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CONTENTS

EDITORIAL

Dear Readers and Authors,

The present issue of the journal offers profound analysis of several topical subjects that undoubtedly deserve your attention. The topics that we managed to raise in this edition comprise climate change, novelties in the Russian legislation, comparative legal studies, and some new developments in education in the field of law.

Climate change is a bleak reality of our time. The authors whose articles appear in this section examine legal efforts undertaken for countering climate change in Nigeria (Adeola O. Kehinde and Olufemi Abifarin) and climatic aspects of legal protection of forests in the Russian Federation (Maria A. Egorova, Natalia G. Zhavoronkova, Yuri G. Shpakovsky, Daria V. Ponomareva, Daria V. Shmeleva).

This issue of the journal highlights novel provisions in the Russian national legislation. Some of them have been already established (Alena V. Serova and Olesya V. Shcherbakova consider national and international responses to digitalization challenges to the employee's right to privacy). Some others can be introduced in the near future (Vyacheslav S. Eliseev and Irina A. Martynenko suggest developing specific economic legislation in order to regulate more successfully economic relations in the private, public and mixed sectors of the Russian economy).

We devote a special section to comparative legal studies. These include, on the one hand, studying the national legal experience of several states in certain areas (consideration of the means by which the invalidity of civil trials procedures is corrected in Jordanian and Egyptian legislation and court practice successfully implemented by Tareq Al-Billeh, comparative analysis of the legal regulation of trusts in the United States and Canada and fiduciary management of property and personal funds in the Russian Federation offered by Dmitry A. Kunitsa, juxtaposition of the peculiarities of a polygraph examiner's report in criminal proceedings in Russia and the United States conducted by Yaroslava V. Komissarova and Nadia K. Danilevich). On the other hand, this section comprises a comparison of the national legislation with international models developed at the universal level within the United Nations and the Organization for Economic

Cooperation and Development (comparative analysis of the Russian tax legislation with the UN and OECD models of taxation in respect of digital services carried out by Karina A. Ponomareva).

Various issues of legal education in foreign countries always remain in the focus of our attention as a law university. This time our contributors turn to the role of legal education for the performance of police interventions at the Academy of the Police Force in Bratislava, Slovakia (Klaudia Marczyová, Iveta Nováková).

All of the topical subjects mentioned above are presented by the authors scrupulously and thoroughly, with due attention to the requirements of domestic legislation and international law, as well as the approaches that have developed in the practice of national courts and international judicial institutions, so you can see the full picture and enjoy expert opinion and clear-minded analysis.We hope this issue of the journal will inspire a wonderful voyage of intellectual discovery!

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COUNTERING CLIMATE CHANGE

Article

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Legal Framework for Combating Climate Change in Nigeria

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Abstract: A very important issue that needs to be addressed urgently across the globe is the issue of climate change. Nigeria as a country is not left out in the battle against climate change. One of the major things that results in the change in climate is the low level or inadequate laws governing activities which lead to climate change. The laws available are ineffective as the level of compliance with the existing laws is extremely low; ignorance on the part of Nigerians is another major issue as an average Nigerian is not aware that his/her day-to-day activities might result in a change in climatic condition. The concept of climate change is a concept in Nigeria that has received a bit of recognition but has not been addressed as it ought to be. This paper examines the effects of climate change on Nigerians and the Nigeria environment in its totality; it further makes an overview of the international conventions on climate change while evaluating the adoption of the international conventions by Nigeria. It examines the laws put in place by the Nigeria government in relation to environmental protection generally and further considers their effectiveness. It concludes that there is no solid legal framework to combat climate change in Nigeria and that the laws put in place to govern environmental protection in Nigeria are grossly inadequate. It recommends that new laws should as a matter of urgency be promulgated to tackle the menace of climate change in Nigeria.

Keywords: Nigeria environment; climate change; environmental protection; international conventions; laws

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Contents

I. Introduction

The method of research employed in this study is the doctrinal in nature. Reference is made to both primary and secondary sources. Primary sources include the 1999 Constitution of the Federal Republic of Nigeria (as amended)[1], National Environmental Standards and Regulations Enforcement Agency Act (NESREA Act)[2], the United Nations Framework Convention on Climate Change (UNFCCC). Secondary sources such as textbooks, journals, articles and case laws were also of great assistance. The importance of internet-based research cannot be overemphasised; the internet is also of tremendous help in the course of this study.

There is no gainsaying that humans, like any other living organism, have affected their environment in diverse ways, through deforestration, burning gas, improperly disposing of wastes and so on. All of them have adverse effects on the climate system, which is absolutely undesirable. Nigeria, including other African countries, is considered to be the most

[1] The 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004.

[2] National Environmental Standards and Regulations Enforcement Agency Act 2007Cap 301LFN 2010.

vulnerable region in the world in terms of the effects of climate change on it as the African continent is seen as one of the most desirable economies in the world and most fragile (Egbewole, 2011, p. 30). There is little or no research on the concept of climate change and it is also difficult to assess the extent of these changes. William Ruddiman is a scientist who studies the Earth's prehistoric climate, he makes the assessment that human activities affecting the global climate can be traced back to 8000 years ago due to activities which involve clearing forests in order to provide space for agriculture and also 5000 years ago to ensure irrigation for Asian rice. It is important to note that these human activities do not contribute as much to global climate change as the evolution of the industrial age, which introduced the burning of fossil fuels for industrial or domestic purposes, biomass burning, greenhouse gas production and aerosols that affect the composition of the atmosphere (Ruddiman, 2021, p. 28).

Therefore, climate change-causing activities is one of the greatest concerns of our generation today and needed to be addressed as a matter of urgency. Some of the potential impacts scientists predicted long ago are now steadily realizing and impacting the lives of people around the world. Some of these effects include droughts, flood, sea ice loss, and more intense heat waves. Nevertheless, it is important to note that human activity over the last 250 years has increased the concentration of greenhouse gases in the atmosphere, but there was no solution to the concentration already present and ravaging the atmosphere (Oluduro, 2012, p. 33). However, it must be pointed out that whenever there is any environmental challenge that poses risk to the world, nations would come together to address the issue by way of conventions to consider it holistically and come up with various policies that will assist in ensuring that the issue is totally resolved. In 1992, a forum was established to bring together most countries of the world to jointly regulate climate change, it is known as the United Nations Framework Convention on Climate Change (UNFCCC) and there are several other Conventions and Protocols after then that will be considered in this research.

This study is significant and crucial at this time and its importance cannot be overemphasized, because human beings live in the environment and it is the environment that sustains them, once the environment is

negatively affected, human existence becomes difficult and there is a struggle of survival; in short, the environment determines the survival of humans and other living organisms.

II. Need for Laws on Climate Change

One of the biggest problems the world is facing right now is climate change, whether we are aware of it or not (Houghton, 2009, p. 87). Scientists agree that human activities are having negative impacts on global climate systems, which would lead to global warming. It is well known around the world that climate change is a phenomenon that is not just one person's responsibility, nor can it be solved by one person.

Climate change is defined as a change in climate, directly or indirectly attributable to human activities, that changes the composition of the global atmosphere and is observed in addition to natural climate variability over a comparable period of time.[3] In short, it is an abnormal, unprecedented change in the average temperature of the troposphere and the atmosphere with an anomalous rate that is the result of emissions of gases, also known as greenhouse gases, which cause the sun's heat to become trapped in the atmosphere (Olawuyi, 2013, p. 89). It is a major long term change in the climate globally.[4] The emission of various pollutants, including carbon dioxide, causes a change in the temperature of the atmosphere leading to what we call climate change. The year 2015 was one of the warmest years since 1850, it is now widely accepted around the world that climate change is indeed real.

Thus, climate change has been seen as a global challenge, which needs to be addressed as a matter of urgency as there is no part of the world that is not experiencing the devastating effect of climate change. In view of this, various conventions have been adopted across the globe to examine the deteriorating effects of climate change and the need to tackle them as a matter of urgency. It has been noted that there is a need to come up with more laws to address the tragedy that is already

[3] Article 1(2) United Nation Framework Convention on Climate Change.

[4] Climate change, what is it? Understanding the basic facts about global warming. Available at: https://warmheartworldwide.org/climate-change/?gclid=EAIaIQobChMIqceI1uf1-AIVEdtRCh22MAxUEAAYAyAAEgIAs_D_BwE [Accessed 12.07.2022].

manifesting as a result of climate change. Some of the existing local laws and international treaties on climate change will be examined briefly.

III. General Effects of Climate Change

The negative effects of climate change across the world cannot be overemphasized. The effects are felt by everyone across the globe. Some of the effects are as follows.

Poverty

It has been noted that climate change brings about all sorts of disaster, including flood, which can sweep away regions accommodating people who lack the basic necessities to sustain a healthy and safe livelihood, destroying homes and livelihoods thereby leaving people in abject poverty. When the weather is severely hot, people find it difficult to work outside their homes, which also brings about poverty. Poverty also arises when crops are not growing well as a result of lack of adequate water needed by them to grow well. Research has also found out that between the year 2010 and 2019, more than 23.1 million people have been displaced by weather-related crisis, which has led them to poverty.[5]

Reduced food security

One of the most noticeable effects of rising temperatures is being felt in global agriculture, although these effects are felt very differently in the largely temperate developed countries and in the more tropical developing countries. Different plants grow best at very specific temperatures, and when those temperatures change, their productivity changes significantly. In North America, for example, rising temperatures may reduce corn and wheat productivity in the US Midwest but increase production and productivity north of the border in Canada. The productivity of rice, the staple food of more than a

[5] Causes and Effects of Climate Change. United Nations. Available at: https://www.un.org/en/climatechange/science/causes-effects-climate-change [Accessed 16.07.2022].

third of the world's population, falls by 10 % for every 1 °C increase in temperature.[6]

Previous climate-related problems have been offset by major advances in rice technology and ever-increasing fertilizer applications. However, future temperature increases in Thailand, the world's largest rice exporter, are expected to reduce production by 25 % by 2050. At the same time, global population models suggest that developing countries will add 3 billion people by 2050 and that food producers in developing countries will need to double production of staple foods by then just to maintain current levels of food consumption.

Rising sea level

Climate change affects sea level rise. The average sea level around the world has risen by about 20 cm in the last 100 years; climate scientists expect it to increase at an accelerating rate over the next 100 years as part of the effects of climate change. Coastal cities like New York are already experiencing an increased number of flooding events, and by 2050 many of these cities may need protective walls to survive.[7]

Heavy downpours and storms

While the specific conditions that lead to precipitation will not change, climate change will affect the amount of water in the atmosphere and will increase, producing heavy downpours instead of steady showers when it rains.[8]

Increased droughts

Despite downpours in some places, drought and prolonged heat waves will be the order of the day; this is as a result of change in the climatic condition. The manner in which temperature rises may be so alarming but that does not mean that those parts of the world that have been extremely cold would no longer be cold or have the usual terrible winter storms. However, hot, dry places are becoming progressively

[6] Climate change, what is it? Understanding the basic facts about global warming.

[7] Ibid.

[8] Ibid.

hotter and drier, and places that were once temperate and regularly rained are becoming much hotter and much drier.[9]

Hotter temperatures

As the world gets warmer, the entire ecosystem is adversely affected. It has been noted that many species of fish have migrated long distances to stay in waters that are the right temperature for them. Farmers in temperate zones are finding drier conditions difficult for crops like corn and wheat, and once prime growing areas are now under threat.[10]

IV. Laws Regulating Climate Change in Nigeria

Three major laws will be discussed here.

Nigeria Climate Change Act

The Act was promulgated in 2021. This law can be said to be the major comprehensive local statute enacted to address the issue of climate change in Nigeria. The newly passed law provides a legal and institutional framework for the reduction of greenhouse gas emissions into the atmosphere by ensuring the formulation of programs and policies for such purposes. It aligns with Nigeria's international climate change commitments by setting a goal of net-zero greenhouse gas emissions by 2050–2070 as this is part of the objectives of the Act.[11]

The Climate Change Act established the National Council on Climate Change — a corporate body with perpetual succession and common seal, which may sue or be sued in its corporate name. It is vested with the power to make policies and decisions on all matters relating to climate change in Nigeria.[12] The Council is saddled with many responsibilities on climate change, such as coordinating the implementation of sectoral targets and guidelines for the regulation of greenhouse gas emissions and other anthropogenic causes of climate change, approving and

[9] Ibid.
[10] Ibid.
[11] Section 1 (f) of the Climate Change Act 2021.
[12] Section 3 (1) of the Climate Change Act 2021.

monitoring the National Climate Action Plan and managing the Climate Fund.

The law mandates federal ministries of environment and land use planning to develop a carbon budget to limit the average global temperature rise to 2 °C and make efforts to limit the temperature rise to 1.5 °C above pre-industrial levels. In cooperation with the aforementioned ministries, the Council, through its Secretariat, is also mandated every five years to develop a national action plan on climate change, the first of which is expected no later than 12 months after the commencement of the Act.[13]

The Climate Change Act offers a strong framework for climate action to meet Nigeria's short, medium and long-term objectives on climate reduction and adaptation. The obligations placed on public and commercial institutions to advance a low-carbon economy and a sustainable way of life are particularly pertinent, as is the Council's and its Secretariat's duty to collaborate with relevant parties, particularly civil society organizations. For any future climate-related legal disputes, these measures offer a strong legal foundation.[14] Even though there are a number of steps that must be taken in order to put the Act into practice, it shows how seriously Nigeria is handling climate change. The Act has the potential to be a tactical weapon for promoting climate change activism and a legal foundation for possible climate litigation in Nigeria because it is the first stand-alone comprehensive climate change law in West Africa and among few globally and regionally.[15]

[13] Akaluzia, T., (2022). The Nigerian climate change act — key highlights — Businessday NG. Available at: https://businessday.ng/opinion/article/the-nigerian-climate-change-act-key-highlights/ [Accessed 14.07.2022].

[14] A review of Nigeria's 2021 Climate Change Act: Potential for increased climate litigation. Available at: https://www.iucn.org/news/commission-environmental-economic-and-social-policy/202203/a-review-nigerias-2021-climate-change-act-potential-increased-climate-litigation [Accesed 24.09.2022].

[15] Ibid.

The 1999 Constitution of the Federal Republic of Nigeria[16]

The 1999 Constitution of the Federal Republic of Nigeria Constitution is the *grundnorm* of all other legislation in Nigeria as all other laws derive their validity from it. The powers and responsibilities of government are contained in the constitution. The government is the executive, the legislature and the judiciary. The Constitution also provides that the National Assembly has the prerogative to enact laws that would ensure peace, order and the good governance of Nigeria. They legislate on drugs, aviation, shipping and drugs, and trafficking, among other things.

Chapter II of the Constitution sets out the basic goals and guiding principle of state policy. This chapter of the constitution is included in the Constitution to encourage the pursuit and realization of the ideals and aspirations of the nation. These ideals and aspirations include protecting and ensuring the good health of workers in their workplace, promoting equitable and sustainable development, and exploiting natural resources for the common good, with a responsibility to protect and improve their environment. Any law inconsistent with the legal provisions contained in the Constitution shall be declared null and void to the extent of its inconsistency.[17] However, it is important to note that the chapter in which this section is contained is not justiciable and therefore the state cannot be sued in court for failure to comply with the content of this section. The contents of this constitutional chapter are only declaratory and pointing the way, but not justiciable.

The Constitution also provided that everyone has the right to respect for their dignity and that they may not be subjected to torture or degrading treatment.[18] Also, a person has the right of access to court and that the judiciary is independent at all times.[19] The Constitution

[16] The 1999 Constitution of the Federal Republic of Nigeria (as amended) Cap C23, LFN 2004.

[17] Section 1(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[18] Section 34(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[19] Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

further states that anyone may exploit human and natural resources, but if it is not in the interest or benefit of the community then it should be prevented.[20] The state has a responsibility to protect, conserve and enhance the environment and protect the water, air, land, forest and wildlife of Nigeria.

However, it is expressly stated in the Constitution that the powers conferred on the judiciary do not extend to "any question or question as to whether there is an act of omission by any authority or person, or whether any act or judicial decision is consistent with the principles, aims and guiding principle of state policy."[21] Therefore, these goals and policies cannot be enforced in court, rather it depends on the priority or policy of the government in power.

There is a growing body of legislation on environmental issues in Nigeria, although apart from the provisions of Chapter II, the Constitution has been silent on the matter and, due to its non-judicial nature, there have been several calls for the Nigerian Constitution to be amended. Environmental rights and claims can currently only be legitimately brought to justice through the basic human rights set out in Chapter IV. For example, the right to life, property and respect for private and family life affect aspects of environmental protection. Redress relating to environmental laws can also be sought in court by any aggrieved Nigerian using a number of international and regional environmental instruments to which Nigeria has signed. Some of these instruments serve as binding laws for the member state to which Nigeria belongs, ensuring their rights are protected.

National Environmental Standards and Regulations Enforcement Agency Act 2007 (Nesrea Act)[22]

Prior to the Koko event in Delta State in 1987, there was virtually no environmental legislation in Nigeria and no institution or body was

[20] Section 17 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[21] Section 6 (6) (c) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[22] The National Environmental Standards and Regulations Enforcement Agency Cap 301 LFN 2010.

created to regulate and control environmental issues in Nigeria. In 1988, following the episode of the Koko saga, the federal government enacted Hazardous Waste Regulations 42, which also led to the creation of the Federal Environment Protection Agency (FEPA).

FEPA was eventually replaced by the National Environmental Standards Regulations Enforcement Agency created by the NESREA Act. The NESREA Act is the major law on environmental protection in Nigeria. The role and objective of this agency is to regulate and enforce environmental standards and policies in Nigeria. One of the main goals and objectives of the agency is the protection and development of the environment, as well as ensuring the sustainable development of the country's natural resources. The responsibilities and powers of the body are, broadly speaking, to enforce compliance with regulations and standards for the environment, in the air, on land and at sea. The law also prohibits the unauthorized discharge of hazardous substances into the atmosphere or environment, the offense is punishable by an amount not exceeding one million naira and imprisonment for a maximum of five years, and if it is a corporation, an additional fifty thousand for each day it persists.

It is important to note that the majority of the laws mentioned above fall woefully short when it comes to addressing Nigeria's climate change concerns. Most of the rules set forth in these regulations are out-of-date and are not followed by the major participants in the sector. The enforcement mechanism is also very poor as penalties prescribed for violation of these laws are unreasonable considering the economic situation of the time in which we find ourselves right now across the globe. It must be made clear that in order for these laws to be effective and useful in Nigeria and around the world in combating climate change, the laws must be reviewed and the major players in the sector must demonstrate serious commitments to ensuring that the laws are obeyed and reasonable sanctions are put in place to deal with those who violate the provisions of the law.

V. International Acts to Combat Climate Change

1972 Stockholm Conference

The foundations for global environmental policy were laid at the 1972 Stockholm Conference on the Human Environment. Principle 1 states that human beings have the fundamental right to liberty, equality and a decent standard of living in a quality environment enabling a life of dignity and well-being. It was held on June 5–16, 1972 in Stockholm, Sweden. It was the first international forum aimed at addressing global environmental challenges. The forum addressed the need for a shared perspective and principles to inspire and guide the world's peoples in preserving and enhancing the human environment. The preamble to the Declaration provides that both aspects of man's environment, the natural and the man-made, are essential to his well-being and the enjoyment of fundamental human rights, the right to life itself. (Olawuyi, 2013, p. 97).

Brundtland Conference

In 1983, the UN convened the World Commission on Environment and Development (WCED), chaired by Norwegian Prime Minister Gro Harlem Brundtland; it consisted of representatives from both developed and developing countries. The Commission was given the responsibility to address growing concerns about the increasing degradation of the human environment and natural resources and the consequences of this degradation for economic and social development.[23] Its mission is to unite countries to strive for sustainable development. This commission is not in itself a convention, but the commission has been charged with the duty to create a united international community with a shared sustainability of environmental problems worldwide. Four years later, the Commission published its report entitled Our Common Future, which provided a diagnosis of the state of the world's environment. The

[23] Drexhage, J. and Murphy D. Sustainable Development from Brundtland to Rio 2012 background paper prepared for consideration by the High Level Panel on Global Sustainability at its first meeting, 19th September, 2010. Available at: https://www.e-education.psu.edu/emsc302/sites/www.e-education.psu.edu.emsc302/files/Sustainable%20Development_from%20Brundtland%20to%20Rio%202012%20%281%29.pdf [Accessed 19.07.022].

report popularized the most commonly used definition of sustainable development, namely development that meets the needs of the current generation without jeopardizing the ability of future generations to meet their own needs.[24]

Vienna Convention

The Vienna Convention for the protection of the ozone layer is a multilateral environmental agreement. It was adopted at the 1985 Vienna Conference and entered into force in 1988. It serves as a framework for international efforts to protect the ozone layer. However, it does not include legally binding reduction targets for the use of chlorofluorocarbons (CFCs), the main chemical agent responsible for causing ozone depletion. These are set out in the accompanying Montreal Protocol.

Montreal Protocol

The Montreal Protocol on Substances that Deplete the Ozone Layer is the protocol to the Vienna Convention for the Protection of the Ozone Layer. First, the air's stratospheric ozone layer acts as a shield in the atmosphere, protecting life on Earth from the sun's harmful ultraviolet (UV) radiation. In the 1980s, scientists observed that the stratospheric ozone layer was thinning. The Montreal Protocol is an international agreement to protect the ozone layer by ending the production of many substances thought to be responsible for ozone depletion. It was opened for signature on September 16, 1987 and came into effect on January 1, 1989. The Protocol includes a unique alignment provision that allows Parties to the Protocol to react quickly to new scientific information and agree to accelerate any reductions so needed in the chemicals already covered by the Protocol.[25] Since it was first introduced, it has undergone about six different adjustments; all of this is to ensure that the goal is achieved.[26] In addition, the parties to the Protocol meet annually to take a variety of decisions aimed at enabling effective implementation

[24] Ibid, see also Brundtlad Report of 1987.
[25] http://www.ozone.unep.org [Accessed 20.03.2022].
[26] Ibid.

of this important legal instrument. So many writers have expressed concern about the state of our natural environment. James Gustav Speth, expressed so much concern about the state of the environment in general and he states that the climate convention does not protect the climate, the biodiversity convention does not protect biodiversity [and] the desert convention does not prevent desertification. He went on to say that since the Montreal Protocol, [the United States] has not given global environmental problems the priority they deserve. There is disingenuousness on the part of most of the countries that are party/ signatories to all these conventions and it is safe to assume that this is one of the reasons why not much has been achieved despite all these conventions. However, it is expected that the ozone layer will recover by 2050 if the international agreement is respected (Speth, 2004, p. 30).

1989 Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on March 22, 1989 by the Conference of Plenipotentiaries in Basel, Switzerland, in response to public outcry following its discovery in Africa in the 1980s and other parts of the developing world of foreign-imported dumps of toxic waste.[27] The overall objective of the Convention is to protect human health and the environment from the adverse effects of hazardous waste (Olawuyi, 2013, p. 98). The Basel Convention defines as illegal the transport or traffic of hazardous waste without consent or with false or fraudulent consent, or that results in the illegal dumping of hazardous waste.[28] In this case, it is up to the exporting state to ensure that it is taken back by the exporter or producer or that it is disposed of in an environmentally sound manner. In summary, then, the Convention seeks, among other things, to:

i. reducing the generation of hazardous waste and promoting the environmentally sound disposal of hazardous waste, regardless of where it is disposed of;

[27] http://www.basel.int [Accessed 19.03.2022].

[28] Ibid.

ii. restricting the transboundary movement of hazardous waste, unless this is in line with the principles of sound management; and

iii. regulatory system for cases where cross-border shipments are allowed.

In summary, it was designed to reduce shipments of hazardous waste between nations, and specifically to prevent shipments of hazardous waste from developed countries to less developed countries.

1991 Bamako Convention

This is fully known as the Bamako Convention on Banning Imports into Africa and Controlling Transboundary Movements and Management of Hazardous Wastes Within Africa. The convention was adopted in 1991. It is a treaty of African nations that bans the importation of hazardous waste (including radioactive waste that was not included in the Basel Convention). The aim is to create a framework for state obligations in relation to the control of hazardous waste, the prevention of transboundary shipments or imports and the taking of precautionary measures against such waste.

The Bamako Convention is significant in that it provided an effective mechanism to prevent waste traders from turning Africa into an international landfill, preventing and controlling the dumping of hazardous waste, including radioactive waste, in the sea or on the seabed /prevents hazardous waste producers from avoiding liability for pollution.[29]

United Nations Framework Convention on Climate Change (UNFCCC)

In 1992, the United Nations Framework Convention on Climate Change was adopted as the basis for a global response to the challenge of climate change. The aim of the agreement is to stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system. It recognizes that the climate system is a shared resource whose stability can be compromised by industrial and other emissions of carbon dioxide

[29] http://www.ntn.org.au [Accessed 29.03.2021].

and other greenhouse gases. By 1995, countries had recognized that the emission reduction provisions in the Convention were inadequate and entered negotiations to strengthen the global response to climate change, launching the Kyoto Protocol two years later. Climate change is a complex problem that is ecological in nature, but has consequences for all areas of life on our planet. At the heart of the response to climate change, however, is the need to reduce emissions. In 2010, governments agreed that emissions must be reduced to limit global temperature rise to below 2 °C.[30]

Kyoto Protocol

This was negotiated in Japan in December 1997 and was open for signature between the member states in 1998. It came into effect on February 16, 2005. This is an amendment to the United Nations Framework Convention on Climate Change, a legally binding agreement under which industrialized countries aim to reduce global warming and deal with the inevitable rise in temperature after 150 years of industrialization. The key feature of the Protocol is that it includes binding targets for greenhouse gas emissions for the world's leading economies, which have accepted it, to reduce their total emissions of such gases by at least 5 % below existing 1990 levels in the 2008 commitment period.[31]

Copenhagen Accord

This is a major breakthrough in the global effort to combat climate change that took place in 2009. The agreement includes emission reduction commitments from all major emitters, including the United States, China, India and Brazil, and provides for an international review of both the goals and actions of developed and developing countries. This reflects Canada's longstanding position that real progress on climate change requires a global deal that includes all major emitters.[32]

[30] The UNFCCC, First Steps to a safer Future: Introducing the United Nations Framework Convention on Climate Change: UNFCCC. Available at: http://unfccc.int/essential_background/convention/items/6036.php [Accessed 01.11. 2021].

[31] http:www.unfccc.int. [Accessed 29.03.2021].

[32] http://www.unfccc.int/meetings/Durban_nov2011/meeting/6245.pht [Accessed 20.03.2021].

Durban Convention

The 2011 United Nations Climate Change Conference in Durban provided a breakthrough in the international community's response to climate change. Outcomes included a decision by the parties to adopt a universal legal agreement on climate change as soon as possible and no later than 2015. COP17/CMP7 President Maite Nkoana Mashabane said after the conference that what was achieved in Durban during the convention would play a central role in austerity tomorrow.[33]

Doha Conference

This was held in 2012 from November 26 to December, 2012 in Doha, Qatar. Governments consolidated the achievements of the past three years of international climate negotiations, opening a door for much-needed greater ambition and action at all levels. Some of the decisions taken are that governments reaffirmed their determination and set out a timeline for the adoption of a universal climate agreement by 2015, which will come into effect in 2020. They emphasize the need to step up their greenhouse gas reduction ambitions and help vulnerable countries in the process help adapt, made further progress in setting up the financial and technological support and new institutions to enable clean energy investment and sustainable growth in developing countries, among other things.[34]

Rio Conference

The United Nations Conference on Sustainable Development was held on June 20–22, 2012 in Rio de Janeiro. It was the conference that laid the foundation for the Sustainable Development Goals based on the Millennium Development Goals. Also during the conference, guidelines on green economy policy were elaborated, while the approach by which

[33] http://www.unfccc.int/meetings/Durban_nov2011/meeting/6245.pht [Accessed 20.03.2021].

[34] Doha Climate Change Conference — November 2012. UNFCCC. Available at: https://unfccc.int/process-and-meetings/conferences/past-conferences/doha-climate-change-conference-november-2012/doha-climate-change-conference-november-2012 [Accessed 17.07.2022].

the proposed sustainable development should be financed was examined and adopted.[35]

Paris Agreement

The Paris Agreement is a legally binding international agreement on climate change. This agreement was approved by 196 parties on December 12, 2015 and entered into force on November 4, 2016. The goal of this remarkable agreement is to limit global warming to below 2 °C, preferably 1.5 °C, compared to pre-industrial levels; With this landmark agreement, countries aim to reach the global peak in greenhouse gas emissions as quickly as possible to achieve a carbon-neutral world by mid-century.[36] This agreement is groundbreaking because, for the first time, countries around the world are making ambitious efforts to combat and adapt to the climate change that is devastating the world.

These are some of the international agreements put in place by nations of the world to combat the menace of climate change. Climate change is with us now and it is obvious that the effects are overwhelming. Several other efforts must be made by all and sundry to ensure that climate change becomes the thing of the past.

VI. Recommendations and conclusion

It is hereby recommended that the newly enacted law on climate change in Nigeria should not be treated like other laws on environmental protection that are ineffective as a result of non-compliance with the laws. The law must be adequately monitored so as to ensure that Nigerians obey the its provisions. Violators of the provisions of the law should also be prosecuted for the violation. There is an urgent need for States to implement the international agreements entered into by them, Nigeria inclusive.

[35] United Nations Conference on Sustainable Development, Rio+20: Sustainable Development Knowledge Platform. Available at: https://sustainabledevelopment.un.org/rio20.html [Accessed 17.07.2022].

[36] The Paris Agreement. UNFCCC. Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement [Accessed 18.07.2022].

It is unarguably certain that climate change has affected the whole world and will continue to affect us until countries of the world address the issue with all sense of seriousness. Thus, the fact that climate change exists is an established fact and it has been analyzed in this article, it is one of the greatest challenges that is currently facing the world. It is an environmental phenomenon and it has a lot to do with energy production and use. Climate change will become the thing of the past and countries of the world will enjoy the weather as usual if the greenhouse emission is reduced as agreed upon.

References

1. Egbewole, W., (2011). *Law and Climate Change in Nigeria*. Ilorin: University of Ilorin: University Press.

2. Hansen, J., (2004). Defusing the Global Warming Time Bomb. *Scientific American,* Vol. 290, No. 3, pp. 68–77. Available at: https://www.researchgate.net/publication/7144217_Defusing_the_global_warming_time_bomb.

3. Houghton, J., (2009). *Global Warming: The Complete Briefing*. 4th ed. Cambridge: Cambridge University Press.

4. McCarthy, J., et al. (eds.), (2001). Climate Change 2001, Impacts, Adaptation and vulnerability: Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge: Cambridge University Press.

5. Olawuyi, D., (2013). *The Principles of Nigerian Environmental Law*. Ado Ekiti: Afe Babalola University.

6. Oluduro, O.F., (2012). Climate Change — A Global and National perspective: The case of Nigeria. *Journal of Politics and Law*, Vol. 5, No. 3, pp. 33–38. Available at: https://www.ccsenet.org/journal/index.php/jpl/article/view/19901.

7. Ruddiman, W., (2003). The anthropogenic greenhouse era began thousands of years ago. *Climatic Change*, 61, pp. 261–293, doi: https://doi.org/10.1023/B:CLIM.0000004577.17928.fa.

8. Speth, J., (2004). *Red Sky at Morning: America and the Crisis of the Global Environment*. 2nd ed. New Haven: Yale University Press.

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Article

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Climatic Aspects of Ecological and Legal Protection of Forests in the Russian Federation

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Abstract: The purpose of the article is to research the legal issues of forest protection in the Russian Federation in the context of global climate change taking into account international obligations under the Paris Agreement 2015 and the Glasgow Leaders' Declaration on Forests and Land Use 2021. The sources of the research are legislative and other regulatory legal acts in the field of forestry relations, environmental and natural resource law, *etc.*

The research methodology is based on scientific methods such as dialectical, logical, predictive, systems analysis, content analysis, as well as private scientific methods, such as statistical, technical and legal, comparative legal.

Keywords: global warming; strategic planning; European Union; hydrocarbon tax; low-carbon economy; Paris Agreement 2015; forestry relations; forest protection

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Contents

I. Introduction

For a number of centuries, the environment has not been a crucial issue, despite the fact that human economic activities have previously generated undesirable consequences. However, since the second half of the twentieth century, environmental pollution has reached a threshold level in a number of areas, and environmental problems have become global in nature. Currently, many environmental problems are associated with global climate change. Ensuring national and environmental security is becoming a matter of paramount importance in the context of climate change, protection of human health, provision of economic development and new technologies (Zhavoronkova and Shpakovsky, 2021).

In July 2021, a new National Security Strategy of the Russian Federation (hereinafter referred to as Strategy-2021) was approved by the decree of the President of the Russian Federation. One of the key components of the Strategy-2021 was a part dedicated to environmental protection, which is extremely important for ensuring sustainable socio-economic development and national security of the state.

For all the variety of topics and approaches mentioned in the Strategy-2021, three issues are important: assessment of environmental (climatic) threats and measures to combat them; connection between national ecological economic and global problems; and ecological, economic and social context of climate problems.

For Russia, the issue of environmental safety in the context of global warming is not an outsider, since the warming in our country is happening 2.5 times faster than the world average. In recent years, many environmental problems in our country have become urgent, and socio-economic processes are increasingly "tied" to the environment.

The requests for an adequate environmental policy, including climate one, have increased in society, business environment and experts. At the same time, it is necessary to take into account that the climate agenda has been and will be the arena of the most intense competition, and the motives for the global rise in temperature can be used as a political and economic factor.

Three global initiatives were adopted at the Glasgow Climate Summit 2021.[1] These initiatives refer to coal, deforestation and methane. One of the reason is that the use of coal as a source of energy is the main cause of climate change. The Summit resulted in more than 40 countries committing themselves to phase out coal by 2030s for large economies and by 2040s for poorer countries. The leaders of more than 100 countries accounting for 85 % of the world's forests have agreed to cease deforestation by 2030. More than 80 countries have signed a Global Methane Pledge,[2] agreeing to cut emissions by 30 % by the end of the decade. U.S., and European leaders have said that combating the strong greenhouse effect is critical to keeping warming at 1.5 °C. Brazil and Indonesia, unlike the 2014 Agreement, became signatories this time. Australia, China, Russia, India and Iran have not signed this agreement. The authors pay special attention to the deforestation initiative as the subject of the research.

The most support received the Declaration on Forests and Land Use[3] and this was the only declaration supported by Russia. The President of the Russian Federation Vladimir V. Putin said: "We are taking the most serious and vigorous measures, improving forestry management, fighting illegal logging and forest fires, increasing reforestation areas,

[1] UN Climate Change Conference, 2021 (Glasgow, October 31 — November 12, 2021), serving as the 26th Conference of the Parties to the 1992 UN Framework Convention on Climate Change and the 3rd Meeting of the Parties to the Paris Agreement.

[2] Global Methan Pledge. Available at: https://www.globalmethanepledge.org/ [Accessed 20.09.2022].

[3] UN Climate Change Conference, 2021. *Glasgow Leader's Declaration on Forests and Land Use*. [online]. Available at: https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/ [Accessed 20.09.2022].

and consistently increasing funding for these purposes."[4] These measures are extremely important taking into account the fact that forests in the Russian Federation cover more than 75 % of the total area of the country. More than 600 million cubic meters of timber can be produced and processed annually.

Forest resources are objectively a competitive advantage for Russia, providing Russian economy with a strategic advantage in the system of global economic relations. Therefore, the central issue of the development of the forest industry is the choice of methods for realizing the existing potential of the timber industry complex.

Despite the fact that the Russian Federation is the largest forest world power, the Country's timber industry complex is not among the leading industries, and the share of its products is no more than 3 % of the global volume. Today, in terms of the scale of forest production and the contribution of forests to the budgetary system, it lags far behind developed countries with market economies.

On September 20, 2018, the Government of the Russian Federation adopted the Strategy for the Development of the Forestry Complex of the Russian Federation until 2030.[5] The Strategy is aimed at achieving sustainable forest management, innovative and effective development of the use, protection and reproduction of forests, ensuring the outstripping growth of the forest sector economy, social and environmental security of the country, and unconditional fulfillment of the international obligations of the Russian Federation in terms of forests.

The Glasgow Leaders' Declaration on Forests and Land Use 2021 is far from the first declaration on forests. In 1992, at the UN Conference on Environment and Development in Rio (UNCED), governments failed to agree on a UN Forest Convention (in addition to the agreed conventions on climate, biodiversity and desertification) and approved a "Non-

[4] A video message to the participants of the meeting on forest management and land use within the framework of the UN Climate Summit. Available at: http://www.kremlin.ru/events/president/transcripts/67055 [Accessed 02.12.2021].

[5] Order of the Government of the Russian Federation No. 1989-r dated 20.09.2018 "On approval of the Strategy for the Development of the Forestry Complex until 2030". Available at: http://government.ru/docs/34064/. (In Russ.). [Accessed 02.12.2021].

legally binding formal statement of principles for global consensus on the management, conservation and sustainable development of all types of forests."[6]

In 1997, the UN established the Intergovernmental Forum on Forests (IFF), which did not solve the problems of the UN Forest Convention. In 2000, the United Nations Forum on Forests (UNFF) was formed by the United Nations Economic and Social Council (ECOSOC) to promote "the management, conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this goal."[7] In December 2007, the UN General Assembly adopted the "Non-legally binding instrument on all types of forests." In 2014, at the UN Climate Summit, governments signed a "non-legally binding political declaration" called the New York Declaration on Forests.[8] It aims to halve deforestation by 2020 and halt it by 2030.

In January 2017, the UN Forum on Forests agreed to develop a UN Strategic Plan for Forests.[9] It was adopted by the UN General Assembly in April 2017. The strategic plan sets out six "forest goals." The goals are the following:

"Reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation and contribute to the global effort of addressing climate change;

Enhance forest-based economic, social and environmental benefits, including by improving the livelihoods of forest dependent people;

Increase significantly the area of protected forests worldwide and other areas of sustainably managed forests, as well as the proportion of forest products from sustainably managed forests;

[6] United Nations Strategic Plan for Forests, 2017–2030. Available at: https://www.un.org/esa/forests/wp-content/uploads/2016/12/UNSPF_AdvUnedited.pdf [Accessed 02.12.2021].

[7] United Nations Forum on Forests. Available at: https://www.un.org/esa/forests/forum/about-unff/index.html [Accessed 02.12.2021].

[8] New York Declaration on Forests. Forest Declaration Platform. Available at: https://forestdeclaration.org/ [Accessed 02.12.2021].

[9] United Nations strategic plan for forests, 2017–2030. Available at: https://www.un.org/esa/forests/wp-content/uploads/2016/12/UNSPF_AdvUnedited.pdf [Accessed 02.12.2021].

Mobilize significantly increased, new and additional financial resources from all sources for the implementation of sustainable forest management and strengthen scientific and technical cooperation and partnerships;

Promote governance frameworks to implement sustainable forest management, including through the UN Forest Instrument, and enhance the contribution of forests to the 2030 Agenda; and

Enhance cooperation, coordination, coherence and synergies on forest-related issues at all levels, including within the UN System and across Collaborative Partnership on Forests member organizations, as well as across sectors and relevant stakeholders."[10]

One hundred and five countries adopted the Declaration of November 2, 2021.[11] The countries that supported the declaration intend to work in six directions. These directions relate to the following issues: deforestation, coal, methane, finance, carbon and net-zero target. In particular, they plan to take active steps to accelerate reforestation and develop new trade practices that would promote sustainable development. The declaration also speaks of the need to apply incentive programs in the field of agriculture, which would take into account the issues of environmental protection, as well as an increase for funds allocated for the protection of forests.

It is important to note that Russia, having expressed support for the draft joint declaration on forests, is adhering to its strategy of reaching carbon neutrality by 2060, relying on its own forests.[12] The purpose of the article is to study the legal problems of ensuring effective protection of forests in the Russian Federation in the context of global climate change.

[10] United Nations Department of Social and Economic Affairs. Forests, 2017. *Six Global Forest Goals agreed at UNFF Special Session*. [online]. Available at: https://www.un.org/esa/forests/news/2017/01/six-global-forest-goals/index.html [Accessed 02.12.2021].

[11] Glasgow Leaders' Declaration on Forests and Land Use 2021. Available at: http://www.kremlin.ru/supplement/5731. (In Russ.). [Accessed 02.12.2021].

[12] Putin: Russia supports the declaration on forests prepared for the Glasgow conference. Available at: https://tass.ru/ekonomika/12826859?utm_source=vk.com&utm_medium=social&utm_campaign=smm_social_share. (In Russ.). [Accessed 02.12.2021].

To analyze these issues, the authors consider a significant array of legislative and other normative legal acts of the Russian Federation regulating forest relations, issues of forest protection as well as climate legislation and the possibility of forest absorption. The article also highlights the issues of forest problems on the climate agenda.

II. Sources and Methods

Climatic problems affect the entire palette of environmental legislation (nature management, environmental protection, ecological safety), but they are especially related to the assimilation capabilities of the environment, the ability of forests to absorb carbon and reduce the greenhouse gases effect being the most significant ones. Given the area of forests in Russia, this circumstance seems to be of fundamental importance for the legislative and economic aspects of the climate doctrine and for the global regulation of the "carbon footprint." The relevant law of the European Union has long been the base for the Russian legislation in this area.[13] At the beginning, EU legislation considered the absorption capacity of forests as a full-fledged part and accounting unit in carbon regulation. Moreover, the so-called emissions trading was based in part on the recognition of the area and composition of forest plantations. Apparently, the presence of such natural advantages in Russia was not considered essential for the development of appropriate regulation.

The basic discrepancy between the calculation methods concerns the time period for averaging the calculations, that is connected with the volume of forest stands, whose absorption capacity is used to calculate the final absorption capacity of forests. In particular, according to the values in the assessment of the Ministry of Natural Resources and Environment of Russia, the predicted average annual absorptive capacity of Russian forests (while maintaining the existing forest management

[13] We can mention the following acts of the European Union: Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ('European Climate Law'), European Parliament resolution of 15 January 2020 on the European Green Deal.

model) in 2021–2030 will amount to 450–500 million tons of CO / year with a tendency to decrease by 2 times by 2040.[14]

According to some experts, the absorptive capacity of Russian forests will have grown by 2040 and by 2030 will amount to more than 2 billion tons of CO_2 / year.[15] It is also necessary to consider the absorption of forest plantations that are not included in the state forest fund: urban green spaces, vacant agricultural land, reserve forests, forest nurseries, *etc*.

The forestry authorities annually launch a national procedure for acquiring data on the state of forests, which is called the "State Forest Register." This data collection contains information on the areas and stocks of wood in forests with differentiation by the dominant tree species, age group, category of purpose and forest management unit. Forest registry databases are the source of information for calculating carbon fluxes. Nevertheless, not only the forest, but also other natural features of Russia (the presence of swamps, abandoned lands, and permafrost) imply the need to develop adequate and effective rule-making work to address the role of forest resources in reducing the "greenhouse effect."

