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CONTENTS

EDITORIAL

Dear Readers and Authors,

This is the fourth issue of our Journal in 2022. We hope that multidimensional nature of the human rights issues will be of interest to the academic community not only for their relevance, but also for the variety of approaches in their understanding. All the papers in the issue are distinguished by a wide scientific context, not only theoretical and legal, but also in the light of such sciences as economics, philosophy, philology, etc. This indicates that interdisciplinarity has become an inherent trend in modern science. Anthropocentrism of all the studies presented in the issue has justifiably led to an emphasis on axiological and ethical sides of interpretation of the problems under consideration. This issue contains both materials of a broad general theoretical type and methodological and applied materials.

The paper written by Svetlana Golovina and Kirill Tomashevski is devoted to the problem of working life in modern society and its legal regulation in new conditions. Complex and challenging nature of this problem is connected with the lack of a uniform scientific approach to assessing the quality of working life, absence the definition of decent work and restructuring of the labor market against a backdrop of digitalization. The authors pay special attention to the problem of the youth and their employment, the quality of labor legislation enforcement and the level of legal consciousness that affects regulation of labor relations in society. Consideration of all these issues leads the authors to the general philosophical markers of humanism and justice as moral and legal principles on which the life of rule-of-law society should be based.

The paper by Golovina and Tomashevski can be considered as a major policy paper for this issue, since it reflects, in one form or another, the concepts of all other papers including legal consciousness, legal culture and civil society, the good and justice, labor emancipation, digitalization and human rights.

Legal consciousness is directly related to the formation of civil society that participates in the mechanism of regulation of the legal society and

its institutions. The paper by Yurij Skuratov, Anna Yastrebova and Roman Dzhavakhyan is devoted to this particular subject. Civil society conveys the sovereign will of the people, and inefficient interaction between civil society institutions and judicial authorities results in serious problems in ensuring the constitutional rule of law in the Russian Federation.

Legal consciousness and legal culture in the context of combating corruption are equally important. This urgent and painful topic is considered by Elena Antonyan, Yuriy Migachev and Maksim Polyakov at the level of its genesis and comprehensive theoretical understanding in the contemporary theory of law. At the same time, the authors indicate the ways to eliminate this octopus that has encapsulated the sphere of public administration of the country.

Nadezhda Tarusina, Artem Ivanchin, Elena Isaeva, Elena Koneva and Snezhana Simonova provide the readers with a spherical, three-dimensional view of the problem of men's and women's emancipation and counter-emancipation in the field of law. The authors' standing is distinguished by a balanced, impartial approach to the gender agenda: they do not share a traditional, exclusively negative view of women's rights in the masculine world. On the contrary, they dwell on men's rights infringement in the Russian legal field. A woman and a man in politics, in criminal legislation, in family and property relationships, in relationships involving the issues of parenthood and surrogacy — these are the issues that are raised in the study. It should be noted that while the editorial office was preparing the current issue, the authors' assumption about possible ban on surrogacy for foreigners in the future was confirmed: now it is prohibited by law in Russia.

Undoubtedly, articles devoted to new realities in the life of a person, namely, digitalization and virtualization, are very relevant. The study authored by Anastasia Mitrushchenkova provides a philosophical and legal understanding of personal identity and personality in the metaverse, describes transformation of the idea of a person, reduction of personality only to external attributes, and dwells on the creation of a parallel, virtual personality. What legal, ethical and ontological challenges a person will face in the near future is an urgent question, the answer to which, according to the author, we will have to look for.

In addition to the national agenda, the issue also reflects the international agenda. We are referring to the study carried out by Uche Nnawulezi and Salim Bashir Magashi concerning the role of UN structures in the implementation of international humanitarian law. The relevance of this topic cannot be overestimated: dynamic processes of geopolitical transformations and nullification of international law rules forced us to look at it in a new way. The same can be said about the article written by Daniil Chugunov, Rustam Kasyanov and Mikhail Evdokimov, where the authors analyze political and legal development of the European Union, changes in its political and economic structuring, European neo-federalism within the framework of the concept of neofunctionalism. Challenges this large geopolitical structure is facing have, on the one hand, called into question its very existence, and, on the other, forced Europeans to take a fresh look at themselves and to look for ways out of a difficult crisis situation. The good and justice, as the main ontological concepts that formed the basis of the European Union ideology, to some extent replacing the idea of the State, needs reconsideration. Europe cannot abandon a complex ideological construction, since it is precisely the ideology that underlies the confrontation with Russia. Monetary, energy and environmental reasons are also important, and, therefore, the EU countries are actively solving all these issues in the context of defending the rights of participating countries and fiercely opposing third world countries.

The study authored by Svetlana Kushnirenko and Anton Kharatishvili is applied in nature. It is devoted to the process of virtualization of money circulation (cryptocurrency) and crimes related to it. The lack of theoretical studies, textbooks on criminalistics of such crimes requires the forensic community to develop practical tools and recommendations for practitioners.

Finally, the paper by Alexander Grakhotsky will certainly pleasure the readers' minds. The article highlights the role of Fritz Bauer, an outstanding lawyer and human rights defender in military and post-war Germany. Legal interpretation of the events is given in the context of the history of German jurisprudence. Thus, the author analyzes the roots of Bauer's understanding of the place and role of a lawyer in the light of Radbruch's works and focuses on the concept of the right to resist that developed in the German legislative

tradition. It is also important to examine how the concept of legitimate power evolved in post-war Germany in connection with the illegal actions of that power. Such a comprehensive presentation of Bauer's views and the historical context of his activities is not only educational in nature: the paper raises problems that are at the forefront of both political and legal meanings today.

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HUMANISM, JUDICIARY, CORRUPTION PREVENTION

Research Article

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Social Justice and Humanism as Axiological Principles of Labor Law and the Concept of the Quality of Working Life

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Abstract: In the context of the intensification of the integration processes of the Russian Federation and the Republic of Belarus, the focus of legal integration on the harmonization and even unification of labor legislation, it seems relevant to address the legal issues of decent work and ensuring the quality of life of citizens of both states, the convergence of state minimum social standards. The main attention in the article is given to such initial axiological legal principles that play a leading role in ensuring decent work and the quality of work life as social justice and humanism in the social and labor sphere, which determines the structure of this article. The problem of quality of life is interdisciplinary. It has not only a legal, but also an economic, sociological, socio-cultural, general philosophical context. Therefore, in the article, along with general scientific and special legal methods, an interdisciplinary approach is widely used. The authors aim is, based on doctrinal developments, normative material and its comparative analysis, to deepen the understanding of the ideas of social justice and humanism in the social and labor sphere, which underlie the legal program of decent work and

the concept of the quality of work life with the development of proposals for improving the labor legislation of Russia and Belarus.

Keywords: justice; humanism; axiology; concept; quality of work life; employee; employer; labor legislation; Belarus; Russia

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Contents

I. Introduction

The main goals facing the International Labor Organization (hereinafter ILO), which were formulated in 1919 in the preamble of its Constitution and which permeate its activities for more than a century: "Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labor exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled…"[1] The ILO founding fathers not only randomly linked the ideas of social justice with the establishment of universal and lasting peace, since injustice, accompanied by want and deprivation, endangers the foundations of peace and harmony throughout the world. These are the "cornerstones" on which international cooperation on

[1] The preamble of the ILO Constitution. Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [Accessed 15.11.2022].

labor and social security has been built for one hundred years. There is no alternative to this idea.

In this article, we aim to look at the genesis of the idea and program of decent work, its transformation into the concept of the quality of working life. These are not opposing each other doctrines, the second one is a logical continuation of the first one, but both of them are possible only in conditions of peace and conscientious cooperation between states based on respect for the universally recognized principles and norms of international law. We are convinced that providing decent work and improving the quality of working life can only be achieved in conditions of peace.

The article will consider two of the most important axiological principles of labor law — the ideas of social justice and humanism. These ideas go back to the philosophical views of Plato and Aristotle, the thinkers of the New Age, but which have found a comprehensive reflection in law already in the twentieth century in the constitutions of modern states, in the branch of labor legislation. We will widely use an interdisciplinary approach, referring to the views of legal scholars, economists and sociologists, as well as the comparative legal method, analyzing the achievements and shortcomings that are present in the national labor legislation of the Russian Federation (hereinafter Russia) and the Republic of Belarus (hereinafter Belarus). The conclusion, based on a comprehensive analysis of the views of representatives of legal and economic science, will substantiate proposals for the further improvement of the labor legislation of Russia and Belarus in the context of the ongoing integration processes between them, both within the Union State and the Eurasian Economic Union (hereinafter the EAEU).

II. From the Concept of Decent Work to the Concept of the Quality of Working Life

The starting point for the formation of a new approach to understanding decent work was the reports of the ILO Director-General (hereinafter the Office) at the 81st session (1994), which outlined a new vision of the problem of liberalization of the regulation of labor relations, combined with the respect for human rights and fundamental

freedoms (Hepple, 2005, p. 57). Later, at the turn of the century, the ILO officially proposed the concept (program) of decent work. This concept was intended to bring about major economic, social and legal changes in labor, as one of the most important spheres in human activity. In the reports of ILO Director-General Juan Somavia at the 87th session of the International Labor Conference (hereinafter ILC) in 1999 and at the 89th session of the ILC in 2001, as well as in other policy documents, the goal of the declared concept was called "assistance in obtaining and performing decent work in conditions of freedom, justice, security and safety, and human dignity" (Somavia, 2004, p. 3).

ILO officials and experts presenting this concept characterize the essence of decent work by listing its features. These are productive activity or productive labor capable of ensuring the competitiveness of the country; decent and fair income for employees; workplace safety; social protection (against unemployment, in case of pregnancy, the need to care for a child, temporary disability, pensions); perspectives for individual development and social integration; active participation in managerial decision-making (through trade unions and business associations); equal starting positions and opportunities for both sexes (Barrett-Reed, 2003, p. 5). It follows from the analysis of official documents that the ILO pays attention mainly to the economic content of decent work, the rationale that decent work provides higher labor productivity, leads to an increase in the competitiveness of organizations, improves working conditions, labor relations and worker satisfaction (Somavia, 2001, p. 7). This approach is not accidental, since labor relations are closely intertwined with economic and production functions. Along with social and protective functions, labor law also performs economic (production) ones.

The ILO Declaration on Social Justice for a Fair Globalization, adopted at the 97th session of the ILC in 2008, declared the Decent Work Agenda to be universal and, in particular, that all ILO member States should pursue policies aimed at solving strategic objectives in such areas as employment, social protection, social dialogue and rights at work. Surely, each state has its own "recipes" for pursuing a national policy aimed at solving this strategic objectives, but within the framework of integration associations (the EU, the Council of Europe,

the EAEU, the Union State of Russia and Belarus), these areas are often refined and coordinated.

The scientific literature has repeatedly attempted to define the concept "decent work." According to A.S. Kudrin "decent work should be understood as a multidimensional concept encompassing economic, political and legal phenomena, creating conditions for efficient and productive work, promoting social, cultural and technical progress for the social protection of workers and their families, contributing to the development of the essence of human beings and unlocking the creative potential of everyone. The state as a subject endowed with social power takes the leading place in the regulation of relations arising in the world of work, being the guarantor of the implementation of the concept of decent work" (Kudrin, 2014, pp. 256–257).

This concept is interpreted somewhat differently by O.S. Khudyakova, who states that the labor law essence and content of "decent work" "should be given, first of all, through a description of the features of the legal regulation of working conditions." She believes that "from a position of justice, work should be considered decent if the existing legal regulation of labor relations is guaranteed to provide all employees with the opportunity to exercise basic labor rights and freedoms, and the objectively existing "inequalities" of employees are compensated in the legislation in such a way as not to create unreasonable benefits and use them for the common good. Another characteristic of decent work is "the legal regulation of such a quality in which the personality of an employee remains free and realizes this benefit in existing labor relations and relations closely related to labor, within the boundaries established by labor legislation, thereby ensuring its self-affirmation and self-realization in within the scope of the choice made" (Khudyakova, 2010, pp. 54–55). We find it possible to agree with this opinion since public legal awareness and law enforcement still fall behind the postulates of the ILO decent work agenda. By now, one can say that the ILO decent work agenda has its logical continuation — the concept of quality of work life, which still remains at the stage of formation.

Until now, the problem of the quality of work life has been mainly dealt with by economists: Zonova, 2016; Ignatenko, 2010; Nikitin,

2005; Roik, 2018; Tsygankov 2007; Tsygankova, 2009. A number of dissertation research on the phenomenon of the quality of the work life of the population were carried out by sociologists: Ivanova, 2005; Kolontaev, 2011.

