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KAZAN UNIVERSITY LAW REVIEW

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Dear readers,

I would like to present for your attention the third regular issue of the journal "Kazan University Law Review" in 2022.

The issue you are now holding in your hands contains articles on topical issues in the theory and practice of Russian and foreign law.

The issue starts with an article by Pavel Yakushev, Doctor of Legal Sciences, Associate Professor, Chairman of the First Judicial Personnel of the Court for Civil Cases on Appeal of the Vladimir Regional Court, "The traditional values in judicial practice". The article analyzes court rulings, which refer to traditional values or to phenomena, which are essentially traditional values but are not named as such directly in the judicial acts. It is substantiated that despite the inclusion of traditional family values at the constitutional level in the sphere of legal regulation, as well as the statement of the task to protect traditional values in a number of strategic legal acts, the regulatory potential of traditional values is not used by the courts enough. The expansion of the application of traditional values by the courts to justify the judicial acts will be facilitated by the normative consolidation of the definition of traditional family values, their list, the criteria for attributing phenomena and moral guidelines to such, as well as the inclusion of references to traditional values in the normative legal acts.

The issue continues with an article by Petr Lang, Doctor of Legal Sciences, Associate Professor, Professor of the Department of Civil and Arbitration Procedure of the Samara State University of Economics, Head of the Department of Analysis, Statistics and Court Proceedings Support of the Eleventh Arbitration Court of Appeal, "The process of law formation: ontological, axiological and epistemological aspects". The article considers the process of law formation as a two-unit process of spontaneous and planned-rational formation of legal norms system, providing the ordering of public relations under the influence of various factors of social development, receiving refraction in legally significant social interests and the subsequent reflection in the legal ideas. The ontological, axiological and epistemological aspects of this process are emphasized. By means of philosophical-legal methodology of law formation is presented in the form of

twofold process of spontaneous and systematic-rational formation of legal norms, providing ordering of public relations.

I am sincerely glad to present to you the study by Gelyusa Garaeva, Candidate of Legal Sciences, Senior Lecturer of the Department of Civil Law of the Law Faculty of the Kazan Federal University, "The waiver and restriction of family legal capacity". The article proves the impossibility of waiver and restriction of general family legal capacity in view of its abstractness and inalienability from the personality of the bearer, while it is possible to restrict and waive only a subjective right. Almost all examples of waiver and restriction of legal capacity, which were previously cited by researchers, are not a waiver of legal capacity or its restriction, but a waiver (restriction) of rights or the exercise of a right. It is necessary to distinguish between legal capacities, which are part of the content of specific subjective rights, and abstract capacities, which constitute elements of legal capacity. In spite of the fact that waiver of legal capacity in general is impossible, it is possible to waive individual capacities included in the structure of legal capacity, for example, it is possible to waive reproductive legal capacity as a variant of parental capacity, if the person resorts to medical sterilization.

With best regards,
Editor-in-Chief
Damir Valeev

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ARTICLES

Pavel Yakushev
Doctor of Legal Sciences, Associate Professor, Chairman of the First Judicial Personnel of the Court for Civil Cases on Appeal of the Vladimir Regional Court

THE TRADITIONAL VALUES IN JUDICIAL PRACTICE

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Abstract. *The article analyzes court rulings, which refer to traditional values or to phenomena, which are essentially traditional values but are not named as such directly in the judicial acts. It is substantiated that despite the inclusion of traditional family values at the constitutional level in the sphere of legal regulation, as well as the statement of the task to protect traditional values in a number of strategic legal acts, the regulatory potential of traditional values is not used by the courts enough. The expansion of the application of traditional values by the courts to justify the judicial acts will be facilitated by the normative consolidation of the definition of traditional family values, their list, the criteria for attributing phenomena and moral guidelines to such, as well as the inclusion of references to traditional values in the normative legal acts.*

Keywords: *traditional values, family relations, limitation of parental rights, deprivation of parental rights, disputes about children.*

In the political and legal agenda of the last decade, traditional values are mentioned quite often.

The Dispatch of the President of the Russian Federation to the Federal Assembly on December 12, 2012, draws attention to the need to preserve traditional values: "…at the beginning of the 21st century we are faced with a real demographic and

values disaster, with a real demographic and values crisis. And if the nation is not able to save and reproduce itself, if it loses its reference points and ideals, it does not need an external enemy, everything will collapse by itself … To make Russia sovereign and strong, we must be more, and we must be better in morality … We must fully support the institutions that are carriers of traditional values, historically proved their ability to pass them from generation to generation"[1].

Problems related to the need to support and protect traditional values have been touched upon in each subsequent annual Dispatch of the President of the Russian Federation to the Federal Assembly[2].

Under the Russian Federation Constitutional Amendment Act of 14 March 2020, No. 1-FKZ "On Improving the Regulation of Individual Issues of the Organization and Functioning of Public Power"[3], *traditional family values* were included in the constitutional scope of legal regulation: Article 114, Part 1, Paragraph "c", of the Russian Federation Constitution mandated the Russian Government to "ensure a unified state policy to support, strengthen and protect families and preserve traditional values".

The National Security Strategy of the Russian Federation, approved by Presidential Decree No. 400 of 2 July 2021[4], regards traditional values as the foundation of Russian society, making it possible to preserve and strengthen state sovereignty and develop society and the individual (paragraph 90); the task of protecting traditional values, including by strengthening the institution of the family and preserving traditional family values (Paragraph 93).

The Strategy does not contain the concept of traditional values, but in paragraph 91 there is an open list of traditional Russian spiritual and moral values, including: "life, dignity, human rights and freedoms, patriotism, citizenship, service to the Fatherland and responsibility for its fate, high moral ideals, strong family, creative labor, priority of the spiritual over the material, humanism,

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[1] Poslanie Prezidenta Rossiyskoy Federatsii Federalnomu Sobraniyu ot 12 dekabrya 2012 goda [Dispatch of the President of the Russian Federation to the Federal Assembly of December 12, 2012] // Rossiyskaya gazeta [Russian Newspaper]. 2012. 13 dekabrya. No. 287.

[2] Traditsionnye tsennosti v Poslaniyakh Prezidenta RF Federalnomu Sobraniyu RF i v normativnykh pravovykh aktakh: sbornik [The traditional values in the Addresses of the President of the Russian Federation to the Federal Assembly of the Russian Federation and in normative legal acts: a collection] / sostavitel P. A. Yakushev. Vladimir: Atlas, 2021.

[3] Sobranie zakonodatelstva Rossiyskoy Federatsii [Code of Legislation of the Russian Federation]. 2020. No.11. Art. 1416.

[4] Ukaz Prezidenta Rossiyskoy Federatsii ot 2 iyulya 2021 goda No. 400 "O strategii natsionalnoy bezopasnosti Rossiyskoy Federatsii" [Presidential Decree No. 400 of July 2, 2021 "On the National Security Strategy of the Russian Federation"] // Sobranie zakonodatelstva Rossiyskoy Federatsii [Code of Legislation of the Russian Federation]. 2021. No. 27 (Part II). Art. 5351.

mercy, justice, collectivism, mutual aid and mutual respect, historical memory and continuity of generations, unity of the peoples of Russia".

Decree of the President of the Russian Federation of November 9, 2022, No. 809 approved the Basic State Policy for the Preservation and Strengthening of Traditional Russian Spiritual and Moral Values[1].

Paragraph 4 of the Basic provides a definition of traditional values, which are "moral guidelines that form the worldview of Russian citizens, are transmitted from generation to generation, are the basis of all-Russian civil identity and the common cultural space of the country, strengthen civil unity, which found their unique, original manifestation in the spiritual, historical and cultural development of the multinational people of Russia".

Paragraph 5 of the Basic State Policy for the Preservation and Strengthening of Traditional Russian Spiritual and Moral Values specifies that traditional values include life, dignity, human rights and freedoms, patriotism, citizenship, service to the Fatherland and responsibility for its fate, high moral ideals, strong family, creative labor, priority of spiritual over material, humanism, mercy, justice, collectivism, mutual assistance and mutual respect, historical memory and continuity of generations, unity of the people of Russia and the Russian Federation.

Inclusion of traditional family values at the constitutional level in the sphere of legal regulation, as well as setting the task to protect traditional values in the Basics State Policy to preserve and strengthen[2] traditional Russian spiritual and moral values, in the National Security Strategy of the Russian Federation and other documents suggest the possibility (and sometimes the need) to apply traditional values in judicial practice as regulators that guide the court in taking judicial acts.

However, the author's analysis of the database "Court practice" in the legal system "Consultant Plus" showed that as of January 23, 2023, the database contains 4 095 056 judicial acts of courts of law, and the words "traditional values" are

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[1] Ukaz Prezidenta Rossiyskoy Federatsii ot 9 noyabrya 2022 goda No. 809 "Ob utverzhdenii Osnov gosudarstvennoy politiki po sokhraneniyu i ukrepleniyu traditsionnykh rossiyskikh dukhovno-nravstvennykh tsennostey" [Decree of the President of the Russian Federation of November 9, 2022, No. 809 "On Approval of the Basic State Policy for the Preservation and Strengthening of Traditional Russian Spiritual and Moral Values"] // Sobranie zakonodatelstva Rossiyskoy Federatsii [Code of Legislation of the Russian Federation]. 2022. No. 46. Art. 7977.

[2] Strategiya razvitiya vospitaniya v Rossiyskoy Federatsii do 2025 goda, utverzhdennaya rasporyazheniem Pravitelstva Rossiyskoy Federatsii ot 29 maya 2015 goda No. 996-r [Strategy for the Development of Education in the Russian Federation until 2025, approved by Order of the Government of the Russian Federation of May 29, 2015 No. 996-r] // Sobranie zakonodatelstva Rossiyskoy Federatsii [Code of Legislation of the Russian Federation]. 2015. No. 23. Art. 3357; Kontseptsiya gosudarstvennoy semeynoy politiki v Rossiyskoy Federatsii na period do 2025 goda, utverzhdennaya rasporyazheniem Pravitelstva Rossiyskoy Federatsii ot 25 avgusta 2014 goda No. 1618-r // Sobranie zakonodatelstva Rossiyskoy Federatsii. 2014. No. 35. Art. 4811.

contained only in 5 of them, and only in the descriptive parts when describing the positions of participants of legal proceedings, which indicates insufficient use of traditional values by courts when describing the motives of the judicial acts.