Estimation of the carbon budget of forests for individual stands, regions and the country as a whole has become a popular area of scientific research. The economic aspect is very important in climate legislation. Any decisions in terms of "decarbonization" are in the first place some redistribution of cash flows, for example, from mining companies to technological companies, from one country to another. Against this background, the mechanism for the formation of new payment surrogate systems, such as the circulation of "carbon units," which are very reminiscent of the tolling or "barter" systems of Russian economy in the 90s of the last century, is fundamentally important. If

[14] Energy Policy, 2021. *Climate Agenda: Version 2.0*. Available at: https://energypolicy.ru/klimaticheskaya-povestka-versiya-2-0/energetika/2021/14/16/. (In Russ.). [Accessed 02.12.2021].

[15] The Moscow Times, 2021. *Russia Says Its Forests Neutralize Billions of Tons of Greenhouse Gases. Scientists Have Their Doubts*. Available at: https://www.themoscowtimes.com/2021/07/05/russia-says-its-forests-neutralize-billions-of-tons-of-greenhouse-gases-scientists-have-their-doubts-a74428 [Accessed 02.12.2021].

a country (enterprise, region) does not emit CO_2 or has found a way to completely neutralize it, then other countries (enterprises) can or should compensate for the costs of this neutralization. There are natural "carbon" sinks that can naturally adsorb emissions. Most notably it is a forest. The ecological and economic importance of forests as the most important aspect of climate legislation depends on the assessment of the "absorbing capacity" of the forest. "Absorption capacity," in turn, is calculated using complex techniques, assessments, experiments, observations, agreements. It is obvious that countries and regions with large forests will be interested in high estimates of the absorptive capacity of forests, "treeless" countries in low. The position of Russia in this case is quite unique. According to some estimates, Russia should not only pay for its carbon footprint, but also receive hefty compensation from European countries for the ability of its forests to "absorb" carbon.[16]

The total annual carbon sink in Russia's forests in the 1990s increased from 100 million tons of CO_2 to 230 million tons.[17] Russia, with its vast forested area, has a unique potential to reduce anthropogenic impact on the climate, comparable to global greenhouse gas emissions from burning fossil fuels. There is no doubt that the reserves of organic carbon in the soil cover of forests are enormous, and there is a lot of it in the vegetation cover. However, it is almost impossible to quickly build up — increase — the carbon stock in soil and forests. Rather, it should be about avoiding significant losses of the reserves available in Russia.

Recent estimates of the area of "urban" forests indicate 18 million hectares and the maximum possible absorption level equal to 210 million tons of CO_2 / year over 100 years. This is a huge area, but only about 10 % of the current greenhouse gas emissions in the energy sector and other sectors of the Russian economy compensates for this overgrowth. In addition, the fate of these wooded agricultural lands is not yet known —

[16] The Moscow Times, 2021. *Russia to Rely on Vast Forests to Meet Climate Goals*. Available at: https://www.themoscowtimes.com/2021/08/27/russia-to-rely-on-vast-forests-to-meet-climate-goals-reports-a74906 [Accessed 02.12.2021].

[17] *See*, RCC, 2021. Geo-Strategy for European Green Policy. [Online]. Available at: http://rcc.ru/article/geopolitika-evropeyskogo-zelenogo-kursa-78609. (In Russ.). [Accessed 02.12.2021]; Larichkin, E. and Buzko, R., 2019. *VC.RU*, [blog] 10 October. Available at: https://vc.ru/u/345086-egor-larichkin/87442-kak-borotsya-s-global nym-potepleniem-18-sudebnyh-del-iz-raznyh-stran. (In Russ.). [Accessed 02.12.2021].

modern legislation does not allow forestry on them. It cannot be ruled out that when the market demand for agricultural products changes (including due to the adverse effects of climate change in southern countries), they will again be in demand.

The analysis showed that over the past 15 years, Russia has lost several million hectares of productive forest.[18] The main factors are man-made fires, logging, infrastructure creation, exploration, production and transportation of minerals. In forest ecosystems, the processes of absorption and emission of CO_2 are constantly going on. Russian forests absorb about 600 million tons of CO_2 per year, which accounts for only 1.2 % of global anthropogenic greenhouse gas emissions, but offset more than 20 % of current emissions in sectors of the country's economy.[19]

A decrease in emissions and an increase in absorption in them for the period under consideration is associated with a 2.5-fold decrease in the volume of logging in the mid-1990s. Thus, the net absorption of CO_2 in managed forests varied from 248.5 in 1990 to 674.1 million tons of CO_2 and 2018, respectively. An increase in absorption on overgrown agricultural land is also noticeable. In general, the forest compensated from 2.4 % to 3 % of industrial emissions from other sectors of the economy in 1990 and up to 26.6 % in 2018 (Zamolodchikov et al., 2013).

III. Results and Discussion

As part of the research on legal regulation of forest conservation and protection issues, the authors focus on the most significant areas of forest relations in the context of global climate change. Due to the environmental law regarding climate regulation, it is necessary to highlight several areas that will be of key importance in the consolidation of forestry and climate legislation. First, it is necessary that the European Union should implement the Russian absorption methodology following a fair and accurate methodology of the "absorbing capacity" of forest

[18] Energy Policy, 2021. *Climate Agenda: Version 2.0*. Available at: https://energypolicy.ru/klimaticheskaya-povestka-versiya-2-0/energetika/2021/14/16/. (In Russ.). [Accessed 02.12.2021].

[19] Ibid.

plantations (developed in Russia), regardless of the political and other characteristics of the countries.

Second, it is important to reassess the ecological and economic (climatic) characteristics of new forest plantations and propose, on their basis, comparative forest management strategies in the regions as guidelines for land users and industries.

Thirdly, it is necessary to revise the methods of economic estimation of forests, including the absorbing capacity of forests as an obligatory factor. To this end, it will be necessary to revise the Forestry and Land Codes, for example, in terms of the use of agricultural land for planting forests.

Fourth, in order to increase the importance of new plantations and preserve old ones in the light of climate legislation it is crucial to revise land management legislation, Forestry and Urban Development Codes.

Fifth, it is necessary to significantly strengthen forest fire safety measures, making forest fires economically unprofitable.

The analysis has shown that due to the forest fires, statistics have not changed significantly for many years. In 70 % of cases, fires are associated with an anthropogenic impact and result from non-observance of fire safety rules by the population when they visit and use forests. The main cause of forest fires is the careless handling of fire by citizens in the forest (50.8 %), this also includes the transfer of fire from lands of other categories (14 %), as well as fires from burning dry herbaceous vegetation (2.9 %).[20]

In addition, low efficiency of forest fire fighting is due to chronic underfunding of forestry, which is increasing every year. Thus, insufficient financing of measures to protect forests from fires leads to an annual decrease in the implementation of preventive fire-fighting measures; a decrease in the number of workers involved in the implementation of measures to prevent forest fires and their extinguishing; and to a decrease in the frequency of aviation and ground patrolling of the forest

[20] Analytical Bulletin of the Federation Council of the Federal Assembly of the Russian Federation No. 7 (664) "On measures taken by the Government of the Russian Federation to prevent and eliminate wildfires, preservation and restoration (by the "government hour" of the 408th meeting of the Federation Council of the Federal Assembly of the Russian Federation on March 22, 2017 of the year). Moscow, 2017. (In Russ.).

fund and the impossibility of creating, staffing and maintenance of the required number of fire-chemical stations and points of concentration of fire-fighting equipment and inventory (Shpakovsky, 2018).

Every year, constituent entities of the Russian Federation have significant accounts payable to enterprises that are involved in extinguishing forest fires. Meanwhile, at present, the Government of the Russian Federation has not determined the sources of covering the debts of the constituent entities of the Russian Federation for the costs of extinguishing forest fires.

The problems of fighting forest fires require a systematic approach to assessing the risk of fire hazard. In this regard, the mechanism of a risk-oriented approach when organizing certain types of state control (supervision) is an important element of the problem under consideration.[21]

The Decree of the Government of the Russian Federation[22] established the procedure for classifying the activities of legal entities and individual entrepreneurs and (or) the production facilities they use to a certain risk category or a certain class (category) of hazard, designated as hazard classes or hazard categories.

The list of risk categories (hazard classes) and the criteria for classifying objects of state control (supervision) as such are based on the need to minimize damage to legally protected values. At the same time, it is necessary to take into account the optimal use of material, financial and human resources of the state control (supervision) body, which will allow observing the frequency of scheduled inspections of legal entities and individual entrepreneurs.[23]

[21] Decree of the Government of the Russian Federation No. 806 dated 17.08.2016 "On the application of a risk-based approach when organizing certain types of state control (supervision) and amending some acts of the Government of the Russian Federation" (with amendments and additions). Available at: http://government.ru/docs/all/108073/. (In Russ.). [Accessed 02.12.2021].

[22] Ibid.

[23] The criteria for classifying objects of state control (supervision) as hazard classes should take into account the severity of the potential negative consequences of possible non-compliance by legal entities and individual entrepreneurs with mandatory requirements.

The severity of potential negative consequences resulting from possible non-compliance with mandatory requirements is assessed subject to possible cases of harm and (or) frequency of occurrence and the spread of negative consequences in view of such cases of harm and (or) difficulties in overcoming this harm.[24] Implementation of the requirements of the Decree of the Government of the Russian Federation No. 806[25] will significantly reduce the risks of forest fires.

Forest legislation, represented primarily by the Forest Code of the Russian Federation, legislation on environmental protection, a number of legislative acts of "environmental" orientation, requires some adjustment. In recent years, a special section of legislation and regulations has appeared. It regulates greenhouse gas emissions, but so far, these are only the first steps towards "decarbonization" (Egorova and Vaypan, 2021).

Another issue is related to the reduction of emissions. As a rule, this is completely equated with decarbonization that is, removing carbon or avoiding carbon emissions into the environment, and a low-carbon economy. The Paris Agreement presents a strategy on low greenhouse gas emissions. Moreover, this strategy does not involve the reduction of CO_2 emissions. Although CO_2 accounts for more than 60 % of total greenhouse gas emissions, there is also the already mentioned methane, which gives almost a quarter of these emissions, and in terms of the greenhouse effect exceeds carbon dioxide by more than 20 times (the specific number varies depending on the time interval).[26]

[24] If there are criteria that allow the object of state control (supervision) to be attributed to various risk categories or hazard classes, then the criteria relating the object of state control (supervision) to higher risk categories or hazard classes shall be applied.

[25] Decree of the Government of the Russian Federation No. 806 dated 17.08.2016 (as amended on 15.01.2022) "On the application of a risk-based approach when organizing certain types of state control (supervision) and amending certain acts of the Government of the Russian Federation" (together with the Rules for classifying activities legal entities and individual entrepreneurs and (or) production facilities used by them to a certain category of risk or a certain class (category) of danger). Available at: http://government.ru/docs/all/108073/. (In Russ.). [Accessed 02.12.2021].

[26] Energy Policy, 2021. *Climate Agenda: Version 2.0*. Available at: https://energypolicy.ru/klimaticheskaya-povestka-versiya-2-0/energetika/2021/14/16/. (In Russ.). [Accessed 02.12.2021].

In the 2000s, Russia adopted a number of legislative and other regulations governing emissions of harmful substances and greenhouse gases. These are Federal laws "On environmental protection", "On ecological expertise", "On the best available technologies" and others, as well as concretizing about three dozen government decrees. The development of legal regulation of emissions continues. In order to comply with the provisions of the Federal Law "On the Best Available Technologies" (2014), they adopted Federal Law "On Conducting an Experiment on Quoting Pollutant Emissions" in 2019 (this experiment is being carried out in 12 cities so far). In addition, the Government made a decision to subsidize the investments of enterprises that reduce harmful.

Following the Paris Agreement recommendations, the National Action Plan for the first stage of climate change adjustment for the period up to 2022 was adopted.[27] At the federal level it provides for organizational, legal and methodological support, including, inter alia, a model "passport of the climatic safety of the territory"; a system of target indicators for achieving adaptation goals; methodological recommendations for assessing climate risks and ranking adaptation measures according to their priority; methodological recommendations for the formation of sectoral, regional and corporate plans for adaptation to climate change; a certain place should be given to the possibilities of the forest to offset carbon emissions, its absorption and the elimination of the greenhouse effect. Thus, the risks arising for Russia under the Paris Agreement can be hedged through an adequate assessment of the absorptive capacity of Russian forests.

Amid the global warming problem, the problem of adaptation to climate change is, as it was, aloof. The Paris Agreement has clearly equalized the importance of adaptation and reduction of greenhouse gas emissions, and the efforts of the world community are aimed at reducing emissions (the costs for these purposes are 5–10 times higher than the

[27] Order of the Government of the Russian Federation No. 3183-r dated 25.12.2019 "On approval of the national action plan for the first stage of adaptation to climate change for the period up to 2022." Available at: http://publication.pravo.gov.ru/Document/View/0001202001040016. (In Russ.). [Accessed 02.12.2021].

costs of adaptation). It is necessary to understand that regardless of the causes of climate change (natural, anthropogenic or combined), people and the economy must adapt to the consequences of these changes. It is important to understand that for the future.

According to the academician of the Russian Academy of Sciences, Boris N. Porfiriev (2020) the Paris Agreement clearly states that tackling climate change must be carried out in the context of achieving sustainable development goals. In achieving the goal of sustainable development related to climate change, three main areas of action are equivalent: reducing greenhouse gas emissions, absorbing greenhouse gases that are already in the atmosphere, and adapting humans, economies, ecosystems to changing climatic conditions. However, many politicians interpret the Paris Agreement in a very peculiar way: adjusting the solution of socio-economic development problems to solving climate problems. They say that if we reduce energy consumption, reduce emissions, reduce the number of cattle, meat consumption, and so on, it will be good for climate. A fundamental question arises: climate for humans or humans for climate?

The "Green Heading" also implies new environmental rationales for industrial policy. The EU documents[28] note that the EU needs "leaders to develop commercial applications of disruptive technologies" and "new forms of collaboration with industry and investors along strategic value chains" in industries such as battery and digital technologies. It appears that the US might consider this to be European protectionism in order to seize leadership in the green technology sector (Porfiriev, 2020; Blazheev and Egorova, 2021).

Attention should be given to what distinguishes forest legislation from other acts in the field of environmental protection, namely, these are carefully explained requirements for reforestation. These requirements have been reflected in the legislation long before the discovery of the

[28] *See*, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions "A New Industrial Strategy for Europe" COM(2020) 102 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0102 [Accessed 02.09.2022].

effect of carbon dioxide absorption.[29] Unfortunately, the mechanism for the implementation of this norm is very poorly explained and it is being implemented unsatisfactorily.

In our opinion, there is no need to list all the legislative measures and all the experience in reforestation, the task is different — to adapt forest legislation in connection with the requirements of the climate doctrine, in order to maximize the use of the protective properties of the forest.

It seems appropriate to draw attention to several key points in this regard:

1. What factors increase/decrease the efficiency of forest management from the point of view of the climate doctrine.

2. To what extent existing environmental legislation reflects the requirements for "energy transition."

3. How to make the most of the advantages of Russia possessing such vast forests.

It is known that not all woody vegetation absorbs carbon equally. Therefore, the very first and most traditional direction is the restoration of a certain type of forest, the creation of conditions for reforestation of the necessary tree species.

The second direction has also been a priority for a long time — the fight against fires and illegal deforestation, but it is still extremely ineffective (Zhavoronkova and Shpakovsky, 2020).

The connection between the state forest policy, as well as the state policy in other sectors, is manifested in the peculiarities of its formation. In this regard, with the adoption of the Federal Law "On Strategic Planning in the Russian Federation,"[30] a set of issues related to the state forest policy needs to be clarified.

[29] Protection and restoration of areas of deforested and dead forests (chapters 3, 3.1, 3.2, 4 of the Forest Code of the Russian Federation). (In Russ.). Computer-based reference system "ConsultantPlus".

[30] Federal Law No. 172-FZ dated 28.06.2014 "On Strategic Planning in the Russian Federation" (as amended). Available at: http://www.kremlin.ru/acts/bank/38630. (In Russ.). [Accessed 02.12.2021].

Based on the strategic goals and objectives of the state forest policy, we highlight the following priority directions for the development of forestry:

— improving the legal status of forests as a special object closely related to the land and determining the mode of use of the lands on which they grow;

— improvement of the system of state management of forests and forestry;

— determination of forms of ownership of urban forests;

— clarification of the procedure for classifying forests as protective and corresponding categories of protective forests;

— advancing the system of payments for the use of forests, including the introduction of a procedure for reimbursing losses when transferring forest lands to lands of other categories, forest management (design of forest areas, design of measures for the protection, protection, reproduction of forests) at the expense of the budgetary system of the Russian Federation;

— improving the legal status and expanding the functions of forest management, as the basis for the cadastral registration of forests, maintaining a forest register, forest planning and forest management;

— creation of organizational and legal conditions for the effective fight against illegal logging and other forest violations based on a system of accounting and control of harvested, purchased and processed timber;

— improving the mechanism of bringing to responsibility for violation of forest legislation (possible organization of the forest prosecutor's office and forest police);

— protection from forest fires by the forest service, restoration of the aviation service in forest divisions, restoration of forest fire zoning of forests;

— determination of the procedure for the creation and operation of forest infrastructure facilities, permission for construction and commissioning, certification of a special type of roads and communication lines, *i.e.,* forests.

In our opinion, climate projects for absorbing greenhouse gases should be of interest to regions, local businesses and the population. To this end, it is necessary to legislate the lease of forests with a low

rental rate, since tenants will bear the costs of reforestation, forest protection from fires, pests and diseases, and illegal logging. Forest users themselves should be interested not only in planting seedlings, but in full-fledged reforestation of the required species to the point of full maturity.[31]

It is rational, in our opinion, to conduct a pilot project to test the creation and use and tools of the Russian register (cadastre) of carbon units absorbed by the forest. Informatization in forest management should increase the efficiency of accounting for carbon absorption by several times. It seems necessary to ensure the accounting and classification of measures aimed at protecting and improving the quality of sinks and storage facilities of greenhouse gases. Today the need for cooperation with external, foreign carbon accounting centers increases.

Reforestation is necessary not only from an environmental point of view, but also from the point of view of carbon sequestration. Another potential forest cover is growing on an area of up to 50 million hectares: this is exactly the potential of unused agricultural land, taking into account the plans of the Ministry of Agriculture of Russia to return abandoned lands into appropriate use. It will allow depositing up to 0.3 billion tons of carbon dioxide per year due to forest growing on abandoned agricultural lands (for comparison, greenhouse gas emissions in the energy sector are about 1.7 billion tons of CO_2-eq. per year). Forest growing on these lands will create up to 100 thousand jobs by organizing forest growing and logging on these lands (Bashmakov, 2009).

The next feature of forest management, which is hardly ever applied in practice, is the introduction of the category of ecologically "managed lands," that is, lands under anthropogenic pressure: all emissions and removals can be fully taken into account in these areas. The ecologically managed lands in the Russian Federation include forests where measures are taken to protect and conserve them, forest management

[31] According to the Forest Code of the Russian Federation No. 200-FZ dated 04.12.2006, the Russian Federation transfers to the state authorities of the constituent entities of the Russian Federation the implementation of the following powers in the field of forest relations: the implementation of protection, reproduction of forests, afforestation on the lands of the forest fund (Article 85, para. 6).

and logging; agricultural land — arable, pasture and hayfields; drained and watered wetlands, peat extraction; lands of settlements, industrial facilities and areas under linear infrastructure facilities, as well as lands transferred between these categories. Natural ecosystems in which no anthropogenic activity is carried out (a significant part of the tundra, steppes, bog ecosystems, reserve forests). This is still a poorly accounted natural reserve from the point of view of carbon absorption.

IV. Conclusion

In our opinion, it is necessary to pay attention to the following aspects of forest legislation in the context of the climate agenda. Firstly, to radically strengthen forest protection against fires, maintaining fire protection agencies, ensuring constant monitoring and control by special forest services. Secondly, to strengthen the control and responsibility of all forest users for proper reforestation. Thirdly, it is necessary to overcome the resistance of the European Union regarding the offset of carbon sequestration by the forest. To this end, it is necessary to recognize on the basis of reciprocity the standards of "carbon neutrality."

In our opinion, specific changes should be made to a number of legislative acts, strengthening their "climatic character." For example, in the fire safety requirements legislation[32] for the prevention of forest fires — It is important to include the issues of improving the forest assessment methodology into Chapter 3 of the Forest Code of the Russian Federation, including those relating to the absorbing capacity of forests, soils and water bodies. The assessment could be provided by a space constellation, space monitoring with a high degree of resolution.

In the context of supplementing and partial processing of forest legislation, it is necessary to develop a methodology for estimating absorption of carbon dioxide emissions, offsetting carbon units by type of territory, type of production, products with characteristics of forests and vegetation.

It is important to note that the system of accounting and monitoring of the absorbing capacity of forests is only being formed in our country.

[32] Federal Law No. 69-FZ dated 21.12.1994 "On Fire Safety." Available at: https://cis-legislation.com/document.fwx?rgn=1526. (In Russ.). [Accessed 02.12.2021].

That is why the experiment in the form of "carbon polygons (farms)" is of great importance. The experiment should be carried out in different regions and in different natural production conditions. In fact, these polygons will be experimental territories (enterprises), where the approbation of technologies for remote and ground calculation of the absorbing capacity of a forest is being implemented. The development of a network of such carbon polygons is currently an alternative to carbon pricing. It is also necessary to adopt a system of quotas, taxes, and fees for the main subjects of greenhouse gas emissions, gradually transferring them from the regional experiments regime to a higher level.

A separate issue is the creation and application of low-carbon technologies in the forestry complex itself. Here, it is not so much a toughening of environmental regulation that is needed, but, in the first place, a stimulating mechanism for financing such projects (benefits, interest-free loans, venture financing, *etc.*).

In Russia today, all innovations boil down, basically, to copying and implementing Western experience or transferring forgotten Soviet technologies and experimental developments of the past "on modern rails." However, domestic forestry education has centuries-old traditions, its own school, its own history.

All this predetermines the relevance of scientific research related to the assessment of the current state of the forestry complex of the Russian Federation with the presentation of problems in various areas of forestry management, including in the context of global climate change. At the same time, the development of proposals for reforming forestry legislation, taking into account the modern experience of forest management and reforestation in other countries with large forests on their territory, should be aimed at solving the problems of sustainable socio-economic development of the country.

References

1. Bashmakov, I.A., (2009). *Low-Carbon Russia: 2050*. Moscow: CENEF. (In Russ.).

2. Blazheev, V.V. and Egorova, M.A., editors, (2021). *Transformation of Legal Regulation Models of Innovation Infrastructure Objects in*

Modern Law: Russian and Foreign Experience. Moscow: Prospekt. DOI: 10.31085/9785392336067-2021-592. (In Russ.).

3. Egorova, M.A. and Vaypan, V.A., editors, (2021). *Contemporary Problems of Entrepreneurial and Corporate Law Development in the 21st Century in Russia and Abroad*. Moscow: Justicinform Publishing House. (In Russ.).

4. Porfiriev, B.N., (2020). *Sustainable Development, Climate and Economic Growth: Strategic Challenges and Solutions for Russia*. St. Petersburg: SPbGUP. (In Russ.).

5. Shpakovsky, Yu.G., (2018). Contemporary Problems of Legal Regulation of Forest Fire Protection. *Lex russica*, 1(134), pp. 43–56, doi: 10.17803/1729-5920.2018.134.1.043-056. (In Russ.).

6. Zamolodchikov, D.G., Grabovsky, V.I., Korovin, G.N., Guitarsky, M.L., Blinov, V.G., and Dmitriev, V.V., (2013). Carbon Budget of Managed Forests in the Russian Federation in 1990–2050: Retrospective Assessment and Forecast. *Meteorology and Hydrology*, 38(10), pp. 701–714. (In Russ.).

7. Zhavoronkova, N.G. and Shpakovsky, Yu.G., (2020). Legal Problems of Spatial Development of the Russian Federation: Issues of Strategic Planning. *Lawyer*, 5, pp. 56–61, doi: 10.18572/1812-3929-2020-5-56-61. (In Russ.).

8. Zhavoronkova, N.G. and Shpakovsky, Yu.G., (2021). Modern Problems of Legal Regulation of Innovative Development of the Forestry Complex in Russia. In: Blazheev, V.V. and Egorova, M.A., editors, (2021). *Transformation of Legal Regulation Models of Innovation Infrastructure Objects in Modern Law: Russian and Foreign Experience*. Moscow: Prospekt. (In Russ.).

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NOVELTIES IN THE NATIONAL LEGISLATION

Research Article

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The Employee's Right to Privacy Transformation: Digitalization Challenges

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Abstract: The development of digital technologies applied for electronic monitoring of employees, artificial intelligence systems and transition to remote employment have naturally lead to a change in the content of the employee's right to privacy. The lack of generally binding international labor standards in the mentioned sphere creates prerequisites for the increasing role of local regulation and legitimation of judicial practice. The authors come to the conclusion that at the legislative level, not only the monitoring over the employee's performance of labor functions, but also the process of dissemination and use of the data obtained in order to make other personnel decisions should be limited. The purpose of this research is to substantiate the assertion that in the context of digitalization it becomes necessary to consider the right of an employee to privacy as one of the fundamental principles of the legal regulation of labor relations.

Keywords: digitalization; inviolability; privacy; personal data; monitoring; labor protection; employment; artificial intelligence; remote work

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Contents

I. Introduction

Digitalization that has covered almost all areas of public life is currently one of the most popular areas of research often referred to as the *technological megatrend* (Jeflea et al., 2022). The right to privacy refers to the human rights that the development of digital technologies has affected on a global scale, forcing a radical review of its content. It has become almost impossible to exclude other people from invading the privacy of a person in the environment where gadgets with high-tech cameras, microphones and surveillance devices are widely available in terms of financial resources and competencies to use them. With each passing year, social media and new technologies facilitate spreading of information while recording; it becomes more and more difficult to control the disclosure of personal information. All this has led to a steady increase in the number of citizens going to court to protect their private lives.

On the other hand, the processes of globalization, as well as transnational corporations development, have led to fierce competition between employers, who are forced to rely largely not on financial resources, ideas and manufactured goods, but on the potential of their employees. In order to achieve maximum employees' efficiency, the employer wants to obtain as much information about job candidates as possible, which includes information about their private lives. After concluding an employment contract with a favorable candidate, the employer begins to control the actions of the employee. Over time, the information technology and science development have allowed the

employer to control the employee's work in new, innovative ways, as well as to obtain all the information about employee's psychological health, genetic or other conditions, personal predispositions.

Since Russian scholars have often discussed non-competition agreements in their research papers (Kulagina, 2022), in this study we will focus only on employer's monitoring of employees as one of the tools to increase the business' efficiency and profitability.

To achieve maximum employees' efficiency, the employer wants to get as much information as possible about job candidates: in the modern world, the use of artificial intelligence in the recruitment process allows us to make conclusions not only about the professional skills and competencies of the applicant, but also about how stress-resistant, sociable, empathic and suitable for the relevant position they are (Shcherbakova, 2021). The studies show that recruiters prefer candidates with such character traits as openness, benevolence, ease of communication (Wehner, Grip, and Pfeifer, 2022). At the same time, there is currently no legal regulation of the use of artificial intelligence programs in employment in Russia, the European Union[1] and the United States (Heilweil, 2020) are taking the first steps towards legal regulation of the development of artificial intelligence programs. Foreign employers have already faced the problem of discrimination when using artificial intelligence in hiring. In 2018, Amazon abandoned the recruiting algorithm that it had been developing for several years, because, according to the results of monitoring data on the use of artificial intelligence, it was forced to admit the fact of discrimination against female applicants.[2]

According to the International Labor Organization, the term "monitoring" includes, but is not limited to, the use of devices such as computers, cameras, video equipment, sound devices, telephones and

[1] The Assessment List for Trustworthy Artificial Intelligence (ALTAI) (2020). Available at: https://digital-strategy.ec.europa.eu/en/library/assessment-list-trustworthy-artificial-intelligence-altai-self-assessment [Accessed 17.08.2022].

[2] Amazon scraps secret AI recruiting tool that showed bias against women. Available at: https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G (2018) [Accessed 17.08.2022].

other communication equipment, various methods of establishing identity and location, or any other method of surveillance, video surveillance, communication monitoring and GPRS monitoring, magnetic cards, portable computers for tracking the workplace, ways and time of being on breaks and using pagers, interceptors, recording devices, *etc*.[3] In recent years, new technologies of artificial intelligence systems have appeared: RFID-chips, tracker bracelets, *etc*. What all these forms of surveillance have in common is that they are performed with the help of modern technology and can violate the privacy of employees (Collins and Marassi, 2021, p. 65).

The obligation of the employer to provide safe and healthy working conditions in the workplace constitutes another factor influencing the restriction of employee's privacy. As the employer's responsibility for workplace working safety grows, so does the necessity of obtaining additional information about habits and daily behavior of employees. It is interesting to note that labor protection improves the stability of the work of employees and the accuracy of the forecasts of employer analysts, thereby positively affecting the profitability of the business (Xiaojia Zheng, Yunfei Yang, and Yanyan Shen, 2022). Thus, on the one hand, labor protection organization and provision is the responsibility of the employer, and, on the other hand, this is an important and desirable process for the employer himself. All of the above makes the right of an employee to privacy especially vulnerable.

Thus, the intent of an employer to interfere the employees' private life can be explained by two reasons: the need for competition in business activities and the responsibility for the safety and health of persons entering into labor relations with the employer. In the first case, we are talking about the situation when the restriction of the employees' privacy is considered necessary in order to protect the ownership of the means of production, as well as to make the business more efficient and controllable. In the context of legal labor regulation, it is about the ability to control employees in the exercise of their labor function. In

[3] Protection of workers' personal data. An ILO code of practice. Geneva. International Labor Office, 1997. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107797.pdf [Accessed 20.02.2022].

the second case, it is about the fulfillment by the employer of the duties assigned to him by the state for the protection of employees' health and safety.

The purpose of this study is to substantiate the assertion that in the context of digitalization, the right of an employee to privacy plays the role of a branch principle of labor law, which underlies the legal regulation of labor relations. Moreover, the existing legal regulation becomes insufficient, both at the national level and at the international level.

II. Literature Review

In modern society, absolute confidentiality is almost impossible, as well as undesirable. However, according to Ruth Gavison, only through its establishment it becomes possible to consider the associated concept of loss of privacy (or what science defines as perceived invasion in private life or perception of invasion (Gavison, 1980)).

When considering the issue of the confidentiality of the private life of an employee, the scholarship has long formed the idea that there are structural elements of confidentiality. Different opinions on this issue are expressed only in terms of the names of these elements, namely: control over information, workspace and workspace autonomy (Sundstrom, Burt, and Kamp, 2017), personal information privacy, working environment privacy, solitude privacy (Ball, Daniel and Stride, 2013).

Within the framework of the historical-cultural approach, a number of researchers (Danilovic, 2017), note the conceptual difference between the practice of the United States and Europe regarding the employees' privacy protection. The American concept of privacy has historically developed around private property, including the means of production. The European approach is mostly oriented on the individual, with the courts continuing to adhere to human rights as an essential element of judicial protection. Despite the fact that in both cases "reasonable expectation of privacy" remains as the most important standard of privacy, in European countries the right to privacy is regarded as a precondition for the right to respect for the dignity of the worker.

As a rule, the issue of the employee's right to non-interference in private life is considered in the context of the institution of disciplinary responsibility. The authors evaluate the legitimacy of the employer's intervention in the private life of the employee in case of employer exercising control over the employee during the exercise of his or her labor function.

The semiological approach to assessing interference in the private life of an employee is focused on the choice of methods, techniques and means that are adequate to the goals of workplace safety and efficient business conduct. This approach assumes the analysis of digital instruments of monitoring over employees during their period of employment. Considering the possibility of monitoring employee's communication, Milica Kovač-Orlandić (Kovač-Orlandić, 2020) concludes that there are two approaches to the choice of means and methods for monitoring employee's communication: a narrow approach and a wide approach. In the first case, monitoring the proper use of the company's premises and evaluating the employee's ability and performance (performance evaluation) cannot be considered as reasons that *automatically* justify the employee's communication monitoring. Monitoring communication referring to such reasons can only be considered acceptable in the situation when there is either no other way of monitoring the employee's behavior or there is no way of evaluating the quality of the employee's work. As part of a wider approach, it is acceptable to introduce monitoring of the employee's communication if it is in the interests of the employer for business purposes.

Within the framework of the semiological approach, it is also possible to consider interference in the private life of an employee from the point of view of the efficiency of the chosen channel of intervention. According to Márton Sulyok (Sulyok, 2009), the use of digital technologies can sometimes hinder work efficiency, since an employee, knowing that he is being watched, may not show up himself due to psycho-emotional characteristics.

An analysis of the economic literature made it possible to identify an economic rationale for the employee's right to privacy. Proponents of electronic monitoring (Alder, 1998) use a teleological approach in economics — the greater the profit, the more reasons the employer has

to use job surveillance. On the contrary, supporters of the protection of the right to privacy use the deontological approach and are more concerned with the process than the result of labor. They state that digital monitoring acts as a *digital whip* in the world of modern technologies (Schmitz, 2005). As a result of the conducted economic studies, experts came to the conclusion that the employer's costs for providing electronic monitoring that results in greater production efficiency can be redistributed as material incentives for employees. In other words, employees' monitoring becomes a non-material stimulation, which, in the long run, lowers the efficiency of its use due to the employees' negative attitude.

The economic approach also allows us to note that the speed of introducing new tools for monitoring employees depends on the financial resources of the employer. Employers are willing to invest financial and time resources in order to maintain control and ownership of their assets. According to research, the business of some companies involved in the production of employee monitoring technologies, or "tattleware technologies," increased significantly in 2020. The contextual approach allows considering the role of the society in limiting the worker's right to privacy. On the one hand, Márton Sulyok (Sulyok, 2009, p. 215) rightly notes the expansion of the concept of the employee's private life, including in professional relationships. On the other hand, cases of armed attacks and massacres during working hours in academic institutions increasingly require employers to establish more effective ways to monitor, if not the employees themselves, then at least the territory and premises owned by the employer, especially after reports of odious crimes related to armed attacks by schoolchildren and students at universities or schools (e.g., Columbine High School Massacre, Perm State University shooting).

The question of interference with an employee's privacy in order to exercise the employer's labor protection powers is also widely discussed. Some research provide positive data concerning the influence of such technologies on the development of industrial hygiene.[4] Other research,

[4] Frost & Sullivan: wearable devices will bring the reality of ubiquitous connectivity closer. Available at: https://www.iemag.ru/news/detail.php?ID=34412 [Accessed 20.02.2022].

such as J. Kallio, E. Vildjiounaite, J. Kantorovitch, A. Kinnula, and M. Bordallo López, consider the issue of willingness and interest of knowledge workers in using monitoring technologies to measure stress levels and gain information about their personal well-being. Research has shown that, first, employees are willing to accept unobtrusive, continuous detection of stress in the context of mental work; second, concerns about more privacy-sensitive practices, such as tracking personal device usage patterns, have not prevented users from agreeing or intending to share data (Kallio et al., 2021).

Interesting conclusions are drawn in the article by S. Suder and A. Siibak, in which the authors conclude that the use of monitoring technologies had a positive effect on mitigating the effects of the spread of COVID-19, when tough measures against employees were required, indicated by the state. However, as a result of reducing the risk of infection spread, employers should restore the imbalance of power in labor relations, including by limiting the use of monitoring technologies (Suder and Siibak, 2022).

III. Discussion

As a result of an empirical research of search queries on key concepts in English: "privacy of employees," "protection of employee's privacy," "data protection," "protection of personal data," the authors have drawn the following conclusions. Monitoring was made with the help of the English version of the official cite of the International Labor Organization. It was found that for the first time the protection of the employees' right to privacy was mentioned in 1956,[5] which indicates the awareness of the existence of the problem for more than 50 years. However, prior to 1997, the studies were exceptional. The first International Labor Organization Code of Practice on the Protection of Workers' Personal Data was adopted in 1997. The most structured reports on this issue have been published since 2000, with the number of publications rapidly increasing every year. From 2015 to 2019, there

[5] Model code of safety regulations for industrial establishments for the guidance of governments and industry. Available at: https://www.ilo.org/global/topics/safety-and-health-at-work/normative-instruments/code-of-practice/WCMS_218458/lang--en/index.htm [Accessed 20.02.2022].

was a slight decline in research interest. 1125 researches[6] considering the protection of the right to privacy were published on the official website of International Labor Organization in 2021. It is also interesting to note the increase in spheres of employment that mention the right of an employee to privacy — from seven spheres in 1993[7] to 100 spheres in 2021.[8]

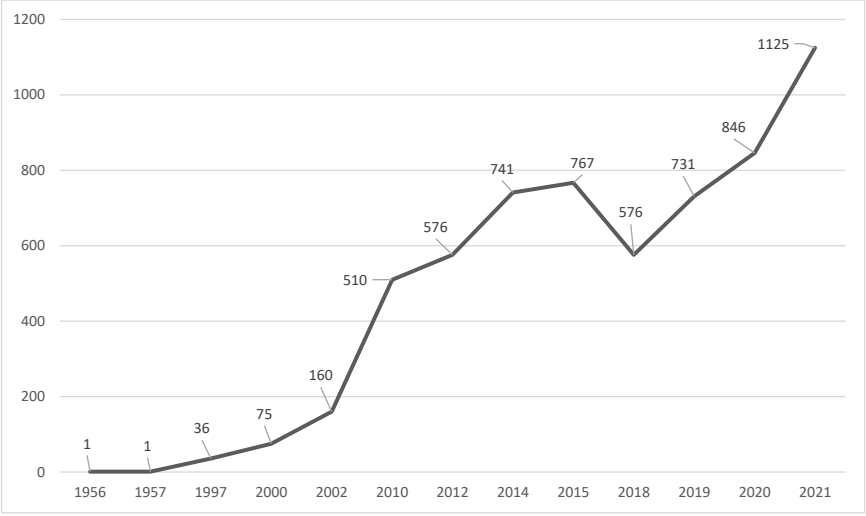

Diagramm 1. Number of publications on the topic of protecting the right of an employee to privacy.

[6] Search for "data protection". Available at: https://www.ilo.org/Search5/search.do?searchWhat=data+protection&navigators=languagesnavigator%1dlanguage%1den%1den%1edatestrnavigator%1dyearstr%1d2021%1d%5e2021%24&sortby=default&lastDay=0&collection=&offset=0 [Accessed 20.02.2022].

[7] Search for "data protection". Available at: https://www.ilo.org/Search5/search.do?searchWhat=data+protection&navigators=languagesnavigator%1dlanguage%1den%1den%1edatestrnavigator%1dyearstr%1d1993%1d%5e1993%24&sortby=default&lastDay=0&collection=&offset=0 [Accessed 20.02.2022].

[8] Search for "data protection". Available at: https://www.ilo.org/Search5/search.do?searchWhat=data+protection&navigators=languagesnavigator%1dlanguage%1den%1den%1edatestrnavigator%1dyearstr%1d2021%1d%5e2021%24&sortby=default&lastDay=0&collection=&offset=0 [Accessed 20.02.2022].

The digital technologies' improvement, creation of new tools for collecting data on employees, on their performance and, finally, on their attitude to the property of the employer inevitably lead to new problems in the legal regulation of labor relations in terms of protecting the employees' right to privacy.

III.1. Judicial legitimation

The lack of clear legal regulation of the employee's right to privacy both at the international and national levels leads to an increase in the role of judicial legitimation of this issue.

On the one hand, the lack of legal regulation of this issue can be explained by the fact that the technology development, its use in the work place and the consequences of such use go ahead of the development of labor legislation regulating their use. At the same time, the importance of legal regulation of this issue at the normative level is noted in a number of researches. Thus, Devasheesh P. Bhave, Laurel H. Teo, Reeshad S. Dalal cited two major developments that are likely to have major implications for employer privacy and labor relations: technology trends and data privacy laws (Bhave, Teo, and Dalal, 2020).

A regulatory framework of employee's privacy issues has emerged relatively recently and it has been associated with the processes of automation and globalization of labor.

In 1996, the issue of developing international labor standards regarding the protection of personal data of workers was raised within the framework of the International Labor Organization (ILO). However, until now, at the level of the ILO, only norms of a recommendatory nature are in force, namely: the ILO Code of Practice on Protection of Personal Data of Workers (1997), ILO Forced Labor (Supplementary Measures) Recommendation No. 203, ILO Recommendation No. 201 dated 16 June 2011 on Decent Work for Domestic Workers.

Article 12 of the Universal Declaration of Human Rights states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and

reputation." The European Convention on Human Rights (Article 8) provides for the right to respect for private and family life, home and correspondence, subject to certain restrictions that are in accordance with the law and are necessary in a democratic society. Protocol 12 to The European Convention on Human Rights containing an absolute prohibition of discrimination has not been ratified by some countries, in particular by the Russian Federation. Consequently, the Russian applicants, when claiming discrimination before the European Court of Human Rights, had to take into account that Article 14 of the Convention applied only to the rights listed in the Convention.

On 28 January 1981, the Council of Europe adopted the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and the Additional Protocol to the Convention concerning supervisory authorities and cross-border transfers of data. A little earlier, the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data were adopted. On 19 February 1999, the Recommendations of the Committee of Ministers to member states of the Council of Europe for the protection of privacy on the Internet were adopted.

At the regional level, the General Data Protection Regulation (GDPR) 2018 and two directives of the European Parliament and the Council of the European Union have also been adopted. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data highlights the need to complement more general data protection rules with internationally recognized principles in the field of employment. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning personal data processing and privacy protection in the telecommunications sector enshrines the right to privacy in the use of personal data in the telecommunications sector.

At the national level, we can refer to the US Electronic Communications Privacy Act of 1986.[9] In the Russian Federation,

[9] Electronic Communications Privacy Act. 1986. (ECPA). Available at: https://hrwiki.ru/wiki/Electronic_Communications_Privacy_Act [Accessed 20.02.2022].

Federal Law No. 152-FZ dated 27 July 2006 "On Personal Data" serves as the basic law concerning personal data protection.

Analysis of the mentioned normative acts allowed us to make two important conclusions. First, there are two different conceptual approaches that form the basis of legal regulation of the stated issue. For example, in the United States, privacy law is aimed at prohibiting interference with private life and wiretapping by the state. At the same time, in Europe and in the Russian Federation, prohibitions and restrictions on interference with private life apply to a greater extent to private employers. Second, attention is drawn to a large number of general norms and principles of regulation to the detriment of sectoral regulation.

As an example of sectoral regulation of this issue at the national level, we can cite the example of the Russian Federation, where employers are granted the right to use instruments, devices, equipment and (or) complexes (systems) of instruments, devices, equipment that provide remote video, audio or other fixation of work processes, for the purpose of monitoring the work safety, ensuring the storage of the information received (Article 214.2 of the Labor Code of the Russian Federation). Employers shall be entrusted with the corresponding duty to inform employees about this right (Article 214 of the Labor Code of the Russian Federation). However, this is a point solution to the problem, relating exclusively to the field of labor protection. Thus, Article 16 of the Federal Law of the Russian Federation No. 152-FZ dated 27 July 2007 "On Personal Data" imposes one more restriction applied within the territory of the Russian Federation. This provision prohibits making legally binding decisions based only on the automated processing of personal data if the subject has not given his or her consent to the processing of personal data in written form. Besides, according to the International Labor Organization "personal data collected in connection with technical or organizational measures to ensure the security and proper operation of automated information systems should not be used to control the behavior of workers."[10]

[10] Protection of workers' personal data. An ILO code of practice. Geneva. International Labor Office, 1997. P. 2. Available at: https://www.ilo.org/

All of the above becomes a prerequisite for the growing role of judicial legitimation in matters of protecting the employee's privacy. Bypassing the issue of criticism of the "evolutionary interpretation" of the European Convention on Human Rights of 1950, we propose to consider the legal positions of the European Court of Human Rights (hereinafter referred to as the ECHR) concerning the issues of restricting the private life of employees by the employer in the context of the development of information technology in modern society.

