juvenile Criminal Code excludes the treatment of cases of children under 14 from the justice system, passing this with full competence to the special social protection units. For juveniles victims and witnesses under 14 years of age, the question can only be asked with the consent and presence of his/her legal/procedural representative, psychologist and defense counsel as long as his presence does not contradict the best interest of the child. The prevalence of specialized people is important in order for minors under the age of 14 to be explained clearly and comprehensively, as well as through examples, the importance of telling the truth and the consequences that the truthfulness of people can bring about the third. At the same time the juvenile is explained that there is no criminal liability for the criminal offense, for refusing to give testimony or for giving false testimony. In any case, the proceeding authority shall consult with the psychologist in advance the content of the questions to be addressed to the juvenile, aiming at providing him with the appropriate question in order to facilitate the giving of evidence, eliminating intimidation or embarrassment from the process.

II. Special rules depending on the nature of the offense

***Special rules on minors victim's and/or witnesses of sexual exploitation or sexual abuse*[2]**

For a specific category of criminal offenses such as sexual crimes, domestic violence due to their very sensitive character and the impact they cause to the juvenile are provided by special rules, interviews of minors from well-educated psychologists with audio-visual technology and their validity in the judicial process. At the same time, it is foreseen that the juvenile witness or victim of domestic violence is forbidden to be questioned in the presence of the parent or abusive relatives during the procedure of establishing the protection order. In cases involving juvenile victims or witnesses of sexual exploitation and/or sexual abuse, the entire trial process is conducted with closed doors.

Conclusions

Juveniles vary from adults due to their physical, psychological and emotional development. Victimization of minors is determined not only by their psycho-

[1] Law – No. 37 / 2017. Criminal Justice Code for Juvenile, Article 42.

[2] Ibid., Article 41.

physical qualities, but also by their social roles that occupy the social perceptions, mentality etc. In this context, the provision of supporting mechanisms is an essential element of the juvenile's right to participate in a judicial process and to understand procedures fairly, while respecting their rights at the same time. Until recently, legal provisions concerning the juvenile were dispersed in many codes and by-laws. With the approval of the CJCJ, a unique system was created which has brought significant improvements in two main directions:

– **At the legislative level**, the CJJC foresees for the first time the principles and the way in which the justice organs should treat a minor victim or witness of crime. In this respect foreseen the general principles that will govern all proceedings involving juvenile victims or witnesses, specific rules of the question depending on the age, nature of the offense, rehabilitation and restoration measures, as well as compensation rights. Unlike current practice, the Juvenile Criminal Code when dealing with cases of children under 14, has entrusted it to special social protection units for children. For a specific category of offenses such as sexual crimes and domestic violence, due to their very sensitive character and the impact they cause on the minor are prescribed special rules, interviews of minors from well-trained psychologists, with audio-visual technology and their validity in the judicial process.

– **At the institutional level**, the CJCJ foresees a whole set of tasks for the child protection unit related to the juvenile victim or witness. The audio recording system, which is an important element for the juvenile justice, is installed in all courts of first instance and appellate, however, remains to be seen how effectively it will be used.

The CJCJ emphasizes the importance of training and qualification of the personnel and people involved in the juvenile criminal justice administration, in order to properly and effectively implement juvenile rights and guarantees.

However, the access of juveniles to justice in Albania is still at a miserable level and there it remains to be seen the implementation and the coordination of the work of justice bodies in the process of protecting the rights of juvenile victims and/or witnesses for guaranteeing a friendly justice to them.

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Section 4. International law

Varun Eknath,
The World Bank Group[1]
E-mail: varuneknath@gmail.com

CURRENCY MISALIGNMENTS: THE ROLE OF THE WORLD TRADE ORGANISATION

I. Introduction

A sovereign state enjoys the freedom to issue and circulate currency within its territory, along with the general right to determine the value of that currency. A domestic regulation on currency exchange control is primarily a domestic matter falling with the states' municipal power. However, it must be noted that a state's control of its own currency flow within its own territory may be a domestic matter, but pegging the currency's value to a foreign currency may bring extraterritorial consequences, thus making it an international matter[2].

In light of this assertion, this article revisits an issue, which has been discussed and deliberated over the last two decades, but has come to the fore front with alleged currency manipulations by China and the recent negotiations on currency manipulations under the Trans-Pacific Partnership (TPP). This article explores the role of the World Trade Organisation (WTO) in addressing issues of currency misalignment. It seeks to examine the relationship between exchange rate misalignments and trade remedies elaborates on the extent to which the WTO Agreement on Subsidies and Countervailing Measures (ASCM) can be

[1] The views and opinions expressed in this article are those of the authors and do not represent or reflect the views of the author›s employer, organization, committee or other group or individual.

[2] Haneul Jung. "Tackling Currency Manipulation with International Law: Why and How Currency Manipulation should be Adjudicated?", – Vol. 9 (2), Manchester Journal of International Economic Law (Manchester, 2012), – P. 185 (hereinafter Jung (2012)).

used to correct the adverse impact caused by exchange rate misalignments. As a possible alternative, the article recommends the possibility of developing a new comprehensive legal framework under the WTO that would prevent misaligned currencies from fuelling distortions in international trade.

II. Currency Misalignment, IMF and the WTO

Currency misalignments might pose a serious challenge to the functioning of the international trading system by distorting competitiveness and undermining the predictability of trade relations. Artificial depreciation of a currency leads to enhanced positions of domestic export producers to the detriment of foreign producers competing in the same market. In order to prevent the distortions of international trade caused by currency misalignments, an intervention at the intetnational level is the need of the hour. The International Monetary Fund (IMF) and the WTO, the two most relevant international institutions in this sphere, have remained adrift from these currency wars, which may result in implementation of unilateral measures challenging the integrity and predictability of the international trade system. As per Article 1.3 of the IMF Agreement, preventing competitive exchange rate depreciation, and maintaining exchange rate stability are mentioned among the purposes of the organization[1]. With regard to the WTO, Article XV of the General Agreement on Trade and Tarrifs (GATT) reads that the WTO is to cooperate with IMF regarding exchange rate issues and fully consult with the IMF, when the issue of exchange arrangements is involved[2].