It can be assumed that taking into account the provisions of Paragraph 2 Part 5 Article 15 of the Federal Law No. 262-FZ of December 22, 2008 "On providing access to information on court activity in the Russian Federation" not all court decisions on family cases, in which it seems possible to apply and analyze traditional values (traditional family values), are posted in the Reference Legal System "Consultant Plus", but the given figures cannot be explained by this alone.

The author's analysis of court rulings on family disputes considered in the Vladimir region in 2021–2022 allowed to identify some court rulings, the reasoning parts of which contain references to traditional values, or to phenomena that are essentially traditional values, but are not directly referred to as such in court acts.

For example, the father, acting in the interests of his six-year-old daughter, filed a lawsuit against the child's mother to determine the child's place of residence at her place of residence, to restrict the mother's parental rights with regard to her daughter, to collect alimony, and to exempt her from paying alimony.

The argumentation states that the defendant leads an immoral life, abuses alcohol, was brought to administrative responsibility for an offense under Part 1 of Article 5.35 of the Code of Administrative Offenses of the Russian Federation (non-performance by parents or other legal representatives of minors of duties of maintenance and education of minors), has avoided the implementation of their parental responsibilities for the daughter, her behavior is not in the interests of the child and may be in the interests of the child. It is also stated that for four months before the plaintiff went to court, her daughter lived with her father.

The representatives of the guardianship and custody authorities gave an opinion on the advisability of satisfying the claim, the prosecutor also believed that the claim should be satisfied in full.

By decision of the Vladimir Region Murom City Court on June 28, 2022[1], the claims were satisfied. The child was left in the upbringing of the father, the place of residence of the daughter was determined with the father, the mother was limited in parental rights, the father was released from paying alimony collected by the decision of the Selivanovsky district court of Vladimir region

[1] Reshenie Muromskogo gorodskogo suda Vladimirskoy oblasti ot 28 iyunya 2022 goda po delu No. 2–837/2022 [Decision of the Murom City Court of Vladimir region from June 28, 2022 in case No. 2–837/2022] // Arkhiv Muromskogo gorodskogo suda Vladimirskoy oblasti [Archive of the Murom City Court of the Vladimir Region].

from September 29, 2019, alimony was recovered from the mother for the maintenance of the daughter.

At the same time, the court of first instance proceeded from the fact that previously the decision of the Selivanovsky District Court of Vladimir region on September 26, 2019, denied the child's father's claim to restrict the mother in parental rights in respect of the minor, the place of residence was determined with the mother, the father was charged alimony for the maintenance of his daughter; since February 23, 2022, the daughter lives with her father; mother was repeatedly brought to administrative responsibility for committing offenses under Part 1 of Article 5.35 of the Administrative Offenses Code of the Russian Federation (eight resolutions on cases of administrative offenses and three protocols on administrative offenses were presented in the case materials); on February 23, 2022, the mother was detained by police in a state of intoxication on the train tracks at the station in Murom City, where she was with her daughter; the defendant is registered with the Department for Juvenile Affairs due to improper performance of duties to bring up her daughter, abuses alcoholic beverages.

By appeal ruling of the judicial board for civil cases of the Vladimir regional court of 14 December 2022[1] the decision of the district court was cancelled in part to satisfy the plaintiff's claims to restrict the mother's parental rights. A new decision was adopted in this part, which denied the claims to restrict the mother's parental rights and warned her of the need to change her attitude to her daughter's upbringing. The rest of the decision of the district court remains unchanged.

The Judicial Board overturned the court's decision to satisfy the requirements of the restriction of parental rights on the basis that the materials of the case do not confirm the existence of legal grounds for the restriction of the parental rights of the defendant.

Since the child's place of residence was determined with the father and, given that the child had been living with the father for four months prior to the court's request, there were no grounds for concluding that meetings between the child and the mother posed a threat to the child's life or health, taking into account that the frequency, frequency, and conditions of meetings could be established by agreement of the parents or by the court.

Restriction of parental rights boils down to taking the child away from the parents without deprivation of parental rights, loss of the parents' right to personal upbringing of the child, with preservation of the parents' ability to communicate

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[1] Apellyatsionnoe opredelenie sudebnoy kollegii po grazhdanskim delam Vladimirskogo oblastnogo suda ot 14 dekabrya 2022 goda po delu No. 33–4441/2022 [Appeal ruling of the Judicial Board for Civil Cases of the Vladimir Regional Court on December 14, 2022 in case No. 33-4441/2022] // Arkhiv Vladimirskogo oblastnogo suda [Archive of the Vladimir Regional Court].

with the child under certain conditions (Paragraph 1 Article 73, Article 75 of the Family Code of the Russian Federation). Given that the place of residence of the child is defined by the father, it is not clear how the rights of the child will be additionally protected by the restriction of the mother's parental rights.

The defendant is not registered in the narcological and psychoneurological dispensaries, is engaged in trade in building materials and has a stable income each month, has a free schedule of work, which indicates the presence of communication with his daughter. According to the Court of Appeal, the reference of the district court to the fact that the defendant has been brought to administrative responsibility for an offense under Paragraph 1 of Article 5.35 of the Code of Administrative Offences of the Russian Federation is not a sufficient reason to enable the restriction of the parental rights of the defendant in respect of their daughter. In this case, the conflictual relationship that has developed between the parents cannot serve as the basis for restricting one of them in their right to communicate with the child. As the representative of the defendant explained, the reason for going to court was the conflictual relationship between the defendant and the plaintiff and his own sister. The agencies of guardianship and custody did not apply for restriction of parental rights.

In addition, the defendant has not withdrawn from her duties to the extent that it can be regarded as sufficient grounds for restricting her parental rights, is interested in the fate of her daughter, has a monthly income.

The appellate court also applied the category "traditional family values", stating that under the established circumstances, the restriction of the defendant's parental rights with respect to his minor daughter is premature and contradicts the principles of the priority of family upbringing of children (Article 1, paragraph 3 of the Family Code of the Russian Federation), humanity, rationality, and justice (Article 5 of the Family Code of the Russian Federation) and *traditional family values* (Paragraph "c" Part 1 of Article 114 of the Russian Constitution), therefore, the decision of the court of first instance in this part must be reversed, with a new decision to deny the claims to restrict the defendant's parental rights with respect to her minor daughter, since no sufficient grounds to apply the measure of liability provided for in Article 73 of the Family Code of the Russian Federation were established in the course of the proceedings.

Moreover, the court of appeal referred to paragraph 5 of Decree No. 809 of the President of the Russian Federation dated 9 November 2022 "On Approval of the Basic State Policy for the Preservation and Strengthening of Traditional Russian Spiritual and Moral Values", according to which the traditional values include the family, and Part 4 of Article 67.1 of the Constitution of the Russian Federation, according to which the state ensures the priority of family upbringing,

creates conditions conducive to the comprehensive spiritual, moral, intellectual and physical development of children, fostering patriotism, citizenship, and respect for elders.

The appeal decision of the judicial board of judges for civil cases of the Vladimir Regional Court of 1 March 2022 also contradicted the restriction of the mother's parental rights with respect to her fourteen-year-old son *by traditional family values* (Article 114 Part 1 Paragraph "c" of the Russian Federation Constitution) as well as by the principles of the priority of raising children within the family (Article 1, Paragraph 3 of the Russian Federation Family Code)[1].

The Court of First Instance limited the parental rights of the mother with respect to her fourteen-year-old son due to the fact that the mother left for work in Moscow during the work week and returned only at weekends, and the child stayed home with his grandmother during the week, which, according to the court, affected his academic performance; noise periodically came from the apartment, neighbors called the police and the juvenile was registered with the Unified Database on Children at Risk and their Families; the child missed medical screenings at school[2].

In reversing the district court's decision and denying the suit to restrict parental rights, the appellate court pointed out that the Constitution of the Russian Federation establishes the priority of family upbringing of children, since family upbringing is the best form of upbringing mankind has ever known.

The Russian Constitution establishes the priority of family upbringing of children, since family upbringing is the best form of child-rearing that mankind knows, because one of the main purposes of a family is to create conditions for the normal development and proper upbringing of children. And this task is performed primarily by the parents. According to Article 54 of the Family Code of the Russian Federation, every child has the right to live and be brought up in a family as much as possible, has the right to know his parents, the right to their care, the right to live together with them, except when it is against children's interests. The child has the right to be brought up by the parents, to have interests protected, to be fully developed, and to have dignity respected.

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[1] Apellyatsionnoe opredelenie sudebnoy kollegii po grazhdanskim delam Vladimirskogo oblastnogo suda ot 1 marta 2022 goda po delu No. 33-4648/2021 [Appeal ruling of the Judicial Board for Civil Cases of the Vladimir Regional Court on March 1, 2022 in case No. 33-4648/2021] // Arkhiv Vladimirskogo oblastnogo suda [Archive of the Vladimir Regional Court].

[2] Reshenie Kolchuginskogo gorodskogo suda Vladimirskoy oblasti ot 10 avgusta 2021 goda po delu No. 33-4648/2021 [Decision of the Kolchuginsky City Court of the Vladimir region on August 10, 2021 in case No. 33-4648/2021] // Arkhiv Kolchuginskogo gorodskogo suda Vladimirskoy oblasti [Archive of the Kolchuginsky City Court of the Vladimir Region].