The first thing worth paying attention to is how the courts understand the right of an employee to privacy. The ECHR in its judgments and decisions tries to establish a balance between too wide and too narrow understanding of this right. On the one hand, the private life of an employee is not limited to his personal life beyond the employment relationship. This position is long established in the judgment of ECHR in *Niemietz v. Germany*[11] when the Court stated that understanding of "private life" cannot exclude the activity of a professional or business nature, since it is in their work that most people have a significant, if not the greatest, number of chances to develop relations with the outside world.

On the other hand, the use of surveillance cameras on the streets or in premises does not raise concerns on the privacy violation. According to the ECHR, "private life" does not apply to places that are freely accessible to the public and that are used for activities that do not belong to the private sphere of the participants.[12]

The next issue dealt with by courts refers to the goals of monitoring that underlie the limitation of employee's privacy. As a rule, limitation of the employee's private life in connection with the need to ensure workplace safety does not cause confusion or disputes. While setting limits in order to build effective business processes, to be unconditional, should be really necessary and indispensable for the implementation

wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107797.pdf [Accessed 20.02.2022].

[11] European Court of Human Rights. Niemietz v. Germany, App No. 13710/88 Judgment of 16 Dec. 1992.

[12] European Court of Human Rights. Peck v. United Kingdom, App No. 44647/98 Judgment of 28 Jan. 2003.

of labor activities. As the analysis of judicial practice shows, the most controversial reasons for interference in the employees' private lives is the desire of the employer to control the use of means of production, the quality of work performed, and the implementation of labor standards in order to maximize productivity and profitability. The reason for this lies in the fact that the courts recognize the possibility of using other ways and methods to achieve these goals, e.g., to limit Internet traffic, motivate employees, plan rational work, *etc.* This thesis is confirmed by the ECHR case law, e.g., in *Chapell v. United Kngdom* and *Huvet v. France*, where the Court found that the employee must choose the methods to achieve maximum productivity by himself.[13]

On the whole, one can formulate two approaches that are used by the courts when establishing the legality of restricting employees' private life. According to the first approach, monitoring the proper use of the company's premises and evaluating the employee's ability and performance (performance evaluation) cannot be considered as reasons that automatically justify monitoring the employee's communication. Monitoring communication with reference to these reasons can only be considered acceptable when there is no other way to control the employee's behavior or evaluate the quality of employee's work. As part of a wider approach, it is acceptable to introduce employees' communications monitoring if it is in the interests of the employer for business purposes.

Both approaches were demonstrated by the ECHR in *Bărbulescu v. Romania*. In this case, the Chamber (2016)[14] and the Grand Chamber (2017)[15] in their decisions provided two completely different justifications for balancing the employees' right to respect for private life, on the one hand, and the right of an employer to control the communication of employees and, accordingly, use their disciplinary powers, on the other.

[13] European Court of Human Rights. Chappell v. United Kingdom, App No. 152A Judgment of 30 March 1989; Niemietz v. Germany, App No. 13710/88 Judgment of 16 Dec. 1992.

[14] European Court of Human Rights. Barbulescu v. Romania, App No. 61496/08, Grand Chamber judgment of 12 Jan. 2016.

[15] European Court of Human Rights. Barbulescu v. Romania, App No. 61496/08, Grand Chamber judgment of 5 Sept. 2017.

Thus, the courts assessed the legality of the methods chosen by the employer to monitor employees. In the late 1990s, at the dawn of the spread of the use of information technology for monitoring work processes, the ECHR considered a number of cases regarding wiretapping of employees' telephone calls and e-mails by the employer. Except for the cases where the employer carried out monitoring for the purely economic purposes of controlling the employer's spending, the ECHR found that the collection and storage of personal information relating to employees' phone calls, e-mails and Internet use without their knowledge constituted an interference with the employee's right to respect for private life and correspondence. The Court first applied a concept borrowed from the U.S. Supreme Court — the "reasonable expectation of privacy" principle. In other words, the employee expects his actions to be confidential.

With the development of electronic technologies, the judicial practice approach to evaluating the legality of means of monitoring has changed. For example, such a common method of monitoring as monitoring an employee's email is controversial, because the nature of an email is such that an employee nowadays often perceives it as their own, even if it is a business email, since an email address usually consists of a name and last name of the employee, and only the employee has access to this address. It is logical that e-mails sent from work should also be protected under Article 8 of the 1950 European Convention on Human Rights, as well as information obtained in the course of monitoring the history of personal Internet use (e.g., *Copland v. the United Kingdom*[16]).

Another conclusion drawn on the result of judicial practice' analysis regarding legality of restricting the private life of an employee is that judicial practice considers the principle of non-interference in the private life of an employee within a system analysis of the other constitutional rights. In one of the first cases involving employee's video surveillance *Karin Kopke v. Germany*,[17] the court considered the

[16] European Court of Human Rights. Copland v. the United Kingdom, App No. 62617/00 Judgment of 3 Apr. 2017.

[17] European Court of Human Rights. Karin Kopke v. Germany, App No. 420/07 Judgment of 5 Oct. 2010.

employee's right to privacy in terms of the employer's property rights. E.V. Sychenko called this approach establishing a balance between protecting the right to privacy of an employee and the ownership right of the employer to equipment and means of production (Sychenko, 2015). The Court decided in favor of the employer, who used video surveillance of the supermarket cashier in order to clarify the circumstances of the theft using the cash register. The video monitoring, according to the court, was also acceptable because it served the purpose of removing suspicion from other employees who were not guilty of committing any wrongdoing (the principle of video monitoring quality). Alongside this, the Court stated that reasonable expectations of an employee concerning confidentiality are significant, although they are not necessarily considered as a decisive factor. Thus, the Court considered videotaping as a tool of permissible control over employees, giving priority to the personal property rights of the employer. In this aspect, it is possible to speak of such a principle of interference in the private life of employees as the principle of quality that means that interference is possible only if there is violation of some other constitutional right.

This position of the Court was confirmed in a later case *López Ribalda and Others v. Spain*.[18] According to the ECHR, the video surveillance, that the employer resorted to, was justified by the amount of damage caused to the employer by the theft of the cashier, and the suspicion of concerted illegal actions of several employees. All this created a general atmosphere of distrust in the workplace.

Finally, the courts in their decisions establish the principles of interference in the employees' private life. Thus, in *Barbulescu v. Romania*[19], the ECHR considered the problem of the need to comply with this principle as the restrictiveness of data processing by the employer, that is, conscious restriction of data subject to monitoring. The Court stated that it is necessary to correlate the scope of interference with the private life of an employee with the purpose of such monitoring. Thus, in the case under discussion, the court considered that the review

[18] European Court of Human Rights. Lopez Ribalda and Others v. Spain, App No. 8567/13 Grand Chamber judgment of 17 Oct. 2019.

[19] European Court of Human Rights. Barbulescu v. Romania, App No. 61496/08, Grand Chamber judgment of 5 Sept. 2017.

by the employer of the topics and contents of 42 of the applicant's e-mails was an excess of the measure that would be sufficient to bring the employee to disciplinary liability. The court found that employer monitoring the use of the Internet by employees and their access to private messages sent via instant messaging service (Yahoo Messenger) constituted a violation of privacy. Therefore, the court established "rules" for monitoring the use of the Internet, e-mail and phone calls by employees through mandatory prior notice.

The principle of employees' prior notice of monitoring was described in detail in another decision of the ECHR. In one of the latest decisions of the ECHR on the issues of limitation of employees' privacy in *Antović and Mirković v. Montenegro* (application no. 70838/13),[20] the court stated that the installation of video surveillance in a number of classrooms of the State University of Montenegro constituted a violation. In this decision, the Court found that any interference with the privacy of employees can be justified only if it complies with the law, if it is implemented in order to ensure the safety of property and people rather than to monitor the labor process (in this case, the learning process in classrooms) and, finally, if the employer complies with the conditions for installing video surveillance.

At the same time, in a dissenting opinion, the dissenting judges proposed to consider a qualitatively different approach to the issue of assessing the legality of employees' monitoring. While admitting the objective reality of widespread usage of video monitoring for safety purposes, they proposed to distinguish video monitoring from registration, processing and use of data received by the employer. In other words, the judges suggested that the reasonable expectation of confidentiality should be interpreted not in relation to the recording itself, but in relation to the storage, processing and use of the collected data or information. Thus, the recognition of the widespread application of the results of digitalization has led to the transformation of such a criterion of interference with private life as a "reasonable expectation of confidentiality." In context of modern conditions, we speak mostly about

[20] European Court of Human Rights. Antović and Mirković v. Montenegro, App No. 70838/13 Judgment dated 28 Nov. 2017.

confidentiality of personal data transfer, rather than about collection of the data that constitute the private life of employees.

All the examples of judicial practice mentioned above clearly manifest that in the situation of digital technologies development, the relevance of legislative regulation in the sphere of labor processes monitoring is increasing.

III.2. Application of artificial intelligence

The introduction of artificial intelligence systems by an employer jeopardizes compliance with the principles of employees' personal data processing.

Currently, in various national jurisdictions and at the international level, the attempts are being made to develop the principles regulating the use of artificial intelligence and the ethical principles in the field of artificial intelligence.

At the international level, we can refer to the European Ethical Charter on the use of artificial intelligence in judicial systems that was adopted in 2018[21] and consolidated the following five principles:

1. The principle of respect for fundamental rights ensures that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights.

2. The principle of non-discrimination specifically prevents development or intensification of any discrimination between individuals or groups of individuals.

3. The principle of quality and security with regard to the processing of judicial decisions and data used by certified sources and intangible data with models elaborated in a multi-disciplinary manner, in a secure technological environment.

4. The principle of transparency, impartiality and fairness that makes data processing methods accessible and understandable and that authorizes external audits.

[21] European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment, Strasbourg 2018. Available at: https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c [Accessed 20.02.2022].

5. The "under user control" principle precludes a prescriptive approach and ensures that users are informed actors and are in control of the choices made.

At the level of the Russian Federation, several normative acts have been adopted that somehow address these issues. For example, Decree of the President of the Russian Federation No. 490 dated 10 October 2019 "On the Development of Artificial Intelligence in the Russian Federation" establishes seven principles for the development and use of artificial intelligence technologies: the principle of protection of human rights and freedoms, the principle of security, the principle of transparency, the principle of technological sovereignty, the principle of an integral innovation cycle, the principle of reasonable frugality, the principle of support for competition.

At the same time, a natural question arises as to how the above mentioned principles for the development and use of artificial intelligence correlate with the principle of privacy in the world of work. This issue is of concern because at the level of strategic planning documents there is an idea that for the purposes of the artificial intelligence development, priority should be given to increasing the array of data to be processed, including personal data. Thus, Paragraph 24 of the Decree of the President of the Russian Federation No. 490 dated 10 October 2019 "On the Development of Artificial Intelligence in the Russian Federation" states as one of the objectives the need to increase availability and quality of data necessary for the development of artificial intelligence technologies. Paragraph 21 determines the priority areas for the development and use of artificial intelligence technologies in terms of improving business entities' efficiency (and not in terms of improving the standard of living of the population) and increase of employees' safety when performing business processes (including risk prediction and adverse events, reducing the level of direct participation of a person in processes associated with an increased risk to his life and health) and optimizing the processes of recruitment and training of personnel, drawing up the optimal work schedule for employees, taking into account various factors.

However, at the same time, the Concept for the Development of Regulation of Relations in the Field of Artificial Intelligence and

Robotics Technologies for the period up to 2024 approved by Order of the Government of the Russian Federation No. 2129-p dated 19 August 2020 explains that in order to solve the problem of increasing availability and quality of data, it is necessary to ensure respect for the right to privacy. As a legal solution, the Concept suggests depersonalization of personal data as one of the measures to protect the interests of personal data subjects in order to conduct scientific research, train artificial intelligence and develop technological solutions based on them, as well as to develop legal conditions for organizing identification using artificial intelligence technologies and robotics.

In 2021, the Code of Ethics in the field of artificial intelligence[22] was developed in Russia. The key provisions of the Code of Ethics are as follows:

— priority of the development of artificial intelligence technologies is in protecting the interests and rights of people and the individual,

— necessity of being aware of the responsibility in the creation and use of artificial intelligence,

— responsibility for the consequences of the use of artificial intelligence systems is always carried by a person,

— the use of artificial intelligence technologies for their intended purpose and implemented where it will benefit people,

— the interests of the development of artificial intelligence technologies are higher than the interests of competition.

— the importance to ensure maximum transparency and truthfulness in informing about the level of development of artificial intelligence technologies, their opportunities and risks.

The documents' analysis shows that, in general, artificial intelligence development is built taking into account the principle of privacy. Moreover, there is no contradiction with the people-centered agenda set by the International Labor Organization in 2019. Nevertheless, if we speak about the world of work, then such a positive attitude can be spoiled. SMART systems implemented by employers, that include machine learning technologies, *etc.*, certainly cope with the tasks of

[22] Artificial Intelligence Code of Ethics. Available at: https://a-ai.ru/code-of-ethics/ [Accessed 20.02.2022].

automating routine labor processes, ensuring the safety of life and health of workers, including reducing the level of industrial injuries and occupational diseases, accelerating the procedure for making legally significant decisions, *etc.* However, for the most part they are used in order to form personalized offers and recommendations for employees (for example, on refusal to hire, in choosing areas of training and additional professional education suitable for specific employees), which means it is practically impossible to depersonalize personal data of employees. In such a case, there is a risk that the employer will exceed the amount of data processed, which will be excessive for the specific purposes of processing. The seriousness of this problem is exacerbated by the fact that employees are not informed about this in advance, and the non-transparent algorithms are difficult to verify. Employers basically build their decisions on automated processing of personal data of employees, especially when it is about hiring the staff. Besides, the border between working and non-working time of an employee is blurred. There are no corresponding guarantees of their rights in the legislation.

Thus, in the territory of the European Union, the legislator has been actively developing general rules and criteria for the introduction of digital technologies. In July 2020, the European Commission developed the final list of principles of ethics for evaluating artificial intelligence in the context of its reliability and legality. This document is called *The Assessment List on Trustworthy Artificial Intelligence (ALTAI)* and it should be used in AI development as a working tool for AI developers.[23]

The ALTAI recognizes that any artificial intelligence has the potential to discriminate against human rights. Prevention of this risk involves using a system of testing and monitoring and, in the future, eliminating and correcting of potentially negative discrimination. The European Commission puts forward seven key requirements for the development of artificial intelligence in order for it to be considered legal, reliable and ethical. They include: human agency and oversight, technical robustness and safety, privacy and data governance, transparency,

[23] Ethics guidelines for trustworthy AI. Available at: https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai [Accessed 20.02.2022].

diversity, non-discrimination and fairness, environmental and societal well-being and accountability.

The European Commission sees ensuring the transparency requirement as follows. First, an artificial intelligence program must be explainable, that is, the results obtained must be challengeable, substantiated and built on clear criteria. Second, an artificial intelligence program should be characterized by open communication. The following should be brought to the attention of users: 1) capabilities and limitations of the system; 2) information that they interact with the artificial intelligence program; 3) information about the purpose, criteria and limitations of the solution, about the potential risks of the system; 4) materials on how to adequately use the artificial intelligence program.

In the mentioned part, Russian legislation should be brought in compliance with the accepted international standards of protection of personal data of citizens in the world of work.

III.3. Expanding the scope of application

With the development of digital technologies, the observance of the employees' right to privacy becomes relevant not only in the context of the institution of labor discipline, but also in other institutions of labor law.

For a long time, research on electronic monitoring in the workplace has been focused on protecting the right to privacy in the context of the disciplinary power of employer. However, an analysis of judicial practice and interdisciplinary research in this area led to an interesting conclusion that the employee's right to privacy is increasingly in need of protection through the legal regulation of other labor and employment law institutions.

One of the areas of digitalization in the field of labor law is the use of artificial intelligence systems in employment relations. Thus, the role of a live recruiter is performed by artificial intelligence that analyzes the facial expressions of an applicant, his or her voice changes, grammar constructions, and information from questionnaires. A potential employer receives information not only about applicant's professional

skills and competencies, but also about how communicative, empathic and suitable the applicant is for a relevant position. At the same time, the employer cannot ignore the intrusion in private life of employees, which is typical of many tests, since they are made to assess physical and psychological abilities of employees or to test their honesty. Employers should regularly evaluate their data processing methods: a) to minimize the types and amounts of personal data collected; and b) to improve the ways in which the privacy of employees is protected. Does it meet the employer's legitimate needs to test employees and job applicants for alcohol and drug abuse, HIV/AIDS, genetics, psychological characteristics and integrity, or does it constitute an unjustified invasion of an individual's privacy? International Labor Organization suggests that employers should use less intrusive means of monitoring.[24] Moreover, it seems logical, that applicants should be aware of the persons who receive information about them during the employment period.

Recognition of the employee's right to non-interference in private life becomes especially relevant within the framework of remote work, when there is an intrusion into the state-protected space of the place of residence of an employee. Indeed, the process of employee's monitoring has positive aspects in terms of improving production goals. However, from the point of view of labor law, it lays down a number of problems, the solution of which causes numerous practical disputes, also in the context of the current legal framework, resulting in confrontation with constitutionally protected rights (Arroyo-Abad, 2021). One of these problems, if not the most important, is connected with the environmental control over employees working from home. Thus, the recognition of the employee's right to privacy must be interpreted in the context of a systematic analysis with the right to inviolability of the home that is enshrined in the Fundamental Laws of the majority of modern States. As the Sentence of the Higher Court of Justice of Castilla y León states "the control of the labor exercise by means of the verification

[24] Protection of workers' personal data. An ILO code of practice. Geneva. International Labor Office, 1997. P. 2. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107797.pdf [Accessed 20.02.2022].

of the connection of the employee to the intranet of the Company and its activity on the network does not, in principle and under normal conditions, imply an invasion of the protected space under the concept of place of residence and is also subject to inspection and control by the Labor Administration."[25]

Technologies of the 4th Industrial Revolution provide opportunities for various industries to improve their compliance with health and safety requirements. Therefore, technology adoption is of paramount importance to eliminate endless incidents in the field of health and safety that lead to poor quality of work, project delays and an increase in the number of occupational injury claims (Malomane, Musonda, and Okoro, 2022). The development of smart portable devices (sensors, trackers, smartwatches) using work environment sensors helps ensure the employees' health and safety by warning about possible exposure to such risk factors as toxins, high temperature, high humidity, lighting, noise levels, as well as the implementation of vital body functions and dangerous objects moving nearby.

In addition, there are also developments that reduce workers' exposure to physical and cognitive stress (Romero et al., 2018). It is assumed that the focus on working safety conditions mostly shifts from physiological to psychosocial indicators. In addition, intellectual labor development makes it possible to reduce the pressure on the physical health of workers and consider issues of moral and psychological safety in the workplace. In other words, a rethinking of wage labor as decent work in terms of psychosocial components is taking place.

At the same time, such technologies' developers are aware that one of the main limitations of their introduction is the lack of a regulatory framework for protecting the employees' right to privacy and protecting personal data. Since the data obtained about the employee can, by a large degree, be used not only for the purpose of labor protection, but also for prediction of the state of the employee in order to make a decision on his promotion or termination of the contract.

[25] Judgment of the Superior Court of Justice of Castilla y León, Valladolid Social Chamber of 3 Feb. 2016. App No. 2016/99.

The right to privacy has considerable importance when considering the issue of establishing a balance between working and non-working time, and, therefore, with exercising the right of an employee to disconnect (from communication channels with the employer after the working day). As an example of the court, giving priority to the protection of the privacy of an employee one can consider the *Intermex case* where the court ruled in favor of an employee who deactivated a mobile application during non-working hours that tracks data on the location of employees and their transport indicators (Newman, 2015). Clearly, such mobile applications can provide employers with accurate real-time data. However, if applied incorrectly, monitoring can bring not only legal problems, but also decrease employee's commitment and satisfaction. As a way out of the situation, Mena Teebklen and Thomas Hess, considering the issue of confidentiality of the employee's private life in the context of digitalization of the workplace, came to the conclusion that in order to avoid stress for an employee about blurring the boundaries between personal life and work, employers at the local level should introduce clear labor standards that correspond to the level of technology used in the workplace (Teebken and Hess, 2021).

All of the above testifies that the concerned parties understand the necessity to protect the employee's right to privacy in the context of various institutes and norms of labor law and the concept under consideration is being intensively studied at the international level.

IV. Conclusion

The interest in consideration of the employee's right to privacy is naturally associated with the new digital technologies' development and labor market globalization. The confidentiality of the employee's private life includes two aspects: informational and behavioral. The former means confidentiality of information about the employee and the latter means confidentiality of employee's actions, both work-related and not work-related. The need for restrictions for the purposes of public safety justifies the approach according to which an employer should be restricted not in obtaining this kind of information, but in its transmission and use for purposes other than employee's safety.

The main problem with establishing monitoring over employees is connected with the lack of sectoral normative regulation of this issue. Today, at the level of the International Labor Organization, only norms of a recommendatory nature are in force. Hereof, the role of local regulation concerning obtaining and using information about the employee increases. It has been established that the ECHR case law within the framework of "living interpretation" is not distinguished by the uniformity of approaches used. However, it seems possible to determine a number of criteria that are considered by the ECHR when making decisions on such categories of cases.

The employer's empowerment in connection with the introduction of artificial intelligence increases the risks of intrusion into the private life of the employee. It has been revealed that more and more often the protection of the employee's right to privacy is becoming relevant not only in the context of institution of disciplinary responsibility or labor protection, but also in the context of legal regulation of employment relations and career advancement when establishing measures of material incentives for employees during remote work and when establishing a balance between working time and time out of work for an employee.

References

1. Alder, G., (1998). Ethical Issues in Electronic Performance Monitoring: A Consideration of Deontological and Teleological Perspectives. *Journal of Business Ethics,* 17, pp. 729–743, doi.org/10.1023/A:1005776615072.

2. Arroyo-Abad, C., (2021). Teleworking: A New Reality Conditioned by the Right to Privacy. *Laws,* 10 (3), 64. https://doi.org/10.3390/laws10030064.

3. Ball, K., Daniel, El., and Stride, Cr., (2013). Dimensions of employee privacy: An empirical study. *Information Technology & People,* 25(4), pp. 376–394. https://doi.org/10.1108/09593841211278785.

4. Bhave, D., Teo, L., and Dalal, R., (2020). Privacy at Work: A Review and a Research Agenda for a Contested Terrain. *Journal of Management,* 469(1), pp. 127–164. https://doi.org/10.1177/0149206319878254.

5. Collins, P. and Marassi, S., (2021). Is that Lawful? Data Privacy and Fitness Trackers in the Workplace. *International Journal of Comparative Labour Law and Industrial Relations*, 17(1), pp. 65–94. htpps://doi.org/10.54648/ijcl2021003.

6. Danilovic, E., (2017). The right to privacy at work. *Anali Pravnog fakulteta u Beogradu,* 65(2), pp. 162–182. htpps://doi.org/10.5937/AnaliPFB1702162D. (In Serb.).

7. Gavison, R., (1980). Privacy and the limits of law. *The Yale Law Journal,* 89(3), pp. 421–471. https://doi.org/10.2307/795891.

8. Heilweil, R., (2020). Illinois says you should know if AI is grading your online job interviews. *Vox Journal.* (1 Jan). Available at: https://www.vox.com/recode/2020/1/1/21043000/artificial-intelligence-job-applications-illinios-video-interivew-act [Accessed 17.08.2022].

9. Jeflea, F.V., Danciulescu, D., Sitnikov, C.S., Filipeanu, D., Park, J.O., and Tugui, A., (2022). Societal Technological Megatrends: A Bibliometric Analysis from 1982 to 2021. *Sustainability,* 14(3)*,* 1543. https://doi.org/10.3390/su14031543.

10. Kallio, J., Vildjiounaite, E., Kantorovitch, J., Kinnula, A., and Bordallo López, M., (2021). Unobtrusive Continuous Stress Detection in Knowledge Work — Statistical Analysis on User Acceptance. *Sustainability,* 13(4), 2003. https://doi.org/10.3390/su13042003.

11. Kovač-Orlandić, M., (2020). Employee's right to privacy: Where is the bound of the employer's right to monitor employees' communications. *Strani Pravni Zivot,* 4, pp. 85–99. https://doi.org/10.5937/spz64-29470.

12. Kulagina A.V., (2022). Russian practice of applying non-competition agreements. *Voprosy rossiyskoy yustitsii*, 19, pp. 345–358. (In Russ.).

13. Malomane, R., Musonda, I., and Okoro, C.S., (2022). The Opportunities and Challenges Associated with the Implementation of Fourth Industrial Revolution Technologies to Manage Health and Safety. *Int. J. Environ. Res. Public Health*, 19(2), 846. https://doi.org/10.3390/ijerph19020846.

14. Newman, L.H., (2015). Sales Exec Says She Was Fired for Uninstalling GPS App That Tracked Her Constantly. Available at: https://

slate.com/technology/2015/05/intermex-employee-says-she-was-fired-for-deleting-xora-gps-apps.html [Accessed 20.02.2022].

15. Romero, D., Mattsson, S., Fast-Berglund, A., Wuest, Th., Gorecky, D., et al., (2018). Digitalizing Occupational Health, Safety and Productivity for the Operator 4.0. *IFIP International Conference on Advances in Production Management Systems (APMS), Seoul, South Korea*. Available at: https://www.researchgate.net/publication/327230622_Digitalizing_Occupational_Health_Safety_and_Productivity_for_the_Operator_40 [Accessed 20.02.2022].

16. Schmitz, P.W., (2005). Workplace surveillance, privacy protection, and efficiency wages. *Labour Economics,* 12(6), pp. 727–738.

17. Shcherbakova, O., (2021). The use of artificial intelligence programs when recruiting employees. *Digital application*. *Rossiiskij yuridicheskij zhurnal* 3, pp. 72–76. http://doi.org/10.34076/22196838_2021_3_72 [Accessed 10.09.2022]. (In Russ.).

18. Suder, S. and Siibak, A., (2022). Proportionate response to the COVID-19 threat? Use of apps and other technologies for monitoring employees under the European Union's data protection framework. *Special Issue: COVID-19 and the world of work (Part II),* 161(2), pp. 315–335.

19. Sulyok, M., (2009). Constructing an Employee's Right to Workplace Privacy. *ZIAS — Zeitschrift für auslandisches und internationales Arbeits- und Sozialrecht*, 3, pp. 206–230.

20. Sundstrom, E., Burt, R., and Kamp, D., (2017). Privacy at work: Architectural correlates of job satisfaction and job performance. *Academy of Management Journal,* 23, pp. 101–117.

21. Sychenko, E., (2015). Wiretapping of the work phone, search of work premises and video surveillance of an employee: the practice of the European Court of Human Rights. *Administrative law,* 1, pp. 89–94. (In Russ.).

22. Teebken, M. and Hess, M., (2021). Privacy in a Digitized Workplace: Towards an Understanding of Employee Privacy Concerns. *HICSS*. Available at: https://www.researchgate.net/publication/348430699_Privacy_in_a_Digitized_Workplace_Towards_an_Understanding_of_Employee_Privacy_Concerns [Accessed 20.02.2022].

23. Wehner, C., Grip, A., and Pfeifer, P., (2022). *Do recruiters select workers with different personality traits for different tasks?* A discrete choice experiment. Labour Economics 78. https://doi.org/10.1016/j. labeco. 2022.102186.

24. Xiaojia Zheng, Yunfei Yang, and Yanyan Shen, (2022). Labor protection, information disclosure and analyst forecasts: Evidence from China's Labor Contract Law. *China Journal of Accounting Research*, 15 (3). https://doi.org/10.1016/j.cjar. 2022.100251.

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Article

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Prospects for the Development of Economic Legislation of the Russian Federation

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Abstract: The authors analyze the main legal schools that have developed in Russian legal science, pointing out their features and shortcomings, and propose to consider the development of Russian economic legislation. Accordingly, the authors reveal possible scenarios for reforming the Russian economy analyzing its public and private sectors legal support, while noting the mixed sector of the economy that has developed in Russia, which also needs to be substantiated by the corresponding body of legislation. Attention is drawn to the reform of market legislation and the privatization of state property, with an indication of the objective laws violations within the legal regulation of the economy public sector. The authors substantiate the need to create a three-sectoral model of legal regulation of economic relations, which involves the formation of three separate arrays of legislation in the private, public and mixed sectors of the economy. It is supposed that they are justified within the framework of the methodology of the Theory of Economic Law, which is the main goal of this article.

Keywords: economic legislation; development prospects; legal regulation theory; state property; privatization policy; reforming legislation; Russian Federation

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Contents

I. Introduction

The study of the USSR and post-Soviet states' economies legal support, primarily of Russia, led us to the conclusion about a deep theoretical error in the economic theory, which considers the public and private sectors of the economy from the general positions of the law of supply and demand, from the standpoint of cost theories, *etc*. Private and public sectors of the economy have different psychological and economic motivators and principles of state (economic and legal) regulation. If the psychological and economic basis of relations in the private sector of the economy is "a sense of ownership" and a "sense of benefit," which create a competitive environment, then public sector of the economy is based on the principles of social policy and involve a planned socialized economy.

It is easy to see that the fundamental principle of market and planned economies is different, and, accordingly, their strengths and weaknesses are different. As a result, *the theories of public and private sectors of the economy are* also *different*. Thus, to talk about the shortcomings of the socialist economy through the prism of "Economic Theory", as well as to point out the shortcomings of the private sector of the economy through the prism of "Political Economy," is no more valuable than, for example, to evaluate the effectiveness of an aircraft construction from the point of view of a designer of diesel locomotives.

The assessment of the state economy is based on the quantity of goods produced in its physical terms, where finance has an auxiliary function, while the private sector has long since shifted to finance as a "thing in itself" (Kant, 1907), dictating the development of products and generating a financial assessment of those things that for the state sector do not matter. Indeed, for the state, the valuation of land and real

estate that belongs to it is not so significant; services do not have such a wide range that they have in a market economy. It is only in the private economy where there is a "stock market," "soap bubbles" in the form of "right for the right;" options, brokers, jobbers and other "intermediary speculators" appear. And they are basically meaningless for the state.

The collapse of the Soviet Union put on the agenda the issue of replacing union legislation and resolving the fate of "perestroika," since it was a failure, which resulted in massive economic corruption, and was exacerbated by the creation of private enterprises at the expense of state property. As the reforms of the times have shown, the so-called "Perestroika" led by Mikhail Gorbachev, the heads of state-owned enterprises began to pose the main danger to the Soviet (Russian) economy, since they acted in their own (and not the enterprises led by them) interests through the mechanisms of the withdrawal of property of state enterprises through cooperatives and rental enterprises. At the same time, in the last period of the existence of the USSR, the state still held the "pillars" of the Soviet economy — the strategic state sectors of the economy (the military-industrial complex, the oil and gas sector, metallurgy and a number of other industries) (Eliseev and Velento, 2019, pp. 378–399).

Therefore, of particular interest is the analysis of the Russian legislation development through the prism of the "Theory of Economic Law," which is based on the theoretical substantiation of optimal models of legal support for economic models and their comparison with the current ones.

II. An Analysis of the development of economic legislation in Russia and the corresponding theoretical views

Since the early 1990s, with the beginning of the statehood of the Russian Federation, the following scenarios for the movement of the country's economy were theoretically possible:

1) rejection of reforms as a way to restore the socialist economy and the directive market;

2) substantially opposite to the first Eastern European way that was based on total privatization and removal of state property alongside with the construction of a classical market;

3) the way of building a mixed economy based on a combination of state and private forms of ownership;

4) building a two-sector economy — in fact, the Chinese way of development, as a kind of combination of state and private property;

5) some other way, which should take into account the specifics of the Russian economy.

To understand the reform processes, it is important to consider the historically established debate between representatives of schools of economic law (primarily civil law and business law) on the relationship between the branches of law, as it does not subside at the present time (Sergeeva and Tolstoy, 2002, pp. 65–72; Laptev, 1993; Bykov, 1993; Puginsky, 2002, pp. 9–17; Dozortsev, 1994; Andreev, 1996; *et al.*). At the same time, the legal regulation of the public sector of the economy always remains the main stone of disputes.

These disputes went beyond a purely scientific approach, acquired a political connotation, which is not surprising, since the legal support of the economy largely determines the efficiency of the economy.

Business lawyers' discussions following the debates about the need for government intervention in the economy that take place among economists, to a certain extent, reflect them. At the same time, economic disagreements boil down to two main positions. On the one hand, supporters and followers of the John Maynard Keynes' theory (1993) believe that an effective economy can only be the result of active government intervention in the economic sphere (Yadgarov, 1998, pp. 187–189). On the other hand, the theory of Adam Smith (1993) and his followers, expressed in neoliberalism (Yadgarov, 1998, pp. 189–194), one of the leaders of which is Milton Friedman (Blaug, 1994, p. 640), advocate the minimization of state influence on the economy.

Nevertheless, both schools investigating the market economy leave apart the directive (socialist) economy, the creation of which was advocated by Karl Marx (1960), Friedrich Engels[1] and their followers,

[1] There is no doubt that volumes 2 and 3 of "Capital" by Karl Marx are posthumous. Their content was extracted by Engels from K. Marx's voluminous manuscripts, which were far from complete. *See*: Aron, R., (1992). Stages of development of sociological thought. Moscow: Progress-Politics. P. 164. (In Russ.).

and this approach should be considered as an independent economic position.

It should be noted that Milton Friedman himself understood the term "socialism" as the public sector of the economy, and "capitalism" as the private sector (Burlatsky, 1996, p. 398), indicating that the public sector always needs special economic regulation, different from the private sector.

But his problem as a representative of the American school of economics is that the public sector is viewed through the prism of "market" economic theories, which in advance puts the state in a losing position, since all the criteria for assessing the effectiveness of the economy are developed precisely in the economic science serving the market economy.

It is important to note that the market itself does not provide an abundance of goods, but only equalizes supply and demand for it by setting a threshold for the unavailability of goods for those segments of the population that are lower than the others in the pyramid of demand, *i.e.,* have the least amount of money. In other words, the socialist "scarcity of goods" is transformed into a capitalist "shortage of money."

Economic theory also does not give proper assessments of the "junction" in the economy public and private sectors, which results in corruption, evaluating this as a drawback of the exclusively state side, and is also a delusion: corruption is a product of market behavior that has been unreasonably introduced into the public sector. Failure to understand this at the state level leads to economic mistakes when the fight against corruption is viewed through the prism of privatization, which in fact means a refusal to fight it, since from the moment of privatization corruption is legalized and transformed into monopoly abuses and does not disappear.

All views on the legal regulation of economic relations inherent in the modern understanding were formed in the USSR:

1) private commercial law covers all areas of the national economy (unifying and harmonizing role);

2) private commercial law regulates socialist production relations (the state sector of the economy) (Lieberman, 1931);

3) denial of private commercial law as an independent branch (civilistic understanding of private commercial law) (Wolf, 1928; Stuchka, 1931).

During the pre-revolutionary period in Russia, the basis of the legal support of economic relations was made up of the works, first of all, of the civilists Konstantin P. Pobedonostsev (1896), Dmitry I. Meyer (1915) and other authors (Shershenevich, 1994). At the same time, complex codified documents were adopted, such as, for example, the Trade Charter, the Charter on Industry, the Charter on Bills, *etc.* (Worms, 1914).

Tsarist Russia had a fairly powerful state sector of the economy, the budget revenues from it were significant, and its management as a whole was based on the administrative scheme of legal regulation, in accordance with the Manifesto "On the General Establishment of Ministries" dated June 25, 1811 (Russian legislation of the 10–20th centuries, 1988, pp. 92–134).

Inna V. Ershova, exploring the economic law of that period, notes that "private entrepreneurs were primarily focused on making a profit from their activities, in the state economy the satisfaction of public interests prevailed" (Ershova, 2001, p. 11). Speaking about the effectiveness of the public and private sectors of the economy, she gives the following example: "The construction of railways in Russia was started by the treasury. In the seventies of the 19th century, they were transferred to private capital. This led to a lack of system in the construction of roads, a focus on commercial purposes to the detriment of national economic interests, inconsistency between individual societies, low quality construction at high prices. For these reasons, in 1978 the state again engaged in railway construction, bought out the most important roads, and established their more successful operation. However, during the tenure of Sergey Yu. Witte as Minister of Finance (1892–1902), private capital again took its position in the railway industry, not freed from its vices. Buying back the roads built by private companies to the treasury in the future, the state had to complete and rebuild them" (Ershova, 2001).

The above example shows that in pre-revolutionary Russia, the legal regulation of public and private sectors of the economy was carried

out on the basis of various principles, which corresponded to the logic of the legal regulation of economic relations in general.

After the October 1917 events, the situation changed radically: in connection with the nationalization of private property and the formation of the socialist sector of the economy, civil law was leveled in the direction of public legal regulation. Leadership is taken by economic law, although the term itself was often used instead of the term "civil law," in fact, no different from the latter (Asknazy, 1926).

The *"two-sector theory"* of Peteris I. Stuchka attracted particular attention in the 1920s (Stuchka, 1931), which coincided with the state's New Economic Policy. The key idea of this theory was to recognize the simultaneous coexistence of the public and private sectors that should be regulated in different ways: the private sector — based on civil law, and the public sector — in the order of planning and subordination.

The oppression of the private sector by the state implied, over time, a transition from a two-sector theory of legal regulation of economic relations to a one-sector theory, which was expressed in the emergence of a *"school of unified economic law"* associated with the names of Leonid Gintsburg and Evgeny Pashukanis (Pashukanis and Gintsburg, 1935).

In fact, it was an attempt, firstly, to mix in one economic code mainly administrative and civil methods of legal influence, and secondly, to combine the state and the remnants of the private sector, which implied a gradual ousting of the latter, more precisely, its regulation on the basis of administrative law.

This theory had two main drawbacks. Firstly, the collective-farm-cooperative movement at that time was already so nationalized that, according to the principles of management, it actually did not differ in any way from the public sector, and this position was reinforced by the "single school." Secondly, regulation of all relations with the participation of a citizen was provided for in the system of unified economic law, which presupposed the suppression of civil law relations.

In the mid-1930s, a *"dualistic concept"* appeared, formed under the influence of Andrey Vyshinsky, in which it was decided to concentrate the regulation of economic relations in the branches of administrative

(vertical relations) and civil law (horizontal relations). The school of commercial law was sharply criticized (Vyshinsky, 1939, p. 22).

The post-war period was characterized by a number of areas of economic and legal thought. Thus, Sergey N. Bratus and Sergey S. Alekseev put forward the *concept of economic and administrative law* in 1963 (later the latter refused of it and switched to the position of market legal regulation of economic relations). They believed that the administrative-legal regulation, when it comes to the legal regulation of economic activity "in depth," breaks off and a "dead zone" is formed. Therefore, it is necessary to close this gap with a special sub-branch of legal science — economic and administrative law (Bratus and Alekseev, 1963, p. 45). The conclusions of this concept concerned the existence of various complex branches of law, which should be distinguished not based on expediency, but based on objective prerequisites for the differentiation of law (Bratus and Alekseev, 1963).

In the post-war period, "operational management" model was of great importance for the Anatoliy V. Venediktov legal thought on the development of the property right, and it is still the most significant one for the public sector of the economy (Venediktov, 1948).

The *third school of private commercial law*, associated with the names of Vladimir Laptev (1969) and Valentin Mamutov (1982), was formed in the late 50s of the 20th century. The representatives of the school argued that the legal regulation of private commercial law relations, on the one hand, had a monistic character (they adhered to the unity of private commercial law regulation). On the other hand, it had a dual public-private character, where the regulation of vertical relations presupposes an administrative nature, and the regulation of horizontal relations — civil law. Despite the duality of vertical and horizontal, authors noted the unity of private commercial law relations and their homogeneity (Theoretical problems of commercial law, 1975, p. 28). The idea was to adopt the Commercial Code, which had never been adopted. The authors of this concept excluded economic relations with the participation of the population from the influence of the proposed Commercial Code and referred only to the subject of civil law.

It must be said that Valentin Mamutov, who headed the Ukrainian school of private commercial law, managed to achieve the adoption of

the Commercial Code of Ukraine[2], which no other country of the former USSR succeeded.

The emergence of the *modern (fourth) school of private commercial (business) law* is associated with the name of Valentin S. Martemyanov and his followers, primarily, representatives of the Department of Business Law of Kutafin Moscow State Law University (MSAL) (Martemyanov, 1994; Ershova, 2006). The Department of Business Law of Lomonosov Moscow State University (MSU) is also in these positions (Gubin et al., 2004). At the same time, it should be noted that the term "private commercial" law has actually been removed from circulation, at best, it is perceived as a "tribute to tradition," but not more.

Despite all the variety of schools of private commercial (business) law, *the civilistic concept of business law*, formed under the influence of the works of the leading civil law scientists of the USSR, and subsequently Russia (Bratus, 1963, p. 143; Dozortsev, 1994), undoubtedly dominates. According to it, business law loses its independence and is considered a part of civil law, clarifying the operation of civil law in relation to certain areas of economic activity.

The civilistic concept has always existed, but only in the Russian Federation it was adopted at the level of economic and legal policy, which was reflected:

1) in the elimination of the legal specialty 12.00.04 (containing formulation "private commercial law") by renaming it into "business law" under the auspices of "Civil law";

2) the refusal to separate "business law" from civil law in 2017;[3]

3) the consolidation of academic specializations in 2021, which poses an insurmountable obstacle to even raising the issue of the

[2] State Code of Ukraine. *Vidomosty Verkhovnoyi Radi*. 2003. No. 18. Art. 144. Available at: https://antiraid.com.ua/news/108-gospodarskij-kodeks-ukrayini-vid-16012003-436-iv/. (In Ukranian). [Accessed 19.07.2021].

[3] Order of the Ministry of Education and Science of the Russian Federation No. 1027 dated 23.10.2017 "On the approval of the nomenclature of scientific specialties for which academic degrees are awarded". (In Russ.). ATP "ConsultantPlus", 2021. [Accessed 21.07.2021].

separation of private commercial law into a separate field of legal science.[4]

In the last decade, *the concept of "economic law"* has developed as a "mega-branch of Russian law" — "an integral and comprehensive system of forms of law (international, national), implemented in the state and regulating relations associated with economic activity" (Ershov, Ashmarina and Kornev, 2015, pp. 7–9).