It has been suggested by many that the IMF is tasked with resolving issues of monetary policy, while the WTO's job is to manage the trading system.[3] While the IMF has the competence to regulate the undervaluation of currencies, it lacks an enforcement mechanism. Recent scholarship has considered and suggested the WTO, equipped with its Dispute Settlement Body (an efficient enforcement mechanism), as a possible alternative to the IMF to address and effectively adjudicate cases involving currency misalignments.

III. Currency Misalignment: The WTO ASCM Test

The relationship between currency misalignments and international trade law has been the subject of significant debate in the past. Under the existing

[1] Article 1.3 of the IMF Agreement.

[2] Article XV. 1 and Article XV 2 of the General Agreement on Tariffs and Trade (GATT)

[3] MR Leviton., "Is it a Subsidy? An Evaluation of China's Currency Regime and its Compliance with the WTO", – Vol. 23 (2). Pacific Basin Law Journal (UCLA, California: Published online), – 249 p.

WTO framework, a case could be made out for a currency misalignment measure to be considered a countervailable subsidy under the ASCM. However, in order to explore the applicability of currency misalignments in the context of the ASCM, a measure on exchange rate depreciation has to be considered a subsidy. In the case of a prohibited export subsidy, the member state can bring a claim of currency mainpulation to the WTO Dispute Settlement Body (DSB) in the context of the ASCM and demand the removal of such a subsidy. Similarly, in case the currency misalignment measure is found to be an actionable subsidy, the WTO member state which suffered the adverse effects of currency manipulation will have an opportunity to impose a countervailing duty[1], which constitutes a proportionate compensation for adversely affected competitiveness of this WTO member. However, such a course is contingent on whether the exchange rate depreciation could be classified as a subsidy within the countours of the ASCM.

For a measure to be considered a subsidy, either actionable or prohibited under the ASCM, a three-tier test must be met. First, there must be a "financial contribution by a government or any public body within the territory of a Member";[2] secondly, such contribution must confer a "benefit";[3] and, finally, for an action to be taken, such contribution must adhere to the requirements of specificity found in Article 2 of the ASCM[4].

a) Currency misalignment as a 'financial contribution' under the ASCM

In light of the first tier, Article 1.1 (a) (1) of the ASCM provides an exhaustive[5] list of financial conducts that may be considered as a financial contribution. First, a financial contribution can involve a "direct transfer of funds", actual or potential, on the part of a government[6]. Some authors have asserted that currency misalignments amount to "direct transfer of funds"[7], especially

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[1] Jung, H. 'Tackling Currency Manipulation with International Law: Why and How Currency Manipulation should be Adjudicated?' Manchester Journal of International Economic Law 9 (2): 184–200, – 2012. – 189 p.

[2] ASCM, Article 1.1 (a) (1).

[3] ASCM, Article 1.1 (b).

[4] ASCM, Article 1.2.

[5] Panel Report, United States – Measures Treating Export Restraints as Subsidies, WT/DS194/R and Corr.2, adopted 23 August – 2001. – DSR 2001: XI, 5767.

[6] ASCM, Article 1.1 (a) (1) (i).

[7] BB Caryl., "Is China's Currency Regime a Countervailable Subsidy? A Legal Analysis

the Chinese currency exchange regime. However, these transfers may not be direct in most cases, resulting in non-applicability of this clause. Therefore, a determination on whether currency misalignment measures amount to a direct transfer of funds will have to be made on a case-by-case basis[1].

Secondly, government revenue otherwise due, forgone or not collected may also constitute a financial contributio[2]. Justifying currency misalignment measures as revenue otherwise due or foregone is an enormously difficult task given that monetary policies involve taking positive action whereas foregoing revenue involves negative action, that is, *not* taking any action[3].

Thirdly, provision of goods or services other than general infrastructure or purchase of goods by the government may be considered as a financial contribution[4]. Currency misalignment measures have been suggested to constitute a free hedging service provided by the government to its exporters. However, the fact that hedging is a by-product and the main goal of the governmental measure makes the task to justify the measure as a service difficult.

Fourthly, any of the above three instances may be considered a financial contribution in the event that governmental authority is delegated for such purposes to "funding mechanisms" or "private bodies" and is, "in no real sense", different "from practices normally followed by government"[5]. In the case of misaligned currencies, the private entities might be banks that, acting as governmental agents without any real autonomy, exchange any foreign currency for the domestic currency at the rate that the government has fixed[6].

In addition, a financial contribution includes "income or price support" as per Article XVI of GATT, 1994[7]. However, the term 'income or price support'

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under the World Trade Organization's SCM Agreement", – Vol. 45 (1). Journal of World Trade (Kluwer: the Netherlands, 2012), – P. 195–6. (hereinafter referred to as Caryl (2012)).

[1] Aluisio de Lima-Campos, Juan Antonio Gaviria, <A Case for Misaligned Currencies as Countervailable Subsidies>, Vol 46 (5), Journal of World Trade (Kluwer: the Netherlands, – 2012), – P. 16. Available at URL: http://unctad.org/meetings/en/SessionalDocuments/ditc_dir_2012d2_deLima-Campos.pdf (hereinafter Gavaria (2012)

[2] ASCM, Article 1.1 (a) (1) (ii).

[3] Caryl (2012) at – P. 196.

[4] ASCM, Article 1.1 (a) (1) (iii).

[5] ASCM, Article 1.1 (a) (1) (iv).

[6] Gavaria – 2012. at – 15 p, see also Carly – 2012. at – P. 197–98.

[7] As referred to in ASCM, Article 1.1 (a) (2).

has never been interpreted by the DSB and it is therefore difficult to make a prediction on the outcome of a case based on the relevant provisions.

b) Do currency misalignments confer a 'benefit' under the ASCM?