Scientist pay even more attention to the category "quality of life" as a broader one in relation to the quality of work life. As the scientist in economics V.D. Roik stated "the current ideas about individual well-being in a specific historical period are determined by official and scientific criteria, norms and standards of such a socio-economic category as the quality of life" (Roik, 2018, p. 42).

The Russian Federation, as a welfare state, calls improving the quality of life of its population priority directions of the national strategy. Decree of the President of the Russian Federation No. 208 dated 13 May 2017 "On the Strategy for the Economic Security of the Russian Federation for the period until 2030"[2] recognizes the goal of state policy in the field of ensuring economic security to increase the level and improve the quality of life of the population, and one of the main directions of state policy is the development human potential. Similar program provisions are provided for in the legislation of the Republic of Belarus. Thus, according to the Program of Socio-Economic Development of the Republic of Belarus for 2021–2025, approved by the Decree of the President of the Republic of Belarus No. 292 dated 29 July 2021,[3] this Program is aimed at creating prerequisites for the growth of the welfare of citizens, ensuring comfortable living in each region of the country, developing human potential; digitalization processes will accelerate significantly, which will necessitate the expansion of digital control and strengthening of cybersecurity, as well as the restructuring of the labor market in order to increase its mobility, flexibility and adaptation to remote work. The main goal of the development of the

[2] Decree of the President of the Russian Federation No. 208 dated 13 May 2017 "On the Strategy for the Economic Security of the Russian Federation for the period until 2030." Collection of Legislation of the Russian Federation. 15 May 2017. No. 20. Art. 2902. (In Russ.).

[3] Program of Socio-Economic Development of the Republic of Belarus for 2021–2025, approved by the Decree of the President of the Republic of Belarus No. 292 dated 29 July 2021. National Legal Internet Portal of the Republic of Belarus, 4 August 2021, 1/19834. (In Russ.).

Republic of Belarus for 2021–2025 is defined in the same Program as "ensuring stability in society and increasing the well-being of citizens through the modernization of the economy, increasing social capital, creating comfortable conditions for life, work and self-realization of a person."

Kazakhstani sociologist B.A. Aldashov defined the quality of life in the most general form as "a set of economic and socially determined living conditions," which includes "objective parameters of life and their subjective assessment at the level of society as a whole, as well as objective parameters and a subjective assessment of the living conditions of separate individuals" (Aldashov, 1994, p. 10). The model of subjective assessment of the quality of life, also developed by B.A. Aldashov, in relation to work indicates such parameters as wages, functions performed, socio-psychological climate, and other factors. Moreover, career as a parameter is related to education, although it is more related to work and the quality of working life of the employee (Aldashov, 1994, p. 13).

Economist R.P. Nikitin clarified the content of the quality of life as "a complex socio-economic category that expresses the degree of satisfaction and the level of development of the material, industrial, physical and intellectual needs of people, determined by the socio-economic conditions and opportunities created in society, allowing a person to be its active member" (Nikitin, 2005, p. 5). V.A. Tsygankov developed the concept of quality of work life, applicable for modern Russian conditions, based on the allocation of two blocks: the principles of the existence of labor and the creation of conditions for a more complete realization of the labor potential of both an individual employee, an enterprise, and the economy as a whole. The main block highlights the following provisions as the core of the quality of work life concept: ensuring effective employment; formation of the level of incomes, ensuring a decent standard of living for employees, on the basis of the state and internal company policy in the field of remuneration, the creation of safe and healthy working conditions. The additional block covers: increasing the content of labor; development of labor democracy; purposeful change of attitude to labor; ensuring job satisfaction (Tsygankov, 2007, p. 8). Noting the theoretical value of this

conceptual approach, one can notice some terminological shortcomings from the standpoint of the conceptual apparatus of labor law: the party in relation with the employee is not the enterprise, but the employer in Russia, the hirer in Belarus, and "labor democracy" is traditionally referred to as "industrial democracy." In addition to terminological remarks, we believe that the concept of the quality of work life is much broader in terms of its constituent elements. In modern conditions it should be supplemented by the quality of the system for improving the skills of workers, their professional training and retraining, ensuring the adaptability of their labor function in the face of constantly changing economic and scientific conditions and scientific and technological progress. When considering the modern concept, it is important to take into account the quality of labor rationing and accounting of working time, the quality of organization of rest time, ensuring the privacy of the employee, the labor honor and dignity of the employee (respect for the man of labor) and a number of other components.

I.V. Tsygankova proposed a methodology for assessing the quality of the work life of young people at the enterprise level. This makes it possible to assess such parameters as remuneration for work, working conditions, flexibility in the use of working time, labor productivity, labor mobility, job satisfaction, investment in human capital, job security, the level of mechanization and automation, the state of cultural and social conditions of workers. She also revealed "the main socio-economic problems of the use of youth labor, which negatively affects the quality of work life of young people, including: the lack of opportunities for obtaining the desired education, the problem of employment, the lack of job security, low wages, limited possibilities to purchase housing, limited opportunities for career growth and promotion" (Tsygankova, 2009, p. 10). I.V. Tsygankova developed a concept for the formation of the quality of working life of the youth in the Russian Federation in modern conditions, based on providing a differentiated approach to improving the quality of work life of youth, depending on the region and industry; creation of a system of labor motivation and stimulation of young people, taking into account the strategy of state development and the conditions for the formation of the labor ideology of youth; the use

of non-standard forms of employment, especially flexible ones in the framework of employment; regulation of the quality of the working life of young people through the implementation of a targeted policy that allows for a strategic approach to the formation, use and development of the labor force of youth; development and implementation of programs to improve the quality of the work life of youth at enterprises (Tsygankova, 2009, p. 11).

According to M.N. Ignatenko, "the low level of quality of work life in modern Russia is determined primarily by the contradictions that are formed between the moral values of Russian employees and the market values of a new management mechanism that has been actively introduced into Russian life since the 90s of the last century" (Ignatenko, 2010, p. 4). Note that in order to evaluate the level of quality of work life as low or high, one needs appropriate indicators and their comparison with similar indicators in other counters.

Until today the uniform scientific approach to evaluating the quality of work life is absent, researches express different amount of indicators of the quality of work life (Zholudeva and Melnichenko, 2018, pp. 42–44). For example, a famous Russian economist V.D. Roik names job satisfaction in terms of organization, content, remuneration, modes of work and rest, professional training as assessed indicators of the quality of working life; guaranteeing safe working conditions, including the working environment and normal labor intensity; access to social insurance systems: pension, medical, accidents at work and occupational diseases (Roik, 2017, pp. 34–35).

To summarize the views of economists on the issue under study, the most common indicators of the quality of work life include: working conditions at the workplace; wage level; creation by the employer of conditions for employee personal development; motivation to work and employee satisfaction; and workplace democracy. As we see, mostly these indicators correlate with the elements of decent work agenda. However, the fundamental difference of the concept of decent work life is that its level is determined not only by objective indicators, but also by the subjective evaluation of the employee himself. A survey conducted by the Russian Public Opinion Research Center (VCIOM)

in August 2021 showed that the vast majority of Russian citizens (82 %) are satisfied with their work (33 % are completely satisfied), but 18 % of respondents do not receive job satisfaction.[4]

So, the idea of the quality of work life is that a person should be provided with such employment conditions that would allow him to fully maintain not only his economic well-being, but also realize his spiritual needs, be able to pay sufficient attention to the family, raise children, support his personal growth, professional development and career development. In this regard, the thesis about the need for a more loyal organization of working time and the proposal for a possible reduction in the future of the working week to four working days, formulated by the Prime Minister of Russia D.A. Medvedev in 2019 during a speech at the International Labor Conference seems interesting. However, the fact that almost half of Russians (48 %) do not support the proposal for a possible reduction of the working week to four working days, as evidenced by the VCIOM poll, is noteworthy. Only 29 % of respondents approve of the idea. Respondents attributed the following to the positive consequences of the reduction of the working week: improved health, increased life expectancy; the opportunity to have a good rest; the opportunity to spend more time with family; improving the upbringing of children; the release of free time for personal life, creativity, self-development, travel; increasing labor productivity, improving the quality of work; the opportunity to do household chores; possibility of additional income. The first three negative consequences are as follows: lower wages, falling living standards, rising prices; increased alcoholism, drug addiction, abuse of bad habits; deterioration in production indicators (fall in labor productivity, non-fulfillment of the plan, poor quality of work, etc.).[5] We believe that the main fear of employees associated with the prospect of loss of earnings has a very real explanation: employers are unlikely to want the transition to a four-day week to be carried out at their

[4] VCIOM News, (2021). Man and his work. 21 August 2022. Available at: https://wciom.ru/analytical-reviews/analiticheskii-obzor/chelovek-i-ego-rabota (In Russ.) [Accessed 15.11.2022].

[5] VCIOM News, (2019). Four-day workweek: a dream or a risk? 24 June 2019. Available at: https://wciom.ru/analytical-reviews/analiticheskii-obzor/chetyokhdnevka-mechta-ili-risk (In Russ.) [Accessed 15.11.2022].

expense. That is why, in conditions of an unstable economic situation and the lack of social orientation among most modern employers, such a seemingly progressive idea as the reduction of the working week seems premature. For such a radical novel in the sphere of working time and rest time, a deep economic and social study of the issue is needed, but the statement of the problem itself testifies to the intentions of the state to seriously reform labor legislation.

It should be noted that the concept of the quality of work life has gone through several evolutionary stages and, according to O.V. Zonova is currently at the fourth "integration" stage of development, characterized by the interpenetration of various concepts, in particular, the concept of decent work and continuous human well-being. The same author understands the basic concept of "quality of work life" as "a set of organizational and socio-economic conditions that contribute to the development of a person and his potential at different stages of life, the measurement of which is possible by using a system of indicators that characterize the degree of implementation of the value orientations of workers formed during the period prior to employment, as well as the level of satisfaction of needs and provision of decent conditions both during the period of active labor activity and in the period after completion of labor activity" (Zonova, 2016, p. 7).

The issue of the quality of work life in terms of improving labor legislation was addressed in the works of legal scholars (Golovina, Kuchina and Serova, 2019; Golovina, 2021; Kuchina, 2021). Based on the fact that the most important components of the quality of work life are motivation to work and job satisfaction, which include not only material well-being, but also employee satisfaction from achievements in the labor process as a result of self-realization and self-expression, the global task of the employer is to create conditions that contribute to realize the creative abilities of the employee. In this regard it is suggested to improve one of the principles of the modern labor law and formulate it as "ensuring the right of every employee to fair working conditions, including meaningful and interesting work that meets human needs."

Important elements of the concept of the quality of work life, as well as the axiological principles of labor law, are two moral and legal ideas: social justice and humanism in labor relations. It is these ideas that we will focus on in this article.

III. Social Justice in Labor Relations in Belarus and Russia

Justice is a category as polysemous and complex as law itself. From our point of view, it refers to the very essence of law, one of the main distinguishing features of law, the principles of law, and, on the other hand, to the phenomenon of morality, since it acts as an idea that determines the moral foundations of society. With such an approach, the idea of justice can be certainly called a moral and legal principle.

Justice is closely related to such phenomena as equality and freedom (Kolodiy, 1991, p. 193). Many philosophers and jurists, past and present, define justice in terms of these concepts. For example, Aristotle derived distributing and equalizing justice from geometric and arithmetical equality. Thus, in the book V "On Justice" of his voluminous work "Ethics," Aristotle considered "justice" as a property of the human soul, and "the concept of "justice" means at the same time both legal and uniform... [attitude towards people]" (Aristotle, 1998, pp. 245–246). Hegel wrote "It is all about justice, i.e., in the mind — i.e., in that freedom finds its present being..." (Hegel, 1990, p. 413).

The American social philosopher John Rawls, starting from the same value categories, formulates two most important principles of justice in his opinion: (1) "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all;" (2) "Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity" (Rawls, 1999, p. 266).

As we wrote earlier, upon careful reading of the two principles of justice introduced by J. Rawls, the former directly shows the Kantian categorical imperative, and the latter reflects the trends in the social policy of the capitalist states of the 20th century with its desire for a reasonable redistribution of benefits among members of society (Tomashevski, 2009, p. 82).

Law theorists V.S. Nersesyants and R.Z. Livshits also closely linked the category of justice with law (Nersesyants, 1997, p. 28; Livshits, 2001, p. 66).

The principle of justice receives its branch value concretization in the idea of social justice, which can be considered as an inter-branch principle operating in labor law and social security law. This principle is characteristic of welfare states, which, according to the constitutions, include Belarus and Russia.

