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1-бөлім

МЕМЛЕКЕТ ЖӘНЕ ҚҰҚЫҚ ТЕОРИЯСЫ

Section 1

THEORY OF STATE AND LAW

Раздел 1

ТЕОРИЯ ГОСУДАРСТВА И ПРАВА

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THE ROLE OF CHILDREN'S RIGHTS IN SOCIETY

Today's child is a generation, tomorrow is our future! In order for our future to be bright, the education and upbringing of the current generation must be perfect and their rights must be protected. A person who can defend his rights, of course, protects the rights of his state.

Special rights of children, their protection from threats, discrimination and vulnerability. These provisions are enshrined in the International Convention for the protection of the rights of the child and auxiliary documents.

Individuals who committed crimes in adolescence have a very high probability of committing crimes in adulthood. The factor that affects them is that they suffer from a lack of hope for their future and from joining a normal life and society.

After studying , since the age of liability is 14 years, we often study juvenile delinquency. However, the basis for raising a child in the right direction and determining his attitude to society and his attitude to his environment begins in infancy. taking into account all the factors that affect the child, we need change our view of teenage criminality.

In the Republic of Kazakhstan, all laws are classified in accordance with a single system, for example, we have a criminal code, a civil code, an administrative code or a labor code. With the adoption of the above-mentioned codes in our country, we see only positive effects. Each law applies its own rule and regulates relations in a certain system. This is exactly what we need to adopt the "code of children's rights" for teenagers and children of our homeland

Key words: Child, Law, teenager, crime, criminal liability

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Бала құқығының қоғамдағы рөлі

Бүгінгі бала-ұрпақ, ертеңгі-біздің болашағымыз! Біздің болашағымыз жарқын болуы үшін қазіргі ұрпақтың білімі мен тәрбиесі кемелді болуы керек және олардың құқықтары қорғалуы керек. Өз құқықтарын қорғай алатын адам, әрине, өз мемлекетінің құқығын қорғайды.

Балалардың ерекше құқықтары, оларды қауіп-қатерлерден, кемсітушіліктен және осалдықтан қорғау. Бұл ережелер бала құқықтарын қорғау туралы халықаралық конвенцияда және қосымша хаттамаларда бекітілген.

Жасөспірім уақытында қылмыс жасаған тұлғалардың ересек уақытында қылмыс жасау ықтималдығы өте жоғары. Оған әсер ететін фактор олар өздерінің болашақтарынан үміт күтпей, қалыпты өмір мен ұоғамға қосулудан зардап шегеді.

Зерттей келе , жауаптылыққа тартылу жасы 14 жас болып табылғандықтан, біз көбінесе жасөспірімдер қылмысын зерделейміз. Алайда, баланы дұрыс бағытта тәрбилеу және қоғамға деген қатынасы мен өз ортасына деген қатынасын анықтап, тәрбие негіз баланың сәби кезінен бастау алады. балаға әсер ететін барлық факторларды ескере отырып біз жасөспірімдердің қылмысна деген қатынасымызды өзгертуміз қажет.

Қазақстан Республикасында барлық заңдар бір тұтас жүйе бойынша жіктелген, мәселен біз қылмыстық кодекс, азаматтық кодекс, әкімшілік кодекс немесе еңбек кодекстері бар. Жоғарыда аталған кодекстердің елімізде қабылдануымен тек оң әсерді байқаймыз. Әр заң өз ережесімен қолданып, белгілі бір жүйеде қатынастарды реттейді. Дәл солай біз өз Отанымыздың жасөспірімдері мен балаларына арналған «бала құқығы кодексін» қабылдауды қажет етеді

Түйін сөздер: бала, құқық, жасөспірім, қылмыс, қылмыстық жауаптылық

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Роль прав ребенка в обществе

Сегодня ребенок-поколение, завтра-наше будущее! Чтобы наше будущее было светлым, образование и воспитание нынешних поколений должно быть совершенным и их права должны быть защищены. Человек, который может отстаивать свои права, безусловно, защищает права своего государства.

Особые права детей, их защита от угроз, дискриминации и уязвимости. Эти положения закреплены в международной конвенции о защите прав ребенка и дополнительных протоколах.

Вероятность совершения преступления лицами, совершившими преступление в подростковое время, во взрослое время очень высока. Фактором, влияющим на него, является то, что они страдают от включения в нормальную жизнь и общество, не надеясь на свое будущее.

Возраст привлечения к ответственности составляет 14 лет. Тем не менее, воспитание ребенка в правильном направлении и определение отношения к социуму и к своей среде является основой воспитания ребенка с раннего детства. Учитывая все факторы, влияющие на ребенка, мы должны изменить наше отношение к подростковой преступности.

В Республике Казахстан все законы классифицированы по единой целостной системе, например, у нас есть уголовный кодекс, гражданский кодекс, административный кодекс или трудовой кодекс. С принятием вышеназванных кодексов в стране мы наблюдаем только положительный эффект. Каждый закон использует свое правило и регулирует отношения в определенной системе. Именно это и требует принятия «Кодекса прав ребенка» для подростков и детей нашей родины

Ключевые слова: ребенок, право, подросток, преступление, уголовная ответственность

Introduction

In connection with article 1 of the Constitution of the Republic of Kazakhstan «the Republic of Kazakhstan asserts itself as a democratic, secular, legal and social state, the highest values of which are a person and his life, rights and freedoms» (Constitution of the Republic of Kazakhstan)

A child is a person who has not reached the age of eighteen (large part) (Article 1 of the law on children of the Republic of Kazakhstan). The child is an integral part of society. Today, the conflict between teenagers and the law and their safety is an important issue.

Special rights of children, protecting them from threats, discrimination and their vulnerability. These rules are enshrined in the International Convention for the protection of the rights of the child and additional protocols.

Since gaining independence from the Soviet Union, five Central Asian republics-Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan-have reached made progress in creating juvenile justice systems in accordance with international standards. At the same time, serious problems remain unresolved, and each country will have to make some adjustments in order to fully comply with the established norms. (UNICEF, Poirier)

As with all types of law, the law concerning the child's personality is considered as a special subject, or its adolescent rights and child-related institutions are a new concept in terms of the history of relations. In every century since the birth of humanity, society's attitude to the child has also undergone various changes. Therefore, it is necessary to study the issues of protection of the child and his rights from among the stages of development of culture and law. (Mergaliev)

As for the increase in delinquency among children and adolescents, adolescents do not understand the level of public danger of their actions and do not feel it due to a certain age factor.

In everything, regardless of whether the actions applied to children are taken public or private organizations, courts, administrative or legislative bodies dealing with social service issues are at best concerned with ensuring the highest needs of the child. (Convention on the Rights of the Child)

For any child, wherever he is, to break the law is to face a terrible experience full of great vulnerability. In Central Asian countries, illegal children are particularly vulnerable and isolated. In many cases, they are doubly vulnerable. Firstly, the main reasons why children commit actions that lead to conflict with the law are poverty and social alienation; secondly, juvenile justice systems are so poorly developed that, while awaiting trial, children are subjected to long-term arrest, cruelty and torture. (UNICEF, Poirier)

Materials and methods

In order to study the problem, scientific sources and legislation of foreign countries were studied and analyzed. When analyzing the legal aspects, the following methods were used: analysis and synthesis, formalization, comparative-analytical, scientific generalization, logical methods that allow comparing the domestic and international methodology of work.

Results and discussion

Crime is a socio-legal phenomenon consisting of crimes committed over a certain period of time and in a certain territory that characterize quantitative and qualitative indicators.

The volume of offenses committed by teenagers in special categories of offenses in recent years has been revealed .(Chart №1).

If we focus on crimes committed by minors or with their participation (Chart №2), the most common crime that is committed below is theft. In 2019 alone, 1,385 cases of theft were registered.

Number of registered crimes – the number of socially dangerous acts provided for, identified and officially registered by criminal legislation.

Depending on the nature and degree of public danger of a crime, it is divided into non-serious, moderate, serious, and particularly serious crimes.

Children who have committed crimes – children and adolescents aged 14 to 17 years, officially registered with the internal affairs bodies, where a criminal case has been initiated.

Children brought to criminal responsibility – children and adolescents aged 14 to 17 years, for whom a decision was made to bring them as defendants.

Juvenile delinquency is a set of crimes committed by teenagers whose age at the time of committing a crime has reached the age of 14, and not 18 years.

Crime rate-the number of registered crimes calculated for a certain number of people (ideally 10 thousand) of the population of the Republic, region, or district. To determine the prevalence rate of crimes committed among minors, the number of persons aged 14-17 is included in the formula.

The structure of crime characterizes the percentage (specific weight) of the number of individual types of crimes and the total number of registered crimes. It is through this data that the change in the qualitative characteristics of the crime is made at the expense of which crimes. (Table №1)

Juvenile delinquency for certain types of crimes (Table 1)

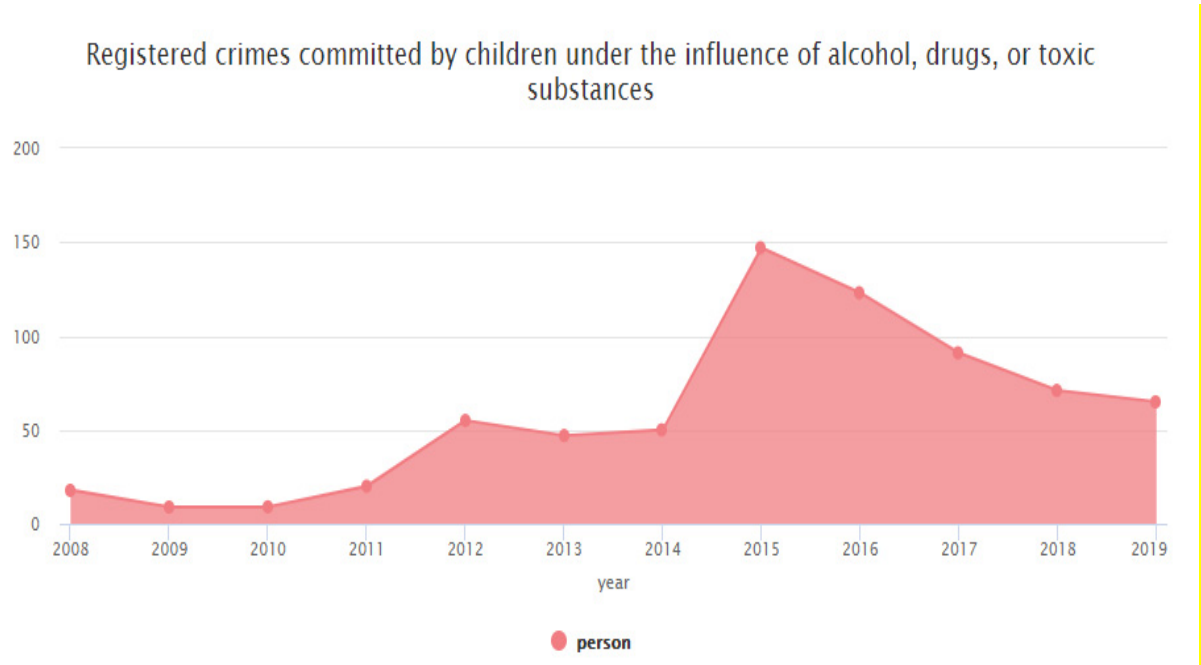

Figure 1

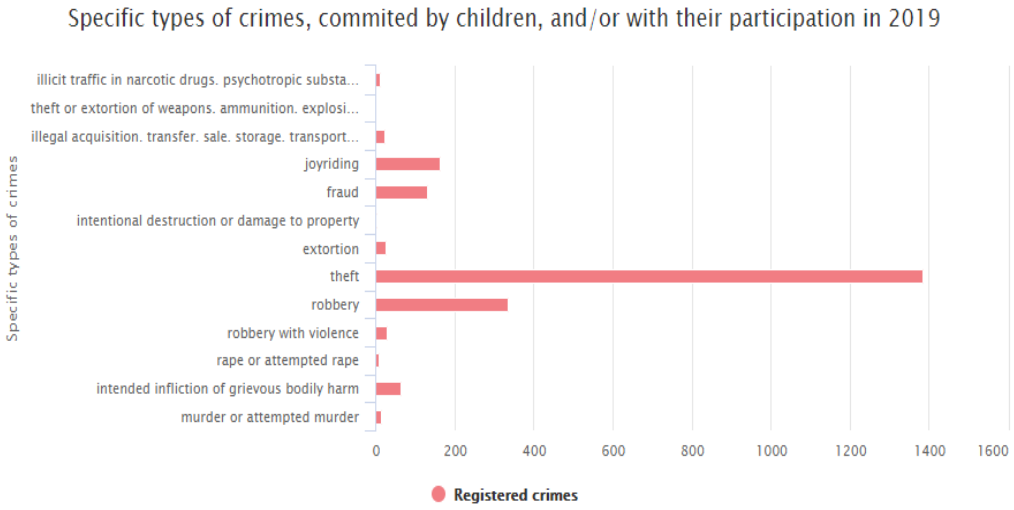

Figure 2

Table 1

	2000	2005	2010	2015	2016	2017	2018	2019
The share of registered crimes in the total number of cases opened or resolved during the reporting period, as a percentage	7 359	6 273	4 006	2 944	3 343	3 148	2 949	2 650
from:								
super heavy	5 422	155	105	35	39	49	43	25
heavy		1 555	1 093	461	614	574	487	601
The share of registered crimes in the total number of cases opened or resolved during the reporting period, as a percentage	6,6	7,3	5,2	2,3	2,3	2,2	1	2,3
minors and (or) individual types of crimes committed with their participation:								
murder or attempted murder	128	98	61	17	16	27	23	15
intentional infliction of harm to health	121	122	89	49	62	57	74	64
rape and attempted rape	90	61	26	14	17	16	3	9
piracy	300	363	157	30	53	36	37	30
robbery	973	933	879	374	484	492	419	336
theft	3 701	3 197	1 925	1 493	1 783	1741	1 568	1 385
extortion	266	201	110	98	81	56	51	26
intentional destruction or damage to property	20	15	5	6	4	5	1	4
fraud	42	155	140	101	114	119	121	131
illegal possession (seizure) of a car or other vehicle without the purpose of theft)	96	174	124	195	168	101	145	162
illegal acquisition, transfer, sale, storage, transportation or transportation of weapons, ammunition, explosives and explosive devices	92	31	33	16	24	28	17	22
theft or extortion of narcotic or psychotropic substances	9	4	3	1	7	6	-	-
illegal trafficking of Narcotic Drugs, Psychotropic Substances or similar substances, as well as violation of the rules of circulation of narcotic drugs or psychotropic substances	521	65	12	32	23	31	1	11

(Information from the official website of the Statistics Committee of the Ministry of national economy of the Republic of Kazakhstan)

Let's move on to the analysis of juvenile delinquency in 2020. In 2020, 655 minor children were brought to criminal responsibility in Kazakhstan – 31.3% less than in 2019 (954 cases). Of these, 82.6 percent reached the age of 16-17 years, and another 17.4 percent-14-15 years. Of the total number of minors brought to criminal responsibility, there were 60 girls. In 2019, there were 59 girls. 425 minors were included in the category of criminals, and in 2019 – 617 students, the annual reduction was 31.1 percent. Among non – working and non-studying minors, 221 teenagers were teenagers were also involved in criminal liability in 2019-320, an annual decrease of 30.9 percent. Of the minors brought to criminal responsibility, 78 minors were represented as part of the group with adult involvement, and in 2019-146 adolescents who committed crimes in the same group with adults, we notice a decrease of 46.6%.In 2019-146 adolescents who committed crimes in the same group with adults, we trace a decrease of 46.6%. As a result, in 2020, 71.1 percent of minors, or 466 minors, were involved in crimes against property.. Of these, 68 percent or 317 cases are theft, another 14.6 percent or 68 are robbery, 6.7 percent or 31 are fraud.

Another 12.5 percent of the total, or 82 people, were involved in criminal offenses against an individual. Of these, 34.1 percent committed intentional infliction of moderate harm to health, 29.3 percent – sexual intercourse with an ageless subject sixteen or other acts of a sexual nature. (Ranking.kz)

Summing up the above analysis, the number of juvenile delinquency decreased in 2020 compared to 2019. But the reason for this is the covid-19 pandemic, which has established itself in the world ,and not in the responsibility of children and young people who understand the rules of the law. Since March 19, 2020, quarantine measures have been implemented by the decree of the president of the Republic of Kazakhstan K. K. Tokayev.

In addition, this is another proof of the ever-increasing increase in teenage criminality.

Figure 3
(Data on the official page of the Committee on Legal Statistics and Special Accounting of the Prosecutor General's Office of the Republic of Kazakhstan)

In general, since the beginning of 2021, 49 offenses have been registered in the Republic of Kazakhstan for more than 1 month, including 3 minor offenses, 10 moderate offenses, 34 serious offenses, and 1 particularly serious ones.

How to change the situation for these children and ensure the creation of a juvenile justice system that is fair, impartial and effective for all. UNICEF recommends that children's interests be taken into account from the very beginning in a broader reform of the justice system, so that they can access systems that ensure that children's rights are respected fairly, effectively, and take into account their interests, and understand the consequences of their actions. In addition to supporting children so that they can play a constructive role in society, these steps will allow them to strengthen the rule of law and implement human rights more effectively. UNICEF also sees

the involvement of children in the development of justice strategies as a contribution that allows them to break the vicious circle of poverty and social alienation. We hope to unite the efforts of supporters of the principle of the rule of law to achieve these goals.

"The Criminal Code of the Republic of Kazakhstan on criminal liability of minors determines that persons who have reached the age of fourteen at the time of committing a crime, but have not reached the age of eighteen, are recognized as minors" (Criminal Code of the Republic of Kazakhstan).

Let's look at the issues that can provoke the commission of a crime among minors. The main psychological theory is the theory of social learning, which seeks to determine the causes of a particular behavior. Followers of this theory view crime as a deliberate reaction to a particular life event. The most famous representative of this theory is A. Bandura, when a person opens the doors of this life, he is not born with a special character, but learns violence and aggression by repeating the behavior of others. In many cases, the reasons for the crime may be related to this theory. This is especially true in the case of minors.

At all times, there is a" teenage bottom " – street dwellers and children from poor families. Of course,not every time, but it is true that there are often such children in modern times, and they are the majority.

Most often, children from average families fall to this bottom. Their parents earn money through hard work, stay at work day and night, and do not have time to pay special attention to the upbringing of children. At the same time, teenagers control the lives of others: they just come and steal, so that everything in life happens. There is a negative idea that it is possible to take it away without telling anyone, without hard work.

The third category is children from rich families. From a material point of view, everything is there, but children are not adapted to life. In addition, they are often more free than boys and girls in the "teenage bottom", because they are sure that money and familiar roots will decide everything. These three categories are delicious prey for crime. (Makarov,2019)

Any child can commit offenses and crimes. Yes , of course, his parents and environment, although his friends had a lot of influence on the child, did not know that his actions were really dangerous.

After studying , since the age of liability is 14 years, we often study juvenile delinquency. However, the basis for raising a child in the right direction and determining his attitude to society and his attitude to his environment begins in infancy.

Conclusion

Therefore, taking into account all the factors that affect the child, we need change our approach to juvenile delinquency. All laws apply in the Republic of Kazakhstan are classified according to a single system, for example, we have a criminal code, a civil code, an administrative code or a labor code. With the adoption of the above-mentioned codes in our country, we see only positive effects. Each law applies its own rule and regulates relations in a certain system. This is exactly what we need to adopt the "code of children's rights" for teenagers and children of our homeland. Now the Republic of Kazakhstan has adopted the law "on the rights of the child in the Republic of Kazakhstan", adopted in 2002. But the development of a new code will create a new idea in society. It is necessary not only to approve the Code of the Rights of the child, but also to make it legally mandatory for the child to fully familiarize himself with the code until the child reaches the age of 14. First of all, the child learns and understands the language of law from an early age, and the older he is, the more citizens and citizens in our country will be able to apply the law and understand the language of law. Secondly, a child who has fully mastered the law can consciously respond to his actions. Of course, it is not easy to develop a whole code, but we hope that it will be understandable and impressive for the child if not only lawyers, but also teachers, professional psychologists, who are directly involved in the upbringing of children, participate in the development of the code. Thirdly, a teenager who has committed a crime would have no difficulty in returning to normal life, because sometimes children are not accepted into their environment without understanding childhood, and a child who has mastered the law does not make such mistakes. When teenagers are brought to criminal responsibility, the main goal of both parents and teachers in the state is not to repeat the crime again. At the same time, the main purpose of bringing to justice is to ensure that the person understands his guilt and does not tempt the participants in the execution of the response. Fourth, the development and adoption of the code of children's rights will allow specialists to study juvenile delinquency more deeply.

In this regard, if we look at the international examples, Georgia has adopted two codes for children and adolescents. On September 20, 2019, the state of Georgia adopted the "Code of the rights of the child".

Article 1. Purpose Of The Code:

1.the purpose of this code is to ensure the well-being of the child on the basis of the Constitution of Georgia and by promoting the effective implementation of the Convention on the rights of the child, Additional Protocols to the Convention and other international legal acts recognized by the state.

2. the implementation of the purpose provided for in the first part of this article involves various issues, including:

a) exercise of the rights and freedoms of the child;

B) priority consideration of the best interests of the child, protection of his / her dignity, implementation and protection of his / her rights to welfare, safety, life, health, education, development, as well as consideration of other interests regardless of equality for children;

C) guided by high moral values, in particular – ensuring the participation of the child in the spirit of peace, respect for dignity, tolerance, freedom, equality and cooperation, preparing him for independent life in society, raising the child;

d) orientation of the child to respect the native country, language, and traditional cultural values of the native country;

e) protection and support of the family as the main nest of society, especially the environment, which is important for the upbringing and well – being of the child;

e) orientation of the child to work and a healthy lifestyle as a mandatory prerequisite for the development of society;

G) orientation of the child to volunteering as a necessary element of civic activity and the development of a friendly society.(Code of the state of Georgia on the rights of the child)

If we study in more detail the world crime and security indices for 2020 and compare the indicators of Georgia and Kazakhstan , out of 133 countries, Georgia ranks 130th in terms of security and crime, crime is 20.50%, and the Security Index is 79.50% . As for Kazakhstan's indicators, it ranks 34th out of 133 countries with a crime index of 54.81% and a security index of 45.19% . (Numbeo).

Again, the problem is that persons who committed crimes in adolescence are very likely to commit crimes in adulthood. The factor that affects them is that they suffer from a lack of hope for their future and from joining a normal life and society.

The next issue to consider is the United Nations" minimum standard rules for the administration of Juvenile Justice " (Beijing rules). These international rules were ratified by the resolution of the Supreme Council of the Republic of Kazakhstan dated June 8, 1994. Based on these rules,

Article 1.3

Sufficient attention should be paid to the implementation of positive measures that provide for the full mobilization of all possible resources for adolescents in conflict with the law, including the family, volunteers and other groups of society, as well as schools and other public institutions, in order to reduce the need for intervention on the part of the law and promote the well-being of the teenager in order to (Beijing rules).

In his address to the people of Kazakhstan dated September 1, 2020 "Kazakhstan in a new situation: time of action", head of state Kassym-Jomart Tokayev noted the need to ensure the protection of the safety and rights of minors, including by monitoring each case under investigation related to child violence.(Tokaev K.) In conclusion, based on the above data, we, having formulated our point of view, believe that the development of the code of children's rights at home is the main way to combat juvenile delinquency.

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2-бөлім

КОНСТИТУЦИЯЛЫҚ ЖӘНЕ ӘКІМШІЛІК ҚҰҚЫҒЫ

Section 2

CONSTITUTIONAL AND ADMISTRATIVE LAW

Раздел 2

КОНСТИТУЦИОННОЕ И АДМИНИСТРАТИВНОЕ ПРАВО

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КОНСТИТУЦИОННО-ПРАВОВЫЕ ОСНОВЫ ОБЕСПЕЧЕНИЯ НАЦИОНАЛЬНОЙ БЕЗОПАСНОСТИ РЕСПУБЛИКИ КАЗАХСТАН

В данной статье раскрываются актуальные вопросы конституционно-правового обеспечения личности, общества и государства. С юридической точки зрения безопасность рассматривается как совокупность правовых норм, целью которой является защита национальных интересов от существующих угроз. Особое внимание уделяется анализу конституционного законодательства и особенностям нормативного регулирования процесса обеспечения национальной безопасности Республики Казахстан.

Вопросы обеспечения безопасности личности, общества и государства являются сегодня одними из главных. Каждое государство ставит главной целью защиту своего суверенитета, стабильного развития социума, достойного проживания всех его участников. Поэтому в настоящий период наблюдается особое внимание к проблемам национальной безопасности. Данная категория является предметом многих дискуссий, политических споров, теоретических исследований.

Национальную безопасность можно рассматривать с различных точек зрения: и как деятельность специальных государственных органов по защите национальных интересов, и как состояние защищенности национальных интересов страны от реальных и потенциальных угроз, и как создание условий для существования нормального функционирования и прогрессивного развития самой системы (общества, государства, проживающих в ней людей). На наш взгляд, современное законодательное определение понятия национальной безопасности включает в себя два базовых компонента: защищенность и ориентацию на прогрессивное развитие.

Ключевые слова: Конституция, национальная безопасность, система обеспечения национальной безопасности, Совет безопасности, национальные интересы.

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Constitutional and legal basis for ensuring the national security of the Republic of Kazakhstan

This article reveals the current issues of constitutional and legal support of the individual, society and the state. From a legal point of view, security is considered as a set of legal norms, the purpose of which is to protect national interests from existing threats. Special attention is paid to the analysis of the constitutional legislation and the peculiarities of the regulatory regulation of the process of ensuring the national security of the Republic of Kazakhstan.

The issues of ensuring the security of the individual, society and the state are among the main ones today. Each state has as its main goal the protection of its sovereignty, the stable development of society, and the decent living of all its participants. Therefore, at the present time, there is a special attention to the problems of national security. This category is the subject of many discussions, political disputes, and theoretical studies.

National security can be considered from various points of view: both as the activity of special state bodies to protect national interests, and as the state of protection of the national interests of the country from real and potential threats, and as the creation of conditions for the existence of normal functioning and progressive development of the system itself (society, the state, the people living in it). In our opinion, the modern legislative definition of the concept of national security includes two basic components: security and orientation to progressive development.

Key words: Constitution, national security, national security system, Security Council, national interests.

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Қазақстан Республикасының ұлттық қауіпсіздікті қамтамасыз етудің конституциялық-құқықтық негіздері

Бұл мақалада тұлғаны, қоғамды және мемлекетті конституциялық-құқықтық қамтамасыз етудің өзекті мәселелері ашылады. Құқықтық тұрғыдан алғанда, қауіпсіздік ұлттық мүдделерді қолданыстағы қауіп-қатерлерден қорғауға бағытталған құқықтық нормалардың жиынтығы ретінде қарастырылады. Конституциялық заңнаманы талдауға және Қазақстан Республикасының ұлттық қауіпсіздігін қамтамасыз ету процесін нормативтік реттеу ерекшеліктеріне ерекше назар аударылады.

Жеке адамның, қоғам мен мемлекеттің қауіпсіздігін қамтамасыз ету мәселелері бүгінде басты мәселелердің бірі болып табылады. Әрбір мемлекет өзінің егемендігін, қоғамның тұрақты дамуын, оның барлық қатысушыларының лайықты өмір сүруін қорғауды басты мақсат етіп қояды. Сондықтан қазіргі кезеңде ұлттық қауіпсіздік проблемаларына ерекше назар аударылуда. Бұл санат көптеген пікірталастардың, саяси даулардың, теориялық зерттеулердің тақырыбы болып табылады.

Ұлттық қауіпсіздікті әр түрлі тұрғыдан қарастыруға болады: ұлттық мүдделерді қорғау үшін Арнайы мемлекеттік органдардың қызметі ретінде де, елдің ұлттық мүдделерін нақты және ықтимал қауіп-қатерлерден қорғау жағдайы ретінде де, жүйенің өзі (қоғам, мемлекет, онда тұратын адамдар) қалыпты жұмыс істеуі мен прогрессивті дамуы үшін жағдай жасау ретінде. Біздің ойымызша, Ұлттық қауіпсіздік ұғымының қазіргі заңнамалық анықтамасына екі негізгі компонент кіреді: қауіпсіздік және прогрессивті дамуға бағдарлау.

Түйін сөздер: Конституция, Ұлттық қауіпсіздік, ұлттық қауіпсіздікті қамтамасыз ету жүйесі, қауіпсіздік кеңесі, ұлттық мүдделер.

Введение

Вопросы обеспечения безопасности личности, общества и государства являются сегодня одними из главных. Каждое государство ставит главной целью защиту своего суверенитета, стабильного развития социума, достойного проживания всех его участников. Поэтому в настоящий период наблюдается особое внимание к проблемам национальной безопасности. Данная категория является предметом многих дискуссий, политических споров, теоретических исследований.

Национальную безопасность можно рассматривать с различных точек зрения: и как деятельность специальных государственных органов по защите национальных интересов, и как состояние защищенности национальных интересов страны от реальных и потенциальных угроз, и как создание условий для существования нормального функционирования и прогрессивного развития самой системы (общества, государства, проживающих в ней людей). На наш взгляд, современное законодательное определение понятия национальной безопасности включает в себя два базовых компонента: защищенность и ориентацию на прогрессивное развитие.

В современных условиях национальная безопасность рассматривается как социальное явление, которое включает в себя множество аспектов, закрепленных правом, как состояние, которое аккумулирует множество видов ущерба, а также возможных представлений об угрозах и их последствиях. Главными составными частями национальной безопасности выступают безопасность личности, безопасность общества и безопасность государства в таких сферах, как международные отношения, оборона, политическая жизнь, экономика, социальная сфера.

Постепенно деятельность по обеспечению национальной безопасности приобретает системный и последовательный характер, и предусматривает реальную оценку ситуации во всех важных сферах жизнедеятельности общества и определение наиболее опасных угроз с целью приоритетности работы по их устранению.

Тем не менее, процесс совершенствования системы национальной безопасности страны еще не завершен, особенно это касается нормативного правового регулирования. Сегодня в законодательстве и деятельности институтов обеспечения национальной безопасности РК должны учитываться новые, более масштабные вызовы и угрозы безопасности, связанные с целевым воздействием на экономический потенциал, со-

циальное развитие, на киберпространство, экологию, биологическую сферу и другие области отдельной страны и целой группы государств. Необходимо переосмыслить само понятие безопасности. Это уже не просто военно-политическая категория, это понятие, затрагивающее интересы каждого человека, социума и страны в целом.

Материалы и методы

Юридическая наука должна исследовать правовые механизмы обеспечения национальной безопасности. На практике из-за недостаточной разработанности конституционных и иных норм в этой области возникают различные правовые коллизии. Сегодня следует говорить о необходимости выработки концептуальных основ новой политики национальной безопасности, связанными с изменениями на международной арене. Концепция национальной безопасности должна обеспечивать внутренние интересы и опираться на национальное законодательство Казахстана. Сказанное выше предопределяет высокую требовательность к научным разработкам в области исследования проблем обеспечения национальной безопасности.

Результаты и обсуждения

Правовая основа обеспечения национальной безопасности — это есть совокупность взаимосвязанных, внутренне согласованных основополагающих нормативных правовых актов, содержащих политико–правовые принципы и нормы, направленные на правовое регулирование общественных отношений в сфере обеспечения безопасности личности, общества и государства. Основное предназначение этих принципов и норм права заключается в том, чтобы нормативно регламентировать организацию системы обеспечения национальной безопасности РК и обеспечивать эффективное функционирование институтов государственной власти как центров управления и регулирования данным процессом.

Главной целью обеспечения национальной безопасности Республики Казахстан является сохранение внутриполитической стабильности, защита конституционного строя, государственной независимости, территориальной целостности и национальных интересов Казахстана на международной арене.

Обеспечение национальной безопасности представляет собой комплекс мер, направленных на поддержание защищенности национальных интересов путем: определения основных направлений деятельности государства в этой сфере; выявления и прогнозирования угроз национальной безопасности, а также возможностей продвижения политических инициатив Республики Казахстан за рубежом; осуществления комплекса оперативных и долговременных мер по предупреждению и нейтрализации угроз национальной безопасности, в том числе по устранению причин и условий, порождающих эти угрозы.

Немаловажное значение имеет мобилизация сил и средств обеспечения национальной безопасности в случаях возникновения непосредственной угрозы национальной безопасности, посягательства на нее, в том числе в случаях экстремальных и чрезвычайных ситуаций внутригосударственного, трансграничного и глобального характера. В этой связи необходимо безотлагательное принятие решений и действий по защите национальных интересов, пресечению незаконной деятельности, посягающей на национальную безопасность, осуществлению иных правоограничительных мер, в том числе путем ограничения доступа к имеющейся конфиденциальной информации. Особое внимание должно быть уделено локализации и ликвидации последствий, связанных с посягательствами на национальные интересы, осуществлению комплекса восстановительных мер.

Республика Казахстан обеспечивает свою национальную безопасность всеми имеющимися в ее распоряжении средствами и методами, в том числе экономическими, политическими, специальными, военными, правовыми, применяемыми односторонне или в соответствии с международными договорами.

Основные направления государственной политики в области обеспечения национальной безопасности определяет Президент Республики Казахстан. Так, в соответствии с статьей 40 Конституции Республики Казахстан (Конституция РК 1995) Президент Республики Казахстан *является главой государства, его высшим должностным лицом, определяющим основные направления внутренней и внешней политики государства и представляющим Казахстан внутри страны и в международных отношениях.* Как справедливо отмечает казахстанский ученый Ибраев Н.С., данная конституционная функция Президента Республики Казахстан кардинально меняет его место в государственном механизме, в системе разделения власти. Это означает,

что именно Президент Республики Казахстан определяет стратегию развития государства, его долгосрочные приоритеты, общие ориентиры его эволюции. По существу, данная функция означает определение дальнейшей судьбы страны и представляет собой самую ответственную конституционную функцию, предопределяющую содержание других конституционных функций и конкретных полномочий главы государства Республики Казахстан (Ибраев 2001: 89). Следует согласиться с выводом исследователя Ибраева Н.С., который считает, что «сегодня институт президентства способен реально решать важнейшие задачи управления республикой и проведения её внутренней и внешней политики. Президент является не только номинальным главой государства, но и реальной властвующей политической фигурой (Ибраев 2001: 86).

Место и роль Главы государства в государственном механизме и системе разделения государственной власти рассматривались в научной работе академика Сартаева С.С. и исследователя Назаркуловой Л.Т. «Становление Конституции Республики Казахстан: проблемы и перспективы». Авторы отмечают, что …из смысла данной конституционной нормы можно предположить, что сегодня определение стратегии развития государства, его долгосрочных приоритетов, общих ориентиров его эволюции возлагается на Президента Республики Казахстан. Тем самым Конституция кардинально меняет его место в государственном механизме и в системе разделения власти (Сартаев 2001 а).

Важное значение имеет вступивший в силу с 5 июля 2018 года Закон «О Совете безопасности Республики Казахстан», координирующий проведение единой государственной политики в сфере обеспечения национальной безопасности и обороноспособности страны (https://online.zakon.kz/m/document/?doc_id=38039248).

Основными задачами Совета Безопасности являются планирование, рассмотрение и оценка реализации основных направлений государственной политики в области обеспечения национальной безопасности, укрепления обороноспособности страны, обеспечения законности и правопорядка.

Помимо этого, Совет безопасности вносит предложения и рекомендации главе государства для принятия решений по вопросам внутренней, внешней и военной политики в области обеспечения национальной безопасности и мерам по реализации этих решений, а также по повышению эффективности деятельности государственных органов, обеспечивающих безопасность личности, общества и государства. Одновременно подготавливает рекомендации по заключению, исполнению и денонсации международных договоров Республики Казахстан, затрагивающих национальные интересы.

Конституционно – правовую основу обеспечения национальной безопасности составляет совокупность взаимосвязанных, внутренне согласованных основополагающих нормативных правовых актов, содержащих политико–правовые принципы и нормы, направленные на правовое регулирование общественных отношений в указанной сфере с целью их упорядочения, охраны и развития в соответствии с национальными интересами. Основное предназначение этих принципов и норм права — нормативно регламентировать организацию системы обеспечения национальной безопасности и обеспечивать эффективное функционирование институтов государственной власти как центров управления и регулирования процесса обеспечения безопасности личности, общества и государства.

Основными источниками права для создания правовой основы обеспечения национальной безопасности является Конституция РК, законы и международные договора, ратифицированные Республикой Казахстан. Правовая основа обеспечения национальной безопасности может быть систематизирована по сферам международной жизни и по отраслям национального права (международное гуманитарное право, конституционно-правовая, административно-правовая, уголовно-правовая и иные отрасли национального права).

Наиболее важные нормативные правовые документы, регулирующие процесс обеспечения национальной безопасности можно разделить по иерархии на следующие блоки.

Первый блок – международно-правовые акты в сфере обеспечения международной безопасности. Согласно внесенным изменениям в Конституцию 10 марта 2017 года международные договоры, ратифицированные Республикой, имеют приоритет перед ее законами. Порядок и условия действия на территории страны международных договоров, участником которых является Казахстан, определяются законодательством Республики.

Второй блок – стратегические политические документы: Стратегии, Послания Президента. Политико-правовыми источниками теоретических обобщений и практических действий по обеспечению национальной без-

опасности являются ежегодные послания Главы государства народу Казахстана, доклады и выступления Президента РК по наиболее важным проблемам внешней и внутренней политики государства. Послание народу Казахстана, с которым обратился 1 сентября 2020 года Президент РК Касым-Жомарт Токаев (www.akorda.kz), стало 24-м по счету. Цель президентских посланий – задавать направление реформам, организационной, регуляторной и законотворческой деятельности государственного сектора. В третий блок можно отнести кодексы, законы и в четвертый блок – подзаконные акты.

При изучении предмета исследования – обеспечения национальной безопасности, считали бы целесообразным применить диалектический метод. Согласно данному методу для объективного рассмотрения явления или процесса необходимо рассматривать его в развитии и во взаимосвязи с иными общественными процессами – политикой, культурой, религией, экономикой и др.

Этапы становления правового обеспечения национальной безопасности

Процесс зарождения и становления правового обеспечения национальной безопасности РК можно условно разделить также на четыре этапа: первый этап – с 1990 по 1993 г.; второй этап – с 1994 по 2000 г.; третий – с 2001 по 2011 г.; четвертый – с 2011 г. по настоящее время. Рассмотрим эти этапы поподробнее.

Первый этап характеризуется процессом зарождения законодательства РК в сфере обеспечения национальной безопасности. 25 октября 1990 года была принята Декларация о государственном суверенитете Казахской ССР. В дальнейшем 16 декабря 1991 года вступил в действие конституционный закон «О независимости Республики Казахстан». 28 января 1993 года принята первая Конституция суверенного Казахстана. Академик НАН РК Сартаев С.С. в своем научном труде «Мы живем в конституционном пространстве» подчеркивает, что в первые годы были созданы конституционные основы суверенитета Республики Казахстан, цель которых обеспечить независимость и безопасность государства (Сартаев 2010 b).

20 июня 1992 года принят Закон «Об органах национальной безопасности Республики Казахстан». Данный закон сформировал основные принципы деятельности органов национальной безопасности. Так, впервые были закреплены такие принципы как законность, равенство всех перед законом, соблюдение прав и свобод человека, гуманизм и интернационализм, демократия и независимость от деятельности любых политических партий и общественных объединений, сочетание в работе гласности и конспирации, единоначалия и коллегиальности. 11 февраля 1993 года была принята Военная доктрина Казахстана.

Основной характеристикой процесса обеспечения национальной безопасности первого этапа является ориентированность на военную безопасность.

Второй этап – этап первоначального формирования системы правового обеспечения национальной безопасности. В Послании Президента страны народу Казахстана 10 октября 1997 года «Казахстан – 2030: процветание, безопасность и улучшение благосостояния всех казахстанцев» (www.akorda.kz) указаны основные долгосрочные приоритетные цели и стратегии, главной из которых является национальная безопасность. Изменившаяся политическая и военная обстановка в мире и регионе потребовала радикального пересмотра военной доктрины Казахстана. Указом Президента страны от 10 февраля 2000 года утверждена новая военная доктрина.

В 1995 году утверждена новая редакция закона «Об органах национальной безопасности РК», определившего статус, полномочия, принципы и организацию деятельности органов национальной безопасности.

В 1998 году принят Закон Республики Казахстан «О национальной безопасности Республики Казахстан». Данный закон закрепил, что обеспечение национальной безопасности является главным условием развития Республики Казахстан как независимого суверенного государства. Особо значимым для системы национальной безопасности является Закон от 13 июля 1999 года «О борьбе с терроризмом». Тем самым, создается правовая основа для профессионализации деятельности органов национальной безопасности.

Третий этап – этап уточнения системы правового обеспечения национальной безопасности. В этот период были приняты нормативные правовые акты касательно военной безопасности. Следует отметить принятие Закона Республики Казахстан от 5 марта 2003 года «О военном положении». Указом Главы государства от 21 марта 2007 года утверждена новая Военная доктрина Республики Казахстан, имеющая оборонительный характер.