With respect to the second tier, a 'benefit' is deemed to exist if the financial contribution is provided on terms that are more advantageous than those that would have been available to the recipient of the market[1]. In the case of currencies misalignments, the governmental measures are intended to keep the currency artificially low to make exporters better off and benefit them.

c) Currency misalignments and the requirements on 'specificity' under the ASCM

In light of the third tier, Art. 2 of the ASCM indicates that the specificity of a subsidy can exist if the subsidisation is made on 'certain enterprises'[2]. In the case of a currency misalignment measure, it is an extremely hard criterion to fulfil, given that the currency exchange regimes apply to every individual firm, industry of a group of enterprise within the territory of the state. Although Art. 2.1 (C) of the ASCM expands the scope of specificity to include concentrated actual usage by certain enterprises, it is argued that undervalued currencies are objective in implementation and benefit most domestic players and therefore cannot be regarded as measures taken solely for the benefits of the exporters.

Secondly, specificity is automatically presumed in cases when the measure amounts to a 'prohibited subsidy' within the meaning of Art. 3 of the ASCM. The prohibited subsidy under Art. 3 is a subsidy that is contingent, in law or in fact, upon export performance. Annex I of the ASCM provides an illustrative list of prohibited export subsidies and includes 'currency retention schemes' (Annex I (b)) and 'governmental exchange risk programmes' (Annex I (j)). The term 'retention' under Annex I (b)'s 'currency retention scheme' ordinarily refers to a private exporter's right to retain a portion of its foreign exchange earnings, notwithstanding a general rule to surrender such earnings to a designated bank[3]. Therefore, a currency retention scheme is generally irrelevant to the undervaluation of a currency. Moreover, 'governmental exchange risk programmes' under Annex I (j) may provide a better justification

[1] Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, adopted 20 August – 1999. DSR – 1999. – III, 1377 at para. 157.

[2] ASCM, Articles 2.1 (a), 2.1 (c), 2.2, and footnote 2 of Article 2.1 (b).

[3] Deborah E. Siegel, 'Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements', 96 Am. J. Int'l L. – 2002. – P. 561, 617.

for currency misalignment measures which may be categorised as exchange risk hedging. However, as stated earlier hedging may be a by-product and not the main goal of the measure.

A WTO ASCM test of currency misalignment regulations indicates that measures on currency misalignment are unlikely to meet all the requirements under the ASCM.

IV. Conclusion

The above-mentioned discussion makes it amply clear that the term 'subsidy' within the ASCM context is a major hindrance for the applicability of currency misalignment measure. The difficulty to categorise currency misalignment as subsidies acts as a major con for the application of the ASCM and subsequently the imposition of the countervailing duties. Moreover, with respect to 'specificity', it will be next to impossible for a WTO member to argue that the currency misalignment measure is targeted to benefit exporters solely. It is unlikely that the existing legal texts of the WTO were intended to addresses issues of currency misalignment. Additionally, the lack of legitimacy and the dismal compliance rate of WTO rulings seem to weaken the case for currency manipulations issues to be resolved under the framework of the WTO.

However, it must be remembered that the WTO has been able to play an important and constructive role in addressing its inefficiencies in the past (the Uruguay Rounds) and will continue to do so even in the aftermath of the collapse of the Doha Development Agenda. The WTO is strategically placed and equipped with powerful, adequate tools, particularly its Dispute Settlement Body. In order to prevent countries from taking unilateral actions that challenge the security and predictability of trade relations in a multilateral framework, issues of currency manipulations must be adjudicated under the auspices of the WTO DSB. The WTO DSB, has the potential and is well equipped to address currency misalignment disputes adequately.

Thus, it is recommended that the possibility of facilitating the development of a new multilateral legal framework under the auspices of the WTO addressing issues of currency misalignment is explored. Such a framework would undoubtedly require a consensus within the WTO membership. Under the new framework, currency misalignments attributable to the government could be treated like prohibited or actionable subsidies. Such a framework could then allow the WTO members to initiate investigations, and categorise measures of

currency misalignments as prohibitive or countervailable. Equipped with the right to demand the removal of the measure or impose countervailing duties, WTO members would have a recourse to avoid or neutralise the benefits of such currency misalignments. Such a trade remedy would thus prevent misaligned currencies from limiting market access and would essentially promote and further the credibility and predictability of WTO rules. The WTO DSB has the ability to provide legal certainty and clarity insofar as currency misalignments measures and their classification as prohibitive or countervailable measures under a new legal framework is concerned.

However, it must be remembered that this is only possible if the WTO and the IMF can collaborate their efforts (pursuant to Art, XV (4) GATT) and ensure that when a case comes to the WTO DSB, the case is adjudicated by providing a clear and convincing ruling on currency misalignment (in collaboration with the IMF Executive Board), thereby restoring the rule of law in state practice of controlling foreign exchange rate.

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Grishin Pavel Andreevich,
Chief specialist-expert of the Legal support department of
Samara regional office of Rospotrebnadzor
E-mail: traveller_fm@ro.ru

COMMUNIQUÉ AS A WAY OF SELF-DEFENSE IN INTERNATIONAL RELATIONS

In 1949 the United Nations General Assembly approved the Draft Convention on the International Transmission of News and the Right of Correction[1], but this convention was not enforced. In 1952 at the 403rd plenary meeting of the seventh section of the United Nations General Assembly the Convention on the international right of correction[2] (hereinafter Convention) was adopted in resolution 630 (VII) and opened for signature but in accordance with article VI of this Convention it entered into force only in 1962. Main parts of this Convention were identical to those of the Draft Convention on the International Transmission of News and the Right of Correction, except the parts regarding enforcement provisions[3].