In restricting the child's mother's parental rights, the Court of First Instance did not establish the circumstances of the parent's conduct dangerous to the child, did not indicate what exactly it consists in or may consist in, did not clarify other circumstances demonstrating the need to protect the child's interests in the form of restricting the child's mother's parental rights. Neither did the guardianship agency's opinion specify such grounds. The reference of the court to the fact that the resolution brought the mother to administrative responsibility for an offense under paragraph 1 of Article 5.35 of the Code of Administrative Offenses of the Russian Federation is not a sufficient criterion for limiting the defendant in parental rights with respect to her son. At the hearing of the court of appellate instance, the minor consistently asserted his desire to live with his grandmother and mother, who comes from Moscow for several days every week and also referred to an improvement in his school performance. The judicial board found that the mother had not withdrawn from her responsibilities, was interested in her son's fate, was employed, was involved in raising the child, provided material support for his upbringing, and the minor had spoken in favor of staying with his birth family, so the restriction of parental rights of the mother as a measure of responsibility would not meet the interests of the minor, who had the right to be raised by his parents and (or) maintain legal ties with them. At the same time, there is no information about the criminal record, as well as about the fact of criminal prosecution against the mother, and the defendant does not suffer from mental disorders.

Therefore, it has been established that the defendant did not culpably evade her parental responsibilities to raise and support her juvenile son. In such circumstances, the separation of the mother and son and their separation are inadmissible, and the restriction of the defendant's parental rights is contrary to the principles of the priority of family upbringing of children, humanity, reasonableness and fairness, and *traditional family values*.

In another case, the guardianship and custody agency, acting in the interests of two brothers, ten and six years old, filed a lawsuit to deprive their parents of their parental rights and recover alimony.

The decision of the District Court satisfied the lawsuit[1]. The court proceeded from the fact that the father and mother suffer from alcoholism and abuse their parental rights, evade proper upbringing and education of their children, arrange quarrels while intoxicated at night, depriving children of sleep, leave children in

[1] Reshenie Sudogodskogo rayonnogo suda Vladimirskoy oblasti ot 6 oktyabrya 2021 goda po delu No. 2-523/2021 [Decision of the Sudogodsky District Court of the Vladimir Region on 6 October 2021 in case No. 2-523/2021] // Arkhiv Sudogodskogo rayonnogo suda Vladimirskoy oblasti [Archive of the Sudogodsky District Court of the Vladimir Region].

life- and health-threatening situations, were prosecuted for committing an offense under Part 1 of Article 5.35 of the Code of Administrative Offences of the Russian Federation. In addition, earlier by the decision of the Sudogodsky District Court of Vladimir region dated March 4, 2020, the defendants were restricted in their parental rights, and by the decision of the same court dated September 21, 2020, they were restored in their parental rights, but they failed to come to relevant conclusion.

In reversing the decision of the Court of First Instance, the Court of Appeal pointed out[1] that the deprivation of parental rights is an exceptional measure, which entails serious legal consequences both for the parent and for the child. This deprivation of parental rights is allowed only if the parent is guilty of unlawful behavior, and is applied in the situation when it is impossible to protect the rights and interests of the child in any other way. On the contrary, from the evidence in the case file, it follows that the defendants are not registered with a narcologist. The mere fact that the defendants drank alcohol cannot be the basis for such a drastic and exceptional measure as termination of their parental rights, considering also that on September 21, 2021, they underwent antialcoholic treatment and the supporting documents were submitted to the court of the first instance. During the time the children lived in the social and rehabilitation center for minors, the mother visited the children 16 times and the father eight times. The defendants bought the children medications prescribed by the doctor, including expensive medications, as needed. The defendants are employed and have positive characteristics from their places of work.

During the trial of the Appeal Court, in the presence of a teacher and in the absence of parents, the ten-year-old son of the defendants was interviewed, who explained that he wanted to return home and dreamed of celebrating the New Year with parents and brother. At the same time, the child's opinion was stated independently, consistently, consciously, without any external influence, the Judicial Collegium did not see signs of influence on the formation of the child's opinion by his parents or employees of the social-rehabilitation center during the interview, the child expressed his opinion on the basis of his own understanding of his interests and needs.

The Judicial Collegium concluded that since the measures taken in the form of establishing temporary guardianship over the minors, removing them from the family and placing them in the social and rehabilitation center for minors, preventive

[1] Apellyatsionnoe opredelenie sudebnoy kollegii po grazhdanskim delam Vladimirskogo oblastnogo suda ot 30 noyabrya 2021 goda po delu No. 33-4375/2021 [Appellate ruling of the Judicial Collegium for Civil Cases of the Vladimir Regional Court on November 30, 2021 in case No. 33-4375/2021] // Arkhiv Vladimirskogo oblastnogo suda [Archive of the Vladimir Regional Court].

work with the parents yielded positive results, the defendants revised their attitude toward raising the children, in particular they became employed, received alcohol-relief treatment, maintained contact with the children while they were in the social and rehabilitation center, wish to raise the children, have for this purpose the necessary. Deprivation of parental rights as an exceptional measure applied when all other measures have failed would not be in the interests of minors who have the right to be raised by their parents and (or) maintain legal ties with them.

Therefore, in circumstances, a complete and final severance of the parent-child relationship is unacceptable and contrary to the children's interests and *traditional family values*.

The Judicial Collegium also took into account that there was no evidence of cruel, abusive or degrading treatment of the defendants with the children, no cases of leaving the children in circumstances which threatened their lives or health.

As the Judicial Collegium stated in its decision on appeal, the deprivation of parental rights contradicts the principles of the priority of family upbringing of children (Article 1, Paragraph 3 of the Family Code of the Russian Federation) and *traditional family values* (Article 114, Part 1, Paragraph "c" of the Constitution of the Russian Federation). In this connection, the first instance court decision should be set aside, and a new decision should be made to dismiss the claims to deprive the defendants of parental rights.

However, taking into account that the fact of inadequate performance by the defendants of their parental duties due to alcohol abuse was confirmed during the trial, the judicial panel warned the defendants of the need to change their attitude to the upbringing of children (Paragraph 18 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of November 14, 2017, No. 44 "On the Practice of Application by the Courts of Law in Resolving Disputes Related to the Protection of Rights and Legitimate Interests of a Child in Immediate Threat to His Life or Health, as well as in Restriction or Deprivation of Parental Rights")[1].

However, as noted earlier, in the reasoning parts of some judicial acts there are references to phenomena that essentially refer to traditional values, but are not directly referred to as such in the judicial acts.

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[1] Postanovlenie Plenuma Verkhovnogo Suda Rossiyskoy Federatsii ot 14 noyabrya 2017 goda No. 44 "O praktike primeneniya sudami zakonodatelstva pri razreshenii sporov, svyazannykh s zashchitoy prav i zakonnykh interesov rebenka pri neposredstvennoy ugroze ego zhizni ili zdorovyu, a takzhe pri ogranichenii ili lishenii roditelskikh prav" [Resolution of the Plenum of the Supreme Court of the Russian Federation of November 14, 2017 No. 44 "On the Practice of Application by the Courts of Law in Resolving Disputes Related to the Protection of Rights and Legitimate Interests of a Child in Immediate Threat to His Life or Health, as well as in Restriction or Deprivation of Parental Rights"] // Byulleten Verkhovnogo Suda Rossiyskoy Federatsii [Bulletin of the Supreme Court of the Russian Federation]. 2018. No. 1.

For example, the decision of the District Court[1] denied the father of the child's lawsuit to change the previously established order of communication with his nine-year-old son by a court decision.

By an Appeal Decision of the Judicial Collegium for Civil Cases of the Vladimir Regional Court of May 31, 2022[2], the decision of the Court of First Instance was overturned in part to deny satisfaction of the lawsuit to establish the order of communication between the father and his son during the May holidays. A new decision was made in this part, which defined the order of communication between the father and his son during the May holidays of each year for 4 days, from May 7 to 10, with the organization of overnight stays of the son at his father's place of residence. At the same time the court of appeal indicated that "taking into account the military-patriotic education of the boy by his father, his age, the father's ability to have a positive impact on the physical and mental health of the child, the son's stay with his father during this period will contribute to the formation of patriotism and a sense of pride in his country".

However, patriotism, citizenship, service to the country and responsibility for its future are considered traditional values in Paragraph 5 of the Basic State Policy for the Preservation and Strengthening of Traditional Russian Spiritual and Moral Values.

The Cassation Court agreed with this approach[3].

It seems that the insufficient application of traditional values by the courts to justify the judicial acts is facilitated by:

— the absence of a basic legal definition of the concept of traditional family values, their list, as well as the criteria for attributing phenomena and moral guidelines to such;

— lack of references to traditional family values in normative legal acts.

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[1] Reshenie Gorokhovetskogo rayonnogo suda Vladimirskoy oblasti ot 27 yanvarya 2022 goda po delu No. 2-12/2022 [Decision of the Gorokhovets District Court of Vladimir Region on January 27, 2022 in case No. 2-12/2022] // Arkhiv Gorokhovetskogo rayonnogo suda Vladimirskoy oblasti [Archive of the Gorokhovets District Court of the Vladimir Region].

[2] Apellyatsionnoe opredelenie sudebnoy kollegii po grazhdanskim delam Vladimirskogo oblastnogo suda ot 31 maya 2022 goda po delu No. 33–1946/2022 [Appellate ruling by the Judicial Board for Civil Cases of the Vladimir Regional Court on May 31, 2022 in case No. 33-1946/2022] // Arkhiv Vladimirskogo oblastnogo suda [Archive of the Vladimir Regional Court].

[3] Opredelenie sudebnoy kollegi po grazhdanskim delam Vtorogo kassatsionnogo suda obshchey yurisdiktsii ot 15 noyabrya 2022 goda po delu No. 88-25180/2022 [Ruling of the Judicial Panel on Civil Cases of the Second Court of Common Pleas of November 15, 2022 in Case No. 88-25180/2022] // Arkhiv Vladimirskogo oblastnogo suda [Archive of the Vladimir Regional Court].

With regard to the sphere of family relations, within the framework of our monographic study to identify traditional family values we used two criteria *theoretical* and *empirical*[1].