Finally, it is important to note such a direction of legal science (considered as a section of the Theory of Law) as the *"theory of economic law,"* which is understood as the objective laws of the legal support of economic relations, reflecting the processes inherent in all branches of law, which in one way or another relate to the economy (Eliseev and Velento, 2019). The theory of economic law itself is based on the postulate that the relationship between economics and law is one-sided: "Effective law does not interfere with the economy, but ineffective law can destroy any sound economy."

Returning to the "scenarios for the movement of the country's economy" in the early 1990s, it is important to note that the path of "restoring the directive economy" at that moment was a doomed path, since the "political bomb of capitalism" has already exploded in the minds of the Russian people, when the overwhelming majority of the population regarded Europe as "the mantra of a bright life."

At the same time, one cannot fail to note the growth at that moment of the protest movement of workers who were losing jobs and, accordingly, sources of livelihood. However, the new liberal government seeing this danger, carried out an accelerated privatization in order to create a stratum that owns tangible assets (transferred from the state) and will defend its interests to the end: "every plant sold is a nail in the

[4] Order of the Ministry of Education and Science of the Russian Federation No. 118 dated February 24, 2021 "On the approval of the nomenclature of scientific specialties for which academic degrees are awarded and amending the Regulation on the Council for the Defense of Dissertation for the Degree of Candidate of Science, for the Degree of Doctor of Science, approved by the Order of the Ministry of Education and Science of the Russian Federation No. 1093 dated 10.11.2017. (In Russ.). ATP "ConsultantPlus", 2021. [Accessed 21.07.2021].

coffin of communism," and "Privatization in Russia before 1997 was not an economic process at all."[5] All this made the processes irreversible.

The scenario of the transformation of the Russian economic legislation of the post-Soviet period *along the version of the Eastern European path*, which was based on privatization and disposal of state property with the construction of a classical market, was chosen as a basis.

To understand the processes of this period, it is enough to pay attention to the most significant laws: the Law of the Russian Soviet Federative Socialist Republic (RSFSR) "On Property in the RSFSR,"[6] the Law of the RSFSR "On Enterprises and Entrepreneurial Activity,"[7] the Law of the Russian Federation "On the Privatization of State and Municipal Enterprises in the Russian Federation,"[8] the Law of the Russian Federation "On Insolvency (bankruptcy) of enterprises"[9] and others, which created opportunities for appropriation of state property under the guise of privatization. Subsequent legislation is adopted as part of the development of these processes.

Mechanisms for enhancing the negative opportunities of heads of state-owned enterprises served as a basis: if in the last period of the USSR's existence they had only the opportunity to "pinch off" part of the state financial flow from state-owned enterprises through cooperative institutions and rental enterprises, then here there is a possibility of appropriating enterprises entirely. To this end, state-owned enterprises got market powers, formations on the basis of private enterprises gained

[5] Livejournal page of Sergey Reshetnikov. Available at: https://sm-reshet.livejournal.com/103994.html. (In Russ.). [Accessed 03.07.2021].

[6] Law of the RSFSR No. 443-1 dated 12.24.1990 "On property in the RSFSR". Bulletin of the SND of the RSFSR and the Supreme Council of the RSFSR. 1990. No. 30. Art. 416. (In Russ.).

[7] Law of the RSFSR No. 445-1 dated 25.12.1990 "On enterprises and entrepreneurial activity". Bulletin of the SND and the Supreme Council of the RSFSR. 1990. No. 30. Art. 418. (In Russ.).

[8] Law of the Russian Federation No. 1531-1 dated 03.07.1991"On the privatization of state and municipal enterprises in the Russian Federation". Bulletin of the SND and the Supreme Council of the RSFSR. 1991. No. 27. Art. 927. (In Russ.).

[9] Law of the Russian Federation No. 3929-1 dated 19.11.1992 "On insolvency (bankruptcy) of enterprises". Bulletin of the SND and the Armed Forces of the Russian Federation. 1993. No. 1. Art. 6. (In Russ.).

the "green light," and various controlling links, in particular, such as "labor collectives," were eliminated.

So, for example, paragraph 3 of Art. 2 of the Law of the RSFSR "On Property in the RSFSR" established a private, state, municipal form of ownership, as well as the property of public associations (organizations). At the same time, clause 2 of the same norm introduced a single market legal regime of the owner's property for all owners (regardless of the form of ownership), when "the owner at his own discretion owns, uses and disposes of the property belonging to him." At the same time, he (the owner) could "transfer his powers to own, use and dispose of property to another person, use the property as a subject of pledge or burden it in any other way, transfer his property into ownership or management to another person, and also have the right to commit with this property any actions that do not contradict the law," could "use the property for any entrepreneurial or other activity not prohibited by law." The law directly emphasized that "the establishment by the state in any form of restrictions or advantages in the exercise of property rights, depending on the location of property in private, state, municipal property and the property of public associations (organizations) is not allowed" (part 2, paragraph 3, Article 2 of the Law).

The property of state (municipal) enterprises was assigned on the right of "full economic management," for which the range of rights and freedoms was the same as for the owner (clause 2, Article 5 of the Law), which together with the possibility "to unite the property being in private, state, municipal property and the property of public associations (organizations)" (clause 1, Article 3 of the Law) secured the mechanism of transfer of funds from state to private sector of economy.

Finally, Article 25 of the Law explicitly stated that "enterprises, property complexes, buildings, structures and other property in state or municipal ownership may be alienated into the private ownership of citizens and legal entities."

Distinguishing is the *1992 Law of the Russian Federation "On insolvency (bankruptcy) of enterprises,"* which created an opportunity to bankrupt not only private, but also state-owned enterprises. The practice of that time showed that state bodies basically initiated

bankruptcy, *i.e.*, the state "destroyed" state property: in particular, the tax authorities often initiated bankruptcy.

This process was significantly accelerated by the *Law of the Russian Federation "On the privatization of state and municipal enterprises in the Russian Federation,"* which defined the privatization of state and municipal enterprises as "the acquisition by citizens, joint-stock companies (partnerships) from the state and local Councils of People's Deputies into private ownership of enterprises, workshops, productions, sites, other subdivisions of these enterprises, separated into independent enterprises; equipment, buildings, facilities, licenses, patents and other tangible and intangible assets of enterprises (operating and liquidated by the decision of bodies authorized to make such decisions on behalf of the owner); shares (stocks, participatory interests) of the state and local Councils of People's Deputies in the capital of joint-stock companies (partnerships); shares (stocks, participatory interests) owned by privatized enterprises in the capital of other joint-stock companies (partnerships), as well as joint ventures, commercial banks, associations, concerns, unions and other associations of enterprises" (Article 1 of the Law).

The analysis of privatization legislation can, of course, be continued, but the meaning of what was happening is very clear: there was a deliberate "destruction" of state property in order, as one of the aforementioned authors of perestroika put it, to drive as many nails as possible "into the lid of the coffin of communism."[10]

These processes have sharply raised the negative activity of the population in the form of organized and general crime, *i.e.*, enrichment through illegal redistribution, including state (municipal) property, was considered permissible in the minds of the population.

When the President of the Russian Federation instructed the Accounting Chamber in 2011 to analyze the activities of 1,500 large, privatized enterprises for efficiency, the conclusion was the following:

[10] Interview of Anatoly Chubays. Available at: https://topwar.ru/19976-a.chubays-privatizaciya-voobsche-ne-byla-ekonomicheskim-processom.-ona-reshala-glavnuyu-zadachu-ostanovit-kommunizm.html?ysclid=l7snd2wgun261829676. (In Russ.). [Accessed 08.09.2022].

none of them became more efficient than during the period when they were state-owned.

At the moment, the Russian Federation has implemented a *liberal market model of the economy and relevant legislation*, where the central link is the Civil Code of the Russian Federation, which plays the role of an economic constitution, which, in turn, refers to various federal laws that supplement its provisions. Moreover, the changes that have occurred recently do not change the essence of *civil law regulation*, but only supplement and clarify individual institutions of legal support of economic relations.

At the same time, measures are being consistently carried out aimed at putting in order the public sector of the economy, among which the following measures should be highlighted to improve the economy and economic legislation, such as:

1. The state sector of the economy has increased due to the acquisition by the state, primarily by the Russian Federation, of controlling shares (stakes) in a number of organizations in strategic sectors of the economy (fuel and energy complex, military-industrial complex, space industry, *etc*.). This gave the right for the state (as an owner, stakeholder, owner of a share) to set tasks for the relevant enterprises, as well as to influence the formation of pricing in them.

2. Within the framework of antimonopoly legislation, the state began to influence pricing: in particular, prices for energy resources in the wholesale market are set by the Market Council, and in the retail market — by regional energy commissions, which include government representatives.

3. Elements of strategic planning of the economy have appeared: in this regard, the Federal Law "On Strategic Planning in the Russian Federation,"[11] Presidential Decree No. 400 dated July 2, 2021 "On the National Security Strategy of the Russian Federation"[12], *etc*.

[11] Federal Law No. 172-FZ dated 28.06.2014 "On Strategic Planning in the Russian Federation". SZ RF. 2014. No. 26 (part I). Art. 3378; 2020. No. 31 (part I). Art. 5023. (In Russ.).

[12] Decree of the President of the Russian Federation No. 400 dated 02.07.2021 "On the National Security Strategy of the Russian Federation". SPS "ConsultantPlus", 2021. (In Russ.).

4. Creation of legislation on state (municipal) procurement of goods (works, services), which is, in particular, an anti-corruption mechanism: Federal Law "On the contract system in the field of procurement of goods, works, services to meet state and municipal needs"[13], *etc.*

5. Creation of elements of a directive market through the formation of links between organizations that are part of the system of State corporations and State companies (for example, the "Rosatom" State Atomic Energy Corporation, the "Roscosmos" State Corporation, *etc.*).

In fact, this indicates the formation in Russia of elements of a two-sector model of economic legislation based on the two-sector theory of legal regulation of the economy. At the same time, during the privatization period, an independent sector of the *mixed economy* was formed, which received support from the academician Sergey Yu. Glazyev:[14] it relies on the convergence (combination) of capitalist and socialist mechanisms of economic development, using the "Chinese way" as a basis.

However, the study of China's economic legislation makes it possible to speak not about mixing legislation, but about the formation of separate arrays of legislation in the public and private sectors of the economy, *i.e.*, on the formation in China of a *"two-sector model of legal support for the economy."*

As for the mixed sector of the economy formed in Russia, *i.e.*, legal support (school of common economic law), it is the least effective, because when mixing different motivations (a sense of ownership and a sense of benefit, on the one hand, and the principle of priority of social and public interests, on the other), there is an unjustified extraction of profit by private individuals due to the redistribution of public funds, the directive market will receive a powerful corruption component. Thus, instead of the classical market, there will be monopoly and criminal markets.

[13] Federal Law No. 44-FZ dated 05.04.2013 "On the contract system in the procurement of goods, works, services to meet state and municipal needs". SZ RF. 2013. No. 14. Art. 1652; 2021. No. 24 (Part I). Art. 4188. (In Russ.).

[14] Glazyev, S.Yu. Nations behave like people. *Vzglyad: Delovaya Gazeta*. Available at: http://vz.ru/opinions/2015/7/8/754999.html. (In Russ.). [Accessed 09.07.2021].

On the other hand, it is not possible to distribute the entire Russian economy under the influence of two independent arrays of legislation (for the public and private sectors of the economy) due to the established Russian legal system and the state's position on this issue.

There is one more point: part of economic relations cannot be divided under the specified arrays of legislation. In particular, we are talking about the mechanism of public-private partnership, about concession agreements between the state and private business, about production sharing agreements. And finally, in ordinary contracts, where the state (municipality) acts as one party, and the second party is private individuals, it is impossible to break the state and private property interests. This also includes state support for business entities, since state funds need strictly targeted use.

Also remarkable are organizations that have a block of shares (or a share) in a public entity: this is a huge sector of the economy, since the privatization of large state-owned enterprises was basically reduced to corporatization, in particular, this fully concerns the fuel and energy complex (FEC), military-industrial complex (MIC), the space industry and other important sectors of the Russian economy. But if the block of shares in a public entity is sufficient to manage the relevant enterprise, then we are talking about the state sector of the economy and the directive market of relations. With regard to the mixed sector, the disputable question is about cases when a block of shares (share in the authorized capital) is insufficient for the state management of the organization.

Relations in the mixed sector of the economy cannot claim to build fully effective legislation, but negative processes in it can be minimized.

III. Conclusion

Therefore, Russian economic legislation objectively needs the development of a three-sector model of legal regulation, when it is required to form separate arrays of legislation on the private sector of the economy, legislation on the public sector of the economy and

legislation on the mixed sector of the economy, *i.e.*, legal doctrine requires the recognition of the three-sectoral theory of legal regulation of economic relations. As for the place of the "Theory of Economic Law" in legal science, its task is to fill in the theoretical gap in the legal support of economic relations.

References

1. Andreev, V.K., (1996). Civil Code of the Russian Federation and the latest legislation. *State and Law*, 4, pp. 110–116. (In Russ.).

2. Aron, R., (1992). *Stages of development of sociological thought*. Moscow: Progress-Politics. (In Russ.).

3. Asknazy, S.I., (1926). *Essays on economic law in the USSR*. Leningrad: Priboy. (In Russ.).

4. Blaug, M., (1994). *Economic thought in retrospect*. Moscow: Delo. (In Russ.).

5. Bratus, S.N. and Alekseev, S.S., (1963). On the development of legal issues of national economy management. *Jurisprudence*, 4, pp. 43–50. (In Russ.).

6. Bratus, S.N., (1963). *Subject and system of Soviet civil law*. Moscow: Gosyurizdat. (In Russ.).

7. Burlatsky, F.M., (1996). *Russian sovereigns. The era of the reformation*. Moscow: Shark. (In Russ.).

8. Bykov, A.G., (1993). Entrepreneurial law: problems of formation and development. *Bulletin of Lomonosov Moscow State University*. Ser. "Law", 6, pp. 3–10. (In Russ.).

9. Dozortsev, V.A., (1994). One code or two? (Do we need an economic code along with a civil one?). Legal problems of a market economy in the Russian Federation. In: *Proceedings of the Institute of Legislation and Comparative Law under the Government of the Russian Federation*. Moscow. Issue 57, pp. 115–143. (In Russ.).

10. Eliseev, V.S. and Velento, I.I., (2019). *The theory of economic law: the theory of branches of law that provide economic relations*. Moscow: Prospekt. (In Russ.).

11. Ershov, V.V., Ashmarina, E.M., and Kornev, V.N., (2015). Economic law as a mega-branch of Russian law: its subject and system. *State and Law*, 7, pp. 5–16. (In Russ., abstract in Eng.).

12. Ershova, I.V., (2001). *Problems of the legal regime of state property in the economic turnover: theoretical foundations and ways of improvement*. Moscow: Jurisprudence. (In Russ.).

13. Ershova, I.V., (2006). *Business Law: Textbook*. 4th edition. Moscow: Jurisprudence. (In Russ.).

14. Gubin, E.P., et al., (2004). Science and teaching of economic and business law at the Moscow State University. M.V.Lomonosov. In: *Entrepreneurial law in a market economy*. Moscow: New legal culture. Pp. 11–53. (In Russ.).

15. Kant, I., (1907). *Criticism of Pure Reason*. Transl. from German and foreword by N. Lossky. SPb.: Typography of M.M. Stasyulevich. (In Russ.).

16. Keynes, J.M., (1993). General theory of employment, interest and money. In: *Anthology of economic classics*. In 2 volumes, V. 2. Moscow: Ekonov. (In Russ.).

17. Laptev, V.V., (1969). *Subject and system of commercial law*. Moscow: Legal literature. (In Russ.).

18. Laptev, V.V., (1993). Commercial law is the law of entrepreneurial activity. *State and Law*, 1, pp. 33–38. (In Russ.).

19. Lieberman, S., (1931). The last stage of the NEP and economic law. *Problems of Marxism*, 5–6, pp. 18–20. (In Russ.).

20. Mamutov, V.K., (1982). *Improving the legal regulation of economic activities*. Kiev. (In Russ.).

21. Martemyanov, V.S., (1994). *Commercial law:* Course of lectures. In 2 vol. Moscow: Bek. (In Russ.).

22. Marx, K., (1960). *Capital.* 2nd ed. Vol. 23. Moscow: State publication of political literature. (In Russ.).

23. Meyer, D.I., (1915). *Russian civil law*. Ed. by A.I. Vitsina. Edition 9. Petrograd. (In Russ.).

24. Pashukanis, E.B. and Gintsburg, L.Ya., (1935). *Course of Soviet private commercial law*. In 2 vol. Vol. 1. Moscow: Soviet legislation. (In Russ.).

25. Pobedonostsev, K.P., (1896). *Civil Law Course: Compositions*. In 2 vols. St. Petersburg: Printing house of the Ministry of railways (A. Behnke). Parts 1–3. (In Russ.).

26. Puginsky, B.I., (2002). *Commercial law of Russia*. Moscow: Yurayt-M. (In Russ.).

27. *Russian legislation of the 10–20th centuries,* (1988). Vol. 6. Legislation of the first half of the 19th century. Moscow: Legal literature. (In Russ.).

28. Sergeeva, A.P. and Tolstoy, Yu.K., (2002). *Civil law*. Volume 1. A Textbook. 6th ed. Moscow: TK Welby. (In Russ.).

29. Shershenevich, G.F., (1994). *Textbook of Commercial Law* (after the edition of 1914). Moscow: Spark. (In Russ.).

30. Smith, A., (1993). Research on the nature and causes of the wealth of peoples. In: *Anthology of economic classics*. In 2 volumes, Vol. 1. Transl. from English. Moscow: Ekonov. (In Russ.).

31. Stuchka, P.I., (1931). *The course of Soviet civil law*. Vol. 1. Moscow: State socialist economic publishing. (In Russ.).

32. Theoretical problems of commercial law. Moscow: Nauka, 1975. 413 p. (In Russ.).

33. Venediktov, A.V., (1948). *State socialist property*. Moscow-Leningrad: Academy of Sciences of the USSR. (In Russ.).

34. Vyshinsky, A.Ya., (1939). *The main tasks of the science of Soviet socialist law*. Report by A.Ya. Vyshinsky, debate and closing remarks at the 1st meeting on the science of soviet state and law on 16–19 of July 1938. Moscow: Soviet state and law. (In Russ.).

35. Wolf, V.Yu., (1928). *Fundamentals of Business Law*. Moscow: Financial publishing house of the NKF of the USSR. (In Russ.).

36. Worms, A.E., (1914). *Sources of Russian commercial law*: Collection of extracts from the Code of Laws, statutes, policy conditions and contracts. Moscow: Higher education. (In Russ.).

37. Yadgarov, Ya.S., (1998). *History of economic doctrines*: Textbook for universities. Moscow: Infra-M. (In Russ.).

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COMPARATIVE LEGAL STUDIES

Research Article

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The Correction of the Invalidity of the Civil Trials Procedures in Jordanian and Egyptian Legislation: The Modern Judicial Trends

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Abstract: The research deals with correcting the invalidity of procedures in the Jordanian Civil Procedures Law and the Egyptian Civil and Commercial Procedures Law. It highlights the status of the procedural invalidity and the mechanism of its correction. These conditions must be met to correct the procedural invalidity and the period specified by the Jordan and Egypt legislator to correct the invalid procedure. The study concluded several findings and recommendations, the most important of which is that the Jordanian legislator did not specify a period for correcting the invalid procedure and did not explicitly grant this right to the court in determining the period of correction, just as the Egyptian legislator did by granting the court the authority to specify the period for correction, and that the invalid procedure may be corrected, even if it pertains to the general system, as long as this correction has been made within the specified time.

Keywords: procedural invalidity; civil procedure; correction of procedures; general system; civilian trials; correction period; judicial trends

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Contents

I. Introduction

The procedural action must be carried out by the conditions established by law, which determines the actions or the incidents that affect it. Defining the spot referred to as invalidity is necessary to clarify the concept of invalidity itself (Omar, 1999, p. 669). For an action to be considered a procedure, the action must be lawful. It must constitute positive conduct, the law has direct procedural effects on the activity, and the procedural activity is part of litigation (Al-Ansari, 1999, p. 234).

Therefore, the importance of the research lies in clearly addressing the procedural invalidity correction mechanism, as this subject is considered one of the important topics that have a major role in practical reality. In this research, we will conduct through and in-depth analysis of this subject by addressing all aspects, whether theoretical or practical, of two important cases related to this topic, namely availability of the conditions for correcting the invalid procedure and availability of methods to correct invalid procedure, noting that the failure to address this issue leads to ambiguity and weakness in the provisions of Articles 25 and 26 of the Jordanian Civil Procedure Law (Al-Qdah, 2008, p. 291).

These provisions did not specify a legal period for correcting the invalid procedure, did not grant the court the right to specify this period, and did not stipulate any penalty if the invalid procedure was not corrected within the specified legal period. By referring to these provisions, it is observed that the legislator did not expressly provide for all methods of correction, but rather the term “correction” was mentioned in general, nor did the legislator refer to the types of invalidity that are related to the Public System and not related to the

Public System, where the research will address the shortcomings in these provisions by consulting the provisions of the Jordanian Court of Cassation, the Egyptian Court of Cassation, and the Egyptian Civil and Commercial Procedures Law, to address some matters not mentioned in the provisions of Articles 25 and 26 of the Jordanian Civil Procedures Law (Ghossoub, 2010, p. 233).

The selection of this research topic came as a result of the emergence of new practical facts worthy of analysing. Among these facts is that the legislator did not specify a period for correcting the invalid procedure, did not expressly grant this right to the court in order to determine the period of correction, and did not mention the court's role in determining a reasonable period for the correction procedure, did not specify the penalty for exceeding this period (Ragheb, 1978, p. 23), and the state of availability that corrects the invalidity, as well as identifying methods to correct invalidity, among these methods, the correction by completing procedural actions, and the correction while the invalidity remains, it is also permissible to correct the invalid procedure, even if it is related to the Public System, whereas, the litigant who wants to relinquish the invalidity is required to have the capacity to litigate (Hindi, 2005, p. 49).

This research aims to clarify the role of the court in determining a specific period to correct the invalid procedure and to clarify that if the procedure is not corrected, a financial fine is imposed on the opponent who refrained from correcting, and showing that if the opponent's representative attends the court sessions after notification, then this attendance corrects the invalidity. On the other hand, if the opponent's attorney attended the trial proceedings and did not contest the validity of the notification on the date of the first session, this act is considered an implicit relinquishment of the appeal of the invalidity of the notification of the said session; thus, he will not be able to raise this issue to the Court of Appeal and Cassation (Tzerrin and Khowaldi, 2016, p. 50).

In this research, we will address several dilemmas, as there is a defect in the provisions of Articles 25 and 26 of the Civil Procedure Law. We will try to consider this deficiency by answering several questions. Some of the most important questions are as follows. First, what does

the procedural invalidity correction mean? Secondly, what conditions must be available to correct the invalidity of the procedures stipulated in Article 26 of the Civil Procedure Law? Third, what is the period set by the Jordanian legislator to correct the invalid procedure? Fourth, what is the court's role in setting a reasonable legal period for correcting the invalid procedure? Finally, what is the penalty imposed on an opponent who does not comply with the periods set by the court for correction?

The descriptive-comparative approach will be adopted in this research due to the diversity of legislations that differed in addressing the sub-sections and sub-topics of the main topic of the study, clarifying the differences between these legislations, pointing to the strengths and weaknesses of these different legislations, and the extent to which they are considered. The research also followed the analytical approach to analyze all the provisions of legislation related to the subject of this study to determine its contents, implications, and objectives, then criticizing and commenting on it and highlighting the critical aspect of the researcher. The author also adopted the critical approach to highlight the viewpoints and trends of jurisprudence in the topics that were addressed, where the critical aspect of the researcher is highlighted in every aspect that he dealt with in the jurisprudential trend, where this research necessitated the use of several research methods due to the nature of its complexity among the texts of the law, the viewpoints, the jurisprudential trends, and the judicial rulings (Malkawi, 2008, p. 13).

II. The terms of correction of the procedural invalidity

What is meant by correcting the invalid procedure is to remove the invalidity, that is, the invalid procedural procedure has a legal effect, and that invalid procedure that is revocable will not be invalid (Abu Attia, 2007, p. 395) where the legislator resorts to correction so that the litigation continues until its objectives are achieved. In contrast, the correction aims to avoid the judgment of invalidity (Wally, 1973, p. 813).

Article 20 of the Egyptian Civil and Commercial Procedures Law states the following, "The procedure shall be invalid if the law expressly stipulates its invalidity or if it was marred by a defect for which the

purpose of the procedure was not achieved, and it is not permissible to judge its invalidity despite the condition of its invalidity, if it is proven that the purpose of the procedure has been achieved" (Article 20, The Egyptian Civil and Commercial Procedures Law, 1986) while the Jordanian Court of Cassation defined invalidity as follows, "It is a legal adaptation that goes in contradiction with its original legal form, such contradiction leads to the failure to produce the effects that the law entails if it is complete. (If it was entire)."[1]

Correction of invalidity is permissible for the judge; the correction does not have a retroactive effect, as the procedure is considered effective in its results from the date of its correction and not from the date it is decided (Tim, 2008, p. 116). To correct an incorrect procedure, it is required that the correction be made within the legally prescribed period for the procedure to be carried out and that the procedure is taken into account only from the date of the correction (Akhras, 2012, p. 417).

The correction must be made within the legally prescribed period for the procedure so that the legislator's approval of the correction does not mean that the correction will be made at any time in order for the correction achieves its objectives that avoiding obstructs and procrastination in the progress of the lawsuit (Hindi, 2005, p. 49). In contrast, article 26 of the Jordanian Civil Procedures Law stipulates the following," The invalid procedure may be corrected, even after adhering to the invalidity, provided that the correction is made within the legally prescribed period for the procedure to be implemented" (Article 26, The Jordanian Civil Procedures Law, 1988).

While Article 23 of the Egyptian Civil and Commercial Procedures Law states," The invalid procedure may be corrected, even after adhering to the invalidity, provided that this is done within the legally prescribed period for the implementation of the procedure. If the procedure does not have a specified date in the law, the court shall set a reasonable date for the correction to be implemented. The procedure shall be

[1] Court of Cassation (civil), Greater Amman Municipality Council v. Aida Ahmed, 16 September 2009, D 2009, 1775 (Jordanian Court of Cassation).

considered only from the date the correction is carried out" (Article 23, The Egyptian Civil and Commercial Procedures Law, 1986).

It is observed that the Jordanian legislator did not specify the period of correction and did not grant the court the right to specify this period, unlike what the Egyptian legislator did when he granted the court the authority to set a specific period for correcting the procedure if it was not specified by the legislator (Omar and Khalil, 2004, p. 352).

While the Jordanian Court of Cassation ruled the following, "With regards to the two reasons for the appeal, where the two reasons concluded that the appealed judgment violated the interpretation and application of the law, as the invalid procedure issued against the person against whom the cassation decision was issued by giving an incorrect name to the appellant when depositing the rent allowance is a material error that does not exceed a lapse, because this invalid procedure occurred before the lawsuit was filed, whereas the court does not have the authority to correct the invalid procedure under the provisions of Article 26 of the Civil Procedure Law, the appealed judgment also indicated that the appellant against him had deposited the rent by using the triple name of the appellant, while it was proven that he had deposited the rent in a different name than the appellant's name."[2] In another ruling of the Jordanian Court of Cassation, it was stated, "It is benefited from Article 26 of the Civil Procedures that it is permissible to correct the invalid procedure even after adhering the invalidity, provided that the correction is made within the prescribed specified period."[3]

However, there are some cases in which the Jordanian legislator stipulates to take a specific action based on it; this action will have its effect. In contrast, Article 107 of the Jordanian Civil Procedure Law stipulates the following, " If any party fails to comply in response with the decision issued regarding the production of a document or permission to disclose it, so that if that party is the plaintiff, then he is by this act expose his lawsuit for dropping the basis of untraceable, and

[2] Court of Cassation (civil), Fawaz Mahmoud v. Heirs of Ishaq Abdul-Jabbar, 18 August 2015, D 2015, 1213 (Jordanian Court of Cassation).

[3] Court of Cassation (civil), Jerusalem Insurance Company v. Social Security Corporation, 30 September 2001, D 2001, 2269 (Jordanian Court of Cassation).

if this party is the defendant, he will expose his defence to cancellation if he presented a defence, while the court issues its decision to drop or cancel at the request of the party who requested access to this document" (Article 107, The Jordanian Civil Procedure Law, 1988).

Although there is no explicit provision in Article 26 of the Jordanian Civil Procedure Law that grants the court the authority to set a specific date for conducting the procedures, nevertheless, the court can be granted this authority as Article 85 of the Jordanian Civil Procedures Law and its amendments No. 24 of 1988 states, "If one of the obligated litigants fails to deposit the amount to be deposited within the specified period, the opponent may deposit this amount without prejudice to his right of recourse against his litigant, the court is also entitled to consider the failure to deposit the amount by the opponent obliged by the deposit, as evidence that he relinquish from the proof of the incident, which he requested the appointment of an expert to prove it"(Article 85, The Jordanian Civil Procedure Law, 1988). Therefore, it can be said that the authority to set the time limit refers to the court, and the litigant must correct the invalid procedure during this period (Ghossoub, 2010, p. 233).

A distinction must be made between the procedure for which the legislator sets a specific period for the correction procedure, such as the periods of appeal, cassation and pleading, where correction must be made during these periods. In contrast, the correction has no effect unless the specified date is observed and if the deadline has passed. The correction has not taken place, then the correction is not permissible after that (Article 69, The Jordanian Civil Procedure Law, 1988), and between the procedure which does not have a specific period for it, under this, the court sets a specific period for its correction (Wally, 1959, p. 533).

The procedure is taken into consideration only from the date of its correction, so that the invalid procedure may be corrected, even if the concerned person insists on invalidity (Nasir & Dakhil, 2016, p. 237), however, Article 26 of the Jordanian Civil Procedure Law states the following, "The procedure is only valid from the date it was corrected"(Article 26, The Jordanian Civil Procedure Law, 1988), where the Jordanian Court of Cassation ruled that "the deficiency in

the statement of the defendant's name in the statement of lawsuit is not considered a deficiency that necessitates the cancellation of the statement of lawsuit, for not requiring invalidity on the one hand, and not harming the litigant due to this cassation on the other hand, even if it stipulates for invalidity on the other hand, according to Article 24 of the Civil Procedures Law, provided that the defendant has attended all court procedures represented by her attorney."[4]

Notwithstanding, correction may be carried out even if the invalidity is related to the Public System, as long as such correction eliminates the invalidity,[5] Furthermore, such correction is implemented within the specified period (Abu Al-Wafa, 1988, p. 136).

In the case of a request for invalidation of judgments, the matter is different, as in the event of such invalidity occurring, this procedure is corrected by requesting a correction procedure, and it does not entail the invalidity of all procedures, the Jordanian legislator identified cases of invalidity of judgments in the provisions of Articles 132 and 133 of the Jordanian Civil Procedures Law, which are related to cases of the judge's incompetency to consider the lawsuits and preventing him from handling it, under the penalty of invalidity of the judgment, the invalidity was also stipulated in Article 160 of the same law"(Articles 132, 133, 160, The Jordanian Civil Procedure Law, 1988), whereas the Jordanian Court of Cassation ruled that "the invalidity results from the court judgments which did not indicate the court that issued it, the date and place of its issuance, the names of the judges who participated in its issuance and attended its pronunciation, the full names of the litigants, their attendance or absence, their names and surnames, overviewing all the facts of the lawsuit, the litigants' requests, a brief summary of their essential pleads and defences, and the reasons for the court judgment and its text, based on Article 160 of the Civil Procedures Law, which necessitated the fulfilment of the above-mentioned conditions."[6]

[4] Court of Cassation (civil), Iraqi National Insurance Company v. Trans Shibnj, 15 December 1991, D 1991, 591 (Jordanian Court of Cassation).

[5] Court of Cassation (civil), Jordan Telecom Public Shareholding Company v. Osama Mahmoud, 9 February 2005, D 2004, 3015 (Jordanian Court of Cassation).

[6] Court of Cassation (civil), Faiza Amin v. Samir Amin, 31 March 1999, D 1998, 2016 (Jordanian Court of Cassation).

The invalidity is due to a defect in the judgment procedure itself, as the defect distorts the judgment itself as a judicial procedure, which leads to its invalidity, such as, if the ruling was issued by a committee that formed in a lower quorum (Al-Zoubi, 2006, p. 884), whereas the Jordanian Court of Cassation ruled that" the judicial ruling is a procedural act which its issuance required to be in writing and signed by the judge and all members of the judicial committee that issued this decision, and sign the draft decision that archived in the case file, including the reasons for the ruling and its text, so that the decision is valid, and it constitutes a valid basis for its issuance, in accordance with the provisions of Articles 159 and 160 of the Law of Civil Procedure, and since the draft decision was signed by all members of the committee considering the lawsuit in the Court of Appeal, the judgment fulfils all its conditions and legal requirements, the unavailability of the signature of the commission member on the final printed version does not affect the validity of the ruling, especially since the court seal is stamped in the place of the commission member's signature to indicate that the draft decision bears his signature, and that this member was in a state of absence during the period during which the judgment was prepared and printed, therefore this reason must be rejected."[7]

If the litigant corrects the procedure, considering that there is a defect in his right, the judgment does not prevent the first procedure from being considered valid. Its effect shall be effective from the date of its consideration. If the court finds that it is free of defects, the plaintiff's submission of the list of claims is clearer and more comprehensive than the list he submitted. The court considers that the list presented at the beginning fulfils the lawsuit's purpose, and this does not result in the invalidity of the first list. Therefore, the court decided to add the list submitted later to the lawsuit record. Suppose the appellant provides a legitimate excuse to justify his absence from the trial date. When the Court of Appeal considered the appeal, it found that he had been notified of the invalid procedure. In that case, this does not prevent the judgment from being rescinded (Abu Azzam, 2008, p. 77).

[7] Court of Cassation (civil), Heirs of Fadl Mansour v. Taiba Investment and Advanced Food Industries Company, 17 March 2021, D 2020, 6262 (Jordanian Court of Cassation).

The jurisprudence stipulates other conditions to correct the invalid procedure, including the following reasons: 1) The correction process leads to the correctness of the invalid procedure; 2) correction must be carried out before invalidity is judged; 3) The procedure is subject to correction does not exist (Fouda, 1993, p. 313).

III. The methods of correcting the invalid procedure

What is meant by correction is the elimination of invalidity. Suppose it is combined with an invalid act that leads to its derogation or invalidity. If the invalidation is corrected by the availability of all its requirements in the performance, it has become not defective. In that case, it shall not be judged invalid (Wally, 1973, p. 813).

The jurisprudence divides correction into methods; although the Jordanian legislator did not specify methods of correction, it can be considered as the term "correction" contained in Article 26 of the Jordanian Civil Procedures Law came in a general form. Therefore, it includes all correction methods (Al-Sharqawi, 2013, p. 116).

There are many correction procedures, where the first method of correcting the invalid procedure is to correct it by completing the procedural action, completing the invalid procedure, through adding what is missing and correcting the invalid requirement, the procedural action must satisfy the requirements for judging its validity based on what established by the legislator. If the procedural action violates these requirements, it will be invalid and void (Al-Shwarabi, 2010, p. 48), while if it is possible to complete the deficiency in the action, it must meet all its requirements in order for it to become valid (Wally, 1959, p. 527).

A distinction must be made whether a deficiency or defect is one of the basic requirements that must be fulfilled in the procedure, an example of this is the adjective in the lawsuit, which is a condition of the lawsuit and not a procedural action (Hillel, 2007, p. 312; Abu Al-Wafa, 1957, p. 291), and by referring to French law, it differentiates between invalidity on formal reasons or invalidity on objective reasons, Article 115 of the French Civil Procedure Law regarding the formal reasons state, "The invalidity shall not be judged if the defect is not

corrected and the correction shall have a retroactive effect, so the act is considered valid since its adoption and the defect associated with it disappears, and it is considered as if it did not exist since the original, so the possibility of holding on to its invalidity ceases," while Article 121 of the same law above provides objective reasons, as it stipulates the case in which the invalidity can be covered, and it is not judged if its cause disappeared before the decision was issued, therefore, the effect of the correction is subject to two assumptions only: a-the ability to cover violation; b- eliminating the reason that led to the invalidity within the specified time, that is, before the issuance of the decision (Articles 115, 121, The French Civil Procedure Law, 2020).

Hence the importance of differentiating between a text that has a period, as it is necessary to adhere to this period and correct during it, and if the correction period is not specified, the correction shall take place before the judge decides to dismiss the lawsuit, regardless of the opponent's adherence to invalidity (Al Qadi, 1994, p. 82). All legislator requirements must be added to the invalid procedure and what is lacking so that the complement shall be completed and achieves the desired objectives (Al-Rashidi, 2011, p. 99).

For example, if an unclear pleading is submitted, the defect is removed by presenting a more comprehensive and clear pleading by the provisions of Articles 117 and 118 of the Jordanian Civil Procedures Law; this indicates that the complement must be made at the time specified by the legislator, and if this is not done within the time specified by the legislator. Furthermore, suppose a period is not specified. In that case, as is the case in Jordanian legislation, the court shall set a period to carry out this procedure, as the court has the discretion to set a specific period for completing the invalid procedural action, and there is no penalty for the opponent if he does not correct the procedure within the period specified by the court (Abu Azzam, 2008, p. 79; Articles 117, 118, The Jordanian Civil Procedures Law, 1988).

It is advised that the text of Article 26 of the Jordanian Civil Procedures Law should be amended by adding a maximum period of three months granted to the opponent to correct the invalid procedure, so that if he does not carry out this correction during this period, the lawsuit will be dropped, accordingly, the opponent will be obliged

to carry out the complement during this period, which will fulfil the purpose of this provision, and it is also possible to grant the court the authority to impose fines on those who fail to correct this procedure during this period, the provision of Article 24 of the same law is also amended by adding a paragraph granting the court the power to drop the lawsuit in the event the opponent fails to correct it at the time specified by the court, under penalty of dropping the lawsuit, whereas Article 72 of the Jordanian Civil Procedure Law stipulates, "The court's ruling against one of its employees or the litigants who failed to deposit documents or perform any of the pleading procedures within the period specified by the court, with a fine not exceeding twenty dinars, this shall be by a decision recorded in the minutes of the session, and has what judgments have executive power, and it is not subject to appeal in any way, nevertheless, the court may dismiss the convict from the full fine if he presents an acceptable excuse" (Article 72, The Jordanian Civil Procedures Law, 1988).

While the second method to correct the incorrect procedure is to perform the correction while the defect remains, this correction is represented in the Civil Procedure Law in Relinquishing adherence to invalidity, the relinquishment is the opponent's declaration of his will by relinquishing his right to adhere to invalidity, the relinquishment can be express or implied (Salman and Mohammed, 2018, p. 265), and that this relinquishment may respond to the request for invalidity, and it has the right to respond to this request and has the right to adhere to the invalidity (Al-Shawarbi, 2004, p. 218), whereas Article 25 of the Jordanian Civil Procedures Law states the following, "It is not permissible to adhere to the invalidity except for the cases which legislated the invalidity for its benefit, and the invalidity may not be adhered by the opponent who caused it, and all this except in cases where the invalidity is related to the Public System" (Article 25, The Jordanian Civil Procedures Law, 1988).

The invalidity shall lapse if it is expressly or implicitly relinquished by the person in whose interest it is legislated (Moloki, 2009, p. 90), except in the cases related to the Public System and what is meant by express relinquishment, which is the tendency of the opponent's will to relinquish his right to invalidity, the Jordanian legislator did

not stipulate a specific form for relinquishment of invalidity, as it is permissible to relinquish by verbal during the session. However, this relinquishment is recorded in the session minutes; it may also be in writing that the opponent gives written notice of his relinquishment of invalidity (Wally, 1959, p. 557).

The Jordanian Court of Cassation ruled that "since it does not invalidate the procedure unless it is defective so that if a defect is found in the procedure, shall lead to its invalidity, then the requirement that the procedure missed was added, or the defective requirement in the procedure has been corrected, so that the procedure has all its requirements, so it becomes non-defective and is not judged invalid, explicitly based on the text of Article 26 of the Law of Civil Procedure."[8]

Another ruling of the Jordanian Court of Cassation stated that "the invalidity of the litigant's private procedures is not from the Public System because it was legislated for the benefit of the one who was harmed by leaving it in the manner specified in the law. Therefore, Article 25 of the Civil Law Stipulates the following: it is not permissible to insist on the invalidity except for the one who legislated the invalidity for his benefit, and the invalidity is lapse if it is expressly or implicitly relinquished by the one who legislated in his favour, except in cases where it is related to public order, and whereas, the relinquished procedures are not related to the Public System, and the litigant representative did what she did base on a legal mandate authorizing her to do what she did, therefore, the claim of the plaintiff and this case, for the reasons mentioned in the statement of claim, have no legal basis."[9]

A question at this moment arises as to the permissibility of prior agreement on this express relinquishment; therefore, a distinction must be made if this relinquishment responds to the right to adhere to the invalidity of a particular activity for a specific reason so that the relinquishment may be pre-approved, or whether this relinquishment is general and indefinite, then this agreement is not permitted, because the relinquishment is without knowing the reasons for the invalidity, as

[8] Court of Cassation (civil), Social Security Corporation v. Amjad Qadri, 10 May 2021, D 2021, 754 (Jordanian Court of Cassation).

[9] Court of Cassation (civil), Mohammed Sameh v. Lands Circle, 22 June 2009, D 2008, 3519 (Jordanian Court of Cassation).

in event he knew of these reasons, he would not have relinquished his right to adhere the invalidity (Al-Aboudi, 2007, p. 152).

What is meant by implicit relinquishment is that the opponent adopts a behaviour. This behaviour indicates his relinquishment of invalidity and his willingness to bear the defective act (Al-Sabawi and Yahya, 2011, p. 382), and the circumstances of the condition should be a clear indication of this relinquishment. Therefore, the competent judge shall study the opponent's behaviour so that if it becomes clear to the judge that the behaviour of this opponent indicates a conclusive indication of his relinquishment of invalidity, then the opponent's adherence to invalidity is not accepted afterwards (Wally, 1959, p. 558).

In a decision of the Jordanian Court of Cassation, it was stated that" if the attorney appointed by the appellants attended the trial proceedings until the issuance of the judgment in the lawsuit in the Court of First Instance and the attorney above did not appeal the validity of the notification on the date of the first session, this behaviour would indicate that the appellants have implicitly relinquished the appeal to the invalidity of the notification for the previous session. Therefore, they may not raise this issue at the Court of Appeal and Cassation, under Article 25 of the Law of Civil Procedure."[10]

Where the text of Article 25 of the Jordanian Civil Procedures Law corresponds to the text of Article 22 of the Egyptian Civil and Commercial Procedures Law, which states the following." The invalidity shall be forfeited if the person in whose favour the law was issued expressly or implicitly relinquished it, except in cases where the invalidity is related to the Public System" (Article 22, The Egyptian Civil and Commercial Procedures Law, 1986).