7 марта 2005 года принят Закон «Об обороне и Вооруженных силах Республики Казахстан». Данный закон является системообразующим актом для таких законов, как закон «О военном положении», «О гражданской обороне», «О мобилизационной подготовке и мобилизации» и ряда других законодательных актов. Отметим значимость Закона от 18 февраля 2005 года «О противодействии экстремизму», в котором впервые было сформировано правовое понятие экстремизма. Также были внесены изменения в Закон «О борьбе с терроризмом». Новое наименование данного закона – «О противодействии терроризму» направлено на изменение политики борьбы с этим негативным явлением.

На рассматриваемой стадии была определена система безопасности Республики Казахстан и ее функции, конкретизированы содержание и принципы, систематизированы виды национальной безопасности, разграничен круг полномочий государственных органов, задействованных в этом процессе.

Четвертый этап – современный этап. Данный период связан с принятием в 2011 году закона «О религиозной деятельности и религиозных объединениях». Внесены кардинальные изменения в закон «Об органах национальной безопасности РК». Следующим шагом в развитии системы обеспечения национальной безопасности стало принятие 13 февраля 2012 года двух Законов РК: “О специальных государственных органах Республики Казахстан” и “О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам специальных государственных органов Республики Казахстан”.

В 2012 году принята Стратегия «Казахстан-2050. Новый политический курс состоявшегося государства» (www.akorda.kz), являющаяся документом особого исторического и политического значения. В ней содержится подробный анализ положения республики на текущий момент. Здесь были изложены семь приоритетных долгосрочных целей, которые следует указать. Это национальная безопасность; внутриполитическая стабильность и консолидация общества; экономический рост, базирующийся на развитой рыночной экономике с высоким уровнем иностранных инвестиций; здоровье, образование и благополучие граждан Казахстана; энергетические ресурсы; инфраструктура, в особенности транспорт и связь; профессиональное государство, ограниченное до основных функций.

6 января 2012 года принята новая редакция закона «О национальной безопасности РК». В 2015 году разработан Закон «О противодействии коррупции», в 2016 году – Закон «О контрразведывательной деятельности».

Проведенный анализ нормативного регулирования национальной безопасности показывает, что в основе всей законодательной базы находятся конституционные нормы о защите суверенитета, о высшей ценности для государства – человек, его жизнь, права и свободы.

Конституция Республики Казахстан имеет высшую юридическую силу и прямое действие на всей территории Республики. Следует отметить, что термин безопасность в Конституции РК употребляется в самых различных значениях и словосочетаниях. К примеру, в статье 20 словосочетание употребляется в значении «подрыва безопасности государства», в статье 32- «в интересах государственной безопасности», в статье 61 – «обеспечения обороны и безопасности государства». Что касается использования понятия национальная безопасность, то следует заметить, что такое словосочетание упоминается только с названием государственных органов, например – Комитет национальной безопасности Республики Казахстан. В Мажилисе Парламента РК действует Комитет по международным делам, обороне и безопасности, при Президенте РК (ст. 44, п. 20) Совет Безопасности Республики Казахстан (без уточнения какой именно) (Байкенжеев 2009).

Основу правового регулирования обеспечения национальной безопасности составляют нормы конституционного, административного, гражданского, уголовного, гражданского, процессуального права, регулирующие наиболее важные военно-политические и общественные отношения в сфере обеспечения безопасности — организационные, управленческие, имущественные и охранительные правоотношения.

Следует отметить, что процесс обеспечения национальной безопасности основывается на общих принципах права, как справедливость, равноправие, гуманизм, демократизм, единство прав и обязанностей, законность, приоритет защиты прав и свобод человека. Соблюдение всех этих принципов является обязательным условием для устойчивого и безопасного развития государства, общества и личности.

Вместе с тем, процесс совершенствования системы национальной безопасности страны необходимо продолжить, и указанная работа должна вестись в непрерывном формате.

Во-первых, необходимо четкое и ясное понимание таких дефиниций как национальные интересы, угрозы национальной безопасности, полномочия государственных органов в области обеспечения национальной безопасности. Полагаем необходимым провести классификацию данных категорий и закрепить указанную классификацию на уровне закона о национальной безопасности.

В-вторых, необходимо четкое законодательное регулирование взаимодействия 30-ти государственных органов, занимающихся обеспечением национальной безопасности в РК. В связи с этим полагаем необходимым разработку общего положения для государственных органов, цель которого обеспечить единые подходы, методы и действия в деле обеспечения национальной безопасности.

В-третьих, необходимо уделять постоянное внимание повышению уровня правового сознания и правовой культуры граждан РК. При этом особое внимание уделять молодёжи. Поскольку именно молодежь в силу возрастных особенностей подвержена деструктивным течениям и восприятию чуждых для казахстанского менталитета идей и воззрений. Современный мир достаточно уязвим к новым видам угроз, которые в планетарном масштабе могут нанести непоправимый ущерб системе безопасности человека, общества, государства в целом.

Заключение

Таким образом, в Республике Казахстан создана нормативная правовая база в сфере обеспечения национальной безопасности соответствующая мировым демократическим стандартам. Однако феномен национальной безопасности достаточно сложен, многогранен, динамичен и противоречив. Поэтому необходима периодическая законодательная корректировка и научные изыскания, отражающие потребности социума.

Вопросы обеспечения национальной безопасности должны охватывать все институты гражданского общества. В этой связи необходим постоянный мониторинг общественного сознания по отношению к системе национальной безопасности.

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3-бөлім

АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ ПРОЦЕСС

Section 3

CIVIL LAW AND PROCESS

Раздел 3

ГРАЖДАНСКОЕ ПРАВО И ПРОЦЕСС

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LEGAL FEATURES OF COMPETITIVE OBLIGATIONS UNDER THE CIVIL LAW OF THE REPUBLIC OF KAZAKHSTAN

The article analyzes specific aspects of civil regulation of the competitive obligation. The high importance and lack of practical development of the above problem determine scientific work's undoubted novelty. Further attention to the civil principle of competitive responsibility is needed to better and rationally address civil law's current concerns. Competitive commitments represent another type of unilateral commitment. They clearly show the features of obligations, which in the private law of foreign countries are called quasi-contract. The content of these obligations may cover those actions of the contestants on the competitive task that is usually performed by debtors under some civil law contracts – contracts, orders, commissions, and others. It is not ruled out for the contestants to commit legal acts, creating science, literature, and art. In the first case, it is not a question of the actual commission of legally significant actions by the contestants in favor of the subject who announced the contest, but about their readiness for legal obliging themselves in exchange for compliance with the person of their condition who disclosed the conflict. Public competitions are once again widespread in the civil circulation. Simultaneously, the comparison of the practice of holding available games with the provisions of civil law shows that public competitions are, in many cases, held in contravening the law. One of the many reasons for this is the imperfection of legal regulation and the lack of good ideas about the Civil Code of Kazakhstan requirements for public competition and their complete or partial disregard.

Key words: competition, obligation, regulation, public customer, organizer, specifics of competitive responsibilities, types of games.

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Қазақстан Республикасының азаматтық заңнамасы бойынша конкурстық міндеттемелердің құқықтық ерекшеліктері

Мақалада азаматтық конкурстық міндеттемелерді құқықтық реттеудің кейбір аспектілері талданады. Жоғарыда аталған мәселенің жоғары маңыздылығы мен практикалық дамуының болмауы ғылыми жұмыстың сөзсіз жаңалығын анықтайды. Азаматтық құқықтың қазіргі проблемаларын неғұрлым тиімді және ұтымды шешу үшін конкурстық міндеттемені азаматтық реттеу мәселесіне қосымша назар аудару қажет. Азаматтық құқықтың қазіргі проблемаларын неғұрлым тиімді және ұтымды шешу үшін конкурстық міндеттемені азаматтық реттеу мәселесіне қосымша назар аудару қажет. Конкурстық міндеттемелер – бұл біржақты міндеттемелердің тағы бір түрі болып табылады. Олар шет мемлекеттердің жеке заңнамасында квазиконтракт деп аталатын міндеттемелердің ерекшеліктерін нақты көрсетеді. Бұл міндеттемелердің мазмұны әдетте борышкерлер бірқатар азаматтық-құқықтық шарттар – шарттар, бұйрықтар, комиссиялар және т.б. бойынша орындайтын конкурстық тапсырма бойынша қатысушылардың әрекеттерін қамтуы мүмкін. Конкурсқа қатысушылардың ғылым, әдебиет және өнер туындыларын жасау – құқықтық актілер жасауы әбден мүмкін. Бірінші жағдайда, бұл конкурс жариялаған субъектінің пайдасына конкурсқа қатысушылардың заңды маңызды іс-әрекеттерінің нақты комиссиясы туралы емес, конкурс жариялаған тұлғаның олардың шарттарын сақтау үшін заңды қызметке дайындығы туралы екендігін көрсетеді. Жариялы конкурстар азаматтық үндеуде кеңінен таралған. Сонымен бірге, мемлекеттік конкурстарды өткізу тәжірибесін азаматтық құқықтың ережелерімен салыстыру көптеген жағдайларда жариялы конкурстар заң аясында өткізілетінін көрсетеді. Мұның көптеген себептерінің бірі құқықтық реттеудің жетілмегендігі, сондай-ақ Қазақстанның Азаматтық кодексінің жария бәсекелестікке қойылатын талаптары туралы барабар идеялардың болмауы, яғни оларды толық немесе ішінара елемеу болып табылады.

Түйін сөздер: конкурс, міндеттеме, реттеу, жария тапсырыс беруші, ұйымдастырушы, конкурстық міндеттемелердің ерекшелігі, конкурс түрлері.

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Правовые особенности конкурсных обязательств по гражданскому законодательству Республики Казахстан

В статье анализируются некоторые аспекты гражданского регулирования конкурсного обязательства. Высокая значимость и отсутствие практического развития вышеуказанной проблемы определяют несомненную новизну научной работы. Для более эффективного и рационального решения нынешних проблем гражданского права необходимо уделять дополнительное внимание вопросу гражданского регулирования конкурентного обязательства. Конкурентные обязательства представляют собой еще один вид односторонних обязательств. Для более эффективного и рационального решения нынешних проблем гражданского права необходимо уделять дополнительное внимание вопросу гражданского регулирования конкурентного обязательства. Конкурентные обязательства представляют собой еще один вид односторонних обязательств. Они четко показывают особенности обязательств, которые в частном праве иностранных государств называют квазиконтрактами. Содержание этих обязательств может охватывать те действия конкурсантов по конкурсной задаче, которые обычно выполняются должниками по ряду гражданско-правовых договоров – договоров, приказов, комиссий и др. Не исключено, что конкурсанты будут совершать правовые акты – создание произведений науки, литературы и искусства. В первом случае речь идет не о фактической комиссии юридически значимых действий конкурсантов в пользу субъекта, объявившего конкурс, а об их готовности к юридическому услужливости в обмен на соблюдение их условий лицом, объявившего конкурс. Публичные конкурсы вновь широко распространены в гражданском обращении. В то же время сравнение практики проведения публичных конкурсов с положениями гражданского права показывает, что общественные соревнования во многих случаях проводятся в нарушение закона. Одной из многих причин этого является несовершенство правового регулирования, а также отсутствие адекватных представлений о требованиях Гражданского кодекса Казахстана к публичной конкуренции, а значит, их полное или частичное пренебрежение.

Ключевые слова: конкурс, обязательство, регулирование, публичный заказчик, организатор, специфика конкурсных обязательств, виды конкурсов.

Introduction

Among the most common obligations arising from unilateral action are competitive obligations. The scope of proliferation has expanded considerably in recent years.

The concept of a competitive obligation is contained in Part 1 of Article 910 Civil Code (CC). In the competitive commitment, its initiator, based on the subject matter and the original terms of the competition, makes an offer to take part in it to an unspecified or specific number of persons and undertakes to pay the established fee to the winner of the competition and conclude a contract with him corresponding to the content of the tender obligation.

Chapter 46 of the Special Part of the Civil Code (Article 910-916) is dedicated to competitive obligations. In addition, as explicitly stated in article 910 of the Civil Code, competitive obligations may be regulated by other legislation of the Republic of Kazakhstan.

A great deal of attention is paid to regulating competitive obligations in such legislation as the Public Procurement Act, the privatization decree, the real estate mortgage decree, the Commodity Exchange Decree, the Bankruptcy Act, etc. Many by-laws also govern competitive obligations, such as the Rules for the Organization and Public Procurement of Goods, Works and Services, approved by the Government of Kazakhstan on October 31, 2002, No. 1158, the Rules for the Acquisition of Goods, Works and Services in The Conduct of Petroleum Operations, approved by the Government of Kazakhstan on June 7, 2002, No. 612, the Rules for the Purchase of Natural Monopoly Services, Financial Resources, and Financial Resources, the costs of which are taken into account in the formation of tariffs (prices, rates of fees) on the services provided by them, approved by order of the Chairman of the Agency for the Regulation of Natural Monopolies and Protection of Competition of June 6, 2003, No. 140 -OD, etc.

Materials and methods

This study's methodological basis is presented by a holistic set of principles and scientific analysis methods inherent in civil-legal science. The basic

postulates of the general science-based dialectical method of research formed the author's conceptual approach to know the object and subject of the study. They led to the choice of forms and ways of solving the tasks. In writing, the authors applied the doctrinal provisions of philosophy, sociology, and civil law.

The study was based on the universal method of cognition – dialectical and generally scientific research methods – analysis, including system analysis, induction, etc. From private practices were used: specific-sociological, statistical, comparative-legal, hypothetical-deductive methods of research.

Results and discussion

Competitive obligations, in general, are not a new institution for Kazakhstan's civil law. Obligations arising from the public promise of remuneration were also regulated earlier by the Kazakh Soviet Socialist Republic Civil Code (Chapter 42, Article 437-439). However, the norms of this institution have undergone very significant changes. Besides, there are entirely new types of competitive obligations, namely, competitive obligations arising from bidding. It should be borne in mind that the regulation of these relations in Kazakhstan has its specifics and is carried out on several different principles than, for example, in the Russian Federation and several other countries. In Soviet times, competitive obligations were not given sufficient attention to civilizational science (Smirnov, 1976:76). At present, there is no clear scientific doctrine of competitive duties in Kazakhstan, and its formation is yet to come. On the one hand, all these circumstances make it difficult, and on the other hand – increase the importance of a proper understanding of the nature and specifics of competitive obligations.

Entries meet all the traits of the obligation contained in article 268 of the Civil Code. Therefore, as the competition initiator, one person- the debtor- undertakes to commit specific actions: to pay a reward to the creditor – the competition's winner – or conclude with the last contract.

In this regard, the general provision of the obligation law applies to the competition obligations, except where these general provisions are at odds with the particular rules of the chapter on competitive commitments, or when the application of general conditions is not possible because of the specifics of this type of commitment.

The specifics of the competition commitments are as follows.

1. Unlike most civil-legal obligations, from the sale to the contract, competitive obligations arise not from contracts but other legal facts – unilateral actions (deals).

2. Competitive obligations differ from other non-contractual duties, mainly those arising from harm. First, if obligations of damage arise from legal facts about misconduct, competitive obligations arise from transactions, i.e., lawful actions. Secondly, the damage directly generates an obligation consisting of the cause offenders' duty to compensate for the harm and the victim's right to seek such reparation. Competitive obligations, before they reach their final, final form – the responsibility of the initiator of the competition to perform in favor of the winner of the competition-specific actions, take place from the moment of the announcement of the battle several stages, which will be discussed in more detail in this scientific article.

The competition's concept suggests that an individual game, match, or battle of two or more persons is a prerequisite for the emergence of a competitive obligation.

As a legal concept, competition is used in civil law and other branches of law. The game is widely used, for example, when hiring on the so-called «competitive basis». Rules about such a competition are usually referred to as the labor law industry. However, as is known, labor law regulates the relationship between employer and employee, i.e., the person with whom the employment contract is concluded. The competition simultaneously in hiring allows one to identify such a person, which, according to the employer (even only potential), is best suited to perform work in a particular position or specialty. Nevertheless, the competition concept is inextricably linked with the signs of battle, game, and winner identification. According to the competition, scientific and pedagogical staff and management staff are usually appointed (Dzegorites 2003:110-113).

Types of contests. The legislation provides for two types of competitions.

1. Open competition. In the case of an open competition, the initiator's offer to participate in the game is addressed to an unspecified number of persons, i.e., to all comers. Such a request is made through advertisements in the press and other media.

2. Closed competition. In a snug match, the offer to participate in the game is sent to a specific circle of persons on the competition's initiator's choice.

The initiator of the competition decides how to hold the contest (open or closed). The exceptions are cases where the type of game is defined by law. For

example, under the Public Procurement Act, public procurement is usually made through open competition, and a closed competition is held only in cases where goods, works, and services, because of their complex and specialized nature, are available only to a limited number of potential suppliers who are known in advance to the bidder. Simultaneously, the holding of a closed competition is coordinated with the authorized body (part 1 of Article 18 of the Act), (Public Procurement Act, 2015).

Preliminary selection of persons wishing to participate in the competition, which determines its participants' qualifications, can only occur in open competition (part 5 article 19 of the Civil Code).

Competitions can be divided into species and on other grounds.

Thus, there are competitions held in one stage and competitions held in two or more locations. In the first case, the winner of the game is identified immediately, and the second winner (winners) of the next stage becomes a participant in the next step of the competition. Regulatory acts (RA) may provide for the grounds and procedures for holding the competition in several stages. For example, section 19 of the Public Procurement Act (PPA) defines a contest's conduct using two-stage strategies. The game is somewhat well regulated by the two-stage guidelines of Article 14-2 of the Privatization Ordinance. It should be taken into account that although in the subsequent stages of the open competition, not everyone takes part, but only passed the previous steps, i.e., individual persons, the game does not turn into a closed one. Also, cases where the evaluation of competitive applications (proposals of the contestants) are conducted by the competition initiator or the competition commission created by him in several stages. The characteristics of the participants' suggestions (price, technical parameters, etc.) are evaluated.

Types of competitive commitment. Because of competition of one kind or another, a very competitive obligation arises and develops. Law into species, in turn, also divides competitive responsibilities. The Act (part 1 of Article 910 of the Civil Code) divides the competitive obligations into two types:

1) Liabilities arising from a public remuneration pledge;

2) The Republic of Kazakhstan laws established obligations arising from the tender, auction, and other bidding forms.

United by the generic concept of competitive obligation, these species differ because of origin and content (Sukhanov 2010:43). The first type of competitive obligations' content is the competition's initiator's obligation to pay the winner a fee. The range of the second – the commitment to conclude with the winner of the bidding a contract of the relevant kind.

Besides, the law explicitly allows for the existence of mixed competitive obligations, which will be responsible for the payment of the winning reward and the conclusion of a contract with him. This derives from the notion of a competitive obligation, which indicates the initiator's responsibility to pay remuneration and conclude a contract (Belov 2003:711).

Subjects of competitive obligations. The residents of competitive commitments, as well as any other obligations, are the parties. As parties, the law names the initiator of the contest and the winner of the competition. However, as mentioned above, the competitive obligations in its formation go through several successive stages. Each of these stages has its composition of the participants of legal relations. Only the contest's initiator's figure, participating in all competitive obligation development phases, remains unchanged.

In the literature, the party's obligation (debtor and creditor) is traditionally considered as subjects of responsibility. However, due to the interdependence and interrelation of civil-legal relations in modern society, third parties play an increasingly important role in this relationship. They often affect the content of the obligation and determine its legal nature.

The initiator of the competition is the person in whose interests the contest is always held. The initiator of the game:

1) Determines the subject and the original terms of the competition;

2) Announces the contest, i.e., makes an offer to take part in the fight to an unspecified or specific person's circle. Moreover, the conflict initiator makes an offer to participate in the contest either directly or through an intermediary – the competition's organizer (part 3 of Article 910 of the Civil Code). Sometimes the figure of the organizer of the contest is determined directly in the legislation. For example, the Public Procurement Act contains several provisions relating to the organizer of the competition. First of all, it is established that the organizer is the customer (public bodies, state institutions, as well as state-owned enterprises and public companies, fifty percent or more of the shares (shares) or a controlling stake of which belong to the state, and affiliated with the legal entities) or a person determined by the customer per the law for the organization and conduct of the competition (sub. 5

and 10 of Article 1 of the Public Procurement Act). Separately, it is stipulated that the contest organizer can be the administrator of the republican budget programs, which is also entitled to determine for the state agencies under its control a single organizer of the competition.

3) Determines the winner of the competition. As a rule, to determine the game's winner, the initiator (organizer) of the game creates a competitive commission. Directly about, the competitive (tender) commission is mentioned only in the article dedicated to tenders. Thus, following section 3 of article 915 of the Civil Code, «the choice of the winner of the tender from among its participants is made by the initiator of the tender or the tender commission he created in a closed or, under the terms of the tender, in the open order». However, the creation of a competitive commission is possible in any other competition. The most common is creating a competitive commission (jury), consisting of specialists of the relevant profile, evaluating works in science, literature, art, and other creative activity and sports areas. Although the rule of section 3 of Article 915 of the Civil Code is formulated as dispositive and, therefore, creating a competitive commission is the prerogative initiator of the competition. Still, in some cases, the legislation explicitly establishes the need for such a commission. For example, the creation of a competitive commission provides for part 3 of Article 9 of the Public Procurement Act. The Government determines the education and activities of the competition commission. The order of creation, the number and personal composition of the competition commission, the quorum required for decision-making, etc., are determined for different competitions. As a rule, the competition commission determines the competition's winner and performs all the game's actions, starting with its announcement. The Competition Commission usually operates based on the competition commission's provision approved by the competition organizer;

4) Pays the winner a fee and enters into a contract with him that corresponds to the competition's terms, i.e., fulfills the actual competitive obligation, being its party.

Contestants

Other subjects of competitive legal relations are contestants. Under section 5 of article 910 of the Civil Code, an open competition may be subject to the pre-qualification requirements for contestants of a particular type, established by law. For example, article 8 of the Public Procurement Act lists a potential supplier (Velbi 2018: 813). According to this article, the potential supplier must:

1) Have professional qualifications, as well as experience in the market of purchased goods, works, and services for no more than one year;

2) Have the necessary financial, material, and human resources to meet obligations under the public procurement agreement;

3) Have the civil capacity to enter into a public procurement contract;

4) To be solvent, not subject to liquidation, his property should not be seized, and his financial and economic activities should not be suspended following the legislation of the Republic of Kazakhstan;

5) Do not be held accountable for the failure or improper performance of its obligations under public procurement contracts concluded during the past two years based on a court that has entered into legal force.

The relevant documents confirm the compliance of the contestant (potential supplier) with the requirements. The completeness and reliability of the information provided are established at the time of consideration by the competition commission of documents ensuring the potential supplier's compliance with qualification requirements (A.P. Sergeeva 2018:826-827). It is imperative that the bidder may not set the potential supplier's conditions not provided by the Public Procurement Act. The potential supplier has the right not to provide information that does not relate to the qualification requirements.

The competition's very concept indicates that the number of participants cannot be less than two because otherwise, there can be no competition, competition. In some cases, the law enshrines explicitly this requirement, stipulating that in cases where the number of participants is less than two, the battle be considered to have failed. Nevertheless, even in cases where such a requirement is not contained in the law, it is obvious. For example, part 4 of article 915 of the Civil Code stipulates that a tender may be deemed to have been initiated by less than two bidders or bids by bidders are found to be not eligible for tender. Part 7 of article 916 of the Civil Code also stipulates that an auction can occur if two bidders take part in it. Similar requirements contain other legislation.

On the contrary, there is no such requirement in the notion of a competitive obligation arising from a public promise of remuneration. However, it logically derives from the concept itself because, in the absence of at least two participants, it is impossible to determine the best performance of the work; it is impossible to recognize any person as the winner,

and so on. Legislation or conditions of the competition may provide for compulsory participation in the contest and a larger number of participants.

In some cases, the subjective component of the competition obligation, if it is not defined in the law and the competition conditions, can be established based on the substance of the game's subject matter. Thus, if the match is announced to create a work of science, literature, art, or another result of creative activity, the contestants can only be individuals because creativity is inherent only to the individual (person). The Copyright Act explicitly defines that the work authors are an individual whose creative work is created.

The question of the plurality of persons in the competitive obligation is quite controversial in practice. As mentioned above, general duties are applied to competitive commitments, as they do not contravene the institution's extraordinary norms in question. General obligations allow several individuals on each side of the obligation to participate in the responsibility (Ivanova 2005:8-13). Part 2 of article 269 of the Civil Code stipulates that several persons may participate in the deficit as a creditor or debtor at the same time (Bogdanova 2003: 10).

The possibility of acting as the initiator of a contest between two or more persons of doubt, as a rule, does not cause, and in practice, it is quite common. The question of the participation of several persons as participants in the competition is more challenging to resolve. Earlier, we noted that the contestants «can be both citizens and legal entities, including groups of citizens and consortia» (Suleimenov 2003:576). The latter statement needs some clarification and clarification. On September 6, 2002, the Prosecutor General's Office of Kazakhstan explained consortia's participation (associations of legal entities without a legal entity) in competitions to purchase goods, works, and services. The Committee gave a similar explanation of the «consortiums» on Public Procurement by the Ministry of Finance of the Republic of Kazakhstan.

The point of these clarifications is that article 1 of the Public Procurement Act provides that suppliers and potential suppliers are an individual and a legal entity (the latter is defined in article 33 of the Civil Code). Also, since the consortium is not a legal entity, the «participation of consortia in public procurement, particularly as suppliers, including potential ones, is unacceptable». «Because consortia cannot participate in the public procurement process, the purchase of services should be made from legal entities and individuals, not from consortia, as they cannot be potential suppliers under public procurement legislation» (Commentary on the Russian Federation's Civil Code).

The explanations of the Public Procurement Committee stipulate that «regulation of the results of joint activities is not within the scope of the public procurement legislation» and that «violation of public procurement legislation will be admitted to the public procurement process of consortia, respectively, and the acquisition of goods, works, and services from such associations, except when a consortium member participates in the public procurement process as an independent legal entity».

Based on these clarifications, all public procurement organizations deny participation to several individuals as a potential supplier. In other words, they require that only one individual or entity submit one application. When an application is submitted (signed) by several legal entities, the customer announces that the applicant is a consortium. Since the latter cannot be the right subject, it does not accept (rejects) such an application.

In practice, however, there are often cases where the purpose of the contest organizer, especially the bidding, can be achieved only if one contract is concluded with not one but several persons. For example, the organization announces a competition among banks to provide loans for the amount that none of the banks to date can independently offer. On the other hand, a large consignment of goods is purchased, which neither of the sellers can provide alone. In this case, it would be desirable to bring together several such persons for their joint participation in the competition. Moreover, the above explanation does not prevent this from being discouraged.

As you know, the consortium is a temporary voluntary equal union (unification) based on a joint economic agreement. Legal entities pool certain resources and coordinate efforts to solve specific financial problems (Article 233 of the Civil Code). The consortium itself is not a legal entity. Consequently, he may not be a party to competitive legal relations, nor can he be involved in any other civil-legal relationship. Only individuals and legal entities can be applied. Besides, it is quite right that it is not listed among the potential suppliers. Nevertheless, to be the subject of civil legal relations means to speak in them on their behalf and, as a rule, under their responsibility (Lebedev 1988:77).

Moreover, the consortium's meaning is that it binds the legal entities' mutual rights and obligations. A joint business agreement (consortium agreement) is an agreement only between members of a consortium. In all other relationships with third parties (in «external» relations), the consortium mem-

bers – legal entities – Act on their behalf. Nevertheless, the connection of their consortium agreement may determine their joint entry into civil relations. Thus, one application for participation in the public procurement competition can be submitted not by one legal entity but by several, related or even unrelated to each other by a joint economic activity agreement. In this case, the participant of competitive legal relations (potential supplier) will not be a consortium; thus, an entity of civil law does not exist, but legal entities. Here, all legal entities acting together and working in their interests can submit the application and others' parts because of a contract of instruction (trust). Another matter must apply to each of the applicants.

Nevertheless, the requirement – «one application for participation in the competition can be filed by only one person» – is not based on the law. It is noteworthy that legal entities and individuals can submit one application jointly if only by the nature of the purchased works or services (e.g., banking). The participation of individuals in the competition is not excluded. In such cases, there is no legal reason to call such an association a consortium since the latter is an Association of exclusively legal entities. Simultaneously, there are no other grounds to reject such an application since the Civil Code's general rules allow for a plurality of persons in the obligation, including the competitive burden.

Unlike consortia, which are still enshrined in the law, such entities as groups (collectives) of citizens (individuals) are not mentioned in the legislation. However, this does not mean that they are not entitled to participate in competitions or other civil relations. Here, the subject of legal concerns will be not some particular subject – a collective and individuals, but speaking together, together. And in the case of winning the competition with all of them (or only one of the members of the team, having a power of attorney from the rest) can be concluded only one contract or paid the reward conditionally due to the competition (which in this case is shared among the members of the author's team).

All this shows that the law perfectly allows persons' plurality on the participant's side of the competitive obligation (Sergeeva 2008:826).

The winner of the competition is a party to the competition obligation in its final stage. The contest itself is held precisely to identify the winner. The winner in the competitive commitment is the creditor, that is, the party with the right to demand to commit specific actions in its favor – payment of remuneration or the conclusion of a contract of one form or another.

Part 3 of article 915 of the Civil Code stipulates that the winner of the tender's choice from among its participants is made by the initiator of the tender or created by the tender commission in a closed or, under the terms of the tender, in the open. The procedure for determining the winner is regulated in more detail in the legislation on certain types of competitive obligations (privatization, public procurement, etc.).

The competition can be aimed at identifying one winner or several winners (winners). In many ways, the type of competitive obligation determines the choice of one of these options. Thus, competitive obligations arising from bidding aim to conclude a contract that can only be completed with one person (given the multiple as mentioned above of persons in a competitive commitment). On the contrary, the public promise of remuneration of such restrictions does not know. One person or several winners, including their ranking (distribution by place), can set rewards. For example, a competition to create the best musical or literary work may include the first, second, and third prizes or even several prizes at each level.

Separate legislation stipulates that if the winner of the competition does not sign the contract within the specified time frame, the organizer of the game has the right to agree with another participant of the competition, the proposal of which is the most preferable after the submission of the winner per the protocol on the outcome of the match (part 3 of article 23 of the Public Procurement Act). It is usually said that there is a replacement for the winner of the competition in such cases. This statement does not appear to be entirely accurate. Of course, granting the right to enter into a contract with another person, in case of refusal of this winner of the competition, is in the interests of the initiator of the game, as it saves him from the need to hold a new contest, bear the associated costs, etc.

However, from the very concept of the competitive obligation, it follows that, first, the contract is with the winner of the competition, and the refusal of the winner of the warranty does not make the other person the winner. Secondly, before the actual winner, the initiator of the competition should conclude a contract, and it is this duty that constitutes the content of the competitive debt. In the cases under consideration, the competition's initiator has the right to conclude a contract with another person but is not obliged to do so. All this shows that the contract concluded in such cases is not based on a competitive obligation but is an independent way of concluding a contract (particularly a deal on public

procurement or privatization). However, it is an accessory, additional to the competition.

Becoming a competitive commitment. Protecting the interests of the participants of the competition obligation and liability under the competitive obligation.

It was becoming a commitment. The specifics of the competitive obligation, which has already been mentioned above, is such that the deficit in its full form does not arise immediately, not at the time of the announcement of the initiator (organizer) of the contest about its holding, but in the process of becoming a commitment based on its results and identification of the winner of the competition, which becomes a creditor. In this regard, a competitive obligation arises because of a complex factual composition in which unilateral transactions take the central place.

The Civil Code defines transactions as actions by citizens and legal entities aimed at the emergence, alteration, or termination of civil rights and obligations (Article 147 of the Civil Code). Deals are divided into one-sided and two-way or multilateral (contracts). A wrong transaction is recognized for which, following the parties' law or agreement, it is necessary and sufficient to express one party's will (part 1 and 2 of article 148 of the Civil Code).

The announcement of the contest, made by the initiator of the competition, is a one-sided transaction, initial and in many respects determining the competitive obligation's content by the stage of becoming this obligation. The announcement contains the competition's initiator's offer in a statutory order to pay a reward to the winner of the game or to conclude a contract with him when the game-winner reaches an inevitable result of the competition. Legislation may provide lists of the necessary conditions for a public promise of remuneration (Agarkov 1940:123). Such a list is listed in section 2 of article 911 of the Civil Code: a general contract of income must necessarily contain conditions for the substance of the job, the criteria and manner of presentation of the results, the size and form of remuneration, and the manner and timing of the announcement of the products.

This unilateral transaction gives rise to others' rights (an individual or uncertain circle) to participate in the competition by submitting relevant proposals (proposals), presenting works, etc. Accordingly, this transaction also generates a duty, a unilateral obligation for the perpetrator (part 1 of article 149). At this stage, the responsibility is to accept competitive applications (proposals).

As the initial stage of the competition committee's development, the announcement of the competition is significant. That is why the legislation pays excellent attention to how this announcement should be made. In particular, the report should be made no later than a specific date before the contest itself, allowing participants to prepare for the competition properly. It is envisaged that the announcements should be made in periodic printing and distributed through electronic means of communication. In addition to the contest's actual report (notification), the so-called «competition documentation» plays a significant role. The organizer of the competition provides to everyone who wants to participate in it. Competition documentation is designed to provide participants with complete information about the conditions of their participation in the game, as the ad published in newspapers, as a rule, does not always reflect the full story. The competition documentation also contains requirements for preparing the competitive application and its submission and regulations on evaluating competitive applications and recognizing the winning bid.

Applying to a bidder is also a one-way transaction. However, it generates a duty not for the person who committed it but for the competition's initiator. The game initiator must consider and evaluate this application in conjunction with other applications and identify the winner. It is only the identification of the competition's winner that leads to the appearance of a commitment in its final form and makes this winner a party of the competitive obligation. The legislation also imposes a special requirement on this stage of the development of competitive legal relations. In particular, there may be requirements for the form and content of the competition application, the timing of its submission, and so on.

Consideration of the competition winner's applications and identification is also a unilateral action (deal) of the game's initiator. Determining and announcing the competition winner is the final stage of the formation of a competitive commitment. This reveals the person against whom the initiator of the game is fulfilling the obligation.

Legislation details the rules for identifying the winner for certain types of competitions, defines the criteria by which the winner is determined sets the time frame during which the decision to recognize the winner should be made. Particular attention is paid to the order of the design of such a decision. Usually, the competition initiator's conclusion (competition, tender commission) is drawn up by a protocol, reflecting which of the contestants and on what grounds was recognized as the winner.

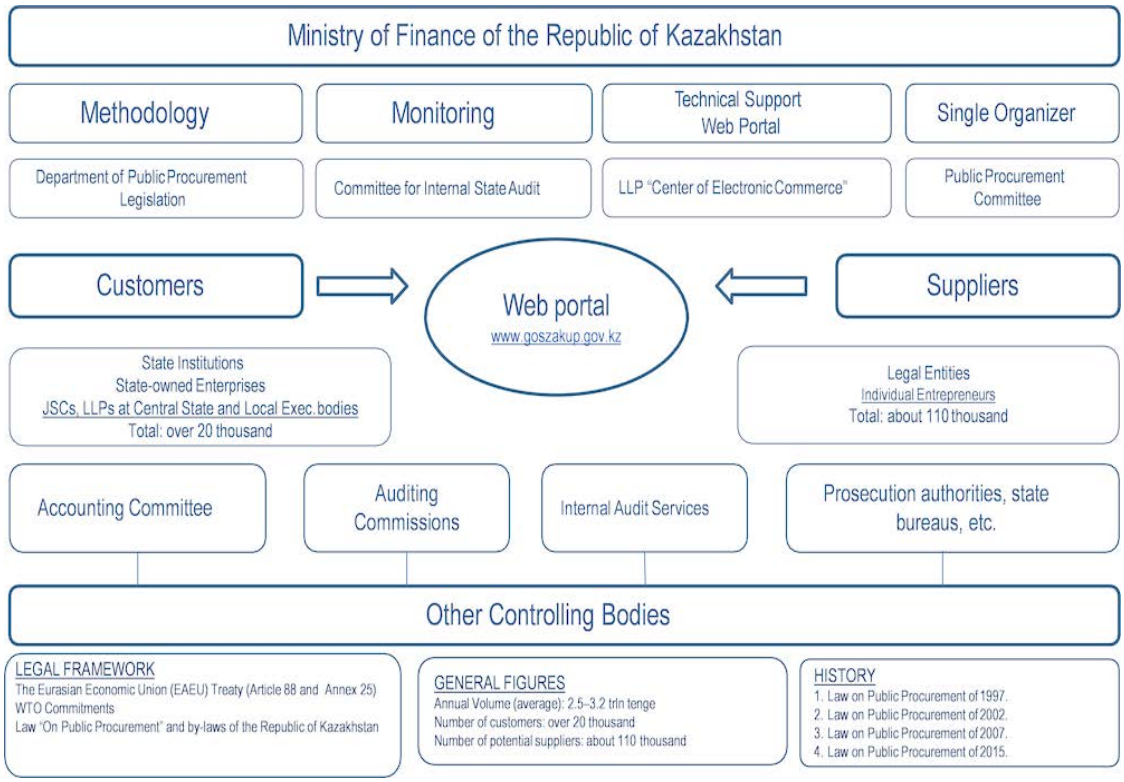

Figure 1

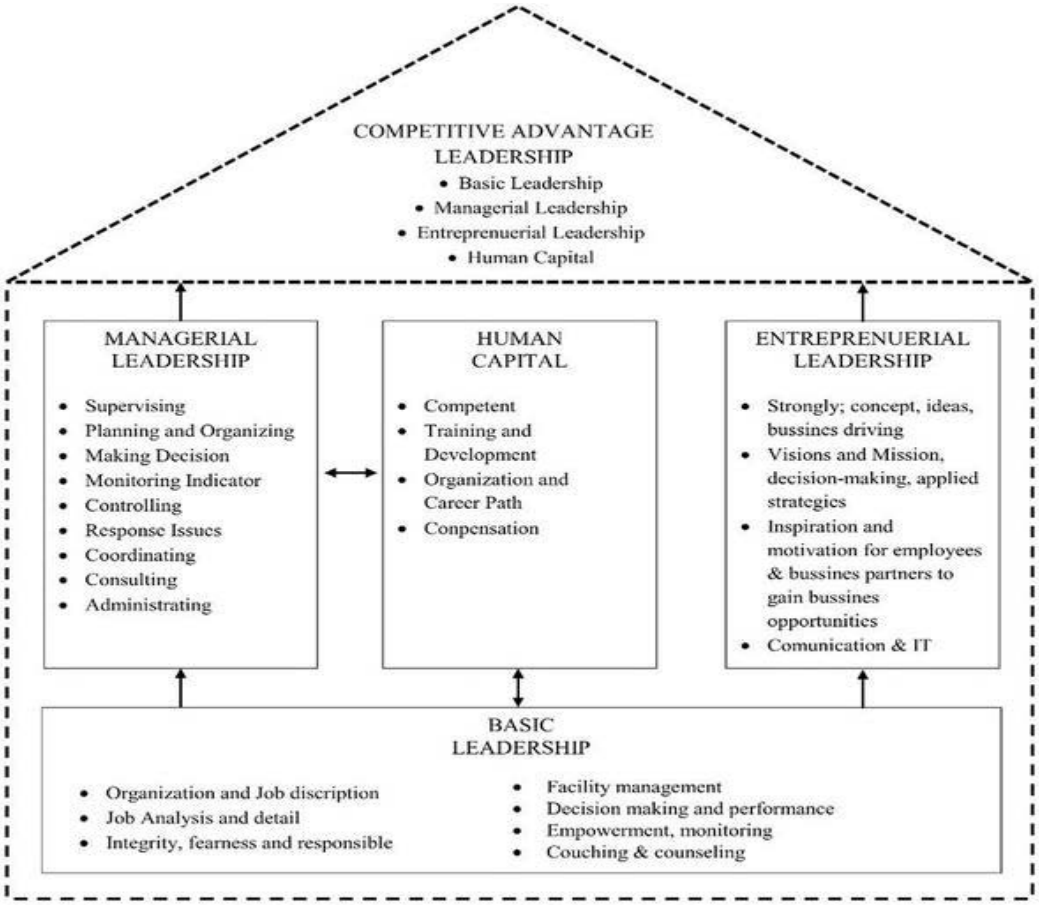

Figure 2

The announcement of the competition, the submission of proposals (proposals), and the decision on the winner's determination are, as has been said, one-sided transactions. Each such transaction, made by both the initiator of the competition and other persons, including the contestants, generates certain rights and obligations. In other words, after each stage, there is a legal relationship, which also meets the signs of the responsibility (e.g., the duty of the initiator of the competition to consider the proposal submitted and the right of the participant to demand such consideration). However, these commitments are not of self-importance to their parties but are subordinated to the ultimate goal of creating a competitive commitment in its final form. Therefore, these circumstances are not considered as separate types of civil obligations but as so-called «interim competitive obligations». However, this does not preclude the possibility of applying to the legal relations that take place at each stage of the formation of the competitive obligation, i.e., to the general norms of the burden.

When they are formed, all these unilateral transactions form a complex factual structure, from which the final competitive obligation arises. The actual composition that comprises the competitive commitment may include other legal facts. For example, article 913 of the Civil Code states that a contract forms the relationship between the organizer of lotteries and other similar games and their participants. However, the obligation of the lottery organizer to pay the winnings is not contractual. Its offensive requires several elements of the actual composition, particularly recognition of the lottery ticket winners.