Under the empirical criteria, we analyzed the Constitution of the Russian Federation and Constitutions of European states (in the editions that were in effect before the aggressive imposition of neoliberal views in a few states and making changes in the Constitution under their influence) to identify the most significant patterns in the family sphere, since the constitutional level of certain family imperatives indicates their high importance and value for the state and society, as well as the existence of a national (public) consensus on their significance and value. As N. S. Bondar rightly points out, "constitutional values reflexively express the values of society," and "constitutions are the main custodians and sometimes generators of the value norms of states"[2].

The theoretical criterion involves attributing to traditional family values those socio-normative modes that ensure that the family performs its basic functions.

Application of these criteria in dialectical unity allowed us to identify the following traditional family values: marriage as a voluntary union of a man and a woman; family as the basis of society; motherhood, fatherhood, and childhood; care for children, the good of the child; family education of children; building family relationships based on high spiritual and moral principles and feelings; care for disabled family members; equality of spouses; autonomy of family relations.

At the same time, traditional family values are proposed to mean normative models of due in family relations, ensuring performance by family of basic functions (demographic, educational, economic, sociocultural, household, primary social control, social status, spiritual, emotional, leisure, etc.), constituting moral basis of family relations, having natural imperative for most members of society.

To expand the application of traditional family values by courts, it is necessary to include in the Family Code of the Russian Federation direct references to the regulation of family relations by traditional family values.

In particular, in Article 4 of the Family Code of the Russian Federation it should be specified that civil legislation applies to property and personal non-

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[1] *Yakushev P. A.* Traditsionnye tsennosti v mekhanizme pravovogo regulirovaniya semeynykh otnosheniy v Rossii i stranakh Evropy: diss. …d-ra yurid. nauk [Traditional values in the mechanism of legal regulation of family relations in Russia and European countries: dissertation of Doctor of Legal Sciences]. M., 2021. Pp. 64–78.

[2] *Bondar N. S.* Aksiologiya sudebnogo konstitutsionalizma: konstitutsionnye tsennosti v teorii i praktike konstitutsionnogo pravosudiya [The axiology of judicial constitutionalism: constitutional values in the theory and practice of constitutional justice]. M.: Yurist, 2013. Pp. 8–9.

property relations between family members not regulated by family legislation if it contradicts the essence of family relations and traditional family values (supplementing the article after the words "essence of family relations" with the words "traditional family values"). Article 5 of the Family Code of the Russian Federation should be supplemented with a provision to the effect that in the absence of norms of family and (or) civil law to be applied to family relations by analogy of law, the rights, and obligations of family members shall be determined on the basis not only of principles of justice, humanity, and reasonableness but also traditional family values (supplementing the last sentence of the article after "justice" with "traditional family values"). Paragraph 2 of Article 6 of the Family Code of the Russian Federation must be supplemented with a provision on the inadmissibility of applying the rules of international treaties contradicting both the Constitution of the Russian Federation and the foundations of law and order and morality and traditional family values (supplementing the first sentence of paragraph 2 after the word "morality" with the words "traditional family values").

Therefore, despite the inclusion of traditional family values at the constitutional level in the sphere of legal regulation, as well as the task of protecting traditional values in a number of strategic normative legal acts, the courts do not use the regulatory potential of traditional values enough. The expansion of the application of traditional values by the courts to justify the adopted judicial acts will be facilitated by the normative consolidation of the definition of traditional family values, their list, the criteria of attributing phenomena and moral guidelines to such, as well as the inclusion of references to traditional values in the normative legal acts.

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Traditsionnye tsennosti v Poslaniyakh Prezidenta RF Federalnomu Sobraniyu RF i v normativnykh pravovykh aktakh: sbornik [The traditional values in the Addresses of the President of the Russian Federation to the Federal Assembly

of the Russian Federation and in normative legal acts: a collection] / sostavitel P.A. Yakushev. Vladimir: Atlas, 2021. 32 p. (in Russian)

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THE PROCESS OF LAW FORMATION: ONTOLOGICAL, AXIOLOGICAL AND EPISTEMOLOGICAL ASPECTS

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Abstract. *The article considers the process of law formation as a two-unit process of spontaneous and planned-rational formation of legal norms system, providing the ordering of public relations under the influence of various factors of social development, receiving refraction in legally significant social interests and the subsequent reflection in the legal ideas. The ontological, axiological and epistemological aspects of this process are emphasized. By means of philosophical-legal methodology of law formation is presented in the form of twofold process of spontaneous and systematic-rational formation of legal norms, providing ordering of public relations.*

Keywords: *law formation, law making, ontology, axiology, epistemology, law genesis.*

Today's jurisprudence has distanced itself from the orthodox view of legal norms as the product only of the government. Such an understanding had for some time ideological grounds as well as factual reasons. But today the situation is changing dramatically. The contribution of other subjects of law formation in each

national normative system is recognized by a significant number of researchers both in Russia and foreign countries[1]. Such a trend will only expand[2].

It should be noted that law formation from a logical point is a more general concept than the concept of law-making, i.e., it can be obtained by generalization by removing a number of features essential to the concept of law-making. According to researchers, law-making as a concept includes two largely opposite phenomena — spontaneous formation of legal norms and law-making itself[3]. Here we can fix the indicated opposition: on the one hand, indeterminacy, on the other — expediency, together leading to a single result. However, the ontological contradiction does not entail a logical contradiction, so that the concept of law formation can be considered quite consistent within itself[4].

Science considers law formation as a two-unit process of spontaneous and planned-rational formation of the system of legal norms, providing the ordering of public relations, which is carried out under the influence of various factors of social development, receiving refraction in legally significant social interests and the subsequent reflection in the legal ideas[5].

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[1] *Goldsmith L., Posner E.* The Limits of International Law. New York: Oxford University Press. 2005; *Shelton D.* International Law and Relative Normativity in International Law, Edited by Malcolm D. Evans. Oxford University Press. 2003; *Williams A. C.* Civil Society Initiatives and "Soft Law" in the Oil & Gas Industry // New York University Journal of International Law & Politics Vol. 36. (2004); *Daneliya G. R.* Osobennosti pravovogo regulirovaniya sotrudnichestva gosudarstv-chlenov ES v oblasti obshchey vneshney politiki i politiki bezopasnosti: avtoref. diss. … k.yu.n. [The specifics of the legal regulation of cooperation of EU member states in the field of common foreign and security policy: author's abstract of dissertation of Candidate of Legal Sciences]. Kazan, 2006; *Zimnenko B. L.* Mezhdunarodnoe pravo i pravovaya sistema Rossii: diss. … d.yu.n. [The International law and the legal system of Russia: Dissertation of Doctor of Legal Sciences] M., 2006; *Lutkova O. V.* Osnovnye kontseptsii istochnikov mezhdunarodnogo prava: diss. … k.yu.n. [The basic concepts of the sources of international law: dissertation of Candidate of Legal Sciences]. M., 2004; *Lysenko D. A.* Problemy pravovogo statusa transnatsionalnykh korporatsiy: mezhdunarodno-pravovye aspekty: avtoref. diss. … k.yu.n. [The problems of the legal status of transnational corporations: international legal aspects: abstract of the dissertation of Candidate of Legal Sciences]. M., 2003.

[2] *Lang P. P.* Pravovaya deyatelnost: aksiologicheskie i mirovozzrencheskie osnovaniya [The legal activity: axiological and attitudinal foundations]. Samara: OOO "Poligraficheskoe obedinenie "Standart", 2021. P. 43.

[3] *Pridvorov N.A., Trofimov V. V.* Pravoobrazovanie i pravoobrazuyushchie faktory v prave [The law formation and law-forming factors in the legislation]. M.: Norma, 2016. 400 p.

[4] *Murashko L. O.* Aksiologicheskoe izmerenie protsessa pravoobrazovaniya: istoriya i sovremennost: diss. … dokt. yurid. nauk [The axiological dimension of the process of law formation: history and modernity: dissertation of Doctor of Legal Sciences]. M., 2015. P. 302 and next.

[5] *Pridvorov N.A., Trofimov V. V.* Pravoobrazovanie i pravoobrazuyushchie faktory v prave [The law formation and law-forming factors in the legislation]. M.: Norma, 2016. P. 14.

Uniting in one category of two opposite descriptive and conceptual constructions is an epistemologically difficult activity, although in this case the expediency of such unification is obvious: it is the need to find common patterns of formation of legal norms, regardless of whether someone controls this process or not, whether he is characterized by a clearly expressed subjectivity or is completely anonymous.

The process of formation of the normative system, which is law, has a number of ontological, axiological and epistemological specifics, equally inherent in both law-making practice and non-state phenomena of legal genesis.

It appears that law is not a purely atomized structure, that is, it cannot be divided into microscopic fragments in the form of deontic (permissive, prohibitive and binding) judgments. To be more precise, it is certainly possible to divide it, but then the very systemic effect would disappear, for which only one can speak about the formation of a new quality (the so-called "emergent nature"), while the system is always something new, separate and standing out against the background of the environment. In this regard, going beyond the law in the narrow sense (that is, in fact, individual legal regulations) is justified approximately in the same way as the introduction of the third dimension into geometry is justified: then much becomes clear from what is valid also in relation to the plane (two dimensions), but cannot be considered and realized if one stays there. Exit to the space with higher dimensionality is a typical methodological method, thanks to which the former knowledge is renewed, clarified, takes on a new life. This is why we need a philosophical characterization of law formation in order to solve exactly theoretical-legal tasks.