The legal jurisprudence stipulated three conditions for the relinquishment to be affected, whether explicit or implicit. The first condition is the issuance of the relinquishment of the opponent who is entitled to adhere to the invalidity, so if it is issued by another person (Wally, 1959, p. 562), then it has no effect, as a dispute arises regarding the attorney's right to relinquish the proving invalidity in favour of

[10] Court of Cassation (civil), Khalil Ibrahim Company v. Jordan International Travel and Tourism Co, 24 April 2002, D 2002, 730 (Jordanian Court of Cassation).

his client, however, this legal dispute is determined in the Jordanian judiciary, where the attorney has the right to relinquish the proving invalidity in favour of his client. In contrast, a ruling of the Jordanian Court of Cassation stated, "If the notifications are done correctly, the claim of invalidating it shall be extinguished in the presence of the addressee at the specified session or by submitting his defence memorandum, and since the appellant attorney attended the specified session, and since the appellant attorney has attended the specified session, and submitted his defence memorandum in the lawsuit, therefore, raising this plea after that is not acceptable, and must be rejected."[11]

Article 21 of the Egyptian Civil and Commercial Procedures Law states," It is not permissible for anyone to adhere to the invalidity except for one who legislates invalidity for his benefit. Furthermore, it is not permissible to adhere to the invalidity by the opponent who caused it, and all of this except for cases where the invalidity is related to the Public System" (Article 21, The Egyptian Civil and Commercial Procedures Law, 1986).

Another ruling of the Jordanian Court of Cassation stated that "Article 25 of the Jordanian Civil Procedure Law has established a stable provision from a legal and juridical point of view, that invalidity is adhered to only by the one who legislated for his benefit and not the one who caused it, except for cases where the invalidity is related to the Public System, and the invalidity lapses if it is explicitly or implicitly relinquished."[12]

While the Egyptian Court of Cassation (Labour Chambers) ruled in Appeal No. 7096 for Judicial Year 90 issued on October 27, 2021 as follows, "As a basis for the appellant's obligation to submit an official version copy of the primary judgment, in accordance with the provision of Article 255 of the Pleadings Law, amended by Law 76 of 2007, that the contested judgment was referred to him with its justifications and without indicating these reasons in the minutes, while if the contested

[11] Court of Cassation (civil), Abdullah Rashid v. Zulfiqar Corporation for Import and Export, 20 September 2005, D 2005, 4465 (Jordanian Court of Cassation).

[12] Court of Cassation (civil), Civil attorney general assistant v. Ibrahim Ahmed, 10 December 2000, D 2000, 1726 (Jordanian Court of Cassation).

judgment discloses in its minutes the reasons on which the primary decision was based, and none of the litigants contested that, then the purpose of submitting the official version copy of this ruling was achieved, and the invalidity is prohibited in this case under Article 20 of the Pleadings Law, according to what was stated, and it was clear from the contested judgment that it disclosed within its minutes the reasons on which the primary decision was based in his judgment in the lawsuit filed by the appellant, and those filed by the appellee, and none of the litigants challenged the provisions of the contested judgment in this regard, thus, the purpose of submitting an official version copy of the preliminary judgment issued in these two cases has been achieved, and this plea remains void."[13]

The second condition is that the opponent can relinquish. This condition is assumed in the opponent automatically because the eligibility for relinquishment is the same as eligibility for litigation, so if the litigant does not have the litigation capacity, then there is no capacity to relinquish the invalidity (Al Lahi, 1996, p. 562).

In a decision of the Jordanian Court of Cassation it was stated that "Procedures that take place after the juvenile has reached the age of majority are void because the litigation is invalid, where his father represented him in the case through the civil lawyer and his registrar to file the lawsuit, and by referring the documents to the Court of First Instance, which adopted the procedures that took place after that date, arguing that the plaintiff's attorney (i.e., the plaintiff's attorney after reaching the age of majority) authorized the previous procedures on behalf of his client, while the defendant's attorney did not accept the aforementioned plaintiff's consent to the previous procedures, since those actions and procedures relating to the dispute, are related to the Public System, therefore, permitting a juvenile after reaching the age of majority and completing the eligibility for litigation does not discriminate behaviour contrary to the Public System, as permission responds to behaviour that revolves between benefit and harm that is not related to the Public System, since the Court of First Instance

[13] Court of Cassation (civil), 27 October 2021, D 2021, 7096 (The Egyptian Court of Cassation — Labour Chambers).

adopted the above-mentioned previous procedures and the Court of Appeal followed them, the Court of Appeal issued a judgment based on invalid procedures that should be revoked."[14]

While the Egyptian Court of Cassation ruled the following, "Since the confrontation between opponents is one of the main elements of litigation that only occurs with it, this confrontation can only be achieved by initiating litigation and its procedures, including announcements from and by whom has the capacity to litigation, where litigation capacity means the capacity of the litigant to perform or receive the procedural act, and it is available when the litigant eligibility to perform the right subject of the dispute, while if the litigant does not have this capacity, notifications and other procedures shall be directed to his legal representative in the litigation and its procedures, such as the guardian, trustee or in charge, as the litigant must monitor any death or change in character or status of his opponent so that the litigation takes its proper legal path."[15]

The third condition is that the opponent has the will to relinquish, which must be determined by the opponent, this will is not available to the opponent if he is not aware of the defect that leads to invalidity. If these conditions are met, relinquishment shall have its effect (Al-Shwarabi, 2010, p. 14); Article 25 of the Jordanian Civil Procedure Law summarized the case for relinquishing invalidity, which is not related to the Public System, as stated in the Jordanian Court of Cassation decision, "However, jurisprudence and the judiciary have established that the challenge to the invalidity of the notification is not from the Public System and that it is the right of the litigants, and it may be relinquished explicitly or implicitly, and the right to present its pleading is forfeited if it is not carried out at the first opportunity available to the litigant by the provisions of Articles 24, 25, 110 of the Civil Procedure Law."[16] Whereas the effect of this relinquishment is the inability of this

[14] Court of Cassation (civil), Salim Abdul Karim v. Mohamed Rady, 14 December 2008, D 2008, 1063 (Jordanian Court of Cassation).

[15] Court of Cassation (civil), 28 February 2000, D 2000, 7353 (The Egyptian Court of Cassation).

[16] Court of Cassation (civil), Civil attorney general assistant v. Sabri Mahmoud, 5 January 2009, D 2008, 2464 (Jordanian Court of Cassation).

opponent to adhere to the invalidity by any means or in any degree of litigation, and this relinquishment extends its effect to the Public System (Al Tahyiawi, 2003, p. 197).

It is a process of correction while the defect remains or a state of correction through achieving a legal fact. In contrast, this state is an application of the rule that states "there is no invalidity if the correction fulfils the purpose of the form required by law" (Wally, 1959, p. 567). The legislator addressed this case in Article 110/2 of the Jordanian Civil Procedure Law, which states, "The invalidity of the notification and the lawsuit memorandum arising from a defect in the notification or its procedures or on the date of the session shall be eliminated by the presence of the person who required to be notified at the specified session or by submitting his defensive memorandum" (Article 110/2, The Jordanian Civil Procedure Law, 1988).

It is observed that the legislator relied on a legal fact, which is the fact of notification of the lawsuit and its memoranda, and that the invalidity is eliminated in the presence of the person who is required to be notified or by submitting a defensive memorandum. Therefore, the Jordanian Court of Cassation ruled, "If the defendants' attorney attends the sessions following the notification, his attendance corrects the invalidity according to Article 110/2 of the Civil Procedure Law."[17]

In another ruling, the Jordanian Court of Cassation ruled that "the jurisprudence of the General Assembly of the Court of Cassation has been established that Article 109/e of the Civil Procedure Law allows the litigant, before deliberating on the merits of the lawsuit, to request the court to rule the invalidity of the notification documents of the lawsuit, Paragraph 1of Article 11 of the aforementioned law also expressly states that a plea that is not related to the Public System must be submitted before any procedural defence or defence request is presented in the lawsuit, otherwise, the right to it shall be forfeited, also Paragraph 2of the same article expressly states that the defendant's filing of his defence memorandum forfeits his right to adhere on invalidity, as is the case for attendance (Cassation of the General Assembly Right 1255/2005), whereas the defendant's attorney attended the session of April 30, 2007

[17] Court of Cassation (civil), Ziad Ismail v. Arab Bank, 21 July 2010, D 2010, 273 (Jordanian Court of Cassation).

and did not raise the pleading that the notification of the lawsuit was invalid, then submitted a later date on May 8, 2007 the aforementioned invalidation request, that is, after the legal period stipulated in Article 5 of the Civil Procedure Law, and after submitting his respond to the lawsuit memorandum, it was concluded that the rejection of the request is sound, and that its decision is in accordance with the law."[18]

While Article 24 of the Egyptian Civil and Commercial Procedures Law stipulates the following, "If the procedure is invalid, while the elements of other procedure are available, it will be considered valid as a procedure which all its elements available, and if the procedure is invalid in part, then this part alone is invalid, and the invalidity of the procedure does not result in the invalidation of the previous procedures or subsequent procedures if they were not based on it" (Article 24, The Egyptian Civil and Commercial Procedures Law, 1986).

The Jordanian Court of Cassation ruled in its judgment No. 2996/2020 (General Assembly) issued on October 25, 2020 as follows, "Article 83/3 of the Law of Civil Procedure states the following: the expert must be qualified to carry out the expertise in the task assigned to him, scientifically, technically, professionally, or practically, and to perform his task with integrity, honesty, and sincerity, and to disclose, whether in the trial minutes or in a separate report, the presence or absence of any circumstances or reasons that would raise doubts about its impartiality and independence from any of the parties of the lawsuit, their attorney or the court committee, and if it is proven that this disclosure is inaccurate or not submitted, the expert's report shall be considered invalid and the expert is obligated in this case to return the wage he received, accordingly, and to determine the extent to which the expert's report is invalid in this lawsuit, initially, it is noted that the experts disclosed that there are no reasons that would affect their impartiality and independence from the parties to the lawsuit, their attorney, or the court committee, as this disclosure came in the introduction to the experts' report, where Article 24 of the Civil Procedure Law states the following: the procedure is invalid

[18] Court of Cassation (civil), Nael Camel v. Mohammed Abdullah, 24 January 2010, D 2009, 2612 (Jordanian Court of Cassation).

if the law stipulates its invalidity or if it is marred by a substantial defect that results in harm to the litigant, and invalidity is not judged despite the stipulation if the procedure does not result in harm to the litigant), in light of this and with regard to procedural invalidity (that is, with regard to procedures as distinct from substantive invalidity, the legislator adopted the rule (there is no invalidity without stipulation or a fundamental defect that results in harm to the opponent), and to mitigate this rule the legislator adopted the second rule contained in Article 24 of Civilian Assets that (invalidity is not judged despite the stipulation if the procedure does not result in harm to the litigant), by applying the provisions of Article 24 of Civilian Assets to the violation of the provisions of Article 83/3 of Civilian Assets, the non-disclosure of experts shall result in invalidity because of the explicitness of the Article provision, however, this invalidity is not judged despite its stipulation, if the procedure does not result in any harm to the litigant, where the procedure caused harm to the opponent can be determined from the total experience procedures, so that if the disclosure is a necessary matter, the violation of which results in the invalidity of the expert's report, then preparing this disclosure and completing this part of the expert's procedures at any stage, whether, when understanding the experts the task entrusted to them, when preparing the report of the expert procedure, within the expert report, or in experts acknowledgment that comes after submitting the expert report and before deciding the lawsuit by the court that considering the lawsuit, all of this achieves the purpose of disclosure, achieves the purpose of this procedure, or the form decided by law for the procedure, so there is no harm to the opponent in all the cases that have been referred to, in which the required disclosure can be made, this is supported by the fact that the court, before adjudicating the lawsuit, if it finds that this disclosure is inaccurate for any reason, may decide to invalidate the expert's report, the court also has the right to reopen the trial to ascertain any matter it deems necessary to settle the lawsuit Article 158/3 of Civilian Assets, accordingly, there is no justification to claim the invalidity of the expert's report (if it has not been disclosed) at a particular time, the legislator explained how to disclose as what was indicated in the provision by doing so (in the trial records or in a separate report), but he didn't specify the time period,

and since the experience report replaces the separate report, because if it is submitted, it will be included in the trial minutes, and therefore the reference in the report (for disclosure) achieves the purpose that the legislator intended from this disclosure, and this purpose is to verify the impartiality and independence of the expert by the court, accordingly, the experts in this lawsuit disclosed in the introduction of the expert's report that there are no reasons that would affect their impartiality and independence from the parties to the lawsuit, their attorneys, and the court committee, upon that, the appeal by nondisclosure becomes misplaced."[19]

While the Egyptian Court of Cassation (Commercial Chambers) ruled in Appeal No. 6275 for Judicial Year 87 issued on July 7, 2021, as follows, "The invalidity of the litigation by the invalidity of the notification of one of the litigants is a relative invalidity, that is established for the benefit of the one who was legislated to protect him and is not related to the Public System, only the litigant whose notification is invalid may plead it, even if the subject matter of the lawsuit is indivisible, and this court had ruled "different committee members" on January 16, 2019 to accept the appeal as a form, this implies that it judged the validity of the notification of the respondents against the first to the sixth in the memorandum of appeal in cassation, accordingly, it is not permissible to reconsider whether or not the invalidity of their notification in this memorandum is invalid, in addition, the pleading of this invalidity is legislated for their benefit, and it is not permissible for others to plead with it, this is what makes the apparent pleading by the invalidity of this notification on an unfounded basis."[20]

IV. Conclusion

The Jordanian legislator did not specify a period to correct the invalid procedure and did not expressly grant this right to the court to determine the period of correction, as did the Egyptian legislator who granted the

[19] Court of Cassation (civil), Madarak International Meat and Livestock Trading Est v. Feed Development Company, 25 October 2020, D 2020, 2996 (Jordanian Court of Cassation).

[20] Court of Cassation (civil), 7 July 2021, D 2021, 6275 (The Egyptian Court of Cassation).

court the right to specify the period of correction; the invalid procedure may be corrected, even if it is related to the Public System, and as long as this correction has been performed within the specified period. In contrast, the Jordanian legislator has not explicitly stipulated all correction methods, but these methods can be adopted, as the term "correction" is in a final form.

The court has a discretionary authority to set a specific period for the completion of the invalid procedural act, and there is no penalty for the litigant if it is not corrected within the period specified by the court; the invalidity of the litigant's private procedures is not part of the Public System, since it was legislated for the benefit of those who were harmed by not doing so, in the manner prescribed by law, thus, it is not permissible to adhere to invalidity except for those who legislated invalidity for their benefit. The invalidity lapses if it is relinquished explicitly or implicitly by the one who is legitimized for his benefit, except in cases related to the Public System. In contrast, the procedures that have been relinquished are not related to the Public System.

The presence of the appointed attorney in the court proceedings until the issuance of the judgment in the lawsuit, and since he did not appeal the validity of the notification on the date of the first session, this act indicates his implicit relinquishment of the appeal to the invalidity of the notification of the previous session. Accordingly, he may not file this lawsuit later in the Court of Appeal and Cassation. In contrast, the litigant who desires to relinquish the invalidity must have the capacity, and what this capacity means is the litigation capacity. If the defendant's representative attends the sessions after the notification, his attendance corrects the invalidity.

It is recommended to amend Article 26 of the Jordanian Civil Procedures Law by adding a specific period for correction or granting the court to specify this period, provided that the text is as follows. First, the invalid procedure may be corrected even after the invalidity is adhered to, provided that this correction is performed within three months from the date of knowledge, and the procedure is only considered from the date of its correction. Second, the court may drop the lawsuit if the previous periods were not considered. Alternatively, the text could be formulated differently. First, the invalid procedure may be corrected,

even after adhering to the invalidity, provided this is done within the legally prescribed time for performing the procedure. If the procedure does not have a date specified in the law, the court shall set a reasonable date for correction, and the procedure is considered valid only from the date of its correction. Second, the court may rule against the one who exceeds the period it specifies with a fine not exceeding twenty dinars, by a decision that is recorded in the minutes of the session, and has what judgments have executive power, and it is not permissible to appeal against this decision in any way; nevertheless, the court may dismiss the convict from the full fine if he presents an acceptable excuse.

References

1. Abu Al-Wafa, A., (1957). *The Theory of Defenses in the Pleadings Law*. Second Edition. Egypt, Cairo: Dar Al Maaref.

2. Abu Al-Wafa, A., (1988). *The Theory of Defenses in the Pleadings Law*. Egypt, Cairo: Mansha'at al-Maaref, Eighth Edition.

3. Abu Attia, P., (2007). *Explanation of the Pleadings Law*. Egypt, Alexandria: New University Publishing House.

4. Abu Azzam, P., (2008). *The Theory of Invalidity in the Civil Procedure Law*. Master's Thesis. The University of Jordan, pp. 77–79.

5. Akhras, N., (2012). *The Explanation of the Civil Procedure Law, Part (2), The Lawsuit and The Litigation Procedures*. Jordan, Amman: Dar Al-Ettifaq Library for Publishing and Distribution.

6. Al Lahi, S., (1996). *The Principles of Judicial Organization, Litigation and Pleadings in the Hashemite Kingdom of Jordan*. Jordan, Amman: Dar Al-Ettifaq Library for Publishing and Distribution.

7. Al Qadi, M., (1994). *Explanation of the Pleadings Law*. Part (1). Iraq, Baghdad: Legal Library of Printing and Publishing.

8. Al Tahyiawi, M., (2003). *Procedures for Filing a Legal Lawsuit origin and exception*. Egypt, Alexandria: New University Publishing House.

9. Al-Aboudi, A., (2007). *Explanation of Civil Procedure Provisions*. Jordan, Amman: Dar Al-Ettifaq Library for Publishing and Distribution.

10. Al-Ansari, H., (1999). *The defects invalidate the judgment and methods to stick to it*. Egypt, Alexandria: Dar Al-Jama'a Publishing.

11. Al-Qdah, M., (2008). *Civil Trial Procedures and Legal Organization*. Jordan, Amman: Dar Al-Ettifaq Library for Publishing and Distribution.

12. Al-Rashidi, F., (2011). *The invalidity of Procedural Activity in Kuwaiti Civil and Commercial Pleadings Law, a comparative study with Jordanian law*. Master's Thesis. Middle East University, pp. 100.

13. Al-Sabawi, Y. and Yahya, I.S., (2011). The Legal Effects of Invalid Ruling in the Civil Procedure Law: a comparative study. *Al-Rafidain Journal of Rights*, 14(50), 383, doi: https://search.emarefa.net/detail/BIM-306899.

14. Al-Sharqawi, A., (2013). *The effectiveness of the Legal Means in Reducing the Procedural Invalidity According to the Jordanian Civil Procedure Law:* A comparative study. Amman: Arab University.

15. Al-Shawarbi, A., (2004). *Commentary on the Pleadings Law*, Part 1, General Provisions in the Pleadings Law. Egypt: Mansha'at Al-Maaref.

16. Al-Shwarabi, A., (2010). *The Civilian Procedural and Objective Invalidity*. Egypt, Alexandria: Modern University Office.

17. Al-Zoubi, A., (2006). *The Principles of Civil Trials*: A Comparative Study. Jordan, Amman: Wael Publishing House.

18. Fouda, A., (1993). *The Invalidity in the Civil and Commercial Pleading Law*. Egypt, Alexandria: New University Publishing House.

19. Ghossoub, A., (2010). *Al-Wajeez in the Civil Procedures Law*. Lebanon, Beirut: University Foundation for Studies and Publishing.

20. Hillel, F., (2007). *The Invalidity in the Pleadings Law*. Egypt, Alexandria: New University Publishing House.

21. Hindi, A., (2005). *Adherence to Invalidity in the Pleadings Law*. Egypt, Alexandria: New University Publishing House.

22. Malkawi, B., (2008). The Scientific Fundamentals of Writing Legal Research: PhD and Master's Theses, Bar Association Research, Judicial Institute Research and Student Research, Conferences and Seminars. Jordan, Amman: Dar Wael for Publishing and Distribution.

23. Moloki, E., (2009). *The Civil Pleading Law*. Egypt, Cairo: Al-Atak for Book Industry.

24. Nasir, T. and Dakhil, A., (2016). Correct The Defective Judicial Procedure — Comparative Study. *Al-Mouhaqiq Al-Hilly Journal for*

legal and political science, 6(4), pp. 235–282, doi: https://www.iasj.net/iasj/article/102932.

25. Omar, N., (1999). *The Mediator in the Civil and Commercial Procedures Law*. Egypt, Alexandria: New University Publishing House.

26. Omar, N. and Khalil, A., (2004). *The Civil Procedure Law*. Lebanon, Beirut: Al-Halabi Human Rights Publications.

27. Ragheb, W., (1978). *The Principles of Civil Litigation*. Egypt, Cairo: Dar al-Fikr al-Arabi.

28. Salman, E. and Mohammed, A., (2018). Legal regulation for the correction and effects of theoretical nullification. *The Journal of Law Research*, 16, 266, doi: https://www.iasj.net/iasj/article/170166.

29. Tim, Y., (2008). *The invalidity criterion in the Jordanian Civil Procedure Law: A Comparative Study with the Egyptian Civil and Commercial Procedures Law*. Master's Thesis. Amman Arab University.

30. Tzerrin, Z. and Khowaldi, N., (2016). *The Procedural invalidity in the light of the Civil and Administrative Procedures Law*. Master's Thesis. University of Abd Alrahman Meira Bejaia. Pp. 50–51.

31. Wally, F., (1959). *The Theory of Invalidity in the Pleadings Law*. Egypt, Alexandria: Modern Printing House.

32. Wally, F., (1973). *The Civil Judiciary Law*. Egypt, Cairo: Dar Al Nahdah Al Arabiyah.

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Article

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Review of Some Aspects of the Russian Legislation on Fiduciary Management of Property and Personal Funds through the Prism of the Law on Trusts in the United States and Canada

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Abstract: Enactment of new provisions of the Civil Code in the spring of 2022 on personal funds has increased the number of legally recognized instruments for management of property of others available in Russia (personal funds, investment funds of closed type and trust management agreements). This article reviews similarities between these three instruments and trusts formed under applicable laws of the United States and Canada. Such similarities suggest that certain legal mechanisms and approaches to legal issues developed in the United States and Canada should be taken into account for further development of the Russian law on personal funds and implementation of the law in practice. The article analyses certain aspects of the Russian legislation on management of property of others (legal status of each instrument, liability of the managers to the beneficiaries and liability of founders of personal funds for the obligations of such funds) and compares provisions of Russian law with relevant laws of the State of New York and the Province of Quebec.

Keywords: trusts; personal funds; fiduciary duties; subsidiary liability; protection of beneficiaries

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Contents

I. Introduction

The legislation on personal funds, which came into force in spring of 2022, caused a rather lively discussion and a mixed reaction among practicing lawyers. On the one hand, many of our colleagues welcomed the novels as the legislators provided the legal basis for another asset management tool for individuals, which many have already dubbed "Russian trusts" and whose analogue is well known and widely used in many countries, including by wealthy Russians for management of their foreign assets. On the other hand, the possibility of creating instruments very similar to trusts has existed in Russian legislation for quite some time, and the new provisions of the Civil Code (hereinafter, the "Code") on personal funds raise many questions, criticism and doubts about the advantages of personal funds in comparison with existing and in many ways similar asset management tools (property trust management agreement (TMA) and closed mutual fund (ZPIF)). The purpose of this article is to identify some issues of legislative regulation of TMA and personal funds using the similarities of trust relations with relations arising under TMA and personal funds and to suggest possible solutions

to these problems considering the experience of the United States and Canada.

We chose these two jurisdictions[1] because, although the legal systems of both countries are traditionally considered as a part of the so-called common law system (where judicial precedent is one of the sources of law along with the codified legislation), the civil law of Quebec is based on the Civil Code of this province which brings Quebec closer to the system of continental law, where the codified legislation is recognized as primary source of law, while the State of New York in particular and the United States at large remain classic representatives of the common law system. Codified fairly recently, in 1991, in the Civil Code of the Quebec Province (hereinafter, the Quebec Code), the key rules on trusts have largely developed under the influence of case law.

In order to proceed to the discussion of some issues of the Russian legislation on personal funds, we consider it necessary to point out some similarities and differences between trusts and personal funds, as well as some similarities and differences between personal funds and existing instruments known to Russian law and already mentioned above (TMA and ZPIF). If similarities exist between trusts, on the one hand, and personal funds and TMA, on the other hand, it is logical to conclude that the similarity of legal relations implies that similar approaches may be used to regulating such relations, so the experience of the United States and Canada may be useful in further work with personal funds and other similar instruments in Russia.

II. Comparison of Trusts with Personal Funds

Trusts and Funds. First, it should be noted that the trusts and personal funds are created with the same purpose: the transfer by the settlor of a trust property to another person (trustee or personal fund) to be managed in the interests of the beneficiary in accordance with

[1] Strictly speaking, the United States and Canada cannot be regarded as uniform jurisdictions in relation to trusts, since the regulation of trusts is carried out at the level of individual states and provinces, not at the federal level.

the terms and conditions set forth the settlor (founder).[2] The settlor of the trust (founder of the personal fund) can be the beneficiary of such the trust (personal fund) during his or her lifetime, as well as any other person or a class of persons may be the beneficiary pursuant to settlor's decision. Second, the settlor of the trust and the founder of personal fund transfers title (right of ownership to the property) to the trustee or the fund, and although the trustee or the fund acquires legal title to the property, they owe an obligation to transfer the results of the management of the property to the beneficiaries. In fact, creation of a trust or fund results is a serious limitation on the powers of the new owner of the property, who fully retains only the right to own such property, while the power to use and the power to dispose the property are significantly limited by the terms of management of the trust or fund, and the power to receive fruits or results in general belongs to the beneficiaries. While the sole manager of personal fund (trustee) can be one of the beneficiaries of the fund or trust, such sole manager cannot be the only beneficiary of the trust or fund. Third, the main participants in legal relations arising from the creation of a trust or personal fund are absolutely the same: the founders (settlors), property managers (trustees or the funds themselves) and beneficiaries. Fourth, the means or ways of regulating the relations that arise upon formation of a trust or personal fund, as well as the respective roles of the main participants. A key role belongs to the settlor or the founder who sets up the trust or fund and provides for the rules to govern them. At the same time, the relations between the founder, on the one hand, and the trustee or managers of the fund, on the other hand, can also be regulated by a contract concluded between them and covering a range of issues not reflected in the rules governing the trust (for example, the amount and procedure for paying the trustee's remuneration, limitation of the trustee's liability to the beneficiaries, *etc.*). If the

[2] Worth noting that trust formation in the US and Canada is usually a part of the so-called estate planning, where the trusts serve as an instrument for avoidance of high taxation on property and inheritance, management of assets to the benefit of the settlor or third parties and protection of assets from creditors. Since there is no inheritance tax in Russia, the creation of personal funds may serve the last two purposes.

arrangements between the settlor and trustee may be stipulated in a contract, which gives the trustee the opportunity to take advance its interests and protect its when concluding it, the beneficiary is usually deprived of the opportunity to participate in the formation of the terms and conditions for the operations of a trust or personal fund, and left with a somewhat passive role in relations with the trustee or personal fund, since the beneficiary has no contractual grounds to participate in the trust's operations and activities or influence the trustee's decision-making related to the activities of the trust or fund. Participation of the beneficiary in the work of a personal fund depends on the will of the founder, who has the right, as one extreme, to fully classify the work of the personal fund from the beneficiaries (who still have the right to receive certain information about the work of the fund under Russian statutory law), or, as the other extreme, to introduce beneficiaries into the supervisory board of the fund, even giving them the authority to approve certain transactions of the fund or make decisions on key issues of fund's activities.[3] Even if the founder of the fund decides not to involve the beneficiaries in the activities of the fund and make it as difficult as possible for them to obtain information about fund's activities, the beneficiaries are not entirely deprived of the opportunity to defend their rights under statutory law. Fifth, even though it is premature to classify Russian personal funds under any criteria, it appears that Russian legislation lays down the prerequisites that, as this instrument of personal asset management develops in Russia, the same types of personal funds will emerge in Russia as the types of trusts known in the US and Canada.

Personal (living) and testamentary. Already, Russian legislation distinguishes between testamentary and living funds, depending on when such funds are created, after the death or during the life of the founder. This distinction dictates significant differences in the creation, functioning and termination of the activities of testamentary funds, which are provided for by Russian legislation (for example, a ban on the

[3] The Civil Code of Russia 1994 (clause 2 of part 3 of Article 123.20-7). Available at: https://internet.garant.ru/#/document/10164072/paragraph/52183716 3:3 [Accessed 19.08.2022].

reorganization of the testamentary fund[4] or the procedure for replacing members of collegial management bodies of testamentary funds.[5] In turn, the trusts are also divided into inter-vivos or living trusts and testamentary trusts (the trusts created pursuant to a will after the death of the settlor).

The Russian legislation provides that a personal fund after the death of its founder can continue its work as a testamentary fund.[6] This kind of trusts are called "pour-over" trusts in the US (literally "iridescent trust", since the property of a living trust in this case shimmers or flows into testamentary trust).

Revocable and irrevocable. In the US, a trust is irrevocable if its founder does not have the right to terminate its activities or change the terms and conditions of its operations. All testamentary trusts are naturally irrevocable. Individual states take two different approaches to whether a trust is revocable or irrevocable. In most jurisdictions, a living trust is irrevocable unless the settlor specifically and unequivocally reserved its right to change the terms and conditions of the trust at the time of its creation. Usually, irrevocable trust allows its settlor to reduce the overall tax burden on the settlor's assets. The Uniform Trust Code[7] and a minority of states take the opposite position — by default, a trust is considered revocable unless its documents specifically provide otherwise.[8]

The Code provides that the Charter of personal fund, the terms and conditions for managing the personal fund and other internal documents of such fund can be changed of modified by the founder

[4] The Civil Code of Russia 1994 (part 10 of Article 123.20-4).

[5] The Civil Code of Russia 1994 (part 4 of Article 123.20-8).

[6] The Civil Code of Russia 1994 (clause 2 of part 2 of Article 123.20-4).

[7] The Uniform Trust Code (or UTC) is not a legislative act, it is a model code developed by leading scholars and practitioners and recommended by them for adoption and implementation by the states. Legislators in each state decide whether to adopt such code in whole or in part or not to adopt at all. The State of New York, for example, has not adopted the UTC as its legislative act.

[8] The Uniform Trust Code 2003 (Section 602(a)) Available at: https://efaidnbmnnnibpcajpcglclefindmkaj/https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6bae0bb2-00ea-8080-d084-5be9ef7bbc66&forceDialog=0 [Accessed 19.08.2022].

during his/her life.[9] After the death of the founder, the Charter of the personal fund, the terms and conditions for managing the personal fund and other internal documents of such personal fund cannot be changed, except for the situation when the management of the fund on the previous terms becomes impossible due to circumstances that could not have been anticipated at the time of the fund's creation. During the life of the founder, it is also allowed to reorganize the personal fund through a merger, accession, division and separation, provided that as a result of such reorganization one or more personal funds created by the same founder are formed. And although the list of the exhaustive grounds for the liquidation of personal fund[10] does not include the liquidation by founder's decision (which would otherwise have made any personal fund revocable), it seems that providing the founder with the means to indirectly cause the liquidation of his/her fund is a matter of competent preparation of documents of the personal fund since the legislation provides the founder with broad powers to participate in the management of the fund (including participation in collegial management bodies of the fund, appointment and dismissal of the sole executive body of the fund, ability to change the terms and conditions of management of the fund, *etc.*). Thus, it can be argued that a personal fund created in accordance with the legislation of the Russian Federation meets the criteria of a *revocable trust*. Testamentary fund, as mentioned above, because of their nature, can only be irrevocable.

Other types. One of the features common to all trusts formed in the US and Canada is the recognition of the beneficiary's right to alienate and divide its interests in the trust as well as to bequest such interests or pass them through inheritance unless the terms of the trusts specifically provide otherwise. If the settlor limits such powers of beneficiaries in the trust documents and protects the rights of beneficiaries from the claims of their creditors, such trusts are commonly referred to as protective trusts. There are several types of protective trusts such as discretionary trusts, support trusts and spendthrift trusts).

[9] The Civil Code of Russia 1994 (clause 5 of part 8 of Article 123.20-4).

[10] The Civil Code of Russia 1994 (part 11 of Article 123.20-4).

Discretionary trusts. A typical feature of a discretionary trust is the delegation to the trustee of the power to make decisions on whether to make payments from the property of the trust to the beneficiary who needs such payments, as well as decisions on payments in excess of reasonable needs of the beneficiary (for example, for the purchase of items of luxury). Moreover, the documents of the trust can set the guidelines that the trustee must follow when exercising its discretion or provide the trustee with absolute discretion over its decisions. Anyway, the beneficiary has the right to appeal the decisions of the trustee, but the beneficiary bears the burden of proof that trustee abused its power of discretion in rendering respective decisions.

Support trusts. A distinctive feature of a support trust is the existence of the obligation on the part of trustee to make payments to the beneficiary if they are necessary to meet the needs of the beneficiary. Under the trust documents, the needs of the beneficiary may be limited to certain goals, for example — education or healthcare. If the beneficiary provides the manager with evidence of the existence of the need stipulated in the trust documents, the trustee shall make payments to the extent that the property of the trust affords.

Spendthrift trusts. A distinctive feature of a restrictive spendthrift trust is the protection of the beneficiary's funds from the claims of its creditors if these funds are held by the trustee. Thus, the funds of the trust distributable to the beneficiary are essentially inaccessible to the beneficiary's creditors if such funds are spent in the interests of the beneficiary by the trustee by transferring, for example, funds directly to a person who provides the beneficiary with relevant services or performs certain works for the beneficiary. Most of the states in the US would enforce the terms of trust prohibiting the transfer of the interests of beneficiaries to third parties and the foreclosure of the rights of the beneficiary to satisfy its obligations. At the same time, certain exceptions are established from this general rule. For example, for the payment of alimony or funds for the maintenance of the beneficiary's children.

The imperative provisions of the Russian legislation prohibiting the transfer of the rights of the beneficiary of the personal fund to other persons and the foreclosure on the interests of the beneficiary to

satisfy its obligations[11] make Russian personal funds look very much like protective trusts. Since these norms of the legislation are imperative and the founder cannot change or amend them to deprive the beneficiaries of their rights vested under statutory law, it can be concluded that at this stage of development of personal funds, the law does not allow the establishment of funds where the powers of beneficiaries can be alienated, divided or passed to their heirs or assignees.

Here we note that such prohibition creates the risk of transfer by the founder of a personal fund of all of his/her property to a personal fund and, by appointing himself or herself as the sole beneficiary of the fund (which is explicitly allowed by law,[12] in order to significantly complicate the recovery by creditors of property which is essentially used exclusively in the interests of such a beneficiary because such property is transferred and belongs to another person, that is the personal fund. Perhaps, in attempt to address such risk, the Russian legislator has introduced the rule on fund's liability for the debts of founder discussed below. In the U.S., such trusts (self-settled spendthrift trusts) cannot be used by the settlors to protect their assets, in other words — special provisions of such trusts, limiting the rights of creditors of the beneficiary, will not be enforced by the courts.[13]

In Russia, the rights of individual beneficiary (as opposed to beneficiaries that are legal entities) of the testamentary fund do not pass via inheritance.[14] In most jurisdictions in the United States, only those rights and interests of beneficiaries that are specifically limited by the terms of the trust by the life expectancy of the beneficiaries (the so-called life interest) cannot pass via inheritance.

Thus, the unity of the goals of trusts and personal funds (as well as TMA), the same key players with almost identical functions, a very

[11] The Civil Code of Russia 1994 (clause 2 of part 1 of Article 123.20-6).

[12] The Civil Code of Russia 1994 (part 4 of Article 123.20-5).

[13] The Uniform Trust Code 2003 (Section 505(a)), *also* Restatement of the Law, second, trusts 2d, as adopted and promulgated by the American Law Institute at Washington, D.C., 1957 (§ 156); Restatement of the Law, third, trusts 3d, as adopted and promulgated by the American Law Institute at Washington, D.C., 2003 (§ 58(2) and comment "e").

[14] The Civil Code of Russia 1994 (part 2 of Article 123.20-6).

much alike ways of regulating relations among such players, together with similarity of distinctive features typical for certain kinds of trusts and funds, predetermine similarity of the key interests of main players of the trusts and personal funds. The similarity of key interests allows us to assume that personal funds will face the same issues, difficulties, challenges, and contradictions that trusts have faced and resolved, and therefore the relevant experience accumulated in the US and Canada should be of considerable interest to Russian lawyers.

III. Comparison of Trusts and Personal Funds with ZPIF

It appears that, currently, ZPIF is the most common instrument of asset management in the Russian market. TMA as another instrument of asset management (and not just a contract concluded between the management company of ZPIF and its founder(s)) is also used in practice, although not so often. The main similarity of all three instruments is the possibility of implementing the key idea of the trust — transferring the founder's property to a manager in the interests of the founder or third parties. Such similarity predetermines the inevitable comparison of these instruments in order to select the most optimal of them for a specific task that property owners set for themselves. Let us briefly dwell on the comparison of personal funds with these alternative tools to try to assess the prospect of personal funds in competition with them.

It appears that the following differences will play an important role in choosing between the personal fund and ZPIF:

1. ZPIF is not a legal entity,[15] while a personal fund is a unitary non-profit organization, an independent legal entity.[16] Although the rationale for establishment of personal funds as unitary non-profit organization in general and in the form of a fund in particular has been rightfully questioned by Alexandra Yu. Fokina and Svetlana A. Ivanova and (Fokina, Ivanova, 2022, pp. 90–91), it appears that the key consequence of this difference is that the income received from the management of

[15] Federal Law No. 156-FZ of November 29, 2001 "On Investment Funds" (clause 2 of part 1 of Article 10). Available at: https://internet.garant.ru/#/document/12124999/paragraph/137106:4 [Accessed 19.08.2022].

[16] The Civil Code of Russia (part 1 of Article 123.20-4).

the property transferred to ZPIF is not subject to taxation at the level of ZPIF and its shareholders shall pay tax on their personal income only upon redemption of their ZPIF shares in whole or in part or receipt of distributions from ZPIF, while the personal fund will have to pay corporate profit tax and the beneficiaries will pay personal income tax on the distributions made by the fund. Apparently, ZPIF has a rather serious advantage due to its legal status. While it is necessary to note that the beneficiaries of the fund may receive payments from the fund during their life, the ability to receive such payments depends on the founder of the fund and the terms of management of the fund. The shareholders of ZPIF forfeit any distributions once they sell or redeem their shares.

2. By its nature, ZPIF is not an instrument designed by the legislator to provide for management of someone's property in the interests of third-party beneficiaries. ZPIF is an investment fund and is regulated as such. Beneficiaries of ZPIF are the owners of the shares of ZPIF. Therefore, it can be argued that the legal nature of interests of key players of ZPIF, and their respective powers and means to advance their interests differ significantly from the interests of beneficiaries of personal fund. The key participants in legal relations arising from the creation of ZPIF are its founders (shareholders) and a management company acting under a TMA. Since ZPIF is not a legal entity capable of holding title to property, the property of ZPIF remains to be the property of shareholders of ZPIF during the entire period of existence of ZPIF. Upon dissolution of ZPIF, its shareholders cannot regain title to the property contributed to ZPIF, such property must be sold by ZPIF. Also, the rules of ZPIF are established by the managing company, not the shareholders of ZPIF. A share of ZPIF is a registered security certifying its owner's divided interest in the property contributed to ZPIF and managed by the management company.[17] The interest of beneficiary of the personal fund is not of an equitable nature — the beneficiary's rights arise from fiduciary obligations of the trustee and are based on the terms and conditions of management of the fund, which are established by the founder of the personal fund. To receive a share of

[17] Federal Law No. 156-FZ On Investment Funds (part 1 of Article 14).

ZPIF, its founder or shareholder must contribute property to a separate property complex, which is ZPIF, or provide some other consideration for the right to own such a share, which defines the equitable nature of shareholder's interest in ZPIF. To become a beneficiary of a personal fund, one only needs to be so named by the founder of personal fund. For these reasons, the investment like design of ZPIF may not allow to fully realize the opportunities provided to the founder of personal fund in terms of flexibility in the distribution of payments among beneficiaries, determining the composition of beneficiaries, the conditions for making payments. It should probably also be noted that Russian law prohibits transferring a property with attached security interest to ZPIF,[18] while there is no such a restriction in respect of property transferred to a personal fund. Perhaps, ZPIF was utilized as a quasi-trust in the past because Russian statutory law did not provide for creation of personal funds and TMA could not manage monetary funds and securities.

3. Each share of ZPIF provides its owner the same rights and privileges as any other share of ZPIF owned by another person. The shareholders of ZPIF enjoy the same rights as other shareholders pro rata to their respective stocks,[19] while the correlation of interests of beneficiaries of personal fund is determined by the founder of the fund at his/her absolute and sole discretion (in other words, the beneficiaries may have different sets of claims towards personal fund) and can be changed by the founder at any time.

4. Like any security, a share can be transferred by its owner to any third party, and, in the event of the death of the owner of the share, it goes into the estate of the deceased and inherited under law or will. The shares limited in circulation give their owners the right to demand the allotment of property attributable to such upon redemption of the share.[20] The shareholder of ZPIF is not protected from the claims of its creditors and cannot protect the property contributed to ZPIF from the claims of such shareholder's creditors (as the property of ZPIF is common property of all shareholders). The shareholder is free to

[18] Federal Law No. 156-FZ On Investment Funds (part 3 of Article 13).

[19] Federal Law No. 156-FZ On Investment Funds (clauses 7 and 8 of part 1 of Article 14).

[20] Federal Law No. 156-FZ On Investment Funds (clause 6 of part 1 of Article 14).

alienate, divide and bequest its shares to any third person without founder's consent. Beneficiaries of personal fund do not have such flexibility in respect of their interests in the fund.

5. The current Russian legislation and the Central Bank of the Russian Federation, as the regulator of investment funds, impose several requirements on the composition and structure of the assets of ZPIF.[21] The founder of the personal fund has the right to transfer to the fund any property. The only requirement to the contribution of a founder of personal fund is that the value of the property transferred to the fund may not be less than one hundred million Russian rubles or approximately $ 1,2 million.[22] In case of liquidation of ZPIF, its property or proceeds of the sale thereof can be distributed only among the shareholders, while in the liquidation of the personal fund, its property can be transferred to any person in accordance with the terms and conditions of management approved by the founder of the fund.