According to our country's law, the bidding winner and the seller sign a protocol on the auction results on the auction or tender day. This protocol is reasonably considered in Kazakhstan's legal literature as a preliminary treaty under Article 390 of the Civil Code (Didenko 1999: 156).

The actual composition that creates a competitive obligation, depending on its type, includes other legal facts other than the above.

In addition to dividing deals into one-sided and two-and-multilateral, cynical science, unilateral agreements are also divided into basic and supportive ones. The principal transactions are considered the basis of legal relations; auxiliary – transactions change or terminate legal relations already existing in the person who makes the transaction. The contest's announcement generates only the opportunity to participate in the competition, but not subjective right. The right arises from the moment of making another transaction – applying (work) to the game.

The legislation provides the procedure for forming a competitive obligation and cases where the competitive commitment (competition) can be declared invalid, failed, or the match can be canceled.

A competitive obligation may be invalidated if the transactions that have served as the basis for the appearance of a competitive commitment are invalidated. The court invalidates the competition on the claim of interested persons.

The grounds for invalidating transactions under the basis of a competitive obligation are generally established by chapter 4 of the Civil Code in articles on the invalidity of transactions. It also shows the consequences of invalidating transactions if this chapter's rules are not at odds with the norms of special legislation on competitions or do not contradict the merits of competing obligations. There are also special rules in the law on the invalidity of transactions based on competitive commitments.

The declaration of the contest failed, which should be distinguished from recognizing the match's invalidity, is not related to the violation of the law during the competition but is due to circumstances beyond the control of the contest's initiator, the contestants. It may take place in cases provided by the law or the terms of the competition established by its initiator. For example, a tender may be deemed to have failed if fewer than two bidders took part in it. Their proposals are considered the initiator of the tender that does not meet the tender conditions (part 4 of Article 915 of the Civil Code).

Suppose the contest is recognized as a failure. In that case, there is no obligation of its initiator to pay a reward or conclude a contract with the competition winner, like the latter, in this case, is not determined. Legislation and the conditions of the game may establish other consequences of recognition of the contest failure. For example, in the case of tendering for a failed mortgage, the mortgage holder has the right to convert the mortgaged property into his property at its current appraisal value (part 3 of article 32 of the Real Estate Mortgage Ordinance).

The Civil Code and other competition legislation provide for abolishing and changing certain types of competitive obligations and the consequences of such cancellation and change. Thus, under section 6 of article 12 of the Public Procurement Act, the organizer of the competition has the right to make changes to the competition documentation by the deadline of no later than five calendar days before the expiry of the final deadline for submitting competitive applications on his initiative or in response to a request from a potential supplier to amend the competition documentation by filing a protocol.

The amendments are binding and are immediately reported to all potential suppliers to whom the competition organizer submitted the competition documentation. Simultaneously, the deadline for submitting competitive applications is extended by the organizer for at least ten calendar days to account for these changes in competitive bids by potential suppliers (Sarbash, 2005:27-38). Nevertheless, the Civil Code does not contain a general rule approximately cancellation or modification of competitive obligations. Still, it only includes control over abolishing the public promise of remuneration (Article 912 of the Civil Code).

Such a general rule should be included in the Civil Code.

Rules on abolishing competitive obligations are sometimes contained in special legislation on certain types of such duties. In cases where the consequences of the competition's cancellation are not provided by special legislation, it is necessary to proceed from the Civil Code's general norms on obligations and the game's declared conditions.

Conclusion

They are protecting the interests of the initiator of the competition. The Civil Code contains one measure to protect the interests of the initiator of the game, held in the form of bidding (tender and auction). Thus, part 6 of article 915 of the Civil Code stipulates that the terms of the tender may be provided for each bidder to make a guarantee fee, which is returned to the participants after the tender results. The guarantee fee will not be refunded if the bidder withdraws his offer or changes it before the tender expires. The guarantee fee is not returned to the tender winner if the winner refuses to enter into an appropriate contract with the tender's initiator on terms that meet the tender winner's proposals.

Those wishing to participate in the auction must apply for participation in the auction and make a set amount of the guarantee contribution (part 6 of article 916 of the Civil Code) before the auction if the conditions are not established. If the buyer refused to enter into a sale contract, he is excluded from the bidders' list, and the guarantee fee is not returned to him. The guarantee contribution was born for persons who took part in the auction but did not buy anything. For those who purchased any of the auction items, the amount of the guarantee fee is counted in the account of the paid purchase price.

The guarantee fee mentioned in the rules is a means of protecting the competition's initiator's interests, resulting in a sales contract (at auction) or, in general, any warranty (attender). Bidding and conducted by their initiator (organizer) for this purpose, so the refusal of the winner of the bidding from the conclusion of the contract violates the interests of the initiator (the organizer), who usually plans its activities given those contracts, which are to be concluded at the auction, bears individual costs associated with the bidding, etc.

The guarantee fee should be distinguished from the payment for the right to bid under special legislation. Thus, applications for participation in the competition of investment programs for the right to subsoil use for exploration, extraction, and combined exploration and extraction of minerals are accepted for consideration after payment of the contribution to participate in the competition. Unlike the guarantee fee, the fee for participation in the game is not subject to a refund.

It should be borne in mind, however, that a guarantee contribution is not a means of securing a competitive obligation, as it is often referred to in the legal literature and the current legislation (Civil and trade law of capitalist states 1993:407-408).

As you know, the Civil Code regulates in sufficient detail the various ways of ensuring compliance. Article 292 of the Civil Code includes forfeiture, collateral, withholding of debtor's property, surety, guarantee, deposit, and other means provided by legislation and treaties. The mere non-mention of the guarantee contribution in this article does not mean that it is not exhaustive. The guarantee fee performs the same functions as the means of enforcement, named in article 292 of the Civil Code. It has even some terminological affinity with them, particularly with a guarantee. Therefore, a more detailed analysis of the general concept of ways of securing the security is necessary to clarify whether the guarantee fee is a way of securing a competitive obligation or not.

First, it should be borne in mind that the Civil Code establishes ways to ensure not obligations as such, but ways to ensure the performance of responsibilities. As derived from the rules of Chapter 17 of the Civil Code, the fulfillment of the blame is the debtor's commitment to the actions that constitute his duty's content. The bidder makes the guarantee contribution and encourages him to conclude a contract with the initiator under the threat of assistance loss. However, the winner of the competition does not have an obligation to end such a contract. As discussed above, the competitive responsibility is unilateral. The very concept of this type of debt follows only the competition initiator's commit-

ment (trades) to conclude with the winner of the contract of the appropriate kind. For the winner of the conclusion, the initiator's agreement is a right, but not a duty. Therefore, if the competition winner does not enter into a contract with the initiator, it cannot be said that he violates any duty lying on it. Moreover, if there is no duty, there can be no way to ensure its fulfillment. Nor can we talk about the guarantee contribution as a means of securing or that the bidding winner is obliged to enter into a contract with the initiator because the loss of the guarantee contribution means negative property consequences for the winner who has not agreed (Didenko 2006:545).

In this regard, the guarantee contribution provided by the competition obligations rules should be considered an independent way of protecting the interests of the competition's initiator, but not as a way of securing obligations.

Legislation regulating certain types of competitive obligations, on the other hand, not only speaks of the provision of competitive obligations but also even provides for separate ways of ensuring. Thus, the Public Procurement Act does not mention, unlike the Civil Code, a guarantee contribution. However, article 14 regulates in sufficient detail the so-called «provision of a competitive application». It is established that the provision of a competitive application can be submitted in the form of:

1) Pledge of money placed in the bank;
2) Bank guarantee.

The validity of the competition application must be at least the expiration date of the competition application itself.

The provision of the tender application is not returned to the potential supplier who submitted the competitive application and the appropriate condition, in cases where the potential supplier:

1) Withdrawn or changed the bid after the final deadline for submitting the competition application;
2) Did not enter into a public procurement agreement, being confident as the winner of the competition;
3) Did not provide security for the public procurement contract's execution after signing the public procurement contract in the form, scope, and terms stipulated in the tender documentation.

The competition organizer returns the submitted provision of the tender application to a potential supplier within five business days of the following cases:

1) Expiration of the competition application;
2) The entry into force of the public procurement agreement;
3) Termination of public procurement procedures without determining the winner of the competition;
4) Withdrawal of the competition application before the final deadline for submitting competitive applications;
5) Rejecting the competition application as non-compliant with the competition documentation;
6) Determine the winner of the competition, another potential supplier.

For the reasons outlined above, the guarantee contribution should be in mind, not how the obligations are enforced (the more incomprehensible the «enforcement of the application»).

Moreover, even if the competition winner did have a responsibility to conclude a contract and the fulfillment of this duty could be provided somehow, the collateral and bank guarantee for this purpose are unacceptable. The essence of the collateral is that the collateral holder has the right, in the case of default, to obtain satisfaction (meaning the joy of the requirement, which corresponds with the outstanding duty) from the value of the mortgaged property mainly to other creditors, who own this property (the lender) (Article 299 of the Civil Code). If the winner of the competition had a duty to conclude a contract, and the initiator, accordingly, would have the right to demand such an agreement, for example, the supply of equipment, in case the winner of the competition did not fulfill this duty, the initiator would still not receive the satisfaction of his requirement (requirement to conclude a contract) by applying the mortgaged money to his property.

In this case, money can replace neither the contract for the supply of equipment nor the equipment itself. The guarantee is that the guarantor obliges the creditor of another person (the debtor) to be responsible for the failure to comply with the person's obligation in full or in part in solidarity with the debtor (Article 329 of the Civil Code of the Republic of Kazakhstan). According to the literal meaning of the guarantee (including banking), in case of refusal of the winner of the competition to conclude a contract, the guarantor bank had to complete such a deal instead of the winner. In practice, however, the implementation of the bank guarantee is that in the case of refusal to conclude a contract (and in other cases), the initiator of the competition requires the guarantor of payment of money, which, as already said, can replace neither the contract nor the subject of the agreement, which remained unconversionable.

It can be recognized, therefore, that the public procurement legislation «bail of money» and «bank guarantee» as ways to «ensure a competitive ap-

plication» have nothing in common but the name, with civil-legal concepts of ways to ensure the fulfillment of obligations, collateral, and guarantees. Public procurement legislation can and should only provide a deposit, as follows from the Civil Code's general rules on Competitive Obligations.

Responsibility for violation of competitive obligations. General rules on liability for non-performance or improper performance of duties also apply to competitive commitments, as long as it does not contravene special legislation on these obligations or their merits. As a rule, liability for violation of competitive obligations comes in the form of damages. Since the competitive duties are one-sided, in which the responsibility lies only with the initiator of the competition, but not on its participants (competitors), the fault in the form of damages can be borne exclusively by the initiator; thus, if the initiator of the tender refuses to conclude with the winner of the relevant contract the winner of the tender in the right to recover the damages caused to him (part 5 of Article 915 of the Civil Code of the Republic of Kazakhstan). For the tender's winner, if he refuses to conclude a corresponding contract with the tender's initiator on the terms that meet the winner's proposals, there is no compensation for damages.

Commitments are arising from a public promise of remuneration.

Commitments from the public promise of remuneration are widespread in practice. For example, these are competitions for creating works of science, literature, and art, battles for the best performance of music, dances, the best sporting achievements, etc. These contests can be both one-off and systematically held at specific intervals.

The contents of the obligation arising from the public promise of remuneration are disclosed in article 911 of the Civil Code. Under Part 1 of this article, any person who has publicly announced a payment of monetary or other remuneration for better performance or different results must fulfill the obligation to a person recognized as the winner under the competition's terms.

Signs of this type of obligation, while limiting it from others, including similar, legal relations should be highlighted.

First, being a kind of competitive commitment, the type of commitment is based on the competition, i.e., the competition and participants' competition. This is particularly important to bear in mind that, in principle, obligations arising from a public remuneration pledge may not be associated with the game. For example, from the general promise of reward to someone who finds a lost thing, there is also an obligation. Still, it will not be based on the competition, instead of the public promise of remuneration to the author's best architectural project. Different people, better or worse, can make an architectural project, but you cannot find a lost item, «better or worse». It can only be seen or not found.

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DEVELOPMENT AND FORMATION OF THE LEGISLATION OF FOREIGN COUNTRIES REGULATING BUSINESS PARTNERSHIPS

The article has chosen the topic's relevance because the «origin» of this organizational and legal form was in ancient times, even in Ancient Rome and Greece. In different traditional systems, such a corporate and legal structure as a Limited liability Partnership is called differently, so in England-a Limited Liability Partnership, in the United States of America – a Limited Liability Company, in Germany-a limited liability company.

In this article, only some limited liability partnership elements will be analyzed using the comparative-legal method. In particular, we will talk about the number of participants, authorized capital, registration, liability, etc., in comparison with the Republic of Kazakhstan, England, the United States, and Germany.

A business partnership is different from a simple partnership, which, according to article 228, has no authorized capital and is not a legal entity. In contrast to business partnerships, a simple partnership is formed based on a contract on joint activities of its participants, and the material basis of its activities is the property of the participants of a simple partnership, which is the common shared property of these participants, but not of the partnership.

Key words: civil Code, the Law on business partnerships, commercial organization, participants of business partnerships, comparative analysis of business partnerships.

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Шаруашылық серіктестіктерін реттейтін шет елдердің заңнамаларының дамуы мен қалыптасуы

Мақаланың тақырыбының өзектілігі – бұл құқықтық форманың осы түрінің «пайда болуы» ежелгі уақытта, тіпті ежелгі Римде және Грецияда болған. Әр түрлі құқықтық жүйелерде жауапкершілігі шектеулі серіктестік әр түрлі аталады, сондықтан Англияда - жауапкершілігі шектеулі серіктестік, Америка Құрама Штаттарында – жауапкершілігі шектеулі серіктестік, Германияда – жауапкершілігі шектеулі серіктестік.

Бұл мақалада жауапкершілігі шектеулі серіктестіктің кейбір элементтері ғана салыстырмалы құқықтық әдісті қолдана отырып талданады. Атап айтқанда, Қазақстан Республикасымен, Англиямен, АҚШ-пен, Германиямен салыстырғанда қатысушылардың саны, жарғылық капитал, тіркеу, жауапкершілік және т.б. туралы сөз болады.

Шаруашылық серіктестік 228-бапқа сәйкес жарғылық капиталы жоқ және заңды тұлға болып табылмайтын жай серіктестіктен ерекшеленеді. Шаруашылық серіктестіктерден айырмашылығы, жай серіктестік оның қатысушыларының бірлескен қызметі туралы шарт негізінде құрылады, ал оның қызметінің материалдық негізі серіктестіктің өзі емес, осы қатысушылардың ортақ үлестік меншігі болып табылатын жай серіктестікке қатысушылардың мүлкі болып табылады.

Бұл процестерге көптеген субъектілер қатысады (соның ішінде орталық немесе федералды үкімет, жергілікті билік, жеке сектор және жергілікті қауымдастықтар). Олар айналысатын негізгі мәселелер көп қырлы. Мұндай серіктестіктердің көптеген мысалдары бар, бірақ оларды түсіну мен талдаудың жалпы теориялық негізі жеткіліксіз дамыған.

Түйін сөздер: азаматтық кодекс, шаруашылық серіктестіктер туралы заң, коммерциялық ұйым, шаруашылық серіктестіктің қатысушылары, шаруашылық серіктестіктер туралы салыстырмалы талдау.

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Развитие и становление законодательства зарубежных стран, регулирующего хозяйственные товарищества

Актуальность выбранной темы статьи заключается в том, что «зарождение» этой организационно-правовой формы происходило в глубокой древности, ещё в Древнем Риме и Греции. В различных традиционных системах такая корпоративно-правовая структура, как товарищество с ограниченной ответственностью, называется по – разному, так в Англии – товарищество с ограниченной ответственностью, в Соединённых Штатах Америки – общество с ограниченной ответственностью, в Германии – общество с ограниченной ответственностью.

В данной статье сравнительно-правовым методом будут проанализированы лишь некоторые элементы товарищества с ограниченной ответственностью. В частности, речь пойдёт о количестве участников, уставном капитале, регистрации, ответственности и т.д., в сравнении с Республикой Казахстан, Англией, США, Германией.

Хозяйственное товарищество отличается от простого товарищества, которое, согласно статье 228, не имеет уставного капитала и не является юридическим лицом. В отличие от хозяйственных товариществ, простое товарищество образуется на основании договора о совместной деятельности его участников, а материальной основой его деятельности является имущество участников простого товарищества, являющееся общей долевой собственностью этих участников, но не самого товарищества.

Ключевые слова: гражданский кодекс, закон о хозяйственных товариществах, коммерческая организация, участники хозяйственных товариществ, сравнительный анализ хозяйственных товариществ.

Introduction

In developed countries' legislation and legal science with market economies, the legal norms regulating economic partnerships (partnerships) and monetary companies (companies) are distinguished and quite consistently divided. This is due to the fundamental difference between business companies and business partnerships. However, in some publications related to companies' English Law, this difference is more technical than functional, which can be agreed upon. In both cases, the same function is that people unite to conduct business to profit (Davis 1997: 3-5).

Nevertheless, both in English Law and civil code countries, the same essential difference is noted between a business partnership and a business company. It consists of the fact that the actual and legal relationship of the collaboration with its founders is decisive in a business partnership. Through the league itself, its founders' association with each other, their joint activities in the conduct of the partnership's affairs. In turn, in a business company, its participants are not required to participate in its affairs, nor is their labor participation in the company's activities mandatory. In this regard, it is possible to preserve a business company's independent legal personality, regardless of changes in its participants' composition.

In particular, business entities, companies (JSC and LLP (LLC)) have such characteristics as:

(a) the preservation of the legal personality and legal capacity of the company, regardless of how the composition of its participants (shareholders) changes);

(b) limitation of the participants ' property liability for the company's debts to the value of their contributions to the company's capital;

(c) the turnover of the shares and equity interests that allows them to be disposed of without such consequences as the termination of the company's existence as an independent economic unit, and

(d) delegated management of the company's property and management of its affairs, which does not require its participants' participation (shareholders) both in its power (the conduct of its affairs) and its economic activities.

Such societies are a form of concentration and free redistribution of capital, and corporate relations and relationships within the corporation are characterized by a high degree of mobility. Participants (shareholders) were alienated from the property and activities of the financial company created by them, acquiring the right to distribute income from the corporation's activities. One person may establish a business company, and it may have a sole shareholder (participant) during the entire period of its activity. Business conduct in such companies usual-

ly requires professional management by hired managers, and ensuring proper protection of creditor's and shareholders' rights is of particular importance to the legislator. Business entities may be part of corporate groups (groups of companies), requiring unique legislative and administrative control related to economic concentration.

Materials and methods

At the local level, continued or more significant involvement in partnership approaches is likely between public bodies and private bodies, and non-governmental organizations due to pragmatic factors such as resource ands well as more ideological factors. These factors include a belief in the overall advantages of a partnership approach; the move towards enabling local government (where publicly funded services are implemented by private or not-for-profit bodies rather than by the public sector); a recognition that anyone local actor often does not have all the competencies or resources to deal with the inter-connected issues raised in many policy areas; and more excellent agreement that urban regeneration should include the genuine nature of their relationships with networks of and partnerships between other actors, including the flows of resources, power, and information within these networks—participation of the local community. However, the theoretical and empirical validity of these views needs further analysis.

Results and discussion

The study results show that business partnership and innovation management affect business units of multiply providers in Indonesia. Innovation management has a more significant effect than a business partnership in improving business performance. The development of innovation management is dominantly shaped by how the management's effort in developing project management, followed by developing the innovation process, portfolio management, strategy innovation, and technology.

Main part

Business companies' peculiarities determine the creation of legal mechanisms that are not applicable in regulating business partnerships themselves (for example, exclusive and limited partnerships). This circumstance makes it reasonable to control joint-stock companies' legal status and limited and additional liability companies (partnerships) separately.

In turn, in developed jurisdictions, business partnerships are also characterized by many significant features that separate them from business companies and other business units, determining the specifics of the legal regulation of their status.

In particular, the following features identify a business partnership as an independent organizational form of conducting business activities on the rights of a legal entity:

(a) A partnership is established by natural persons in the number of at least two persons. This is since the partners must not only make the collaboration a sure property investment, but they also have to put your work. G. F. Shershenevich pointed out that «the personal involvement may be the work of the technical, available in representation». He considered that could not justify the participation of a partner in the profit of the partnership if the participant did not take any part in the activities of the collaboration under the constituent agreement (Shershenevich 1994). A similar position is reflected in modern French legislation, based on the fact that contributions in the form of skills and experience (although not considered as a contribution to the authorized capital) provide the basis for obtaining shares in the partnership, granting the right to participate in the profits and net assets of the league and imposing the obligation of proportional participation in covering the losses of the association (Walters 2008);

(b) The founders' participation (participants) in a business partnership in its activities means their active involvement in the collaboration itself is business activities. In Russian Law, such regulation is traditional: according to Article 295 of the Civil Code of the RSFSR of 1922, a mandatory feature of a full partnership was the occupation of all its participants (comrades) in trade or fishing under a legal firm. Under Article 312 of this Code, the conduct of such transaction or fishing in a faith-based partnership was mandatory for unlimited responsible partners. The current Russian Law also establishes the personal conduct of economic activities by the participants of the collaboration as the defining feature of a business partnership: articles 69 and 82 of the Russian Civil Code establish that participants in full cooperation and participants in a limited partnership must engage in entrepreneurial activities on behalf of the partnership they have found. In this regard, it is prescribed that the participants of a business partnership have a commercial status: according to Article 66 of the Civil Code of the

Russian Federation, only individual entrepreneurs and (in which, however, some inconsistency with the doctrine and an explicit internal contradiction in the norms of the Code) commercial organizations can be participants of a business partnership. A merchant's status is mandatory for members of a general association and general partners of a limited partnership and following Articles L. 221-1 and L. 222-1 of France's Commercial Code (Walters Kluwer b:2008). The formation of trade associations by merchants is also provided for in the German Trade Code (note to paragraph 105) (Walters Kluwer: 2009);

(c) The relationship of the business partnership with its founders. As a general rule, a partnership is formed based on its founders' agreed decision and ceases to exist when at least one of the participants leaves the league. Such retirement may take place in connection with the death of a participant, the termination of the constituent agreement on the partnership, the exclusion of a person from the membership of the association;

(d) The business partnership is managed by the members of the association themselves. At the same time, the principle of unanimous decision-making usually applies. About third parties and economic partnership, its participants are represented only by its participants, who are fully responsible for their property for the partnership's debts. In partnerships as associations of persons, as a rule, there is no delegation of the management function to the bodies of the block, nor should there be any bodies of the partnership.

At the same time, German lawyers believe that in practice, any of the signs of an economic (commercial) partnership can be canceled or limited in its application by Law or by a constituent agreement. However, they also consider it impossible to attract third-party managers to conduct the partnership's business and represent it in relations with third parties. Such managers do not bear total responsibility (Schmidt-Trenz 2007: et al.). And; for example, Article L. 221-3 of the Commercial Code of France, on the contrary, provides that the charter of a general partnership may provide for the appointment of managers who are not members of the coalition. Moreover, it is allowed to appoint a legal entity as such a manager. Similarly, G. F. Shershenevich noted that personal participation was necessary only in an artel partnership following the Russian pre-revolutionary legislation. Participants unite to achieve an economic goal by joint work. Individual participation was not an essential attribute in an entire block, but it had to be assumed since it usually took place. Similarly, in faith-based partnerships, personal participation on the whole participants' side was only deemed (Shershenevich 1994).

However, Kazakhstan's legislation on business partnerships and companies has its peculiarities, manifested in the following main aspects. First of all, the legislator's position regarding the division into business partnerships and business companies is not unambiguous. Although joint-stock companies (as an independent organizational and legal form of legal entities) are already regulated separately by the joint-stock legislation's norms, the legislative regulation's inconsistency and business companies' division and business partnerships are apparent. Also, Kazakhstan's legislation differs somewhat from foreign legislation in establishing the characteristics of economic alliances themselves. In particular, under the legal definition of a business partnership (see article 58 of the Civil Code and article 1 of the Law on associations), such only by the fact that it is a commercial organization and its authorized capital is divided into shares of its founders (participants) formed through their in-kind contributions. By article 8 of the Law on partnerships, current management of the partnership exercises its Executive (collective or individual) a body established by the General meeting of participants, i.e., mandatory delegated power of the Affairs and assets of a partnership, usually unique to societies and companies with limited liability.

Such a business partnership criterion as the founders' mandatory personal participation (participants) in its business activities is not consistently enough by the Kazakh legislation. In some cases (for example, concerning participants in a general partnership and general partners in a limited partnership), participation in the partnership activities is the participant's responsibility. The unique requirement that a member of the association has an individual entrepreneur (merchant) is also not established by the Kazakh legislation.

Besides, the term «business partnership» covers both business partnerships (full and limited) and business companies (LLPs). In this regard, provisions are essential for ensuring the financial company participants' legitimate interests but do not correspond to the economic partnership's nature. So, for example, entered into partnership Act article 8-1 on the provision of business partnership information on their activities affecting the interests of its members, ignoring this feature of a business partnership, under which its activities are objectified joint and coordinated activities of

its members, including the management of all the affairs of the league. The unique regulation of these issues in Article 8-1 of the Law on Partnerships does not contribute to the effective achievement of economic partnerships' goals. It forms the basis for disagreements and conflicts between the participants of the block.

Thus, the current Kazakh legislation does not draw a sufficiently defined boundary between business companies and business partnerships.

The elimination of most of the essential features of a business partnership in the Kazakh legislation occurred with the Law on Partnerships' adoption in 1995. Before its adoption, financial companies and economic alliances were initially divided quite definitely under force legislation. In particular, before adopting the General Part of the Civil Code on December 27, 1994, the Fundamentals were in effect in Kazakhstan. Based on Article 11 of the Fundamentals, commercial organizations could be established as business partnerships and business companies. Business partnerships were defined as general partnerships and limited partnerships, while joint-stock companies, limited liability partnerships, and additional liability partnerships were classified as business companies.

According to the legal definitions included in the Fundamentals, the difference between companies and partnerships was that the participants of the block, based on a contract between them, engaged in entrepreneurial activities on behalf of the league and were jointly and severally liable for its obligations with all the property belonging to them. In turn, business companies suggested only bringing together their founders' contributions as the material basis of the company's business and the limitation for property damage involved in its activities and their contributions to the company's Charter capital. It was stipulated that unique legislative acts should determine the legal status of certain types of business companies and partnerships.

Such an act was the Law of the Kazakh SSR of June 21, 1991, «On economic partnerships and joint-stock companies». By this Law, all the types of business partnerships and business companies listed in the Fundamentals were united by a single concept of a business partnership (similar to how the general term «partnership» is now combined in the French Commercial Code of 2000 for all relevant commercial corporations). In particular, such partnerships were defined as associations of organizations and citizens built based on an agreement and the basis of membership to carry out various types of economic activities to meet their own and public needs. Simultaneously, the definitions of each of the above types of partnerships completely coincided with the corresponding reports contained in the Fundamentals. Joint economic activity and unlimited joint liability of general partnership partners conceptually separated full and limited partnerships from LLPs, CDOs, and JSCs, which have an exclusive property and legal autonomy from their participants (shareholders), with the latter limiting the risks of their losses associated with the activities of these three types of partnerships.

Since the Law on Partnerships' adoption in 1995, the only significant difference between full and limited partnerships and other types of business partnerships provided is the joint and additional liability of top partners for the partnership's debts if insufficient property repays these debts independently. In turn, it was provided that the participants (shareholders) LLP, TDO, and JSC connected with their participation in economic partnerships of the corresponding forms do not risk their property, except for the property of their property contributions to the authorized capital of economic partnerships. Since July 1998, a joint-stock company has generally been recognized as an independent form of commercial corporations and is no longer a type of business partnership.

In connection with the establishment of differentiation in the scope of the participants of economic partnerships of various forms provided by Kazakhstan legislation, regulation of the status of each of these forms of partnerships has its characteristics, as enshrined in articles 58 to 62 Civil Code General provisions concerning business partnerships are subject to considerable additions (and sometimes even change) the legislative rules applicable to each form of business entity.

At the same time, the provisions of Articles 58 – 62 of the Civil Code apply to all business partnerships established under the legislation of the Republic of Kazakhstan, regardless of whether they are appointed by citizens of the Republic of Kazakhstan and legal entities established under the Kazakh legislation, or among their participants there are foreign citizens, foreign legal entities and organizations, as well as stateless persons. This is due to Article 1100 of the Civil Code's mandatory requirement that a legal entity's Law is considered the country's Law where this legal entity is established. In the development of this provision, Article 1101 of the Civil Code also specifies that the legal entity's Law determines a legal entity's civil legal capacity.

Therefore, if a business partnership is established in the Republic of Kazakhstan's jurisdiction, it can only be shown following the Kazakh legislation and can only be regulated. It can be created only in those forms and with the organizational structure and allocation of jurisdiction between the bodies provided for by Law. Only Kazakhstan legislation may define the content and scope of rights of participants in a business partnership, the procedure and conditions for the formation and use of the property of the block, reorganization and liquidation of the league, and other aspects of the implementation capacity of the Kazakhstan legal entities created in various forms.

A limited liability partnership is created based on a constituent agreement. The foundation agreement of an LLP is concluded by signing the agreement by each founder or his authorized representative and is supposed in writing. The foundation agreement is subject to notarization, except for the foundation agreement of a limited liability partnership that is a small business entity.

Creating a limited liability company begins with the conclusion of the foundation agreement. It ends with data entry on the limited liability company in the court's relevant commercial register of the first instance at the company's location.

The company's foundation agreement must be notarized (Section 2, paragraph 1 of the Law on Limited Liability Companies).

Only one person has the right to establish a limited liability company and conclude a foundation agreement (Section 1 of the Law on Limited Liability Companies).

The company's brand name is the name under which the limited liability company is registered in the commercial register and operates on the market. The members of the company are free to choose a brand name. The company name must indicate the legal form of the «limited liability company» or the generally accepted abbreviation of this designation (GmbH).

As a rule, the founders of a limited liability company are not personally liable for its obligations. The company's obligations are fulfilled only at the expense of the company's property unless otherwise provided by Law or the constituent agreement. The transfer of responsibility for the company's obligations to the founders is provided only if particular conditions are met in cases of lack of capital, mixing of private property and company property, mixing of the spheres of individual legal entities, destruction of the enterprise within the framework of an actual concern and the so-called abuse of the standard form of the company.

In England, there is a limited liability Partnership (Limited Liability Partnership (LLP)

The following legal acts, namely regulate the activities of Limited liability Partnerships: the Limited Liability Partnership Act 2000 (Limited Liability Partnership Act 2000); the Limited Liability Partnership Regulations 2001 (Limited Liability Partnership Regulations 2001); the Companies Act 1985 (Companies Act 1985); the Bankruptcy Act 1986 (Insolvency Act 1986); the Financial Services and Markets Act 2000 (Financial Services and Markets Act 2000).

Section 401 of the Uniform Federal LLC Act states that members of an LLC may make a contribution in the form of tangible or intangible property or in any other form beneficial to the company, including cash, promissory notes, the provision of a service, as well as in the form of obligations to contribute money or property, or in the form of a contract for the provision of services.

After analyzing and comparing the organizational and legal forms in the above countries (the Republic of Kazakhstan, Germany, England, USA), we can conclude that the legislation governing a limited liability partnership in the Republic of Kazakhstan and a limited liability company in Germany is very similar. In turn, the legislation governing Limited Liability Partnerships in England and the legislation governing the provisions of Limited Liability Companies in the United States are identical. In my opinion, this fact indicates that the Republic of Kazakhstan and Germany belong to the Romano-German legal system and England and the United States to the Anglo-Saxon system of Law.

Also, by examining the legislation of these countries, believe that in the legislation of the Republic of Kazakhstan in the field of limited liability partnerships necessary to make amendments to paragraph 2 of article 23 of the Law «On limited liability companies» as follows: the initial size of the share capital is equal to the sum of the contributions of the founders and cannot be less than the amount equivalent to one hundred the size of the monthly calculation index for the date of submission of documents for state registration of the partnership, i.e., since this was before the adoption of the Law of the Republic of Kazakhstan No. 239-IV «On Amendments and Additions to individual Legislative Acts of the Republic of Kazakhstan on the simplification of the state registration of legal entities and the registration of branches and representative offices» of January 20, 2010, because the authorized

capital performs the function of the initial capital. This is the so-called starting property, the basis of the partnership's activities; the determining process, which consists of the fact that, as a general rule, each participant's share in the partnership's property is established through the authorized capital; the limiting function. This function plays the most significant role concerning limited and additional liability partnerships. As a general rule, a member of an LLP bears the risk of losses only within the limits of the amounts contributed to its authorized capital, security (guarantee) function to protect the partnership's creditors' interests.

The foundation agreement is concluded between the participants of the partnership and is signed by all of them. The founding agreement expresses the participants' will to establish a business partnership, regulate their rights and obligations, and provide for their responsibility to each other, related to the creation of the alliance, the formation of its property.

The content of the constituent agreement of a business partnership is a commercial secret of its parties. Persons who are not parties to the constituent agreement are not entitled to require admission to familiarize themselves with its contents. Even for state registration or re-registration of a business partnership, the constituent agreement's presentation or copy to the registering body is not required. By the Law on Partnerships, the constituent deal is subject to production to State or other official bodies and third parties only by the decision of the participants of the economic partnership or in cases established by legislative acts. Law regulates the procedure and conditions for such presentation.

The foundation agreement is valid for the entire duration of the business partner's existence, being the basis of its participants' relationships that develop in connection with the partnership's activities. Any situation involving the termination of a Memorandum before the partnership's termination contradicts the concept of a business partnership and the legal nature of relations between participants of turnover of joint business activities in the form of a business partnership.

In this matter, the fundamental principle is that all the participants of the partnership are its managers. Per this, the supreme body of a business partnership is the general meeting of its participants. In those partnerships that, according to the Law, may have one participant, the broad meeting powers belong to its sole participant.

Should bear in mind that the relationship between the partners, including the partnership management, is regulated by the contract between them on a dispositive basis. However, external relations, including the partnership with third parties, should be handled by public norms since the implementation of these «externally oriented» legal relations significantly affects such third parties' interests. The publicity of the provisions on the distribution of Executive and representative powers is achieved because they are included as mandatory norms in the partnership's charter and comply with the Law's requirements.

Kazakhstan law prescribes the creation of a collective and (or) sole executive body in a business partnership, responsible for implementing its activities' current management and accountable to its participants' general meeting. Moreover, it is stipulated that the sole governing body may not be elected from among its participants. The executive body's obligation is justified for business partnerships (companies) with limited or additional liability. The liability of their participants related to their activities is limited to the value of their participation in the partnership's capital.

Conclusion

However, in full and limited partnerships, where all responsibility for the partnership activities is assigned to the participants, the obligation to create an executive body by them, especially by involving third parties, is not justified. Traditional in the civil law theory and civil legislation of the State of continental Europe and Russian Law is the rule that the conduct of the partnership's affairs is carried out by the partners themselves jointly based on their joint responsibility unless the constituent documents provide otherwise. Simultaneously, granting the right to form such an executive body in them is not objectionable. It corresponds to Western states' legislation (see, for example, Article L. 221-3 of France's Commercial Code).

Paragraph 4 of Article 60 of the Civil Code provides for the right of any of the partnership participants or several such participants at any time to request an audit of the business partnership. Must meet this requirement. However, in this case, it is necessary to distinguish between conducting an audit by deciding the general meeting of participants and conducting an audit at the request of one or more participants of the partnership. In the first case, the partnership's body makes the decision, and the league pays the related expenses. Suppose the request to conduct an external audit is made by one of the participants or several participants. In that case, they must pay the costs of operating the audit,

in this case, from the funds of the participants who requested it.

The commented article states that the procedure for conducting an audit of a business partner's activities is determined by the legislation and the constituent documents of the partnership. It should be borne in mind that during the audit organization is guided only by the requirements applicable to the respect of their activity's legislation: section 2 of article 4 of the Law as mentioned earlier, «On audit activity» imperative States that the audit is carried out by the Law and international standards on auditing that does not contradict the legislation of the RK, published in the State and Russian languages by an authorized organization. In this regard, it seems unreasonable to require an audit organization to comply with the procedure established by a business partner's constituent documents when conducting an external audit.

Simultaneously, the partnership's constituent documents' relevant provisions are mandatory for the association, its bodies, and employees. The conditions and procedure for deciding on conducting an external audit, the interaction of the partnership's bodies and employees with the audit organization conducting the audit, are usually regulated by the partnership's constituent documents (primarily it is charter) and the partnership's internal documents. In the absence of such regulation of these issues, the relevant points to an individual case of an external audit may be regulated by an administrative act, but such regulation may be objectively limited.

In conclusion, summarizing what is stated in this article, it should be noted that such an organizational and legal form as a Partnership (Partnership, Company, Company) with limited liability is the most common administrative and legal form at present both in our country and abroad.

A limited liability partnership (Partnership, Company, Company) provides a real opportunity for participants to manage the partnership's affairs to receive income directly. At the same time, the participants are limited in liability.

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4-бөлім

ТАБИҒИ РЕСУРСТАР ЖӘНЕ ЭКОЛОГИЯЛЫҚ ҚҰҚЫҚ

Section 4

NATURAL RESOURCES AND ECOLOGY LAW

Раздел 4

ПРИРОДОРЕСУРСОВОЕ И ЭКОЛОГИЧЕСКОЕ ПРАВО

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БЛАГОПОЛУЧИЕ ЖИВОТНЫХ – НОВЫЙ ТЕРМИН В КАЗАХСТАНСКОМ ЗАКОНОДАТЕЛЬСТВЕ

За последние несколько десятков лет в законодательства многих стран мира вошел термин «благополучие животных». Все больше граждан осознает значимость ответственного обращения с животными и влияние благополучия животных на повседневную жизнь человека: на качество сельскохозяйственной продукции, здоровье населения и климат. В законодательстве Казахстана термин «благополучие животных» также начал постепенно внедряться в тексты различных нормативных актов, однако определение этого термина наше законодательство не дает. Значение его зачастую ускользает при правоприменении. Целями данного исследования является анализ происхождения и значения данного термина; обоснование важности института благополучия животных, а также выявление казахстанских нормативных актов, в которых данный термин используется. В исследовании нами проанализированы все казахстанские нормативные акты, содержащие данный термин, а также значимые для Казахстана международные документы, которые также его используют. Несмотря на очевидную важность данного исследования и его актуальность в условиях пандемии и увеличения объемов мировой торговли, данная статья первой в казахстанской юридической науке затрагивает проблему законодательного регулирования благополучия животных. В заключении статьи приводятся выводы и практические рекомендации по совершенствованию казахстанского законодательства в области обращения с животными, в чем заключается практическое значение данной работы.

Ключевые слова: благополучие животных, здоровье населения, обращение с животными

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Animal welfare – a new term in kazakhstan's legislation

Over the past several decades the term "animal welfare" has been introduced into the legislation of many countries around the world. More and more citizens are realizing the importance of responsible treatment of animals and the impact of animal welfare on human daily life: on the quality of agricultural products, public health and climate. In the legislation of Kazakhstan the term "animal welfare" has also begun to be gradually introduced into the texts of various regulations, but the legislative definition of this term is still missing. Often the meaning of this term often is not clear for the law enforcement authorities. The objectives of this study are to analyze the origin and meaning of this term; substantiation of the importance of the institution of animal welfare, as well as the identification of Kazakhstani normative acts in which this term is used. In the study, we analyzed all Kazakhstan's normative acts containing this term, as well as significant for Kazakhstan international documents that also use it. Despite the obvious importance of this study and its relevance in the context of a pandemic and an increase in world trade, this article is the first in Kazakhstani legal science to address the problem of legislative regulation of animal welfare. The article concludes with the recommendations for improving Kazakhstani legislation in the field of animal management, which constitutes the practical applicability of this work.

Key words: animal welfare, public health, treatment of animals.

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Жануарлардың саулығы-қазақстандық заңнамадағы жаңа термин

Соңғы бірнеше онжылдықта «Жануарлардың саулығы» термині әлемнің көптеген елдерінің заңнамаларына кірді. Көптеген азаматтар жануарларға жауапкершілікпен қараудың маңыздылығын және жануарлардың саулығының адамның күнделікті өміріне: ауылшаруашылық өнімдерінің сапасына, халықтың денсаулығы мен климатқа әсерін түсінеді. Қазақстан заңнамасында

«Жануарлардың саулығы» термині де біртіндеп әртүрлі нормативтік актілер мәтіндеріне енгізіле бастады, алайда біздің заңнамада бұл терминнің анықтамасы берілмеген. Оның мәні құқық қолдану кезінде жиі түсіп қалып отырады. Осы зерттеудің мақсаты осы терминнің шығу тегі мен мағынасын талдау; жануарлардың саулығы институтының маңыздылығын негіздеу, сондай-ақ осы термин пайдаланылатын қазақстандық нормативтік актілерді анықтау болып табылады. Зерттеуде біз осы терминді қамтитын барлық қазақстандық нормативтік актілерге, сондай-ақ оны пайдаланатын Қазақстан үшін маңызды халықаралық құжаттарға талдау жасадық. Зерттеуде біз осы терминді қамтитын барлық қазақстандық нормативтік актілерге, сондай-ақ оны пайдаланатын Қазақстан үшін маңызды халықаралық құжаттарға талдау жасадық. Осы зерттеудің айқын маңыздылығына және оның пандемия және әлемдік сауда көлемінің ұлғаюы жағдайында өзектілігіне қарамастан, қазақстандық заң ғылымында бірінші болып осы бап жануарлардың саулығын заңнамалық реттеу проблемасын қозғайды. Мақаланың қорытындысында, бұл жұмыстың практикалық мәні неде екенін білдіретін, жануарлармен жұмыс істеу саласындағы қазақстандық заңнаманы жетілдіру жөніндегі қорытындылар мен практикалық ұсынымдар келтіріледі.