Ontology is a chapter of philosophy that investigates objects, the structures of objects, and the functions inherent in objects. Simplifying, we can say that ontology is a scheme of reality, made with the maximum degree of abstraction. In science, it is customary to call ontological schemes, which pretend to complete coverage of reality in all its typical diversity, world pictures[1]. Legal science, according to some scientists, also contributes to a picture of the world, although the latter does not resemble the results of the ontological comprehension of natural sciences — physics, biology, or cosmology. In any case, the multiplicity of pictures of the world is partly due to the basic abstraction that is chosen as the main one, the main one in the unfolding of the scheme of reality. Once this abstraction is changed, the whole picture of the world changes as well. In those disciplines where the ontological boundaries between objects are sufficiently well-defined,

[1] *Vedeneev Yu. A.* Yuridicheskaya kartina mira: mezhdu dolzhnym i sushchim [The legal view of the world: between the proper and the actual] // Lex Russica. 2014. No. 6. Pp. 641–654.

different pictures of the world are difficult to combine with one another, if, of course, there is any need for researchers to do so at all. For example, if we look at the electron as a wave, the microcosm will appear in our theory as one side, and if we look at it as a particle — another side. Hence, the problem of quantum mechanics, and its paradoxical nature: there is no complete understanding of how it is possible to combine these views of the subatomic level of matter. In this sense, the social sciences look much simpler: their pictures of the world overlap, so that, for example, the doctrine of the class structure of society can be combined with the theory of social solidarity, although initially these views are rooted in opposing philosophical beliefs about the prospects for social development and the driving forces of such development. Or, for example, synthetic theories or concepts of law are possible, whose main purpose is to remove the opposition between positivism and naturalism as general philosophical principles for understanding the nature of law and its origins. Synthetic theories of law include the so-called "communicative" or "dialogical" understanding of law.

The unification of different paradigms of understanding the law is also possible because at the base of legal thinking are concepts that are pre-theoretical in their origin. We dare to argue that for legal relations, the central concept of the ontological type is the concept of order, and it is this concept that emerged and existed outside any theory. In other words, order or the intuition of orderliness is equidistant from all competing views of law.

The notion of order should be seen as a semantic center, attracting to itself all ideas about the structures, functions, attributes of legal reality. Therefore, we should focus on the idea of order as the basis for the analysis of law from an ontological point of view.

As you know, the human consciousness is not inherent in principle the idea of complete chaos, none of the people cannot imagine the absolute disorderliness of phenomena and the absence of all interconnections in the surrounding reality. But even relative indeterminism, in which causality appears and disappears, is difficult to imagine, since people are used to seeing a causal relationship between phenomena, but not its absence. Moreover, in an era of far-reaching advances in science and technology, the absence of causality is perceived only as a temporary ignorance of the connections between phenomena at a level deeper than is currently available to us. Finding determinism in a particular subject area seems, for this style of thinking, only a matter of time and a purely technical difficulty.

It is telling to what extent the social sciences are not similar to the natural sciences. In the former, it is assumed that for two independently discovered facts, there is inherently no relationship. This assumption in statistics is called the "null

hypothesis"[1]. Whereas the presence of a relationship and its character (correlation or causality) must be proved (or, similarly, the null hypothesis must be disproved). In the social sciences, the null hypothesis, apparently, cannot be applied or is applied rather rarely. Events occurring in social space can have unanticipated effects on people seemingly significantly distanced from the place and time of a given event. Subjects carrying interactions can introduce distortions into information or perceptions of what is happening, which also affect the outcome of the event. Thus, there are many more unknown yet real interactions in society than there are outside it, so it seems correct to make the opposite assumption with regard to social reality, rather than the similarity of the null hypothesis: the two events in it should be considered related until the opposite is established. Moreover, from our point of view, even the absence of social connection can often be interpreted as something unnatural.

The universal connection of social phenomena emerges even within or, more precisely, thanks to mythological consciousness. Just as the space of myth is organized according to the principle of universal belonging, the whole, as ancient thinkers believe, arises before the parts, and it is the parts that exist thanks to the whole, and not vice versa. Therefore, it is not at all surprising that Platonism places the properly organized state, the state corresponding to its notion, as Hegel, for example, would put it. The Platonic way of thinking is sufficiently mythologized, and a purely logical beginning plays a clearly subordinate role in Platonism. The invariable presence of myth in the structure of ancient thought can partly explain the fact that the notions of individuality were formed first as applied to the physical level of being, that is, to the material world — we are talking about the teachings of the school of atomists. At the same time, in the law of that time, the principle of individualization of responsibility and punishment was also absent, although it was the guilty person who was punished, and not his whole family or clan, for example, as was done in pre-state societies, especially in nomadic tribes.

We must keep in mind, however, that the universality of social reality does not mean its unchanging existence. Moreover, ancient philosophers preferred to argue that states tended to degenerate over time, which points to the "golden age" mythology characteristic of the minds of the time. The degeneration of the state is understood as the loss by the powers that be of the common good as the only yardstick and aim of the action. It is possible to save the polis from degeneration and tyranny only by establishing a better order. Thus is born the most important political utopia of all time and peoples — the dream of an ideal state.

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[1] *Fisher R.* Statisticheskie metody dlya issledovateley [The statistical methods for researchers]. M.: Gosstatizdat, 1958. 267 p.

But from the point of view of the ontological analysis of political-legal reality another thing is interesting: it turns out that the social order, for whatever reason, cannot be established for a long time without changing at the same time. Efforts, human energy, both volitional and intellectual, are required to ensure that this order maintains its basic parameters. And even if we are not talking about the ideal state, the most ordinary political relations also tend, over time, to turn into their opposite.

The instability of the social order may be due to many reasons, but the main one is the very fact that people possess an individual will, which in its decisions acts as an autonomous entity beyond the control of reason. This circumstance renders either useless or meaningless versions of the ideal state, since there is no guarantee that all citizens will follow exactly this ideal.

However, it should be noted that at all times, society retains ideas about the desired political order, as well as the understanding that the actual order differs from the desired one. Even if myth has no power today, ideology — a system of ideas about the world that fixes something that is absent in fact and that should be, remains significant. Ideology is constructed by combining a multitude of value judgments into a system. Usually the emphasis is placed on the subject of evaluation, not on the evaluating subject, and one prefers not to talk about the grounds of evaluation.

Both the actual and the ideological are fixed by society in social norms. From our point of view, when we talk about the ontological aspect of law, we mean, first, that the legal system enshrines a certain image of society, which sanctions this legal order, giving it significance and universality. It is clear that this fixation does not allow us to unambiguously determine all the basic parameters of society, relying only on what is enshrined in the sources of law, but it is also obvious that at the heart of any system of norms lies, first and foremost, the idea of a social community about itself, whether it is a state, a union of states or a region permeated by political-integrative ties (such as modern Europe[1]).

It should be noted that the actual content of legal judgments is often minimal. It is only necessary to ensure the coherence of the legal system with other systems that make up the fabric of social interaction. For example, factuality is common in construction norms and rules, sanitary rules, technical regulations, it is found in environmental, urban planning and housing legislation. Judgments about facts per se, of course, cannot express any social values, although by changing the

[1] *Lang P.P.* Pravovye tsennosti Evropeyskogo Soyuza: sovremennoe sostoyanie i transformatsiya [The legal values of the European Union: current state and transformation] // Aktualnye problemy pravovedeniya [Actual problems of jurisprudence]. 2021. No. 1(69). Pp. 4–9.

set of these facts we can always judge any value-motivated trend, including the expansion or narrowing of the areas of legal regulation.

Therefore, values are inherently localized in the upper level of legal consciousness, i.e., legal ideology. Obviously, at the lower level, i.e., legal psychology, there is also a value aspect, but it is not decisive in the ontological, axiological or epistemological study of law formation. Personal motives that are not correlated with general values either do not influence the legal behavior of the individual at all, or (if they do, and in a negative direction) are subject to identification in extreme cases, such as criminal proceedings.

However, one should not equate ideological judgments about law with legal ontology. It is quite clear that the set of ideas about the desired state of affairs is not necessarily limited to the schematization of existing objects and the relations between them. Moreover, in every ideology, the judgments and phrases that are the least defined in semantic terms but the most emotionally critical (or, respectively, apologetic) are the most attractive, which obviously correlates with the target audience as the authors of specific "ideological" texts envision it.

However, there is one component of legal ideology that has an ontological character that cannot be eliminated. It is the question of existence, or rather, its solution, offered by a given normative system. This component is so important that it is possible to distinguish one legal order from another, both synchronously and diachronously, by judgments about existence. I would like to explain this statement.

If we consider ontology to be a kind of scheme of reality, as mentioned earlier, then this scheme usually always determines which entities are recognized as valid, that, exists, and which are invalid or non-existent. In the latter case, they are neither named nor specified. The first primitive ontology was the "theory" of the Greek philosopher of the fifth century B.C. Parmenides, that being is, and non-being is not. Parmenides not only introduced a new object (being), the real correspondence of which he could not find without reference to logical reason, he also justified why non-existence does not exist[1]. Subsequently, the field of schematization, to which thinkers inevitably resorted, was constantly expanding, so that the philosophical sciences in the twentieth century already refrain from the idea of showing a picture of all reality in a single scheme. Of course, some tendencies in this direction remain: certain types and forms of existence are problematized, grandiose classifications of objects are created, but there are no

[1] *Romanenko R.A.* Problema sootnosheniya yazykovoy i ontologicheskoy kartin mira v filosofii Parmenida [The problem of the correlation between the linguistic and ontological view of the world in the philosophy of Parmenides] // Nauchnye issledovaniya i razrabotki molodykh uchenykh [Research and innovation by young scientists]. 2015. No. 3. Pp. 134–137.

authors who would claim to portray a picture of the world. In all appearances, such a task cannot be accomplished today without so many simplifications and conventions that they will eventually reduce the value of such a solution to a minimum.

Ontological statements about social phenomena are primarily judgments about existence, rather than judgments about specific properties. The latter, it should be noted, are much easier to check for truth, while existential judgments are much more difficult to check for truth, since the null hypothesis does not apply in the social sciences, so it is often necessary to prove the absence of ontological status rather than its presence.

The language of law is unified, does not include ontological terminology in its entirety, and is adapted to the tasks of normative regulation, rather than a descriptive function, and so on. However, at the same time, no one doubts that law models social reality, laying into it not an arbitrary but a desirable structure, from the point of view of certain political forces. Thus, the first level of ontology at which the presence of values can be detected in law is the judgment of who is considered to exist for a given normative system.