According to T.Ya. Khabrieva "...The welfare state does not set itself the task of achieving absolute social justice, it is intended only to provide such social compensation which would eliminate the occurrence of social conflicts due to uneven distribution of resources, preventing the legal, social, cultural isolation of certain social groups" (Khabrieva, 2009, p. 4).

E.A. Sarkisova back in 1969, analyzing the problem of humanism in criminal law, also touched upon the question of its relationship with the principle of justice, offering the author's definition: the principle of social justice is "the provision of real freedom, equality, fraternity, this is the desire for a better, perfect life for all workers" (Sarkisova, 1969, p. 16). This definition does not seem to be entirely successful, because it leads to a mix-up of the principles of justice and formal freedom, it applies only to workers, while the principle of social justice applies also to those non-workers (for example, juvenile orphans who have lost their breadwinner, as well as the unemployed, pensioners, etc.).

Theoretical scientist G.V. Maltsev believes that "the main elements of the concept of social justice are, on the one hand, the totality of social relations of the exchange and distribution type, and, on the other hand, the criteria developed on the basis of social practice and primarily industrial practice, that stimulate these relations." Based on this, he concludes that "in social justice, material (sociological) and ideological (normative-value) components are distinguished" (Maltsev, 1977, pp. 67–69). Let us agree with this scientist on that the subject of social justice demands interdisciplinary research, but for the purpose of this article, we restrict ourselves to the labor law aspect.

According to A.A. Linets, justice in labor law as a whole and in interaction of subjects of labor relations in particular, can be achieved through two mechanisms. "The first mechanism (substantial) is

about direct (material) establishment of labor rights, obligations and guarantees (for example, the establishment of minimum wage). The second mechanism (procedural) is about smoothing out inequalities of negotiating positions by establishing legal means of achieving and consolidating agreements of subjects on certain conditions of the use of labor (for example, establishing a written form of a condition on a hiring assessment test (Art. 70 of the Labor Code of the Russian Federation))" (Linets, 2021, p. 122).

Despite the fact, that the current labor legislation does not provide for the general formulation of the principle of justice (as well as social justice), at the same time, separate norms that reflect the idea of justice do exist. They are, in particular, the following.

Employees shall be guaranteed a just share of remuneration for the economic results of their labor in accordance with the quantity, quality and social significance of such work (Art. 42 of the Constitution of the Republic of Belarus,[6] Para. 5 Art. 11 of the Labor Code of Belarus[7]), safeguarding the right of every employee to timely and complete payment of equitable wages (Para. 7 Art. 2 of the Labor Code of the Russian Federation[8]).

Women and men, adults and minors shall have the right to equal remuneration for work of equal value (Art. 42 of the Constitution of the Republic of Belarus), everyone shall have the right for labor remuneration without any discrimination whatsoever and not lower than minimum wages and salaries established by the federal law, as well as the right to protection against unemployment (Part 3 Art. 37 of the Constitution of the Russian Federation[9]).

[6] The Constitution of the Republic of Belarus, 15 March 1994 (as of 27 February 2022). Available at: https://president.gov.by/ru/gosudarstvo/constitution (In Russ.) [Accessed 15.11.2022].

[7] The Labor Code of the Republic Belarus dated 26 July 1999 (as of 30 May 2022). Available at: https://etalonline.by/document/?regnum=hk9900296 (In Russ.) [Accessed 15.11.2022].

[8] The Labor Code of the Russian Federation dated 30 December 2001 (as of 4 November 2022). Available at: http://www.consultant.ru/document/cons_doc_LAW_34683/ (In Russ.) [Accessed 15.11.2022].

[9] The Constitution of the Russian Federation dated 12 December 1993 (as of 1 July 2020). Available at: http://www.consultant.ru/document/cons_doc_LAW_28399/ (In Russ.) [Accessed 15.11.2022].

Prohibition of discrimination in the sphere of labor relations (Art. 14 of the Labor Code of Belarus, Art. 3 of the Labor Code of the Russian Federation), including the prevention of any direct or indirect restriction of rights or the establishment of direct or indirect advantages when concluding an employment contract, depending on circumstances not related to the business qualities of employees (Art. 64 of the Labor Code of the Russian Federation).

Increased payment, reduced working hours, the additional annual paid leave is granted to employees involved in work with harmful and (or) dangerous labor conditions (Clause 5 Part 1 Art. 55, Art. 62, 113, Part 3 Art. 115, Art. 157 of the Labor Code of Belarus, Art. 92, 117, 147 of the Labor Code of the Russian Federation).

Taking into account the severity of the misconduct, the circumstances of its commission, the previous work and behavior of the employee when imposing a disciplinary sanction and imposing liability on the employee (Part 3 Art. 198, Art. 408 of the Labor Code of Belarus, Part 5 Art. 192, Part 1 Art. 250 of the Labor Code of the Russian Federation) and some others.

In the Soviet period of history, scientists in the field of labor law (N.G. Aleksandrov, A.I. Protsevsky and others) saw the principle of fair distribution in the norms of wages, as a rule, linking it with the constitutional principle of socialism "from each according to his ability — to each according to his work," and its legal expression was seen "in the determination by the socialist state of a universally obligatory measure of labor and a measure of consumption" (Protsevsky, 1982, p. 59). Surely, such interpretation has nothing in common with the idea of justice according to Aristotle. On what basis does the state itself decide what are the needs of a person (in this case, an employee)? One individual may be satisfied with little, where another one desires and deserves more, considering his intellectual of physical abilities, business qualities, etc.

The reasoning of the legal scholar R.Z. Livshits, who explains the phenomenon of justice using the example of the same institution of wages, is interesting: "In distributive relations, justice is the correspondence between the actions of a citizen, his labor contribution and the response of society. This means, that labor legislation, for example,

is aimed at establishing a mechanism for fair remuneration for work: those who work more and better should get more" (Livshits, 2001, p. 66). Further, the same author, considering the soviet experience of centralized establishment of wages, rightfully notes that "Equalization in wages is incompatible with justice. Equalization means equal payment for unequal labor, where justice demands unequal labor to be unequally payed (Livshits, 2001, p. 67). However, R.Z. Livshits' conclusion that decentralized regulation of wages comes to the requirements of justice, is not always justified. This is explained by the fact, that with the help of local and individually contractual regulation, the employer can sometimes deviate from the principles of justice in favor of some subjective, sometimes even mercantile, interests. We find a vivid example in the legislation of the Republic of Belarus: the establishment of employees hired on the basis of labor contracts increases in tariff rates and salaries (surcharges to them) up to 50 %. For example, for one employee, the employer, when hiring, set a 50 % increase, for another — 20 %, for the third — 1 %. Is this fair, when considering that all three employees are hired at the same time and for similar positions (professions), having equal level of qualification? We suppose not. Such manifestations of injustice should be fought based on the norms prohibiting discrimination in labor relations (Art. 14 of the Labor Code of Belarus and Art. 3 of the Labor Code of the Russian Federation), but there are also hidden and indirect forms of discrimination, the proof of which in court is very problematic.

Discriminatory principles in the sphere of wages can be met not only in practice of certain employers, but also in the regional policy of establishing a minimum wage. In Russia, it is allowed to increase the minimum wage established by federal law throughout the state, in a separate constituent entity of the Russian Federation by concluding a regional agreement on minimum wages (Art. 133.1 of the Labor Code of the Russian Federation). The practice of recent years shows that some regions exclude employees of budgetary organizations from the number of persons who are given an increased minimum wage, thereby reducing their level of social protection and violating the principle of fairness in the field of wages. Thus, the following minimum wages have been established for 2022: in the Republic of Bashkortostan — 14,200 rubles,

with the exception of employees of organizations financed from the federal budget, the budget of the republic, local budgets and state non-budgetary funds, as well as non-profit organizations (Minimum Wage Agreement in the Republic of Bashkortostan dated 24 December 2021); in the Republic of Tatarstan — 16,700, except for employees of organizations financed from the federal budget, the budget of the republic and local budgets (Agreement on minimum wage in the Republic of Tatarstan No. 324 dated 24 December 2021); in the Altai Territory — 16,638 rubles — only for employees of the non-budgetary sphere (Regional agreement on the amount of the minimum wage in the Territory region for 2022–2024 No. 142-s dated 25 November 2021); in the Bryansk region — 14,200 rubles — only for non-budgetary employees (Regional agreement on the minimum wage in the Bryansk region for 2022 for organizations in the non-budgetary sector of the economy); in the Rostov region — in the amount of not less than 1.2 minimum wages — for employees of non-budgetary organizations, individual entrepreneurs (Rostov regional tripartite (regional) Agreement for 2020–2022 No. 13 dated 21 November 2019); Saratov region — 14,300 rubles, with the exception of employees of organizations whose financial support is carried out at the expense of the federal, regional and local budgets (Agreement on the minimum wage in the Saratov region dated 15 October 2021); Tula region — 14,800 rubles — for non-budgetary employees (Regional agreement on the minimum wage in the Tula region dated 16 December 2021),[10] etc. There are reasonable doubts about the fairness of the differentiation of the minimum wage according to such a criterion as the source of financing of the employer.

According to several sociological researches, that took place at the beginning of 2000s, the majority of the employed population in both Belarus and Russia did not have any faith in the ability of labor legislation to properly protect their rights and interests (Ulumdjiev, 2009). The situation, probably, did not change dramatically now. According to A.M. Kurennoy, with whom we cannot but agree, ignoring the issues of justice in social and labor spheres by the legislator can become the

[10] Reference information: "The size of the minimum wage in the subjects of the Russian Federation" (as of 1 February 2022). Available at: http://www.consultant.ru/document/cons_doc_LAW_291114/ (In Russ.) [Accessed 15.11.2022].

unexpected catalyst for the development of the society (Kurennoy, 2014, p. 15). On our own behalf, we add that it can also become the engine of socio-political transformations, as the revolutionary events in Russia at the beginning of the 20th century vividly testify to.

Nobel Laureate in Economics Joseph Stiglitz also links the idea of freedom to social justice: "With freedom comes responsibility: the responsibility to use that freedom to do what we can to ensure that the world of the future be one in which there is not only greater economic prosperity, but also more social justice" (Stiglitz, 2002).

Having considered social justice in labor relations, we wish for both the Russian and Belarusian legislators to consistently take into account the requirements of justice in the Labor Code and other laws, repaying equals for equal, and unequals according to their dignity. We wish for the courts to proceed from justice when overcoming gaps in law, resolving conflicts and competition of legal norms, as well as taking into account the specific circumstances of a labor dispute. Besides, the Supreme Court of the Russian Federation directs the courts of general jurisdiction to this point in Resolution of the Plenum No. 2 dated 17 March 2014 "On the application by the courts of the Russian Federation of the Labor Code of the Russian Federation"[11], naming justice as a principle of disciplinary responsibility (Para. 53), requiring compliance fairness in relation to the cost of goods when paying wages to an employee in kind (Sub-Clause "d" Clause 54) and in determining the amount of compensation for moral damage caused by unlawful actions or inactions of the employer (Clause 63).

IV. The Idea of Humanism, Ensuring Healthy and Safe Working Conditions in Belarus and Russia

The idea of humanism is closely connected with the category of justice. Humanism can be interpreted as a world view, based on the principles of equality, justice, relationship humanity, imbued with love

[11] Resolution of the Plenum No. 2 dated 17 March 2014 "On the application by the courts of the Russian Federation of the Labor Code of the Russian Federation". Available at: http://www.consultant.ru/document/cons_doc_LAW_47257/ (In Russ.) [Accessed 15.11.2022].

for people, respect for the dignity of the individual, concern for the welfare of people.

The relationship between society and the individual in a democratic legal welfare state should be based on the "principle of respect for a person as the highest social value" (Protsevsky, 1982, p. 12), but not only be fixed (which is implemented in the Constitutions of the Russian Federation and the Constitution of Belarus), but also actually put into practice.

Back in the Soviet period, humanism was considered as a principle or a discourse in philosophical and sociological literature, as a general legal principle or a principle of legal responsibility in legal literature. Besides, these two interpretations of the principle of humanism have remained in post soviet literature.

According to V.D. Popkov, the humanism of law is a reflection of social relations, ideas and views in the law itself. They meet the interests of the comprehensive development of the individual, the elevation of human dignity. Humanism as a principle of law is "recognition of the supreme value of a person expressed in legal forms, securing and ensuring his rights, conditions for free development, well-being, affirming truly human relations between people and stimulating the all-round development of a person" (Popkov, 1972). Such a broad approach is seemingly acceptable in the context of analyzing humanism in labor relations, when the operation of this principle is not limited only by the institutions of disciplinary and material liability in labor law.