Түйін сөздер: жануарлардың саулығы, халықтың денсаулығы, жануарларды емдеу

Введение

Опыт человечества, полученный в результате текущей пандемии, еще раз наглядно продемонстрировал, насколько окружающая среда влияет на человека и в какой неразрывной связи находятся здоровье человека и здоровье животных. Здоровье человека и животных неразделимо. Условия, в которых содержатся животные, и их благополучие, тесно связано с возможностью появления новых заболеваний, в частности зоонозных, т.е. общих для человека и животных. Эпидемии случались и раньше, но ученые отмечают, что в последние несколько десятилетий частота их возникновения увеличилась (Akhtar 2012:61). «С 1980 года появилось более 35 новых инфекционных заболеваний человека» (Karesh 2005:1000), среди них Эбола, свиной грипп H_1N_1, птичий грипп H_5N_1 и, наконец, коронавирус. Хотя причина возникновения последнего до сих пор обсуждается, наиболее вероятной считается версия о распространении этого заболевания вследствие неорганизованной торговли дикими животными и плачевными условиями их содержания на китайских птичьих рынках – так называемых “wet markets” – «влажные рынки» (Aguirre 2020: 256-265).

Помимо этого, связь между здоровьем животных и здоровьем человека, а также окружающей средой прослеживается и в других сферах.

Здоровье животных – это одна из существенных составляющих более широкого термина «благополучие животных» (*англ.* “animal welfare”), используемого все чаще в юридическом, биоэтическом и ветеринарном контекстах во многих странах мира. Этот термин используют ветеринарные врачи, маркетологи, фермеры, заводчики животных, зоозащитники и юристы. Его применяют к сельскохозяйственным животным, животным-компаньонам, зоопарковым и другим животным. Однако понимание этого термина может разниться в зависимости от того, кто и с какой целью его использует. В данной статье мы попробуем разобраться в происхождении и истинном значении этого термина, а также в том, какое значение он имеет для общества и какое отражение он находит в законодательстве Казахстана.

Целью данной работы является анализ не этической стороны вопроса, но анализ научных исследований и нормативного материала по вопросам благополучия животных, а также изучение того, как этот термин используется. Поскольку вопрос о благополучии животных, о значении самого термина, а также о методах оценивания благополучия животных является предметом многолетних исследований зарубежных коллег, в ходе данного исследования проведен также анализ основной зарубежной юридической и естественно-научной литературы.

В ходе работы нами было установлено, что благополучие животных является неотъемлемой частью благополучия и здоровья населения, а, следовательно, требует точного законодательного определения и детального нормативного регулирования.

Что такое благополучие животных? Обзор литературы

В настоящий момент трудно установить, кто и когда впервые предложил использование этого термина, однако в настоящее время многие ученые высказали свое мнение по поводу значе-

ния и содержания этого термина. В частности, известный английский биолог, профессор Кембриджского Университета по благополучию животных Дональд Брум определяет благополучие животных как измеримое состояние индивида, определяющееся его окружающей его средой (Broom 1991: 4167-4175). Иными словами, это состояние комфорта или дискомфорта, зависящее от того, что происходит вокруг.

Это не абстрактное, субъективное, а конкретное и измеримое понятие (Broom 1991a: 4167-4175).

Например, отсутствие еды – это очевидное нарушение состояния благополучия. Что же еще входит в это понятие? Некоторые ученые предлагают определить это понятие, исходя из понятия нужд животных (Broom 2011b). Эти нужды животных, по мнению ряда известных ветеринарных врачей, выходят за рамки исключительно физического состояния и включают в себя, в частности, психологические страдания и стресс (Hewson 2003: 496). Благодаря систематическим и тщательным исследования в области благополучия животных, примерно полвека назад была предложена так называемая концепция пяти свобод, определяющая основные компоненты благополучия животных.

Считается, что концепция пяти свобод была впервые озвучена в Великобритании, в 1965 году, в отчете Технического комитета по изучению благополучия животных (FAWC 1979). В нем говорилось, что у сельскохозяйственных животных должна быть свобода «вставать, лежать, поворачиваться, ухаживать за собой и растягивать конечности». В последствии этот список был несколько дополнен, синтезирован и сведен к основным пяти свободам:

«1. Свобода от голода и жажды – обеспечивается своевременным доступом к воде и пище, соответствующей биологическому виду для здорового образа жизни

2. Свобода от дискомфорта – обеспечивается подходящей средой обитания, включая убежище, места отдыха и комфортный температурный режим.

3. Свобода от боли, увечий и болезней – обеспечивается предоставлением своевременной ветеринарной помощи

4. Свобода естественного поведения – обеспечивается достаточным пространством для жизни, а также общением с себе подобными

5. Свобода от страха и стресса – обеспечивается условиями и обращением, которое исключает психические страдания» (FAWC 1979).

Очевидно, что конкретные условия, в которых один биологический вид будет обладать полным благополучием, для другого вида могут быть безразличными, неблагоприятными или даже смертельными. Например, общение с себе подобными для стадных животных может являться существенной составляющей благополучия, а то время как другие виды могут спокойно существовать поодиночке. Климат, уровень влажности, температура, необходимое жизненное пространство, диета – составляющие, которые отличаются существенно от вида к виду. Для этого биологи и ветеринарные врачи разрабатывают стандарты и нормы содержания того или иного вида.

Содержание термина «благополучие животных» продолжает эволюционировать. Ряд ученых предлагает полностью отойти от, или, по крайней мере, существенно расширить принцип пяти свобод. Ведь мнение ряда ученых о том, что отсутствие благополучия тождественно страданию животного верно лишь от части. Существуют ситуации, в которых благополучие животных нарушено, но животное не испытывает видимых и измеримых страданий (Broom, 1991: 4167-4175). Кроме того, говоря о страданиях, ученые принимают во внимание не только физические страдания, такие как боль, голод, жажда, но и психические страдания – страх, горе, тоска и пр. (Keeling, 2011: 13-26). Так, по мнению Дональда Брума, благополучие животного нарушено, если оно находится в одном или нескольких следующих состояниях: боль, страх, трудности в движении, трудности в выполнении каких-либо действий (например, при групповом кормлении, когда только наиболее сильные и активные особи получают доступ к пище, для остальных животных эта возможность ограничена), тоска, вызванная изолированностью или недостатком стимулов, или, наоборот, чрезмерная психологическая нагрузка (Broom, 1991: 4167-4175).

Ниже рассказывается, как данный термин используется в нормативных актах Казахстана и перекликается ли нормативное определение, данное Всемирной организацией здравоохранения животных (OiE) с мнениями Брума и других ученых.

Материалы и методы

Термин «благополучие животных» зачастую недооценивается в современной науке, в частности юридической. Для людей, не специализирующихся в это области, с традиционным под-

ходом к вопросу, этот термин вызывает скептицизм и недоверие как слишком неопределенный, основанный на субъективном ощущении: жалко нам или нет это животное, например, в зоопарке. Закостенелый, отсталый и неинформированный подход к вопросу, с которым мы иной раз сталкивались на практике, позволяет некоторым людям высказывать мнение о том, что боль, физические и психические страдания животных – это какие-то литературные образные высказывания, основанные лишь на излишней чувствительности использующих их лиц. Совершенно очевидно, что такое мнение не только идет вразрез с мнением ученых всего мира, но и отстает от мировых законодательных тенденций, в частности наднациональных (о чем ниже). Кроме того, хотелось бы подчеркнуть, что данный термин является научно оформленным биологами и ветеринарными врачами, а состояние благополучия или его отсутствия, как было упомянуто выше, является объективным и измеримым (Broom 1991: 4167-4175; Mellor 2015: 241; Velarde 2012: 244-251).

Результаты и обсуждение

Как мы видим, благополучие животных, имея конкретные и измеримые показатели, является объектом многочисленных исследований специалистов различных сфер. В чем же практическое значение этого термина и почему, собственно, мы должны беспокоиться о нем и стараться его обеспечить?

Нынешняя пандемия – это лишь один из примеров и доказательств того, что здоровье человека и животных неразрывно связаны. Это объясняется, во-первых, тем, что человек с биологической точки зрения относится к животным, а общность ДНК с некоторыми видами достигает 96% (Aguirre, 2020: 256-265). Даже с обыкновенной домашней кошкой наш ДНК схож на 90% (Jungle-up: 2020). По причине такой генетической близости многие, хотя не все, факторы, неблагоприятные для животных, влияют и на здоровье человека. Во-вторых, человек и животные являются частью экосистемы, дышат одним и тем же воздухом, используют одну и ту же воду для питья и т.д. То есть, экология, благополучие животных и благополучие людей также находятся в тесной связи.

Помимо этого, здоровье сельскохозяйственных животных непосредственно сказывается на качестве сельскохозяйственной продукции, производной от этих животных. На связь благополучия животных и здоровья человека указывают и стандарты OiE – всемирной организации здоровья животных – о которых будет подробно рассказано ниже.

Понятие благополучия животных актуально и в контексте жестокого обращения с питомцами, так как оно тесно связано с бытовым насилием и жестокостью в отношении человека (Байдельдинова 2016).

Кроме того, благополучие животных, особенно некоторые формы использования животных, существенно влияют на окружающую среду. К примеру, по данным FAO сельскохозяйственное производство является основным источником выбросов парниковых газов (FAO 2020). Навоз является основным источником повышения содержания метана в воздухе, что пагубно влияет на качество воздуха и в больших объемах ускоряет изменение климата и процесс глобального потепления (Akhtar 2012: 117-124). Интенсивное сельскохозяйственное производство является источником огромного количества навоза. Так, например, по оценке специалистов, свиноферма с 5000 свиней производит столько же фекалий, сколько производит город с населением в 50 000 жителей (Johns Hopkins Bloomberg School of Public Health: 1999). Очевидно, что при такой плотности содержания животных их благополучие также страдает.

Непосредственное влияние благополучия животных мы видим и в мировой торговле: развитые страны, с высокими стандартами благополучия животных, отказываются импортировать сельскохозяйственную продукцию из стран, где такие стандарты не приняты или систематически нарушаются. Примером может служить недавний отказ Австралии экспортировать живых овец в страны Ближнего Востока – Кувейт, Катар и Турцию – по причине нарушения этими странами установленных OiE стандартов благополучия животных (Foodnavigator 2019).

Таким образом, благополучие животных и условия их содержания непосредственно связаны с человеком – его здоровьем, благополучием, а также здоровьем других животных и окружающей средой. Многочисленные публикации биологов, медиков и специалистов по здоровью населения подтверждают данный тезис. (Например, количественные доказательства того, как плохие условия содержания, перевозки, убоя сельскохозяйственных животных сказываются на микробиологической чистоте получаемой продукции; статистические данные о заболева-

ниях работников ферм индустриального производства, о жестком обращении с животными и пр. (Akhtar, 2012).

Таким образом, будучи ключевым фактором в обеспечении здоровья населения и безопасности окружающей среды, термин «благополучие животных» имеет важнейшее практическое значение и находит отражение в законодательствах большинства стран мира.

Хочется отметить, что обеспечение благополучия животных должно осуществляться не только из мотивов целесообразности и, например, увеличения производительности, но и из соображений гуманности (Rollin 1981). Данная статья является юридической и не ставит своей целью раскрыть этическую сторону вопроса, которая заслуживает отдельной публикации.

Правовое регулирование благополучия животных в Казахстане

В Казахстане существует несколько сотен нормативных актов, так или иначе регулирующих обращение с животными (Байдельдинова 2016). Однако, термин «благополучие животных» до сих пор робко присутствует лишь в немногих нормативных актах, а определение его и вовсе отсутствует. Здесь нужно отметить, что в некоторых нормативных актах вместо «благополучие» используется термин «благосостояние» животных. Это неверное, хотя и объяснимое использование термина. Дело в том, что во многих, даже не англоязычных странах применяется английский термин «animal welfare». Слово «welfare» можно перевести и как благосостояние, и как благополучие. Но в русском языке термин «благосостояние» фактически является синонимом слова «богатство» («достаток, благополучие» (Ожегов 2011), что, возможно в некоторых обстоятельствах применимо к людям, но никак не к животным. В то же время определение слова «благополучие» – «спокойная счастливая жизнь в довольстве, полная обеспеченность» (ibid.), полностью отражает суть данного понятия, в частности, в контексте животных. Кроме того, термин «благополучие» используется в официальном переводе Кодекса OiE здоровье наземных животных.

Нормативные акты Республики Казахстан, использующие термин «благополучие» (или «благосостояние») животных, можно условно поделить на две основные группы: 1) нормативные акты в области ветеринарии, которые говорят о благополучии животных в отношении какой-либо болезни и 2) нормативные акты, которые можно назвать нормативными актами о животных нового поколения, которые используют данный термин в соответствии с мировой практикой.

К первой категории относятся:

- Приказ Министра сельского хозяйства Республики Казахстан от 27 ноября 2014 года № 7-1/618 «Об утверждении Правил проведения эпизоотического мониторинга». В данном документе термин используется в словосочетании «эпизоотическое благополучие животных»
- Приказ Заместителя Премьер-Министра Республики Казахстан – Министра сельского хозяйства Республики Казахстан от 14 января 2019 года № 12 «О внесении изменений и дополнений в приказ Министра сельского хозяйства Республики Казахстан от 29 июня 2015 года № 7-1/587 «Об утверждении Ветеринарных (ветеринарно-санитарных) правил». В данном документе термин используется в контексте «благополучие животных по сибирской язве».
- Ряд других нормативных актов, использующих термин «благополучие животных» в контексте эпизоотического благополучия или благополучия по той или иной болезни.

Ко второй категории относятся:

- Приказ Заместителя Премьер-Министра Республики Казахстан – Министра сельского хозяйства Республики Казахстан от 25 августа 2017 года № 354 «Об утверждении Правил содержания и разведения животных в неволе и (или) полувольных условиях»: «При вольерном содержании животным обеспечивают достаточное укрытие от дождя, снега, ветра или чрезмерного солнечного излучения, необходимое для их комфорта и благополучия.»
- Приказ Министра сельского хозяйства Республики Казахстан от 30 декабря 2014 года № 16-02/701 «Об утверждении Правил обращения с животными»: 4. Физические и юридические лица, занимающиеся воспроизводством, выращиванием, разведением, содержанием сельскохозяйственных, домашних и диких животных, включая племенных животных обеспечивают: […] 3) заботу о здоровье, благосостоянии и использовании животного в соответствии с его видом, возрастом и физиологией;

Ряд местных нормативных актов содержат аналогичные вышеуказанной нормы:

- Решение Туркестанского областного маслихата от 30 октября 2020 года № 53/547-VI «Об утверждении Правил содержания сельскохозяйственных животных в населенных пунктах Туркестанской области»; Решение маслихата Актюбинской области от 12 декабря 2016 года № 84

«Об утверждении Правил содержания сельскохозяйственных животных в населенных пунктах Актюбинской области;

• Решение Северо-Казахстанского областного маслихата от 14 июля 2015 года № 36/7 «Об утверждении Правил содержания животных на территории Северо-Казахстанской области»

• Решение Алматинского областного маслихата от 15 декабря 2017 года № 26-130 «Об утверждении Правил содержания животных на территории Алматинской области»

• Решение Акмолинского областного маслихата от 30 сентября 2015 года № 5С-41-9 «Об утверждении Правил содержания животных в Акмолинской области»;

• Решение X сессии Карагандинского областного маслихата от 29 сентября 2017 года № 221 «Об утверждении Правил содержания животных на территории Карагандинской области»

• Решение маслихата Актюбинской области от 5 июня 2020 года № 530 «О внесении изменений в решение областного маслихата от 12 декабря 2016 года № 84 «Об утверждении Правил содержания животных на территории Актюбинской области»

Международные нормы о благополучии животных

Помимо национальных нормативных актов для Казахстана актуален ряд наднациональных документов, также использующих термин «благополучие животных»:

• Меморандум о взаимопонимании между Евразийской экономической комиссией и Всемирной организацией здравоохранения животных (10 января 2014 года). Поскольку Всемирная организация здравоохранения животных (OiE) является основной организацией в мире по выработке стандартов благополучия животных, в частности как рекомендации для ВТО, тот факт, что Казахстан подписал подобное соглашение, содержащее рассматриваемый термин, имеет особую значимость. Меморандум использует термин в следующем контексте: «1. Стороны намерены осуществлять в рамках своей компетенции сотрудничество в сфере ветеринарии по следующим направлениям: […] взаимодействие в рамках осуществления Всемирной организацией здравоохранения животных деятельности по разработке и обновлению международных стандартов, касающихся здоровья и благополучия животных.»

• Стандарты OiE о благополучии животных впервые были опубликованы в Кодексе здоровья наземных животных в 2004 году и в Кодексе здоровья водных животных в 2008 году, соответственно. На настоящий момент действует редакция Кодексов 2019 года. В ее тексте широко используется понятие благополучия животных и, что примечательно, содержится его определение.

Нормативное определение термина «благополучие животных»

Заметим, что стандарты, разрабатываемые OiE, не являются обязательными для сторон. У организации нет правоприменительного и правоохранительного механизма. Однако, будучи стандартами, разрабатываемыми для Всемирной торговой организации, соблюдение или несоблюдение данных стандартов может влиять на привлекательность страны в качестве торгового партнера.

Глава 7 Кодекса OiE здоровья наземных животных 2019 года полностью посвящена благополучию животных. Эта же глава содержит нормативное определение данного термина:

«Благополучие животных – это физическое и ментальное состояние животного в связи с условиями его жизни и смерти.

Состояние благополучия животного признаётся хорошим при условии его соответствия следующим критериям: хорошее состояние здоровья, комфортные условия содержания, хорошая упитанность, безопасность. Оно не должно находиться в состоянии боли, страха, угнетённости и должно иметь возможность проявлять своё естественное поведение, присущее его физическому и ментальному состоянию.»

При анализе данного определения можно проследить четкую связь с принципом пяти свобод, которое, напомним, включает такие компоненты как питание, доступ к воде, комфортные и соответствующие биологическому виду условия содержания, своевременное ветеринарное обслуживание, отсутствие стресса и безопасность. Данное определение также отражает проанализированное выше мнение ученых о том, что благополучие включает в себя как физическую, так и психологическую составляющую. Такое определение представляется удачным и может быть принято за основу при формулировке определения термина «благополучие животных» в казахстанском законе об обращении с животными.

Заключение

Таким образом, проанализировав наиболее значимую научную литературу в области благополучия животных, а также нормативные акты Республики Казахстан и некоторые актуальные

для Казахстана наднациональные нормы в области обращения с животными, можно сделать следующие выводы:

1) Благополучие животных – неотъемлемая часть благополучия людей и здоровья окружающей среды;

2) В некоторых нормативных актах Республики Казахстан используется термин «благосостояние» животных. Его необходимо заменить на более отражающий суть феномена термин «благополучие» животных;

3) Термин «благополучие» («благосостояние») животных используется в ряде нормативных актов Казахстана, но определение данному термину не дается. Необходимо дать законодательное определение благополучия животных, основываясь на международном опыте и международных нормативных актах;

4) Необходимо принять закон, имеющий своей целью обеспечение благополучия животных, для всех сфер использования;

5) Необходимо установить конкретные санкции за нарушение благополучия животных, ужесточить санкции за жестокое обращение с животными.

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5-бөлім

ҚЫЛМЫСТЫҚ ҚҰҚЫҚ, ПРОЦЕСС ЖӘНЕ КРИМИНАЛИСТИКА

Section 5

CRIMINAL LAW, PROCESS AND CRIMINALISTICS

Раздел 5

УГОЛОВНОЕ ПРАВО, ПРОЦЕСС И КРИМИНАЛИСТИКА

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CRIMINOLOGICAL PROBLEMS OF DOMESTIC VIOLENCE AGAINST WOMEN

Domestic violence against women is a global problem that has no cultural or geographic boundaries. Violence against women in all its forms and manifestations is a violation of human rights and freedoms.

The urgency of the problem of domestic violence lies in the fact that domestic violence is one of the most widespread forms of violence in women's lives – much more widespread than physical assault or rape by strangers or acquaintances.

The purpose of the article is a multifaceted analysis of the preconditions and factors of committing domestic violence for the effective prevention and fight against violence against women. The study is based on world experience and theoretical studies of scientists and international organizations, using modern criminological methodology. The article examines the factors influencing the commission of unlawful acts against women, the victimological aspect and the criminological characteristics of domestic violence.

As a result of the study, conclusions are drawn, proposals for the suppression and prevention of domestic violence are presented, an analysis of the current legislation governing legal relations in the studied area is carried out, actors of the prevention of domestic violence in Kazakhstan are given.

Key words: law, domestic violence, criminological characteristics, victimology, crimes and wrongful acts against women.

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Әйелдерге қатысты тұрмыстық-отбасылық күш қолданудың криминологиялық мәселелері

Әйелдерге қатысты отбасылық-тұрмыстық зорлық-зомбылық-мәдени немесе географиялық шектері жоқ жаһандық проблема (мәселе). Әйелдерге қатысты барлық зорлық-зомбылық нысандары мен көріністері адам құқықтары мен бостандықтарының бұзылуы болып табылады.

Отбасылық-тұрмыстық зорлық-зомбылық мәселесінің өзектілігі – жыныстық сериктес тарапынан зорлық-зомбылық әйелдер өміріндегі бейтаныс немесе таныс адамдар тарапынан физикалық шабуыл немесе зорлауға қарағанда әлдеқайда кең таралған зорлық-зомбылықтың түрлерінің бірі болып табылады.

Мақаланың мақсаты әйелдерге қатысты зорлық-зомбылықтың алдын алу және онымен күресу үшін отбасылық-тұрмыстық зорлық-зомбылықтың алғышарттары мен факторларын жан-жақты талдау болып табылады. Зерттеу заманауи криминологиялық (қылмыстық) әдіснаманы қолдана отырып, ғалымдар мен халықаралық ұйымдардың әлемдік тәжірибесі мен теориялық зерттеулеріне негізделген. Мақалада әйелге қарсы заңсыз әрекеттерді жасауға әсер ететін факторлар, тұрмыстық зорлық-зомбылықтың жәбірленушілік аспектісі және криминологиялық сипаттамасы қарастырылған.

Зерттеу нәтижесінде қорытындылар жасалды, отбасылық-тұрмыстық зорлық-зомбылықтың жолын кесу және алдын алу бойынша ұсыныстар ұсынылды, зерттелетін саладағы құқықтық қатынастарды реттейтін қолданыстағы заңнамаға талдау жүргізілді, Қазақстанда отбасылық-тұрмыстық зорлық-зомбылықтың алдын алу факторлары келтірілді.

Түйін **сөздер:** құқық, заң, отбасылық-тұрмыстық зорлық-зомбылық, криминологиялық сипаттама, виктимология, әйелдерге қарсы қылмыстар және құқыққа (заңға) қарсы әрекеттер.

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Криминологические проблемы семейно-бытового насилия в отношении женщин

Семейно-бытовое насилие в отношении женщин – глобальная проблема, которая не имеет культурных или географических границ. Насилие в отношении женщин во всех его формах и проявлениях является нарушением прав человека и его свобод.

Актуальность проблемы семейно-бытового насилия заключается в том, что домашнее насилие является одной из самых распространенных форм насилия в жизни женщин – гораздо более распространенной, чем физическое нападение или изнасилование со стороны незнакомых или знакомых людей.

Целью статьи является многогранный анализ предпосылок и факторов совершения семейно-бытового насилия для эффективного предупреждения и борьбы с насилием в отношении женщин. В основе исследования лежат мировой опыт и теоретические исследования ученых и международных организаций, с использованием современной криминологической методологии. В статье рассмотрены факторы, влияющие на совершение противоправных деяний против женщины, виктимологический аспект и криминологическая характеристика бытового насилия.

В результате исследования сделаны выводы, представлены предложения по пресечению и профилактике семейно-бытового насилия, проведен анализ действующего законодательства, регулирующего правовые отношения в исследуемой сфере, приведены факторы профилактики семейно-бытового насилия в Казахстане.

Ключевые слова: право, закон, семейно-бытовое насилие, криминологическая характеристика, виктимология, преступления и противоправные деяния против женщин.

Introduction

The Republic of Kazakhstan, on a par with other UN member states, has supported and adhered to almost all the main international obligations in the field of ensuring gender equality, and also assumed the responsibility to fulfill the Sustainable Development Goals until 2030, where one of the main tasks of the fifth Goal " Gender Equality "is the elimination of violence against women.

The fight against violence in modern society is one of the most important priorities of the state policy of Kazakhstan and belongs to the obligations assumed by the Republic and currently being implemented at the national level. In 2015, under the auspices of the National Commission on Women Affairs and Family and Demographic Policy under the President of the Republic of Kazakhstan, by General Prosecutor's Office of the Republic of Kazakhstan active work was carried out in the framework of the project "Kazakhstan without violence," which combined the efforts of all government agencies, non-governmental and international organizations.

Due to the specifics of acts in the family and everyday life, a woman is more likely to become a victim at home – seemingly safe than on the street or in other predictable places. The high risk of domestic violence lies in the fact that a woman, as a victim, may receive not only physical or psychological trauma, but also die.

Getting married, a woman often, along with the joys of family life, receives in the person of her husband, his relatives and friends a source of constant anxiety, emotional stress and conflicts. Physical abuse in marriage is always preceded by a streak of mutual dissatisfaction, psychological pressure, verbal battles, alienation, hostility.

Physical and sexual violence in the family involves a close relationship between the victim and the perpetrator and is expressed in abuse and lack of assistance. What means do women choose to fight back violence in marriage? The range of behavioral responses to violence is quite large. Someone endures and is silent, someone makes scandals, argues, persuades, scolds, some leave the house and file for divorce.

The reasons of the violent behavior of abusers are psychological and social based. In many cases, violence provokes the rapist's psychological health – bad mood, nervousness, jealousy, an inferiority complex, low self-esteem, megalomania, indifference of the wife, her insubordination or simply her sociability, fear of losing his wife or the costs of upbringing. To a large extent, the aggressiveness is caused by social factors – financial problems, unstable work. The reasons for committing offenses in the field of family and domestic relations is

the conflict that has arisen, supported by the joint drinking of alcohol, hostile relations, low social level and jealousy. Women seldom provoke men to violence or aggression themselves. The provocation of aggressiveness, if it occurs, consists, as a rule, in retaliatory or initiating insults, remarks or claims.Participants of in-depth interviews who suffered from domestic violence were constantly exposed to it and hid the facts of violence from others, even if it threatened their lives. In some cases, the physical damage was so severe that it led to disability.

In addition, there are many stereotypes that force women to continue living with a rapist without seeking external help, reinforced by the fear of being alone, without financial support, and depriving their children of a full-fledged family.

Materials and methods

In the study of the questions raised, a logical, formal – legal, analytical, as well as a functional method is used that reveals the qualitative characteristics of the research subject, which allows to determine the essence of the institution under study, the possibility of the regulatory impact of industry legislation on the state of law and order in the Republic of Kazakhstan. In the scientific analysis undertaken by the authors, the principles of complexity and consistency are consistently carried out and productively combined, which made it possible to more fully, scientifically actualize the issues of criminological problems of domestic violence against women.

Results and discussion

Overall , the overwhelming majority of victims of domestic violence worldwide are women, and it is women who tend to experience more serious forms of violence.

In 2017, the sample survey on violence against women included the following objectives: The survey was designed to provide important data on prevalence, violence against women, the impact of violence on women's health and well-being, and women's access to help. (Committee on Statistics of the Ministry of National Economy of the Republic of Kazakhstan, 2017)

This sample survey made it possible to obtain answers to the following questions:

1. What is the prevalence and frequency of physical violence against women aged 18 and over? Who are the main culprits?

2. What is the prevalence of violence against women aged 18 and over by non-intimate partners? Who are the main culprits?

3. What are the consequences of domestic violence for various aspects of women's lives? To what extent does violence affect women?

4. What family and individual factors are associated with the occurrence of various forms of partner violence against women?

5. What actions / coping strategies do women use when responding to violence? Are there specific people or organizations that they would rather turn to for help?

This study was conducted using qualitative and quantitative components, including a 12 focus groups, 14 provinces and 2 cities of the Republic of Kazakhstan and 14 342 women interviewed. Participants identified several factors that, in their opinion, are the reasons for the use of violence by men against women. Alcohol abuse (almost all victims of violence and men who committed violence indicated that violent acts were committed while intoxicated), economic problems and lack of work in men, which result in psychological stress and displacement of disorder on a woman, were named. It is widely believed that in some cases women themselves provoke violence, or do not have the knowledge and skills to resolve and reduce the intensity of conflicts ending in violence. Page 49

The study found that some women have a higher risk of becoming a victim of domestic violence, mainly:

- women with a low level of education;
- women who are not currently employed or have never worked;
- women with children and economically dependent on their husbands;
- women with low self-esteem;
- women who do not have sufficient legal literacy.

At the end of 2009, in accordance with paragraph 15 of the Concluding Observations of the UN SIDO Committee (UN Committee on the Elimination of Discrimination against Women) , the Republic of Kazakhstan adopted the Law "On the Prevention of Domestic Violence". By this law, employees of the internal affairs bodies are empowered to issue protective orders against persons committing offenses aimed at protecting the rights of victims.

According to the Kazakh authorities, the number of complaints of domestic violence in 2018 increased by 104 percent compared to 2015. (Manshuk Asautai, 2019)

According to the results of a study conducted with the UN, about 17 percent of women have experienced physical or sexual violence by their partner in their life , and one in five – psychological. One third of the women surveyed complained about the manifestation of control by men.

To analyze the offenses committed in the Republic of Kazakhstan, consider the data on the offenses committed for the reporting period from January 2020 to December 2020 . (Table 1)

Table 1 – Ministry of Internal Affairs of the Republic of Kazakhstan, 2021; Information service Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan, 2020

Offense	Number of offenses registered in the ERDR	Offenses committed against women
Article 99 of the Criminal Code of the Republic of Kazakhstan Murder	629	133
Article 107 of the Criminal Code of the Republic of Kazakhstan Intentional infliction of moderate harm to health	2634	671
Article 106 of the Criminal Code of the Republic of Kazakhstan Intentional infliction of serious harm to health	1925	234
Art. 120 of the Criminal Code of the Republic of Kazakhstan Rape	595	584
Art. 110 of the Criminal Code of the Republic of Kazakhstan Torture	32	22
Art. 73 CAO RK Unlawful actions in the field of family and domestic relations	229	229
The number of criminal offenses committed in the family and household sphere	1071	-

Based on the official data of the Committee on Legal Statistics and Special Accounts of the Republic of Kazakhstan, out of 5815 reported offenses, 1664 were committed against women.

At the same time, according to information posted by the media portal Polisia.kz, September 3, 2020, only in Almaty the number of crimes against women has been reduced by more than two times. According to the local police service, since the beginning of the year, the registration of crimes against women has been reduced by 2.2 times in Almaty, including: – causing grievous bodily harm – by 2 times; – infliction of average harm to health – by 14.9%; – rape by – 2 times; – theft – 2.6 times; – robberies – 3.1 times; – robberies – 2.3 times; – hooliganism – by 49.2%; – fraud – by 18.8%. In the field of family and household relations, 15 crimes have been committed since the beginning of this year with the same period. 13 of them were committed after joint consumption of alcoholic beverages, 4 – on the basis of jealousy, 8 – by spouses, 5 – by cohabitants, 4 – by close relatives. Total in 2020, criminal offenses in the family and domestic sphere made – in 1071 , compared to the year 2019, where similar offenses committed – 1049 .

Turning to the global statistics presented in the report of the UN " Global murder investigation in 2019", we see: in consequence of domestic violence 34 % of women killed by intimate partners, 24% of women killed by other members of the family, 42% of women killed persons is not schimisya family. (Graph 1)

In accordance with Figure 1, the analysis covers the percentage of women killed in 2017 in the 5 region ah – Africa, America, Asia, Europe and Oceania. Although almost six out of every ten women (58 %) intentionally killed worldwide are killed by an intimate partner or other family member, there are marked differences in this proportion between these regions.

In four of the five regions, this proportion is very high, making the home the most likely place to kill a woman. At the upper limit , more than two-thirds of all women (69 %) intentionally murdered in Africa are killed by intimate partners or other family members, while the lowest proportion of women killed by intimate partners or other family members was in Europe (38%). Oceania has the highest proportion of women murdered by exclusively intimate partners, 42% , and Europe has the lowest, 29 % .

Some countries in the Americas have very high rates of homicide related to crime (mainly organized crime), which means that the proportion of homicides related to family relations and homicides involving intimate partners among all homicides is lower than in other regions x, although the number of victims is still high (46%). With the exception of Oceania, the difference in the proportion of murders committed by an intimate partner or other family members (63%) and murders committed by an exclusively intimate partner (42%) is less noticeable between regions.

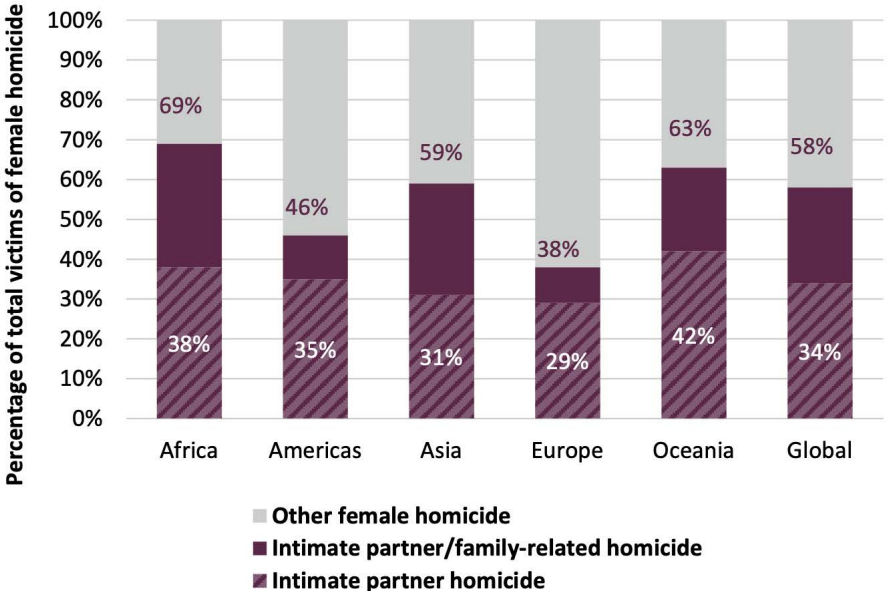

Figure 1 – UNODC "Global study homicide 2019", Booklet 5, Vienna 2019: 17

Although murder by an intimate partner or other family member is the most important factor in understanding the extent of female mortality, this form of murder accounts for only a relatively small proportion of all murders (male and female) recorded worldwide. Despite the fact that women and girls account for a much smaller share of the total number of homicides than men, they bear the largest burden of family-related homicide. Thus, 81% of murders worldwide occur only among men, while only 19% of murders are committed against women. At the same time, 64% of women die at the hands of roommates and other family members, versus 36% of killed men. At the hands of only intimate partners , 82% of women died against 18% of killed men.

Meanwhile, offenses committed in the family and domestic sphere, have a latent second nature, as in real life, the facts of violence is much more than that becomes known to law enforcement agencies and the public.

This is primarily due to the fact that women often hide the fact of violence against them by their spouses. In addition, a significant number of victims are reconciled, reject their initial statements, or refuse to undergo a medical examination. In this regard, it becomes difficult for law enforcement agencies to collect the necessary material, as a result, this serves as a basis for refusing to initiate a criminal case.

Questioning of women in all regions of Kazakhstan , carrying out th Ministry of the Interior showed that the main cause of violence in the family are the property disputes and jealousy.

Thus, most of the respondents or 34% indicated the cause of domestic violence – property disputes, 26% – pointed to jealousy of spouses, 25% – to alcoholism, 12% – interference of other persons in the family life of spouses, 7% – answered about the occurrence of disagreements between spouses.

Analysis showed that about 70-75% of illegal actions in the sphere of family relations, have committed are in apartments, houses and other residential buildings, yards and their surroundings, that is, where the victim , it would seem, should feel secure.

More often, violent crimes of the analyzed category are committed in rural areas, more than 60%. Only 40% of violent crimes against women are recorded.

The participants believe lack of work with abusers, since they are only punishable when their acts become known to law enforcement.

Thus, citizen I. and citizen N. have been married for 16 years, during the years of marriage they had three children, aged 16, 10 and 1.5 years. During the entire marriage, citizen I. was subjected to systematic beating by her husband, according to her, she did not apply to the law enforcement agencies and suffered violence in order to save her family.

Unfortunately, this behavior is typical for victims of domestic violence. Returning to theory and practice , in such situations, the victim accepts such

an attitude towards himself as part of family and domestic relations , often being in material or mental dependence on the partner. While the offender considers such an attitude towards the victim justified and believes that his actions will not become public due to social and moral principles, or knowing that the victim will not turn to law enforcement agencies, thus, this gives rise to impunity for the illegal deeds.

In the case of citizen I., after 16 years of family life, systematic beatings, humiliation and insults, their eldest son became a victim of her husband. In the winter of 2020, a 16 year old boy was admitted to hospital with a fractured collarbone due to beating. D alley, under the rules, health professionals sent the information to law enforcement agencies to i to a criminal complaint on this fact was recorded in the material ERDR. However, even after that, citizen N. persuaded citizen I. to keep the family in the name of the children and their future.

At the same moment citizen I. filed a statement of claim for divorce. She was forced to hide with her children from the persecution of her husband. 5 months later, after unsuccessful attempts by the court to reconcile the spouses, in the summer of 2020 their marriage was dissolved, citizen N. was not deprived of parental rights, which allowed him a month later to take three children for a walk, including the youngest child who was breastfed. After the walk, he returned the older children, took the younger and took them away in an unknown direction, turned off the phone and did not get in touch anymore. Citizen I. was in a helpless state and completely unaware of the whereabouts of her child. The law enforcement agencies referred to the fact that the law had not actually been violated, the father had the right to communicate and be with his children, the case was not accepted for proceedings. After 5 days, he returned the child to the mother. Today, she is fighting for full custody of the children and for the restriction from communication with her ex-husband on the basis of the Law.

Another story is Inkar Kenzhebaeva , who lives in a crisis center today . At the age of 25, she met a man on the Internet , after a month of epistolary communication, she found out that he was in prison, but still continued to communicate with him and decided to wait for his release, and they got married in prison . After three years of waiting, they met, at the end of August 2016, he took Inkar away from home , a year later , the woman found out that her husband was making money illegally, five months later he was detained, he soon returned home, after another month he began to drink. After another drink of alcohol, he pounced on Incar with an ax . At that time, they already had a daughter, he tore her out of the woman's hands and threw her on the bed, after which he escorted the woman out into the street and threatened to hack to death. That night, she managed to escape from him and hide in a nearby building. In the morning she returned home, he no longer remembered what had happened, but he asked for forgiveness and promised not to repeat this again. That night, among other things, he beat her. Inkar told her husband that she did not believe him and was leaving him, but her husband persuaded her to stay and for the sake of his daughter again promised not to do this. She stayed. The woman developed fear, she was afraid of her husband, according to her, she kept asking him for forgiveness. Over time, he stopped letting Inkar go home to his mother and forbade him to communicate with everyone, including her younger brother and sister. Threatened that something would happen to her. Once again, when her husband was drunk, he heated oil on the stove and poured hot oil on her legs. A month later, the wounds healed, but all this time he did not let the woman out of the house and did not even allow her to go to the hospital. That same night, he conducted an electric current along the fence around their house so that Inkar could not escape. Since then, Inkar has been repeatedly beaten by her husband. For the sake of her daughter, Inkar endured everything. One day he took her to the river e " Almatinka " and told him to swim after , a woman came out of the water, he attacked her with a knife, struck 23 hit in the head, after which he decided to hang it and remove it all on camera, but wanted her to do it herself, to make it look like suicide, and not to be accused . Inkar agreed, he put on gloves and put the rope around her neck. She was about to die and kicked the stool under her feet. Out of surprise, he ran up and cut the rope, saying that he was not going to kill her, but only wanted to torment her. Immediately asked her to make him coffee, Inkar covered in blood – and saw her daughter began to cry, the woman took the child in his arms, th e husband started watering them with water, not paying attention to the fact that in the hands of her child. Since then, Inkar says, her daughter has been afraid of water. The woman tells the story six months after the incident , in March 2020 , her head wounds did not heal for a long time, she had to shave her hair. The wounds have healed. A man is serving a sentence in prison for a term of 2.5 years for the rape of another woman. Today Inkar is 31 years old.