Member States that signed and ratified the Convention are Cyprus, Egypt, El Salvador, Ethiopia, France and Guatemala. These 6 signatories deposited their instruments of ratification and completed all stages of assuming the obligations involved in the Convention and nowadays are implementing their programmes of action. This Convention is opened to signature by every member of the United Nations, every state invited to the United Nations Conference on freedom of information held in Geneva in 1948 and every other state which the General Assembly may, by resolution, declare to be eligible.

To date a further 17 States have acceded to this Convention (Argentina, Bosnia and Herzegovina, Burkina Faso, Chile, Cuba, Ecuador, Guinea, Jamaica, Latvia, Liberia, Montenegro, Paraguay, Peru, Serbia, Sierra Leone, Syrian Arab Republic, Uruguay). Signatories of the Convention are 6 States, parties are 11 States. Nowadays the total number of countries that ratified the

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[1] Draft Convention on the International Transmission of News and the Right of Correction, 6 United Nations Bulletin 678–1949.

[2] Convention on the International Right of Correction (December 16, – 1952), 435 United Nations Treaty Series 191–1963.

[3] Myres S. McDougal, Gerhard Bebr, Human Rights in the United Nations, 58 American journal of international law 605, 617. – 1964.

Convention is 23. The number of the Convention's signatories remains the same since 2006. So just 23 countries in the world committed themselves to respecting Convention's requirements for correction of news dispatches in all circumstances.

The Convention regulates the dissemination of a version of facts, that were published or disseminated by mass media of any states and were false, distorted or could be detrimental as a Contracting State thinks, that may be submitted to the Contracting State, within whose territory such dispatch has been published or disseminated (that version of facts called "communiqué"), characteristic features of the communiqué and cases of use of it. It means that the Contracting states understand the problem of somebody's reputation defamation and want to implement their people's right to be fully and reliably informed, to improve understanding between their citizens through the free flow of information by opening the Convention to signature.

Well, that communiqué must be issued with respect to the false, distorted or detrimental information and must be without any opinion on this news dispatches. This means that it must be a statement of facts submitted by the Contracting State with no emotions or comments on the news dispatches. Not later than five clear days from the date of receiving a communiqué by a Contracting State that country government must release the communiqué to mass media operating in its territory. Correspondents as well as information agencies are covered by the provisions of this Convention too but that doesn't widen the scope of the Convention application. That means that the Contracting States may use this Convention in relations with information dissemination produced by residents of the Contracting States whose profession is providing information to general public, but nowadays modernization driven by the internet age is fuelling a demand for information and is shaping relations between people. Any individual may rely on disseminating a false image of a target country abroad and this dissemination is capable of enhancing international relations or tensions between states. Moreover, this information may be used to strengthen national decision making on other nation. For example, in the situation when somebody publishes or disseminates false, distorted information or information that can be detrimental for a country or for a nation related to a particular state, this state cannot use communiqué to provide the real version of facts on the international arena owing to the fact that this country is not one of the Contracting States of the Convention.

It is worth noting, however, the right of correction is provided by legislations of countries that are not Member States of the Convention. In some countries the right of correction is a part of its Constitution. For example, the Slovene Constitution states: "The right to correct published information which has damaged a right or interest of an individual, organization or body shall be guaranteed, as shall be the right to reply to such published information"[1]. Matevz Krivic pointed at "somewhat illogical naming of these legal institutes" because of the content of the term "correction" in Slovene legislation that is the same to "reply" in other countries, while Slovene "reply" is a reply just to protect public interests[2]. According to the Constitution of Venezuela "everyone has the right to timely, truthful and impartial information, without censorship, in accordance with the principles of this Constitution, as well as the right to reply and corrections when they are directly affected by inaccurate or offensive information"[3]. At the same time the Constitution of Brazil uses just the term "reply". Article 5 of this Constitution reads as follows: "right of reply is assured, in proportion to the offense, as well as compensation for pecuniary or moral damages or damages to reputation"[4]. Stephen Gardbaum noted that the right of reply is granted regardless of its mentioning in the constitutional text[5] and in some countries that right is mentioned in a special act. Russia, for instance, under the Civil Code of the Russian Federation[6] provides the right of refutation and the right to answer[7].

It is worth noting that the right of correction and the right of reply vary from country to country, there are no standards of including these ways of self-de-

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[1] Constitution of the Republic of Slovenia art. 40, available at URL: http://www.us-rs.si/en/about-the-court/legal-basis.

[2] Matevz Krivic, Simona Zatler, Freedom of the Press and Personal Rights: Right of Correction and Right of Reply in Slovene Legislation 7–2000.

[3] Constitution of the Bolivarian Republic of Venezuela art. 58, available at URL: http://www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf.

[4] Constitution of the Federative Republic of Brazil art. 5, available at URL: http://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11

[5] Stephen Gardbaum. A Reply to "The Right of Reply", 76 George Washington Law Review 1065, – 2008. – P. 1065–66.

[6] The Civil Code of the Russian Federation art. 152, available at URL: http://en.smb.gov.ru/support/regulation/ccpart1.

[7] The French Press Act of 1881 contains the similar regulation and provides the right of rectification (article 12) and the right of reply (article 13).

fense into a state legislation and the content of legal constructions of defense of honor, dignity, and business reputation, etc. differs in various countries. But not all states give the right of reply or correction to its citizens. The Constitution of Papua New Guinea provides no rights to protect their people from the false, distorted or detrimental information. At the same time the Parliament of Papua New Guinea may make reasonable provision "to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs"[1]. In other words, the way of defending of honor, dignity, and business reputation, etc. as "correction" goes hand in hand with "reply" and regardless of its mentioning in the Constitution of a particular state[2].

The Convention was dismissively described in 1980[3] as largely ineffective. That's the reason why the number of the Convention's signatories is so low. However, the Convention fulfills the need for a legally binding document, but its provisions have been put into effect many years ago so, in my opinion, actualizing the text and the spirit of the Convention is one of the first priorities of the Contracting States. In brief, the increase in the number of the Convention's signatories is not necessary without mainstreaming the provisions of the Convention. At the same time if government intrudes into actual or virtual high-walled newsrooms, such provisions would give rise to a meddlesome government dictating news editing[4]. That is the one side of the coin of the unending discussion about balancing between heavy state control against mass media and total non-interference in the affairs of such organizations. Harmonization of public and private interests is a great challenge especially when ways of self-defense are used[5].