Ukrainian scientist in the field of labor law A.I. Protsevsky considered humanism one of the features of collectivism, and the latter "as a consequence of the socialist mode of production, in turn, gives rise to the highest moral qualities of a working person, including such as conscientious work, high citizenship, a sense of responsibility, a sense of master, etc." He also associated humanism with such concepts as freedom, human rights, democracy, social justice, social equality (Protsevsky, 1982, p. 9). Here it is appropriate to recall the norm-principle of "respect for the man of labor" introduced in 2020 into the Constitution of the Russian Federation, which has an ideological significance in some ways and is closely interconnected with the idea of humanism.

We agree with N.Y. Sokolov that the problem of humanism is the problem of a person, his essence and purpose, position in society, freedom and social values, and that "the humanistic orientation is even more clearly manifested when analyzing specific norms of legislation" (Sokolov, 1968, pp. 3, 19).

Humanism, the same as the idea of justice, is by its nature is a moral-legal principle. On the one hand, it finds its embodiment in law, on the other hand, acts as one of the most fundamental moral principles in the life of society. Humanism, despite its close connection with the principles of justice, equality and freedom, does not "dissolve" in them but rather has its special moral-legal content. In our opinion, humanism is a guiding moral-legal principle, according to which a person is recognized as the highest value of society and the state; the measure of all things; bearer of a number of inalienable inviolable natural rights. Restriction and deprivation of the rights and freedoms of an individual is only acceptable in strictly limited cases of general interests (interests of the society).

The Belarusian and Russian labor legislation, while not directly proclaiming the principle of humanism and hardly using the term "humanism" and its derivatives in the legal norms, nevertheless, is guided by it.

Mostly, the system of law of the Republic of Belarus, at the current moment, largely correspond to the mentioned principle, which finds its reflection in several articles of the constitution of the Republic of Belarus. In addition to Art. 2, 21, 23, 24 of the Constitution of the Republic of Belarus, this principle is reflected in a number of constitutional-legal norms that directly regulate labor relations: the right to healthy and safe working conditions (Part 1 Art. 41); prohibition of forced labor (Part 4 Art. 41); guarantee of wages not lower than the level that provides employees and their families with a free and dignified existence (Part 1 Art. 42); 40-hour work week, the right to rest (Art. 43).

The idea of humanism is also reflected in several articles of the Constitution of the Russian Federation, including in connection with other principles, in particular: Man, his rights and freedoms are the supreme value (Art. 2); the State shall guarantee the equality of rights and freedoms of man and citizen (Part 2 Art. 19); labor is free and forced

labor shall be banned (Parts 1 and 2 Art. 37); everyone shall have the right to labor conditions meeting the safety and hygienic requirements (Part 3 Art. 37), etc.

The ideas of humanism are also embodied in the norms of labor legislation, in particular, in the chapters of the Labor Code of Belarus and the Labor Code of the Russian Federation on labor protection, in articles on limiting working hours, on the minimum wage in Belarus and Russia, on guarantees and compensation, etc.

Another manifestation of humanism in labor law is carried out using such a method as differentiation of the legal regulation of labor relations. Both the Labor Code of Belarus and the Labor Code of the Russian Federation establish special standards in the field of working hours and rest time, labor protection, contain additional guarantees upon dismissal for certain categories of employees who are in particular need of legal protection: women and persons with family responsibilities, minors, persons with reduced working capacity.

Unlike the Labor Code of the Russian Federation, the Labor Code of Belarus includes a special Chapter 21 that deals with the specifics of the work of persons with disabilities. According to the Labor Code of Belarus terminating an employment contract on the initiative of the employer with a person with disabilities who is undergoing medical, occupational, work and social rehabilitation in the corresponding organizations, regardless of the amount of time spent in them, except in the event that dismissal of the person with disabilities is on grounds acknowledged by legislative acts as defamatory circumstances of dismissal, is prohibited.

Labor legislation in Russia has no additional guarantees and does not establish specific procedures when terminating an employment contract with persons with disabilities. Perhaps the only exception is the provision in Art. 179 of the Labor Code of the Russian Federation, that grants a preferential right to retain the job for employees who got a maiming in work or a professional disease in this organization during the period of employment with this employer, as well as for invalids of the Great Patriotic War and invalids of military actions in defending the Motherland. For comparison: in Germany, additional legal protection of persons with disabilities from unjustified dismissal is provided.

In accordance with Art. 85 of the Social Code[12] (book 9), the termination of an employment contract at the initiative of the employer requires the prior approval of the integration office (*das Integrationamt*) — the body responsible for promoting the employment of persons with disabilities. The employer must send information on future dismissal of a person with disabilities to the office and receive either an approval or a refusal from the regulatory body, or find a compromise between the parties to the employment contract (Kutarova, 2018, p. 203). Perhaps the Russian legislator should pay attention to foreign experience, which testifies to the humane attitude towards persons with reduced ability to work, and think about establishing additional guarantees for the dismissal of persons with disabilities, given the importance of the social and labor rehabilitation of a person with disabilities, taking into account the difficulties in finding work and employment.

It seems that there is an objective need to establish additional privileges and guarantees for persons with reduced work capacity. Among other criteria, the quality of work life implies that a person performs such an amount of workload that is comfortable for him. In this regard, the issue of the duration and regime of working time of persons with reduced work capacity, which can also include persons of pre-retirement and retirement age, is relevant. In order to further humanize labor legislation, it is advisable to give them the right to establish part-time work (along with employees listed in Art. 93 of the Labor Code of the Russian Federation) and a comfortable work and rest regime, in which it is easier for an older worker to cope with production tasks and overcome the stresses that accompany work processes. Flexible work schedule, allowing for working out the set number of hours at any convenient time agreed with the representative of the employer, and a combination of work in the office and at home, providing the opportunity to work remotely (the latter option was actively used during the Covid-19 pandemic) are possible. Such novelties would be fully in line with ILO Older Workers Recommendation No. 162 (1980),[13] which

[12] Sozialgesetzbuch (24 June 2022). Available at: https://www.sozialgesetzbuch-sgb.de/sgbix/1.html (In Germ.) [Accessed 15.11.2022].

[13] ILO Older Workers Recommendation, 1980 (No. 162). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R162 [Accessed 15.11.2022].

proposes a range of measures to ensure that older workers are able to continue to work in satisfactory conditions: promoting the gradual reduction of hours of work, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, of all older workers who request such reduction; increasing annual paid leave on the basis of length of service or of age; enabling older workers to organize their work time and leisure to suit their convenience, particularly by facilitating their part-time employment and providing for flexible working hours; facilitating the assignment of older workers to jobs performed during normal day-time working hours after a certain number of years of assignment to continuous or semi-continuous shift work; use of systems of remuneration that take account not only of speed of performance but also of know-how and experience; the transfer of older workers from work paid by results to work paid by time (Para. 14 and 16 of the ILO Recommendation).

V. Discussion and Conclusion

It should be noted, that the ideas of social justice and humanism do not always fulfill their axiological purpose. Unfortunately, even in the 21st century there are obvious deviations from the ideas of freedom of speech, non-discrimination and humanism in labor relations, when the leaders of the trade union movement, as well as ordinary employees for political reasons, are subjected to administrative and criminal prosecution by the state for the performance of their trade union, public duties or for expressing views and judgments (Deikalo and Gulak, 2021). We suppose, that the 2021 tendency of strengthening the repressive orientation of the labor legislation of Belarus does not correspond to the principles of humanism and justice (in particular, the inclusion in Art. 42 of the Labor Code of Belarus of new grounds for dismissal of employees for absence from work in connection with serving an administrative penalty in the form of administrative arrest, for participating in an illegal strike, for calling employees to terminate their employment duties without good reason, etc.) (Tomashevski et al., 2022, pp. 292–295).

Unfortunately, recently we can see, how the legislator, in favor of liberalization of legal regulation of labor relations, moves away from traditional legal and labor values and allows employers to use the possibilities of collective agreement regulation in order to overcome the established in a centralized manner restrictions, change the format of guarantees and benefits for employees, established by law. Let us give an example with the protection of the most important human value: the life and health of an employee. As known, work in conditions associated with harmful and (or) dangerous factors requires the establishment of additional guarantees for employees performing their work function in an aggressive and unsafe production environment. Traditionally, the main such guarantees were reduced working hours and additional paid leave, the duration of which was dictated by the state itself. These measures (the so called "protection by time") are aimed at compensating or neutralizing the impact of harmful and (or) dangerous factors, affecting the health of an employee during the performance of their work function. However, Federal Law No. 421-FZ dated 28 December 2013 "To Amend Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law "On Special Assessment of Working Conditions"[14] fundamentally changed the situation. Now, on the basis of a branch (inter-branch) agreement and a collective agreement, with the written consent of the employee, drawn up by concluding a separate agreement to the employment contract, the employer can increase the working hours up to 40 hours a week with the payment to the employee of a separately established monetary compensation in the manner, amount and at conditions that are established by branch (inter-branch) agreements, collective agreements (Part 3 Art. 92 of the Labor Code of the Russian Federation). Similar changes have also happened in the institution of rest time, in connection to annual paid leaves for work with harmful and (or) dangerous labor conditions. According to Art. 117 of the Labor Code of the Russian Federation, on the basis of a branch (inter-branch) agreement and collective agreements, as well as the

[14] Federal Law No. 421-FZ dated 28 December 2013 "To Amend Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law "On Special Assessment of Working Conditions". Collection of Legislation of the Russian Federation. 2013. No. 52 (Part I). Art. 6986 (In Russ.).

written consent of the employee, drawn up by concluding a separate agreement to the employment contract, part of the additional annual paid leave that exceeds the minimum duration of this leave can be replaced by a separately established monetary compensation in in the manner, in the amount and on the terms established by the branch (inter-branch) agreement and collective agreements. For comparison: Part 3 Art. 161 of the Labor Code of Belarus establishes a complete ban on the replacement of monetary compensation for the additional annual paid leave for the work in conditions associated with harmful and (or) dangerous factors. Therefore, this imperative guarantee norm, adopted for the purpose of the protection of the health of employees, cannot be changed by a collective agreement or contract.

Thus, Russia has made yet another transition from the centralized establishment of guarantees of the labor rights of employees to a contractual method of regulating working conditions, which can hardly be characterized as a progressive trend. Breaks in work and annual leaves are of particular value in terms of restoring the physical condition of an employee, maintaining his or her health and improving his or her ability to work; accordingly, a reduction in such breaks may have an adverse effect on the well-being of the person working in harmful working conditions and may subsequently lead to a deterioration in health, up to and including disability.

It is not enough to proclaim the idea of humanism, establishing it in law, it is necessary to consistently implement its real social relations, including through personnel, judicial and other law enforcement practice. Only in such a case the regulatory impact of legal norms, that is reflected in the principle of humanism, will achieve its result — legal and moral education of the individual.

To summarize, let us formulate the following main conclusions and recommendations:

In modern conditions, the issues of the quality of work life take on new connotations, since the digital economy provides more opportunities for effective organization of labor, the creation of safe and favorable conditions for the implementation of labor activity, the flexible use of working hours, taking into account the state of health of the employee in the formation of his working environment. All these

factors should work for the implementation of the ideas of humanism and social justice;

Within the framework of integration processes in the Eurasian space, work should continue on developing recommendations for improving labor legislation in the EAEU member states, taking into account the transition from the concept of decent work to the concept of quality of work life, in which the relationship between employee and employer should be based on ideas of social justice and humanism, which was particularly evident during the Covid-19 pandemic;

The improvement of labor legislation in Belarus and Russia should be approached on the basis of the fundamental principles of non-discrimination, freedom of labor, prohibition of forced or compulsory labor, social justice and humanism. It is advisable to start developing new model laws that are in demand by practice within the CIS (in particular, "On remote work," "On the regulation of the labor of platform workers and their social protection"), as well as to intensify the process of adopting a model Labor Code for the CIS member states, in which some previously adopted model laws could be codified;

The transition from the centralized establishment of guarantees of labor rights of employees to the contractual method of regulating labor conditions, which is most clearly manifested in the legislation of Russia, as well as the repressive direction in the development of labor legislation in Belarus (in terms of expanding the disciplinary grounds for dismissal) can hardly be described as a progressive trend corresponding to ideas of justice and humanism.