The husband of another woman is at large, she, like Inkar, lives in a crisis center. We met a man in 2012, since then we have been living together, in

2013 a son was born. The man began to beat the woman for crying a child. In 2016, they entered into a legal marriage, their second child was born. However, the beatings and binges did not end. The third child was born in 2017 with cerebral palsy (cerebral palsy). The woman gave birth to him with a hematoma of the uterus – the result of beating by her husband. Repeatedly applied to similar centers in her hometown, Uralsk, lived several times, came to the center in Almaty in the direction of inspectors. The man even beat her for the open front door or for talking on the phone. As the woman says, she forgave him for the sake of three children and a daughter with a diagnosis, she did not know where to go. Nevertheless, several times she left him for her parents, her parents did not want her to return to her husband, they said that he would not change. The first time he beat her, she was very scared and did not go to the police. Subsequently , the police received complaints from the woman and today she is in a crisis center.

The story of the fourth woman, who is also in a crisis center, began with her marriage. He was married, at first everything was fine. After a while, the husband began to drink and raise his hand to her. The woman forgave him all the time. After ten years of marriage, the woman decided to leave the man, since she had nowhere to go, she turned to one of the crisis centers in Almaty. It was very difficult for her, but the center helped her. After that, the woman decided to return to her husband and give him another chance, she represented family life, there are still children. But nothing happened, and the woman returned to the center again. For the sake of children and the future, he wants to leave everything behind and start a new life.

What we see women ‘s return to his aggressor or not go at all, for one reason or another : children, financial dependence, fear of loneliness, social customs and traditions , which do not allow because of their beliefs to soberly assess the situation and to protect themselves and their parents female victims to keep their daughters safe from potential murderers. From a victimological point of view, these women create a victimized situation for themselves , that is, a situation with certain initial events that contribute to their transformation into a real victim, regardless of their will, deliberately ignoring objective circumstances. The main danger of domestic violence and violence in general is that a woman is at the highest risk of dying. Women cannot stand up for themselves, since they are physically weaker than men by several times, but as reality shows, not only physically, but also from a social point of view.

How is a woman protected today? Many social experiments, social surveys and other studies show that 9 out of 10 women are faced with the idea of how not to become a victim and return home safe and sound. For example, returning home, they think about what to protect themselves from available means, what safer route to take on the way home.

Returning to the topic of domestic violence, even if a woman is able to stand up for herself and defend herself from a rapist, such defense often ends in failure for the aggressor, the cost of such defense is life. Thus, a woman runs the risk of changing her status as a victim to a murderer, serving a sentence in accordance with criminal law.

Consider another, more difficult situation, when a woman, defending herself, harms the health of the aggressor, regardless of the severity. The psychology of the rapist is structured in such a way that a woman who defended herself and her life falls into the trap of a manipulator-aggressor and he threatens to turn to law enforcement agencies or make himself a victim of domestic violence in the eyes of friends, relatives or the public. In such a situation, they try to convince a woman that she is in an absolutely helpless position – she has nowhere to go, she will not prove anything, no one will believe her, because in most such cases, the male aggressor has an almost perfect reputation, a pleasant social and moral character. In such a situation, of course, a woman must finally make a strong-willed decision and get away from the aggressor by any means, and that even if she has nowhere and no one to go to, there are always people and services that will help her. Comprehensive work to improve the effectiveness of the fight against domestic violence against women comes to the rescue in such situations: the creation of centers to support victims of violence, the dissemination of information about their existence, the availability of methods of communication with such centers, the provision of psychological assistance to women and children , legal and other support women victims of domestic violence at first, while law enforcement agencies are dealing with the aggressor.

To date, in the Republic of Kazakhstan, in order to prevent family and domestic violence, increase the efficiency of legislation and improve the services provided for victims of violence, Family Support Centers, crisis centers, shelters, as well as the National Commission on Women and Family and Demographic Policy under To the President of the Republic of Kazakhstan.

The National Commission for Women Affairs and Family and Demographic Policy under the President of the Republic of Kazakhstan is an advi-

sory and advisory body. One of the tasks of which is the elimination of violence in the family and in the workplace and the introduction of international experience in combating violence against men, women and children;

Crisis Centers ALE "Union of Crisis Centers" unites 18 organizations from 12 regions of the country. The work of the Union is aimed at preventing gender-based violence and all forms of discrimination, forming a culture of non-violent relations in society. Hotline at 150. The members of the union of crisis centers are:

Aktobe city:"Umit", Women's Support Center;

Kyzylorda city:"Jean" Day shelter for victims of domestic violence at the "Society of Women small business." ;

Petropavlovsk city:"Women's Support Center";

Ust-Kamenogorsk city: "Center for Development and adaptation "Phoenix";

Shymkent city: "Association of Business Women of the South Kazakhstan region", Legal Center for Women's Initiatives " SanaSezim", "Aruanalar";

Zhambyl area, city Sarykemer: "Otandastar "

Kokshetau city:"Development and support of psychological culture"

Zhezkazgan city:"Tomiris";

Temirtau city: "Center for Development and Social Assistance to the Population "My House".

In the city of Almaty there are:

Er Azamat ",

"Tin Challenge Kazakhstan",

"Shelter" program,

"Life Line";

"Center for Social and Psychological Rehabilitation and Adaptation for Women and Children" Rodnik ". Helpline: +7 727 396 19 38 .

Shelter "Arasha ». Helpline : +7 727 317 57 17.

Public Fund "NE MOLCHI KZ". Helpline: +7 705 151 0000

Today, heads of crisis centers and public figures demand the criminalization of domestic violence.

Let us consider the normative interpretation of unlawful acts in the framework of family and domestic relations, that is, those acts in which the subject of the offense is a natural, sane person who has reached the age of criminal and administrative responsibility and is in family and domestic relations with the victim, as well as punishment and other measures, measures applied to the offender, measures to protect the victim from violence.

The legislation of the Republic of Kazakhstan provides for administrative responsibility for unlawful acts in the field of family and domestic violence. Part 1 of Article 73 of the Code of Administrative Offenses reads: " Obscene language, insulting harassment, humiliation, damage to household items and other actions expressing disrespect for persons who are in family and domestic relations with the offender, disturbing their peace of mind, committed in an individual residential house, apartment or other dwelling, if these actions *do not contain signs of a criminally punishable act* , – entail a warning or administrative arrest for up to five days. »Acts committed repeatedly within a year after the imposition of an administrative penalty on the basis of h1. Article 73 of the Code of Administrative Offenses of the Republic of Kazakhstan entails administrative arrest for up to 10 days, however, administrative arrest cannot be applied to pregnant women and women with children under the age of fourteen, persons under the age of eighteen, disabled persons of groups 1 and 2 , as well as women over the age of fifty-eight years old, men over sixty-three years old and men raising children alone under the age of fourteen, a fine of five monthly rates is applied to these persons.

At the same time, in accordance with Article 20 of the Law of the Republic of Kazakhstan "On the Prevention of Domestic Violence", in the absence of grounds for administrative detention and grounds for procedural detention of a suspect in a criminal offense, as well as in order to ensure the safety of the victim, authorized persons are issued a protective order that prohibits the commission of domestic violence, against the will of the victim, to search for, harass, visit, conduct oral, telephone conversations and enter into contacts with him in other ways, including minors and (or) disabled members of his family. The protective order is in effect for thirty days from the moment of its delivery to the person in respect of whom it was issued. Compliance with the order of protection is reviewed at least once every seven calendar days. Violation of a protective order entails administrative liability in the form of a warning or administrative arrest for up to five days. (Article 461 of the Administrative Code of the Republic of Kazakhstan).

So, for committing domestic violence, which does not contain signs of a criminal offense – a warning or arrest for 10 days.

Repeated offense within a year – administrative arrest for 10 days, or a fine of 5 MW, as of the time of the study – 13,890 tenge.

Other acts committed by the aggressor against the victim are qualified under the articles of the Criminal Code of the Republic of Kazakhstan.

To date, in the Republic of Kazakhstan is the question of adoption of the law "On Combating domestic violence", which is defined lit. legal,

economic, social and organizational bases of activity of state bodies, local governments, organizations and citizens of the Republic of Kazakhstan on counteraction to family and domestic violence .

Conclusion

Summing up the results of this study, the issue of combating and preventing domestic violence is acute. The analysis of the above data showed that offenses in the studied area are committed every day, women are in a vulnerable situation, despite the legislative norms that protect their rights and freedoms. In this regard, we propose to consider complex measures of a theoretical, practical and imperative nature as one of the most effective methods of combating domestic violence. The family is the most important institution of civil society in Kazakhstan.

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ПРЕСТУПЛЕНИЯ, СОВЕРШАЕМЫЕ В ОТНОШЕНИИ НЕСОВЕРШЕННОЛЕТНИХ В Г. АЛМАТЫ

Преступления против детей включают физическое и эмоциональное насилие, пренебрежение и эксплуатацию. Преступления, связанные с детьми, часто совершаются родителями, родственниками, опекунами и другими лицами, которым поручена их забота и руководство. Школьные должностные лица, врачи, полицейские и другие подобные представители власти обязаны сообщать о любых признаках жестокого обращения или эксплуатации в отношении ребенка.

В статье рассматривается общая характеристика преступлений в отношении детей и состояние преступности в отношении детей в г. Алматы. Не только в Казахстане, но и во всем мире в последние годы все более актуальной становится проблема насилия над детьми.

Преступление против жизни, здоровья, половой неприкосновенности и половой свободы несовершеннолетних – это умышленное, противоправное деяние, предусмотренное УК РК, причиняющее вред нормальному развития подрастающего поколения.

Защита прав, свобод и законных интересов несовершеннолетних, обеспечение надлежащего их нравственного и психического развития, зашита их от преступлений являются неизменными и важнейшими направлениями уголовной политики государства.

Несовершеннолетние в силу особенностей физического и психического развития более, чем иные категории людей, подвержены различным негативным воздействиям, что может стать основой развития их личностной девиации. Ежегодно тысячи детей становятся жертвами преступлений.

Ключевые слова: преступление, несовершеннолетний, жертва, жертва преступлений, виктимология, преступления против несовершеннолетних, статистика, ювенальная виктимология.

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Crimes committed against juveniles in Almaty

Violations against children incorporate physical and enthusiastic mishandle; disregard; and misuse. Guardians, relatives, gatekeepers, frequently commit violations including children and others endowed with their care and direction. School authorities, specialists, police officers, and other such specialists are required to report any signs of mishandle or abuse of a child.

The article looks at the Common characteristics of violations against children and the state of wrongdoing against children within the nation. In later a long time, the issue of savagery against children has ended up increasingly pressing not as it were in Kazakhstan, but all over the world.

Violation against the life, wellbeing, sexual astuteness and sexual freedom of minors could be a ponder, illicit act beneath the criminal code of the Republic of Kazakhstan that hurts the ordinary advancement of the more youthful era.

The security of the rights, flexibilities and genuine interface of minors, guaranteeing their legitimate ethical and mental improvement, and securing them from wrongdoing are the perpetual and most imperative bearings of the state's criminal policy.

Minors, due to the idiosyncrasies of their physical and mental improvement, are more vulnerable to different negative impacts than other categories of individuals, which can gotten to be the premise for the advancement of their individual deviation. Thousands of children are casualties of wrongdoing each year.

Key words: crime, minor, victim, victim of crimes, victimology, crimes against minors, statistics, juvenile victimology.

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Алматы қаласы бойынша кәмелетке толмағандарға қатысты жасалған қылмыстар

Балаларға қарсы қылмыстарға физикалық және эмоционалды зорлық-зомбылық, немқұрайдылық және қанау жатады. Балаларға қатысты қылмыстарды көбінесе ата-аналары, туыстары, қамқоршылары және оларға қамқорлық пен басшылық жүктелген басқа адамдар жасайды. Мектеп басшылары, дәрігерлер, полиция қызметкерлері және басқа да осыған ұқсас билік өкілдері балаға қатысты қатыгездік немесе қанаудың кез келген белгілері туралы хабарлауға міндетті.

Мақалада балаларға қатысты қылмыстың жалпы сипаттамалары және елдегі балаларға қатысты қылмыстың жай-күйі қарастырылған. Тек Қазақстанда ғана емес, бүкіл әлемде соңғы жылдары балаларға қатысты зорлық-зомбылық мәселесі өзекті бола түсуде.

Кәмелетке толмағандардың өміріне, денсаулығына, жыныстық қолсұғылмаушылығына және жыныстық бостандығына қарсы қылмыс – бұл ҚР ҚК-де көзделген жас ұрпақтың қалыпты дамуына зиян келтіретін, қасақана, құқыққа қайшы іс-әрекет.

Кәмелетке толмағандардың құқықтарын, бостандықтары мен заңды мүдделерін қорғау, олардың тиісті моральдық-психикалық дамуын қамтамасыз ету, оларды қылмыстардан қорғау мемлекеттің қылмыстық саясатының өзгермейтін және маңызды бағыттарының бірі болып табылады.

Кәмелетке толмағандар физикалық және психикалық даму ерекшеліктеріне байланысты, адамдардың басқа санаттарына қарағанда әртүрлі жағымсыз әсерлерге ұшырайды, бұл олардың девиациялық тұлғаларының дамуына негіз бола алады. Жыл сайын мыңдаған балалар қылмыстың құрбаны болуда.

Түйін сөздер: қылмыс, кәмелетке толмаған, жәбірленуші, қылмыстың құрбаны, виктимология, кәмелетке толмағандарға қарсы қылмыс, статистика, ювеналды виктимология.

Введение

Дети, которые по определению нуждаются в опеке и попечении взрослых, относятся к числу наиболее уязвимых и невинных жертв преступлений.

Жестокое обращение с детьми – это плохое обращение с детьми в возрасте до 18 лет и отсутствие заботы о них (Всемирная организация здравоохранения 2020). Может выражаться в форме физического и/или эмоционального насилия, сексуального насилия, пренебрежения, отсутствия заботы, а также торговли или других форм эксплуатации, способных привести к фактическому ущербу для здоровья ребенка, его выживания и развития (Всемирная организация здравоохранения 2002). Глобальной проблемой с серьёзными пожизненными последствиями является насилие над детьми (Всемирная Организация Здравоохранения, 2010).

«Насилие над ребенком дома или на улице, в школе или в любом другом детском учреждении, в социальной сети – преступления, для которых нет оправданий. Насилие не только несет прямую угрозу для жизни и здоровья ребенка, оно оказывает разрушительное воздействие на будущее общества и государство. Зачастую жестокое обращение носит скрытый характер. Уровень развития государства всегда оценивается через отношение к детям, женщинам, пожилым людям и людям с инвалидностью. Недостаточно только принимать хорошие законы и наказывать виновных. Необходимо, чтобы общество и каждый гражданин проявляли нетерпимое отношение к любым проявлениям насилия. Только объединив усилия, мы сможем добиться безопасного общества для наших детей», – утверждает Эльвира Азимова, Уполномоченный по правам человека в Республике Казахстан (Новый глобальный отчет: половина детей в мире страдают от физического, сексуального или психологического насилия, 2020).

В Республике Казахстан на конституционном уровне закреплено: «Брак и семья, материнство, отцовство и детство находятся под защитой государства. Забота о детях и их воспитание являются естественным правом и обязанностью родителей (Конституция Республики Казахстан 1995). Законодательством созданы правовые условия для защиты детей от всех форм физического или психологического насилия, грубого обращения или эксплуатации, включая сексу-

альное. Так, в Уголовном кодексе Республики Казахстан (далее по тексту УК РК) преступления против несовершеннолетних помещены в Главу 2 Особенной части УК РК «Уголовные правонарушения против семьи и несовершеннолетних».

Материалы и методы

При написании настоящей работы применялись общенаучный, историко-правовой, сравнительный, формально-логический, системно-структурный и другие методы, традиционно используемые в правоведении. В работе использован комплекс частных методик, интерпретированных к характеру исследовательских задач: изучение документальных источников; сравнительно-правовой метод рассмотрения и анализа международно-правовых документов и нормативных правовых актов национального законодательства, регламентирующих уголовную ответственность и назначение наказания несовершеннолетним.

Результаты и обсуждение

Преступления против жизни, здоровья, половой неприкосновенности и половой свободы несовершеннолетних являются общественно опасным явлением, представляют собой одну из наиболее опасных форм антисоциального поведения и вызывают широкий общественный резонанс.

Совершение преступлений против несовершеннолетних способствует росту подростковой преступности. Установлено, что этому способствуют такие явления, как: вовлечение несовершеннолетних в совершение антиобщественных действий, наркоманию, проституцию; отрицательный пример членов семьи, их аморальный образ жизни, пьянство, ссоры, скандалы, переходящие в драки, порождают у детей тенденцию к повторению такого поведения в будущем.

Исследования показывают, что в детях из семей, где преобладают теплые, уважительные эмоциональные отношение к детям, чаще всего формируются такие качества, как коллективизм, доброжелательность, способность к сопереживанию, самостоятельность, инициативность, умение разрешать конфликты, не применяя силу и т.д. И наоборот, психологическое отчуждение родителями ребенка, отсутствие заботы о нем, ласки и тепла в отношениях могут стать причиной криминального поведения. К числу других причин можно отнести пренебрежительное отношение родителей к нравственным и правовым запретам, дурной пример их противоправного поведения (хулиганство, хищения, алкоголизм и т.д.).

Согласно исследованию, более двух третей несовершеннолетних преступников воспитывались в семьях, где постоянно присутствовали ссоры, скандалы, взаимные оскорбления, пьянство и разврат. Каждого восьмого рецидивиста, вставшего на преступный путь в раннем возрасте, в пьянство и совершение преступлений вовлекли родители, старшие братья, родственники. К примеру, 26 июня 2017 года в специализированном межрайоном суде по делам несовершеннолетних г. Алматы рассматривалось дело несовершеннолетнего подсудимого Исмаилова А.Х., который совершил грабеж, т.е. открытое хищение чужого имущества, в группе лиц по предварительному сговору с неустановленным следствием лицом по имени «Шабап», как он утверждает с его дальним родственником (Из архива Специализированного межрайонного суда по делам несовершеннолетних города Алматы № 7530-17-00-1/42). Кроме того, неблагополучная семья оказывает негативное влияние не только на собственных членов, но и на других подростков, с которыми дружат их дети. Таким образом, происходит процесс «заражения» подростков, не принадлежащих непосредственно к данной семье» (Малкова 2006).

Таким образом, высокая степень общественной опасности посягательств влияет на процесс формирования личности несовершеннолетнего.

Конституция Республики Казахстан провозглашает, что детство находится под защитой государства, Декларация прав ребенка устанавливает, что ребенок, ввиду его физической и умственной незрелости, нуждается в специальной охране и заботе (Декларация прав ребенка 1959), Правительство Казахстана совместно с международными партнерами инвестирует в борьбу с насилием в отношении детей и прекращение насилия в отношении детей является приоритетным для ЮНИСЕФ в Казахстане.

Несмотря на это, ежегодно совершается около 2 тысяч преступлений в отношении несовершеннолетних, это истязания, побои, вымогательства, оставление в опасности и треть из них связана с посягательствами на половую неприкосновенность, и более 70% таких преступлений совершаются людьми из близкого окружения, лицами осуществляющими уход за ними (отцами, отчимами, сожителями матери, соседями, близкими родственниками, знакомыми)

(https://www.inform.kz/ru/bolee-400-prestupleniy-svyazannyh-s-nasiliem-nad-det-mi-sovershili-v-rk-s-nachala-goda_a3659626).

Согласно статистике, представленной ниже, в Казахстане жертвами преступлений в 2019 году стали 2 115 детей, что значительно меньше по сравнению с 2015 годом, когда количество жертв преступлений среди детей составляло 3 820 детей. 7 месяцев 2020 года в отношении несовершеннолетних было совершено 1 182 правонарушения, за тот же период 2019 года было совершено 1 405 правонарушений (Статистические данные Управления комитета правовой статистике и специальным учетам генеральной прокуратуры Республики Казахстан).

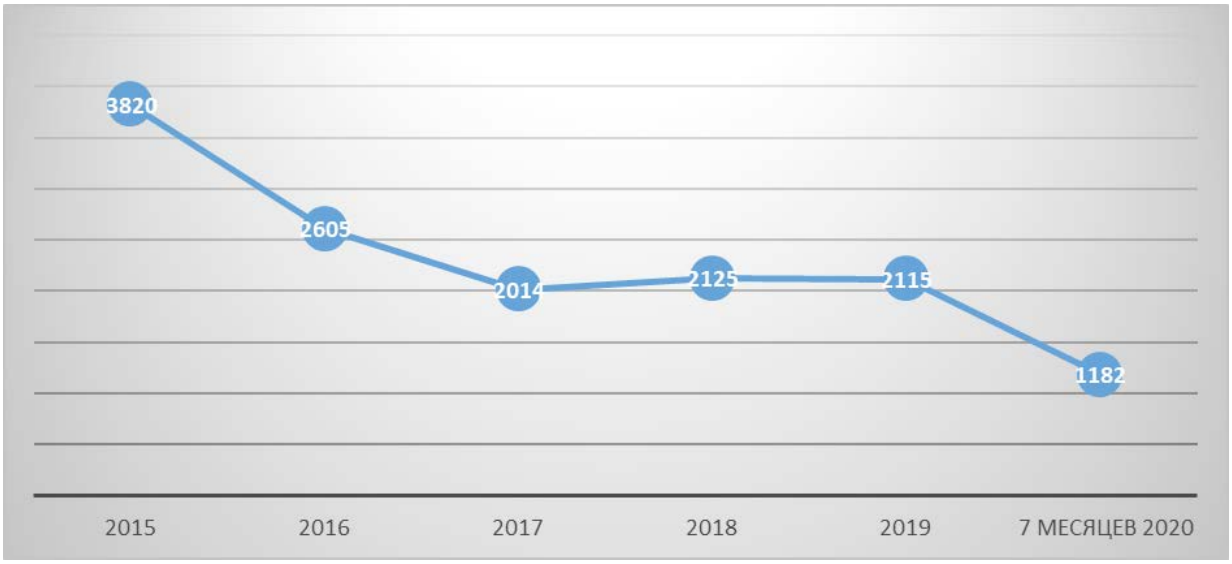

Рисунок 1 – Динамика правонарушений, совершенных в отношении несовершеннолетних с 2015 по 2020 гг.

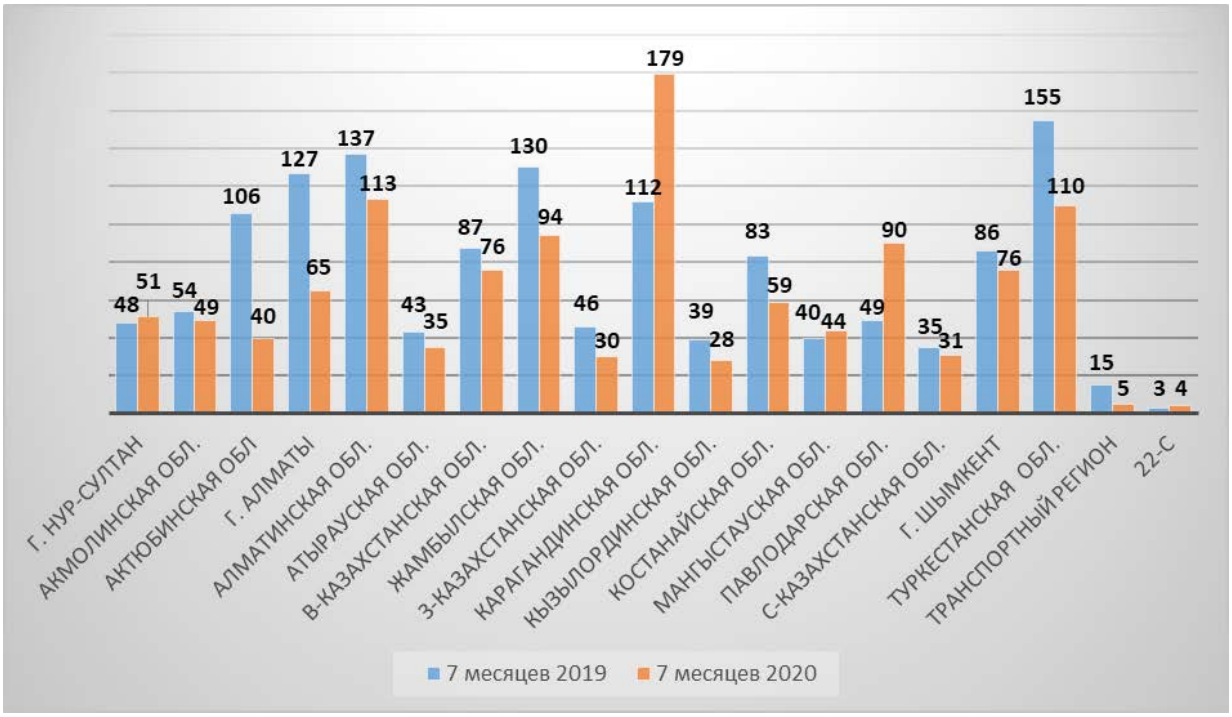

Рисунок 2 – Уровень преступлений, совершаемых в отношении несовершеннолетних в разрезе регионов за 7 месяцев 2019 и 2020 г.

Согласно данным Комитета по правовой статистике и специальным учетам Генеральной прокуратуры РК, за анализируемый период количество правонарушений в отношении несовершеннолетних сократилось на 15,9 %. В разрезе регионов количество правонарушений в отношении несовершеннолетних уменьшилось на 62,3 % (с 106 до 40), в Актюбинской обл. – на 48,8 % (с 127 до 65), в г. Алматы – на 48,8% с 127 до 65 и, наоборот, увеличилось в Павлодарской обл. – на 83,7 % (с 49 до 90), в Карагандинской обл. – на 59,8 % (с 112 до 179) (Статистические данные Управления комитета правовой статистике и специальным учетам генеральной прокуратуры Республики Казахстан).

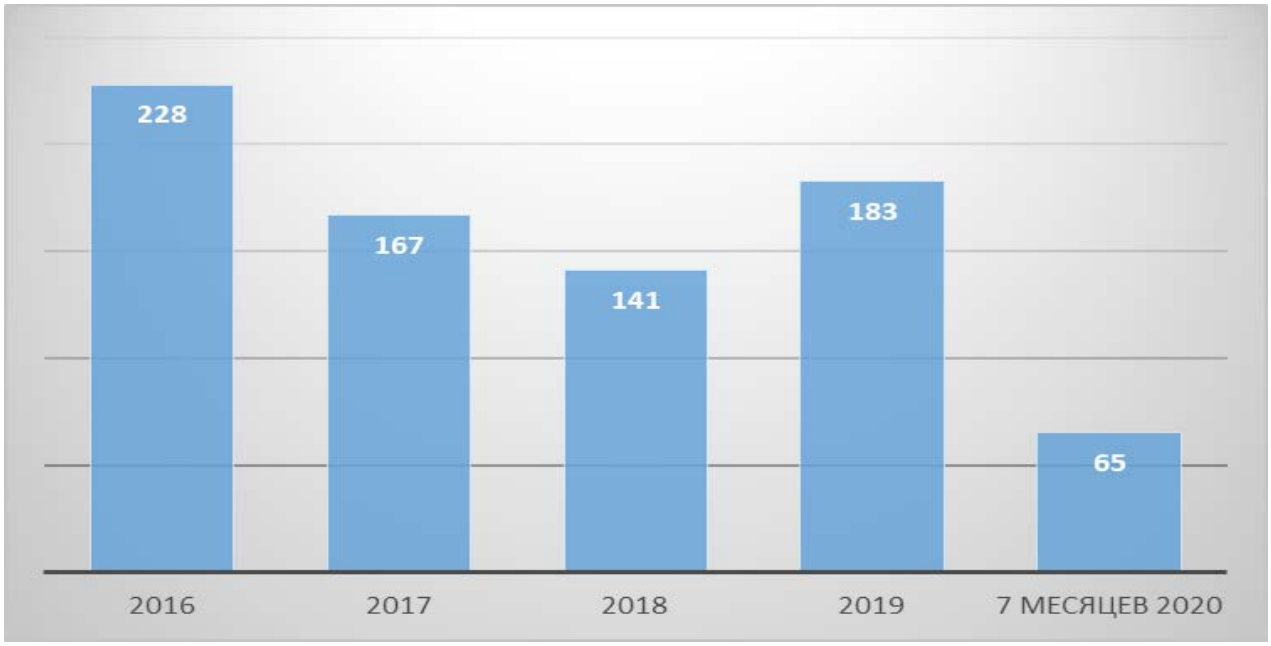

Рисунок 3 – Динамика правонарушений, совершенных в отношении несовершеннолетних по г. Алматы

В динамике за 2016 – 2019 гг. максимальный пик совершения преступлений в отношении несовершеннолетних по г. Алматы наблюдается в 2016 году – 228, а самый низкий уровень в 2018 году – 141. За 7 месяцев 2019 г. и 7 месяцев 2020 г. в г. Алматы идет снижение количества правонарушений в отношении несовершеннолетних на 48,8 %, т.е. с 127 до 65 (Статистические данные Управления комитета правовой статистике и специальным учетам генеральной прокуратуры Республики Казахстан).

По официальной статистике МВД, с января по август 2020 года в Казахстане совершено 550 преступлений против половой неприкосновенности несовершеннолетних. 250 из них – это случаи абсолютного насилия с применением силы, шантажа, угроз, использования беспомощности ребенка. Более половины этих преступлений совершают люди из близкого окружения ребенка. Жертве, как правило, не больше 14 лет (https://liter.kz/mvd-s-nachala-goda-soversheno-550-prestuplenij-protiv-polovoj-neprikosnovennosti-nesovershennoletnih/).

Сексуальное насилие над ребёнком – это насилие взрослого человека или старшего подростка над ребёнком с целью сексуальной стимуляции (Child Sexual Abuse. Medline Plus. U.S. National Library of Medicine 2008).

Сексуальное насилие – одно из самых отвратительных проявлений жестокого обращения с ребенком. Оно оказывает сильное травмирующее воздействие на психику ребенка, его последствия могут быть длительными и в дальнейшем могут оказывать влияние на различные сферы его жизни. Среди насильников есть очень молодые люди, неспособные к зрелым сексуальным контактам, и старые – изолированные, одинокие, не имеющие условий для нормальной половой активности, обездоленные и социально неприспособленные, не умеющие строить удовлетворяющих их от-

ношений. Нередко бывает так, что насильник в своих кругах считается человеком с отличной репутацией, не вызывающим никаких подозрений. Виновниками различных сексуальных злоупотреблений в отношении детей очень часто являются люди, которые сами когда-то подверглись такого рода насилию. В связи с латентностью сексуальных преступлений, статистика сексуального насилия в отношении детей противоречива и ненадежна (Алексейченко, 2013: 44-52).

Рисунок 4 – Категорий преступлений по г. Алматы

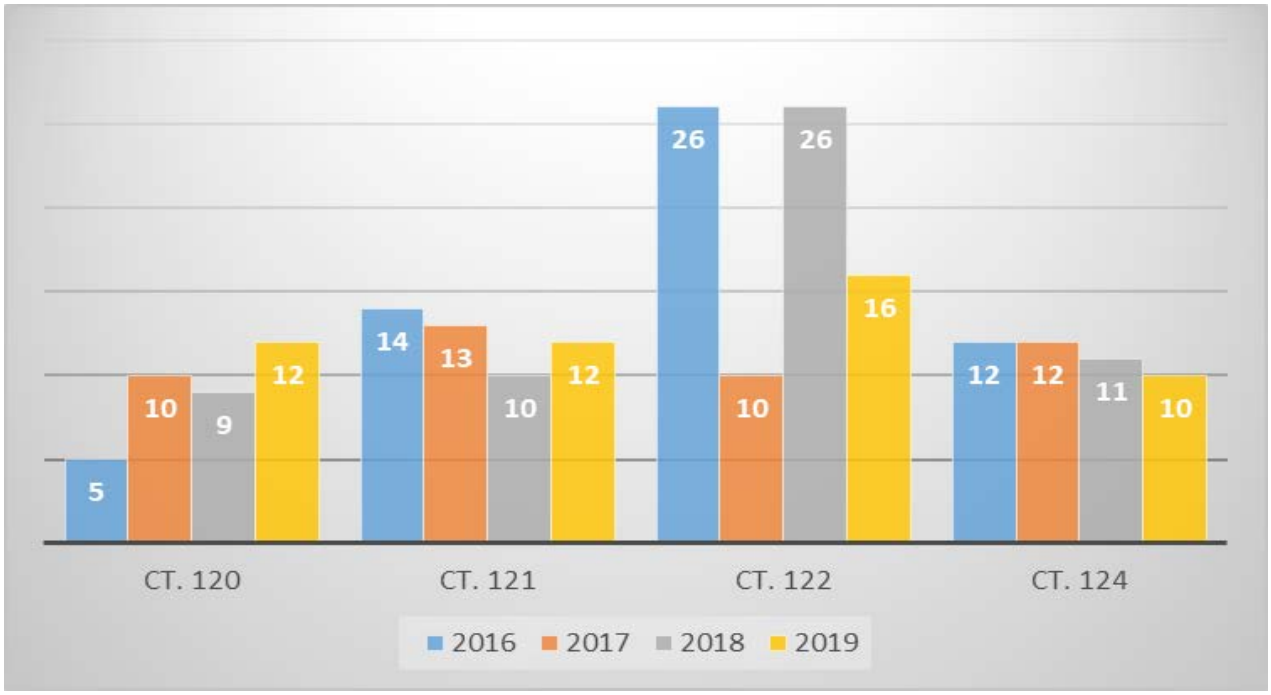

Рисунок 5 – Правонарушения, совершенные в отношении половой неприкосновенности несовершеннолетних по г. Алматы за 2016 – 2019 гг.

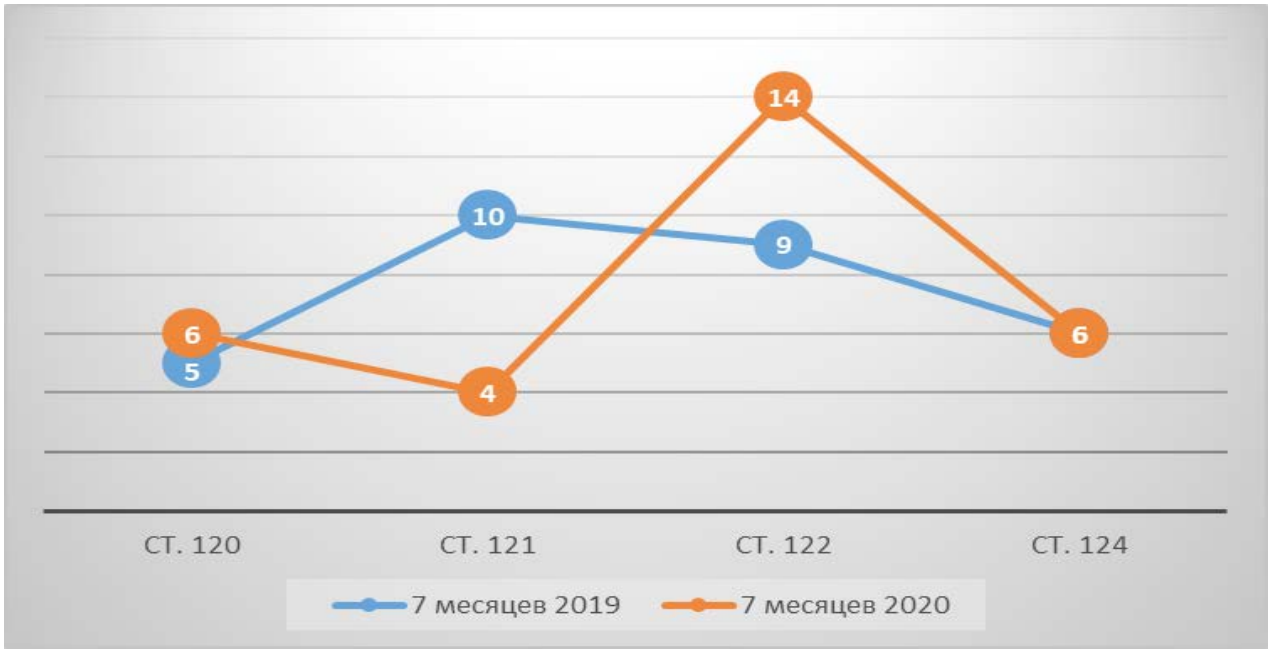

Рисунок 6 – Правонарушения, совершенные в отношении половой неприкосновенности несовершеннолетних по г. Алматы за 7 месяцев 2019 года и 7 месяцев 2020 года

Несмотря на снижение числа преступлений, связанных с половой неприкосновенностью несовершеннолетних, их число все равно остается высоким. В городе Алматы в 2019 году было совершено 50 преступлений против половой неприкосновенности несовершеннолетних, с начала 2020 года было совершено 60 преступлений против половой неприкосновенности, из них 30 – против половой неприкосновенности несовершеннолетних.

Основная доля анализируемых уголовных правонарушений, совершенных в отношении несовершеннолетних, приходится на ст. 122 УК РК «Половое сношение или иные действия сексуального характера с лицом, не достигшим 16-летнего возраста».

Не все из этих девочек подверглись насилию, большая часть из них добровольно вступала в сексуальные отношения с ровесниками либо с взрослыми лицами.

Добровольное вступление в сексуальные отношения несовершеннолетних, не достигших шестнадцатилетнего возраста, свидетельствует об их отклоняющемся поведении в сексуальной сфере, выражающемся в увеличении сексуальной активности, снижении возраста начала половой жизни, упадком нравственности взрослых людей и духовной деградацией самих несовершеннолетних (https://riss.ru/article/7494/).

За 2015 – 2020 годы количество осужденных за совершение уголовных правонарушений против половой неприкосновенности несовершеннолетних составляет 1 868. По статье 120 УК РК осуждено 387 чел., по статье 121 УК РК 408 чел., по статье 122 УК РК 771 чел., по статье 123 УК РК 1 чел., по статье 124 УК РК 301 чел. (Сведения о количестве лиц, осуждённых за совершение уголовных правонарушений против половой неприкосновенности несовершеннолетних 2020).

«Несмотря на общее ежегодное снижение, к сожалению, в отношении несовершеннолетних такие преступления продолжают совершаться. И это естественно вызывает негативную реакцию и тревогу у общественности. Учитывая, что данные преступления влекут тяжкие последствия, отрицательно сказываются на здоровье и психике потерпевших, особенно малолетних, способствуют распространению разврата и снижению культуры общества. Ужесточение ответственности за совершение таких преступлений на фоне общей гуманизации уголовного законодательства является вполне оправданным», – сообщил начальник Следственного комитета Санжар Адилов на брифинге СЦК (https://liter.kz/22204-2/).

Заключение

27 декабря 2019 года Президент РК Касым-Жомарт Токаев подписал Закон «О внесении изменений и дополнений в некоторые законодательные акты по вопросам совершенствования уголовного, уголовно-процессуального законодательства и усиления защиты прав личности».

В соответствии с принятыми поправками изнасилование и насильственные действия сексуального характера вновь переведены из категории средней в тяжкую. Кроме того, согласно поправкам, за изнасилование и совершение других насильственных действий сексуального характера, а также за убийство малолетних детей предусмотрена ответственность в виде лишения свободы на срок от 20 лет до пожизненного заключения (https://24.kg/biznes_info/139717_vkazahstane_ujestochili_nakazanie_zaprestupleniya_protiv_nesovershennoletnih/). Также, установлена ответственность за недоносительство, укрывательство или фальсификацию фактов педофилии. Теперь это также считается тяжким преступлением с максимальным лишением свободы – 6 лет.

Однако до стадии наказания доходят не все дела. Из этих 4836 уголовных дел за пять лет только по 1868 людям был вынесен судебный приговор – это 39 % (https://cabar.asia/ru/kazahstan-tolko-po-39-ugolovnyh-del-po-nasiliyu-v-otnoshenii-nesovershennoletnih-vynosyat-sudebnye-prigovory/).

«Мы увлеклись гуманизацией законодательства, при этом упустив из виду основополагающие права граждан. Нужно в срочном порядке ужесточить наказание за сексуальное насилие, педофилию, распространение наркотиков, торговлю людьми, бытовое насилие против женщин и другие тяжкие преступления против личности, особенно против детей», – президент Казахстана Касым-Жомарт Токаев (Послание Главы государства народу Казахстана 2019).

В большой степени росту насилия над детьми способствует не только неготовность общества открыто обсуждать эту проблему, но и нежелание жертв насилия придать сам факт огласке. Иногда такие преступления длятся годами, жертвы их родственники умалчивают и предпочитают. Иногда родитель жертвы обвиняет ребенка в провоцировании или участии в сексуальных действиях. Это же характерно и для физического насилия, когда родитель ответственность за то, что «сорвался», перекладывает на ребенка – «сам заработал».

Это приводит к стойким личностным изменениям, которые препятствуют способности ребенка реализовать себя в будущем.

Последствиями пережитого в детстве насилия могут быть чувство вины, самообвинения, ночные кошмары, бессонница, страхи, связанные с воспоминаниями о насилии, низкая самооценка, сексуальные расстройства, хронические боли, химические зависимости, самоповреждения, суицидальные мысли, соматические расстройства, депрессия (Roosa 1999), посттравматическое стрессовое расстройство (Widom 1999), тревожность (Levitan 2003), другие психические расстройства.

Важнейшим условием формирования личности «трудного» подростка в большинстве случаев являются отрицательные семейные условия, алкоголизм родителей или родственников, их аморальное поведение. У детей, родители которых ведут антиобщественный образ жизни, часто наблюдаются значительные отклонения в поведении, проявляется стойкая корыстная или насильственная ориентация (Игнатенко 1996: 190).