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1. Communication and Society Today and Tomorrow, Many Voices One World, Towards a new more just and more efficient world information and

[1] Constitution of the Independent State of Papua New Guinea art. 46, available at URL: http://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf

[2] Kyu Ho Youm. The Right of Reply and Freedom of the Press: An International and Comparative Perspective, 76 George Washington Law Review 1017, – 2008. – P. 1031–32.

[3] Communication and Society Today and Tomorrow, Many Voices One World, Towards a new more just and more efficient world information and communication order 249 p. – 1980.

[4] See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259. – 1974. (White, J., concurring).

[5] Pavel Grishin. Self-Defense of the Regime of Commercial Secret in Conditions of Implementation of State Control (Supervision) and Municipal Control, 485 "Business and Law" Journal 77, 81 p. – 2017.

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Section 5. Criminal law

Kundakova Makpal Zhanatkaliyevna,
Al-Farabi Kazakh National University,
doctoral candidate, the Faculty of Law
E-mail: baysalov_1977@mail.ru

CRIMINAL LIABILITY FOR ILLEGAL MIGRATION BY THE LEGISLATION OF FOREIGN COUNTRIES (ON THE EXAMPLE OF THE EUROPEAN COUNTRIES)

The current migration crisis in the world, including Europe, can not be stopped. In 2017, approximately 164 thousand people arrived in Europe: this is more than two times less than in 2016–348 thousand people. In total, since 2015, the territories of Europe were able to reach more than 1.5 million illegal immigrants[1].

This does not reduce the negative effects of the migration crisis on the European countries. To the negative consequences are included the number of offenses committed by immigrants, including criminal offenses. Considering the current state of the criminal legislation of some of these European countries in the fight against illegal migration is one of the topical issues of the day. Italy is one of the countries which is most frequently used as transit corridor for illicit immigration from Africa to Europe.The Criminal Code of Italy contains the following types of offenses related to illegal immigration: assistance in hiring an illegal worker – a fine of 5 thousand euros with imprisonment from 6 months to 3 years (Articles 10, 12, 12.5, 14ff UK of Italy); involvement of an illegal worker in labor activity – a fine of 7,500 euros and 4 years in prison (articles 19, 22.22 of the Criminal Code of Italy)[2].

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[1] Более 3 тыс. нелегалов утонули в 2017 г. при попытках добраться до Европы URL://http://www.interfax.ru/world/589431

[2] Legge n. 94/2009-Security Set 94/2009 came in force on July, 15, – 2009.

Along with Italy, Spain is also related to the transit area for illegal migrants. Spanish law sets out the responsibility for offenses related to illegal migration, and among with the countries that are part of the European Union, Spain is one of the countries that have strict criminal penalties for crimes related to illegal immigration. This step has been made by the fact that Spain has been the main provider of illegal immigrants from African countries to European countries.

In particular, the Spanish Criminal Code provides responsibilities for the organization of illegal migration in the form of "smuggled passports" and crimes related to illegal migration, and they are covered by the following provisions of the Criminal Code: 312, 318, 515, 517, and 518.

In accordance with Art. 312 of the Criminal Code for persons engaged in the illegal transfer of labor, provides the imprisonment from 2 to 5 years. For persons engaged and assisting on the smuggling of people in Spain or their transit to other countries, a penalty is established as of imprisonment of 6 months to 3 years or a major fine is provided. For persons who through their economic or any other activity contributes the creation of criminal organized groups for the transfer of migrants, a penalty of imprisonment for a period of 1 to 3 years is established, or a large fine and a ban on holding a public office for a period from 1 to 4 years[1].

In the Spain, among with the responsibilities for illegal migration in a special Law on Foreigners (Ley de Extranjería) was written in the article 50 criminal punishment for such acts as facilitating the creation or participation in criminal organizations engaged in the delivery of illegal immigrants to Spain, or using its territory as a transit, and in the article 55 and Article 55 provides for criminal liability for illegal use of illegal labor migrants.

In the German Criminal Code, § 234a, "Forced removal of people abroad," fixes the following: " (1) Whoever, by cunning, threatening or using violence, transfers another person outside the scope of this law or forces him to do so, or prevents him from returning to that territory and this puts the person in danger of persecution for political reasons and at the same time to undergo the application of measures of violence or arbitrariness that are harmful to his health and life, deprivation from rims or causing significant harm to his professional or financial position, shall be punished by imprisonment for a term not less

[1] Борьба с нелегальной миграцией в Испании//http://mitorrevieja.blogspot.com/2013/04/blog-post_1547.html

than one year[1]. From this norm we can see that the organization of illegal immigration was prescribed in the following form: "Transfering another person beyond the scope of the law".

In the Dutch criminal law, the components of the crimes related to illegal migration are covered by Articles 197, 197a, 197b, 197c, 197d of the Netherlands Criminal Code (Book VIII). According to Article 197a: 1. A person who is from material motives, assists another person to enter the Netherlands or stay in the Netherlands, or to enter or remain in any state that exercises border control also on behalf of the Netherlands, or who, from material incentives, means or information for this purpose, if it knows or has a good reason to believe that the person's infiltration and stay is illegal, is liable to imprisonment not exceeding four years or a fine of the fifth category. The organization of illegal migration consists of "helping the illegal entry into the territory of that State".

And paragraphs 2 and 3 of this article provides the differentiated composition of the offense referred to above, i. e. if the offense is related to a service or professional activity and by a group of persons

2. If this offense is related to official or professional activity, the term of imprisonment can not exceed five years or the penalty of the fifth category should be appointed, and the judge may deprive the offender of the right to hold public office in connection with. which was committed an offense, and can deprive the offender of the right to engage in professional activities, in the course of which the offense was committed, and order the publication of the judgment.