In characterizing legal genesis, we must proceed from the fact that in social reality it is impossible to completely reduce subjectivity, the subjective beginning. In the terms of classical philosophy, such as Kant's, we are talking about the autonomy of the will, which cannot be limited completely, but always only to a certain extent. In addition, it is precisely for this reason that the endowment of a group of actors with legal personality is the only form of public recognition that matters for the legal system, for the legal order as such. In other words, *a social ontology, relevant for the purposes of legal regulation, can be reconstructed by analyzing the legislation as to which communities are granted which rights and duties within the framework of their legal status*[1].

Further reconstruction of the ontological component in law formation should, in our opinion, include the concept of limit. As Yu. A. Vedeneev correctly writes, "in various historical practices of building a legal or normative-duty order of relations both at the institutional and mental levels of their expression and development, social interests, political preferences, and cultural values are simultaneously present and determine each other. At their intersection, depending on the scale of influence, dynamics, duration, and continuity of social iterations,

[1] See: *Lang P. P.* Pravovaya deyatelnost: aksiologicheskie i mirovozzrencheskie osnovaniya [The legal activity: axiological and attitudinal foundations]. Samara: OOO "Poligraficheskoe obedinenie "Standart", 2021. 372 p.

the normative boundaries of social communication arise and self-determine"[1]. That is to say, a legal prescription is a way of introducing a kind of delimitation within society. It is the presence of boundaries that makes society orderly, at least we identify a certain system as social, separating it from other systems, that is, again, by appealing to the boundaries drawn by the norms of law, morality, religion, etiquette.

The formation of a new legal model means a shift in the boundaries of legal regulation, and there can be just two directions: either the law captures and absorbs new fragments of social reality, or certain relations regulated by law move into the sphere of "shadow", that is, informal regulation. Both of these processes can be observed in different countries in different historical periods, and often both tendencies are not favorable for the participants of social communication.

In the first case, there may be a situation called in foreign studies the juridification of society, that is, an explosive and uncontrollable spread of law into new spheres of relations[2]. In the second case, we should talk about a decline in the demand for law, so that its value as a regulator begins to decline. The absolute limit of this second trend is the so-called anomie — the loss by society of its normative basis (introduced by the French sociologist E. Durkheim).

Excessive legal regulation can be represented in two ways:

a) as a replacement by legal norms of other social norms, and

b) as giving technical norms the status of legal norms.

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[1] *Vedeneev Yu. A.* Grammatika pravoporyadka [The Grammar of Law Enforcement]. M.: RG-Press, 2018. P. 85.

[2] A few domestic researchers have written about juridification, among them: *Belyaev M. A.* Postsovetskoe yuridicheskoe myshlenie i ego subekt [Post-Soviet legal mentality and its subject] // Problemy postsovetskoy teorii i filosofii prava: sb. st. [Problems of Post-Soviet theory and philosophy of law: collected essays.] M.: Yurlitinform, 2016. Pp. 4–29; *Belyaev M. A.* Sverkhregulirovanie: trudnosti problematizatsii [Over-regulation: the difficulties of problematization] // Pravovoe regulirovanie: problemy effektivnosti, legitimnosti, spravedlivosti: sbornik trudov mezhdunarodnoy nauchnoy konferentsii (Voronezh, 02–04 iyunya 2016 g.) [Legal Regulation: problems of efficiency, legitimacy, justice: collection of essays of the international scientific conference (Voronezh, June 02–04, 2016)] / [redkoll.: V. V. Denisenko (otv. red.), M. A. Belyaev]. Voronezh: NAUKA-YuNIPRESS, 2016. Pp. 160–176; *Denisenko V. V.* Pravovoe obshchenie v demokraticheskom grazhdanskom obshchestve [The legal communication in a democratic civil society] // Vestnik Voronezhskogo gos. un-ta. Seriya Pravo [Herald of Voronezh State University. Law Series]. 2018. No. 1. Pp. 29–36; *Denisenko V. V.* Problema yuridifikatsii s pozitsii kommunikativnoy teorii prava [The problem of jurification from the perspective of the communicative theory of law] // Sovremennoe otechestvennoe pravoponimanie: sostoyanie i perspektivy razvitiya: sbornik materialov Mezhvuzovskoy nauchnoy konferentsii [Modern native understanding of law: state and prospects of development: collection of materials of the Interuniversity scientific conference] / FGBOUVO "RGUP", Tsentralnyy filial; otv. za vyp. R. R. Palekha, V. I. Filatov. Voronezh: OOO "Izdatelstvo RITM", 2016. Pp. 42–49.

Thus, legal formation either introduces new functional connections between pre-existing objects into the legal space or introduces new elements, which can be active or passive. Shifting the boundaries of the legal system affects to a greater extent its passive elements (the blessings over which legal relations arise), and through judgments of existence, new active elements are brought into discourse and activity.

In the epistemological respect, law-making can be represented in several forms or ways. This depends on the presence of one or another ontological interpretation of this process, as discussed above, since ontology and epistemology are in themselves inseparable ("the order and connection of ideas and things are one and the same", as B. Spinoza wrote)[1].

Value is a relation in which at least three structural elements can be distinguished — the subject of evaluation, the basis of evaluation and the subject of evaluation. Legal progress as a result of intensive law formation, among other things, means that new bases of value judgments arise, because soon each norm can be used as such a basis. Note that this regularity does not mean that the level of certainty of law increases in society, since the bases of value judgments may not be ordered, since law is an extremely complex system and not all of its parts develop evenly and harmoniously.

Other indicators of legal genesis from the point of view of epistemology are the opportunities opened before the law-enforcer to directly use the principles of law to solve specific judicial and other controversial cases. This is explained by the fact that the developed normative system inevitably begins to describe itself (this is noted, for example, by N. Luhmann)[2]. This does not mean that it closes in on itself and becomes hermetic, it is rather a consequence of the growth of certainty and mutual consistency of parts within a common whole. Developed law also means developed legal consciousness, so that judges better understand the nature of legal values and formulate them in general terms; this is enshrined in judicial precedents (in the common law family) or in the legal positions of higher courts, de facto binding on lower courts (continental law family). The ability to carry out a full legal qualification in the light of legal principles and not to descend into pure (arbitrary) discretion in decision-making is a rather difficult skill, so that law enforcement in the actual progress of law becomes a more intellectual process.

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[1] See: *Spinoza B.* Etika [The ethics] / per. s lat. V. I. Modestova. Mn: Kharvest, M.: AST, 2001. P. 36.

[2] *Luhmann N.* Selbstreflexion des Rechtssystems: Rechtstheorie in gesellschaftstheoretischer Perspektive [Self-reflection of the legal system: legal theory in a social theoretical perspective] // ders., Ausdifferenzierung des Rechts, Beiträge zur Rechtssoziologie und Rechtstheorie. Frankfurt [The differentiation of law, a contribution to legal sociology and legal theory. Frankfurt.], 1999. Pp. 419–450.

This, by the way, indirectly argues in favor of the impossibility of replacing this activity with the efforts of computers, even if technically efficient[1].

The more subtle abstraction inherent in the thinking of those professionals who work with highly developed normative systems leads to a division of value judgments (evaluations) into justified and unjustified. If it is true that value — like truth — is not a property, i.e., cannot be found in objects, but is a relation, then it is necessary to decide every time under what conditions the justifying relation takes place (i.e., justification as a mental communicative action took place), and under what not. However, it is not possible to find this out before the communicative event itself or after it; more precisely, this kind of "cognitive" effort will never lead to a universally recognized result. Consequently, the justification of the value on which this or that outcome of a communicative event, including a political one, is possible only inside or in the course of the said event. This in turn means that the exchange of messages within communication is something more (and more valuable) than the exchange of data, "clear" information. It is a procedural disclosure of intersubjective properties. The positive sense of such processuality is that it reproduces anew and on another level those subjective capacities that are inseparable from the ability to perform rational actions. Thus, in particular, from the desire to maintain dialogue grows the ability to reflect: from the desire for a stable order of relations is born the ability to discuss and evaluate divergent preferences and the like.

Below, we summarize the presented reasoning.

Ontologically, law formation should be understood as the deployment of a number of possibilities, implicitly contained in the legal picture of the world. Law formation, unlike lawmaking, does not have to be discrete and usually does not cause the rupture of the single legal space. In the case of law-making, we can say with absolute precision whether the process of creation of a legal prescription or not, because its end will be the appearance of the corresponding form (source) of law. In the case of law formation, formalization is important, but not crucial, because not all functional interrelations within the framework of law formation are realized. Therefore, we can only talk about the completion of law formation in a sufficiently distant retrospective, i.e., by studying the history of local institutionalization of social relations.

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[1] *Rybakov O. Yu.* Chelovek, pravo, kultura, tekhnologii: novaya paradigma vzaimodeystviya? [The human, law, culture, and technology: a new paradigm of interaction?] // Osnovnye tendentsii razvitiya sovremennogo prava: problemy teorii i praktiki: materialy VI Natsionalnoy nauchno-prakticheskoy konferentsii, Kazan, 25 fevralya 2022 goda. Kazan: Universitet upravleniya "TISBI" [The main trends in the development of modern law: problems of theory and practice: materials of the VI National Scientific and Practical Conference, Kazan, February 25, 2022. Kazan: "TISBI" University of Management], 2022. Pp. 194–201.

During the actualization of the legal picture of the world, the values inherent in a given society also become explicit. Their identification automatically implies their ranking, so by studying legal genesis it is possible to understand which values in a particular historical period are of priority for a given society, and which values are secondary. The fact that between different values there will necessarily be a relationship of greater or lesser relevance is due to the prehistory of this or that legal institution, social and cultural heterogeneity of the population, the public authorities' own goals, the complex foreign policy situation, sometimes difficult and conflicting interaction between the authorities and civil society institutions, the interaction of politics and economics and other objective factors.