6. Shareholders of ZPIF have the statutory right to participate in the management of ZPIF by participating in general shareholder meetings.[23] The founder of personal fund may include all or some of the beneficiaries on the supervisory board of the personal fund (such conclusion follows from the prohibition to the beneficiaries to participate in the work of the executive bodies of the personal fund)[24] or may not vest any managerial right in the beneficiaries. The founder of personal fund has an option to make the information on the fund and the terms and conditions of its operation unavailable to the beneficiaries.[25]

From the above differences between ZPIF and personal funds, the following conclusion can be drawn: since ZPIF is not a legal entity and not taxed at the corporate level, its use as an alternative to a personal fund makes sense only in one case — the coincidence of the founder and the sole shareholder (in fact — the beneficiary) in one person (naturally, such founder and shareholder also controls the management company) when the founder ZPIF does not intend to (1) distribute the income from

[21] Federal Law No. 156-FZ On Investment Funds (Articles 33 and 34).
[22] The Civil Code of Russia 1994 (clause 2 of part 4 of Article 123.20-4).
[23] Federal Law No. 156-FZ On Investment Funds (Article 18).
[24] The Civil Code of Russia 1994 (clause 2 of part 2 of Article 123.20-7).
[25] The Civil Code of Russia 1994 (clause 4 of part 8 of Article 123.20-4).

the management of property among multiple beneficiaries; (2) maintain flexibility of redistribution of proceeds from the management of property amount various beneficiaries, (3) have an option of replacing beneficiaries at any time, and (4) protect the property itself and the income from its use from possible claims of creditors. As noted above, courts in the United States usually refuse to enforce self-settled spendthrift trusts, so if the courts in Russia adopt the same approach, then ZPIF as an instrument of management of sole founder's (or several founders') assets exclusively for the benefit of such founder(s) will remain attractive. But such limited use of ZPIF cannot be viewed as a real alternative to opportunities afforded by personal funds and TMA.

IV. Comparison of Trusts and Personal Funds with TMA

Under TMA,[26] one party (aka a founder) transfers the property to the other party (aka a manager of the property) for a certain period, and the manager undertakes to manage such property in the interests of the founder, or any other person(s) (or beneficiary(-ies)) specified by the founder. Once TMA is concluded, it appears that commercial and legal relations that are very similar to those of personal fund arise. In both cases, we have the management of one's property by another person for the benefit of others, non-equitable nature of beneficiaries' interests, and the same key actors (founder, manager, and beneficiaries). The parties to TMA (usually, the founder and manager) are free to set forth practically any contractual terms and conditions to govern their contract, including the terms and conditions of payments to beneficiaries. The Code specifically provides[27] that foreclosure on the property transferred under TMA is not allowed, unless the founder becomes insolvent and goes into bankruptcy, thus affording to the founder's property similar protection against claims of creditors. Currently, the legislation does not provide for any restrictions on the disposal by beneficiaries of their rights and powers arising under TMA.

[26] The Civil Code of Russia 1994 (part 1 of Article 1012).

[27] The Civil Code of Russia 1994 (part 2 of Article 1018).

At the same time, unlike with the personal fund, the income received by the manager from the management of the founder's property is only taxed as personal income of beneficiaries (so no two-layer taxation is applied to TMA), which makes the tax regime of the TMA like ZPIF. Unlike personal funds, TMA does not provide any statutory protection against creditors' claims to beneficiaries.

Interestingly enough, comparing legal relations arising under TMA with the legal relations arising upon creation of personal funds, one can find a lot of similarities, and, considering that the Russian legislation does not limit the powers of beneficiary to alienate or divide its interests arising under TMA and provide any protection of such interests against the creditors, it can be concluded that TMA de facto creates an instrument of management of founder's property practically indistinguishable from a revocable non-protective living trust. Such TMA may be even structured as irrevocable because, even though the Civil Code provides that TMA may be terminated by either party before the expiration of the term of contract, the statute[28] gives the TMA parties an option to agree on a rather lengthy notice period, short of the period for which the TMA is concluded. Since the current Russian legislation practically does not regulate the content of TMA (most of the provisions of the Code relating to the content of TMA are of dispositive nature and can be changed by contract), the terms and conditions of TMA can be structured similarly to trusts.

Sergey Alimirzoev and Ilia Aleshchev expressed the opinion that TMA is not an analogue of English law trust only because Russian law does not recognize the concept of equitable vs. beneficial ownership and the title to managed assets under TMA does not pass to the manager but remains with the founder (Alimirzoev and Aleshchev, 2021). In the United States, when a trust is created, the legal title to the property placed in the trust passes from the settlor to the trustee. Russian law specifically provides[29] that the transfer of property under TMA from the founder to manager does not entail the transfer of title from one to another. This difference, however, does not significantly affect the

[28] The Civil Code of Russia 1994 (part 2 of Article 1024).

[29] The Civil Code of Russia 1994 (clause 2 of part 1 of Article 1012).

relations among key actors of trust and TMA. With or without the transfer of legal title, the powers of title holder are similarly limited under TMA and trust arrangements. Under TMA, the title stays with the founder but, for the entire term of TMA, the founder is essentially deprived of such powers as the right of possession, right of disposal and right to fruits and benefits (if the beneficiary of TMA is not the founder). Additionally, the manager of TMA has the right to demand the property from anybody's illegal possession, including the possession of the founder, the legal title holder to the property.[30] If the split of equitable and beneficial ownership essentially means that some of the powers of title holder are transferred to another person while the benefits from the use of property remain with the transferor (or assigned to another beneficiary) then TMA perfectly serves such purpose which makes it almost indistinguishable from a revocable trust. Upon establishment of revocable trust, the settlor transfers the trust property to the trustee but reserves the right to terminate the trust and regain title to the trust property at any time, and upon formation of TMA its founder reserves the right of termination of the contract, thus regaining all powers of the title holder of the property, so from practical standpoint it is not essential who holds legal title to the property at any given point of time as the powers of title holder are split between the settlor and trustee for the entire duration of TMA or revocable trust. Moreover, with introduction of personal funds to the Russian legal system whereby the title to property is transferred from the founder to the fund, the distinctions between trust and trust management in the form of personal fund tend to be further erased.

In fact, the trusts and TMA are similar in the ways they are created and in terms of conditions[31] that must be met for them to be created:

1. The settlor of trust must have *the intention to create a trust* (i.e., to establish certain relations with the trustee in connection with management of property in the interest of beneficiaries). The conclusion of TMA between the founder and manager satisfies this condition —

[30] The Civil Code of Russia 1994 (part 3 of Article 1020).

[31] The Uniform Trust Code (Section 402).

by signing the contract, the founder expresses his/her intention to hire the services of the manager with respect to specific property.

2. To create a trust, the parties must comply with the necessary *formalities*. Chapter 53 of the Civil Code of the Russian Federation imposes several requirements as to the form and substance of TMA, its state registration (if the object of the TMA is real estate), the activities of the manager, the parties to the contract, *etc*. If all the requirements of the Civil Code of the Russian Federation are satisfied, then the TMA becomes binding and enforceable. When TMA is formed under Russian law, there is no formation of a new legal entity, just as there is no formation of a new entity when a trust is established in the US or Canada.

3. The trust must have *property (the so-called Res*). One of the essential conditions of TMA[32] is the determination of the composition of the property transferred to the manager.

4. *Existence of beneficiaries* that can be established (ascertainable beneficiaries). The name of the legal entity or the name of the individual in whose interests the property is managed for must be indicated in the TMA.[33]

Based on the foregoing, it is reasonable to conclude that the formation of TMA under Russian law creates legal relations that are very close in essence to legal relations arising from the creation of trusts that do not pursue the goal of protecting trust property or the rights of beneficiaries. Thus, a TMA can essentially perform the same role as non-protective trusts in the U.S. or Canada.

At the same time, the following differences between TMA and trusts can be pointed out (although we think that these differences are more of a technical nature as they do not impact the essence of relations among parties):

1. Russian law imposes a limitation as to who can serve as a manager of TMA — only individual entrepreneurs or commercial organizations can serve as managers of TMA.[34] Any person capable of holding title to the property of the trust can be a trustee.

[32] The Civil Code of Russia 1994 (clause 2 of part 1 of Article 1016).

[33] The Civil Code of Russia 1994 (part 3 of Article 1016).

[34] The Civil Code of Russia 1994 (Article 1015).

2. Russian law provides that money cannot be an independent object of the TMA, unless otherwise is specifically provided for by law.[35] For example, Federal Law No. 395-1 of December 2, 1990 "On Banks and Banking Activities" and Federal Law No. 39-FZ of April 22, 1996 "On the Securities Market" granted credit institutions and professional participants of the securities market the right to manage monetary funds under an agreement with individuals and legal entities. Such restrictions are not known to trusts in the United States or Canada. In the aftermath of the era of financial pyramids and money lost by investors with bad faith real estate developers, the intent of the Russian legislator to introduce such restrictions is understandable, but such restrictions are likely to hold off the development of TMA.

3. The term of the TMA is limited by Russian law to 5 years, while the term of trust is only limited by the rule against perpetuity. Noteworthy, the parties to TMA can enter into a new 5-year TMA upon expiration of the original 5-year term agreement.

4. The death, bankruptcy or liquidation of the manager or beneficiary of the TMA may result in termination of the TMA.[36] In the United States and Canada, such circumstances do not entail the termination of the trust if the trust instruments allow to establish a new beneficiary or appoint a new trustee.

5. Russian legislation does not provide neither for the termination of the TMA in the event of the death of its founder, nor for the transformation of the TMA into a testamentary fund, if the TMA is concluded in favor of the beneficiary who survived the founder. In the event of the death of the founder of the TMA, the contract is binding on the estate of the deceased until its expiration or early termination by the manager. In this article, we do not consider a special type of TMA provided for in Article 1173 of the Code (management of estate of deceased arising by operation of law).

[35] The Civil Code of Russia 1994 (part 2 of Article 1013).

[36] The Civil Code of Russia 1994 (part 1 of Article 1024).

V. Some Legal Issues Related to Regulation of Personal Funds and TMA and Possible Ways to Address Them

Starting from spring of 2022, three asset management instruments are available in Russia, in many respects very similar to trusts: TMA (an analogue of non-protective living trust), personal funds (an analogue of revocable protective living trust) and ZPIF (a special case of non-protective living trust). Despite the similarities among these instruments, there are significant differences among them, which will hinder the use and further development of these undoubtedly important asset management tools.

1. Significant differences in the creation, the legal status, the governance and taxation. Personal funds are created by a written decision of their founders, certified by a notary. The founder shall also approve the Charter of the fund and its Terms of management. The decision on the establishment of the fund and its Charter shall be submitted to the territorial office of the Ministry of Justice of Russia for the state registration of the fund as a legal entity. The Ministry of Justice sends documents to the Tax Service of Russia for the introduction of the fund into the Unified State Register of Legal Entities as a taxpayer. After entering the fund into the Unified State Register of Legal Entities, the Ministry of Justice issues a certificate of state registration to the fund, after which the founder can transfer to the fund the property necessary for its work, and the fund can open a bank account and start its activities. We remind you that the value of the property transferred to the fund cannot be less than 100 million rubles. The profit made by the fund is subject to corporate profit tax and the income distributed to beneficiaries of the fund is subject to their respective income tax. After the creation of the fund, changes to the Charter of the fund are subject to registration with the Ministry of Justice. Compare these procedure and requirements with the creation of a TMA by concluding a respective contract in a simple written form between the founder and the manager and transferring the property to the manager. TMA does not create a new legal entity, the profit generated by the manager is taxed only at the beneficiaries' level upon distribution of such profit, and the manager pays tax on the remuneration that he receives for the management of

the property. The property of the founder is separated on the balance sheet of the manager, independent accounting is maintained on it. We remind, however, that money cannot be the object of TMA. The performance of the parties to the TMA is not regulated by any public authority. Finally, for the formation of ZPIF, its manager first agrees on the rules for managing ZPIF with a specialized depository (which will maintain the list of shareholders of ZPIF and through which payments are made to beneficiaries), then registers such rules with the Central Bank of the Russian Federation, and the Central Bank of Russia includes information about the new ZPIF into the Register of Mutual Funds. After the inclusion of ZPIF in such a register, the property of the fund is formed (by transfer by shareholders of their property to ZPIF), and the management company proceeds to manage the fund. The Central Bank of the Russian Federation, as a regulator of the activities of investment funds, imposes several requirements on the composition and structure of the assets of ZPIF. ZPIF is not a legal entity, the profit from its operations is taxed only at the level of shareholders (i.e., the beneficiaries), and the manager pays tax on the remuneration that he receives for the management of the property. In this regard, transactions with the property of ZPIF are carried out by the management company. The management company is required by law to enter into a TMA with each shareholder of ZPIF, but the terms and conditions of such TMA are non-negotiable (the so-called "accession agreement").

Taking into account the position of the Federal Tax Service of Russia, detailed in the Letter No. BV-4-7/3060@ of March 10, 2021 "On the practice of applying Article 54.1 of the Tax Code of the Russian Federation," that the tax authorities consider it possible to exercise their right to change the legal qualification of transactions made by the taxpayer, if the main purpose of the transaction was to reduce its tax liability, it is especially important when deciding on the use of TMA or ZPIF to develop a reasoned position on what purpose is the main one when choosing a particular tool to minimize the risk of requalification of TMA or ZPIF into personal fund (the so called "constructive trust" in the United States and Canada).

Given the earlier conclusion that ZPIF is a rather inconvenient instrument of property management and can be effectively used under

limited circumstances, the person desiring to preserve certain flexibility in managing its property via analog of a living trust in favor of multiple beneficiaries can chose between a personal fund and TMA. Since both instruments can provide the founder with the desired flexibility, the choice in favor of the TMA can be due to the simplicity of its creation, the absence of a requirement for the value of the property transferred to management, and single layer taxation. In favor of the personal fund may be due to the possibility to transform personal fund into a testamentary fund after the death of the founder (to avoid disputes among heirs) and the absence of a ban on the transfer of money to the personal fund.

2. Lack of clarity on trustee's liability to beneficiaries. Fiduciary duty of a trustee to beneficiaries forms the core of trust relations in USA and Canada. The legislation in these countries regard the fiduciary duty as the highest set of obligations that one can owe to another in connection with management of property. In its simplest terms, it means that the fiduciary owes to the beneficiary the highest degree of care and devotion. The fiduciary must always act in the best interests of the beneficiary and can never take any action which harms the beneficiary intentionally and must avoid negligently harming the interests of the beneficiary as well. It also means that the fiduciary cannot place him or herself in a position in which the interests of the fiduciary conflict with the duty to the beneficiary. Full disclosure of any potential conflict of interest must be revealed to the beneficiary if they arise. The responsibility of the parent to the child, the spouses — to each other are classic examples of the standards of fiduciary responsibility. The classification of the relationship between the trustee and the beneficiary of the trust as a fiduciary relationship (because the manager accepts a duty based on the management of property that would not belong to the manager if the trust had not been established) refers to the standard imposed by legal systems in US and Canada on the actions of the trustee. Explaining the meaning of fiduciary liability, the following obligations of the trustee to the beneficiary are usually distinguished: (1) the obligation to manage the property with such a degree of care and diligence and in such a way as is done with respect to one's own property

(so called "duty of care and skill"), while in some US jurisdictions the standard for this obligation of the trustee is even higher — "...as is done with the property of other persons," as one should demonstrate even greater care and discretion in the management of the property of others;[37] some other important obligations of trustee are usually mentioned in this regard, such as the obligation to act in accordance with instructions of the settlor or in the best interests of beneficiaries, the obligation not to comingle the trust property with the personal property of trustee and the obligation to maintain full records on transactions with trust property;[38] (2) the duty to prudently invest,[39] and diversify such investments; (3) the obligation of unconditional loyalty (duty of undivided loyalty),[40] which is generally understood as the impossibility for the trustee to pursue any personal interests in the management of the property of the trust (therefore, transactions with the property of the trust in relation to trustee personally are considered a violation of this obligation without any conditions, a breach *per se,* even if the transaction is concluded on market terms), and it is worth noting that the obligation of unconditional loyalty applies to any relationship between the manager and the beneficiary, not only to their relationship that exists within the framework of the trust; (4) the obligation to act impartially, that is, taking into account the interests of all beneficiaries, without giving preference to the interests of some of them to the detriment of the interests of others (the duty of impartiality);[41] and (5) the duty to protect confidential information (or duty of confidentiality).

With respect to the manager's duties and responsibility to the beneficiaries, the Russian legislation is not sufficiently developed, and lacks consistency when it comes to regulating this matter in the context

[37] See, for example, General Obligations Law of the State of New York (clause 1 of § 5-1505) Available at: https://www.nysenate.gov/legislation/laws/GOB [Accessed 19.08.2022], which provides for the highest standard of liability of fiduciary: the standard of a prudent person dealing with property of another.

[38] General Obligations Law of the State of New York (clause 2 of § 5-1505).

[39] Powers and Trusts Law of New York (Article 11). Available at: https://www.nysenate.gov/legislation/laws/EPT [Accessed 19.08.2022], incorporating § 1 of the Uniform Prudent Investor Act.

[40] Powers and Trusts Law of New York (§ 13-A-4.1).

[41] Restatement (Third) on Trusts §§ 239(a), 232, general comment (c).

of different instruments. In general, it can be argued that it does not properly protect the interests the beneficiaries.

Personal funds. The legislation on personal funds contains the following provisions on the obligations of the fund and its management bodies to beneficiaries: "in case of violation of the terms and conditions for the management of personal fund, which entailed the occurrence of losses of the beneficiary of the personal fund, the latter has the right to demand compensation of such losses, if such a right is provided for by the Charter of the personal fund."[42] Please note that beneficiaries can seek damages from the fund itself, not from the management bodies of the fund, while the fund itself, as a legal entity, can suffer losses from the actions of its management. With respect to the responsibility of the single executive body of the fund, the Civil Code of Russia requires such body to act "in good faith or reasonably in the interests of *the fund and (or) its beneficiaries."*[43] It is unclear from this norm in whose interests shall the executive body of the fund act? What if the interests of fund and the interests of beneficiaries do not coincide? If the executive bodies of the fund breach this duty, the fund's supervisory body may terminate the powers of the relevant executive body. Does it mean that the executive body of the fund is not liable to the fund and its beneficiaries for the caused damages?

Federal Law No. 7-FZ of January 12, 1996 "On Non-Profit Organizations" (which should be applicable to the personal funds as they are regarded as non-profit entities under Russian law) provides for the obligation of all interested persons (which include the management bodies of personal fund and some officials of the fund) to observe the interests of a non-profit organization (that is, a personal fund) primarily with regard to the purposes of its activities, and not to allow the use of the capabilities of a non-profit organization for other purposes.[44] For transactions that result in a conflict of interests, a special procedure for their conclusion is provided by law (they must be approved by authorized

[42] The Civil Code of Russia 1994 (part 5 of Article 123.20-6).

[43] The Civil Code of Russia 1994 (part 2 of Article 123.20-7).

[44] Federal Law No. 7-FZ of January 12, 1996 "On Non-Profit Organizations" (Article 27). Available at: https://internet.garant.ru/#/document/10105879/paragraph/727257/doclist/431/showentries/0/highlight/7-Ф3:6 [Accessed 19.08.2022].

management body or supervisory authority of the fund). The interested person shall be liable to the personal fund in the amount of the losses caused by the conclusion of the transaction in violation of such an order.

It seems proper to suggest for the management bodies of the fund and some of its officers to be liable to the fund and to its beneficiaries not only for a failure to act in the fund's best interests but also for the breach of the Terms of management of the fund. To achieve it, certain amendments to the provisions of the Civil Code shall be introduced.

With respect to responsibility of managers of ZPIF and TMA, it should be noted that provisions of the Civil Code only would be applicable to the manager of TMA, while the provisions of the Civil Code and the Law on Investment Funds would apply to the managers of ZPIF.

TMA. Due care of the interests of the beneficiary is the responsibility of the manager of TMA.[45] The meaning of "due care" or criteria for determining if one is acting with "due care" have not been yet developed by legislators or courts. In case of violation of such an obligation by the manager, he is liable to the beneficiary in the amount of lost profits of the beneficiary for the entire time of the TMA, and to the founder — in the amount of losses arising from the loss or damage to property and lost profits. It appears, however, that the manager of TMA does not owe to beneficiaries or the founder of TMA any other duties other than the duty of care which meaning is yet to be determined. Although such gap can be fixed by including corresponding provisions in the TMA on the duties of the manager, the meaning of such duties and consequences of their breaches, such individual regulation of matters of manager's responsibilities and corresponding liabilities does not address the difference in the regulation of responsibility of the managers of TMA and personal funds to beneficiaries, especially considering that the beneficiaries can be excluded from the discussion of the terms and conditions of the agreement between the sounder and manager.

Since the essence of the relations between the fund and its beneficiaries and between the manager of TMA and its beneficiaries are very much alike, it appears reasonable to suggest that criteria for assessment of performance of obligations of the manager and the fund

[45] The Civil Code of Russia 1994 (Article 1022).

should be the same and reflected in the law. Otherwise, it is hard to explain in rational terms why the personal fund or its executive bodies responsible for management of assets valued at 200 million Rubles (as an example) and the manager of TMA charged with an obligation to manage immovable property of the same value would owe to their beneficiaries different set of duties and not be liable to the same extent for breach their respective obligations.

ZPIF. The Law on Investment Funds provides for the liability of the management company to the shareholders of ZPIF in the amount of actual damages in case of losses resulting from violation of federal laws and rules of management of ZPIF.[46] This Law also provides for the obligation of the management company to act "reasonably and in good faith" while exercising its rights and performing its obligations.[47] The management company can be held liable for losses caused to its clients in connection with the conflict of interests on the part of the management company.[48] As noted above, the question of the responsibility of the management company of ZPIF to the sole shareholder does not usually arise since the management company is usually controlled by such sole shareholder.

Thus, the responsibility of a management company of ZPIF appears to be more comprehensive in comparison with the responsibility of personal funds and managers of TMA. However, the use of ZPIF for purposes for which trusts are created (management of property in the interests of third-party beneficiaries) is limited.

As an example, let us consider the main provisions of the Civil Code of the Quebec Province (the Quebec Civil Code) governing the obligations of trustees. Please note that statutory provisions applicable to trustees are designed for a much broader group of actors. Title 7 of Book 4 of the Quebec Civil Code governs the administration of property of others and Article 1278 of the Quebec Civil Code specifically provides that Chapter 7 shall be applicable to trustees. Thus, the Quebec legislation has the same requirements to all managers of property of

[46] Federal Law No. No. 156-FZ On Investment Funds (Article 16).

[47] Federal Law No. No. 156-FZ On Investment Funds (part 1 of Article 39).

[48] Federal Law No. No. 156-FZ On Investment Funds (part 1.1 of Article 39).

others, regardless of the grounds on which respective relations on management arise.

The Quebec Civil Code provides both the list of specific obligations of a trustee to a beneficiary and the standards for trustee's performance of such obligations, i.e., certain guidelines and criteria for trustee's actions.

Among the specific obligations of the trustee, there are: (1) the duty to inform beneficiaries without delay of any circumstances causing conflict of interests;[49] (2) the duty not to become a party to a contract affecting the property of the trust or acquire any right in the property of the trust or against beneficiaries of the trust;[50] (3) the duty not to mingle the property of the trust with own property of the trustee;[51] (4) the duty not to use the property of the trust or the information obtained by reason of the trust management to personal benefit of the trustee except with the consent of the beneficiary or unless it results from the law or the act constituting administration of property;[52] (5) the duty not to dispose gratuitously of the property entrusted to the trustee unless it is of the very nature of the trust management or the value disposed is very little and it is disposed in the interests of beneficiary;[53] (6) the duty not to renounce any right belonging to the beneficiary or forming part of the administered property (other than for valuable consideration);[54] (7) the duty to comply with the obligations imposed by law and the terms of the trust. Trustee has the right to sue and can be sued with respect to anything connected with the management of the trust, the trustee also may intervene in any action respecting the administered property.[55]

Also, the Quebec Civil Code provides that the trustee (1) is bound to act impartially if there are several beneficiaries of the trust, taking

[49] Civil Code of Quebec (Article 1311). Available at: https://www.legisquebec.gouv.qc.ca/en/document/cs/ccq-1991 [Accessed 19.08.2022].

[50] Civil Code of Quebec (Article 1312).

[51] Civil Code of Quebec (Article 1313).

[52] Civil Code of Quebec (Article 1314).

[53] Civil Code of Quebec (Article 1315).

[54] Civil Code of Quebec (Article 1315).

[55] Civil Code of Quebec (Article 1316).

into account their respective rights;[56] (2) shall act with prudence and diligence, honestly and faithfully in the best interest of beneficiary; (3) may not exercise its powers in its own interest or that of a third person or place itself in a position where its personal interest is in conflict with the obligations of trustee;[57] and (4) shall preserve the property and make its productive, increase the patrimony or secure its appropriation where the interest of the beneficiary or the purpose of the trust requires it.[58]

To address the above-mentioned gaps and inconsistences in regulation of liability of personal funds, TMA and ZPIF and their managers to the beneficiaries, the approach adopted in Quebec may be studied and implemented in Russia via establishing unified rules applicable to responsibility of managers to beneficiaries and codifying such rules in the Civil Code of Russia. Until then, the founder of personal fund can resolve the issues of the responsibility of the personal fund and its management bodies to the beneficiaries in the Terms and Conditions for the management of the personal fund and other internal documents of the fund. If the matter is not address by the founder, the default provision of the Civil Code of the Russian Federation[59] leaves beneficiaries with no remedy against the fund or its executive bodies for breach of the Terms and Conditions.

Similarly, the founder of the TMA should attempt to clarify the definition of "due care" owed by the manager of TMA to beneficiaries in the TMA and provide for other specific duties and corresponding liabilities of the manager.

At the same time, it is rather common for trustees in the US and Columbia to seek limitation of their liability to beneficiaries for performing their duties. Usually, issues related to the standards to be applied to the performance of the trustee's obligations, the exclusion of liability for negligence (limitation of liability for intentional violation is usually not enforceable), permission to the trustee to conclude some

[56] Civil Code of Quebec (Article 1317).

[57] Civil Code of Quebec (Article 1310).

[58] Civil Code of Quebec (Article 1306).

[59] The Civil Code of Russia 1991 (part 5 of Article 123.20-6).

transactions despite conflict of interests, and some other issues are subject to negotiations.

3. Responsibility of the founders for the obligations of personal funds. Since the settlors of trusts and founders of testamentary funds are not liable for the obligations of trusts and testamentary funds, respectively (mainly because the title to the property is transferred from the settlor or founder to trustee or the fund), much criticism has been addressed to the rule that, within 3 years from the date of creation of the personal fund, its founder bears subsidiary liability for the obligations of the personal fund in case of insufficiency of its property, and the personal fund, with the exception of the testamentary fund, bears subsidiary liability for obligations of the fonder, and the courts may further extend the term of such several liability to 5 years.[60] The explicit reservation that testamentary fund is not responsible for the obligations of its founder opens the possibility of interpreting this norm in a way that the founder bears subsidiary liability for the obligations of the testamentary fund with property remaining after his death and not transferred to the testamentary fund.

Considering that personal fund is a separate legal entity under Russian law, and, as a matter of general rule applicable to all unitary non-commercial entities, the fund should not be liable for obligations of its founder(s) (likewise, the founder(s) of the fund shall bear no liability for the obligations of the fund),[61] the above-mentioned exemption from the general rule for the personal funds does not make sense.

In New York, there is a rule that the founder of the trust shall have no advantages whatsoever in respect of the payments made by the trust in favor of such founder vis-à-vis the founder's actual creditors (i.e., the creditors who already have a claim against the founder) or future creditors (i.e., those who may have such claim in the future). This rule applies regardless of the time passed since the establishment of the trust. As the court of appeals stated in its decision in Vanderbilt Credit Corp. v. Chase Manhattan Bank[62] wherein a protective trust was

[60] The Civil Code of Russia 1991 (part 6 of Article 123.20-4).

[61] The Civil Code of Russia 1991 (part 1 of Article 123.18).

[62] Vanderbilt Credit Corp. v. Chase Manhattan Bank 100 AD 2nd 544 (2nd Dept. 1984).

established for the sole benefit of its settlor: "an attempt to use own property in such a way so creditors cannot foreclose on it contradicts public policy."

Perhaps the Russian legislators pursued the similar goal as described above, where the courts refuse to protect against creditors' claims the so-called self-settled spendthrift trusts (protection against abuse by the founder of its right to transfer all property to a personal fund while appointing himself or herself as the sole beneficiary of the personal fund). Oleg V. Gutnikov has expressed an opinion that such subsidiary liability of founders of personal funds would make the funds "trustworthy" in the eyes of other participants of the civil turnover (Gutnikov, 2022). Vera I. Soldatova thinks that the subsidiary liability is designed to protect the interests of creditors of the founder of personal fund and avoid bad faith behavior of the founder (Soldatova, 2021). Alesya V. Demkina shares such point of view (Demkina, 2021). However, assuming that this was exactly the intent of the legislator, a corresponding exception should be made to the general rule that founders and funds are not responsible for each other's obligations in a different way, namely to provide a specific exemption from the general rule only for the cases where the founder of personal fund is the sole beneficiary of such fund and it can be demonstrated that the founder of personal fund acted in bad faith.

Pursuant to today's wording of the statute, personal funds lose one of its key advantages, which is the protection of assets from the claims of founder's creditors and limitation of founder's liability for the obligations of the personal fund, for the terms of 3 to 5 years from the moment of establishment of the personal fund. The rule on the subsidiary liability of the founders for the obligations of the fund in conjunction with a very complex procedure for creating a fund, where the main role will be played by the Ministry of Justice, and the taxation of personal funds as legal entities can make this instrument of asset management unpopular in Russia.

4. Determination of the circle of beneficiaries. Any individual or legal entity can be a shareholder of ZPIF. The shareholders of ZPIF are its beneficiaries. Given that ZPIF was conceived by the

legislator rather than as an asset management instrument, but as an investment vehicle that can accumulate funds of small and medium-sized investors for placement in large assets, the legislation in fact does not make it possible to appoint beneficiaries in the ways usual for trusts.

Russian law as a material condition of the TMA calls "the name of a legal entity or the name of an individual in whose interests the property is managed."[63] That is, the Civil Code of the Russian Federation establishes a very strict rule in relation to those who can be the beneficiary of the TMA: their names must be specified in the TMA. Recall that the failure of the contracting parties to comply with the material conditions entails the recognition of the contract as not concluded.[64] Thus, since the Civil Code of the Russian Federation does not prohibit the founder from amending the TMA, and the founder may reserve the right to replace one, several or all of the beneficiaries after the conclusion of the TMA, when replacing or including new beneficiaries in the TMA, it is necessary to comply with the requirement of the Civil Code of the Russian Federation on a very specific indication of the names of beneficiaries.

In comparison with the rule applicable to TMA, the rules on who can be a beneficiary of a personal fund can be considered as flexible as possible. The Terms and Conditions of a personal fund may include provisions on the transfer to certain persons (beneficiaries of a personal fund) or to *certain categories of persons* from an indefinite circle of persons... all of the property of the fund or part of it...".[65] Moreover, the Terms and Conditions for the management of a personal fund may provide that the beneficiaries of the personal fund or certain categories of persons to whom the property of the personal fund is to be transferred shall be determined by the bodies of the personal fund in accordance with the Terms and Conditions for the management of the personal fund.[66] The only restriction on who cannot be a beneficiary of a personal fund is that it cannot be a commercial legal entity.[67]

[63] The Civil Code of Russia 1991 (part 1 of Article 1016).
[64] The Civil Code of Russia 1991 (part 1 of Article 432).
[65] The Civil Code of Russia (part 1 of Article 123.20-5).
[66] The Civil Code of Russia 1991 (part 2 of Article 123.20-5).
[67] The Civil Code of Russia 1991 (part 4 of Article 123.20-5).

The rules for determining beneficiaries of personal funds under Russian law resemble the rules of most states in the United States, according to which the founder must either identify a specific beneficiary (beneficiaries) or describe the beneficiary so that it can be unambiguously determined, and, if this condition is not met, then the trust is considered "failed" (a failed trust). Thus, the settlor of a trust does not have to specify the names of beneficiaries (although it can be certainly done) but must make sure that the trustee can unequivocally determine who the beneficiaries are. For example, it is permissible to indicate as beneficiaries of the trust a circle of persons, provided that such a circle of persons is described in a way that the beneficiaries can be uniquely defined (as an example: "all my nephews and nieces" or "my children" would be a proper indication of the circle of persons as beneficiaries, while "some of my brothers and sisters," "my friends"[68] or "my two grandchildren" are examples of improper assignment of a circle of persons as beneficiaries). Also, the settlor may give the trustee the power to decide who exactly from a *certain* group of persons to choose to receive the property of the fund (for example — "choose one or more recipients of a scholarship to study at the university from among my grandchildren"), while the founder can give the manager full freedom in making such a decision or establish certain criteria or rules for such a choice in the trust instrument. However, the founder cannot authorize the manager to determine the beneficiary at his sole discretion "from among those whom he deems worthy," for example.

Since it is not entirely clear yet what exactly the Russian legislator meant by "certain categories and persons from an indefinite circle of persons," perhaps we should adhere to the rule that with such a choice of beneficiaries, the founder should take care to avoid uncertainty about the question, whom the founder meant by such a "category of persons."

Admittedly, personal funds provide the founder with a much wider choice of options for the appointment of beneficiaries than TMA or ZPIF.

[68] See, for example, Clark v. Campbell, 133 A. 166 (N.H. 1926).

VI. Conclusion

Russian legislation and court practice will have to address several issues for personal funds to become a viable instrument of management of personal property, capable of playing the same role as trusts play in the United States or Canada. Since personal funds do not have clear and obvious advantages over TMA and ZPIF in terms of managing the assets of the founder, but look clearly less preferable from the point of view of taxation of the fund's profits and complexity of creation and administration of the fund, the absolute and unconditional protection of the property transferred to the fund from the claims of the founder's creditors and strict fiduciary obligations of the fund and its officers to the beneficiaries could become the main factors (along with the ability to convert the personal fund into a testamentary fund later and prevent the beneficiaries from participating in the management of personal and testamentary funds) for the founders' choice in favor of this instrument. The rich traditions and experience of regulating trusts in the United States and Canada (by means of legislation and administration of justice) can be used to advance the use of personal funds in Russia because of similarities between these two instruments.

References

1. Alimirzoev, S. and Aleshchev, I., (2021). Uncovering Russian Trust Management Agreements: not an alternative to Russian private foundations. *Trusts & Estates*, Vol. 27, Iss. 6, pp. 566–572, doi: 10.1093/tandt/ttab040.

2. Demkina, A.V., (2021). Personal Funds Within the Framework of the Reform of Inheritance Law in Russia. *Imuschestvennye otnosheniya v Rossiyskoy Federatsii* [Property Relationship in the Russian Federation], 12, pp. 63–74. Available at: https://internet.garant.ru/#/document/77163730/paragraph/1/doclist/2831/showentries/1/highlight/:20.

3. Fokina, A.Yu. and Ivanova, S.A., (2022). Personal Fund: problems of regulating. *Obrazovanie i pravo* [Education and Law], 3, pp. 89–92, doi: 10.24412/2076-1503-2022-3-89-92.

4. Gutnikov, O.V., (2022). Subsidiary liability in corporate legal relations: issues and prospective. *Zhurnal rossijskogo prava* [Journal of Russian Law], Vol. 26, No. 7, pp. 48–67, doi: 10.12737/jrl.2022.072.

5. Soldatova, V.I., (2021). Novels of Civil Legislation on Personal Funds. *Vestnik Universiteta imeni O.E. Kutafina (MGUA)* [Bulletin of the Kutafin Moscow State Law University (MSAL)], 11, pp. 87–93, doi: 10.17803/2311-5998.2021.87.11.087-093.

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Peculiarities of a Polygraph Examiner's Report in a Criminal Case in Russia and the United States

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Abstract: From a legal standpoint, the process of investigating crimes and the order of proceedings in a criminal case differ in different countries. However, there are points of convergence where the differences in legal systems are not so important. In the modern world, Latin proverb *Jura novit curia* postulates that judges cannot and should not have knowledge from other sciences. Therefore, lawyers of all countries use the help of persons with special (non-legal) knowledge. In Russia, only an investigator or a judge can appoint an expert examination to obtain an expert opinion. An accused and defense attorneys (mostly professional lawyers) can get an expert opinion. The procedural statuses of *a specialist* and *an expert* under the Russian procedural law do not coincide. However, the reports they provide are formally equivalent and they both can be used as evidence in a legal case. Having no special knowledge, the judge evaluates the conclusions made by the specialist and the expert. The judge can regard one conclusion as a proof, can accept or reject them. The specialist and the expert are obliged to make conclusions based on the results of the study within their competence. Polygraph examiners in the United States and Russia address this issue in different ways due to different approaches to the development of theoretical and applied areas of scientific research.

Keywords: criminal justice; testimony of participants in proceedings; verification of evidence; forensic examination; expert report; polygraph research; expert methodology

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Contents

I. Introduction

The results of research around the world show that false memories are not different from the real ones. This means that the testimony of even conscientious participants in court proceedings cannot be trusted. Judges, investigators, prosecutors or lawyers, guided solely by law and conscience, are unable to distinguish between false memories and memories related to events that actually took place. In few exceptions, Russian lawyers are reluctant to discuss this problem and courts of all instances ignore the existence of this problem either.

To verify the testimony of participants in court proceedings it is necessary to use knowledge from psychology and related fields. Competence of persons participating in criminal proceedings in the status of a specialist or expert is limited by the current level of development of science. The nature of memory has not been studied yet. The authors of the paper use as a case study methodological standards applied in Russia to reports prepared by polygraph examiners to reveal the depth of the problem. Comparing Russian and American approaches to justification and wording of reports prepared by polygraph examiners, they offer universal ways to solve the problem in compliance with legal standings.

II. Methodology

Legal relations associated with the use of special (non-legal) knowledge in criminal proceedings are of a complex nature. Experts have identified many reasons to be cautious about what people say. Factors that can negatively affect the reliability of testimonies include: age (Brewer, Weber, and Semmler, 2005), the target weapon effect (Loftus, 1979, p. 368), verbal obfuscation (Schooler and Engstler-Schooler, 1990), unintentional transference (Ross et al., 1994), change blindness (Simons et al., 2002, p. 79), *etc*. Literature review demonstrates the polygraph effectiveness in verifying participants' testimonies in court proceedings. Scholarship concerning the issue is published in a number of research journals: Polygraph & Forensic Credibility Assessment (American Polygraph Association, USA), European Polygraph (affiliated with Andrzej Frycz Modrzewski Krakow University, Polish Republic), *etc*. In their study the authors applied the dialectical-materialistic method of cognition of social phenomena, basic general scientific and particular scientific methods (analysis, synthesis, *etc*.), took into account the activity approach to the study of human interaction with the surrounding world.

III. Discussion

Today, crimes investigation raises many questions, the solution of which involves the use of knowledge from various fields not related to law. In practice, two situations can take place in criminal proceedings. The first describes the situation when an investigator or a judge need information that they do not possess. As long as they receive the information, they can solve the question arising in the case themselves. The second situation takes place when information from any area of knowledge is insufficient to answer the question, since an investigator or a judge are in any case unable to solve the problem independently.

In the first situation, the investigator or the judge engage a competent person with the procedural *status of a specialist*. The specialist may provide the necessary information in a verbal (in the course of inquiry) and in a written report. The resulting document,

according to the Criminal Procedure Code of the Russian Federation (hereinafter — the CPC), is referred to as a "specialist's report."

In the second case, a person competent in any field of knowledge is invited in the *status of an expert*. Having received from the court the objects necessary for examination, the expert conducts a number of examinations. He states his conclusions in the "expert's report."

The law does not prohibit the expert to conduct an examination of any objects, if necessary. The CPC expressly states that the investigator or the judge may engage an expert to assist in the application of technical means in the study of the criminal case. The same person in the same case can be invited to provide both a specialist's and an expert's report.

Article 204 of the CPC and Article 25 of the Federal Law No. 73-FZ dated 31 May 2001 "On State Forensic Expert Activity in the Russian Federation" define the requirements for the content of an expert opinion. These laws do not specify how the expert opinion should be drafted.

In Russia, the practice has developed of drawing up the specialist's report by analogy with the expert's report. This also applies to polygraph examiners. Now, there are several methodological standards in Russia that polygraph examiners can use when conducting and drawing up examination results in criminal cases. Diachronically, the standards developed in the following way (Komissarova and Khamzin, 2016, p. 33; Komissarova, 2021, p. 174).

In 2005, "Specific Expert Methodology for Production of Psychophysiological Research Using Polygraph" was developed. In 2006–2009, it was validated in the Expert-Criminalistics Center of the Ministry of Internal Affairs of the Republic of Tatarstan (Russia) in accordance with the procedure approved for internal affairs departments. In 2008, "The Uniform Requirements for Procedures of Psychophysiological Investigations with the Use of Polygraph" were published. They were prepared by the Academy of Management of the Russian Ministry of Internal Affairs for polygraph examiners performing investigations. Leading polygraph examiners from the Ministry of Internal Affairs, the Ministry of Defense, the Federal Security Service, the Foreign Intelligence Service, the Federal Drug Control Service and the Federal Penitentiary Service of the Ministry of Justice participated in the procedure of preparing the Requirements. In 2009, the Institute

of Criminalistics of the Center for Special Technology of the Federal Security Service of Russia elaborated the document entitled "Methods of forensic psychophysiological examinations using polygraphs" that is classified and is not available for review. In 2018, "Interdepartmental methodology for forensic psychophysiological examinations with the use of a polygraph" appeared. It was approved by the heads of the Institute of Criminalistics of the Center for Special Technology of the Federal Security Service, the Expert-Criminalistics Center of the Ministry of Internal Affairs, the Main State Center for Forensics and Forensic Examinations of the Ministry of Defense, the Main Department of Criminalistics of the Investigative Committee of Russia. The same year the Expert-Criminalistics Center of the Ministry of Internal Affairs of Russia prepared "Methodological Recommendations on Procedures for Assignment and Production of Psychophysiological Examinations and Polygraph Examinations within the Ministry of Internal Affairs of Russia." They were developed with the participation of polygraph examiners from expert departments of the Ministry of Internal Affairs of the Republic of Tatarstan, the Main Department of the Ministry of Internal Affairs of Russia in Moscow, the Federal Security Service, the Investigative Committee of Russia and the Kutafin Moscow State Law University (MSAL).

In 2020, "Methodological recommendations on the order of appointment and conduct of psychophysiological examinations and investigations with the use of polygraph in the Federal State Investigative Committee of the Russian Federation" were elaborated. In 2021, "Methodological recommendations on the procedure for conducting psychophysiological examinations with the use of polygraph in the departments and military units of the Military Police of the Armed Forces of the Russian Federation" were approved. As a result, the expert community has developed a uniform framework applicable to specialist's and expert's reports.

IV. Polygraph examination description

The report of the polygraph examiner, acting either as a specialist or an expert, is expected to have the following integral elements.

The introductory part indicating: 1) date, time and place of the examination; 2) grounds for examination; 3) information about the initiator of psychophysiological examination with polygraph (hereinafter — PPE); 4) information about the polygraph examiner (full name, education, specialty, work experience, academic degree and/or title, position held); 5) materials made available to the polygraph examiner; 6) surname, first name, patronymic and year of birth of the person subject to the polygraph examination.

Since the examination is conducted in a criminal case, the report must expressly state that the specialist (or expert) was explained all his rights and obligations under the Code of Criminal Procedure.

Initiators always submit two questions for the polygraph examiner's permission. Their wording is universal and is given in several methodological recommendations listed above. Depending on the nature of the criminal case, they may be specified, but they do not change in principle, *e.g.*:

— Does psychophysiological polygraph examination reveal reactions indicate that defendant *X* has information about the circumstances of *L*'s death?

— If yes, due to what circumstances could *S* have obtained this information (could it have been obtained at the moment of causing death to *L*)?