3. The term of imprisonment not exceeding eight years or the penalty of the fifth category should be assigned to a person who commits an offense by virtue of a profession or custom or who commits an offense jointly with another person or other persons.

There is also criminal liability for illegal employment of illegal migrants (197b) and illegal residence in the country (197)[2].

Turkey is one of the transit countries that transmits illegal immigrants to Europe from the countries of the Middle East. This country is based on the provisions of the Criminal Code, which are used in the fight against illegal mi-

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[1] Уголовный кодекс Федеративной Республики Германия//http://constitutions.ru/?p=5854&page=6/

[2] Уголовный кодекс Голландии: Выполнено 3 марта 1881 года; Издано 5 марта 1881 года//http://law.edu.ru/norm/norm.asp

gration, in accordance with international standards, covering all stages of the migration process.

According to article 201 of the Criminal Code of th Republic of Turkey "Actions aimed at ensuring the illegal entry into Turkey of foreign nationals and stateless persons or stay in the country of persons whose prolonged residence in Turkey are not authorized by authorized bodies, departure from Turkey of these persons or Turkish citizens by illegal means, for personal gain, is considered to be an aid to illegal migration".

Persons who is promoting illegal migration or who manufacture forged migrants false identity cards or travel documents for personal gain, or persons attempting such violations, even if the offense is committed constitute another crime, are convicted separately for a heavy sentence of between two and five years and a grievous fine of at least 1 billion lire, with the confiscation of money or items acquired as a result of this act. In case that the offenses provided for in the previous parts have subjected illegal migrants to danger to life or health or to inhuman or degrading treatment, the punishments imposed on the perpetrators are increased by half, and in case of the death of illegal migrants – by half.

In the case of the commission of the above-mentioned acts by an organized group, the punishments imposed on the guilty persons are doubled.

And according to the article 201/b of this code – "Persons recruiting, abducting, transporting, transferring, harboring or receiving persons by threat or use of force or other forms of coercion, fraud, deception, abuse of power or the vulnerability of the provision to obtain the consent of persons for the purpose of exploitation, including forced labor or services, slavery or practices similar to slavery, servitude or the extraction of organs are punishable by a heavy sentence for a period of five to ten years and a heavy fine of at least one billion lirs. The consent of the victim to the planned operation isn't taken into account if any of the levers specified in part one has been used".

The recruitment, kidnapping, transportation, transfer, harboring or receipt of a child under the age of 18 for the purpose of exploitation entails the penalties provided for in part one, even if they are not related to the use of any of the means of influence specified in of this part.

In the case of the commission of the above-mentioned acts by an organized group, the punishments imposed on the guilty persons are doubled"[1].

[1] Уголовный кодекс Турции//http://constitutions.ru/?P=5851

From these two points of view, there are two forms of illegal migration, namely Article 201/a, an illegal form of illegal migrant movements, and Article 201/b, containing an inevitable formulation of Article 201/a of illegal migration in the form of "non – immigration migration" received

And criminal liability for offenses related to illegal migration in European countries, such as France[1], Switzerland[2], Denmark[3], is not provided.

In conclusion, these countries have established various criminal and criminal liability measures related to illegal migration, which are contained in the provisions of the criminal law applicable to the fight against illegal migration, as well as in the above-mentioned countries (except for Turkey), we can see that, the concepts used in the international migration related conventions are not used, and the stages of the migration process are not fully covered.

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Section 6. Environmental law

Bekturova Aidana Gabbassovna,
Al-Farabi Kazakh National University,
PhD., student, Faculty of Law
E-mail: aidanabg17@gmail.com

TO A QUESTION ABOUT WASTE MANAGEMENTS IN THE REPUBLIC OF KAZAKHSTAN

One of types of anthropogenic impact of the person on environmental protection is production of waste.

Classification of waste has rather complex structure which is directly connected with their production and specifics of their further processing. But in the most general view they can be classified on processed and not processed.

The problem of processing (utilization) of garbage is one of the most relevant in the sphere of environmental protection for all world community.

Each country develops own policy in this question.

The most advanced country in this question continues to remain Germany which first-ever on an industrial basis began to be engaged in processing of household and industrial garbage. The law Kreislaufwirtschaftsgesetz of Germany of June 1, 2012 formed the basis of system of the state measures directed to minimization of waste, processing of salvage, a recycling or, for example, power use of garbage. In translation the name of this Law means – "the law on circulation of raw materials in economy" what in general reflects ideology of the relation of the German government to waste and to their role in"Green Economy". At the same time, it is necessary to remember that the fundamental principle of such relation was put by the law on packing materials of 1991 which obliged producers to be responsible for the goods and after their use. Modern technologies allow to use rather effectively materials again that is visible on the example of plastic. Today it is possible to sort up to 40 percent of all plastic.

Annually from secondary raw materials 21 million tons of new plastic products are produced. The ton of new plastic costs an average from 1200 to 1400 euros, ton made of secondary raw materials – is almost three times less. It led to the fact that the need for import of plastic garbage from abroad.

Already today, the waste-processing industry is one of the most profitable, with a turnover of 200 billion euros, employing 250,000 people, and an annual increase of 14 percent[1]. Germany, in which 48% of solid waste is processed, 34% is burned, 14% is composted, 4% is buried [2]. Such high indicators are not the only ones.

The highest rates are shown by Sweden – it is the country that achieved the "zero" index of garbage and for the first time in the world imports garbage for its own needs. Today in Sweden 99% of garbage is processed. So according to statistics "Waste – relatively cheap fuel and the Swedes have developed an efficient and profitable technology for converting household waste into electricity. Sweden even imports more than 700,000 tons of waste from other countries. The remaining ash, which is 15% of the initial weight of the waste, is sorted and sent back for recycling. Residues are sieved to remove gravel, which is used in road construction. And only 1% remains and is stored in garbage dumps. Smoke from incineration plants consists of 99.9 percent of non-toxic carbon dioxide and water, but they are still filtered through a dry filter and water. Slag from the filters is used to fill the abandoned mines"[3].