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Article

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Judiciary and Civil Society in Provision of Constitutional Rule of Law in the Russian Federation

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Abstract: The existing demand for ensuring constitutional legal order as an indicator of the embodiment of law and legality in the regulation of social relations, the role of the judiciary and civil society institutions in achieving the supremacy of the Constitution as the most important condition for the formation of a constitutional state testify to the relevance of the chosen topic of research. The article is aimed at developing conceptual positions on the relationship of various public institutions (state and non-state) in the framework of ensuring justice as the most important guarantee of the rights and freedoms of citizens, their associations, a fundamental condition for ensuring and maintaining constitutional legal order. The study of the role of the judiciary in its dialectical relationship with the institutions of civil society, in the formation and maintenance of the constitutional legal order was used as the main approach for the research of the selected problems. The application of systemic and structural-functional methods of research provided an opportunity to consider the issues of constitutional legal order as a holistic phenomenon, which is in direct dependence on the associated systems of the judiciary and civil society. The analysis of the norms of the Constitution of the Russian Federation, the current legislation of Russia, domestic and foreign scientific publications on judicial power

and its interaction with institutions of civil society made it possible to receive the scientific information on the nature of influence of these constitutional and legal institutes on maintenance of the constitutional legal order. There is a need to increase the level of constitutionalization of legal regulation of public relations in the specified sphere, aimed to guarantee the effective realization of the principle of people's authority. The results and conclusions presented in the article can be used for the purposes of improvement legal and regulatory framework for social relations in the spheres of relations between the judiciary and civil society in their aim to achieve and maintain constitutional legal order. The obtained scientific information can be used in the educational process, as well as a basis for further theoretical research in the field of problems of Russian constitutionalism.

Keywords: Constitution; citizens; constitutional rights; freedoms of citizens; constitutional guarantees; constitution supremacy; constitutional rule of law; Constitutional Court of the Russian Federation; public institutions; judiciary; judicial community bodies; civil society; advocacy

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Contents

I. Introduction

At present, the public consciousness is increasingly questioning the conformity of the actually existing social order and the rule of law to the constitutional attitudes and ideal. In other words, the

establishment of the constitutional legal order as an indicator of the adequacy of legal regulation based on the norms of the Constitution, the effectiveness of the implementation of the regime of legality, the real security of human rights and freedoms is on the agenda of social development. The fundamental basis of the constitutional legal order is the supremacy of the Constitution, which is largely ensured by the courts. In view of this, it is obvious that an important role in the process of establishing the constitutional legal order is played by the judiciary, which is derived from the sovereign power of the people and should have stable feedback, including through the institutions of civil society. Nevertheless, the organization and activities of the judiciary, its cooperation with the institutions of civil society in order to achieve the goal — the supremacy of the Constitution and the law embodied in it as a fundamental condition for establishing the constitutional legal order in modern jurisprudence remain debatable.

Problem. The state of constitutional law and order is achieved through the activities of all branches of state power, local government, institutions of civil society, other human communities, and each individual. However, it is the judiciary that is called upon to ensure the direct effect of the rights and freedoms of citizens and the observance of all other constitutional guarantees in a democratically and socially oriented state. At the same time, the nature of judicial power, the same as all state power, contains a certain contradiction. This consists in the fact that it is derived from the sovereign power of the people in its origin, on the one hand, but, at the same time, is immanently built into the mechanism of the state and derived from it in its functioning, on the other hand. In the case of the judiciary, this contradiction is exacerbated by the fact that it is called upon to resolve legal conflicts that have arisen and potential, to which the state, represented by its bodies, is often a party. In this situation, the courts must rise above their state essence, following their supreme constitutional purpose. We assume that overcoming this contradiction, in global terms, is achieved by minimizing the effect of alienation of the bearers of public power from its source — the people. With regard to the judiciary, this can be achieved through various forms of interaction with institutions

of civil society and the establishment of effective public control over it as an element of the implementation of the principle of people's power (namely the formation of its human resources and institutional formations — courts), as well as the implementation of all functions of the judiciary, among which the dominant function is justice. The success in establishing and ensuring the supremacy of the Constitution, the law embodied in it and the constitutional order in general depends largely on the effectiveness of such interaction and control.

The constitutional legal order is viewed as a result of the implementation of constitutional legality, i.e., the embodiment by all subjects of law of the prescriptions of the Constitution, their implementation of actions on the basis of and in pursuance of the Constitution (Narutto, 2018). The establishment and maintenance of constitutional law and order are considered the most important tasks of public authorities, including the judiciary, with an emphasis on the bodies of judicial constitutional control (Bezrukov, 2017). It is noted that it is the court that is the "living organ of the constitutional law and order" (Ebzeev, 2014). The exclusive role of the courts in the constitutional order is emphasized (Barber and Vermeule, 2016).

The judicial power has been the object of scientific research in the context of its independence, autonomy (Anishina and Gadzhiev, 2006), functions and forms of implementation (Rzhevskij and Chepurnova, 1998). It is argued that the courts are secondary to the policies of developing states and have virtually no political support, which is the reason for the difficulties in achieving the rule of law. The establishment of the rule of law requires the development of proper links between the courts and society. Many studies have challenged the justification for denying the political dimension to the courts (Schor, 2006). A special interest in the forms of public control accompanying the activities of the judiciary is recognized due to the recognition of justice as the highest form of restoring truth and justice, not free, however, from errors and distortions that require elimination and restoration of violated rights and freedoms, including through the implementation of public control functions (Berdnikova, 2012).

A number of studies are devoted to the civil society as a socio-political phenomenon (Khabrieva and Chirkin, 2005; Golovistikova and

Grudtsyna, 2007). It has been noted that the empowerment of civil society is the main concern of democracy (Flyvbjerg, 1998), and the principle of transparency in its activities can help prevent the abuse of institutional power (Richards and King, 2014). It has been argued that there is a need to develop and adopt a fundamental document that would define the strategy of the state and all involved authorities and public institutions to combat crime and delinquency (Skuratov, Glazkova, Grudinin, and Neznamova, 2016, pp. 645–646). Some authors consider the state of civil society as reflecting the level of civil legal awareness of the population and the effectiveness of the system of public control over the activities of the state, creating additional guarantees of compliance with the constitutional rights and freedoms of citizens (Yastrebova, Salomatkin, Dzhavakhyan, Redkous, and Filonov, 2016). Some studies are devoted to the analysis of constitutional and administrative legal aspects of legislative regulation and ensuring public safety in the Russian Federation by the state and private subjects (Yastrebova, Stakhov, Merkulov, Suchkova, Filonov, and Matveeva, 2017).

At the same time, studies on the above topics do not address the underlying issues of the relationship and interaction of the judiciary with various institutions of civil society as the conductor of the sovereign will of the people — the only source of power, a tool to achieve the rule of law as an essential component of the constitutional legal order.

Methodology. In the course of the study of interaction between the judiciary and civil society institutions in the context of ensuring the rule of law as the most important element of the constitutional legal order, we used such methods of research that correspond to the goals and objectives of the work, including dialectical, systemic, structural and functional, formal and logical approaches.

The dialectics of coexistence and interaction of the judiciary with certain institutions of civil society as an objective necessity in achieving the rule of law as an essential component of the constitutional legal order formed The methodological basis of the study. In the process of cognition, the authors actively used the method of analysis of the studied social and legal phenomena: constitutional law and order, the judiciary and civil society as well as the synthesis of the data obtained.

The use of structural functional method is conditioned by the study, on the one hand, of the phenomena of the judiciary and civil society as elements of the social organization system and their functioning in relation to each other, and, on the other hand, by the definition of the role and place of the results of their interaction in the system of the constitutional legal order.

The Constitution of the Russian Federation, federal and federal constitutional laws, other regulatory legal acts of the Russian Federation in the relevant spheres of public relations, as well as the works of Russian and foreign scientists thematically aligned with this work formed the empirical basis for the studied problem.

Results. This article researches the current legal regulation and practice of public relations in the field of interaction of the judiciary with the institutions of civil society as a condition for the establishment of the rule of law and a component of the constitutional legal order. The results received within this study are the following.

1. The study revealed that none of the studied socio-political, political and legal phenomena — constitutional law and order, the judiciary, civil society have no legal, legislatively enshrined definition, derived from the set of scientific judgments about their nature and essence, which increases the level of disputability of the chosen topic;

2. The cornerstone in achieving and maintaining constitutional legal order is the supremacy of law and the Constitution. At the same time, law must be perceived as a synthesis of positive and natural law, corresponding to the concrete historical level of social development.

3. The primary role in ensuring the supremacy of law and the Constitution, implementation of its direct action, protection of the rights and freedoms of citizens and their associations belongs to the judiciary, implementing the functions that correspond to the goals and objectives of this form of organization of state power. The implementation of some of these functions depends on the maturity of the judiciary, the prospects for constitutional development and the achievement of a state of true constitutional law and order.

4. The Russian legislation of Russia determine the main directions and forms of interaction between institutions of civil society and

the judiciary, the points of contact between them in the process of its formation and activity. It is the Bar activities that are the most clearly regulated, however, its role in the process of the formation and functioning of the judiciary is unreasonably underestimated.

II. Judiciary and Civil Society: The Essence and Interaction to Ensure the Constitutional Rule of Law

The concept of "constitutional legal order" today has not become the subject of a wide scientific discussion among domestic lawyers, and even abroad. Nevertheless, a number of scientists, one way or another, have expressed their views on this issue.

A.V. Bezrukov, echoing A.V. Shinkarev, considers law and order as a result of the law, as a state of public relations, qualitatively characterizing the implementation of the law enforcement function of the state, as a complex socio-legal and political-state phenomenon, in which institutional, functional and socio-legal aspects can be distinguished. He notes the special role of the Constitutional Court of the Russian Federation in ensuring the supremacy of the Russian Constitution and establishing constitutional law and order (Bezrukov, 2017; Shinkarev, 2006). Other researchers focus their attention on the grounds of the constitutional legal order, laid by the functions of the Constitution in their systemic unity, secured, in turn, by various forms of implementation of constitutional norms. The political and legal regime of constitutionalism is considered to be the ideal center of the constitutional legal order (Kokotov, 2018).

It is difficult to overestimate the importance of constitutionalism in the system of protection of individual rights and freedoms, the peculiar cost of "unconstitutional omissions" (Neves, 2019). This is evidenced not only by the experience of the U.S. Supreme Court (Shah, 2020), but also by the experience of European countries (Piatek, 2020). Constitutional legal order is considered as a result of the implementation of constitutional legality and, is understood in a broad and narrow sense. In the broad sense, under the constitutional legal order is proposed to understand the totality of social relations in the Russian society,

established and functioning on the basis of the norms of the Russian Constitution. In the narrow sense, it includes parliamentary, electoral and other special constitutional procedures.

The structure of the legal order in the composition of special subjects, acts of implementation of the norms of constitutional law, the totality of constitutional legal relations, constitutional legal consciousness and constitutional legal thinking is defined. The constitutional legal order includes not only a block of state legal relations but also the sphere of relations within civil society. The creation of real mechanisms for implementing the principles of people's power is recognized as one of the primary conditions for maintaining the constitutional legal order (Baranov, 2014). Attention is drawn to the two existing contexts of the theory of constitutional legal order considered by scientists: the study of the typology of the legal order by sectoral principle and within the framework of speculation about the desired and actual state of the legal order. In the first context, the constitutional legal order is emphasized as systemic in relation to the sectoral types of law and order (civil law, criminal law, etc.). In the second context, the constitutional legal order prevails as the ideal embodiment of the proper state of order of legal life. The key characteristics of the constitutional legal order include: ideological component; focus on the formation of a proper legal order; correlation of interests of an individual, society, the state and the international community (Rakov, 2020).

The jurisprudence of the Constitutional Court of the Russian Federation considers the term "constitutional legal order" from various positions.

From the position of the federal legislator, who "not only has the right, but is obliged to use all available — within its discretionary powers — means, including the establishment of this or that type of legal responsibility, guided by its general principles, which have universal significance and inherently relate to the foundations of the constitutional legal order."[1]

[1] Resolution of the Constitutional Court of the Russian Federation No. 8-P dated 4 February 2019. Collection of Legislation of the Russian Federation. 18 February 2019. No. 7 (Part II). Art. 711. (In Russ.).

