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45 ЛЕТ ИНСТИТУТУ ЮСТИЦИИ

PERSONA.
JUSTITIA.
MODERNITAS.

ФЕДЕРАЛЬНОЕ ГОСУДАРСТВЕННОЕ БЮДЖЕТНОЕ
ОБРАЗОВАТЕЛЬНОЕ УЧРЕЖДЕНИЕ
ВЫСШЕГО ОБРАЗОВАНИЯ
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ИНСТИТУТ ЮСТИЦИИ

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ИНСТИТУТ ЮСТИЦИИ

PERSONA. JUSTITIA. MODERNITAS

Сборник тезисов докладов по материалам
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П26 **Persona. Justitia. Modernitas** : сборник тезисов докладов по материалам VIII Международной научно-практической конференции студентов и магистрантов (17-18 ноября 2021 г., Саратов) / под ред. А.С. Землянского, И.О. Кузнецовой ; Саратовская государственная юридическая академия. – Саратов: Изд-во Сарат. гос. юрид. акад., 2021. – 236 с.

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Сборник содержит тезисы докладов участников VIII Международной научно-практической конференции Persona. Justitia. Modernitas, прошедшей на базе Института юстиции Саратовской государственной юридической академии 17-18 ноября 2021 года.

В данный сборник вошли научные работы, подготовленные обучающимися по программам бакалавриата, специалитета, магистратуры юридических вузов и факультетов по различной тематике в области правовой науки из регионов России, а также иностранных государств: Саратова, Москвы, Санкт-Петербурга, Махачкалы, Ульяновска, Казани и Белоруссии.

Для обучающихся юридических вузов и факультетов, преподавателей, а также для широкого круга читателей, интересующихся новациями современной юридической науки.

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Therefore surrogate motherhood transfers the problem of mother's identifying to the next level, Roman lawyer could never think of.

In my opinion, the most urgent issues of the surrogate motherhood are, firstly, the issue of the commercialisation children's birth, which is connected to the issue of the determining the nature of the surrogate motherhood problem, and, secondly, the issue of the legal status of the children, born by the surrogate motherhood, who is citizen of the foreign state.

The first issue is relevant to Russia. The main reason for this situation is a current state of the Russian legal regulation of the surrogate motherhood. There are many restrictions in the sphere of the assisted reproductive technologies[1] (people can use the services of the surrogate mother only in case of special medical reasons; single man has no right to conclude a surrogate motherhood contract etc.), but these restrictions are ineffective due to the absence of the sanctions and controversial judicial practice. For instance, state courts claimed the refusal to register fatherhood of the single man to be unlawful despite the prohibition of the single man to have baby by the surrogacy.[2]

Russian law recognises the surrogate motherhood as a contract, but the nature of this contract is questionable. At first sight, the civil nature of this contract is the right answer – the parties voluntarily enter into a contractual relationship, independently determine their rights and obligations, and as a rule, the relationship is built on the principle of compensation for "services" provided by a surrogate mother. However the problem is to recognise the subject of this contract. The baby obviously can not be the subject of the contract, otherwise this contract regulates the human trafficking. The transfer of the child from the surrogate mother to the legal parents also can not be the subject of the contract – Family law of Russia provides the unconditional right of a surrogate mother to refuse to transfer her child to his genetic parents. The next idea for the subject of the contract is the bearing of the child – but this case can be compared with organ trafficking or with prostitution as a form of the body trafficking, because woman's body becomes the subject of the contract[3].

Therefore surrogate motherhood contract can not be claimed as a civil law contract. However Supreme Court of Russia follows the idea of using civil law principles according to the surrogate motherhood contract[4].

The most relevant issue of the surrogate motherhood of Japan is the issue of the legal status of the children, born by the surrogate motherhood, who is citizen of the foreign state.

Japan does not recognise surrogate motherhood (there is no legal regulation on this issue). Therefore Japanese, who use the services of the foreign surrogate mother, has challenges according to the legal recognition of their children, born by foreign surrogate mother.

The most important case on that issue in Japan is the Aki Mukai Case[5]. In this case, Supreme Court of Japan concluded, that Aki Mukai can not be identified as a legal mother of the children, born by the American surrogate mother, despite of the fact that Aki Mukai is genetically related to the children. This decision is based on the mentioned earlier presumption mater semper certa est – even if Aki Mukai gave her biological material to the surrogate mother, she can not be recognised as a legal mother of the children in Japan, because she did not physically carry the children and did not gave them birth.

Supreme Court decision caused a serious legal confusion, because United State's law identified Aki Mukai as a legal mother of the children, but the Japanese law identifies American surrogate mother as a legal mother of the children.

In conclusion, surrogate motherhood is controversial legal institute, which can absolutely not be recognised by all states in the world, but every legal system should give a chance to every child, born by the surrogate mother, to have an appropriate legal status.

[1] Приказ Министерства здравоохранения Российской Федерации от 31.07.2020 № 803н. СПС «Гарант».

[2] Решение Бабушкинского районного суда г. Москвы от 4 августа 2010 г. по делу № 2-2745/10.

[3] Fundamental legal problems of surrogate motherhood: global perspective / ed. P. Mostowik. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019. p. 77.

[4] Постановление Пленума Верховного суда РФ от 16.05.2017 № 16 (в ред. от 26.12.2017) «О применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей».

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INTERNATIONAL LAW AND NATIONAL LAW INTERRELATION: AN EXAMPLE OF MODERN OKINAWA, JAPAN

Okinawa is the stumbling block of nowadays' relations between the United States of America ("USA") and Japan. An example of the legal status of Okinawa allows to trace interrelation of international and national legal systems in a modern world.