No less effective is the experience of the Netherlands, which imports garbage from Italy, Spain, Germany, Belgium, England. The waste-processing industry is a private sector that generates high incomes. At the same time, according to statistics, only 50% of garbage is processed there.

Japan's experience is very similar to that of the United States of America. They use modern technologies of utilization – plasma gasification at a temperature of 1200 °C and higher, which allows using heat in the domestic sphere, processing it into electricity.

At this temperature, no resin is formed, and toxic waste is destroyed. From 30 tons of garbage in the end there are 6 tons of ash, which is then cleaned and

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[1] The money does not stink, or Processing of waste as favorable business URL://http://www.dw.com/ru/

[2] Kasenova A. M. Topical issues of management of municipal solid waste in Kazakhstan

[3] As Sweden made revolution in processing URL://https://rodovid.me/razdelnyi_sbor_musora/kak-shveciya-sdelala-revolyuciyu-v-pererabotke.html

used in construction. At the same time, the plant not only destroys garbage, but also produces electricity, which is supplied to city houses, baths, swimming pools.

There are a lot of such examples of effective use of garbage, each developed country by means of introduction of new technology tries not only to struggle with the growing amount of household waste, but also to put them into the course of solving domestic and industrial problems. These countries show high environmental and economic indicators of directed processing of solid waste.

A different picture is emerging in developing countries, where there is almost no garbage and prefer to bury it. So, for example, Bulgaria, Romania almost 100% send waste to the burial. The same trend is observed in countries with large land areas and, accordingly, can afford the presence of landfills. These are countries such as the United States of America, the Russian Federation and the Republic of Kazakhstan. These countries show the lowest level of processing and, accordingly, environmental pollution from garbage.

In Kazakhstan the problem of burial and utilization of household waste is one of sharp as the statistics shows their stable growth. The total amount of the saved-up MSW in Kazakhstan is about 100 million tons, at the same time about 5–6 million tons of MSW are annually formed already. By 2025 this figure can grow to 8 million tons, at the same time the formed waste is placed on grounds without preliminary sorting and neutralization[1]. Thus only 90 thousand tons turn into secondary raw materials that makes about 2% whereas all the rest is buried in grounds. At the same time the state machinery realizes that when processing 5–6 million tons of garbage (40%), Kazakhstan could earn up to 4–8 billion tenges.

At the same time, it is necessary to state existence of such serious problems today as:

1. Undeveloped system of collecting, including separate collecting MSW. Whereas developed countries, for more than 10 years passed to separate packing of garbage already at the initial stage. To citizens and the enterprises it is imputed a duty to divide garbage for acceleration and simplification of its processing. Whereas such system is partially introduced only in some districts of the large cities of Kazakhstan. All this leads to existence of the second problem.

[1] The program of modernization of a control system of municipal solid waste for 2014–2050. It is approved by the Resolution of the government of RK of June 9, – 2014. – of – No 634.

2. Namely, to waste disposal without preliminary processing is in turn direct threat to ecological wellbeing of the republic. "It represents epidemiological danger. Grounds are a powerful source of biological pollution as anaerobic (without air access) decomposition of organic waste is followed by formation of explosive biogas which can pose a threat for the person, harmfully influences vegetation, poisons water and air. Moreover, the main component of biogas – methane – is recognized by one of responsible for emergence of greenhouse effect, destruction of an ozone layer of the atmosphere and other troubles of global character. In total from waste more than hundred toxic substances get to the environment. Quite often dumps burn, releasing into the atmosphere poisonous smoke" [1].

3. Low volume of processing and recycling. In total only 5% from all made waste are exposed to processing, and Kazakhstan already saved up 23,6 billion tons of solid waste in the territory. 603 grounds for MSW from which 97% which are not conforming to health requirements act on the territory of the country. At the same time there are indicators which are beyond simple activity of the person and are directly connected with industrial activity. Among them 7 billion tons of waste are dangerous. 230 million tons of waste make radioactive waste and also there are in the territory of the country from them 30 billion tons of chemical waste [2]. And this with the fact that in Kazakhstan there are 1426 enterprises for recycling, from them more than 80 are active and pay taxes. For all that that Kazakhstan ratified in 2007 the Stockholm Convention on resistant organic pollutants in pursuance of which the republic assumed liabilities on destruction of all dangerous SOZ of the containing waste until the end of 2028. Presidential decree of RK (No. 399 of 28.09. 2012) between Kazakhstan and the International Bank for Reconstruction and Development the Agreement on implementation of the "Destruction of Waste of Resistant Organic Pollutants in Kazakhstan" project is signed.

4. Discrepancy of the existing subjects to burial of MSW to requirements of health regulations. So, according to experts "Practically all waste is taken out on solid waste landfills for burial, at the same time from the operating solid waste landfills except for the ground in Astana, all of them does not conform to requirements of health regulations, environmental standards of burial

[1] Tugov A., Eskin N., Litun D., Fedorov O. Not to turn the planet into a dump. Science and life. – No. 5. – 1998.

[2] Ownerless waste URL://http://expertonline.kz/a11988/

and practically exhausted the validity period. Besides, the waste recycling plants constructed in the cities of Astana and Almaty stands idle because of financial difficulty"[1]. At the same time it should be noted that the international standards strengthen requirements to such landfills and Kazakhstan will be forced to bring them into accord. The Order of the Acting Minister of national economy of the Republic of Kazakhstan of March 27, 2015 No. 261 On the approval of Health regulations "Sanitary and epidemiologic requirements to ensuring radiation safety" which establishes standards for preparation and work of garbage burial grounds was for this purpose adopted.