Moreover, in order to "protect the rights and freedoms of human and citizen, to ensure law and order, as well as for other constitutionally approved purposes, *the legislator not only has the right, but is obliged to* use all available means — within his discretionary powers — including the establishment of administrative responsibility, guided by the general principles of legal responsibility, which have universal significance and inherently belong to the foundation of the constitutional legal order."[2]

One of the most important constitutional foundations of the relationship between the individual with society and the state is the right of the citizen to participate, within the limits granted by law, in making and implementing decisions that affect his interests. They also have the right to monitor this implementation through their ability to enter into a dialogue with entities exercising the functions of public authority in order to defend both individual (private) and public interests associated with the maintenance and enforcement of law and constitutional order.[3]

At the same time, the dialogue between civil society institutions and the authorities must be built on a balance of private and public interests and contribute to the achievement of constitutionally significant goals, such as ensuring the free self-organization of citizens within civil society institutions and the maintenance of law and order, without infringing on the very essence of the constitutional right to association, including by creating unreasonable, excessive and insurmountable obstacles to the realization of this right and freedom of activity of public associations.[4]

The constitutional legal order is based on a number of the most important principles of the judiciary:

— presumption of innocence of the accused;[5]

[2] Resolution of the Russian Constitutional Court No. 5-P dated 18 January 2019. Collection of Legislation of the Russian Federation. 28 January 2019. No. 4. Art. 360. (In Russ.).

[3] Resolution of the Constitutional Court of the Russian Federation No. 19-P dated 18 July 2012. Collection of Legislation of the Russian Federation. 30 July 2012. No. 31. Art. 4470. (In Russ.).

[4] Resolution of the Constitutional Court of the Russian Federation No. 2-P dated 17 February 2015. Collection of Legislation of the Russian Federation. 2 March 2015. No. 9. Art. 1389. (In Russ.).

[5] Resolution of the Constitutional Court of the Russian Federation No. 33-P dated 17 December 2015. Collection of Legislation of the Russian Federation. 28 December 2015. No. 52 (Part I). Art. 7682. (In Russ.).

— general legal principles of equality and legal certainty;[6]

— principles of equality and justice in their interrelation with the requirement, enshrined in the Constitution of the Russian Federation, on the inadmissibility of exercising human and civil rights and freedoms in violation of the rights and freedoms of others;[7]

— administration of justice only by a court;[8]

— comprehensive nature of judicial protection and the ideas of a state of law, which implies unimpeded access to justice.[9]

The prohibition to decide instead of a court belongs to the fundamental part of the constitutional legal order and continues the principles of justice recognized in declarative, treaty law and other sources of international law. The Constitution of the Russian Federation does not allow for transferring the powers of a law court to the Russian Federation: by virtue of Art. 118 (Part 1) justice is administered only by a court; the fundamentals of the constitutional order guarantee the court independence in the separation of powers (Art. 10); Art. 46 (Parts 1 and 3) guarantees everyone the right to appeal to intergovernmental bodies for protection of rights and freedoms, and Part 1 Art. 47 prohibits denying anyone the right to have his case heard by the court and the judge in whose jurisdiction it is referred by law.[10]

The Constitutional Court of the Russian Federation analyzes the constitutional and legal aspects of improving law enforcement in

[6] Resolution of the Constitutional Court of the Russian Federation No. 15-P dated 6 June 2017. Collection of Legislation of the Russian Federation. 19 June 2017. No. 25. Art. 3740 (In Russ.).

[7] Resolution of the Constitutional Court of the Russian Federation No. 9-P dated 24 March 2017. Collection of Legislation of the Russian Federation. 10 April 2017. No. 15 (Part VII). Art. 2283 (In Russ.).

[8] Resolution of the Constitutional Court of the Russian Federation No. 1-P dated 19 January 2017. Collection of Legislation of the Russian Federation. 30 January 2017. No. 5. Art. 866 (In Russ.).

[9] Resolution of the Constitutional Court of the Russian Federation No. 4-P dated 17 January 2019. Collection of Legislation of the Russian Federation. 28 January 2019. No. 4. Art. 359 (In Russ.).

[10] Resolution of the Constitutional Court of the Russian Federation No. 48-O-O dated 19 January 2011. Not published officially. Official site of the Constitutional Court of the Russian Federation. Available at: http://doc.ksrf.ru/decision/KSRFDecision55030.pdf (In Russ.) [Accessed 15.11.2022].

2016–2018. It is argued that "the state of constitutional legality largely determines the quality of law enforcement" and that "at the initial stage of establishing constitutional law and order, along with positive aspects, this led to insufficient delimitation of competence in the field of judicial control, direct and indirect, which was aggravated by the imperfection of the legislation determining the procedure for challenging regional laws and acts of the Government of the Russian Federation."[11]

One should agree with some of the positions expressed. However, it seems that the phenomenon of constitutional legal order has a deeper essence, comprehended only through a systematic analysis of its components. Meanwhile, understanding, for example, of the constitutional legal order through constitutionalism does not give a clear picture due to the lack of unity of the scientific position on the essence of constitutionalism itself. For the purposes of this work, we believe it is possible to define the constitutional legal order as the state of regulation of public relations by the norms of the Constitution of Russia, sub-constitutional legislation and the practice of their application, corresponding to the actual constitutional will of the people and perceived as such by public consciousness. It is in this context that the subsequent arguments of the authors about the place and role of the judiciary and civil society in achieving this goal are presented.

Despite a significant number of scientific works on the judiciary, there are still controversial questions about its essence, functions, forms of implementation and place in the system of checks and balances. In the absence of a legitimate definition of the concept of "judicial power", nevertheless, one can confidently characterize it as an element of state power, personified by special state bodies — courts, which, within the framework of the competence and procedures established by law, carry out activities aimed at protecting rights, as constitutionally established value and guarantee of public good and private interest that does not contradict it, through law enforcement, interpretation of law, turning into lawmaking, and the resolution of issues (cases) of a public and private nature in accordance with the law (Dzhavakhyan, 2018). This

[11] Official site of the Constitutional Court of the Russian Federation. Available at: http://www.ksrf.ru/ru/Pages/default.aspx (In Russ.) [Accessed 15.11.2022].

confirms the position on the actualization of the problems associated with the constitutional reform, which was marked by a new round of discussion on the rationality of the organization of state power and ways to improve it at the beginning of 2020 and the validity of amendments to the Constitution of Russia (Dzhavakhyan, 2020).

It is customary to associate the beginning of the reform of the judicial system of the Soviet period with the adoption of the Concept of Judicial Reform of 1991,[12] which defined the tasks of establishing an independent judiciary in the state mechanism; protection and unswerving observance of fundamental human rights and freedoms, constitutional rights of citizens in legal proceedings; increasing the availability of information on the activities of law enforcement agencies, judicial and legal statistics. But only with the adoption of the Constitution of the Russian Federation in 1993, the justice system acquired the constitutional status of an independent branch of state power. Within the framework of federal target programs for the development of the judicial system of Russia, adopted for the periods of 2002–2006, 2007–2012, 2013–2020, important measures were taken in the field of the institutional organization of the judicial system, its material and technical equipment, accessibility and openness, accessibility of justice, status of judges. However, the fundamental constitutional ideas of organizing the judiciary, enshrined in the Constitution of the Russian Federation, have not yet been fully implemented.

The institutional content of the judiciary is expressed in the existence of constitutionally conditioned judicial system, which is part of a broader system of public authorities. The activity of courts to implement state-authoritative powers aimed at solving problems and performing the functions of state power in the field of settlement of social and legal conflicts (existing or possible) expresses the functional essence of the judiciary. The need to balance the powers of the judiciary and the executive in the system of checks and balances should be noted,

[12] Resolution of the Supreme Soviet of the RSFSR No. 1801-1 dated 24 October 1991 "On the Concept of Judicial Reform in the RSFSR." Bulletin of the Congress of People's Deputies of the RSFSR and the RSFSR Supreme Soviet. 31 October 1991. No. 44. Art. 1435 (In Russ.).

as confirmed by the research of foreign colleagues, in particular the study of Bijal Shah (Shah, 2020).

According to the well-established view of the functions of the judiciary, it is customary to divide them into internal and external. Internal functions traditionally include oversight over adopted judicial acts, disciplinary procedures, etc., and external functions, in addition to the main function — justice — include the functions of judicial control (supervision) over the legality and validity of measures of procedural coercion (election of preventive measures, search, etc.); interpretation of legal provisions; certification of facts of legal significance; restriction of constitutional and other branch of legal personality of citizens (Skuratov, 1996). In modern Russia, the composition of external functions has been enriched with the function of judicial constitutional control carried out by the Constitutional Court of the Russian Federation. There are opinions on the human rights and lawmaking functions of the judiciary, the so-called "judicial norm" (Bondar, 2010; Guk, 2009). At the same time, an important constitutional setting remains the provision of Art. 118 Part 1 of the Constitution of Russia that justice is administered exclusively by the court. In his theory of an independent judiciary in a democratic state, Charles Louis Montesquieu formulated the following principles of its organization and activity: popular principle (the exercise of judicial power by representatives of the people), and independence from politics and professionalism (Montesquieu, 1955). However, there is a modern point of view that the rule of law (and, therefore, the activities of the courts as guarantors of the rule of the constitution and law — *note by the authors*) is not based on denying politics, but on promoting the development of proper relations between courts and society (Schor, 2006). The role of the judiciary in the system of separation of powers is generally recognized as a deterrent against unconstitutional actions of the legislature and arbitrariness of the executive. In this regard, it is noted that in a system of constitutional power based on popular sovereignty, the government acts as an agent of the people and must exercise power in accordance with the conditions imposed by people in the form of the constitution. But, the interests of the principal and the agent may diverge: those entrusted with public power may seek to seize more power than was granted, or turn the power they received against

the people themselves. Thus, people are faced with the problem of establishing the effective control over the government (Law, 2009). In the context of the operation of the principle of separation of powers, it is also argued that the essence of such separation, although not all, lies in the combination of form and function; matching tasks with those bodies that are best suited to carry them out. The essence of the doctrine is not freedom, as many authors have suggested, but efficiency (Barber, 2001). It is believed that the judiciary is best suited for these purposes. Its purpose is realized through its functions. At the same time, in a series of relatively ordinary decisions that the courts make as part of their activities, some authors highlight exceptional cases when, for example, the validity of the constitution and the rule of law is questioned, or the court is asked to make a decision on the transition from one constitutional order to another, or when the health of the constitutional order requires that the judge act not just as if outside the law, but in fact contrary to the positive law, precisely in order to preserve the health of the constitutional order. Sometimes courts have no choice but to take on the responsibility of leading and truly participating in the establishment of the legitimacy of the very constitutional order that empowers them (Barber and Vermeule, 2016, pp. 16–25). In the USA, for example, this is the prerogative of the US Supreme Court, and in Russia — the Constitutional Court of the Russian Federation. As A.A. Mishin notes "in the United States, a significant part of the actual Constitution is the result of the activity of the judiciary" (Mishin, 1984, p. 65). For all the importance of the same Constitutional Court of Russia for ensuring the supremacy of the Constitution and constitutional law and order, since it implements the function of judicial constitutional control and, in certain cases, a kind of oversight in relation to other courts, these are far from all functions of the judiciary and relatively small volume of cases. At the same time, commercial (arbitrazh procedure) courts, courts of general jurisdiction consider an incomparably greater number of disputes, including those in the order of rule control. The above positions are of genuine interest and emphasize the importance of the place and role of the judiciary in ensuring the constitutional rule of law. It seems that the issues of the effectiveness of the implementation of the principle of democracy by the people in the activities of the judiciary,

including through the institutions of civil society, along with the use of the institutions of representative democracy and forms of direct participation of citizens (Parts 1 and 5 Art. 32 of the Constitution of Russia). Meanwhile, in the conditions of the visible tendency of the prevalence of political expediency, determined by the legislative and executive components of state power, over the rule of law, the issue of strengthening the judiciary, on the one hand, its improvement and the establishment of effective interaction with civil society institutions, public control over the formation and functioning of the judiciary, on the other hand.

The issue of the role of the public, civil society institutions in strengthening the constitutional rule of law in Russia (Bezrukov and Teplyashin, 2018) as a component of the mechanism of democracy implemented in the sphere of the judiciary is actualized. The very concept of civil society is ambiguously perceived and interpreted in the scientific community. It is spoken of as a form of human community; as a set of voluntary primary associations of individuals; as the very system of non-state relations in society (Golovistikova and Grudtsyna, 2007); as a qualitative state of society (Leist, 2002, p. 114). The institutions of civil society traditionally include the family, church, scientific and professional associations, media, organizations, self-governing associations, and other public associations independent of the state. It is indicative that in accordance with the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation No. 1-FKZ dated 14 March 2020 "On improving the regulation of certain issues of the organization and functioning of public authorities", Part 1 Art. 114 of the Constitution was supplemented with Clause "e1" according to which, "The Government of the Russian Federation... takes measures to support civil society institutions, including non-profit organizations, ensures their participation in the development and implementation of state policy."[13] With regard to the issues of interaction of civil

[13] Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation No. 1-FKZ dated 14 March 2020 "On improving the regulation of certain issues of the organization and functioning of public authorities." Official Internet portal of legal information. Available at: http://www.pravo.gov.ru. 14 March 2020 (In Russ.) [Accessed 14.11.2022].

society institutions with the judiciary, it is necessary to determine the institutions of civil society that have the most significant impact on the judiciary, segments of the process of formation and activities of the judiciary in which interaction takes place, to analyze the forms of such interaction and directions for its improvement.