The process of creation and further enactment of the Constitution of Japan ("Constitution") in 1947[6] was accompanied by the Act of surrender of Japan in 1945 and the Statute of International Military Tribunal for the Far East in 1946. In these legal acts the strategic interest of the USA prevailed. The Constitution implied the so-called "No war" provision of Article 9 that renounced war as a sovereign

[5] Judgment of the Second Petty Bench, Supreme Court of Japan, March 23, 2007, Minshu. URL: https://www.courts.go.jp/app/hanrei_en/detail?id=883 (Accessed 23 October 2021).

[6] The Constitution of Japan. Signed on November 3, 1946. Commenced on May 3, 1947 // URL : https://www.constituteproject.org/constitution/Japan_1946?lang=en

right of the nation and the threat or use of force as means of settling international disputes.

In 1951, the Security Treaty between the USA and Japan ("Security Treaty")[1] and the Treaty of Peace with Japan ("Treaty of San-Francisco")[2] were signed. The Security Treaty was marked by establishment of armed forces bases. The Treaty of San-Francisco implied a provision of Article 3 according to which Japan agrees to transfer the administering authority of Ryukyu Islands, including Okinawa Island, to the USA[3]. In 1952, the Assembly of Ryukyu adopted the resolution for Okinawa's reversion to Japan[4].

The 1960-1970 was a period of secret diplomacy between the USA and Japan. The parties agreed to return the administrative authority back to Japan and leave the arm forced bases and other military assets in the territory of Japan[5]. This decision violated Article 9 of the Constitution, but, due to the agreement being secret, the society remained silent till 2009 when the agreement was revealed.

In the light of Okinawa's issue Articles 98 and 81 of the Constitution have to be applied. Under Article 98, Constitution prevails over the laws and governmental acts, and the international treaties shall be "faithfully observed"[6]. Under Article 81, the constitutionality of the laws and other regulations is to be determined by the Supreme Court, but this list does not include international treaties[7]. According to judicial practice, the Supreme Court may determine the constitutionality of an international treaty if it is "obviously unconstitutional and void"[8]. The Tokyo District Court stated that the transfer of administrative authority on Ryukyu Islands from Japan to the USA is constitutional, as it does not directly affect human rights[9]. The legal status of Okinawa is ambiguous. On the one hand, under the provisions of Constitution, the treaties shall be faithfully observed. On the other hand, their constitutionality, in the light of the Constitution of Japan, remains questionable.

To the issue of Okinawa, the Charter of the United Nations and the International Covenant on Civil and Political Rights, that Japan has signed and ratified, might be applied. Additionally, as an international custom, the provisions of the Universal Declaration of Human Rights might be applied.

[1] Security Treaty Between the United States and Japan. Signed on September 8, 1951. Commenced on April 28, 1953 // URL : https://avalon.law.yale.edu/20th_century/japan001.asp (Accessed 23 October 2021).

[2] Treaty of Peace with Japan. Signed at San Francisco, on September 8, 1951. Commenced on April 28, 1952 // URL : https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf (Accessed 23 October 2021).

[3] Article 3: "Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."

[4] Streltsov, D.V. The problem of Reversion of Okinawa in the US-Japan Postwar Relations. Vestnik RUDN. International Relations, 2017. Vol. 17. №. 3. Pp. 598-611.

[5] McCormack, G. Deception and Diplomacy: The US, Japan, and Okinawa. The Asia-Pacific Journal. Japan Focus, 2011. Vol. 9. №. 1. Pp. 1-19.

[6] Article 98: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity." The treaties concluded by Japan and established laws of nations shall be faithfully observed."

[7] Article 81: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

[8] Judgment of the Supreme Court of 16 December 1959. // Judgments of the Supreme Court. URL: https://www.courts.go.jp/app/hanrei_en/detail?id=13 (дата обращения: 15.03.2021).

[9] Decision of the Tokyo District Court of 24 June 1953, Gyosei Jiken Saiban Reishu. Collection of Judicial Precedents concerning Administrative Cases, Vol. 4, №. 6. 1579 p.

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ACTUAL PROBLEMS OF COPYRIGHT PROTECTION ON THE INTERNET

Due to the specific of relations on the Internet, a number of problems arise in the field of copyright protection. First of all, there is not a simple question: how to determine authorship on the Internet? Such a problem exists due to the fact that the author of the work should be recognized as the one whose name is indicated on the original work, that is, on the page that is the original and placed first. However, such an analysis requires titanic efforts, and sometimes it is not even able to give results, since it is very difficult to prove the establishment of the time of placing an object on the page. Many researchers are sure that the identification of authorship on the Internet may face a number of difficulties of a different nature. For example, the situation with citing any source is complicated, cause source itself may be posted in violation of copyright. So, there is a problem of lack of uniform global rules for citing Internet resources. As a result of which the question arises: what is considered a violation of copyright in this case[10]?

There is also another problem: what are the limits of the implementation of copyright for works posted on the Internet? There are some national legal orders according to which any copying of a copyright work is not allowed without the consent of the author. However, it is difficult to imagine a situation in which each copying of an author's work to a personal device may be accompanied by the consent of the author of the original work. In connection with the emergence of such an institution as "bringing to the public", the problem of copying works also did not find its solution, since communicating to the public does not imply copying, but

[10] Dashyan M.S. The law of information highways: issues of legal regulation in the field of the Internet. M., 2007. P. 23.