5. Lack of objective information on waste. Authorized public authorities possess only rather general information on quantity and quality of household and industrial wastes. It is explained including by the fact that questions of processing and burial of garbage are constantly transferred from one body to another if earlier this question was carried to the Ministry of ecology, then the Ministry of Agriculture, then now this question is carried to maintaining several divisions, such as Ministry of Agriculture, Department of waste management of the Ministry of Energy of RK and Committee of industrial development and industrial safety of the Ministry for Investments and Development of RK at once. Such crushing is explained with the fact that a number of structures including the public authorities which are carrying out protection of ecology is interested in questions of processing of waste today (lands of land and underground waters). Functions of the state agencies interested in development of processing industry including in the sphere of processing of MSW Separately it should be noted a role of public organization and first of all National chamber of businessmen Atameken at which the Committee of information and communication technologies, educations and innovations functions are especially allocated.

The committee is created for effective interaction of business community with public authorities for the solution of tasks of National chamber on the questions connected with development information and communication branches and development of "Green Economy". One of activity of this education is rendering assistance to Kazakhstan on attraction foreign investments into this sphere and also attraction into this sector of

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domestic investors and formation of public-private partnership by creation of the joint overworking plants.

The program of modernization of a control system of municipal solid waste RK approved by the Government resolution of June 9, 2014 of No 634 planned a number of large-scale projects for improvement of waste management in the Republic of Kazakhstan for 2014–2050. At the same time, it should be noted long-term character of this program that to some extent is negatively estimated by human rights activists and figures in the field of ecology who estimate the program as very long that has to affect country environmental problems negatively.

The program provides that in 2018 construction of the plants on processing of MSW 1 billion tenges will be allocated, and within the next 10 years is planned to construct such plants in 41 cities across all Kazakhstan. For implementation of this project foreign investments will also be attracted.

At the same time, some adjustments which enhance responsibility of producers take root into the ecological legislation. So, on January 1, 2016 the principle of expanded obligations of producers (importers) – works in the country (ROP). It represents obligations of the natural and legal entities which are carrying out production in the territory of the Republic of Kazakhstan and (or) import to the territory of the Republic of Kazakhstan of production (goods) for ensuring collecting, the transportation, processing, neutralization, use and (or) recycling which are formed after loss of consumer properties of production (goods) on which, (which) expanded obligations of producers (importers), and its packings extend. Due to the transfer garbage storages in private hands or in the enterprises of public-private partnership importers and producers undertake to pay contributions to private enterprise - operator who will be engaged in processing of waste.

At everything at the same time, now it should be noted that the problem of utilization, burials and processings of all types of garbage continues to remain relevant for Kazakhstan. Such questions as still are relevant:

– lack of the simplified access to waste;

– deficiency of qualified personnel and technology;

– low economic efficiency of investment of a project connected with processing of waste;

– lack of mechanisms of the state support on stimulation of elimination of pollution from historical waste.

Now standards of the Ecological Code of the Republic of Kazakhstan (further – EC RK) and other regulations regulate the sphere of waste management not fully EC RK establishes only general provisions on recycling.

Actually Kazakhstan needs to build a complex control system of waste as an organizational and legal framework, in fact, is absent. The existing norms are insufficient for rational waste management, including responsibility for construction and work of complex system is not distributed. There are no means for ensuring stable financing of development and work of infrastructure.

According to the Concept and also the resolution of the government of the Republic of Kazakhstan of June 9, 2014 No. 634 "About the approval of the Program of modernization of system municipal solid waste for 2014–2050", formation of a complex control system of waste has to be realized with use of the following approaches:

a) creation of the coordinated system of recycling with granting a full range of services and comprehensive protection of landscapes;

b) reduction of number of grounds with transition to broad application of processing and recycling and also extraction of useful substances and materials, receiving fuel due to recycling;

c) development of economy of the closed cycle with multireverse use of production, both within, and out of a value creation chain;

d) improvement of an ecological situation and decrease in technogenic influence on the environment.

For minimization of volume of industrial wastes it is necessary to differentiate accurately powers of public authorities in the sphere of the address with waste, in particular technogenic mineral educations, radioactive waste, municipal waste for establishment of the accurate mechanism of interaction between various central and local executive bodies on development of policy and implementation of supervision over industrial and municipal wastes.

It is also necessary to provide introduction of ecologically safe technologies and processes, including technologies for destruction of the waste containing resistant organic pollutants and other hazardous waste, to expand the ecological requirements concerning production and use of dangerous chemicals (chapter 40 of the Ecological code) for improvement of legislative mechanisms of regulation of chemicals, harmonization of the legislation in the sphere of environmental protection with requirements of the Law "About Safety of Chemical Production", introduction of the international system of classification of chemicals.

Realization of the following events is necessary for the solution of problems with municipal solid waste:

1) stimulation of introduction of separate collecting household waste at the consumer;

2) development of measures of the investments into the sphere of processing of municipal solid waste directed to stimulation of attraction;

3) stage-by-stage introduction of the principle of expanded liability of the producer for the purpose of a covering of a part of expenses on collecting and recycling of packing, the electronic and electric equipment, vehicles, accumulators, furniture and other goods after use;

4) to establish hierarchy of waste management: prevention of formation of waste, separate collecting valuable components, utilization (use of waste as secondary resources), processing, burial on grounds;

5) transition to broad application of processing and recycling and also extraction of useful substances and materials, receiving fuel due to recycling;

6) introduction of "green purchases", for growth stimulation of "environmentally friendly production" where when purchasing production and goods made with use of again processed raw materials has a priority.

These actions will allow to solve above the designated approaches on formation of a complex control system of waste.

At the same time, introduction of amendments to the Law of the Republic of Kazakhstan "About local public administration and self-government in the Republic of Kazakhstan" with investment of local executive bodies with functions on stimulation of the enterprises which are carrying out utilization and processing of waste is necessary.

Besides, it is necessary to improve standards of the legislation concerning the state control and responsibility of natural persons (population) and provisions of the legislation, legal for the purpose of execution, on waste.

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