By virtue of the direct indication of the law, the legal profession as a professional community of lawyers — independent professional advisers on legal issues, belongs to the institutions of civil society. The forms and directions of interaction between the legal profession and the judiciary are determined by the Constitution, Federal Law No. 63-FZ dated 31 May 2002 "On advocacy and the legal profession in the Russian Federation,"[14] criminal procedure, civil procedure and other legislation.

Thus, Art. 2 of the Constitution of the Russian Federation proclaims a person, his rights and freedoms as the highest value, and the recognition, observance and protection of human and civil rights and freedoms as the duty of the state. In its turn, Art. 18 of the Constitution establishes that human and civil rights and freedoms are directly applicable. They determine the meaning, content and application of laws, the activities of the legislative and executive authorities, local self-government and are provided by justice. In accordance with Art. 48 of the Constitution, everyone is guaranteed the right to receive qualified legal assistance. Every arrested person, taken into custody, accused of committing a crime, has the right to use the assistance of a lawyer (defense lawyer) from the moment of arrest, detention or presentation of charges, respectively. These provisions of the Constitution correspond to Art. 1 of the Federal Law No. 63-FZ dated 31 May 2002. This characterizes advocacy as qualified legal assistance provided on a professional basis by persons who have received the status of a lawyer in the manner prescribed by law to individuals and legal entities in order to protect their rights, freedoms and interests, as well as ensuring access to justice. The participation of judges of courts of general jurisdiction and commercial (arbitrazh procedure) courts in the work of qualification commissions of bar chambers of the constituent entities of the Russian

[14] Federal Law No. 63-FZ dated 31 May 2002 (amended: 2 December 2019) "On Advocacy and the Practice of Law in the Russian Federation." Rossiyskaya Gazeta. No. 100. 5 June 2002 (In Russ.).

Federation, in accordance with Art. 33 of the Federal Law No. 63-FZ dated 31 May 2002, can be considered as one of the specific forms of interaction between the judiciary and the legal profession. However, there is no feedback in this format between the legal profession and the judiciary. The issue of the unnatural alienation that has arisen between the bar and the courts was discussed at the round table of the Federation Council with the participation of the leadership of the Federal Chamber of Lawyers of the Russian Federation in October 2019. There was proposed to include lawyers in the qualification collegium of judges — bodies of the judiciary. The current legislation also allows judges considering candidates for the positions of federal judges, representatives of the public to participate in the work of the qualification collegiums. Such judges make up about 30 % of the total composition of the corresponding collegium. However, in practice, these are legal scholars and members of the Association of Russian Lawyers, which, according to the existing opinion, does not create the necessary wide public representation (including the involvement of human rights organizations). On the other hand, due to the small number of such it cannot influence decision-making, and therefore requires an increase to at least 50 % of the composition of the collegiums (Faroi, 2018) with the adjustment of the decision-making procedure by the qualification collegiums of judges. There is also a second "filter" in the selection of candidates for the positions of federal judges — the Commission for the preliminary consideration of candidates for positions of judges of federal courts. This is an advisory body under the President of the Russian Federation to ensure the implementation of the constitutional powers of the President of the Russian Federation to appoint judges of federal courts. The President of the Russian Federation himself approves its composition. Only one person in this composition of 15 participants is a representative of the public — the chairman of the central council of the All-Russian public movement for a decent life and justice "Civil Society" (as agreed). Unfortunately, it is obvious that such representation is largely formal, both because of its insignificance, and because there already exist, so to speak, "systemic institutions of civil society," which are essentially built into the system of state authorities and cannot provide real expression of public opinion and protection of

its interests. Obviously, the current situation does not give grounds to talk about the interaction of civil society institutions with the official authorities on an equal basis (Matuzov and Malko, 2006, p. 108). Other issues related to the constitutional right of citizens to participate in the administration of justice remain in the field of scientific discussion are the following: the justification for the removal of people's assessors from consideration of civil and criminal cases (Smirnova, 2006, pp. 4, 9); the imperfection of the institution of arbitrazh procedure assessors (Lyadnova, 2010, pp. 7, 8); legal regulation in the field of world justice (Dzhavakhyan, 2017), the abolition of the institutions of public defenders and prosecutors (Rubinina, 2015); the formation and operation of qualification collegiums of judges (Lipchanskaya, 2012, pp. 42, 43); and forms of interaction between public authorities and civil society institutions (Yastrebova et al., 2020).

The performed analysis allows us to conclude that the institutions of the civil society in Russia today do not have a sufficient constitutional and legal basis for equal cooperation with public authorities in the field of justice. The existing forms of interaction are not effective and do not have a systemic character. It is too early to talk about the organic coexistence of the state and civil society, including in the implementation of the judiciary, as a necessary tool for establishing and maintaining constitutional law and order.

III. Conclusion

The problems selected for this work are due to the growing scientific interest and dynamic changes in social life associated with the obvious need to change the balance in the state-society-individual relationship. The Russian Constitution forms the basis of these relations and the constitutional legal order. The judiciary is to ensure the constitutional rights and freedoms of citizens, their associations, which include the institutions of civil society. Its highest purpose is to control the rule of law, compliance with the written and actual constitution, positive and natural law, limiting the unfounded claims of other authorities and eliminating the unconstitutionality of their actions. The results of the activity of the judiciary largely determine the achievement and

maintenance of the state of constitutional law and order. Periods of significant political and legal transformations become "moments of truth" for the judiciary, either raising its authority and social significance, or leading to their loss. In this sense, it is difficult to overestimate its solid social foundation. The civil society, not least of all, is bound to provide such foundation.

The need to enhance the role of civil society institutions in the life of Russia is beyond doubt. At the same time, awareness of this need poses the questions of the maturity of civil society itself, the level of development of culture (legal, political, etc.) and public consciousness, readiness for responsible and equal interaction with the institutions of public authority, need to nurture it in accordance with its purpose.

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Article

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Administrative Law Forms and Methods of Corruption Prevention in Public Administration in the Mechanism of Ensuring Protection of the Rights and Freedoms of Citizens of the Russian Federation

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Abstract: The study is devoted to a comprehensive analysis of the content and features of the currently existing administrative law forms and methods used to prevent corruption in public administration of the Russian Federation. The authors draw attention to the high level of public danger of corruption and its manifestations. It is emphasized that corruption is one of the main threats to Russia's national security. The paper describes the main universal legal and doctrinal approaches to corruption prevention and corruption manifestations in public administration bodies at federal, regional and municipal levels of government. The authors have revealed the main causes of corruption in public administration; their detailed classification is given. The paper also considers the main directions of the state anti-corruption policy of the Russian Federation in public administration bodies. Attention is focused on the participation of civil society institutions in the implementation of certain areas of anti-corruption. The paper presents the authors' proposals for improving legal foundations of the currently existing domestic system of anti-corruption forms and methods aimed at preventing and minimizing corruption manifestations. The paper analyzes types, content, and features of their application in public administration activities.

Keywords: corruption; manifestations; anti-corruption; corruption prevention; administrative law forms; administrative law methods; public administration

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Contents

I. Introduction

Global challenges require the formation of new approaches to public administration and improvement of existing ones. Undoubtedly, corruption belongs to the most fundamental threats to the functioning of society and the State. Corruption elimination has now become one of the main national interests of the Russian Federation, which is outlined as a goal in the Decree of the President of the Russian Federation No. 400 dated 2 July 2021 "On the National Security Strategy of the

Russian Federation." Public danger of various types of corruption manifestations does not cause serious disagreements in domestic and foreign academic community. In the majority of cases, legal nature of corruption manifestations is obvious. This primarily concerns corruption-related crimes, with bribery being one of the most common crimes of the category under discussion.

According to official data of the Ministry of Internal Affairs of the Russian Federation, over 18 thousand crimes related to bribery were committed in 2021, and the total number of corruption crimes amounted to more than 35 thousand (0.9 % of the total number of recorded crimes).[1] In addition, certain types of administrative offenses, disciplinary offenses, as well as civil law torts are also corrupt in nature. A very significant number of illegal acts with the signs of corruption are committed annually in the field of public administration. In this regard, it is extremely important to prevent all types of corruption manifestations. Administrative law forms and methods enshrined in domestic legislation play a special role in this process. Their legal and doctrinal nature will be discussed in this study.

II. Legal Foundation of Corruption Prevention in Public Administration

Throughout the history of the world, corruption has accompanied various spheres of public relations that are formed in the process of public bodies functioning. Corruption actually appeared simultaneously with the institution of the State, reflecting its most negative aspects appearing due to the selfish interests of the class of officials existing under any government. For example, Rose-Ackerman points out that corruption is a symptom proving that there are significant problems in the public administration system (Rose-Ackerman, 2010, p. 7). Today there is no country in the world that has completely eliminated corrupt relations in the administrative apparatus. Particularly high levels of corruption are recorded in most countries of Africa, Southeast

[1] Brief description crime in the Russian Federation for January — December 2021. Available at: https://мвд.рф/reports/item/28021552/ (In Russ.) [Accessed 25.09.2022].

Asia and Latin America. Foreign researchers highlight that corruption is associated with serious dysfunctions in the state: distortion of investment decisions, crime, violence and political instability (Talvitie, 2017, p. 4472). Nevertheless, there are individual States (Denmark, New Zealand, Singapore, Switzerland, Finland) that have achieved amazing success in the fight against corruption, minimizing its level to almost zero. The experience of these countries shows that anti-corruption is a long, multi-year process associated with the formation of a clear legal framework, a system of specialized bodies, as well as a system of effective anti-corruption measures.

In Russia, the fight against corruption has been carried out inconsistently, not always successfully and not productively. The official state policy had a significant impact on the process of combating corruption, especially in the 20th century. Preventive anti-corruption norms were consolidated in domestic legal acts only at the present historical stage. The legislation on combating corruption in the Russian Federation has developed extremely slowly and inconsistently. Basically, it included bans and restrictions of an anti-corruption nature against state and municipal employees. We agree with A.B. Artemyev and his rather objective conclusions that the anti-corruption legislation formed at the turn of 1990–2000 had significant shortcomings and was not followed by the officials (Artemyev, 2015, p. 43).

Strengthening of the legal regulation of ant-corruption took place after Dmitry A. Medvedev, then the President of the Russian Federation, signed the Decree No. 815 dated 19 May 2008 "On measures to combat corruption" on the basis of which a new Council under the President of the Russian Federation on Combating Corruption was formed, and on 31 July 2008 the first large-scale state anti-corruption legal program document was approved — the National Anti-Corruption Plan.[2] This document consisted of four parts, and each part can be considered mostly successfully implemented to date. In particular, the second section of the National Plan, consolidated measures to improve public

[2] The National Anti-Corruption Plan (approved by the President of the Russian Federation on 31 July 2008, Pr-1568). Rossiyskaya Gazeta. Available at: https://rg.ru/documents/2008/08/05/plan-dok.html (In Russ.) [Accessed 25.09.2022].

administration. Among these measures it is possible to highlight: 1. foundation of anti-corruption units within the personnel services of state bodies; 2. introduction of methods for assessing the effectiveness of identifying and preventing corruption risks; 3. the use of the One-Stop Shop system and the electronic information exchange system. The first National Plan became a foundation for anti-corruption planning throughout the Russian Federation. Today, this document makes it possible to coordinate all state authorities and local self-government bodies to combat corruption. Provisions of the National Plan serve as the basis for plans and programs not only carried out not only in government bodies, but also in enterprises and institutions, regardless of their form of ownership.

The adoption of Federal Law No. 273-FZ dated 25 December 2008 "On Combating Corruption" (hereinafter the Anti-Corruption Law No. 273-FZ) was the next major stage of the anti-corruption struggle in modern Russia. It is associated with the most serious changes that have occurred during improvement of the system of prevention and suppression of corruption in the public administration system. It is important to pay attention to some provisions of the basic anti-corruption law that are directly related to public administration. The very content of the law is filled with norms directly related to government agencies and especially with civil servants. And a number of articles in general can be considered a direct continuation of the legislation on the state civil service. Among anti-corruption principles (Art. 3), one can single out publicity and openness in the activities of state bodies, which is always relevant to minimize corruption risks. The principles also include the integrated use of various measures, including political, organizational, legal, special, etc. Within the framework of the study, this is especially significant, taking into account the variety of forms and methods of combating corruption.