From an epistemological point of view, law formation is nothing more than a self-description of society in the language of law. It follows that, first, in the course of law formation, any legal activity acquires more grounds or justifying arguments for implementation, or, in other words, legal argumentation becomes more saturated with normative arguments. Secondly, the basic abstractions of legal activity — the principles of law — through law formation acquire the status of directly operative, because their regulatory content becomes more definite and open to interpretation. In this capacity, they become similar to innate human rights and freedoms. On them becomes possible to base this or that law-enforcement decision, including in cases where specific prescriptions contained in subordinate normative legal acts determine an alternative decision.

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THE WAIVER AND RESTRICTION OF FAMILY LEGAL CAPACITY

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Abstract. *The article proves the impossibility of waiver and restriction of general family legal capacity in view of its abstractness and inalienability from the personality of the bearer, while it is possible to restrict and waive only a subjective right. Almost all examples of waiver and restriction of legal capacity, which were previously cited by researchers, are not a waiver of legal capacity or its restriction, but a waiver (restriction) of rights or the exercise of a right. It is necessary to distinguish between legal capacities, which are part of the content of specific subjective rights, and abstract capacities, which constitute elements of legal capacity. In spite of the fact that waiver of legal capacity in general is impossible, it is possible to waive individual capacities included in the structure of legal capacity, for example, it is possible to waive reproductive legal capacity as a variant of parental capacity, if the person resorts to medical sterilization.*

Keywords: *legal personality, legal capacity, subjective rights, somatic rights, waiver of legal capacity, restriction of legal capacity.*

A person, once born, acquires legal personality, from which he cannot renounce, because legal personality is an inalienable element of a person and cannot be lost, it does not depend on the will of the person, it arises and terminates through objective law[1].

[1] *Marchenko M. N.* Teoriya gosudarstva i prava: ucheb. 2-e izd., pererab. i dop [The Theory of State and Law: Textbook. Second edition, edited and updated]. M.: TK Velbi; Izd-vo Prospekt, 2008. P. 591.

As long as a person is alive, we can talk about the existence of legal personality. If a person renounces his life, then we can talk about the renunciation of legal personality only in the case when a person consciously refuses to be a subject of law and, as a consequence, voluntarily renounces his life, which is almost impossible, since the person at that moment is moved by other thoughts and desires. As an example, we can consider the refusal of juveniles from life with the desire to stop being a child for their parents, that is, theoretically, this example can be subsumed under the refusal of a juvenile from the legal personality of a child. However, by virtue of age features, depression, disharmony in the family and other reasons disclosed by psychologists[1], the juvenile is not so much willing to give up his legal personality, as he is willing to attract attention to himself. All the more so, the desire to give up life is not natural to man, because the fear of death, according to researchers, is at the basis of almost all fears: a person under the influence of the instinct of self-preservation is afraid of death as a reflex. In the opinion of J. Hinton, the fear of death is "a part of the human constitution, necessary for the existence of the individual"[2]. S. Kyerkegor wrote that the fear of death is inherent only in man[3].

Very close to legal personality are somatic rights, in particular the right to death, which is understood as "the possibility of a person consciously and voluntarily, at a time of his choice, to depart from life in a chosen and available to him way"[4]. M. A. Lavrik includes suicide and euthanasia as forms of exercising the right to death[5], the latter being prohibited by the Federal Law "On the Fundamentals of Health Protection in the Russian Federation"[6]. However, in the context of this law, active euthanasia is prohibited, while the refusal of medical intervention (this is actually passive euthanasia) is allowed by the same law in Articles 19, 20.

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[1] *Sinyagin Yu. V., Sinyagina N. Yu*. Detskiy suitsid. Psikhologicheskiy vzglyad [The Child Suicide. Psychological viewpoint]. SPb.: KARO, 2006. P. 154.

[2] *Hinton J. Michael.* Perception and identification // Philosophical Review. 1976. No. 76 (October). P. 421.

[3] *Kyerkegor S.* Strakh i trepet. Per. s dat. [Fear and trembling. Translated from Danish]. M.: Respublika, 1993. P. 203.

[4] *Malinovskiy A. A.* Zloupotreblenie pravom: monografiya [Abuse of Law: monograph]. M.: MZ Press, 2002. P. 78.

[5] *Lavrik M. A.* K teorii somaticheskikh prav cheloveka [On the theory of somatic human rights] // Sibirskiy yuridicheskiy vestnik. Irkutsk: Yuridicheskiy institut IGU [The Siberian Law Herald. Irkutsk: Law Institute of Irkutsk State University]. 2005. No. 3. P. 82.

[6] Federalnyy zakon "Ob osnovakh okhrany zdorovya grazhdan v Rossiyskoy Federatsii" ot 21.11.2011 No. 323-FZ [Federal Law "On the Fundamentals of Health Protection in the Russian Federation" of 21.11.2011 No. 323-FZ] // Rossiyskaya gazeta [The Russian Newspaper]. 2011. No. 263.

According to current legislation, the right to death through a waiver of medical intervention may only be exercised by a person. The participation of a representative is permitted only in the cases stipulated in Article 20 of the Law, when the question of the waiver of legal personality of the ward by the representative arises. This is possible in relation to persons declared legally incapacitated, if the latter are unable to refuse medical intervention due to their condition. Also with respect to juveniles under the age of 15, and if one of the parents refuses medical intervention necessary to save a juvenile's life, then the medical organization has the right to appeal to court to protect the interests of such a person, since the parents' refusal to treat a child with a chronic illness is equal to a threat to life.

Euthanasia in the case of juveniles is prohibited in all states because of the special protection of their lives. At the moment, the main state where assisted dying is possible is Belgium[1]. It should be noted that the Federal Law "On the Fundamentals of Citizens' Health in the Russian Federation" does not apply the rules of partial legal capacity of juveniles when the latter exercise their refusal of medical intervention, allowing juveniles who have reached the age of 15 to refuse medical intervention without the consent of their legal representative (Article 54, Paragraph 2 of the Federal Law)[2]. An exception is when medical intervention is necessary for emergency indications in order to eliminate a threat to the life of a person (a juvenile).

As a possible option for the renunciation of legal personality, we should consider the actions of a person aimed at changing gender. There is no unequivocal answer to the following questions: can we talk about the social death of a person, about the replacement of one subject of law by another when changing gender, does changing gender affect the scope and content of rights and obligations, the scope of legal personality, legal capacity and legal competence?

However, the legal status of a person who has changed gender remains unchanged. With a change of gender, a person continues to exist, he does not cease to be a subject of law, he does not experience social and biological death, he does not give up legal personality, but his individual rights change or are lost. After gender reassignment, the person retains the same level of family legal personality that he or she had before the gender reassignment. But in the case of gender reassignment, a person's original biological gender identity determines his or her ability to exercise legal capacity. For example, a man, even after gender reassignment, will not be able to bear a child.

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[1] Report of the CFCEE (Commission regulating euthanasia in Belgium) for the year 2018 [Electronic resource] // URL: https://organesdeconcertation.sante.belgique.be/fr (date of address: 06.11.2021).

[2] *Skorobogatova V. V.* Pravovye aspekty evtanazii [The Legal Aspects of Euthanasia] // Rossiyskiy yuridicheskiy zhurnal [The Russian Law Journal]. 2009. No. 5. P. 100.

Just as a person cannot give up legal personality, so he cannot give up legal capacity. A person has family legal capacity from birth until death. Full or partial waiver of legal capacity by a person is impossible, and legal capacity cannot be taken away[1]. A. V. Myskin writes that legal capacity "is the same objective legal law as the physical law of gravitation or the biological law of gradual aging of any living organism"[2]. Waiver of legal capacity should be seen as an action or inaction, as a result of which a person's legal capacity is self-limited. Waiver of legal capacity turns a person from a subject of law into an object, which is prohibited by international[3] and national law[4]. The rejection of legal capacity must be the rejection of an abstract ability, which belongs to every subject of law, which is impossible, since it contradicts the essence of legal capacity. Accordingly, only the refusal to exercise legal capacity in cases not prohibited by law is possible.

However, despite the fact that the waiver of legal capacity as a whole is impossible, it is possible to waive individual abilities that are part of the structure of legal capacity[5]. For example, it is possible to waive reproductive legal capacity as a variant of parental legal capacity, we are talking about the so-called "Child-free"[6] citizens, the Federal Law "On the Fundamentals of Health Protection

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[1] *Stepanyuk A. V.* Ogranichenie grazhdanskoy pravosposobnosti fizicheskikh lits [The limitation of civil legal capacity of individuals] // Problemy pravosubektnosti: sovremennye interpritatsii: mater. nauch.-prakt. konf. Samara, 29 fevralya 2008 g. Vyp.6. Samara: Samar. gumanit. akad. [Problems of legal personality: modern interpretations: materials of the scientific-practical conference. Samara, February 29, 2008. Issue 6. Samara: Samara Humanitarian Academy], 2008. P. 248.

[2] *Myskin A. V.* Dva ocherka iz oblasti tsivilistiki [Two Essays on Civics]. M.: Statut, 2015. P. 34.

[3] For example, the World Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; the International Labor Organization Convention 29, Concerning Forced or Compulsory Labor, 1930; and others.

[4] Konstitutsiya Rossiyskoy Federatsii (prinyata vsenarodnym golosovaniem 12.12.1993) (s uchetom popravok, vnesennykh Zakonami RF o popravkakh k Konstitutsii RF ot 30.12.2008 No. 6-FKZ, ot 30.12.2008 No. 7-FKZ, ot 05.02.2014 No. 2-FKZ, ot 21.07.2014 No. 11-FKZ) [Constitution of the Russian Federation (adopted by popular vote on 12.12.1993) (as amended by the Russian Federation Laws on Amendments to the Constitution of the Russian Federation of 30.12.2008 No. 6-FKZ, of 30.12.2008 No. 7-FKZ, of 05.02.2014 No. 2-FKZ, of 21.07.2014 No. 11-FKZ)] // Sobranie zakonodatelstva RF [Collection of Legislation of the Russian Federation]. 2014. No. 31. St. 4398; Ugolovnyy kodeks Rossiyskoy Federatsii ot 13.06.1996 No. 63-FZ (red. ot 23.04.2019) [Criminal Code of the Russian Federation of 13.06.1996 No. 63-FZ (edition of 23.04.2019)] // Sobranie zakonodatelstva RF [Collection of Legislation of the Russian Federation]. 1996 No. 25. St. 2954.