In order to solve the tasks, the polygraph examines the materials provided (Polstovalov and Shagimuratova, 2016). The examiner independently draws up a polygraph testing program (selects the methods of its conducting, formulates test questions, *etc.*). During the PPE, video recording is to be carried out, which is necessary to exercise control over synchronization: voicing of questions of the test by polygraph examiner, examinee's answers, peculiarities of the examinee's behavior, possible appearance of artefacts. this helps the examiners avoid third parties doubting the objectivity of the procedure. If necessary, video recording makes it possible to seek an independent opinion from another polygraph examiner. The person subjected to examination must be properly notified about the video recording. He is also explained his rights and responsibilities that must be observed in order for the procedure to be conducted correctly.

The examination part of the report:

— contains the list the methods (methodological recommendations) in accordance with which the PPE was conducted in relation to the person subjected to the polygraph examination;

— gives information about the technical means used;

— provides a summary of the information obtained during the interview conducted before the presentation of the tests made by the polygraph examiner to the examinee;

— describes the essence and course of polygraph testing;

— describes the results of verification tests.

Below we provide the examples of descriptions of the results of tests composed according to the *Methodology of Comparison Questions* (Test No. 3)[1] and the Methodology of Revealing Concealed Information (Test No. 4) (Krahpol and Show, 2015; Komissarova, 2018, p. 135; Pelenitsyn and Soshnikov, 2021, p. 220).

Option 1

When administering the Federal You-Phase test, the examinee was asked a number of relevant questions:

R1. At the time you shot L, were you holding the gun?

R2. Were you pulling the trigger when you shot L?

The examinee answered the test questions truthfully saying "no." Test No. 3 analysis fixed psychophysiological reactions with a greater degree of intensity at the answers of the examinee to relevant questions in comparison with his reactions to control questions. The total score for the test questions is –2 (R1), –6 (R2). Unified total score (hereinafter referred to as UTS): –8. Thus, psychophysiological reactions caused by the awareness of *S* about his shooting at *L*, were revealed in Test No. 3.

When administering verification test No. 4, the examinee was asked one general question: *"Do you know for sure that L was shot with…"*

[1] The results of the tests are interpreted under the Guidelines on the procedure for appointing and conducting psychophysiological examinations and studies using a polygraph in the Forensic Expert Center of the Investigative Committee of the Russian Federation (2020) and the Guidelines on the procedure for conducting psychophysiological studies using a polygraph in organs and military units of the military police of the Armed Forces of the Russian Federation (2021).

with different answers, including the one known from the case file — *a Walther P99 pistol*. When discussing the test, *S* explained that he did not know exactly what weapon was used to shoot *L*. To all variants of the wording of the question specifying the type of weapon that was used to shoot *L,* the examinee answered truthfully *"no."*

During the analysis of the results of verification test No. 4 when responding to the question containing option No. 2 *"...from a Walther P99 pistol"* examinee's psychophysiological reactions exceeded in severity his reactions when answering the other options, which was recorded by the examiner. The total score for option No. 2 is 8; the total scores for other options is from 0 to 4. Thus, psychophysiological reactions caused by the awareness of *S* about shooting *L* with a Walther P99 pistol were revealed in the presentation of test No. 4.

Option 2

When administering the Federal You-Phase test, the examinee was given relevant questions for Test No. 3:

R1. At the time you shot L, were you holding the gun?

R2. Were you pulling the trigger when you shot L?

The examinee answered these test questions truthfully as he said "no." The analysis of results of Test No. 3 fixed psychophysiological reactions with a greater degree of intensity at the answers of the examinee to control questions, in comparison with reactions at his answers to relevant questions. Total scores for the relevant questions are +6 (R1), +8 (R2). Unified total score (hereafter — UTS): +14. Thus, Test No. 3 did not reveal any psychophysiological reactions, which could be caused by *S*'s awareness of his shooting at *L*.

When administering verification test No. 4, the examinee was asked one general question: *"Do you know for sure that L. was shot with..."* with different answers, including the one known from the case file — *"a Walther P99 pistol."* When discussing the test, S explained that he did not know exactly what weapon was used to shoot *L*.

To all variants of the wording of the question specifying the type of weapon that was used to shoot *L*, the examinee answered truthfully "no."

During the analysis of the results of verification Test No. 4 when answering Option No. 2: *"…with Walther P99 pistol,"* no psychophysiological reactions were recorded that exceeded in intensity the reactions of *S* when answering other options. The total score for variant No. 2 is 3; the total score for other options ranges from 1 to 7. Thus, Test No. 4 did not reveal any psychophysiological reactions, which could be caused by *S*'s awareness of the fact that he shot at *L* with a *Walther P99* pistol.

Option 3

When the examinee underwent Test No. 3 (Federal You-Phase test), the examinee was asked relevant questions:

R1. At the time you shot L, were you holding the gun?

R2. Were you pulling the trigger when you shot L?

The examinee answered test questions truthfully as he said "no." The analysis of results of Test No. 3 is comparable in degree of expression of psychophysiological reactions to answers of the examinee to control and relevant questions. Total scores for the relevant questions are +1 (R1), 2 (R2). The unified total score (hereinafter referred to as "UTS") is 1. The results do not allow us to assess the degree of *S*'s awareness of the circumstances reflected in the mentioned relevant questions.

When cunducting verification Test No. 4, the examinee was asked one general question: "Do you know for sure that *L* was shot with…" the examinee was offered various options as an answer, including the one known from the case file — a Walther P99 pistol. When discussing the test, *S* explained that he did not know exactly what weapon was used to shoot *L*.

To all variants of the wording of the question specifying the type of weapon that was used to shoot *L*, the examinee answered truthfully as he said "no."

When analyzing the results of verification test No. 4, we found psychophysiological reactions comparable in their intensity when the respondents gave answers to Test No. 2 "…with Walther P99 pistol," No. 4 "…with Beretta 92 pistol," No. 5 "…with Glock 17 pistol" and less expressive reactions were demonstrated for other options. The total

score for response options No. 2, No. 4, No. 5 are 5, 5, 6 respectively; total score for other options is from 0 to 2. The obtained results do not allow us to assess the degree of *S*'s awareness of the type of weapon from which the shot was made at *L*.

V. A Synthesizing part of polygraph examination

The so-called "synthesizing part" is an independent subsection of the research part of the expert or specialist's report. Having described the result of each verification test, the polygraph examiner evaluates them in interrelation. Taking into account the options stated above, below we provide the case study of the synthesizing part of the report.

Option 1

In the course of presentation of verification tests No. 3–11, the psychophysiological reactions caused by the awareness of *S* about circumstances of the shooting in *L* were revealed.

Based on the complex assessment of the obtained data (judging by the character, degree of expression and correlation between psychophysiological reactions to the questions of the tests presented to the person under examination) the specialist concludes that the information that *S* has was probably received at the moment of shooting at *L* using a Walther P99.

Option 2

The presentation of verification tests No. 3–11 did not reveal any psychophysiological reactions due to *S*'s awareness of the circumstances of shooting at *L*. If in the process of polygraph testing no expressed psychophysiological reactions to relevant questions are revealed, the polygraph examiner is objectively deprived of an opportunity to make any judgement about the degree of awareness of the examinee about the event that served as a ground for the examination and the circumstances of obtaining information necessary for the investigation. In view of

the above, the question No. 2 of the Ruling on the appointment of the examination was not resolved.

Option 3

Thus, polygraph testing did not reveal any sustained explicit psychophysiological reactions to the relevant questions as compared to reactions to the control questions. In this connection, it is not possible to determine the degree of *S*'s awareness of the circumstances of the shooting at *L* and to answer the questions of the Ruling on the appointment of the examination.

Below we provide the examples of the reports of the specialist (expert) concerning the questions posed to the examinee by the initiator of the PPE.

Option 1

1. The polygraph examination revealed psychophysiological reactions in relation to *S* due to his awareness of the circumstances of the shooting at *L*.

2. The information in *S*'s possession was probably obtained at the time he shot at *L*.

Option 2

1. The polygraph examination did not reveal any psychophysiological reactions due to *S*'s knowledge of the circumstances of the shooting in *L*.

2. For the reasons stated in the research part of the report, the issue was not resolved.

Option 3

1. For the reasons stated in the research part of the report, it is not possible to answer the questions posed to the expert.

VI. Polygraph examination reports in Russia and USA: Comparative analysis

Based on the foregoing, it is interesting to compare conclusions drawn up by Russian and U.S. polygraph examiners. As an example, let us refer to the "Confidential Report" included in the Manual prepared by prominent members of the American Polygraph Association (Krahpol and Show, 2015). Readers can access the full report for themselves (see pages 335–338 of the Manual). Avoiding redundant citations, we will cite only the "Conclusions and Recommendations" Section of the article:

A thorough examination of the polygraph test charts was conducted. A full review of the test charts collected indicates clear and consistent physiological criteria sufficient for evaluation in the relevant test questions presented. A numerical evaluation of the polygraph charts was conducted using both conventional numeric spot scoring rules[2] *and the Empirical Scoring System (ESS)*[3] *(Handler et al, 2010, p. 200).*

There were sufficient artefact-free data present in the test charts collected to obtain criteria upon which to conduct a numeric evaluation and form a conclusion. Using the Federal Scoring System 3-position scoring rules, the test data analysis score obtained of –6 exceeds the cut score of –3 for classification of Deception Indicated.

Using the Empirical Scoring System (ESS), an evidence-based, normed, and standardized protocol for test data analysis, the grand total score of –9 equals or exceeds the required cut score of –4 for deceptive classifications. The level of statistical significance is calculated at p = .006, which exceeds the required alpha boundary (a =.05). Normative data indicate that only a small portion (0.6 %) of truthful persons are expected to produce a similar deceptive test score under normal circumstances. These results support the conclusion that there is Deception Indicated by the physiological responses to the test

[2] Relevant reports' data available at Department of Defense Polygraph Institute website: https://www.thepolygraphinstitute.com/index.php/about-us [Accessed 28.09.2022].

[3] Empirical Scoring System methodology relies on data available at American Polygraph Association website: https://www.polygraph.org/.

stimulus questions during this examination examination (Handler et al., 2010, p. 214).

Thus, the reports of Russian and U.S. polygraph examiners almost do not differ in form. They always consist of three parts: the introductory part, the exploratory part, and conclusions. The statements of the conclusions used by specialists (experts) in the two countries are also of interest.

For Russian justice, the traditional approach of American polygraph examiners to formulating conclusions concerning the results of the PPE (e.g.: "deception indicated" or "no deception indicated") is unacceptable.

On 21 December 2010, the Plenum of the Supreme Court of the Russian Federation adopted Resolution No. 28 "On Judicial Expertise in Criminal Cases." This document was updated on 29 June 2021 by Resolution No. 22 of the Plenum of the Supreme Court of the Russian Federation "On Amendments to Certain Resolutions of the Plenum of the Supreme Court of the Russian Federation on Criminal Cases." Paragraph 4 expressly states:

The expert cannot be asked to assess the reliability of testimony of a suspect, accused, victim or witness obtained during interrogation, confrontation and other investigative actions, including with the use of audio or video recording, since under Article 88 of the CPC such assessment is the exclusive competence of entities conducting the criminal proceedings.

The expert opinion obtained in court, as well as in the course of pre-trial proceedings, in a criminal case that contains conclusions about the legal assessment of the act or about the reliability of the testimony of interrogated person, cannot in this part be recognized as admissible evidence and be used as the basis for a judicial decision in the case.

As it known from criminalistics and psychology, a person called for questioning may be in one of the four states:

1. A person possessing the information that the investigator is looking for, wishing and able to objectively and fully provide it;

2. A person possessing the necessary information, wishing to provide it, but for various reasons unintentionally misinterpreting it during communication with the investigator;

3. A person possessing the information, able to provide it, but not wanting to do it;

4. A person not possessing any information, but the investigator mistakenly believes the opposite and tries to obtain a detailed testimony (Baev, 1992, p. 93).

The task of the polygraph examiner is to determine the state of the participant in the proceedings who gives evidence in the case. In other words, during the PPE, the polygraph examiner diagnoses the information state of the examinee.

By the means of polygraph, we "visualize" some physiological correlations of the execution of personal mental process associated with perception, fixation, preservation and subsequent replication of the information about the event that is the matter of interest of investigation authorities and the court (Komissarova and Khamzin, 2018).

First, the polygraph examiner updates the images stored in the memory of the examinee primarily (but not only) by presenting the stimuli selected and arranged in a certain order. This is followed by the examination of the significance, stability and ratio of the reactions on stimuli. By using different systems of evaluation of the recorded information, the polygraph examiner can identify a set of stimuli that are significant to the person.

Depending on the type of stimuli and on the technique used during polygraph examination, a polygraph examiner can give an affirmative or a negative answer to the question: whether the reactions were detected or not, which indicate that the examinee possesses the information about the event or its details.

Thus, based on the analysis of the reactions on the stimuli, a polygraph examiner formulates the expert version regarding the examinee knowledge about the incident. The examiner also has a right to make a judgement about the possible circumstances of how the examinee received the information about the event (the probability of obtaining such information directly at the time of the incident).

VII. Specific Features of the Polygraph Examination

By giving to the PPE initiator the information whether the examinee is a bearer of information regarding the particular event or its details, we must remember that a polygraph examiner has a limited toolkit for the examination. The modern state of the science does not allow making a specification of the information which a person possess by recording and analyzing psychophysiological reactions in response to the stimuli. The mechanisms of memory still are not fully understood (Baddeley, Eysenck and Anderson, 2020).

Taking into account the specific features of the current problem in the context of the situation in which the examination is conducted, the significance of the specific stimuli, detected by the polygraph, may have a different nature. It may not only indicate the deception when answering on relevant questions, but also about the examinee's recognition of the details without reference to the crime event, about the presence of any unsatisfied actual need, *etc*.

Carrying out investigations with the use of polygraph is specific due to in the fact that in order to obtain conclusions the devices' readings are not used directly, since they essentially reflect only the state and dynamics of physiological processes of the person and do not contain any other information that could directly indicate either reliability or unreliability of the subject's statements. Therefore, a polygraph examiner cannot judge whether a lie has been detected in the examinee's testimony.

In science, it is common to distinguish between "validity" and "reliability" of knowledge and judgements based on it. Validity characterizes the relation of knowledge to the reflected object, their correspondence to each other, and the reliability of the proof of knowledge. Validity of the hypothesis that corresponds to reality does not initially raise doubts. However, to become a reliable knowledge, it must be proven (Frolova, 2021, p. 147).

This applies not only to philosophy, but also to legal science. The knowledge gained during the investigation of a crime, preserved in the evidence on which the verdict is based, can also be described from two sides: first, for each of the evidence in terms of their validity (in terms

of "probability" and "reliability"); second, from the point of view of either compliance or non-compliance of the evidence with the reality (in the categories "veracity" and "falseness") (Ovsyannikov, 2001, p. 93; Kruchinina, 2003, p. 18; Vasilyeva, 2022).

The probability of guilt of the accused can be high, although in fact he is not guilty. The probability of guilt of the accused can be extremely low, but, in reality, he is guilty. This depends on what evidence the investigation authorities and the court managed to obtain. When we talk about actions and facts that took place in the past, the probability of the highest degree can be as far from the truth as the probability of the lowest degree.

Similar situations are familiar to polygraph examiners throughout the world as false positive ("false alarm") and false negative ("missing the goal") errors. However, not many people think about the question: who in practice commits such errors and bears responsibility for them.

When the polygraph examiner formulates a conclusion in the categories "Deception Indicated" or "No Deception Indicated," he unreasonably accepts the risks associated with false positive and false negative errors. In fact, this is not the case.

The statements contained in the polygraph examiner's report are the conclusions that the polygraph examiner had made on the basis of the examination result based on the information provided or revealed about the analyzed object and the general scientific provisions of the relevant field of knowledge. By choosing the form of the conclusion (categorical positive, categorical negative, probable), the polygraph examiner, taking into the account the quality and the quantity of the initial data, on the basis of his own special knowledge, evaluates the validity based on the results of the conducted examination.

If during the procedure the polygraph examiner acted in accordance with the available scientific and methodological standards, he has nothing to reproach himself for. A particular professional is not responsible for those limitations that are objectively related to the use of the psychophysiological method of "Lie Detection." A professional operates within its competence, relying on the information (not always complete and reliable) provided by the investigator (court) and participants in the proceedings.

For this very reason, for the investigator and for the judge, a conclusion of any polygraph examiner is only an opinion of an independent expert. A peremptory conclusion of a polygraph examiner "Deception Indicated" or "No Deception Indicated" is nothing more than his subjective opinion, which may not coincide with the opinion of his colleagues. When appointing a re-examination, they can come to diametrically opposite conclusions.

The expert's report as the evidence is subject to an independent evaluation, which, under the Criminal Procedure Code of the Russian Federation, is conducted by the investigation authorities and the court. Regardless of the validity degree of the expert's conclusions, for various reasons, his report can be deemed as inadmissible evidence.

VIII. Conclusion

Under Part 1 of Art. 88 of the Criminal Procedure Code of the Russian Federation, each piece of evidence is evaluated in terms of relevance, admissibility, and reliability. All collected evidence are taken together to provide sufficiency for the resolution of the criminal case (Komissarova, 2018).

In this regard, "reliability" is the quality of evidence that characterizes accuracy, correct detection of the circumstances involved in the fact to be proven. Reliability of the evidence is verified by comparing it with other evidence of the case. Detection of contradictory and conflicting information indicates unreliability of any evidence.

The testimony of the proceedings' participant that is contrary to the established facts is considered unreliable regardless of the reasons that motivated the person to report untrue information.

It is important to understand when detecting certain crimes whether the examinee is telling a lie intentionally or makes an honest mistake. Typical examples include the crimes against justice (for example, deliberate false denunciation).

Unlike criminal law, criminal procedure law regards the testimony of the proceedings' participant containing false information as *a priori* inadmissible evidence. Thus, the conclusion of the expert polygraph examiner interpreted as "No Deception Indicated" following

the examination of the examinee making an honest mistake has no evidentiary value.

When analyzing the case evidence, the investigator and the court, for various reasons, can accept the evidence that do not reflect the circumstances that took place in reality. It is judges rather than polygraph examiners in all countries of the world who inevitably commit false positive and false negative errors when making judgements and passing sentences.[4] The final outcome depends on what case evidence the investigation authorities and the court have managed to obtain.

References

1. Baddeley, A., Eysenck, M.W., and Anderson, M.C., (2020). *Memor*y. 3d ed. New York: Taylor and Francis. https://doi.org/10.4324/9780429449642.

2. Baev, O.Ya., (1992). *Tactics of investigative actions*. Voronezh: VGU Publ.

3. Brewer, N., Weber, N., and Semmler, C.A., (2005). Eyewitness identification. In: Brewer, N. and Williams, K.D., editors. *Psychology and Law: An Empirical Perspective*. London: Guilford Publ. Pp. 177–221.

4. Frolova, O.E., (2021). About the language of scientific research. *Courier of Kutafin Moscow State Law University (MSAL)*, 21;(2), pp. 147–154. (In Russ.). https://doi.org/10.17803/2311-5998.2021.78.2.147-154.

5. Komissarova, Y.V. and Khamzin, S.R., (2018). Theoretical and Applied Problems of the Polygraph Use in Criminal Proceedings in Russia. *Journal of Forensic Sciences & Criminal Investigation*, 6(5), pp. 555700. https://doi.org/:10.19080/JFSCI.2018.06.555700 005.

6. Komissarova, Ya.V. and Khamzin, S.R., (2016). Polygraph Abroad — Countries of the Former Soviet Union. *APA Magazine*,

[4] Thus, according to the American non-profit human rights organization *Project Innocence*, since 1989, 375 people have been acquitted after DNA analysis, 21 of whom have been sentenced to death. Available at: https://innocenceproject.org/dna-exonerations-in-the-united-states/ [Accessed 24.07.2022].

49(5). Available at: http://www.polygraph.org/apa-magazine [Accessed 01.11.2016].

7. Komissarova, Ya.V., (2018). On Standard Methods of Forensic Psychophysiological Examination Using a Polygraph. *Polygraph & Forensic Credibility Assessment: A Journal of Science and Field Practice*, 47(2), pp. 135–141.

8. Komissarova, Ya.V., (2021). Diagnosis of the information state of the subject in the system of forensic recognition. In: *Socio-economic development and quality of the legal environment: Collection of reports of the 8th Moscow Legal Forum: in 5 parts*, part 4, pp. 174–175. Moscow: Publishing Center of Kutafin Moscow State Law University.

9. Krahpol, D.J. and Show, P.K., (2015). *Fundamentals of Polygraph Practice*. San Diego, CA: Academic Press.

10. Kruchinina, N.V., (2003). *Fundamentals of the forensic doctrine of verifying the reliability of criminally relevant information*. Author's Abstract. Moscow.

11. Loftus, E., (1979). Reactions to Blatantly Contradictory Information. *Memory & Cognition*, 7(5), pp. 367–374.

12. Handler, M., Nelson, R., Goodson, W., and Hicks, M., (2010). Empirical Scoring System: A Cross-cultural Replication and Extension Study of Manual Scoring and decision policies. *Polygraph*, 39(4), pp. 200–215.

13. Ovsyannikov, I.V., (2001). *Category of probability in forensic examination and proving in criminal cases*. Doctoral Dissertation. Moscow: Academy of Administration under the Ministry of Internal Affairs of RF. (In Russ.).

14. Pelenitsyn, A.B. and Soshnikov, A.P., (2021). *Evidentiary polygraphology*. In 4 vols. Moscow: TsPP Publishing House. (In Russ.).

15. Polstovalov, O.V. and Shagimuratova, Z.A., (2016). Application of the Polygraph as an Element of Criminalistic tactics of Incrimination. *Russian Investigator*, 2, pp. 9–23. (In Russ.).

16. Ross, D.R., Ceci, S.J., Dunning, D., and Toglia, M.P., (1994). Unconscious transference and mistaken identity: When a witness misidentifies a familiar but innocent person. *Journal of Applied Psychology*, 79(6), pp. 918–930. https://doi.org/10.1037/0021-9010.79.6.918.

17. Schooler, J.W. and Engstler-Schooler, T.Y., (1990). Verbal Overshadowing of Visual Memories: Some things are better left unsaid. *Cognitive Psychology*, 22(1), pp. 36–71. https://doi.org/10.1016/0010-0285(90)90003-M.

18. Simons, D.J., Chabris, C.F., Schnur, T., and Levin, D.T., (2002). Evidence for preserved Representations in Change Blindness. *Consciousness and Cognition*, 11(1), pp. 78–97. https://doi.org/10.1006/ccog.2001.0533.

19. Vasilyeva, O.A., (2022). *Organizational and tactical bases for verifying forensically significant information in the investigation of crimes*. Cand. Sci. (Law) Thesis. Kaliningrad.

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Article

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Analysis of the OECD and the United Nations' Approaches to Developing an International Consensus on Reforming the Rules of Taxation of Digital Services

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Abstract: The article deals with the problems arising in connection with the taxation of the digital economy, using the example of the proposals of the OECD and the EU on the introduction of a tax on digital services, as well as unilateral measures of national states in the area of taxation of the digital economy (on the example of the French digital tax). The main question for the study is whether unilateral measures imposing taxes on digital services represent a suitable solution to the tax problems that arise in connection with digitalization. Based on the analysis of current legislation and jurisprudence, the author concludes that provisions of the Tax Code of the Russian Federation on VAT and income tax do not allow to fully collect taxes on income of corporate groups that use digital business models when providing services related to Russian users. At the same time, Russian organizations that conduct similar activities face full tax burden, which allows us to conclude that Russian companies are discriminated against foreign companies. In this regard, it is advisable to consider the issue of taxation in Russia as the part of the profits extracted by foreign companies in the Russian market.

Keywords: tax law; digital economy; corporate taxation; United Nations; OECD; BEPS Action Plan; digital services tax

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Contents

I. Introduction

The development of the digital economy is significantly changing tax regulation around the world. Global digitalization has been increasing over the last century, causing a shift in cross-border business operations and stimulating companies to explore international opportunities in order to exploit and to benefit from the comparative advantages globally (Olkhovik, Lyutova, and Juchnevicius, 2022, p. 73).

The solutions proposed so far include tax measures indicating the jurisdiction of the source or destination. The taxation options for digital companies discussed at the Organization for Economic Cooperation and Development (hereinafter — the OECD), the United Nations (hereinafter — the UN) and the European Union (hereinafter — the EU) levels include solutions aimed at adapting the existing international tax system to digital reality until a globally agreed solution is reached.

These models, and namely the United Nations Model Tax Convention between Developed and Developing Countries (hereinafter — the UN Model Tax Convention)[1] and the OECD Model Tax Convention on Income and on Capital (hereinafter — the OECD Model),[2] have had a profound influence on international treaty practice, and have significant common provisions. The similarities between these two leading models reflect the importance of achieving consistency where possible. On the other hand, there are some key differences in approaches. Such differences relate to the issue of how far one country or the other should forego, under a bilateral tax treaty, taxing rights which would be available to it under domestic law, with a view to avoiding double taxation and encouraging investment.

The OECD's work on tax issues arising in connection with the digitalization of the economy goes in two directions: Pillar 1 and Pillar 2. Pillar 1 deals with the reallocation of profit of multinational enterprises (MNEs) to market jurisdictions. Pillar 2 deals with a Global Minimum Tax. As of April 2022, 139 countries have joined a new two-pillar approach to reform international tax rules and ensure that multinational enterprises pay a fair share of tax wherever they operate.[3]

The United Nations, through its Committee of Experts on International Cooperation in Tax Matters, has approved recommended language for bilateral treaty rules to address taxing rights around income arising from Automated Digital Services (ADS). The new Article 12B and associated Commentary will form part of the 2021 version of the UN Model Tax Convention. It would have an impact only when two contracting states negotiate (or renegotiate and amend) a tax treaty between them. Therefore, it may have less widespread effect than any consensus to which countries agree in discussions being led by the

[1] UN: Model Double Taxation Convention between Developed and Developing Countries 2017, New York: UN, 2017.

[2] OECD: Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris, 2017.

[3] Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy — 8 October 2021. https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.

OECD in conjunction with the G20 and the 139 Inclusive Framework member countries.[4]

II. The OECD/G20 Pillar 1 approach to the taxation of digital services

As mentioned above, Pillar 1 deals with the reallocation of profit of MNEs to market jurisdictions. Pillar 1 deals among others with taxation of digital services.

Pillar 1 provides for new profit allocation and nexus rules for MNEs that are in scope. These rules are embodied in "Amount A." In-scope companies are MNEs with global turnover above 20 billion euros and profitability above 10 % (i.e., profit before tax/revenue) calculated using an averaging mechanism with the turnover threshold to be reduced to 10 billion euros, contingent on successful implementation including of tax certainty on Amount A, with the relevant review beginning 7 years after the agreement comes into force, and the review being completed in no more than one year. Extractives and Regulated Financial Services are excluded.[5]

Amount A requires the development of sourcing rules and a revenue-based allocation key. Details of these rules are not contained in the statement although the statement confirms that jurisdictions from which € 1 million or more revenue are earned will receive an allocation. This is reduced to € 250,000 for jurisdictions with less than € 40 billion in GDP.

The scope aims at MNEs that perform in-scope activities, combined with a double revenue threshold that takes into account consolidated group revenues and the MNE's revenue earned outside its domestic market. The scope of Amount A is therefore based on two different elements, an activity test and a threshold test.[6]

[4] UN tax committee adopts Article 12B for model treaty rules on digital services. https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-un-tax-committee-adopts-article-12b.pdf.

[5] UN tax committee adopts Article 12B for model treaty rules on digital services. https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-un-tax-committee-adopts-article-12b.pdf.

[6] Pillar 1 p. 19.

Where the residual profits of an in-scope group are already taxed in a market jurisdiction, a marketing and distribution profits safe harbor will cap the residual profits allocated to the market jurisdiction through Amount A.

The statement confirms that jurisdictions will be subject to mandatory binding arbitration with only a limited number of less developed countries permitted to use an elective mechanism.

It also commits that no new Digital Services Taxes or other relevant similar measures will be enacted and imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the Multilateral Convention (MLC). The MLC will require all parties to remove all existing Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future.

There will be a new special purpose nexus rule permitting allocation of Amount A to a market jurisdiction when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction. For smaller jurisdictions with GDP lower than 40 billion euros, the nexus will be set at 250 000 euros.

Where the residual profits of an in-scope MNE are already taxed in a market jurisdiction, a marketing and distribution profits safe harbour will cap the residual profits allocated to the market jurisdiction through Amount A. Further work on the design of the safe harbour will be undertaken, including to take into account the comprehensive scope.

Double taxation of profit allocated to market jurisdictions will be relieved using either the exemption or credit method.

The entity (or entities) that will bear the tax liability will be drawn from those that earn residual profit.

In-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g., transfer pricing and business profits disputes), in a mandatory and binding manner. Disputes on whether issues may relate to Amount A will be solved in a mandatory and binding manner, without delaying the substantive dispute prevention and resolution mechanism. An elective binding dispute resolution mechanism will be available only for issues related to Amount A for

developing economies that are eligible for deferral of their BEPS Action 14 peer review and have no or low levels of MAP disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years.

The application of the arm's length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low capacity countries (Amount B). This work will be completed by the end of 2022.

The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated. The IF notes reports from some members that transitional arrangements are being discussed expeditiously.

III. The United Nations approach and the Article 12B of the United Nations Model Tax Convention

It is important to point it out that the rules that were firstly figured out for digital companies are now designed for MNEs of different branches.

The UN Model Tax Convention forms part of the continuing international efforts aimed at eliminating double taxation.

The UN Model Tax Convention generally favours retention of source country taxing rights under a tax treaty — the taxation rights of the host country of investment — as compared to those of the "residence country" of the investor. This has long been regarded as an issue of special significance to developing countries, although it is a position that some developed countries also seek in their bilateral treaties.

However, the main characteristic of the digital economy is the reduction of the necessity of physical presence in market jurisdictions.

Value is created through user interaction and is concentrated in intangible assets, which are easily transferred to tax havens in order to minimize taxable profits. At the same time, corporate taxation systems are still based on the economic reality of the 1920s, when the rules of taxation according to territorial and resident principles were laid down. In the absence of consensus, many states have begun to formulate unilateral rules for taxation of the digital economy. Inconsistency of these rules will increase the tax burden of multinational enterprises, taking into account the fact that each state seeks to protect its interests (Ponomareva, 2021).

The transfer of intellectual property from high-tax jurisdictions in which such intellectual property was created and developed to low-tax states can contribute to the tax base erosion and profit shifting. Such a trend leads to a decrease in royalty receipts relative to the costs of creating intellectual property (R&D expenses) in the country where such intellectual property was developed, and a higher royalty receipt for the amount of R&D expenses in countries to which intellectual property was artificially transferred for the purpose of tax optimization (Berberov and Milogolov, 2018, p. 52).

Therefore, the latest revision of the United Nations Model Tax Convention continues an ongoing review process intended to ensure that the contents of the Model keep up with developments, including in country practice, new ways of doing business and new challenges. This review process led the Committee to address concerns expressed by both developing and developed countries with respect to the tax treaty treatment of digitalized services. The Committee established a Subcommittee on Tax Challenges Related to the Digitalization of the Economy, which drafted a new Article on Income from Automated Digital Services, together with its Commentary. That Article (Article 12B) and its Commentary, which were adopted at the twenty-second session of the Committee (April 2021) constitute a main part of the changes included in this new version of the United Nations Model Tax Convention.[7]

Under Article 12B, "income from automated digital services (ADS) arising in a Contracting State, underlying payments for which are made

[7] Paras 21–22 of the Introduction to the Commentary.

to a resident of the other Contracting State, may be taxed in that other State;" however, the rate of tax that may be imposed on such income is generally limited to an agreed percentage of the gross amount of the payment. In other words, Article 12B contemplates that a Contracting State may subject income from automated digital services paid to a non-resident of such Contracting State to a withholding tax, subject to a rate limitation to be agreed between Contracting States. The UN Tax Committee recommended a "modest" rate of between 3 and 4 percent for income from such services.[8]

Article 12B contemplates that the beneficial owner of income from automated digital services can request that its "qualified profits" from automated digital services be taxed at the rate provided under the domestic laws of the Contracting State.[9] In effect, this is designed to permit the beneficial owner of the automated digital services income to declare a limited permanent establishment in the jurisdiction where the payer is located in order to be subject to tax on such income at a net income basis.[10] Specific rules are provided for determining the amount of "qualified profits" from automated digital services income by applying the overall (or ADS segment where available) profitability ratio of the beneficial owner (or its group where relevant) to the gross amounts.[11]

The approach taken in Article 12B is significant in that it is a model that countries may consider adopting in domestic law to address concerns with respect to the taxation of automated digital services. In jurisdictions where there is an existing income tax treaty, the adoption of the Article 12B approach in domestic law generally would not be expected to affect the application of the existing treaty unless and until

[8] Commentary to paragraph 2, UN Model Tax Convention, Article 12B, paragraph 18.

[9] UN Model Tax Convention, Article 12B, paragraph 3.

[10] Article 12B would not apply in situations where the automated digital services income is earned by, and effectively connected with, an actual permanent establishment of the taxpayer. See UN Model Tax Convention, Article 12B, paragraph 8. Article 12B also does not apply in the case of payments that constitute "royalties" or "fees for technical services" under Article 12 or Article 12A, effectively giving priority to those provisions of the treaty in the taxation of such income.

[11] UN Model Tax Convention, Article 12B, paragraph 3.

the treaty is renegotiated to include Article 12B. But, in non-treaty jurisdictions such laws would have immediate implications for the provision of cross-border automated digital services.

Income from automated digital services is deemed to arise in a Contracting State if the underlying payments for the automated digital services income are made by a resident of that State or are attributable to a permanent establishment of a non-resident in such state. Correspondingly, if the expenses of the automated digital services are attributable to a permanent establishment of the payer in the Contracting State in which the recipient is resident, Article 12B would not apply. Thus, payments for automated digital services are sourced to the jurisdiction in which the services are used.

However, there would be excluded payments that are regarded as:

— royalties (subject to withholding tax (WHT) under Art. 12 MTC) or fees for technical services (subject to WHT under Art. 12A MTC)

— amounts in excess of the arm's length principle (ALP), the application of Art. 12B being limited to that ALP amount (although the excess may be taxed under other provisions).

Article 12B is directed specifically at tax considerations related to the digital economy, which is also the focus of the OECD's Inclusive Framework efforts. The OECD's two pillar approach has focused on new profit allocation rules for digital and potentially all consumer facing businesses (pillar one), as well as agreement on a global minimum tax (pillar two). An objective of the OECD's efforts is to eliminate the proliferation of unilateral digital services taxes, which present a risk for double taxation. It is unclear whether the approach taken by Article 12B can be reconciled with the OECD approach.[12]

The approach in Article 12B is intended to simplify administration allowing greater adoption, particularly by developing countries. A frequent criticism of the OECD's proposals is that they are complicated to apply, and that the global minimum tax rules disadvantage developing jurisdictions. If the approaches taken by the OECD and the UN ultimately cannot be reconciled, it increases the risk for double taxation.

[12] First to finish: UN approves Article 12B for taxation of automated digital services. https://www.jdsupra.com/legalnews/first-to-finish-un-approves-article-12b-5835006/ [Accessed 19.08.2022].

IV. Issues of correlation of the UN Model Tax Convention and the OECD Model

There are many questions risen by scholars due to issues of correlation of the UN Model Tax Convention and the OECD Model. They are still to be solved.

For example, the conceptual base for taxing business income under the UN Proposal rests on the "supply — demand" logic in the sense that both production countries and market countries are entitled to tax business income of a global enterprise. This represents a departure from the view of the OECD States who have chosen to tax corporate income based on the "supply" framework. The question now arises as to why would OECD Member States agree to this conceptual base? Pillar 1 seems to be compromise in the sense that the competing views of both "supply" countries and "supply — demand" countries are taken into consideration in its design (Chand, 2021).

Concerning the scope of the new Art. 12B, the UN has chosen to limit the scope to ADS only compared to the OECD Pillar 1 proposal where both ADS and Consumer Facing Businesses (CFB) are included (Chand, 2021).

The general definition of ADS provided in Art. 12B states the following: "The term 'income from automated digital services' as used in this Article means any payment in consideration for any service provided on the internet or an electronic network requiring minimal human involvement from the service provider. The term 'income from automated digital services' does not, however, include payments qualifying as 'royalties' or 'fees for technical services' under Article 12 or Article 12A as the case may be. In the Commentary, a list of services and activities that are considered ADS is provided and includes: Online advertising services, Sale or other alienation of user data, Online search engines, Online intermediation platform services, Social media platforms, Digital content services, Online gaming, Cloud computing services; Standardized online teaching services."[13]

Article 12B also states that payments qualifying as royalties or fees for technical services are excluded from ADS. Another list is provided

[13] UN Model Tax Convention, Article 12B, paragraph 6.

in the Commentary of services and activities that cannot be considered as ADS and includes: "Customized professional services, Customized online teaching services, Services providing access to the Internet or to an electronic network, Online sale of goods and services other than automated digital services, Revenue from the sale of a physical good, irrespective of network connectivity ('internet of things')." It should be noted that some of these exclusions could be covered by the definition of CFBs under Amount A of Pillar1 under the OECD/IF project.

The definition of ADS and its related Commentary are similar to the one found in the OECD Pillar 1 project. Well, it is obvious that the UN has been inspired by the work of the OECD. This is not a new phenomenon as the UN Commentary on Tax Treaties and UN Transfer Pricing Manual is heavily inspired from the work of the OECD (Chand, 2021).

It is also widely discussed that the UN proposal ringfences the digital economy: It requires appreciation that Article 12B while purportedly seeking to address the issue of "taxation of digitalized economy," limits its scope only as regards ADS services while leaving outside the scope other businesses which may also demonstrate lack of territorial nexus, but deserving to be taxed in the source country (Ayush et al., 2021). The proposal covers automated digital services and ringfences specific digital business models. Such a narrow scope of application leaves open several other business models that could be taxed. This may then result in giving governments an opportunity to unilaterally impose tax measures for business models outside the scope of ADS (Ayush et al., 2021).

Due to the fact that Article 12B ringfences specific business models, it does not cover the wider set of business models which benefit on account of increasing digitalization. Any global tax reform meant to accommodate the possibilities of the global digitized economy as a whole should be based on economic factors that could apply to unforeseen new business models and changes in the global supply chain of goods and services.

Additionally, the Article 12B does not provide any revenue thresholds. This may lead to disproportionate administrative burdens for both taxpayers and tax administrations and may create an unbalanced

playing field for small and medium-sized enterprises with cross-border activities, as they may not have sufficient resources to meet this burden compared to larger MNE groups.

On the other hand, the OECD Pillar 1 proposal provides a global revenue threshold (which may possibly decrease over a period of time) and a de minimis foreign in-scope revenue test. Moreover, the Pillar 1 proposal requires a revenue threshold also for each specific type of activities to trigger nexus to the local jurisdiction. Additionally, as compared to the UN proposal, the Amount A proposal put forward a one stop shop type of mechanism wherein the taxpayer will have to register only with the tax administration of the Ultimate Parent Entity (and this tax administration is required to transmit the tax revenues to the respective market countries).

Professor V. Chand evaluates the UN proposal is "less" neutral, inefficient, simple on the face of it but complex when you get into the details, ineffective to collect taxes in several situations (weak sourcing rules as well as non-applicability of withholding taxes in a B2C scenario) as well as non-flexible due to its narrow scope. Moreover, by staying within the existing international tax framework, it creates room for tax uncertainty (Chand, 2022).

At the same time, it seems that the proposal is not really in the interest of developing countries because i) in many situations developing countries will not be able to collect the much-needed revenues from the digital economy; ii) it relies on bilateral negotiations which could be time consuming and perhaps not leading to the desired outcome; and iii) it is clearly not in the interest of OECD Member States who will surely be reluctant to introduce this provision in their tax treaties due to the various issues surrounding it. However, the IMF and World Bank show support for this proposal from a developing countries standpoint.

V. Recommendations and Practical Proposals for Improving the Mechanisms of Taxation in the Era of Digital Services in Russia

Currently, active work is underway on changing of Russian tax legislation in connection with taxation of digital services.

The point of the current study is also connected to the OECD Action 1 which are important for Russian tax legislation. Some other BEPS Actions have already been studied by scholars (Berberov and Milogolov, 2018). However, we should figure it out it there are risks for Russia in this context.

It should be noted that international cooperation in the area of taxation is not a qualitatively new phenomenon and has been actively developing in recent years in many countries, including Russia. Here are three examples of such cooperation:

1) the mechanism of VAT payment in the EU when importing digital services to the Single Market;

2) the mechanism for the provision and exchange of country reports of the CRS (Country-by-Country Report) within the framework of the Action 13 of the BEPS Project;

3) the International Compliance Assurance Program of the OECD. ICAP[14] is a voluntary program that allows multinational corporations to eliminate uncertainty and ensure predictability of taxation of transactions and business activities in the participating States of the program (Milogolov and Ponomareva, 2021).

Despite the rather high degree of detail of the dispute prevention and resolution mechanisms proposed by the OECD Pillar 1, there are still unresolved issues about how such an international cooperation mechanism will work in practice. A key source of tax risks for taxpayers and potential tax disputes between countries is associated with the inability to isolate Amount A from other CRS tax obligations (related to the application of transfer pricing rules, the determination of Amount B, *etc*.). It will require an unprecedented level of international cooperation and the speed of decision-making from the tax authorities of different countries in order for the mechanism of the distribution of global profits of the MNE to work in practice.

The proposed Pillar 1 mechanism for dispute resolution through international arbitration does not correspond to the position of Russia.

[14] OECD (2021), International Compliance Assurance Programme — Handbook for tax administrations and MNE groups, OECD, Paris. www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assuranceprogramme-handbook-for-tax-administrations-and-mne-groups.htm.

Thus, none of the tax agreements in Russia has provisions on mandatory dispute resolution. In addition, Russia did not accept the relevant provisions of the BEPS MLI when joining it. This position of Russia is connected with the fact that in the current political conditions and in the current conditions of intense international competition, the authorities of the Russian Federation do not consider it possible to transfer part of the national tax sovereignty to the supranational level. It is the factor (rejection of the mandatory dispute resolution mechanism) that may cause Russia to refuse to adopt the Pillar 1 approach discussed in the framework of the BEPS Project.

The other side of the coin is the national tax regulation of activities of IT companies. Currently, the state pays special attention to the development of the IT industry and it should be expected that interest will be increasing.

Various government preferences and benefits, including tax incentives, are important tools for the development of the IT industry.

In the Russian Federation, the beginning of the transformation of the legal regulation of taxation to the conditions of digital reality is associated with the appearance of the so-called Google tax (Article 174.2 of the Tax Code of the Russian Federation). These rules have been significantly criticized by law enforcers, since they have a number of shortcomings related, for example, to the ambiguity of the wording of the list of electronic services, the ambiguity of the mechanism for eliminating double taxation, as well as the procedure for paying such a tax and the lack of a real mechanism for ensuring the universality of tax payment. The main number of disputes from the point of view of law enforcement was caused by the list of services provided in electronic form to identify certain actions of taxpayers for their compliance with the closed list provided by Article 174.2 of the Tax Code of the Russian Federation.