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6-бөлім

ХАЛЫҚАРАЛЫҚ ҚАТЫНАСТАР ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ

Section 6

INTERNATIONAL RELATIONSHIPS AND INTERNATIONAL LAW

Раздел 6

МЕЖДУНАРОДНЫЕ ОТНОШЕНИЯ И МЕЖДУНАРОДНОЕ ПРАВО

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СУДЕБНАЯ СИСТЕМА СИНГАПУРА (опыт работы в пандемию 2020 года)

Задача постоянного повышения эффективности правосудия продолжает быть актуальной ввиду ее многогранности и растущего запроса общества. В целях продолжения данной дискуссии в статье проведен анализ судебной системы Сингапура через призму ее судоустройства и судопроизводства.

Цель работы – проанализировать практические решения исследуемой юстиции, осветить положительный и отрицательный опыт.

Научная и практическая значимость исследования заключается в том, что выявлена положительная практика повышения уровня доступности и открытости правосудия. В результате, представляется возможной имплементация норм зарубежного права ввиду близости возникающих потребностей судебных систем, как в России, так и в Казахстане.

Методологическая основа: формально-юридический метод, синхронный и диахронный методы, а также общенаучные методы познания.

Приведен краткий обзор юстиции Сингапура, в том числе, опыт внедрения в данную систему электронных технологий. Автор показывает, что внедрение данных технологий и умеренная децеремонизация некоторых элементов судебного разбирательства позволяет снизить бюрократические и материальные издержки, а также более эффективно и безопасно в условиях пандемии 2020 года использовать трудовые ресурсы суда и остальных лиц, участвующих в деле.

Ключевые слова: электронный суд, автоматизация судопроизводства, доступность правосудия, интернет.

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Singapore's judicial system (experience in the 2020 pandemic)

The task of constantly improving the efficiency of justice continues to be relevant due to its versatility and the growing demand of society. In order to continue this discussion, the article analyzes the judicial system of Singapore through the prism of its judicial system and judicial proceedings.

The purpose of the work is to analyze the practical solutions of the studied justice, to highlight the positive and negative experience.

The scientific and practical significance of the study lies in the fact that there is a positive practice of increasing the level of accessibility and openness of justice. As a result, it seems possible to implement the norms of foreign law due to the proximity of the emerging needs of judicial systems, both in Russia and in Kazakhstan.

Methodological basis: formal legal method, synchronous and diachronic methods, as well as general scientific methods of cognition.

A brief overview of the Singapore justice system, including the experience of implementing electronic technologies in this system, is given. The author shows that the introduction of these technologies and reasonable deterimental some elements of the trial allows to reduce the bureaucratic and material costs, as well as more efficiently and safely in a pandemic 2020 use human resources of the court and other persons involved in the case.

Key words: electronic court, automation of legal proceedings, accessibility of justice, internet.

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Сингапур сот жүйесі (2020 жылғы пандемиядағы жұмыс тәжірибесі)

Сот төрелігінің тиімділігін үнемі арттыру міндеті оның көпқырлылығы мен қоғамның өсіп келе жатқан сұранысына байланысты өзекті болып қала береді. Осы пікірталасты жалғастыру мақсатында мақалада Сингапурдың сот жүйесін сот құрылысы және сот ісін жүргізу призмасы арқылы талдау жүргізілді.

Жұмыстың мақсаты – зерттелетін әділет органдарының практикалық шешімдерін талдау, оң және теріс тәжірибені көрсету.

Зерттеудің ғылыми және практикалық маңыздылығы сот төрелігінің қолжетімділігі мен ашықтығы деңгейін арттырудың оң практикасы айқындалғанында болып отыр. Нәтижесінде Ресейде де, Қазақстанда да сот жүйелерінің туындайтын қажеттіліктерінің жақындығына байланысты халықаралық құқық нормаларын имплементациялау мүмкін болып отыр.

Әдістемелік негіз: формальды-құқықтық әдіс, синхронды және диахрондық әдістер, сондай-ақ танымның жалпы ғылыми әдістері.

Сингапурдың әділет саласына қысқаша шолу, оның ішінде осы жүйеге электрондық технологияларды енгізу тәжірибесі келтірілген. Автор бұл технологияларды енгізу және сот процесінің кейбір элементтерін қалыпты түрде жою бюрократиялық және материалдық шығындарды азайтуға, сондай-ақ 2020 жылғы пандемия кезінде соттың және басқа да адамдардың еңбек ресурстарын тиімді және қауіпсіз пайдалануға мүмкіндік беретінін көрсетеді.

Түйін сөздер: электрондық сот, сот ісін жүргізуді автоматтандыру, сот төрелігінің қолжетімділігі, интернет.

Введение

В результате укоренения в социальных, в экономических и в иных потребностях общества и государства информационно-коммуникационных технологий наблюдается устойчивая тенденция к внедрению данных технологий в существующие формы осуществления правосудия, а также во вспомогательные механизмы судебного делопроизводства, как в Республике Казахстан, так и в Российской Федерации. Внедрение новых механизмов работы неизбежно сталкивается с необходимостью нивелирования рисков, которые объективно нельзя исключать. В этом случае, как справедливо отмечает профессор И.И. Рогов, допустима имплементация зарубежного опыта (Рогов 2016:). Близкую позицию занимает и профессор В.Д. Зорькин, говоря о том, что при модернизации внутригосударственной системы правосудия не зазорно использовать умеренную рецепцию, опыт, выдержавший проверку временем (Зорькин 2018:5).

При этом, несмотря на безусловные общие элементы судебной системы, берущие свое начало из общеизвестной теории Ш.Л. Монтескье, необходимо учитывать обоснованное замечание профессора В.В. Момотова о том, что «жизнь любого правопорядка, как и жизнь каждого человека, уникальна» (Момотов 2017: 17).

Предмет работы – законодательные и иные нормативные правовые акты, а также позиции правоведов, устанавливающие и развивающие доступность, непосредственность, открытость правосудия в исследуемой стране.

Цель работы – сформировать практические предложения по повышению доступности правосудия путем модернизации внедренных информационных технологий.

Переходя к анализу опыту Сингапура, стоит отметить, что система Сингапура в 2019 году отметила свое двухсотлетие. И в настоящее время обоснованно может считаться одной из признанных фаворитов по успешному внедрению информационных технологий в свою судебную систему. Изучение опыта выстраивания судебной модели этой страны представляется весьма важным, как для определения направлений дальнейшего развития судебной системы, так и для сравнения способов функционирования уже существующих механизмов осуществления правосудия.

Материалы и методы

Методологическую основу исследования составили: формально-юридический метод исследования, который проводится с целью формулирования практических рекомендаций по развитию и совершенствованию законодатель-

ства, синхронный и диахронный методы сравнения, которые позволили выделить проблемные вопросы.

Рассмотрены пути повышения таких основополагающих принципов как доступность, открытость, непосредственность юстиции. В том числе, путем пересмотра подходов к использованию уже функционирующей на межведомственном уровне системы видеоконференцсвязи (далее – ВКС) не только между государственными судами. Также в статье приведены примеры возможного использования положительного опыта развития системы электронного документооборота.

Основная часть

Судебная система Сингапура состоит из двух уровней: The Supreme Court (Верховный суд Сингапурас, далее – ВС Сингапура) и State Courts (государственные суды). С 7 марта 2014 года Subordinates courts (нижестоящие (подчиненные) суды) были переименованы в The State Courts (государственные суды). В качестве оснований к переименованию отмечалась необходимость дополнительно подчеркнуть их высокую значимость для общества введу того, что по подавляющему числу споров тяжущиеся обращаются именно в эти суды. ВС Сингапура состоит из Высокого суда и Апелляционного суда, и является высшим звеном судебной системы по уголовным, гражданским и экономическим спорам. Высокий суд Сингапура функционирует в качестве суда первой и апелляционной инстанции. Как суд апелляционной инстанции он рассматривает жалобы на акты, принятые государственными судами.

Апелляционный суд рассматривает апелляции на акты, принятые Высоким судом по уголовным, гражданским и экономическим делам в качестве суда первой инстанции.

В состав государственных судов первоначально входят такие суды как: магистратские (мировые) суды, окружные суды и коронерские суды (https://perma.cc/Z2SX- UFCL).

Магистратские (мировые) суды рассматривают гражданские дела по искам на сумму не более 60 000 долларов. По уголовным делам данные суды рассматривают дела, в которых максимальный срок тюремного заключения не превышает пяти лет или наказание ограничено только штрафом.

Окружные суды рассматривают гражданские дела, сумма иска которых составляет от 60 000 и до 250 000 долларов или до 500 000 долларов для исков о дорожно-транспортных происшествиях, или исков в отношении телесных повреждений, возникших в результате несчастных случаев на производстве. По уголовным делам данные суды рассматривают дела, в которых максимальный срок лишения свободы не превышает 10 лет.

Коронерский суд рассматривает уголовные дела, а именно случаи внезапной или неестественной смерти, или в случае, когда причины смерти неизвестны.

Чтобы обеспечить быстрые, менее дорогостоящие и более неформальные процессы разрешения мелких претензий и споров, в 1985 году были дополнительно учреждены специализированные трибуналы для различных типовых споров – трибуналы мелких тяжб. В дальнейшим количество специализированных судов расширилось, и уже в 2015 году были учреждены трибуналы по разрешению споров в сообществах (трибуналы по разрешению общественных споров), а в 2017 году учреждены претензионные трибуналы для разрешения споров вытекающих из трудовой занятости граждан. Трибуналы мелких тяжб рассматривают иски на сумму, не превышающую 20 000 долларов или 30 000 долларов, если обе стороны дают письменное согласие в отношении споров, возникающих из таких договоров как: купле-продажи, оказания услуг, а также правонарушений в отношении ущерба, причиненного имуществу и из договоров аренды жилого помещения на срок до двух лет. Трибуналы по разрешению споров в сообществах рассматривают иски на сумму не более 20 000 долларов по спорам между соседями, касающихся правонарушений, связанных с вмешательством в пользовании жилых помещений. Претензионные трибуналы предоставляют работникам и работодателям быстрый и доступный способ разрешения споров, связанных с заработной платой и неправомерными действиями при увольнении, не превышающие 20 000 долларов или 30 000 долларов для споров, регулируемых трехсторонним посредником. В то же время, с точки зрения субъектного состава сторон, государственные служащие, самозанятые и моряки не подпадают под юрисдикцию данных судов введу наличия альтернативных механизмов разрешения споров.

Некоторые окружные суды и мировые суды также относятся к специализированным судам, в том числе, суд сообщества, дорожный суд и ночные суды.

Суд сообщества рассматривает уголовные дела в отношении несовершеннолетних правона-

рушителей (в возрасте от 16 до 21 года), правонарушителей с психическим заболеванием, дела с участием правонарушителей в возрасте 65 лет и старше, в случаях бытового насилия, магазинных краж, жестокого обращения с животными, случаев, которые вытекают из проблем расовых отношений.

Дорожный суд рассматривает нарушения, вытекающие из его названия. К таким категориям дел относятся вождение в нетрезвом виде, ложный вызов дорожной полиции и по некоторым другим делам.

Отдельно стоит остановиться на так называемых ночных судах. Такие суды рассматривают административные правонарушения, в том числе, и нарушения правил дорожного движения. В системе государственных судов Сингапура функционируют два ночных суда, каждый из которых рассматривает определенную категорию дел. К компетенции первого относятся споры, вытекающие из предписаний, принятых различными государственными ведомствами, такими как Совет по жилищному строительству и развитию, Управление городской застройки, Совет Центрального фонда обеспечения персонала и Управление бухгалтерского учета и корпоративного регулирования. К компетенции второго относятся споры, связанные с правонарушениями в области дорожного движения. Отличительной особенностью этих судов является график их работы с понедельника по четверг, и рабочий день начинается с 18:00. Такой режим работы полностью оправдывает их необычное, на первый взгляд, название.

Особое место в судебной системе занимают дела по рассмотрению споров, вытекающих из семейного права. 1 марта 1995 года были созданы суды по семейным делам, как часть государственных судов для рассмотрения вопросов иждивения, жестокого обращения с детьми. С 1 апреля 1996 года дела о разводе, раздельном проживании были переданы из Высокого суда в суды по семейным делам. В 2014 году для более полного удовлетворения потребностей семейного правосудия Суды по семейным делам были реструктурированы и стали существовать в качестве отдельной под ветви судебной системы, известного как суды по семейным делам. С 1 октября 2014 года в структуру судов по семейным делам входят семейное отделение Высокого суда, суды по семейным делам и суды по делам несовершеннолетних.

Таким образом, распределение компетенций между вышеперечисленными звеньями судебной системы Сингапура в основном происходит на основании предметного состава спора. Особенностью Сингапурской модели правосудия является наличие разнообразных специализированных звеньев судебной системы. С точки зрения судопроизводства, обращает на себя внимание то, что до обращения в трибуналы мелких тяжб необходимо пройти обязательную досудебную процедуру медиации, и только в случае не прихода к консенсусу дело передается на рассмотрение в суд.

Результаты и обсуждения

Переходя к опыту внедрения информационно-коммуникационных технологий в Сингапуре, стоит отметить, что еще в 1996 году Лорд Вулф в общеизвестном докладе Access to justice («Доступ к правосудию») отмечал, что «электронные технологии позволят, с одной стороны, оптимизировать и усовершенствовать действующие модели правосудия, а с другой – скорее всего постепенно превратятся в мейнстрим для дальнейших реформ. Такие технологии в скорой перспективе станут ядром модели правосудия. В связи с чем уже сейчас заслуживают особого внимания на самом высоком уровне» (https://www.goodreads.com/book/show/1632182.Access_to_Justice).

С 1997 г. в судах Сингапура применяется электронная система подачи документов (Electronic Filing System; далее – EFS), и, что не менее интересно, кроме электронной подачи документов, система позволяет получать судебные акты в электронном виде.

Кроме того, такой порядок взаимоотношений тяжущихся с судом первоначально был добровольным, но спустя всего три года, применение этой формы обращения в суд было признано успешным, и электронная форма взаимодействия с судебной системой стала носить императивный характер (http:// mstreamlegal.com/ uploads/ upload_ legal_ research_ centre/ lntegrated% 20Litigation% 20system.pdf).

Продолжая развивать цифровые технологии, судебная система Сингапура модернизировала механизм обработки входящей корреспонденции. В результате, был автоматизирован процесс первичного анализа поступающих в суд документов, как на предмет их соответствия минимальным требованиям к содержанию документа и его приложению, так и с точки зрения категории спора. Прошедшие такую проверку документы автоматически распределяются конкретному судье. Такая автоматизация привела к

значительному сокращению времени на принятие документов и снижению практики ошибочного распределения дел, а также нивелировался вопрос хранения архива суда (Malik, 2007: 53).

В качестве результатов двух вышеуказанных модернизаций были разрешены следующие задачи: ускорение делопроизводства; частично решена проблема человеческого фактора, в том числе, и проблема нехватки сотрудников суда; сократилось рабочее пространство в виду уменьшения штатных единиц вспомогательных служб суда и помещения, как для их рабочих мест, так и для хранения документов в бумажном виде; появилась возможность автоматического отслеживания движения документов; повысился уровень прогнозирования потенциальных проблем, к примеру, вытекающих из постоянно меняющихся объемов тех или иных категорий дел (http:// research.osgoode.yorku.ca/ iapl2007).

Платформа EFS позволила создать популярные у сторон сервисы, связанные с доступом к базе данных судебных дел, начиная от поиска даты и времени судебного заседания и заканчивая получением электронного образа окончательного судебного акта (http:// app.supremecourt.gov.sg.). Отметим, что для многих моделей правосудия продолжают быть актуальными такие технологические решения, которые позволяют, не выходя из дома в любой момент времени всем заинтересованным лицам получить объективное представление о ходе рассмотрения судебного дела и одновременно нивелировать человеческий фактора со стороны сотрудников суда.

Важная роль в повышении уровня доступности правосудия отведена и официальным сайтам судов, на которых представлена различная информация, сгруппированная в зависимости от субъекта, который к ней обращается: профессионального защитника или тяжущегося, который решил обратиться к системе самостоятельно, а также информация для представителей общественности и СМИ. По аналогии с официальными сайтами в России и Казахстане для получения доступа к вышеперечисленным электронным услугам, необходимо пройти соответствующую регистрацию. Данные официальные сайты государственных судов, кроме предоставления вышеописанных услуг, являются одним из элементов единого механизма, целью которого является нивелирование конфликтов в обществе. В результате, пользователь сайта может, не используя дополнительные ресурсы, а в рамках сайта переходить на другие платформы. К примеру, введены отдельные разделы, посвященные вопросам медиации и аналогичных механизмов разрешения споров. В данных разделах уже сейчас предоставлена возможность так называемой онлайн-медиации.

Безусловно, все вышеперечисленные новшества обладают одним существенным недостатком в виду того, что не могут быть распространены на все слои населения. Однако, законодатель в Сингапуре предложил следующий механизм решения данного вопроса. Когда тяжущиеся не обладают необходимыми навыками работы в Интернате или не имеют для этого технической возможности, то для них стали функционировать сервисные бюро (Service Bureau), специалисты которого оказывают необходимую помощь. В то же время, сотрудники такого бюро не обладают правами на осуществление юридической помощи. В результате, вся ответственность за содержание текстов документов возложена на тяжущихся (http:// www.lawgazette.com.sg/ 2000-2/ Feb00-20.htm).

Дальнейшим шагов в этом направлении видится перестройка работы всех электронных сервисов, с которыми непосредственно взаимодействуют «обычные» люди, на возможность их эксплуатации не с персонального компьютера, а со смартфона. Такая позиция вытекает из фактических обстоятельств в виду того, что в настоящее время все чаще у человека есть в пользовании смартфон и далеко не всегда компьютер. Данный подход дальнейшего развития электронного документооборота уже взят на вооружение рядом зарубежных юрисдикций, в частности, в Англии и Канаде (https://perma.cc/2XMY-P6D8).

В сингапурских судах электронные технологии продолжают постепенно встраиваться в судопроизводства. Здесь обращает на себя внимание реализация, так называемой, «концепции императивных приказов», устанавливающей для лиц, участвующих в деле, определенные процессуальные сроки. Основные элементы такого механизма уже внедрен, как в процессуальные кодексы Российской Федерации, так и Республики Казахстан. Отличительной особенностью механизма, применённого в Сингапуре, является его автоматизация (http:// www.aseanlawassociation.org/10GAdocs/). В результате, проверка исполнения сторонами, установленных судом пресекательных сроков на совершения тех или иных процессуальных действий (сроков представления документов и т.д.) осуществляется в автономном режиме, и, как следствие, исключение человеческого фактора со стороны судьи или аппарата судьи в виде отсутствия обязанности

в ручном (рутинном) режиме отслеживать процессуальные сроки, не говоря о высвобождении рабочего времени у самого ценного элемента судебной системы – судей и работников суда.

Еще одной отличительной особенностью работы Сингапурской судебной системы является наличие общего правила проводить предварительные судебные заседания через ВКС, а не «вживую». Необходимо, однако, отметить, что это правило не носит императивный характер, и лицам, участвующим в деле, предоставлена возможность провести заседание непосредственно в залах судебных заседаний. Более того, данные залы оснащены различными средствами коммуникации. К примеру, стороны могут воспользоваться компьютерными системами. Также предоставлена возможность подключить персональный носитель информации, в результате этого представители могут декларировать остальным участникам процесса оцифрованные доказательства, презентации и т.п. Такой технологичный подход к организации рабочего пространства лиц, участвующих в деле, и их представителей обосновывается, с одной стороны, принципом равноправия сторон путем выравнивания положения сторон в процессе, а с другой – преследует цель повышения объективности суда, для которого теперь является нормой применение сторонами таких технологий. К примеру, для повышения объективного понимания, с чем столкнулись участники дорожного движения в момент совершения ДТП, какая была погода, как располагались элементы благоустройства, дорожные знаки или какое положение было у автомобилей после ДТП, в Сингапуре теперь возможно не путем изучения схемы дорожного движения (нарисованной инспектором от руки), а в лучшем случае фото-таблицы мест повреждения автомобилей из экспертного заключения, а путем просмотра интерактивной карты местности или фотографий и записей видеорегистраторов. Опыт Сингапура в данном направлении не является «приятным» исключением. Подобные технологии уже активно внедряются в США. В результате, суд непосредственно во время судебного разбирательства использует различные спутниковые программы, например, программу: «Google Планета Земля» для детального трехмерного изучения изображений перекрестков и улиц на экране в зале судебного заседания.

Сингапурская судебная система прибывает в непрерывном поиске наиболее эффективных механизмов осуществления правосудия. В связи с чем, еще в 2006 году была образована лаборатория iCourtLab для проведения экспериментов с прогрессивными технологическими решениями в целях повышения эффективности модели правосудия (http:// www.aija.org.au/ Law&Tech%20 08/ Papers/). В результате, судебная система начала сотрудничать с частными высокотехнологичными компаниями, предоставив им площадку для проведения натурных испытаний продукции, основанной на наукоемких технологиях и технических решениях в области информационных процессов. Таким образом, получила новый толчок развития синергии с частным сектором экономики.

Положительным решением внедрения вышеприведенных информационно-коммуникационных технологий стало их незаменимость в период пандемии COVID-19 2020 году и для работы судебной системы Сингапура. Основным инициатором по введению неотложных мер выступил ВС Сингапура. «26» марта 2020 года главой ВС Сингапура было принято поручение в отношении дальнейшего функционирования судебной системы страны в период кризиса. Данное поручение содержит различные предписания, отметим наиболее интересные из них. Главным из них являлось принятие решение о том, что суды Сингапура продолжат работу. В рамках профилактических мер, а также с целью повышения уровня безопасности не только лиц, участвующих в деле, но и как отдельно подчеркивалось в вышеуказанном поручении, медперсонала (т.е. медработников, которые были задействованы в ликвидации последствий COVID-19). Во время вспышки пандемии продолжилась расширяться практика применения информационно-коммуникационных технологий для проведения слушаний. В частности, в данном поручении предписывалось, что слушания, в первую очередь, проводились посредством не только ВКС или телефонной связи, но и путем расширения практики использования письменной формы осуществления правосудия. Кроме того, стоит обратить внимание, что последнее из вышеперечисленных решений по пересмотру критериев к применению письменной формы осуществления правосудия, не было единоличной инициативой главы ВС Сингапура, а стало результатам совместной работы с Генеральной прокуратурой Сингапура, юридическим обществом Сингапура и пенитенциарной службой.

В данном поручении содержались предписания и в отношении непосредственно работников суда в виде инструкции по организации их работы в целях снижения риска переноса инфекции,

в том числе, о переводе части сотрудников суда на удаленный режим работы, а в отношении лиц, продолжавших работать в здании суда, как и в отношении посетителей суда, ввелись дополнительные санитарные предписания (https://perma.cc/WA7T-DBHN). В отношении тех судебных заседаний, по которым участие с использованием видеоконференцсвязи или телефонной связи невозможно, глава ВС Сингапура ввел ограничение на число представителей сторон. Кроме того, произошли изменения и в часах приема сторон путем увеличения интервалов между слушаниями, что в итоге привело к объективному увеличению часов работы зданий суда в целом.

С «27» марта 2020 года суды Сингапура начали издавать соответствующие дополнительные инструкции для сотрудников суда, в которых содержатся подробные требования об использовании ВКС и телефонных конференций для различных видов слушаний в зависимости от категории дела (https://perma.cc/K5CE-9YW4).

До начала пандемии в ВС Сингапура уже проводились слушания в режиме ВКС по отдельным категориям дел, находящимся на рассмотрении апелляционного суда и Высокого суда, но в связи с произошедшим кризисом такая форма слушаний была расширена. Особенностью расширения данного формата стало то, что теперь во время судебного процесса судьи будут находиться не только в залах судебных разбирательств, расположенных непосредственно в суде, но и также дистанционно, например, дома, как и остальные участники процесса (https://perma.cc/WA7T-DBHN).

В качестве программного обеспечения для работы ВКС была задействована не только специально разработанная платформа «PTCs», но и введу объективной перегрузки данной системы, начиная с «30» марта 2020 года слушания стали проводиться с использованием общедоступных платформ, таких как «Zoom» и т.д.

Необходимо, однако, отметить, что, несмотря на вышеперечисленные меры, уже «05» апреля 2020 года глава ВС Сингапура Сундареш Менон был вынужден принять новое распоряжение по вопросам дальнейшей работы судебной системы в период с «07» апреля 2020 года по «04» мая 2020 года. Из анализа данного распоряжения следует, что принятых мер профилактики заражения COVID-19 недостаточно, и в работу судебной системы вводятся дополнительные ограничительные предписания.

В свете этих обстоятельств суды Сингапура в вышеуказанный временной отрезок фактически частично перестали рассматривать дела, за исключением только тех споров, которые не требовали отлагательств, и опять же акцент делался на том, чтобы по возможности рассмотрение этих дел осуществлялось с применением ВСК или телефонной связи. Для определения единого перечня дел, которые были отнесены к категории неотложных, на официальных сайтах судов были опубликованы соответствующие списки. Все остальные споры, которые не попали в указанные списки, по умолчанию подлежали отложению. Учитывая, что фактически каждое судебное дело является уникальным, был предусмотрен исключительный механизм, согласно которому по заявлению сторон конкретный спор мог быть признано не требующим отлагательств.

Вводились и дополнительные ограничения в части личного приема граждан, а также прием всей, входящей в суд корреспонденции, переводился на дистанционный режим, т.е. в электронный вид или через почтовые отделения связи. Аналогично обстояло дело и с приемом посетителей суда по другим вопросам (https://perma.cc/8WE5-RVQ4).

Кроме вышеперечисленных нововведений, пандемия оказала влияние и на порядок фиксации хода судебного заседания. В судах Сингапура, как и в судах, к примеру, Англии и Французской Республикой запрещена аудио – или видеозапись слушаний без получения соответствующей санкции со стороны суда. Данное ограничение продолжило действовать и при использовании ВКС. Также, там, где слушания проводятся в режиме ВКС, продолжают применяться все судебные правила касающиеся одежды и этикета. Однако, были нивелированы такие церемониальные элементы, как необходимость вставать в начале или в конце слушания, или вставать при обращении в суд, как это было предусмотрено при физическом присутствии в зале суда.

С «08» июня 2020 года слушания по большинству дел были возобновлены. Чтобы эффективней рассмотреть объективно избыточно накопленные материалы судебных дел, судьи ВС Сингапура приняли решение о том, чтобы не уходить в свои традиционные ежегодные отпуска в июне, и такая практика нашла поддержку в судебных составах государственных судов Сингапура.

Подводя итоги работы удаленных слушаний, глава судебной системы обратил внимание на положительные отзывы об использовании видео и телеконференцсвязи для проведения слу-

шаний во время кризиса. По общему мнению, дистанционные слушания были удобны, эффективны по экономии времени на участия в них и представляли собой важное средство, с помощью которого суды могли поддерживать доступ к правосудию.

В свете необходимости сохранение мер предосторожности суды продолжили использовать видео и телеконференции для различных слушаний и после «01» июня 2020 года.

Заключение

Подводя итог по описанному опыту судебной системы Сингапура, отметим, что, как обоснованно подчеркнул профессор М.А. Аленов: «жизнь требует своевременного использования технологических новшеств практически во всех сферах», даже «в такой консервативной сфере, как судопроизводство» (Аленов, 2013:72). Близкую позицию занимает и М. Папация: «учитывая распространение Интернета, внедрение электронных моделей взаимодействия судов и тяжущихся, многие проблемы в этом плане решаются гораздо легче» (Жуйков, 2016:22).

Судебная система Сингапура на данный момент является одной из наиболее высокотехнологичных моделей правосудия, и более двадцатилетний опыт внедрения таких механизмов только дополнительно подчеркивает это обстоятельство. Повсеместный опыт применения ВКС уже шагнул дальше и в настоящий момент позволяет участвовать в судебном заседании, не выходя из дома не только тяжущимся, но и судьям. Более того, этот подход не ограничивает место нахождения сторон и позволяет участвовать в судебном процессе, находясь заграницей. Кроме того, применение автоматизированных технологий, как в отношении документооборота путем повсеместного перевода его в цифровой формат, так и автоматизации процесса отслеживания процессуальных сроков хода судебного заседания, вызывают еще больший интерес к изучению таких технологических решений, носящих универсальный характер, с точки зрения их возможной имплементации в отечественном правосудии.

Отдельно обращает на себя внимание ускоренный и одновременно слаженный подход в совместной работе ВС Сингапура, Генеральной прокуратуры и профессионального сообщества в период пандемии 2020 года. Представляется интересным опыт разделения всех категорий дел на не терпящих отлагательств и на остальные дела с возможностью пересмотра содержательного наполнения данных групп в зависимости от эпидемиологической ситуации в стране, а также с учетом возможности предоставления права лицам, участвующим в деле, вне зависимости от отнесения конкретного дела в ту или иную группу, как говорится «в индивидуальном порядке», активно участвовать в выборе формы, способах и сроках защиты своих прав.

В то же время обращает на себя внимание первоначальная недостаточность подготовки процессуального законодательства Сингапура к подобного рода форс-мажорным обстоятельствам, как минимум, в понимании основных алгоритмов действий. Например, в виде необходимости дополнения процессуальных кодексов положениями о новых основаниях для приостановления производства по делу в силу наступления чрезвычайных ситуаций, а также выработке дополнительных гарантий для тяжущихся в виде приостановления течения процессуальных сроков, таких как для подачи заявлений в суд, для обжалования судебных актов и т.д.

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CONSERVATIVE IDEOLOGY IN THE U.S. SUPREME COURT IN THE 21ST CENTURY

At the beginning of the new millennium, the United States entered a new Republican Party cycle. The competition between the two leading parties in the 2000 elections was more acute than ever. It even resulted in a protracted constitutional and political crisis, when the U.S. Supreme Court had to stop the prolonged recounts in Florida (five votes in favor, four against), which was beneficial to the Republican parties. However, the Republicans managed to strengthen their future positions, and Democrat Barack Obama replaced Republican George W. Bush in the White House only after his two presidential terms.

Should understand American constitutional judicial lawmaking primarily as the Supreme Court's lawmaking as the activity of processing, interpreting, applying, and repealing regulations. Lawmaking activities aim to fill the gaps in legislation and reflect the objective needs of public life. Hence the importance of constitutional judicial lawmaking in human rights and other areas of legal regulation.

As a legal tool, the U.S. Supreme Court uses procedural requirements and arguments in relatively (and specifically) undeveloped and unmodified legislation. The basis of constitutional lawmaking is the U.S. Supreme Court's role in overseeing the implementation of judicial procedures. The requirement to comply with the procedural guarantees included in the U.S. Constitution's text, which coincide with common law's procedural requirements, is given the meaning of constitutional principles by the U.S. Supreme Court.

Thus, there was no reason for conservatism's full triumph in the early 21st century, as in the last decade of the 20th century. This celebration is not visible in the activities of the Supreme Court. Due to the death of W. Rehnquist in 2005, John Roberts, whose biography was very similar to Rehnquist's in terms of close ties to the Washington bureaucracy, filled the Chairman's vacancy.

The Supreme Court of the United States in national minorities' rights until the 2000s, despite the turn to constitutional judicial conservatism, did not move to a complete activism revision. The Court's main goal was not to attack affirmative measures but to interpret state regulation's doctrinal grounds, such as equal protection by law and due process. Still, conservative courts failed to change the role and reformat the meaning of doctrines.

Key words: conservative ideology, conservatism, U.S. Supreme Court, constitutional judicial doctrines, U.S. Constitution, dissenting opinions of U.S. Supreme Court justices, conservative decisions of the U.S. Supreme Court.

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21 ғасырдағы АҚШ жоғарғы сотындағы консервативті идеология

Жаңа мыңжылдықтың басында Америка Құрама Штаттары Республикалық партияның жаңа цикліне кірді. 2000 жылғы сайлауда екі жетекші партия арасындағы бәсекелестік бұрынғыдан да өткір болды. Бұл тіпті ұзаққа созылған конституциялық және саяси дағдарысқа әкелді, онда АҚШ Жоғарғы Соты Флоридадағы дауыстарды қайта санауды тоқтатуға мәжбүр болды (бес дауыс, төрт қарсы), бұл республикалық партияларға пайдалы болды. Алайда, болашақта республикашылдар өз позицияларын нығайта алды, ал демократ Барак Обама республикашыл Джордж У. Буштың орнына Ақ үйге екі президенттік мерзімнен кейін ғана келді.

Американдық Конституциялық заң шығаруды, ең алдымен, Жоғарғы соттың заң шығаруын ережелерді өңдеу, түсіндіру, қолдану және жою қызметі ретінде түсіну керек. Заң шығару қызметі заңнамадағы олқылықтардың орнын толтыруға және қоғамдық өмірдің объективті қажеттіліктерін көрсетуге бағытталған. Бұл адам құқықтары саласындағы және құқықтық реттеудің басқа салаларындағы Конституциялық сот заңының маңыздылығын білдіреді.

Заңды құрал ретінде АҚШ Жоғарғы Соты процедуралық талаптар мен дәлелдерді дамымаған және өзгермеген заңдарға қатысты (және нақты) қолданады. Конституциялық заң шығарудың негізі – АҚШ Жоғарғы Сотының Сот процедураларының орындалуын бақылаудағы рөлі.

Жалпы Заңның процедуралық талаптарына сәйкес келетін АҚШ Конституциясының мәтініндегі процедуралық кепілдіктерді сақтау талабын АҚШ Жоғарғы Соты Конституциялық принциптердің мағынасына береді.

Осылайша, 20 ғасырдың соңғы онжылдығындағыдай 21 ғасырдың басында консерватизмнің толық жеңісіне негіз болған жоқ. Бұл мереке Жоғарғы соттың қызметінде көрінбейді. 2005 жылы У. Ренквисттің қайтыс болуына байланысты, Джон Робертс, оның өмірбаяны Вашингтон бюрократиясымен тығыз байланысы жағынан Ренквистпен өте ұқсас болды, төрағаның бос орнына келді.

АҚШ-тың Жоғарғы Соты ұлттық азшылықтардың құқықтары мәселесі бойынша 2000 жылдарға дейін конституциялық сот консерватизміне бет бұрғанымен, белсенділікті қайта қарауға көшкен жоқ. Соттың негізгі мақсаты оң әрекеттерді сынға алу емес, мемлекеттік реттеудің заңдармен және процедуралармен тең қорғалуы сияқты доктриналық негіздерін түсіндіру болды. Алайда, консервативті соттар доктриналардың рөлін өзгертіп, мағынасын қайта құра алмады.

Түйін сөздер: консервативті идеология, консерватизм, АҚШ Жоғарғы Соты, Конституциялық сот доктриналары, АҚШ Конституциясы, АҚШ Жоғарғы Соты судьяларының ерекше пікірлері, АҚШ Жоғарғы Сотының консервативті шешімдері.

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Консервативная идеология в верховном суде США в 21 веке

В начале нового тысячелетия Соединённые Штаты вступили в новый цикл Республиканской партии. Конкуренция между двумя ведущими партиями на выборах 2000 года была более острой, чем когда-либо. Это даже привело к затяжному конституционному и политическому кризису, когда Верховный суд США был вынужден прекратить затянувшиеся пересчёты голосов во Флориде (пять голосов за, четыре против), что было выгодно республиканским партиям. Однако в дальнейшем республиканцам удалось укрепить свои позиции, и демократ Барак Обама сменил республиканца Джорджа У. Буш в Белом доме только после двух президентских сроков.

Следует понимать американское конституционное правотворчество прежде всего, как правотворчество Верховного суда как деятельность по обработке, толкованию, применению и отмене нормативных актов. Законотворческая деятельность направлена на восполнение пробелов в законодательстве и отражение объективных потребностей общественной жизни. Отсюда вытекает важность Конституционного судебного правотворчества в области прав человека и других сферах правового регулирования.

В качестве юридического инструмента Верховный суд США использует процедурные требования и аргументы в относительно (и конкретно) неразвитом и неизменённом законодательстве. Основой Конституционного законотворчества является роль Верховного суда США в надзоре за осуществлением судебных процедур. Требование соблюдения процессуальных гарантий, содержащихся в тексте Конституции США, которые совпадают с процессуальными требованиями общего права, придаётся Верховным судом США смыслу конституционных принципов.

Таким образом, не было никаких оснований для полного триумфа консерватизма в начале 21-го века, как в последнее десятилетие 20-го века. Этот праздник не виден в деятельности Верховного суда. В связи со смертью У. Ренквиста в 2005 году Джон Робертс, чья биография была очень похожа на биографию Ренквиста с точки зрения тесных связей с вашингтонской бюрократией, заполнил вакансию председателя.

Верховный суд США в вопросе о правах национальных меньшинств вплоть до 2000-х годов, несмотря на поворот к конституционному судебному консерватизму, не перешёл к полному пересмотру активизма. Главная цель суда состояла не в том, чтобы критиковать позитивные меры, а в том, чтобы толковать доктринальные основания государственного регулирования, такие как равная защита законом и надлежащая судебная процедура. Однако консервативным судам не удалось изменить роль и переформатировать смысл доктрин.

Ключевые слова: консервативная идеология, консерватизм, Верховный суд США, конституционные судебные доктрины, Конституция США, особые мнения судей Верховного суда США, консервативные решения Верховного суда США.

Introduction

Since the early 1980s, the Supreme Court of the United States has sought to narrow (reduce, weaken) the guarantees of citizens' constitutional rights, primarily the rights formulated and recognized by judges during the strategy of judicial activism. To this end, the Court consistently revised constitutional judicial doctrines by applying textualism techniques (and other «ingredients» of judicial conservatism).

The concept of «judicial conservatism» when applied to the analysis of the activities of justices of the U.S. Supreme Court looks overly politicized but reflects real political and legal positions. The concept is multi-faceted and represents a system of views, methods, and practical actions with these elements' interdependence. Can attribute the following factors to the main ones:

- Commitment to textualism as a mechanical (literal) interpretation of the U.S. Constitution, judicial self-restraint, and originalism as complementary textualism conceptual approaches;
- Borrowings from the concept of legal formalism with its varieties of «analytical jurisprudence» and «legal process», rejection of sociological jurisprudence, «legal realism» and «judicial activism»;
- Emphasis on the «classical» values of free enterprise with an apology for the inviolability of property and freedom of contract, and, as a result, a negative attitude to state interference in the space of market relations, especially the Federal government;
- Rejection of judicial lawmaking as the power of judges in the process of interpretation to create legal structures to eliminate gaps in legal regulation;
- A conservative political and legal ideology based on the declared independence from public pressure on the Court; non-recognition of a wide range of constitutional rights and their restriction by the «fundamental rights» (property and freedom) of citizens;
- Refusal in words in contradiction with the implementation of lawmaking in the form of legal fiction (Lindquist 2012: 10-12), emphasizing limiting the jurisdiction of Federal courts.

Materials and methods

The object of scientific research is conservative judicial law-making in the United States as one of the US Supreme Court's functions. Scientific work's methodological basis is a set of general scientific and special methods of studying phenomena and processes: the historical and legal method, the functional and sociological method, the comparative-legal method, the logical method, analysis and synthesis, induction, and deduction.

The scientific article is based on the study of English-language sources, including materials of judicial practice, some of which were not previously used by domestic specialists.

Results and discussion

The complex historical and theoretical nature of scientific research predetermined the use of various normative sources. Still, the U.S. Constitution with amendments, the U.S. Supreme Court's decisions on the main areas of law-making activity were of particular importance. It is necessary to highlight the specific significance of judges' special opinions, which are auxiliary sources that allow us to analyze the motivation for making judicial decisions.

Judicial conservatism has developed throughout constitutional history since the formation of the U.S. state. There is a coincidence of traditional conservative values of previous periods and modern values of judicial conservatism. For example, the revival as the only genuine negative concept of human rights, based on an individualistic worldview and non-interference of the state in the so-called «space of freedom». This proves the stability of the ideological and legal basis and the stability of the practice of judicial conservatism.

By the beginning of the 21st century, judicial conservatism elements were more clearly embodied in constitutional practice, primarily weakening constitutional rights – guarantees due to their narrow interpretation. This was the case in criminal proceedings and administrative proceedings, for example, the restriction of the right to judicial review concerning recipients of social benefits (Rossum 2006: 8).

Judicial conservatives oppose the interpretation of equal protection of laws as allowing for legal differentiation, even though traditional differentiation is one of the realities of rights.

At the center of the judicial conservatives, ' efforts were adopting decisions to destroy, equal to other fundamental rights in importance and constitutional guarantees.

The above signs of judicial conservatism are not exhaustive. The above symptoms of judicial conservatism are not thorough. Besides, the last obstacle is politicization when discussing the most important constitutional issues. Moreover, in its conservative composition, with a numerical predominance of judges with conservative views, the U.S. Supreme

Court agreed on some problems with recognizing individual rights and social programs in the «era of activism».

The concept of «new rights» is subject to evolutionary development. In the U.S., the idea of four generations of rights (personal, political, socio-economic, collective) is not in demand, as are other European concepts of human rights. In the 1940s and 1970s, human rights types, particularly social and economic requests, were intensively discussed. Still, at the present stage, the problem of classification of rights has lost its relevance due to the weakening of interest in the previous models of the so-called «social state» (Safonov 2007).