[5] *Suslov A. A.* Otkaz ot pravosposobnosti v grazhdanskom prave [The waiver of legal capacity in civil law] // Prolog: zhurnal o prave [Prologue: A Journal of Law]. 2017. No. 1. P. 10.

[6] *Veevers J. E.* 1980. Childless by choice. Toronto: Butterworth, Canada. P. 189.

of Citizens in the Russian Federation" in Article 57 fixes the possibility, upon the written application of a citizen, of medical sterilization for the purpose of depriving a person of the ability to procreate of persons older than thirty-five years or a citizen with at least two children, and with medical indications and the informed voluntary consent of the citizen.

Waiver of legal capacity and its restriction are prohibited by law, as a result of which there are practically no studies in the field of this problem. According to Paragraph 3 of Article 22 of the Civil Code of the Russian Federation, a complete or partial waiver of legal capacity or legal competence and other transactions aimed at restricting legal capacity or legal competence are void, except in cases where such transactions are permitted by law[1]. The Family Code of the Russian Federation does not contain a norm prohibiting the deprivation or restriction of legal capacity, except for Paragraph 3 of Article 42 of the Family Code of the Russian Federation, which stipulates that a marriage contract cannot restrict the legal capacity or legal competence of the spouses. This is also reflected in court practice.

Thus, the Constitutional Court of the Russian Federation in its Order indicates that "Paragraph 1 of Article 42 of the Family Code of the Russian Federation, which enshrines the right of spouses to change the statutory regime of joint ownership by concluding a marriage contract, which may contain any provisions relating to the property relations of spouses, considered in the system of the current legislation, including in conjunction with Article 22 "Inadmissibility of deprivation and restriction of the legal capacity and legal competency of a citizen" of the Civil Code of the Russian Federation, which establishes the nullity of a complete or partial waiver of a citizen's legal capacity or legal competency and other transactions aimed at restricting the legal capacity or legal competency, except cases where such transactions are allowed by law, and developing the constitutional principle of freedom of contract within the framework of marriage and family relations, cannot be considered as violating the constitutional rights of A. R. Kolesov mentioned in the complaint"[2].

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[1] See, for example, Postanovlenie FAS Severo-Zapadnogo okruga ot 30.08.2011 po delu No. A66–8547/2010 [The Decree of the FAS Northwestern district from 30.08.2011 in the case of No. 66–8547/2010].

[2] Opredelenie Konstitutsionnogo Suda RF ot 27.09.2018 No. 2320-O "Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanina Kolesova Andreya Rafailovicha na narushenie ego konstitutsionnykh prav punktom 1 stati 42 Semeynogo kodeksa Rossiyskoy Federatsii" [Order of the Constitutional Court of the Russian Federation of 27.09.2018 No. 2320-O "On refusal to accept for consideration the complaint of citizen Kolesov Andrei Rafailovich on violation of his constitutional rights by paragraph 1 of Article 42 of the Family Code of the Russian Federation"].

According to the majority of scientists, the Family Code of the Russian Federation allows limiting family legal capacity and legal competence. As an example they cite Article 14 of the Family Code of the Russian Federation which restricts a person's marital legal capacity, Article 127 of the Family Code of the Russian Federation restricts adoptive legal capacity. L. M. Pchelintseva believes that limitation of family legal capacity is observed when parental rights are deprived or restricted[1]. V. V. Lazarev holds a similar opinion[2]. As an example of limitation of legal capacity is often cited the prohibition of a spouse without the consent of the wife to initiate a case for dissolution of marriage during the pregnancy of the wife and within a year after the birth of the child (Article 17 of the Family Code of the Russian Federation).

Recognition of a person as legally incapable also refers to grounds for limiting legal capacity, since such a person cannot exercise their ability to marry, become an adoptive parent, a guardian (custodian) until they have been recognized by a court as legally capable, at the same time a legally incapable person may be a parent, although limited in parental rights, according to article 73 of the Family Code of the Russian Federation. According to S. P. Grishaev, in the above examples involving incapacitated persons we should speak not about limitation of family legal capacity, but about its loss, since, for example, the guardian of such a person cannot enter into marriage instead of the ward. However, it misses the right of such persons to receive alimony or the obligation to pay it. M. V. Antokolskaya believes that if family rights can only be exercised personally, without the possibility of participation of representatives, then not only family legal competence, but also family legal capacity is lost or restricted[3].

M. A. Khvatova argues that incapacitated and juveniles are limited in family legal capacity (in particular adoptive and guardian legal capacity), since they cannot properly bring up children and protect their rights[4].

According to many authors, age, health status, citizenship, kinship relations, social factors are also reasons for limiting the realization of family rights, and family legal capacity is limited through the restriction of specific family rights.

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[1] *Pchelintseva L. M.* Semeynoe pravo Rossii [The Family Law of Russia]. M., 2006. P. 100.

[2] *Lazarev V. V.* Osnovy prava. Semeynye pravootnosheniya: uchebnik. 3-e izd., pererab i dop. [Fundamentals of Law. Family legal relations. Textbook. Third edition, edited and updated]. M.: Yurist, 2002. P. 134.

[3] *Antokolskaya M. V.* Semeynoe pravo [Family law]. M.: Yurist, 2003. P. 83.

[4] *Khvatova M. A.* Ogranichenie i utrata grazhdanskoy deesposobnosti, kak predposylka ogranicheniya semeynoy pravosposobnosti [Limitation and loss of civil capacity as a prerequisite for limiting family legal capacity] // Pravo [Law]. No. 9. P. 74.

Only some scientists believe that it is impossible to refuse and limit legal capacity in view of its inalienability from the personality of the bearer, since it is possible to limit and refuse only from the right[1]. Examples of refusals and restrictions on legal capacity, which were cited above, are not a waiver or restriction of legal capacity, but a waiver (restriction) of specific rights or the exercise of a right.

V. A. Khokhlov sees a difference between legal capacity, which is included in the content of specific subjective rights, and abstract capacity, which constitutes elements of legal capacity. He believes that the confusion of these concepts occurred due to Article 22 of the Civil Code of the Russian Federation, which prohibits the restriction of legal capacity and legal competence, but, on the other hand, allows the restriction, if it is not prohibited by law[2]. V. A. Khokhlov writes that even in courts there is a confusion of these two notions: according to Article 22 of the Civil Code of the Russian Federation, agreements that restrict not legal capacity, but only certain legal opportunities are invalid, thus courts narrow legal capacity.

It is necessary to agree with V. A. Khokhlov: it is necessary to distinguish between capabilities, which are included in the content of specific subjective rights, and abstract abilities, which constitute elements of legal capacity. This once again confirms the fact that the content of legal capacity includes not rights and obligations, but abilities to have these or those rights and obligations. Thus, it is only possible to limit individual capacities in specific legal relations, and the waiver of specific capacities is not a waiver of legal capacity, but a waiver of the implementation of these capacities[3].

Thus, a person's legal capacity is invariable and inalienable, it cannot be restricted; only the right, the ability to exercise the right, can be restricted. Legal capacity and its elements are static and abstract, they represent a person's ability to have rights and obligations. Thus, a person may not exercise all the abilities constituting legal capacity, or may refuse to exercise individual abilities for a specific period. And the waiver of legal capacity must be the waiver of an abstract capacity, which belongs to every subject of law, which is impossible, since

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[1] *Zhaglina M. E.* Grazhdanskaya pravosubektnost nesovershennoletnikh [The civil legal personality of juveniles] // Vestnik Voronezhskogo instituta MVD Rossii [Herald of the Voronezh Institute of the Ministry of Internal Affairs of Russia]. 2016. No. 2. P. 56.

[2] *Khokhlov V. A.* Obshchie polozheniya ob obyazatelstvakh: ucheb. posobie [The General Provisions on Obligations: Textbook]. M.: Statut, 2015. P. 125.

[3] *Belov V. A.* Grazhdanskoe pravo: ucheb.: v 4-kh t. T. 2: Obshchaya chast. Litsa, blaga, fakty [The Civil Law: Textbook: in 4 Volumes. Vol. 2: General part. Persons, goods, facts.]. M.: Yurayt, 2013. P. 340.

it contradicts the essence of legal capacity; accordingly, only the waiver of the exercise of legal capacity is possible in cases not prohibited by law.

A person always has legal capacity, as opposed to a subjective right. General legal capacity is the same for all natural persons: everyone has equal capacity to possess rights and bear responsibilities, it cannot be restricted under any circumstances, it cannot be waived. If a person could restrict or deprive his or her legal capacity, then it would be a complete exclusion of the ability to acquire and exercise family rights and obligations. However, as long as the person is alive, this is not possible.

However, it is possible to limit institutional legal capacity, for example, due to the deprivation of parental rights, but at the same time the sectoral family legal capacity is retained. Thus, on the grounds stipulated by family law, a person may be limited in his or her ability to become a subject of child-parent relationships, marriage relationships, relationships to accept a child left without parental care into a family, but the ability to have family rights and obligations in general is retained.

Thus, we can conclude that it is impossible to waive and limit general family legal capacity in view of its abstractness and inalienability from the personality of the bearer, while it is possible to limit and waive only a subjective right. Virtually all examples of waiver and restriction of legal capacity cited by researchers are not a waiver or restriction of legal capacity, but a waiver (restriction) of rights or the exercise of a right. As a consequence, it is necessary to distinguish between legal capabilities, which are part of the content of specific subjective rights, and abstract capabilities, which constitute elements of legal capacity.

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