It is worth noting that the Google tax was provided for foreign companies, which led to imbalance in the taxation of foreign and Russian companies in Russia, which also discouraged taxpayers.

In 2020, the state took a serious step towards the IT industry. The tax maneuver in relation to taxation of the IT industry in the Russian Federation is provided by Federal Law No. 265-FZ dated 31 July

2020 "On Amendments to Part Two of the Tax Code of the Russian Federation," the provisions of which have come into force on January 1, 2021 and assume:

— reduction of the corporate income tax rate from 20 % to 3 % while meeting three conditions: accreditation of the organization with the Ministry of Communications, the average number of employees of at least 7 people and receiving at least 90 % of income from digital activities with the establishment of a list of such activities;

— reduction of the insurance premium rate from 14 % to 7.6 % with the simultaneous observance of the conditions established for IT companies to receive a reduced income tax rate;

— exemption from VAT of exclusive rights to computer programs and databases included in the unified register, as well as rights to use these programs and databases.

The key condition for applying the VAT benefit is that the program must be included in the register of domestic software. At the same time, the legislator removed IT companies engaged in advertising activities or activities as integrators from the scope of these benefits.

Despite the fact that the tax maneuver provides, at first glance, exclusively preferential tax conditions for those taxpayers to whom the relevant rules are addressed, representatives of the IT sphere express opinions that the total tax burden will increase as a result of such a maneuver (Lyutova, 2021, p. 269).

At the same time, the manipulation led to the establishment of additional restrictions on the application of VAT benefits, in connection with which it was criticized by industry representatives. Thus, on the basis of Federal Law No. 265-FZ dated 31 July 2020, not all taxpayers can receive such a benefit, but only those who carry out operations to exercise exclusive rights to computer programs and databases included in the Unified Register of Russian computer programs and databases.

In March 2022, further tax incentives for the IT industry were announced. In particular, by Decree No. 83 dated 2 March 2022 "On measures to ensure the accelerated development of the information technology industry in the Russian Federation," the President of the Russian Federation decided to take the following measures aimed at:

— establishment of a "zero" income tax rate for IT companies until 2024;[15]

— expansion of the list of companies that will be able to claim tax benefits (for income tax and insurance premiums). In particular, it is proposed to extend the corresponding benefits to companies that receive income from the distribution (placement) of advertising or operate as integrators (that is, performing work on adaptation, installation, implementation, testing and support of domestic software that does not belong to them);

— exemption of accredited IT companies from tax and currency control for up to three years.

It is expected that the legislation will be supplemented with benefits announced as part of the second package of measures to support the IT industry,[16] in particular:

— accelerated depreciation. The benefit involves the introduction of an increased depreciation coefficient (coefficient 3) for the purchased domestic software, which will aloow to write off costs into expenses faster. It is assumed that it will be possible to use the benefit from 2023;

— costs with an increasing coefficient. It provides for the possibility of accounting for the costs of purchasing Russian software and equipment in the field of artificial intelligence with the use of an increasing coefficient of 1.5;

— investment tax deduction. This benefit assumes the possibility of accounting for the costs of implementing Russian software and equipment as part of the investment tax deduction, that is, if certain conditions are met, such expenses can be deducted directly from the tax amount, and not the tax base.

According to statistics (according to the results of 9 months of 2021), the tax maneuver in the IT industry provided an increase in additional tax revenues by 48 billion rubles and an increase in the volume of sales by IT companies of their solutions and services (over

[15] Federal Law No. 67-FZ dated 26 March 2022 "On Amendments to Parts One and Two of the Tax Code of the Russian Federation and Article 2 of the Federal Law 'On Amendments to Part Two of the Tax Code of the Russian Federation'".

[16] Action plan ("roadmap") "Creating additional conditions for the development of the information technology industry" dated 9 September 2021.

1.14 trillion rubles and an increase of 38 % compared to the same period in 2020). At the same time, it is important to note that the state has not exhausted the stock of measures that can contribute to the development of the industry. For example, at the moment, these benefits, as a rule, cannot be applied by aggregator companies or companies that receive revenue from using software in other ways.[17]

At the same time, the effectiveness of tax benefits largely depends on specific legislative formulations, the actions of law enforcement agencies and the general economic situation. For example, the tax maneuver in the IT industry has generated a large range of questions about the categories of recipients of such benefits, and also caused the need to qualify IT terminology for tax purposes. In this regard, the controlling and relevant state agencies were forced to send explanations regarding the application of the new provisions of the legislation. Thus, the Ministry of Finance of Russia issued the letter No. 03-07-07/111669 dated 18 December 2020, in which specific activities of IT companies subject to benefits were cited; the Federal Tax Service of Russia published answers to point questions (the Letter No. SD-4-3/20902@ dated 18 December 2020 "On tax maneuver in the IT industry"), as well as the Ministry of Finance of Russia clarified the meanings of the special terms ("adaptation" and "modification") in the Letter No. P11-2-05-200-3571 dated 27 January 2022.

Law enforcement officers also control those who want to take advantage of the available benefits. For example, in the case against Kaspersky Lab JSC (case No. A40-158523/2020), the courts supported the position of the tax authority on the possibility of qualifying the work performed as R&D for the purpose of applying an increasing coefficient to the corresponding costs.

Given the above, it should be assumed that the application of the announced benefits may be fraught with various difficulties. Let's explain by the example of a proposal to exempt IT companies from tax control. The legislation (part 4 of Article 89 of the Tax Code of the

[17] Tax incentives in the IT industry: realities and prospects. Available at: https://www.advgazeta.ru/mneniya/nalogovye-lgoty-v-it-industrii-realii-i-perspektivy/ [Accessed 21.05.2022].

Russian Federation) allows tax authorities to conduct on-site tax audits for three years (that is, in 2022, the period 2019–2021 can be checked). Does the proposed benefit mean that after the expiration of the three-year period, the tax authorities will not be able to conduct an on-site tax audit for the past period? This, as well as a lot of other questions (for example, about the possibility of sending requirements to IT companies and conducting other control measures) are still open.

The general economic situation also has a direct impact on the effectiveness of the application of benefits. Thus, the proposal to "reset" the income tax rate will not have the desired effect if the company has no profit. In this regard, during the period of economic turbulence VAT benefits seem to be more effective for business.

At the same time, there are grounds to assume the emergence of a trend of softening the approaches of the law enforcement, and an example of this is the Letter of the Ministry of Finance of Russia and the Federal Tax Service of Russia No. SD-4-2/3289@ dated 17 March 2022 "On tax advantages established for IT business." Earlier, the department adhered to the approach,[18] according to which the reorganization of business mainly in order to obtain benefits for IT companies could be considered as a scheme of "business fragmentation." In this regard, many companies were rather restrained in assessing the prospects for using the relevant benefits. However, in the new letter, the Federal Tax Service has significantly softened its position, indicating that the reorganization of an IT company in the form of separation should not be considered as a violation of Article 54.1 of the Tax Code of the Russian Federation.

VI. Conclusions

Thus, it becomes obvious that in recent years the state has made significant steps towards the IT industry in the field of taxation. At the same time, there is reason to believe that such support will expand in the future. However, the effectiveness of measures depends on a large

[18] The Letter of the Federal Tax Service of Russia No. SD-4-3/2160 dated 20 February 2021.

number of factors, some of which are beyond the will of the legislator, so it is important to monitor the development of legislation and law enforcement practice and adapt to new conditions in a timely manner.

Coming back to issues of international taxation, we should say that Russia should both use international experience and follow its own interests.

For example, the mechanism of international cooperation of tax administrations in the taxation of digital business models proposed by the OECD under Pillar 1 includes:

1) self-declaration mechanism at the level of the ultimate parent entity of the group;

2) the mechanism for preventing disputes regarding the Amount A and the instruments for involving the CIM in this mechanism;

3) binding dispute resolution mechanism affected by Pillar 1 rules;

4) simplification and unification of the rules for attributing profits to basic marketing operations and resale operations (Amount B).

The key idea of the proposed rules is to provide the possibility of a "single window" for the MNEs to access all interested tax administrations at once. We consider it expedient to implement this idea regardless of the success of the Pillar 1 initiative.

In this regard, our key recommendation for the development of tax administration in Russia is to expand and adapt, taking into account national specifics and fiscal interests, the approaches proposed by the OECD under Pillar 1 to international cooperation in the field of digital business tax administration.

We believe that the necessity to response to the challenges of the digital economy in the new conditions at the level of Russian legislation is beyond doubt. In addition, the effectiveness of the new rules can be ensured only if the measures implemented in the legislation of as many States as possible are harmonized. Otherwise, it will be impossible to ensure uniform regulation of cross-border tax relations.

The initiative of unilateral decisions limits the tax sovereignty of countries. The digital economy has no boundaries, and its taxation can no longer be carried out within the same jurisdiction. Digitalization of business significantly affects the income of states from corporate

taxes. These are the decisions that the market jurisdictions must fight for. The OECD has formed the task of developing some approaches to fair taxation of profits of digital companies, taking into account their presence on the market.

The implementation of national digital tax is accompanied by many side-effects (Milogolov and Berberov, 2021, p. 1744). It will take long time to find a unified solution. Countries should be careful with designing and implementing new tax policies.

It is obvious that Russia can gain a lot by joining the measures proposed by the OECD. In particular, it will be able to count on a part of the profits of digital MNEs as one of the sales markets in which they operate. At the same time, Russia will be able to set its own thresholds for the revenue of digital giants to recognize a company obliged to pay additional taxes in Russia because Russia is not an OECD Member State.

The experience of foreign countries shows that there is a trend of introducing national digital taxes, but these taxes have many differences from each other, which leads to double taxation, lack of legal certainty and distortion of competition.

On the other hand, the provisions of the Tax Code of the Russian Federation on VAT and income tax do not allow to fully collect taxes on income of corporate groups that use digital business models when providing services related to Russian users. At the same time, Russian organizations that conduct similar activities face full tax burden, which allows us to conclude that Russian companies are discriminated against foreign ones.

In this regard, it is advisable to consider the issue of taxation in Russia of the part of the profits extracted by foreign companies in the Russian market.

References

1. Ayush T., Nishant S., Shefali M., and Stella J., (2021). *Taxation of Digitalized Economy: Analysing the United Nations Article 12B Solution, New Delhi, The Dialogue and Economic Laws Practice*. Available at: https://elplaw.in/wp-content/uploads/2021/06/The-Dialogue-Eco-

nomic-Laws-Practice-Taxation-of-Digitalized-Economy.pdf [Accessed 21.05.2022].

2. Berberov, A.B. and Milogolov, N.S., (2018). Assessment of the Scope of Tax Base Erosion in Russia. *Financial Journal* [Finansovyy zhurnal], 47 (6), pp. 47–58.

3. Chand, V. and Vilaseca, P., (2021). *The UN Proposal on Automated Digital Services: Is It in the Interest of Developing Countries?* Available at: http://kluwertaxblog.com/2021/03/05/the-un-proposal-on-automated-digital-services-is-it-in-the-interest-of-developing-countries/ [Accessed 21.05.2022].

4. Lyutova, O.I., (2021). Relevant issues of taxation of IT field in the era of digitalization and globalization. Law and society in the context of globalization: development prospects. In: *Collection of scientific papers based on the materials of the International Scientific and Practical Conference*, pp. 267–271. (In Russ.).

5. Milogolov, N.S. and Berberov, A.B., (2021). Russia in global digital tax reform: together or apart? *Journal of Siberian Federal University Humanities and Social Sciences*, 14(11), pp. 1731–1745.

6. Milogolov, N.S. and Ponomareva, K.A., (2021). International Cooperation of Tax Administrations in Taxing Digital Business Models: Myth or Reality? *Nalogi*, 3, pp. 29–31. (In Russ.).

7. Olkhovik, V.V., Lyutova, O.I., and Juchnevicius, E., (2022). Economic Growth Models and FDI in the CIS Countries During the Period of Digitalization. *Financial Journal*, 14 (2), pp. 73–90. https://doi.org/10.31107/2075-1990-2022-2-73-90.

8. Ponomareva, K., (2019). Comparison of Proposals to Adjust the Permanent Establishment Concept to the Digital Economy. *Bulletin of International Taxation*, 73 (11), pp. 581–589.

9. Ponomareva, K.A., (2021). Digital services taxes: the international experience and relevance for the Russian Federation. *Kutafin Law Review*, 8(2), pp. 314–330. https://doi.org/10.17803/2313-5395.2021.2.16.314-330.

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LEGAL EDUCATION

Article

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The Role of Legal Education for the Performance of Police Interventions at the Academy of the Police Force in Bratislava

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Abstract: This paper studies the law-related learning process at a state university and emphasises its peculiarities and special status. Certain law subjects offered at the Academy of the Police Force in Bratislava (Slovakia) are presented and the importance of legal education concerning the performance of the police service is stressed. The authors offer a brief overview of the assigned study fields and programs and list the law subjects that have a special place in the Police Academy training system. They share their practical knowledge and experience obtained while teaching selected law subjects. The paper has been developed within a national research project and the attention is given to selected attributes of the learning process — the police law — as its knowledge is crucial for the performance of police interventions. The paper underlines the legitimacy of obtaining law-related knowledge, which the Police Academy graduates will need in their future police career.

Keywords: Academy of the Police Force in Bratislava; Constitutional Law; intervention; law; law classes; law departments; law subjects; Police Law; service actions

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Contents

I. Introduction

The higher education system in Slovakia is represented by 35 universities, 117 faculties and 4,911 study programs. Six of these universities offer law studies. Specialized law academic institutions include Comenius University in Bratislava (Faculty of Law), University of Pavol Jozef Šafárik in Košice (Faculty of Law), University of Trnava (Faculty of Law), Matej Bel University in Banská Bystrica (Faculty of Law), Pan European University in Bratislava (Faculty of Law), Danubius University (Janko Jesenský Law Faculty). Nevertheless, we must point out that non-legally specialized universities also provide some legal training by offering certain law-related subjects. This largely depends on a university type, graduate profile, and study programs. A present-day society has high expectations of citizens and accordingly, legal knowledge is required in multiple professions.

Regarding the above-mentioned facts, we aim to specify the status of the Academy of the Police Force in Bratislava (hereinafter referred to as "Police Academy") and the importance of teaching law subjects for present and future police officers. Knowledge of the law and legal awareness are essential elements of professionalism in modern law enforcement. Having a solid understanding of police intervention (service actions) procedures is crucial for all police officers.

Police Academy is a state university that provides education and training to members of the Police Force other security services

and civilian youth and offers two study programs *Security and Legal Protection of Persons and Property* and *Security and Legal Services in Public Administration*. In Slovakia, there are two more state universities, namely The Armed Forces Academy of General Milan Rastislav Štefánik and The Slovak Medical University in Bratislava. The training at the Police Academy is offered at all levels of university studies: Bachelor, Master and Doctoral. The Police Academy with its almost 30-years history is a relatively young institution as compared to traditional universities. Its origin dates back to 1992 when the first academic year started on the 1st of October 1992.[1] Comparable to many other universities, the Police Academy has undergone certain changes connected with the enhancement of the training space. Accredited study programs have always reflected the current needs of society and policing along with the security issues and today the Police Academy is proud of its university status. At present time, the training is provided in the field of study *Safety and Security Sciences* which replaced two previous fields of study offered at the Police Academy, namely *Protection of Persons and Property* and *Security Public Administration Services*. In 2019, a new system of study fields in the Slovak Republic was set by a Decree of the Ministry of Education, Science, Research and Sports of the Slovak Republic No. 244/2019 Coll. on the system of study fields in the Slovak Republic. The Police Academy has been entitled university right to realize habilitation procedure and inaugural procedure as well as rigorous examinations in the assigned study field. In the academic year 2020/2021 1,237 students (639 internal students and 598 external students) enrolled for Bachelor and Master studies. The importance of legal education from the perspective of graduates' profile is underlined by many scientific and research projects and their successful outcomes and effects on the police practice. At present time, 29 national and international research projects are being carried out, *e.g., Analysis of legislation in the field of internal security and internal order in the Czech Republic and Slovak Republic*, *National model of criminal intelligence*, *Detection and investigation of economic crimes*, *Use of special evidence in investigating serious crime*, *Legal awareness of Slovak citizens about drug crime*, *Application aspects of the Act*

[1] Police Academy. Official website. Available at: http://www.akademiapz.sk.

No. 171/1993 Coll. On the Police Force as amended and related legal regulations, *Human rights protection by the police*, *Criminological and criminal solutions of domestic abuse*. The Police Academy provides the following training programs:

Table 1: Training Programs

1st university degree — Bachelor studies
Security and legal protection of persons and property
Security and legal services in public administration
2nd university degree — Master studies
Security and legal protection of persons and property
Security and legal services in public administration
3rd university degree — Doctoral studies
Security and legal protection of persons and property
Security and legal services in public administration

This brief characteristic clearly shows that the Police Academy does not belong to a network of law universities, nevertheless, it provides training in several law subjects. Four special departments, which are the principal units for legal matters, were set up for this specific purpose: Public Law Department, Private Law Department, Criminal Law Department and Administrative Law Department. Besides the academic sessions, these departments are actively involved in life-long learning programs for police officers such as *Specialized Police Training* delivered to new police officers (investigators, traffic and patrol police officers) who graduated from non-law faculties, Integrated Rescue System Training, Senior Studies (University of the Third Age), Vulnerable Victims of Crime and Investigation, special training program for future liaison officers. International cooperation, especially with neighboring partnership universities, is very well developed.

Law courses have a special place in the Police Academy training system as they help students gain important knowledge of the law as a complex of legal regulations valid in the Slovak Republic, to get acquainted with the legislation of special social relations in various areas of social life. Students learn about several law branches, basics of European as well as international law. Finally, yet importantly, the

objective of teaching law subjects is that students can apply obtained knowledge in other, also non-law subjects during their study, but predominantly in their post-graduate achievements (investigation, criminal police, financial police, patrol police, traffic police, border and foreign police, riot police, railway police, Prison and Court Guard Service, Inspection Service, National Crime Agency). For instance, graduates shall be skilled in applying the provisions of the Criminal Code and Code of Criminal Procedure in criminal proceedings, shall correctly understand the interpretation of provisions related to criminal liability, merits of crimes, imposing sanctions, procedures performed by law enforcement bodies and courts during criminal prosecution, *etc*. Furthermore, law subjects help students to develop the skills they will need to succeed in their future career in public administration service. They acquire knowledge on the system, subjects and sources of administrative law, public administration as an element of executive power, organizational aspects of public administration, administrative acts, administrative liability, constitutional and international aspects of the protection of ownership right, enforcement of legality, supervision in public administration, *etc*. (Košičiarová, 2015, p. 3).

II. Law courses

As stated above, the Police Academy focus on law subjects is considerable. For illustration, below we present the law subjects lectured by law-related departments. Not all subjects are obligatory subjects (OS), certain subjects are optional obligatory subjects (OOS) so the students have a choice opportunity. To summarize, students of the study program *Security and Legal Protection of Persons and Property* may take 34 law subjects (23 obligatory subjects and 11 optional obligatory subjects). Students of the study program *Security and Legal Services in Public Administration* may take 41 law subjects (28 obligatory subjects and 13 optional obligatory subjects). The academic performance of law subjects is completed with semestrial exams. Law courses provided in Bachelor and Master degree programs are listed in tables 2–5. Although the list does not show subjects taught in English, the Police Academy also provides courses on law subjects in the English language.

Table 2: Law courses lectured at Public Law Department

Degree	**Security and legal protection of persons and property**	**Security and legal services in public administration**
Bachelor	Theory of state and law (OS) Constitutional law (OS) Law of the European Union (OS) Protection of human rights (OOS) History of state and law of security services (OOS) Theory of legal standards development (OOS)	Theory of state and law (OS) History of state and law (OS) Constitutional law of the Slovak Republic (OS) Development of public administration (OS) Law of the European Union (OS) Protection of human rights (OOS) Theory of legal standards development (OOS)
Master	International law (OS) International security (OS)	International law (OS) International security (OS) International organizations (OOS)

Table 3: Law courses lectured at Private Law Department

Degree	**Security and legal protection of persons and property**	**Security and legal services in public administration**
Bachelor	Civil law I/1 (OS) Civil law I/2 (OS) Labor law (OOS)	Civil law I/1 (OS) Civil law I/2 (OS) Labor law 1 (OS) Labor law 2 (OS)
Master	Civil law 2 (OS) Trade law (OS) State service law (OS)	Civil law 2 (OS) Trade law (OS) International law (OOS)

Table 4: Law course lectured at Administrative Law Department

Degree	**Security and legal protection of persons and property**	**Security and legal services in public administration**
Bachelor	Administrative law 1 (OS) Administrative law 2 (OS) Administrative law (OS) Slovak asylum law (OOS)	Administrative law 1 (OS) Administrative law 2 (OS) Administrative law 3 (OS) Environmental law (OS) State administration (OS)

Continuation of the table 4

Degree	**Security and legal protection of persons and property**	**Security and legal services in public administration**
		Administrative law (OS) Public administration in EU countries (OS) Public administration in Slovakia 1 (OS) Public administration in Slovakia 2 (OS) Public administration in Slovakia 3 (OOS) Trade licensing law (OOS) Theory and practice in public administration (OOS)
Master	Financial law (OS) Tax law (OS) State administration (OS) Schengen acquis (OS) Financial and tax law (OOS)	Financial law (OS) Special administrative proceeding (OS) Tax law (OS) Asylum law and migratory policy (OS) Theory of public administration 1 (OOS) Public procurement 1 (OOS) Theory of public administration 2 (OOS) Public procurement 2 (OOS) Financial and tax law (OOS)

Table 5: Law courses lectured at Criminal Law Department

Degree	**Security and legal protection of persons and property**	**Security and legal services in public administration**
Bachelor	Criminal material law I (OS) Criminal procedural law I (OS)	Criminal material law I (OS) Criminal procedural law (OS)
Master	Criminal material law II (OS) Criminal procedural law II (OS) Criminal law (OS) European criminal law (OOS) Criminal and legal protection of the society against corruption (OOS)	Criminal and legal protection of the society against corruption (OOS)

Lecture-based classes, which are still widely used for delivering law subjects, apply teaching methods under the competence of relevant departments. Regularly, lecturers organize and carry out educational and methodical work according to the taught discipline or separate types of education sessions to exchange teaching experience and share methodological innovations. In most classes, active methods and innovative approaches have been used focusing on experience-based training where theoretical learning is linked to practice. The concept of students' engagement is predicated on the belief that practical exercises improve their inquisition, interest, and inspiration. A lecturer must handle numerous teaching methods to be applied in the transformation of the learning content into a particular teaching procedure. Continuous study of teaching methods is inevitable for every university lecturer, and he/she shall be able to choose a suitable teaching method and teaching content considering important teaching factors. A lecturer shall be aware of which teaching methods are available, shall identify the advantages and disadvantages of these methods, the purpose of these methods. In contemporary teaching, there are five basic criteria for structuring teaching methods in a system: didactic, psychological, logical, procedural, and organizational. Accordingly, teaching methods are divided into verbal, demonstration, practical, reproduction, production, induction, deduction, analogy, comparison, motivation, exposition, fixation, diagnostic, problem-solving methods, *etc*. (Bajtoš, 2020, p. 88–92). During a teaching process, a combination of several methods is frequently applied, which is known as a methodological change. The most effective methodological change is achieved when teaching methods from different groups are combined and changed several times during a session.

Law subjects at Police Academy are taught in two organizational forms:

1. Lectures. A teacher's monologue speech where he/she delivers students theoretical background on the given issue is supplemented by practical exercises (with the use of information and communication technology). From the historical point of view a lecture is the oldest teaching form and is widely used at universities, its origin dates back to the Middle Ages. At present, it still represents a basic organization

form and teaching method. At the Police Academy, a lecture is delivered to all enrolled students at once.

2. Tutorials. These are interactive classes after a lecture with small study groups where students discuss the content of the lecture and assigned tasks. At tutorials, teachers check how the learning content has been understood, reinforce the content by practical examples, motivate and activate the students. Teachers, as a rule, use different teaching methods and share the positive experience through discussions. Students have enough space to progress their viewpoints, constructive thinking, problem-solving, brainstorming (a market of ideas generated to solve defined problems) (Skalková, 2007, pp. 192–193).

Based on positive methodological results and personal long-lasting experience in delivering such subjects as Constitutional Law of the Slovak Republic and Protection of Human Rights we outline the most frequently applied teaching styles and methods:

— Situational approach emphasizes the role of contextual factors in case studies solutions: students work in small groups to solve the case study, either real or possible to happen. Students are engaged in a discussion of specific scenarios that resemble real-world examples, identify alternative solutions, and choose the optimal way. The role of the lecturer is to ask students to justify their proposals, provide feedback and summarize the merits of the case as well as conclusions. This method enables several possibilities. For instance, the lecturer prepares a particular case, *i.e.,* a decision of the Constitutional Court on violation of fundamental rights or freedoms to a woman who had applied for a working position. The woman had fulfilled all the required working criteria, had been invited to a working interview but was finally rejected. There is clear evidence of discrimination (sex, minority member). Students shall use relevant legal norms to solve the case, namely violation of fundamental rights and freedoms guaranteed by the Constitution of the Slovak Republic and international conventions.

— Simulation is an instructional scenario where the learners are placed in a world defined by the teacher. They represent a reality within which students interact. The teacher controls the parameters of this world and uses them to achieve the desired instructional results. For instance, a wide range of computer-based simulations may be used,

with several alternatives such as court trial, negotiations in the highest executive power body National Council of the Slovak Republic or students' conference where students are responsible for the course of the conference in terms of organization and logistics, content, form and presenting papers.

— Roleplay is an activity in which students assume the role of another person and act it out. Students are usually given an open-ended situation in which they must make a decision, and resolve a conflict. Role-playing is designed to promote students' empathy and understanding of others. It also gives students a chance to be imaginative and creative. Building on these insights, students can develop a wider range of ideas about how to solve various problems. Role-playing is also useful for developing critical-thinking, decision-making, and confidence. For illustration, students are assigned a specific case to study and to review the hearing, it is recommended that they prepare in advance. The roleplay should take place in a special classroom and should last for at least 45 minutes. Students are divided into several groups and take different roles: a judge, a prosecutor, an attorney, a court clerk, an accused, a victim, a witness and role play a court trial.

In addition, teaching methods used in law classes aim at raising students awareness and improving their skills on how to deal with, for instance, the Collection of Laws of the Slovak Republic and hierarchy of rules of law through computer-based courses, Internet-based courses with the use of a national legislation website Slov-lex[2] which is a legislative and information portal of the Ministry of Justice of the Slovak Republic. This portal provides professionals and general public with electronic access to applicable law and all the relevant information regarding law. Learners and teachers also enjoy moot problems such as a simulations of meetings and negotiations of the highest legislative body National Council of the Slovak Republic, which often requires drafting of organizational and supporting documents, development of students' Constitution as the basic law, which must fulfil content-related and formal requirements, or, *e.g.,* establishment of a political party in conformity with conditions fixed by relevant legislation. Since

[2] Slov-Lex. Právny a informačný portál. Available at: https://www.slov-lex.sk.

the forthcoming academic year, teachers and learners will be placed, in principle, in the same environment as in the real world, namely moot trials will be exercised in a new special classroom called "Court Room," his will lead to getting an authentic experience with specific positions in trial procedures.

III. Law and the police service in the educational process

This part of the paper introduces teaching of law subjects, which are necessary for the performance of the police service, as well as the importance of law knowledge in real police work. In general, there are two main reasons that have led us to focus on these issues. Firstly, as already stated above, Police Academy as a university institution that provides education on selected law subjects. Secondly, several members of the teaching staff are members of a national research team that have been carrying out a scientific project titled *Service actions performed by a police officer and the application of a principle of appropriateness from the perspective of criminal and administrative law*. The project is aimed at an urgent topic — enhancement of the efficiency of the performance of interventions by members of the Police Force. The research team is supported by police experts, which enables to link the theoretical knowledge with practice. The expected outcomes of an applied research project shall contribute not only to academic matters but also to police work. The project started in 2018 and is planned until 2022. Project aims and objectives are summarized below:

— Analysis of *de lege lata* of selected legal and internal norms governing the rules and realization of police interventions.

— Defining separate legal entitlements, obligations and coercive measures applied by police officers (law, sub-legal, legislative, internal, *etc*.).

— Analysis of specific cases when police interventions into fundamental rights and freedoms that were applied (casuistry, assessment of appropriateness vs. inappropriateness of the police procedures).

— Empirical research on realization of service actions.

— Proposal of *de lege ferenda* on a national level to improve legislation and practical realization of service actions, ensure higher standards of communication with the public. Provisions *de lege ferenda* will focus on the establishment of an instrument that will enable to effectively examine the appropriateness of service actions and evaluation of the current state of play.

— Transformation of the obtained knowledge into the training curricula at the Police Academy — practical training on the appropriateness of service actions, the negative impact of interventions into fundamental rights and protections of a police officer. Implementation of the results into training curricula of the University of the Third Age.

— Provision of the obtained knowledge and proposals *de lege ferenda* to the police authorities, development of a methodological instrument for the needs of the Police Force.

— Development of a training module to be uploaded on Intranet of the Ministry of Interior which will evaluate and examine the appropriateness of service actions from the perspective of Administrative, Constitutional and Criminal Law.

— Increase the public trust in law enforcement authorities and courts by decreasing the level of procedural breakdowns.

According to Article 9 (3) of the Act No. 171/1993 Coll. on the Police Force an intervention means an activity of a police officer set forth by and performed within the scope of the present Act, which directly interferes with the fundamental rights and freedoms of a person. The key tasks of the Police Force as an armed safety corps include co-operation in protecting fundamental human rights and freedoms, especially by safeguarding the life, health, personal freedom and security of persons and in the protection of property, detection of criminal acts and identify their perpetrators, carry out investigations of criminal offences, combat against organized crime, terrorism and international crime. The Police Force in the performance of their tasks is governed by the Constitution, constitutional laws, laws and other generally binding legal regulations and international treaties, to which the Slovak Republic is bound. A police officer on duty is obliged to intervene if a criminal act or offence is being committed, or there exists. A police officer off duty is obliged to intervene if a criminal act or offence is being committed, which

directly threatens the life, health or property. During the intervention, a police officer is entitled to use coercive means such as different hand holds, punches and kicks of self-defence, means for removing defiance or avert an attack, handcuffs, a police dog, mounted crowd control by motor vehicles and mounted crowd control, technical means to prevent a vehicle drive off, arresting belt and other means for stopping a vehicle by force, special water cannon, stun device, a strike by a firearm, a threat by a firearm, warning shot in the air, use special ammunition, use a plane, a weapon. A police officer can take a service action (intervention) solely based on conditions stipulated in The Charter of Fundamental Rights and Freedoms[3] that states that the state power may be enforced only in cases and within limitations determined by law. From the point of view of the state, a service action can be understood as every state action, failure to take action caused by conduct identified as protection of fundamental law (Peťovský, Odlerová and Škrinár, 2017, p. 45). Considering whether an intervention has or has not been appropriate depends on a fact whether the rights and freedom of persons have been violated. During the performance of service actions, police are governed by principles stipulated in legal regulations. These principles regulate the procedures of the police intervention and at the same time, they guarantee that personal rights and freedoms are interfered only within determined limits and in conformity with law. They include a principle of officiality, a principle of opportunity, a principle of subsidiarity and a principle of appropriateness. A principle of appropriateness means that all police interventions into personal rights and freedoms shall be appropriate to impending danger or unlawful conduct by a violator. A police officer must decide on appropriate use of forcible means and a timeframe of the action to be taken.

During the project, several publications have already been developed including the university textbook titled *Police Law*, a monograph, some conference proceedings, methodical guidelines, *etc*. Moreover, a few national and international conferences have been organized, hundreds of police officers have been trained, a special classroom was

[3] It is a document enacted in 1991 by the Czechoslovak Federative Republic and currently continued as part of the constitutional systems of both the Czech Republic and Slovak Republic.

established where trainings of police officers will be provided. Trainings will cover the issues of police interventions, theory of law, selected issues of Criminal Law, Constitutional Law, and Administrative Law. The objective of the research team is to bring in new expertise and achievements and transform them into the educational process of law-related subjects, to develop relevant publications and deliver them to university teaching staff, police experts, students, *etc*. The ambition is to promote proposals *de lege ferenda* for possible (internal) legal regulations that connects the Police Academy with law universities. Yet, scientific discussions promoted at various research-related venues are crucial for the exchange of experience between law teaching staff and law experts.

As already mentioned, law subjects that are key determinants for the appropriate police work comprise mainly Constitutional Law of the Slovak Republic, Criminal Law and Administrative Law. We will primarily pay attention to the learning content of the Constitutional Law. In its broader sense, it is a basic element of the legal order binding by the Constitution of the Slovak Republic that represents the highest legislative power. It means that all legislation shall be governed by the Constitution of the Slovak Republic, including legislation ruling the status of the Police Force and police service.[4]

Constitutional Law of the Slovak Republic is an obligatory subject at Bachelor level in accredited study programs and is delivered in the first semester. Students learn about

— state regime,

— type of the government,

— system of the state bodies (status of the head of the state — President of the Slovak Republic, the highest legislative body — National Council of the Slovak Republic, executive power — the Government of the Slovak Republic, judicial power — system of courts in the Slovak Republic and the status of the Constitutional Court of the Slovak Republic, Prosecutor's Office, Public Defender of Rights),

[4] Act No. 171/1993 Coll. on the Police Force, Act No. 300/2005 Coll. Criminal Code of the Slovak Republic, Act No. 301/2005 Coll. Code of Criminal Procedure, Act No. 372/1990 Coll. on Offences.

— territorial self-government — state authorities in municipalities and higher territorial units.

Students also learn how fundamental rights and freedoms are guaranteed and understand the status of a citizen in the state and a person in society. They study how the state bodies are created, how elections are held, *e.g.,* presidential elections, parliamentary elections, municipal elections, elections of deputies to municipality councils, regional elections. Accompanying goals of the Constitutional Law classes may be summarized as follows:

— correct use of selected law terminology,

— skills in the application of relevant rules of law,

— knowledge of fundamental rights and freedoms, their limitations, authorized interventions into fundamental rights and freedoms, a system of their protection.

Academic staff make use of real and imaginary cases to find solutions by determining the correct procedure, applying relevant legislation, analysing problems. Students make use of helpful didactic means to develop projects and presentations on a specific topic. Finally, in a relaxing atmosphere, faculty members use crosswords with questions related to Constitutional Law issues, students are required to fill in the blanks with correct words. When delivering certain lectures such as "National Council of the Slovak Republic" aimed at informing students about constitutional and legislative competencies of the National Council, the process of Parliamentary negotiations leading towards the approval of laws we prefer situational approach and model situations, *e.g.,* simulation of the negotiations in the Parliament, trial process, the establishment of a political party. Another topic is related to "Judicial Power and Court System in the Slovak Republic" where students learn about the court system functioning — District Courts, Regional Courts, The Supreme Court, The Supreme Administrative Court, Special Criminal Court and The Constitutional Court of the Slovak Republic. Students gain knowledge about the independent judicial system, functions of a judge, basic organization, and competencies of courts. As for fundamental rights and freedoms, specifically the right to judicial protection, students may apply gained knowledge during tutorial trials. Students are very interested in the practical application of guaranteed

constitutional rights including right to associate in political parties and movements, they set up their political party with its name, program, *etc*.

By applying such teaching methods, students act different roles in specific situations that are preceded by a detailed theoretical study of the relevant legislation. During lecturing topics such as Fundamental Rights and Freedoms and Police Service, Police Protection of Fundamental Rights and Freedoms students apply knowledge gained at lectures by analysing particular practical cases, careful investigation of cases, use of relevant legislation, guided discussion. We have many good experiences with organizing visits, *e.g.,* to the Slovak National Centre for Human Rights.[5] The connection between theory and practice is not only an aim but also an effort of all faculty members. Visits to selected institutions are supported by expert lectures. Recently we have organized visits to the National Council of the Slovak Republic, Government Office of the Slovak Republic, the Sereď Holocaust Museum. In addition, other departments organize visits to court trial proceedings, municipality offices, Office of the Government of the Slovak Republic, *etc*.

These teaching methods are applicable within several law subjects, though they fit the best for the face-to-face learning process. Unfortunately, the widespread COVID-19 pandemic has affected not only human health but also the education system. Many educational institutions had to transit to an online learning system, teaching practices at the Police Academy are currently employ the MS Teams application.

We have briefly introduced certain teaching forms and methods used for specific law subjects and in the next part of the paper, we will indicate the *importance* of obtaining legal knowledge from Constitutional Law, Criminal Law and Administrative Law for the police service. The content of the subject Constitutional Law has been illustrated above and it is evident that students gain knowledge of a basic legal sector that also determines other subjects such as Criminal

[5] A national human rights institution established in the Slovak Republic, accredited with status B by the International Coordinating Committee of National Human Rights Institution. The Centre performs a wide range of tasks in both human rights and fundamental freedoms including the rights of the child and observance of the principle of equal treatment.

Law and Administrative Law. We have also highlighted the Constitution of the Slovak Republic that is a basic source of law. Speaking about the police duties and tasks, these are governed by several legal regulations and are the concern of many legal sectors as well as legal studies. These circumstances contributed to the development of a university textbook *Police Law*[6] that represents a partial outcome of our research project. The textbook summarizes all relevant legal information and brings in an interdisciplinary overview of the duties of the Police Force from different legal perspectives. Besides a primary regulation, *i.e.,* Act on the Police Force, the authors have cumulated legal knowledge from the Constitutional, Administrative, Criminal, and International Law. In this respect, the textbook unifies understanding of the police actions and their legislative framework, provides expertise from many legal sectors and illustrates practical experience. The textbook:

— contains the key wordings from the Act on the Police Force which is a basic regulation for the police-related activities;

— clarifies basic terminology of the police law and the structure of the Police Force;

— informs about rights and obligations of the members of the Police Force;

— analyses the service actions and interventions performed by members of the Police Force with the use of forcible means.

It introduces a term of "police law;" the legal status of the Ministry of Interior of the Slovak Republic as a central body of state administration for the Police Force; the legal status, duties and structure of the Police Force; analyses police activities and interventions, duties and entitlements of a police officer to use coercive means; compensation of damages caused by police interventions; and appropriate and inappropriate performance of police interventions. In addition, the textbook presents the constitutional and legal aspects of the police law, constitutional limitations of interventions into personal rights and freedoms as well as international elements of the police service. The textbook is divided into 7 comprehensive chapters: Police Law,

[6] A university textbook was developed by a team of authors: Marczyová, K., Hašanová, J., Strémy, T., Šimonová, J., et al. in 2019.

Police Service and Interventions, Constitutional Aspects of the Police Law, Constitutional Limitations of Police Interventions into Selected Fundamental Rights and Freedoms, Criminal Aspects of the Police Law, International Aspects of the Police Law, Protection of Police Officers. The textbook is significant not only as one of many outcomes of our research project, but serves as a study tool, because a basic didactic function of learning tools is to provide optimal conditions for reaching educational objectives (Bajtoš, 2020, p. 223). The textbook is primarily developed for police officers but can be a learning platform for all police officers, police service applicants and others interested in this field.

Law classes focusing on the police law will be also delivered during a special training program called *A week of appropriate interventions*. It is a tailor-made training course for police officers during which traffic police officers, patrol officers and investigators will be trained on tactics of service actions, interventions into fundamental human rights and freedoms and possible consequences for acting police officers, legislation related to application problems what will be demonstrated on model situations, discussions about the content and importance of the principle of restraint in the police practice, electronic information module will be presented via Intranet of the Ministry of Interior of the Slovak Republic which will offer all necessary information and outcomes of the project. *A week of appropriate interventions* shall first focus on members of patrol and traffic police to hand them over the knowledge that they will use in examining the appropriateness and legitimacy of performed service actions when interfered with fundamental human rights. The aim is to eliminate a risk of inappropriate intervention, unlawful actions. A research team has prepared a training program that consists of theoretical and practical parts (exercises). The training will be practised in a specially designed classroom. The theoretical part will be supported by lectures and open discussions in the field of Constitutional Law, Criminal Law and Administrative Law. Main topics include, *e.g.*, principles of police service and service interventions, forcible means and their use, interventions into personal rights and their constitutional limits, the principle of appropriateness and moderation. The theoretical study will be followed by practical exercises and analysis of legal regulations and casuistry. For this purpose, a classroom is equipped with real aids

and devices and modern didactic technology. The classroom contains various accessories of police equipment and modern computers, thus, it is possible to demonstrate different situations when realizing service actions. It is equipped with an interactive teaching whiteboard, coercive means such as handcuffs, holsters for textile handcuffs, service belts, batons, tasers, tactical bags, *etc*. Students are motivated by wall posters and photos of police actions and interventions performed outdoors and by a life size model of a police officer carrying all required accessories including a riot shield. Via analysis and training on how to solve crises by respecting obligations and competencies and coercive measures, the police officers will be able to manage and handle real actions and interventions. As J. Záhora states "this principle features a new, more humane understanding of the criminal process and respect for human rights and freedoms. This principle means that it is important to impose certain restrictions for interventions into civil rights and freedoms" (Záhora, 2018, p. 31).

IV. Conclusion and recommendations

Besides others, Police Academy specializes in delivering law classes, which are determining for gaining knowledge applicable within other learning subjects but important for the police practice. Concerning police officers, education is focused on their full preparation for the police service. University education is demanding for both students and academic staff; and to ensure high-quality learning process it is inevitable that all faculty members handle and apply all necessary knowledge and appropriate teaching methods and material aids. The authors pointed out the importance of law subjects delivered by a non-law academic institution while emphasising certain aspects of the police work during the realization of interventions (service actions). The paper represents a partial outcome of the national research task No. APVV-17-0217 — "Service actions performed by a police officer and the application of a principle of appropriateness from the perspective of criminal and administrative law" that is supported by the Slovak Research and Development Agency.

References

1. Bajtoš, J., (2020). *Didaktika vysokej školy*. Wolters Kluwer SR, s.r.o. ISBN 978-80-571-0245-8.

2. Košičiarová, S., (2015). *Správne právo hmotné, Všeobecná časť*, Plzeň: A. Čeněk, ISBN 978-80-7380-578-4.

3. Marczyová, K., Hašanová, J., Strémy, T., Šimonová, J. et al., (2019). *Policajné právo*. Plzeň: A. Čeněk, 424 p. ISBN 978-80-7380-790-0.

4. Peťovský, M., Odlerová, M., and Škrinár, T., (2017). *Zákon o Policajnom zbore, Aplikačná prax*. Plzeň: A. Čeněk. ISBN 978-80-7380-682-8.

5. Skalková, J., (2007). *Obecná didaktika*.

6. Záhora, J., (2018). Uplatňovanie zásady primeranosti a zdržanlivosti pri využívaní informačno-technických prostriedkov v trestnom konaní v Slovenskej republike. *Časopis pro právní vědu a praxi*, 1, pp. 29–39. Available at: https://journals.muni.cz/cpvp/article/view/8930 [Accessed 29.07.2021].

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