Since the early 1970s, the focus has been on the right to privacy and its derivatives. A group of these rights, which have received a very vague formulation of «new rights», gradually acquires the meaning of the legal «Institute of privacy». There is an opinion that their discussion is a departure of the Court from pressing problems. We must, however, immediately recognize that the dispute about privacy and new rights is essential not only in connection with the massive violations in the sphere of «personal space» and «private life» that take place but also for reasons related to the foundations of constitutionalism, the interpretation of the U.S. Constitution and the desire to give constitutional development a new impetus. Another issue is always «hovering» over the U.S. Supreme Court's discussion on sexual minorities' rights, euthanasia, the right to appeal against police actions, etc. What should consider society's interests and the state the highest state interests, and which rights of citizens are inviolable for state intervention (restrictions)? These issues are mutually determined by each other. The interpretation and creativity of judges select the solution to the problems of judicial practice.

Noting the heterogeneity of aspirations and pluralism of views of the U.S. Supreme Court justices, it is impossible, firstly, to ignore the division into judicial liberals-activists and judicial conservatives, and, secondly, not to recognize the prevailing trend of the strategy of judicial conservatism. It is clear to all American law researchers that without considering the political and legal approach of judges as factors influencing the judicial function's implementation, it is impossible to carry out a legal analysis of the Supreme Court's activities (Pozner 2008: 371-372).

The influence of individual preferences and views of judges, judicial neutrality in the political sense, as a component of the U.S. Supreme Court judges' professionalism also occurs. However, in our opinion, political and legal ideology is an essential factor in the interpretation and lawmaking activities of the U.S. Supreme Court. Although it is in demand, it is impossible to limit itself to the U.S. Supreme Court's normative analysis, allegedly acting outside of ideology and politics. «Mechanical» or «challenging constructivist» interpretation and application of textualism are indeed an essential part of the U.S. Supreme Court's modern judicial conservatism, but only a part. Equally fundamental goals and values, such as reducing the list of rights protected by the Constitution; the desire to weaken the constitutional guarantees of the so-called «new rights» legalized by The Court in the era of judicial activism.

To characterize judicial conservatives and judicial liberal activists, the «party trail» is also essential. The division between judicial conservatives and judicial liberals largely coincides with the political division between Republican Party appointees (judges with predominantly conservative beliefs) and Democratic Party nominees (judges with predominantly liberal-activist and non-interpretative views) (Burns 2009: 99).

The personal factor plays a vital role in the U.S. Supreme Court's judicial strategy in applying and revising doctrinal interpretation. For example, Sandra Day O'Connor, a nominee from the Republican conservative circles, took a balanced and moderate position on several essential Court decisions, relying on public interest in private constitutional law. To a lesser extent, this applies to the influential retired member of the Court, Anthony Kennedy. In comparison with his colleagues from the conservative majority, he voted following the liberal position; for example, he supported the decision to legalize same-sex marriage in 2015. As if refuting the division into judicial conservative and judicial liberal activists, such instances abound in the Court's past composition. Several judges are characterized by a strong commitment to conservative interpretation methods and views by traditional legal philosophy. The late Supreme Court Justice Antonin Scalia, an «informal leader» of conservative-leaning justices and former and current chief judges of the United States Supreme Court. Rehnquist and J. Roberts judge Clarence Thomas, and Samuel Alito.

American authors believe that judges nominated by U.S. Presidents and representatives of the Republican Party emphasize innovations in American law structure and recognize (directly or indirectly) the lawmaking of judges.

Turning to the Supreme Court's activities in the last decade, it is advisable to highlight the main ar-

eas of judicial practice of a conservative orientation to review the doctrinal approaches developed before the early 1980s.

The strategic approach of the U.S. Supreme Court justices is based on the concept of fundamental constitutional rights (to life, liberty, and property), the restriction of which is contrary to the U.S. Constitution, primarily its provision on due process and equal protection by law. They are also referred to as fundamental personal rights. Did not directly reflect citizens' private rights for several reasons, the original version of the U.S. Constitution. They were consolidated after amendments and additions to the Constitution, called the «Bill of Rights» in 1791. However, the Constitution's text and the bill of rights do not provide a clear understanding of the list of individual rights.

An oft-repeated argument is that by the time adopted the U.S. Constitution, and recorded them in the States' declarations of human rights. The reason is the reluctance to talk about slavery, tacitly recognized by the Constituent Convention.

However, the prevailing view is that the right to life, liberty, and property are fundamental personal rights that the state cannot restrict without due process of law. Thus, fundamental rights are guaranteed by procedural guarantees of judicial protection in the event of violations by the government. After adopting the XIV Amendment, due process requirements were eventually interpreted as directed against the States' violations. The critical problem of judicial interpretation was not the claim's object – the States or/and the Federal government. The list of due process rights is more important, taking into account the natural evolution of fundamental constitutional rights.

The state can legally restrict such rights, but only if its actions are dictated by the highest state interest, which is the public interest (the concept of «state interest» is not applicable and has little meaning in the American tradition). The U.S. Supreme Court reviews laws that may lead to restrictions on citizens ' rights for violations of fundamental rights and the existence of an undisputed public interest.

How do we understand the undisputed public, compelling state interest (undisputed and immutable)? It should not be in doubt and, under its indisputability, does not require judicial interpretation. It is difficult to determine the interest of judicial review with methods of interpretation as indisputable and immutable. Theoretically, this is the interest of the state-organizational society, each in the protection of absolute values, such as protecting the coastline, clean air, depleted natural resources, public health, and assistance to the disabled, and the elimination of slum areas with housing. Can abuse these values to the detriment of public interests. The public interest (infrastructure, offshore mining, emergency housing, fight against unsanitary conditions, etc.) if it leads to abolishing fundamental rights is not absolute; it creates a legal conflict. The U.S. Supreme Court seeks a balance between the public interest and individual law of fundamental importance but focuses on protecting the private part. Thus, there are doubts about forced eviction from low-rise or dilapidated houses, the right to provide all citizens with medical insurance through compulsory deductions, and the right to receive unemployment benefits (for people who do not have work experience). In other words, the main goal of the Court is to protect fundamental rights, fix violations that mean unconstitutional actions, contradict the Constitution as the highest source. The Court suspects the restriction of fundamental rights in a particular act of the authorities and requires them to prohibit the relevant action. Under this approach, the right to private property and business freedom is also a real public interest of the state, a public interest (although it is not, without restrictions). According to the author of this article, the undisputed and compelling interest is not limited to «fundamental rights», as they are narrowly defined in conservative judicial jurisdiction.

In the wording of court rulings and doctrinal approaches to the public interest and to the state's inspection powers, American judges from the first half of the 19th century attributed life, health, and public safety as the main goals the country. Simultaneously, as in the period when put the doctrine of inspection powers forward as the basis for state regulation of economic relations, the list of such indisputable constitutional goals, i.e., public order requirements, is not fully defined by the U.S. Supreme Court. From time to time, there are debates in the Court and in the legal community about whether public morals or the common good (in judicial terms, «general welfare» – the General welfare or – the common good) are related to the primary constitutional goals.

Under the strict judicial procedure, the Court presumes any restriction of fundamental rights unconstitutional. The regulation of «fundamental rights» can only be justified by the highest state interest. For example, a threat to public order from a criminal offense requires restrictions on the offender's fundamental rights. Nevertheless, the American legal system's public order concept includes the goals that are usually appropriate for public-legal

regulation and guarantees of property and personal integrity. The judicial interpretation analysis is also complicated because private property and its protection are considered the highest constitutional value and indisputable «public interest».

The highest requirement of public order in the American tradition is protecting fundamental rights as private rights of natural origin. Hence (in addition to the fact that the list is not defined textually) the message of constitutional legitimization, or a kind of «fundamentalization» of new constitutional rights. Among these new rights is the right to privacy, the right to «privacy». This «constitutionalization» (turning into a subjective constitutional right) of privacy with rights derived from it (the right to euthanasia, the right to abortion, etc.), and met with opposition from judicial conservatives and part of the legal community, and society as a whole.

The core of the conservative strategy is an approach to interpretation. Only those rights specified in the text or arise from the authors of the Constitution's intention or original intentions (textualism and originalism) are constitutionally protected. According to judicial conservatives, they should abandon new rights legitimized by applying «due process» as a substantive requirement. The state has to provide them with protection under the «flag» of justice. Argument – the text of the XIV Amendment of the Constitution does not have the purpose and intent of the constitutional requirement to protect a limited list of rights. Moreover, it cannot safeguard non-named rights under amendment XI without recourse to other Constitution provisions.

The arguments of liberal activists, supporters of abortion, euthanasia, sexual minority rights, and other new rights were indeed impeccable, as was the interpretation of the XIV amendment's provisions. Their main argument is that the combination of fundamental personal rights and due process requirements in one phrase proves that the Constitution guarantees all the rights derived from the individual's fundamental rights. There is a point of view about the division of all individual rights into procedural rights (according to due process and according to the provisions of amendments IV to VIII; and these are also personal rights) and so-called «rights to self-expression» (religious freedoms, freedom of speech, press and information). For example, freedom of movement, spouses' divorce, the right to an old-age pension, etc.

Nevertheless, conservative judges have also found it difficult to formulate their legal position. Their usual argument that the constitutional text does not contain a particular individual right is rejected because many other rights recognized by the U.S. Supreme Court, constitutionally legitimized by applying established doctrinal approaches, are not mentioned in the text. American author K. Sunstein noted that with a textual system, it would be necessary to repeal state laws on the use of contraceptives since there is no indication of this in the text of the U.S. Constitution. The problem of contraception is also multi-layered in meaning. Some contraception methods prevent pregnancy from developing after conception, which is theoretically a threat to the right to life. There are grounds for prohibiting contraception (Chemerinsky 2010 a: 326). Of course, it would be extraordinary if recorded some of the modern rights in 1787.

The right to privacy has been at the center of discussion over the past decades. The evaluation of «privacy» by the Russian researcher V. Vlasikhin deserves attention (V. Vlasikhin, 2000 a:55-58). «Privacy», in his opinion, refers to all those aspects of human life that are subject to absolute legal protection from any encroachments from outside (whether by the state or other individuals). This is the intimate world of a person, the sphere of their relationships, including family life, beliefs, personal rights, personal contact, housing, correspondence, reputation, personal, informal relationships with other people, religious and political views. American lawyers also include such concepts as the right of a person to control «their own living space», «their personality», and «information about themselves».

The formation and development of «privacy» are of interest from studying the U.S. Supreme Court's broad interpretative capabilities. Judicial lawmaking of the Court at all stages, especially during «judicial activism», was characterized by flexibility and elasticity. The Court, relying on the IV, XIV, and, to a lesser extent, IX amendments, formulated a new constitutional right of citizens, which is not explicitly stated in the U.S. Constitution's text. Of all the citizens' rights in the United States, «privacy» is the most convincing example of implementing the U.S. Supreme Court's lawmaking function.

The Institute of the right to non-interference in private life (the Institute of privacy) has been formed since the second half of the 1960s. However, the concept of confidentiality appeared earlier. It is estimated that such rights are enshrined in Amendments IV to VIII. «Must not violate the right of the people to guarantee the inviolability of their persons, homes, papers, and property from unjustified searches and arrests» (IV Amendment of the U.S. Constitution). The Amendment's meaning is not only to proclaim guarantees against criminal pros-

ecution but also to fix everyone's right to inviolability from state interference in the difficult-to-define sphere of personal space and private life. If it is a right, then it must protect it in a substantive sense.

The first critical decision on non-interference in private life was Griswold v. Connecticut (Griswold v. Connecticut, 381 U.S. 479 (1965)), where the U.S. Supreme Court, for the first time, came close to recognizing the right not to contradict the Constitution. In the circumstances of the case, the law of the state of Connecticut not only prohibited the use of contraceptives but also extended to spouses. Accordingly, any consultation related to the use of contraceptives was also considered illegal. Because of two center employees for conscious motherhood providing information to a married couple about contraceptives, they were fined by a court decision. The U.S. Supreme Court, which heard the case on appeal, declared the Connecticut law unconstitutional. In the conclusion of the Supreme Court of the United States on this from the mouth of W. Douglas sounded the following words: «We are dealing here with «privacy», which is older than the bill of rights – it is older than our political parties, older than our education system. Marriage is a union that should support a specific order of life, not someone's interests, a Union that should promote well-coordinated experience together, not political programs. This Union should promote mutual loyalty, not economic or social initiatives…» (The judicial majority representative, judge Douglas).

The Supreme Court of the United States in this decision confirmed the ability of the family to independently, without state intervention, determine the order of childbirth. Simultaneously, the Court found the justification for its decision in many fragments of the U.S. Constitution's text, even though the concept of «privacy» is not used in any provision. The Court argued that various constitutional guarantees, such as those in the «semitones» of the U.S. Constitution. The Amendments create the right to form associations, with the freedom of such associations as the family to make decisions. In this sense, privacy is one of these guarantees. In its ban on soldiers ' camping «in any house» in peacetime without the owner's consent, the third Amendment represents another aspect of this «privacy», the inviolability of the home... V amendment in its clause on the inadmissibility of forcing self-incriminating testimony and allows a citizen to form a «privacy» zone, which the state cannot force him to give up... All such cases show that the «privacy» that this case calls for its recognition is legitimate (Vlasikhin 2000 b: 56).

The Court also based its decision on the IX Amendment provisions, where there are grounds for the doctrine of unnamed rights (Zhidkov 1993: 768). Thus, the Court applied a «structural interpretation», invoked several provisions, and recognized the right to privacy as valid.

In 1973, the Supreme Court of the United States made one of the most critical decisions (Roe v. Wade, 410 U. S. 113 (1973)) on the right to abortion. The U.S. Supreme Court, first, to determine whether fundamental constitutional rights are restricted here, and second, to determine whether banning abortion is an undefined state interest has tested state laws prohibiting the right to abortion. In other words, what is consistent with the Constitution – a woman's right to terminate a pregnancy or the obligation to obey the law of the state (state) prohibiting termination of pregnancy in the name of moral goals and women's health?

In privacy, defined the subject of a legal dispute between activists and conservatives to interpret constitutional principles.

In the 1973 Roe v. Wade decision, the U.S. Supreme Court rejected the Texas law banning abortion, but not based on a «light-weight» approach in the context of the relationship between the Federal center and the States regarding the balance of their powers in this area, as was the case with the U.S. Supreme Court several times before. The «activist» majority of the U.S. Supreme Court in 1973 argued that it recognized the right of privacy as a new constitutional right under the prohibition of deprivation of liberty under the due process clause. The Court also turned to the clarifying wording of another decision: «...the right of privacy includes the rights of an individual, whether married or not, to be free from unlawful interference by the state in matters as important as the conception of a child» (Eisenstadt v. Baird 435 U. S. 438 (1972)).

In the Roe decision, when considering the right to abortion, the Court expressed no overriding (indisputable) state interest in preserving the human embryo at an early stage of development. «The prohibition of abortion becomes an undisputed state interest only if the fetus has formed to such an extent that it can survive without the mother's womb», the Court's activist majority argued. According to the main speaker, Judge Blackman, this is due to the embryo's transition to another development stage – the ability to live later. In this case, the deprivation of life is unacceptable, and the state interest in banning abortion becomes immutable. Judge Blackman continued: «But we can't precisely define this point, as it could not be determined, in addition to law,

other scientific areas-medicine, theology, philosophy. We can't rely on their position either. Judges do not have the right to decide this issue independently (about the critical point)» (Cases and Materials: 478).

According to the prominent constitutionalist L. Tribe (Chemerinsky 2010 b: 173), it is not the legislator or the Court that should choose whether to preserve the fetus or have an abortion. A woman, possibly with the help of a doctor, should select this. L. Tribe argued that conservatives' position (human life begins with the appearance of signs of conception and the beginning of the embryo) is formulated not based on a secular morality, medicine, and scientific knowledge. Still, the basis of religious faith. Moreover, the recognition of life from the moment of conception leads to the glory of the prohibition of abortion as an immutable constitutional interest that cannot be challenged.

However, it is indisputable that the Court's language is not absolute, which has led to a new discussion of the issue from the 1970s to the present when the U.S. Supreme Court has chosen privacy as the object of increasing criticism and modification of doctrinal approaches. Attempts to evaluate the normative value of «privacy» are not complete (Johnson J. 1989:157-168). The complexity of the problem is also that the general name combines very heterogeneous rights, interests, and regulation methods in various private life manifestations.

Due to the difficulties of reviewing the Roe precedent, judicial conservatives have developed a strategy other than textualism – cutting and diluting new rights. It is difficult to abolish the right to abortion since the U.S. Supreme Court has repeatedly defended many types of the right to freedom as a fundamental constitutional right (the right to freedom of movement, to attend Church schools, to sterilization, etc.). However, they are not mentioned explicitly in the U.S. Constitution's text and were not discussed by its founders. Some arguments go beyond legal logic but left them out of the brackets since the judges mostly used standard logic in constitutional debates. From the mid-1970s to the present, the U.S. Supreme Court's position has evolved towards restricting the right to terminate the pregnancy as the primary type of privacy law.

Discussed the issue of turning a fetus into a viable being in the context of the abortion ban. In 1992, in the case (Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U. S. 833 (1992)) of Planned Parenthood v. Casey, the Court ruled that a woman who doubts the choice of a solution must agree to state authorities' decision following the law in the interests of preserving the child even before the final formation of the fetus. In other words, it can prohibit abortion at any time, but as an exception. For example, if a woman is charged with excessive responsibility, or, in the Court's terminology, «improper encumbrance of a responsible decision». Besides, the Supreme Court of the United States agreed that the establishment in the law of the state of Pennsylvania of a «waiting period» of 24 hours for a decision is not contrary to the U.S. Constitution.

Therefore, there was a deviation from the legitimacy of the right to abortion, but the U.S. Supreme Court repeatedly returned to the issues under discussion even after this decision. The Court continued to derogate from the right to terminate a pregnancy. If in the Casey decision, the judges allowed that, per the undoubtedly proven results of medical checks and the problematic situation of women, can revoke the right to abortion, then in 2007, in the decision in the case of Gonzales v. Carhart (Gonzales v. Carhart, 550 U. S. 124 (2007)), a new interpretation followed. In this case, after legislative initiatives of the George W. Bush administration to tighten procedures for termination of pregnancy, the Court ruled that if for typical medical reasons, the need to ban abortion covers a significant number of women in labor; the state can pass a law restricting the right to abortion even in the initial stages of pregnancy. The concept of «partial-birth» included in the legislation, according to many authors, is not wholly legitimate and linked to medical expertise. It is used to achieve a ban on abortion under the pretext of improving the psychological state. Nevertheless, it ignores the fact that it is necessary to have an abortion in some cases to preserve women's health.

The trend of restriction has not led to the abolition of abortion rights. Factors such as the change in the Supreme Court's composition in the early 2000s, when the U.S. Congress approved the appointment of two opponents of the abolition of privacy, and the uncertainty of public opinion and the main political forces on this issue played a role. In the U.S. and even more in other countries where the level of medicine is lower. Women's health issues related to the state of health care in the country, the availability of medical services and contraception in a broad sense, and the level of sexual literacy are increasingly coming to the fore. Nevertheless, we repeat that the peculiarity of the standard technologies of the U.S. Supreme Court and the impossibility of «simple» cancellation of precedents, the duration and doctrinal validity of the previous strategy of the U.S. Supreme Court to legitimize the right of privacy, are significant reasons for preserving the

right to abortion. Judicial conservatives, in our opinion, prohibit the right to abortion; it would be necessary to decide not using the methods of text and tradition but using judicial lawmaking. The abortion ban is deduced from the recognition of «non-legal», external, as R. Posner defined factors as the main ones. The ban can be constructed by an allegorical interpretation and judicial interpretation of the provisions, such as social aspects and religious values being highlighted. Nevertheless, this could backfire on the conservatives in Court. After all, they are categorically against «speculation» and non-interpretivism as ways of judicial lawmaking.

There is not much else in the U.S. Constitution that would logically confirm the conservative position of justices like Antonin Scalia and Clarence Thomas. The political factor also plays a role. Thus, according to E. Chemerinsky, judicial conservatives' arguments are based on not only textualism and the need for self-restraint and not only on the protection of property and business. Judicial conservatives are forced to consider the positions of the U.S. Congress and the U.S. President, insurance companies, social protection authorities, and various groups of the population, including minorities, who are subjected to discrimination.

The institution of privacy includes norms governing the issue of recognizing the rights of individuals belonging to sexual minorities and, in the context of privacy, to same-sex marriage. There has been a modified application of the doctrinal interpretation of privacy. For a very long time, the U.S. Supreme Court opposed recognizing such rights as the rights of a social group; therefore, the Court's decision was controversial. On the one hand, the U.S. Supreme Court, and in its predominantly conservative composition, recognized the new law as consistent with the U.S. Constitution. On the other hand, the Court recognized the constitutional right to same-sex marriage with significant restrictions.

In 1986, at the height of Reaganism, the U.S. Supreme Court refused to recognize the right to nontraditional sexual relations as a fundamental right. Note that U.S. President Ronald Reagan, like most members of the Republican Party, as opposed to sexual minorities' empowerment (Bowers v. Hardwick 478 U. S. 186 (1986)). In the Court's opinion, the law does not have a unified interpretation with the right to privacy. Albeit with reservations, the majority of the judiciary upheld Georgia's homosexuality and lesbian law. By defining couples' relationships as «sodomy», the Court specifically emphasized that such sexual encounters were generally illegal and prohibited by 13 states in 1971 when introduced the Bill of Rights.

However, the 2003 decision in Lawrence v. Texas recognized the rights of individuals with nontraditional sexual orientation to engage in intimate relationships (without marriage). Revision of the 1986 precedent begins. Majority rapporteur, Judge Anthony Kennedy emphasized that the rights of persons of nontraditional sexual orientation are based on the recognition of the freedom and dignity of all as free citizens (Lawrence v. Texas, 539 U. S. 558 (2003).

However, the U.S. Supreme Court did not recognize this right as a fundamental right; many restrictions accompanied the decision. Thus, it did not identify the state's corresponding goal (interest) to protect homosexuality and lesbianism as a dominant interest. Consequently, state laws that impose bans on this group of individuals do not apply, the U.S. Supreme Court said, verification by the strict procedure. The Court noted that instead of a rigorous verification procedure, the laws regulating members of this social group's rights are checked based on «reasonableness», as it would be with non-fundamental rights that do not contradict the Constitution. Only if there is the expression «legalized» discrimination against sexual minorities (in public institutions, at work, etc.), the procedure for strict verification of the relevant regulatory Act is applied. The Court still (2017) does not assert that the right to engage in same-sex sexual contact is fundamental. Consequently, the U.S. Supreme Court (SCOTUS) upholds the relevant state laws to the extent that they do not exceed the reasonableness test. As a result, many state laws maintained several restrictions against people of nontraditional social orientation.

Since recognition as a «fundamental right» did not occur, the Lawrence precedent was a so-called «defective precedent», from the point of view of liberal activism. However, in our opinion, liberal activists in judicial robes do not take modern American society's realities, the negative social consequences, including for the child's psyche, into account. By 2014, most U.S. states had passed laws prohibiting discrimination against sexual minorities and approving same-sex marriage. The U.S. Supreme Court on June 26, 2015, in its decision in Obergeffel v. Hodges (and other choices), recognized the right of same-sex couples to marry. Argument – section 1 of the XIV amendment on due process guarantees (https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf). In terms of judicial strategy and the doctrinal rationale for due process, the conservative majority has become a

minority due to Justice Anthony Kennedy's defection to non-interpretivism and sexual minority rights advocates.

The lawmaking activity of the U.S. Supreme Court includes another area of regulation – the right to euthanasia. This is a difficult question, referred to in popular literature as «the right to die». In U.S. legal practice, the right to euthanasia is often accompanied by a strict definition of «right to assisted suicide».

The law itself as a derivative of privacy has been debated in the United States for several decades and has been extraordinarily active since 1973. The subject of disputes is recognizing or rejecting the right to leave life due to the unbearable suffering of incurable patients who are conscious and confirm the choice by relatives and doctors.

The first Court of Appeals district XI 1997 (D.C.) in Vacco v. Quill held that privacy includes the right to medical assistance of death with a terminal illness and a conscious request of the patient (Vacco v. Quill 117 S. St. 2293 (1997)). Reason: the provision of equal protection of laws is not relevant to this right, so it is possible to apply a soft verification procedure and, consequently, allow euthanasia as an exception. Nevertheless, in 2002, the second circuit court of appeals (New York State) explicitly prohibited the right to medical assistance in the event of death. The revised the decision's basis: the right to euthanasia contradicts the judicial constitutional doctrine of equal protection by law. The following arguments justified this decision. The first argument is that the artificial life support system for a patient in a coma makes it possible to pass away with dignity. However, most Americans are not provided with such a scenario, so it is impossible to ensure equality before the law. Recognition of such a right would violate the U.S. Constitution, something that would violate equality. The second argument of the New York Court of Appeals is that allowing such actions can be a way to facilitate suicide. Moreover, as a justification, one of the judges said that lifting the ban in such conditions would be equivalent to a so-called «invitation to suicide».

The difference in the legal positions of the circuit courts of appeals in most cases is the basis for consideration of the issue in the U.S. Supreme Court. The Supreme Court of the United States, having considered the possibility of Glucksberg, refused to recognize the right to euthanasia as fundamental and stressed that «...in all civilized countries, it is a crime to assist in suicide» (Washington v. Glucksberg 117 v. S. Ct. 2258 (1997)). The Court applied a method of interpretation typical of the «school of the political process»: «This is such an important decision that the U.S. Congress should make it as an expression of the will of the people... this decision should not reflect the judges ' preferences» (Ibid. P. 577). Judge brewer (speaking with the same opinion) he clarified that the decision does not mean legitimation of the right to a dignified end of life, but leaves questions about physical and moral torment. Cannot assess the right to end one's life on the principle that a fundamental right is not an absolute right. «Our Court does not take into account the unbearable suffering to which some incurable patients are subjected» (Cases and Materials… P. 561). And other judges concluded that the issue of euthanasia needs further consideration.

Indeed, the number of supporters of euthanasia is growing. The Court ruling referred to an «ingrained tradition» as an argument for banning euthanasia for terminally ill people who are suffering. It is complicated for judges to reject life and death as a fundamental human right if they do not apply to religious philosophy. The right to choose is denied, but the right to life is transferred from the individual to the state and the nation to politicians and legislators. According to E. Chemerinsky, when the Court moves the right to life to politicians, the state's interest disappears as an insurmountable interest. Such a claim must be constitutional and exist against the will of politicians. According to the logic of constitutionalism, the right to life and death under natural origin is inviolable. When an incurable patient experiences unbearable suffering, it is necessary not only to turn to an abstract tradition that does not coincide with the modern needs of morality and law, state, and religion. The Court did not conduct such an analysis.

In 2014-2017, we should note the continuation of state legislatures' attempts to pass euthanasia laws. In four states (Oregon, Washington, Vermont, Montana), they remain in effect pending a U.S. Supreme Court review of their constitutionality. Various circumstances, including the Court's incomplete composition after the sudden death of Antonin Scalia, made it impossible to make a responsible and legitimate decision. In March 2017, at the suggestion of Donald Trump, the U.S. Senate approved a new conservative Supreme Court judge, who took Antonin Scalia – Neil Gorsuch. Besides, after some «shift» towards the moderate non-originalist position of Judge Anthony Kennedy, with eight judges, the reality for some time was a «stalemate» situation with the voting.

The entire Court (since April 2017) has again turned into a «super-legislature» and performs law-

making functions. However, this depends on many factors and the formation of the corps of judges and their views. Leaving aside forecasts in the direction of realities, it should be admitted that if before 1973, the Court was inclined to recognize types of rights derived from privacy. After 1973, the erosion of privacy rights begins. As for the U.S. Congress, it has intensified the departure from the previous strategy of protecting citizens' rights and new rights due to the balance of political forces in this organ of state power.

The transition of the U.S. Supreme Court to restrictions on procedural rights has become one of the foundations of judicial conservatism. This trend's realization meant the consistent erosion of due process's guarantees, which was one of the U.S. Supreme Court's achievements in the 1950s and 1960s.

The main intention of conservative judges is to abandon the due process clause's broad interpretation, thereby undermining the concept of judicial activism and U.S. citizens' constitutional right to judicial protection. First, by disabling both a provision (principle, doctrine) to protect a wide range of rights under most of the Bill of Rights amendments. Second, as a substantive and not a «purely» procedural requirement. Thirdly, as a requirement for political power and the state to adopt laws appropriate for citizens and social groups' rights. Fourth, the aim is to disclaim the application of due process (legal justice) as a basis for the expansion of the list of ownership by the U.S. Supreme Court as referred to as fundamental rights or as derived from fundamental rights.

Since it is impossible to directly cancel the results of previous activities due to the rule of common law and the recognition of precedent as a source of direction, the conservative leadership has chosen a strategy of erosion of citizens ' procedural rights in the main areas of constitutional regulation.

The conservative approach has changed almost every area of constitutional law. The conditions for implementing judicial guarantees of citizens who have suffered damage from large corporations' activities have worsened. The Court imposed restrictions on protecting consumer rights by reducing the coefficient of the so-called «punitive compensation» within the institution of «punitive damages». The Court took the position of abolishing constitutional guarantees to participants in contractual relations as a «weak side», for example, in labor relations. The strategy of restricting rights affected the rights of «vulnerable» categories of citizens. The Supreme Court recognized the compulsory transfer of citizens who suffered from the deprivation of benefits to private arbitration bodies, not to the courts, as mandatory to the Constitution. Not only is the rather abstract principle of responsibility of the authorities to society undermined; under the threat of the use of a civil lawsuit in relations between citizens and government officials.

Two basic requirements follow from the concept of a civil claim: the right to compensation for damage and the obligation to restore the violated right. The application of civil action against government officials and employees remains at the center of discussion in the U.S. Supreme Court during the period of judicial conservatism. The principle of equality of subjects in a civil dispute is questioned, as is the possibility of a claim against the authorities and administration.

Conservatives in the U.S. Supreme Court cannot overturn the application of civil action to the relationship between government and individuals. Therefore, they employ a strategy of slowly destroying this vital right, using sophisticated tactics here too. The tactics are selective to applicants from various social groups (Mobil Oil Exploration v. the United States 530 U. S. 604 (2000)). In this case, with the participation of a large corporation, the Court, in its decision, recognized the legality of the waiver of sovereign immunity and the legitimacy of the corporation's financial claims against the government.

The concept of a civil suit is rarely applied to the categories of the least protected citizens, pensioners, students, women, disabled people, all recipients of benefits who are harmed due to errors of officials and discrimination. E. Chemerinsky cites an example of lower courts' attempt to protect a disabled person's rights who tried to get a job with a decent salary corresponding to his skills and abilities but was refused based on age criteria. The U.S. Supreme Court has affirmed (in an appeal against a lower court ruling) that you cannot sue the state if you are fired due to age (Kimel v. Florida Board of Regents 528 U. S. (2001)).

In a 2009 decision, in the case of 14 Penn Plaza v. Pyett, the U.S. Supreme Court dismissed an old-age Union member's claim (14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009)). He has been rejected even though under the Fair Working Conditions Act of 1938, the service workers' Union has the right to keep a worker at retirement age. The Court continued to apply a controversial rationale of «goodwill» by the state to an employee's acceptance of a claim in another case (Alden v. Maine, 527 U. S. 706 (1999)). Employees demanded overtime pay for

overtime per federal law. The decision of the U.S. Supreme Court: without the consent of the state, the claim cannot be considered, including based on the requirements of federal law following the doctrine of sovereign immunity. Often, the Court rejected claims under the pretext of the impossibility of relying on the law and precedent and formulating a position on the law. The Court again called the best way to resolve a labor dispute is the assistance of private mediators, which indicates an infringement of the right to judicial protection.

Therefore, there was a restriction on the right to judicial protection in claims against the possibility of applying to the Court with a lawsuit against public authorities. The activity of the U.S. Supreme Court has led to a narrowing of the chances of challenging decisions in the interests of big business and the state elite (establishment). At the same time, doctrinal approaches have changed.

Let us turn to one of these approaches, the doctrine of «sovereign immunity». It is based on the principle extracted from English Law, which in the popular presentation sounds: «The king can't be wrong». The regulation forbade the filing of lawsuits against the monarch, the state, or officials, even if they act in contradiction with the law. But this principle is archaic, and the U.S. judicial practice is dominated by another one, about the responsibility of authorities and public administration before the law in violation of citizens ' rights and damage to them. From this perspective, applying the doctrine of sovereign immunity undermines the fundamental constitutional principle enunciated in the U.S. Supreme Court's decision in Marbury v. Madison. «The essence of civil rights and liberties includes the right to be protected by law, regardless of by whom or when it is harmed», the Marshall Court ruled in 1819 (Marbury v. Madison, 5 U. S. 137 (1803)). First of all, private law principles' constitutional significance is the focus of equality of subjects – participants of legal relations contradict the code (in this sense archaic) of sovereign immunity.

M. Dorf convincingly refutes the judges' arguments with conservative views in the U.S. Supreme Court, referring to their methodology. From the standpoint of originalism, as for the adherence to tradition and the original interpretation, the actual arrangement did not include the doctrine of sovereign immunity, he recalls. There was no discussion of sovereign immunity in the Constitutional Convention if that makes it pointless to rely on originalism and the founding fathers' original intentions.

Concerning arguments based on textualism, the U.S. Constitution is silent about granting states the privilege of sovereign immunity. We must agree with M. Dorf that «not a single provision of the U.S. Constitution, including the text of the 11th Amendment, referred to by judicial conservatives, does not mean prohibiting citizens from applying to the court of their state with a damage claim». But to interpret this way, one will have to use the sophisticated method of non-interpretivism inherent in liberal activists, that is, ignore the text and the original intention. That is, to refute the textually exact meaning of Amendment 11 to prohibit lawsuits against states in federal courts only for citizens of other countries and foreigners, but not for citizens of their government. This is even though this Amendment's purpose is to prohibit citizens' filing of claims in federal courts from citizens of other states, but not from their citizens.

This is how the U.S. Supreme Court, with a very dubious, similar to the most daring examples of activists, interpretation, did in 1890 in the judgment in the case of Hans v. Louisiana. The Court then refused to follow the text. Moreover, he replaced the narrow interpretation of sovereign immunity as acting exclusively against citizens of other states and foreigners with a broad understanding of the text of the 11th Amendment. This meant that citizens of other countries and citizens of their nation were prohibited from suing state authorities in federal courts. Judge A. Kennedy, one of the attentive interpreters of the U.S. Constitution, not distinguished by liberal approaches and joining the conservatives in most decisions, was forced to declare that the principle of sovereign immunity was derived not from the 11th Amendment, «but from the structure of the Constitution as it is were accepted». The notion of «constitutional structure» in justifying a specific provision on sovereign immunity is unconvincing. For example, the principle of the supremacy of federal Law from Article 4 of the U.S. Constitution is a structural element that does not provide grounds for a broad interpretation of sovereign immunity. Therefore, the impossibility of following textualism and originalism on the issues of sovereign immunity in the U.S. Supreme Court testifies to the flaws of the conservative methodology. Nevertheless, the conservatives' use of «activist» methods also became a manifestation of opportunism and dependence on political factors.

The Opinion of E. Chemerinsky: «If judicial conservatives are honest in their commitment to textualism and originalism as the basis of interpretative methodology, then they should recognize the absence of a provision on sovereign immunity in the Constitution». «Otherwise, with the continuation of

the broad interpretation of sovereign immunity, according to the author, the responsibility of the authorities to the people is undermined».

At the beginning of the new century, the U.S. Supreme Court sought to change the previous doctrinal approaches to procedural guarantees, in particular, to limit the rights of participants in criminal proceedings.

First of all, this is the restriction of the right to go to Court with claims against officials who have violated the rights of those under investigation and accused, and the erosion of the doctrine of «exclusion of evidence» (illegally obtained by police and investigators).

It must be admitted that in many cases, the basis for authoritarian approaches and restrictions on rights in the actions of the U.S. Supreme Court was the position of the «political authorities» – the U.S. President and the U.S. Congress, their criminal law policy pursued to combat crime. The problem of crime in the United States has been one of the most acute and caused great public outcry. Concern about high crime rates leads to attempts to identify causes and gives rise to different views on how to solve the problem. Objectionable is the tendency to humanize criminal law that emerged in the 1960s. Right-wing conservative political forces demanded tightening criminal legislation at many historical development stages and extending all new legal regulation areas. The position of the Conservatives on the doctrine of «exclusion of evidence» was formulated by President Ronald Reagan and his entourage: «... the fact that the culprit can be exempted from criminal liability is much worse, the «excesses» associated with obtaining evidence of guilt». R. Reagan gained wide popularity by attacking judicial activism, «excessive guarantees and indulgences to criminals». The criticism was carried out with an eye to the adoption of stringent criminal laws. About 20 bills of R. Reagan passed the stages of consideration in Congress, and the President signed almost all. Thus, the Organizational Crime Control Act of 1984 weakened and undermined the right to bail. Simultaneously, the U.S. Supreme Court put forward strange arguments that even if the suspect does not pose a public danger, he cannot be dangerous in the future.

The fight against terrorism has given a new impetus to legal conservatism due to the tightening of criminal law policy. In 1996, it adopted the law on combating terrorism and the effective use of the death penalty. In amendments to this law, the U.S. Congress abolished the right of accused of terrorist activities to go to federal courts. According to the 2001 Patriotism Act, adopted by the U.S. Congress to fight terrorism, among other areas, there was a tightening of procedural aspects of investigating new types of crimes; the concept of «federal crime related to terrorism» appeared. The population's particular discontent was caused by the massive introduction of wiretapping and electronic surveillance. In 2005, the federal law on combating terrorism was extended until June 1, 2015. Discussions are continuing on new measures, including anti-immigration measurements, in the spirit of this Act.

Criminal law is the responsibility of the states. Since the 19th century, there have been attempts to codify at the federal level, but they are far from being implemented. Simultaneously, in the field of criminal procedure relations, the role of the federation and the U.S. Supreme Court is more significant (Kozochkin 2007: 478). By interpreting legislation, filling its gaps, correcting shortcomings, federal courts in this area are engaged in lawmaking. The Court initiates and stimulates new approaches that directly affect the constitutional rights of the individual. The U.S. Constitution and the U.S. Supreme Court's interpretations of criminal procedural requirements and precedents are essential sources of constitutional and criminal law.

Defined the U.S. Supreme Court's strategy under the chairmanship of E. Warren in the criminal procedural sphere as a «model of due process». Besides, the U.S. Supreme Court's design was carried out to ensure the unity of criminal law, the judicial system, and the coordination of legal policy to protect citizens' rights.

It is necessary to highlight two goals of the strategy of judicial conservatives in the criminal law sphere. First, to rethink the legacy of the «era of activism», that is, the Warren Court's strategy that went beyond focusing on protecting due process. In several 5th and 15th Amendments due to process decisions, the Supreme Court in the 1960s achieved the extension of procedural guarantees to the states, considered by judicial conservatives, to violate the states' rights.

Secondly, the conservative forces sought, together with the political branches, to achieve a reduction in crime by tightening legislation and cutting procedural guarantees. During the reign of the Republican administrations (R. Nixon, R. Reagan, both Bushes), the opinion was spread that the reason for the high crime rate was the judicial activism of the U.S. Supreme Court chaired by E. Warren and W. Berger in the 60s and 70s of the 20th century.

During the subsequent twentieth century, the U.S. Supreme Court considered that illegal police actions could negatively affect the court decision.

The goal was to prevent police brutality and prevent the practice of violating suspects' rights and accused persons. The ruling of the U.S. Supreme Court in Miranda v. Arizona was crucial (Miranda v. Arizona 384 U.S. 436 (1966)). Evidence obtained by police officers who failed to comply with such rights as the right to refuse to testify, the right to a lawyer and the right to an interpreter during the investigation stage, and other investigative actions were declared illegal under the V amendment's prohibition of self-incrimination during testimony. Besides, the Court here, taking into account the use of unlawful methods by the police against H. Miranda (although He was guilty of rape, besides with repeated criminal acts), applied the provisions of the XIV amendment as related in the sense of protecting constitutional guarantees with the requirements of the V amendment, continuing the line of the Mapp case. The Court ensured that the bill of rights was incorporated with the provisions of the fourteenth Amendment. During those decades of the 1960s and 1980s, American police used less illegal methods.

Judicial conservatives have continuously criticized these decisions, especially the Miranda precedent. In recent decades, they have achieved a partial repeal of the Miranda rules in several decisions (For example, in the judgment in Arizona v. Evans 514 U.S. 1 (1995)).

According to judicial conservatives, the Warren Court went too far in protecting the rights of criminal defendants, which was one reason for the increase in crime in the country.

I completely disagree with the opinion of judicial conservatives that the Warren Court went too far in protecting the rights of criminal defendants. This suggests that judicial conservatives are trying to undermine the accused's rights in criminal proceedings to put them behind bars without any evidence.

During the democratic administration of Barack Obama (2009-2016), the United States President and Congress remained passive concerning the numerous manifestations of police brutality and patronage of ill-treatment of accused' ill-treatment persons on the ground. The limitation of opportunities to obtain judicial protection for victims from the actions of the authorities became obvious. According to E. Chemerinsky, restricting the rights of the accused is erroneous because, at the same time, constitutional rights are violated. The essence of the issue is that police arbitrariness and restriction of suspects' rights and persons under investigation cannot reduce crime and eliminate its causes. Still, they do lead to a limitation of constitutional rights.

The violation of the accused and suspects' rights at the beginning of the new century is becoming an important public issue. The reason is the search for a model of fighting crime and the increased cases of police arbitrariness against the background of a shift towards a repressive model of criminal justice. Describe this picture of police brutality can be an example of an African American George Floyd. On May 25, 2020, George Floyd died after a white Minneapolis police officer, Derek Chauvin, pinned his neck with his knee to the asphalt and held him in this position for almost 8 minutes while Floyd lay face down on the road. Police officers Thomas lane (African American) and J. Alexander Kueng (white) also helped hold Floyd, while Tu Tao stood by and watched. Floyd's arrest occurred in Powderhorn (Minneapolis, Minnesota) on suspicion of paying for a pack of cigarettes purchased at a store with a fake $ 20 bill and was recorded by several observers on their phones. Videos of Floyd repeatedly saying, «I can't breathe», were quickly shared on social media and broadcast by the media. It is known that George Floyd began to utter the phrase «I can't breathe» even before he was knocked to the ground. The four police officers involved were dismissed the next day and were later arrested.

The FBI launched an investigation into the death at the Minneapolis police department's request. At the same time, the Minnesota Bureau of Criminal prosecutions investigates whether there were violations of Minnesota laws, including the use of force.

It is essential that police repressive and excessive actions were mainly characterized by a stricter approach to youth from national minorities. They have used illegal methods against this social group, such as planting drugs.

One of the U.S. Supreme Court's deviations from the constitutional guarantees of participants in criminal proceedings is modifying the Fourth Amendment's application. This Amendment guarantees the interference of public authorities, including the police, in private life. The fourth Amendment requires sufficient grounds for detentions and searches. The interpretation of part IV of the Amendment (a combination of words) since the beginning of the XX century has been that police intervention, in the form of searches and temporary detention, requires justification by real facts, credible reasons, and otherwise, the methods are illegal. For some time, the only exceptions to the guarantees against unlawful intrusion were the Prosecutor's sanction and the criminal's pursuit.

However, the modern U.S. Supreme Court is gradually moving away from this interpretation,

which creates the ground for police abuse. In Mueller v. Mena in 2005, the Court expanded the police's ability to conduct unjustified, unauthorized searches, and arrests (Mueller v. Mena, 544 U. S. 293 (2005)). In another decision, the Court found that unsecured checks of suspicious persons on the street were legal and consistent with the U.S. Constitution (to stop and frisk). The judges concluded that if a police officer sees a person who has changed travel direction, it is enough to check documents and identify them. Refusal to identify a person, according to the U.S. Supreme Court, is grounds for detention. If the suspicions are unjustified, and the police actions were rude and degrading, then the victim's appeal to the Court almost does not lead to a positive result – the judges' side with the police.

Among the cases considered by the Court in the 2007-2008 session, the public drew attention to several of them. For the first time in almost 70 years, the Court took up interpreting the second constitutional Amendment on the right to bear arms. In an inherently conservative decision, District of Columbia v. Heller, the justices, by a majority of just one vote, considered unconstitutional the Federal district of Columbia's status, which required residents to obtain licenses for any small arms. Moreover, the owners had to keep it unloaded and locked in a safe place. The late U.S. Supreme Court Justice Antonin Scalia, who made the decision, did not consider that the Amendment only applies to the militia as an organized formation, but rather authorizes an individual citizen's right to bear arms self-defense.

However, it was recognized that legislatures could restrict the rights of certain groups at risk (criminals and the mentally ill), as well as the use of those types of weapons (for example, bullets) that did not exist at the time of the adoption of the constitutional Amendment, i.e., at the end of the XVIII century.

Cases attract increased public attention related to the application of criminal procedure rules. In the decision in Georgia v. Randolf (2006) prepared by D. Souter and adopted by five votes in favor and three against, a police search of private premises without the authorization of a judge and if there was an objection from at least one of the residents was found to have no legal consequences. The evidence found could not be used against the tenant who objected, which was argued by the IV constitutional amendment on the home's inviolability. It is shown that the accepted interpretation differed from the circumstances of the case Illinois v. Rodriguez (1990) when one of the tenants gave consent to the search in the absence of another tenant – then such an investigation was recognized as lawful. Chief justice of the United States Supreme Court John Roberts expressed a different opinion, noting that his colleagues' decision to limit the police's ability to counter domestic violence. He also pointed out that the Fourth Amendment is not relevant since the person who shares a room with someone refuses to protect their privacy, since their cohabitant can consent to its invasion. Justices Scalia and Thomas also supported the minority opinion.

The American authors draw attention to a change in another doctrinal approach that follows from Amendment IV. Back in the first half of the 20th century, the U.S. Supreme Court decided that the police were not allowed to invade a home at their will at any time. The Supreme Court in 2006, in a decision in Hudson v. Michigan, took the position of restricting the rights of citizens according to the well-known doctrinal method of police actions «to knock and announced». The Supreme Court of the United States agreed that the police do not violate the right to inviolability of the home and other rights if immediately after the words «Open, the police» begins to break down the door, even if there was no reason to do so (Hudson v. Michigan, 547 U. S. 586 (2006)). Supreme Court argument: suspects can be dangerous (even if they are not now) potentially in future actions. In this precedent, the concept of a «potential criminal» appeared, which is unacceptable because, without being a criminal, an individual can be deprived of rights.

In this original article, considering the U.S. Supreme Court's conservative ideologist should be emphasized that with the coming to power of Donald Trump, the U.S. Supreme Court has become an even more conservative ideological balance the highest state power. The current President of the United States immediately appointed three justices of the Supreme Court of the United States with conservative views.

This is due to the death of U.S. Supreme Court Justice Ruth Bader Ginsburg, who died on September 18. She was 87 years old.

President Bill Clinton appointed Ginsburg to the position in 1993. She belonged to the liberal wing of the Supreme Court and was the second female justice of the U.S. Supreme Court. In this position, she fought against gender discrimination and defended women's rights. In particular, she promoted equality for men and women in pay and access to education and advocated for women's rights to abortion.

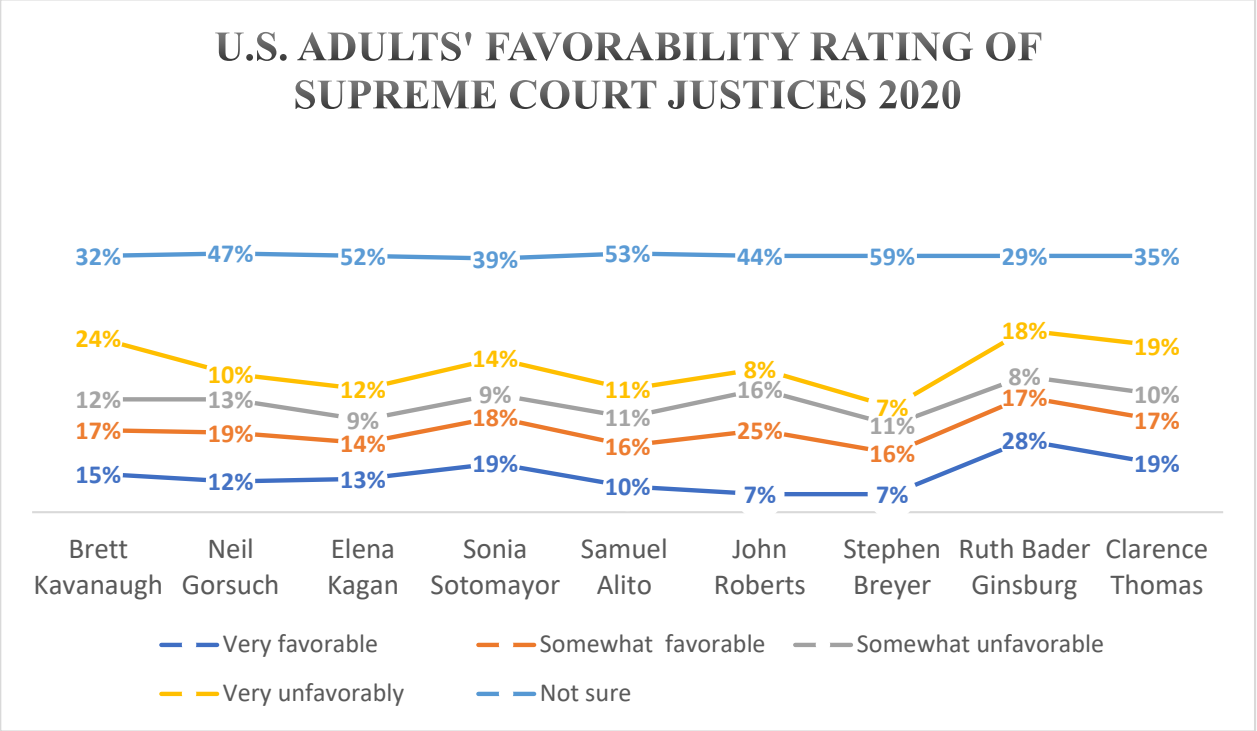
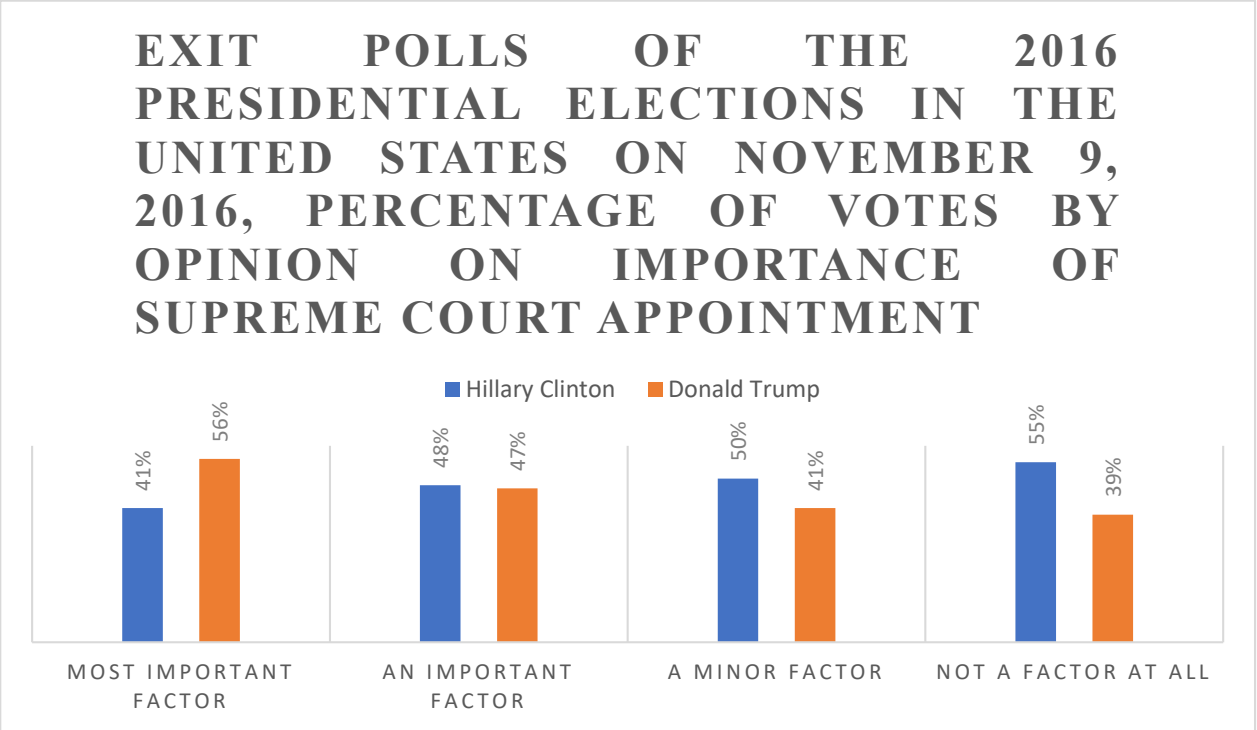


Chart №1



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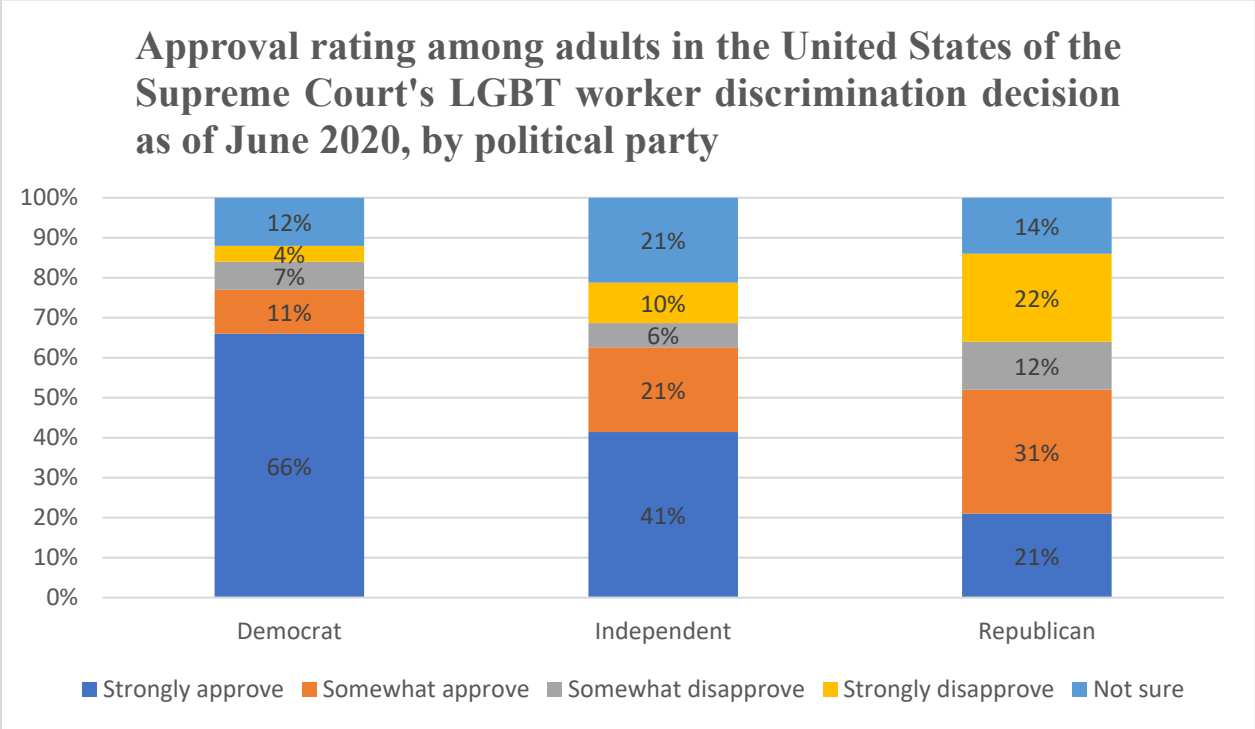

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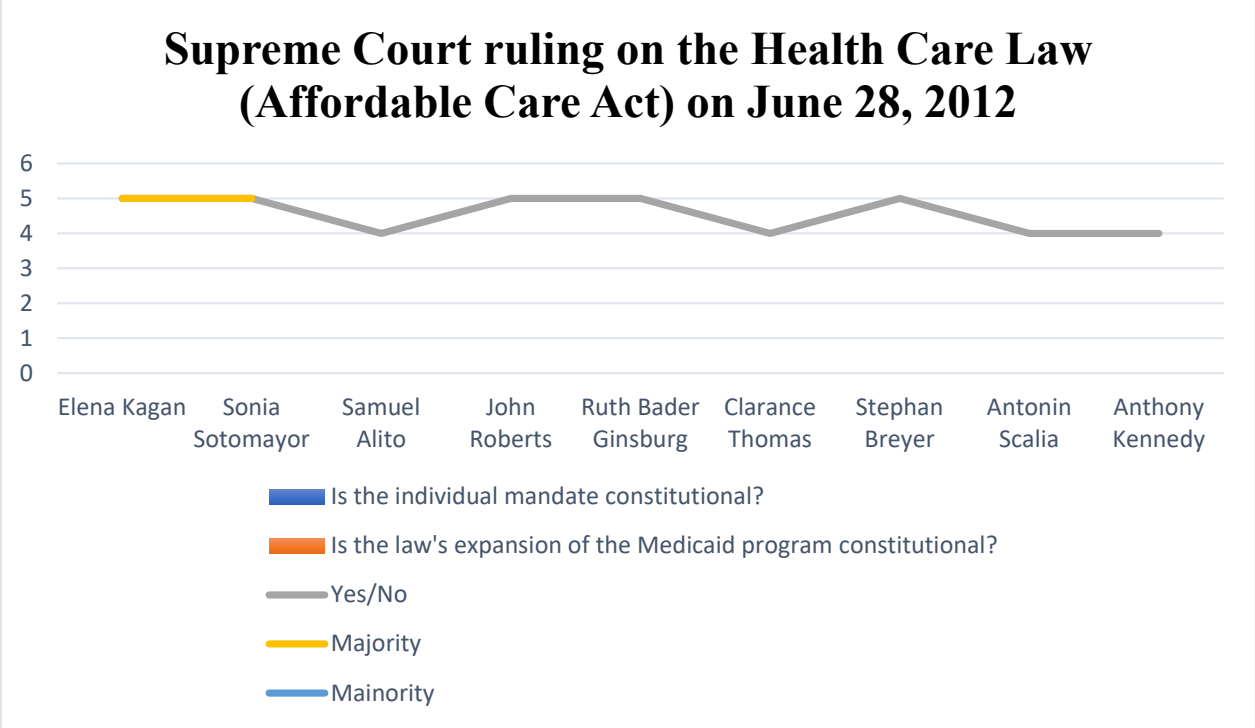

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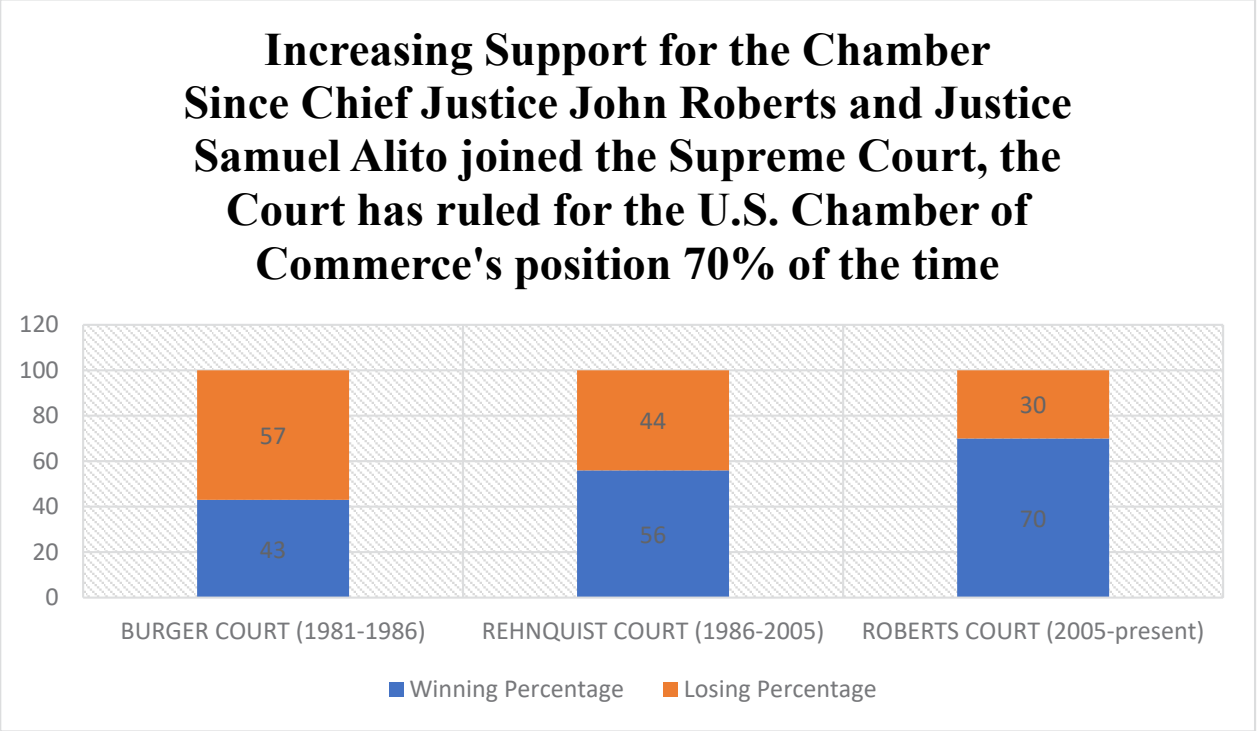

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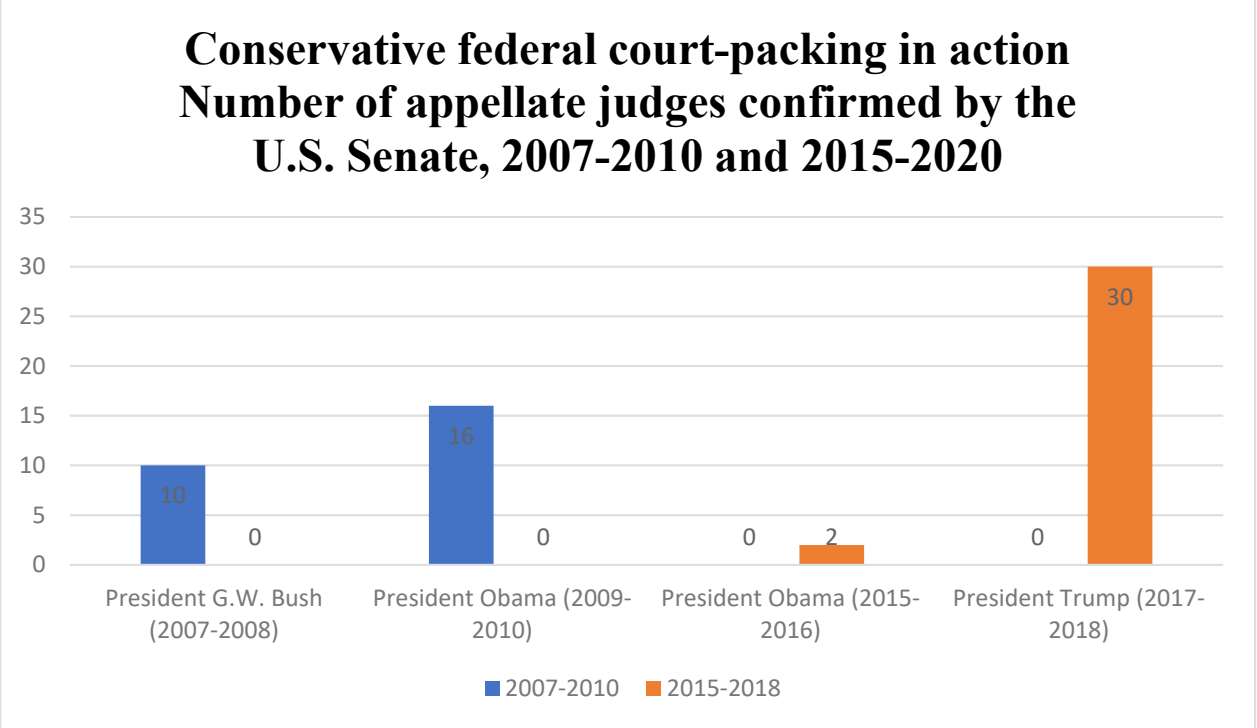

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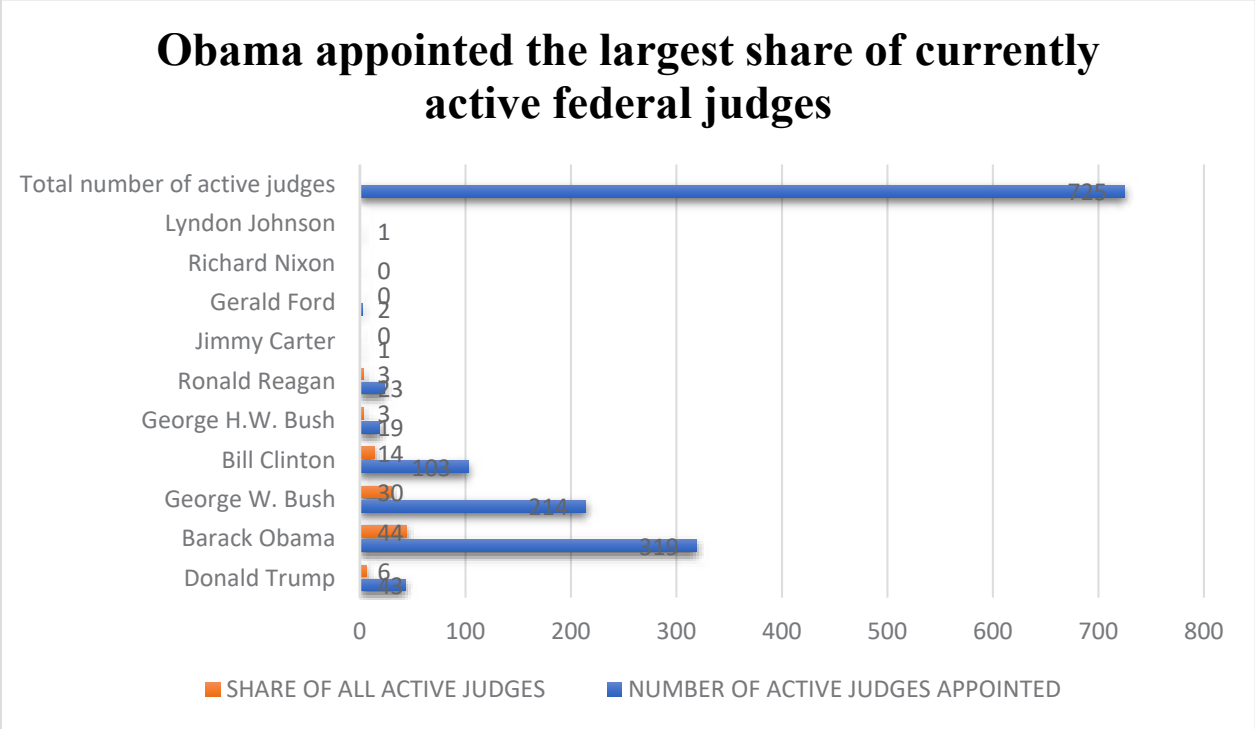

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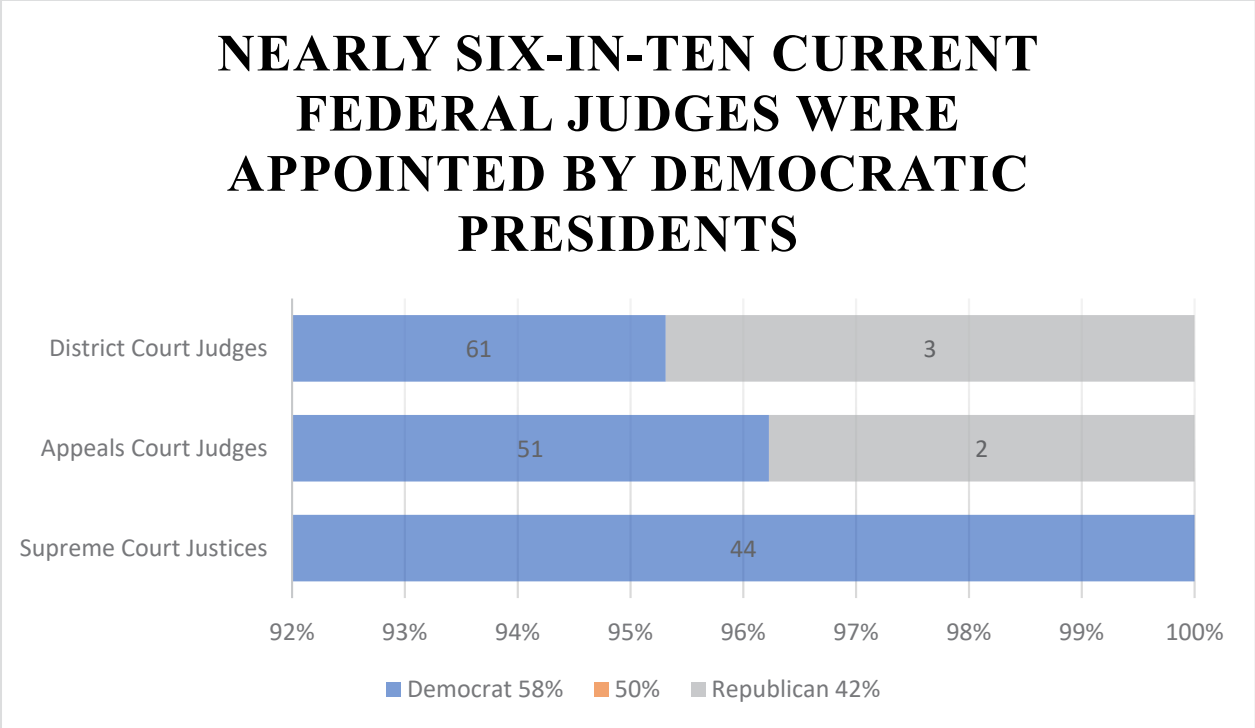

Chart №8

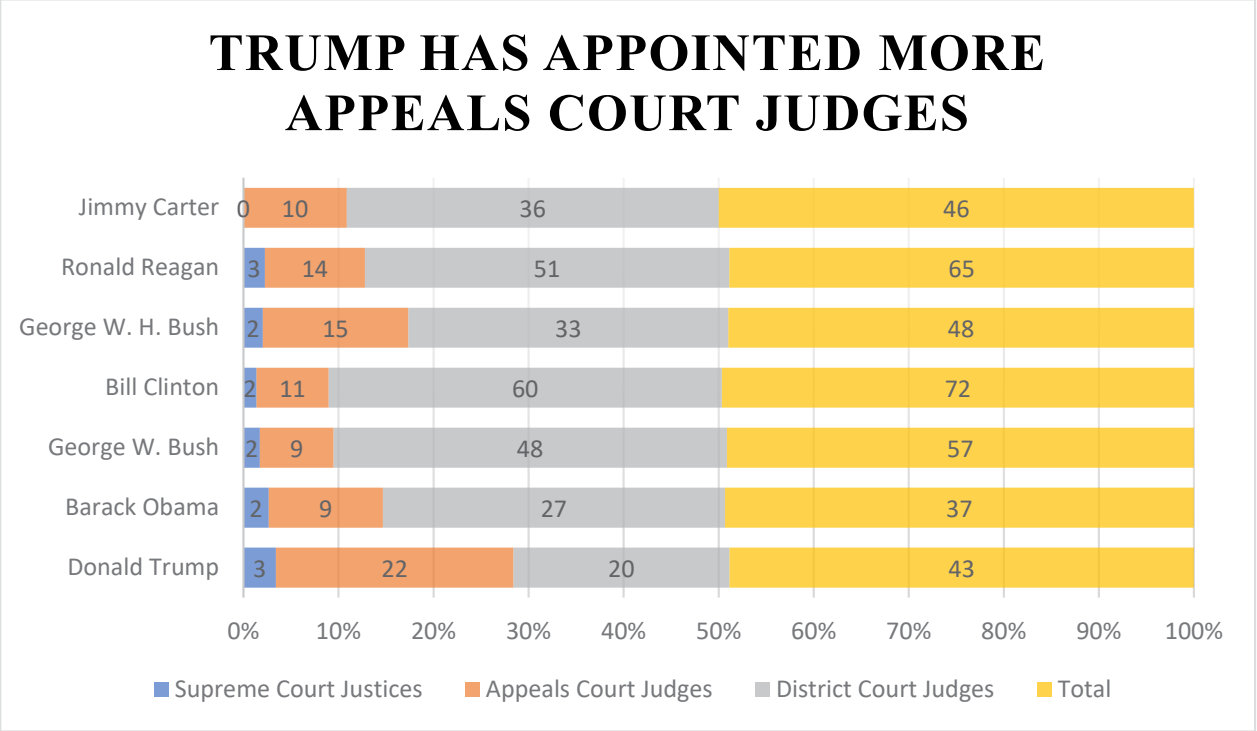

Chart №9

U.S. Supreme Court Justice Ruth Bader Ginsburg (1993-2020)

Before her death, Ginsburg told her granddaughter that she wanted her replacement to be appointed as the next President.

«My most fervent wish is that will not replace me until a new President is appointed», said Ruth Bader Ginsburg.

Ruth Bader Ginsburg knew that the Trump administration was a potential threat. She knew that the Trump administration would do everything possible to promote its nominee to the Supreme court and change the balance of power in favor of Republicans. By the way, the first contender for Ruth's seat of trump's choice is Neil Gorsuch, whom liberals despise for supporting Evangelical Christians. The evangelists were those pastry chefs from Colorado who refused to bake cakes for same-sex weddings. Another candidate, Brett Kavanaugh, was accused of sexual harassment, and one of his victims was psychology Professor Christine Blasey Ford. The latter had to speak at a public hearing and tell how Kavanaugh tried to rape her.

Despite Ruth Bader Ginsburg's fears, the Trump team pushed through their candidate just 42 days before the election. Justice Amy Coney Barrett of the United States Supreme Court took Ginsburg's seat with conservative views. Barack Obama was not allowed to choose a candidate as many as 11 months before the 2016 election. This is important because an elected Supreme court justice can remain in this position for life-like Bader Ginsburg. And he will devote his service either to protecting minorities or destroying the civil rights that were so hard-won.

Conclusion

Conclusion the study of the U.S. Supreme Court's legal activities in the second half of the 20th and early 21st century can identify two main areas: judicial activism, judicial law admission, and judicial conservatism in the form of judicial conservatism self-restraint. We have to note the legal uncertainty, and to a certain extent, not quite the legal nature of these concepts, established in American lawyers' lexicon.

Judicial activism criticized continuously for the ideological and political component and deviation from the U.S. Constitution's letter. The U.S. Supreme Court, especially the Warren Court, in the opinion of judges with conservative views, pushed back the objective doctrine-based «stare decisis», the justification of decisions based on non-legal (political and other) goals, guided, among other things, the protection of the interests of various social groups, elitist groups or protest movements, seeking the constitutional legitimization of all new rights contrary to the duty of judges to follow judicial self-restraint, the text of the Constitution U.S., not non-legal factors.

In the past three decades, judicial conservatives' work has also gained judicial activism signs, with their advantage in the U.S. Supreme Court, but only with the opposite vector. The conservative majority's goal is to dismantle the achievements in the 1937-1970s, results of judicial lawmaking, a return to the apology of legal formalism, modification of doctrines in the direction of a return to a narrow interpretation of the provisions of the Constitution.

The doctrine of judicial self-restraint can only be explained on a superficial basis as a means against the politicization of judges. Its purpose is not to renounce judicial lawmaking; the real intention is to revise constitutional principles' interpretation. There is no doubt that some of the justices seek to achieve conservative political goals in the style of politicians like R. Reagan and J. Bush Jr. (they also offered to the Senate majority of the current composition of judges of the U.S. Supreme Court).

The policy-law ingemination of judicial self-restraint and judicial minimalism is as follows. Social justice is unattainable, and actions in this direction are not entirely consistent with constitutional principles, from the point of view of judicial self-restraint, procedural justice, and legal equality, which creates equal opportunities (a different idea of equality of opportunity in J. Rawls and R. Dvorkin, allowing the so-called unequal treatment of equality).

In the author's opinion, recognizing the importance of procedural equality and procedural justice, he comes to a different assessment of the vector of American law development.

Not only the U.S. Supreme Court but also the U.S. Congress will not be fair because of the unequal representation of social groups in Congress and the rigid attachment of judicial methodology to natural justice. Conservative judges who refuse to protect citizens as representatives of «vulnerable groups» discriminating against members of these groups who do not adequately enforce procedural rights (examples of this are given in this paper) create such unequal opportunities. These unequal possibilities are challenging to eliminate.

The American author S. Lindquist and other authors, for example, R. Posner, speak about the more significant influence of non-political factors on judicial decision-making. Applying the concept of «institutional» is non-political activism. Institutional activism refers to the judicial justification (measured and by the vote of judges) to preserve the existing institutions of society and the state and maintain the status of the federation and the states' powers. Institutional activism is characterized by the abandonment of the function of judicial lawmaking, the preservation of the priority of governments in the field of common law, and unconditional guarantees are fundamental rights of private property, etc.

However, a new problem arises: it is almost impossible to separate «institutional activism» from judges' ideological and political activism with sufficient certainty, as the American authors acknowledge. Theoretically, when U.S. Supreme Court justices waive constitutional restrictions in the form of a duty under Article III of the Constitution to be considered solely under common law and the law of fairness, they open the way for judicial legalization that, frankly speaking, is not the best and not the best option for legal stability. This increases the amount of «political» belonging to the political branches and the courts' powers. The erosion of the «threshold» (requirement) of procedural guarantees through expansive interpretations is indeed a feature of judicial activism and the appropriation of the function of judicial lawmaking. Hence the narrow conservative interpretation.

Nevertheless, there is no other consequence of the current commitment to narrowly interpreting due process as a purely procedural requirement

and other Constitution provisions. This reluctance protects new forms of public interest and social groups' rights by analyzing the due process as a substantive requirement. According to S. Lindquist, this position «is a way to disguise ideological [Conservative at the new stage] activism, that is, to hide their political goals».

The evaluation of judicial activity, therefore, depends on the purpose of self-restraint. If judges, following a restriction, should not make decisions with political consequences such as constitutional protection of the rights of the poor, women, and national minorities, the conclusion is that institutional views (in the spirit of American legal formalism, textualism, and «inviolability» of precedent) to protect conservative political objectives. This position, covered by traditional dogma and references to the U.S. Constitution's text, is political.

The opposition of judicial activism and judicial conservatism characterizes the current stage of the Supreme Court of the United States. This is not a repetition of the previous steps: the former activists, supporters of the «living» Constitution, have abandoned many activist intentions, wanting to «Minimum» preserve the liberal-activist stages' achievements. Besides, judicial conservatives faced a difficult obstacle in the form of doctrines and doctrinal methods adopted in the 20th century. It is complicated to revise precedents, ideologies, and interpreted principles; hence the «flash» of conservative activism at the turn of the century.

The balance between conservatives (turned conservative activists) and activists who have become minimalists is not stable due to the crisis in politics, the economy, and the mass consciousness.

American law's most important feature is legal dualism, corresponding to judicial methodology's dualism, the unity of legal formalism, and traditional liberalism with judicial lawmaking elements. Thus, in the era of activism of the 1950s-1970s, the U.S. Supreme Court, from the perspective of formalism and conservative dogmatic, repeatedly adopted not only liberal activists but also conservative decisions, for example, rejected the recognition of equality between men and women, preserved the death penalty abolished the glory of the right to education as a fundamental constitutional right. However, this period should be characterized as institutional (representations of the place and role of the judiciary) and referring to the direction of judicial methodology (sociological jurisprudence and legal realism).

The U.S. Supreme Court remains close to this position on the widespread use of procedural safeguards as a doctrinal method. However, this technology does not allow the right to be used as a tool for social change. Such a strategy is not enough to implement the law, as is not enough and the law's omnipotence in a positivist sense in other legal systems.

It is wrong to talk about changing the American law model and the judiciary – from a progressive activist to a minimalist-conservative model, and therefore a rejection of judicial law. Even judicial conservatives are forced to use the methods of opponents. This scientific paper gave examples of protection by conservative judges, such as A. Scalia, of the «counter-reform» actions of political authorities by addressing arguments with a deviation from textualism.

Redefining the model and institutional framework of judicial lawmaking is possible in two ways. Firstly, by understanding the U.S. Constitution as a document of exclusively private law with a negative concept of human rights («fundamental rights»), with a return to the model of «federalism from below» and to the inviolability of state sovereignty, through a narrow and narrow dogmatic (conservative) interpretation of constitutional principles. This first path does not seem feasible because of the «heritage» of activists in hundreds of doctrines and a robust law layer. Notably, the Conservative strategy of judges, which are discussed in American jurisprudence, has not received a large part of the legal community.

Secondly, changing the dualistic model of American law is theoretically possible theoretically because to abandon the established methodology of judicial lawmaking with three dedicated elements of judicial law (applying procedural guarantees in the material and legal, it is impossible to be absolutized by standard law methodology, the traditional function of lawmaking.

Besides, the condition for changing the judicial methodology with the rejection of constitutional lawmaking will be the constitutional recognition of a broad list of constitutional rights of the individual, the adoption by the U.S. Congress of decisions on the codification of the federal legislation, a new model of federalism with a focus on the powers of national power. However, this way at the present stage, with the most substantial influence of conservatism, including the judicial one, is impossible.

Thus, legal dualism, not constitutionalism in its understanding of following the Constitution's letter – the basis of American statehood, legal consciousness, interpretation of the text. Consideration in the U.S. Supreme Court's scientific

work allowed the author to conclude that there are conflicting ideological meanings and sometimes-opposite targets, making it challenging to fulfill the task of maintaining sustainability and stability. In other words, the objectives of the Supreme Court cannot be achieved conservatively. This demonstrates the need to find new interpretations and the need for judicial lawmaking.

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МАЗМҰНЫ – CONTENTS – СОДЕРЖАНИЕ