The authors believe that for the purposes of more detailed understanding of the nature of corruption, it is necessary to amend the Anti-Corruption Law No. 273-FZ adding Art. 1 to Para. 1.1 containing the definition of a corruption offense. The Anti-Corruption Law No. 273-FZ should clearly differentiate between the categories of

corruption and corruption offense with due regard to the fact that the latter is quite common in the text of the law. In addition, the definition of the concept of the *corruption offense* can also be found in the anti-corruption legislation of foreign countries. In particular, the Law of the Republic of Kazakhstan "On Combating Corruption"[3] contains a definition of this concept, where there is no possibility of applying disciplinary measures for acts of corruption. The Law of the Republic of Uzbekistan "On Combating Corruption"[4] also contains a definition of the corruption offense, but in a more truncated form, without specifying the types of responsibility that occur for committing acts that have signs of corruption. It is necessary to understand that corruption and corruption offenses are related, but still different, categories. Thus, the corruption offense is an illegal act (act or omission to act) that has signs of corruption, for which criminal, administrative, civil, or disciplinary measures can be applied in accordance with the legislation of the Russian Federation.

The system of legal regulation of anti-corruption, in addition to federal legislative acts, also includes the laws of the constituent entities of the Russian Federation. Each constituent entity of Russia has its own separate law aimed at combating corruption. They were adopted in different years, also before the Anti-Corruption Law No. 273-FZ came into force, as it happened, for example, in the Republic of Tatarstan. Regional laws have different names, but at the same time quite similar content, due to the consolidation of universal anti-corruption measures. The existence of such extensive anti-corruption legislation in the constituent entities of the Russian Federation is an additional confirmation of the most important thesis — corruption is one of the problems of a national scale, the manifestations of which are present at all levels of government.

[3] Para. 11 Art. 1 of the Law of the Republic of Kazakhstan No. 410-V dated 18 November 2015 "On Combating Corruption" (with amendments and additions) (as of 3 July 2017). Information system "Paragraph." Available at: http://online.zakon.kz/document/?doc_id=33478302#pos=0;0 (In Russ.) [Accessed 25.09.2022].

[4] Para. 3 Art. 3 of the Law of the Republic of Uzbekistan No. ZRU-419 dated 3 January 2017 "On combating corruption". National database of legislation of the Republic of Uzbekistan "LexUz". Available at: http://www.lex.uz/pages/GetAct.aspx?lact_id=3088013 (In Russ.) [Accessed 25.09.2022].

The anti-corruption activities of public authorities at the level of the constituent entities of the Russian Federation also have a diverse nature and are associated, among other things, with the publication of regulatory legal acts to combat corruption. As a rule, these are acts of the head of the constituent entity, its highest executive authority, as well as individual executive authorities of the constituent authority of the Russian Federation. Each constituent entity of the Russian Federation has its own anti-corruption plan. These documents are clearly synchronized with the federal anti-corruption plan, but take into account the specifics of each individual region of Russia. Thus, under Part 2 Art. 5 of the Law of the City of Moscow "On measures to combat corruption in the City of Moscow,"[5] the anti-corruption plan has been developed and approved in accordance with the procedure established by the Mayor of Moscow. Currently, Moscow has the anti-corruption plan for the same period of time as the federal one — from 2021 to 2024.[6] Local anti-corruption plans are also in effect in all regional executive authorities. For example, a similar document is used in the Department of Transport and Development of Road Transport Infrastructure of the city of Moscow.[7] It should be noted that Russia today has the necessary legal framework for combating corruption. Regulatory legal acts regulating anti-corruption issues are constantly being improved, supplemented and changed. New anti-corruption laws, decrees of the President of the Russian Federation, resolutions of the Government of the Russian Federation, regulations of federal executive authorities and executive authorities of the constituent entities of the Russian Federation are adopted annually.

[5] Law of the City of Moscow No. 64 dated 17 December 2014 "On measures to combat corruption in the city of Moscow". Bulletin of the Mayor and the Government of Moscow. 72 (In Russ.).

[6] Order of the Mayor of Moscow No. 75-RM dated 15 February 2021 "On approval of the Anti-Corruption Plan in Moscow for 2021–2024" (annotated). Official website of the Mayor of Moscow. Available at: www.mos.ru (In Russ.) [Accessed 25.09.2022].

[7] Order of the Mayor of Moscow No. 75-RM dated 15 February 2021 "On approval of the Anti-Corruption Plan in Moscow for 2021–2024" (with amendments and additions). Official website of the Mayor of Moscow. URL: https://www.mos.ru/upload/documents/files/7633/d_1880101234.pdf (In Russ.) [Accessed 25.09.2022].

III. Causes of Corruption in Public Administration

For a deeper understanding of the content of corruption, it is necessary to identify the reasons that contributed to its large-scale spread in public administration. In this context, S.N. Shishkarev argued that corruption is a consequence of political instability, economic decline, morality degradation, weakening of the system of social control (Shishkarev, 2010, p. 4). In many ways, the causes of corruption in the public administration of the Russian Federation coincide with the general causes of corruption in the country, but there is also a certain specificity caused by the special nature of official relations in the structure of public authorities. The "gene" of corruption lies in the shortcomings of the system of state and municipal service that forms a kind of the core of public administration. Most of these reasons have been studied for a long time in the framework of relevant dissertation research (Kurakin, 2008; Shevelevich, 2008; Sevryugin, 2011).

The authors support the opinion of Nikolai I. Dorokhov that modern corruption is focused on maximum use of the opportunities for personal enrichment of officials due to errors and mistakes committed during the society's reform (Dorokhov, 2006, pp. 26–29). Thus, corruption will remain at a high level until a truly effective system of public administration is formed in Russia in the exercise of public powers by officials.

The scholarship analysis allows the authors to determine the most common causes of corruption in the field of public administration. They include:

a. low level of remuneration, which does not allow a significant number of public officials to consider their work in public administration as the main source of income;

b. constant outflow of qualified specialists to other areas, including business, and, as a result, poor public sector employees' performance;

c. insufficient level of legal culture and legal awareness of a significant part of officials accompanying their propensities to corrupt behavior;

d. so-called "clannishness" or "nepotism" in the system of state and municipal service;

e. lack of proper administrative control and supervision of management and law enforcement agencies over the activities of officials;

f. lack of a developed system of public control over the activities of officials with the participation of civil society institutions;

g. an excessive number of executive authorities and their officials, often exercising excessive and duplicative powers, which contributes to the growth of bureaucracy and red tape in the execution of decisions.

This list can be continued further, since there are really a lot of reasons for corruption among civil servants in executive authorities. In addition, it is possible to identify a number of other general causes of corruption. First, they include the reasons of a political and ideological nature that are associated with illegal merging of the interests of business and government officials (the so-called phenomenon of "bureaucratic capitalism"), weak civic initiative, ineffective implementation of anti-corruption policy, and a low level of ideological propaganda against corruption. Second, they include organizational and legal reasons related to the ineffective use of anti-corruption measures by state authorities, lack of initiative of authorized officials of government bodies, and "soft" sanctions for corruption offenses. Third, socio-economic reasons contribute to the high degree of social stratification into poor and rich, a significant level of inflation, low average wages, retirement and pension benefits. Fourth, these are moral and ethical reasons caused by the legal nihilism of a significant part of Russian society, the perception of corruption as a norm of behavior and legal nihilism of a significant part of society, as well as lack of ethical and moral barriers prohibiting corruption offenses in the minds of a significant part of officials.

IV. Main Directions of the State Anti-Corruption Policy with the Participation of Civil Society Institutions

Anti-corruption is an integral part of the State Policy. In almost every annual address to the chambers of the Federal Assembly of the Russian Federation, the President of Russia stated the importance of combating corruption. In his message for 2012, the President of the

Russian Federation actually outlined the main directions of state policy in the field of combating corruption in the coming years.[8]

Stricter control over the income and expenses of state and municipal employees, heads of large state-owned companies and their families was declared as the first direction of the Anti-Corruption Policy.[9] In this regard, a corresponding federal law was adopted regulating the procedure for providing information concerning officials' expenses and expenses of their family members. Under Part 1 Art. 3 of this law, an official is obliged to provide information about his/her expenses and expenses of his/her spouse and minor children for each transaction, if the amount of this transaction exceeds the total income of the official and his/her spouse for the last three years preceding the transaction, and about the sources of funds, except for the account of which the transaction was made. The procedure required in this case for providing the above information was approved by the majority of federal executive authorities, including the Ministry of Finance of the Russian Federation.[10]

The next direction of combating corruption in the public administration system was the initiation by the President of the Russian Federation of a different order of remuneration of heads of state organizations and institutions. According to the Head of State, a more equitable procedure for the distribution and redistribution of monetary incentives for employees of budget organizations is needed. The quality of the organization's work and the average salary of the

[8] Message of the President of the Russian Federation to the Federal Assembly dated 12 December 2012. Rossiyskaya Gazeta. 287. 13 December 2012 (In Russ.).

[9] Order of the Ministry of Finance of the Russian Federation No. 131n dated 24 August 2015 "On Approval of the Procedure for Submission by Citizens Applying for Positions and Employees Filling Positions in Organizations Created to Perform Tasks Assigned to the Ministry of Finance of the Russian Federation of Information about Their Income, Expenses, Property and Property Obligations, as well as Information about income, expenses, property and property obligations of their spouse and minor children". Official Internet portal of legal information. Available at: http://www.pravo.gov.ru (In Russ.) [Accessed 25.09.2022].

[10] Federal Law No. 230-FZ dated 3 December 2012 "On control over the compliance of expenses of persons holding Public positions and other persons with their incomes". Collection of Legislation of the Russian Federation. 10 December 2012. No. 50 (Part IV). Art. 6953 (In Russ.).

staff should be applied as the main criteria for determining the amount of remuneration. Unfortunately, today the heads of many budget enterprises and institutions abuse their official position, distributing monetary incentives in their own favor or in favor of the managerial staff, ignoring ordinary employees. In this regard, it is necessary to set the maximum limit of benefits and "bonuses" for the management and make the remuneration procedure as transparent as possible. It should be noted that this criterion is reflected in many regulatory documents that regulate the procedure for remuneration of employees of state and municipal enterprises and institutions. In particular, under Para. 16 of the Uniform Recommendations on Establishment at the Federal, Regional and Local Levels of Remuneration Systems for Employees of State and Municipal Institutions for 2022, the main principles underlying evaluation of employees' efficiency include objectivity, predictability, adequacy, timeliness and transparency.[11]

The third direction of the State Anti-Corruption Policy, outlined by the President of the Russian Federation, was the improvement of legislation on public procurement. At the request of Vladimir Putin, the highest representative authorities accelerated their work to adopt a new law aimed at regulating procurement activities for state and municipal needs. The Federal Law "On the Contract System in the Field of Procurement of Goods, Works, Services for State and Municipal Needs"[12] took into account the wishes of representatives of state authorities, local self-government, commercial enterprises and organizations, as well as the President of the Russian Federation. Thus, in the text of the law there are separate chapters and articles devoted to monitoring and audit in the field of procurement (Chapter 4) and public control in the field of procurement (Art. 102).

[11] Unified recommendations on the establishment at the federal, regional and local levels of remuneration systems for employees of state and municipal institutions for 2022 (approved by the decision of the Russian Tripartite Commission for the Regulation of Social and Labor Relations dated 23 December 2021, Protocol No. 11). Rossiyskaya Gazeta. No. 7. 14 January 2022 (In Russ.).

[12] Federal Law No. 44-FZ dated 5 April 2013 "On the contract system in the field of procurement of goods, works, services for state and municipal needs" (annotated). Official Internet portal of Legal Information. Available at: http://www.pravo.gov.ru [Accessed 25.09.2022].

Anti-corruption measures proposed by the President of Russia also include a serious expansion of the powers of deputies of the State Duma in relation to the Accounts Chamber of Russia. The Head of State proposed to grant the right to members of the lower House of the Federal Assembly to nominate candidates for the post of a chairman, deputy chairman and auditors of the Accounts Chamber of the Russian Federation, as well as to limit the term of office for the same categories for two terms. The President's initiatives are reflected in the new Federal Law "On the Accounts Chamber of the Russian Federation."[13] Anti-corruption measures provision by this authority is highlighted in Art. 5 of the Law as one of the main tasks of the Accounts Chamber of the Russian Federation.

The fifth important initiative of the President of the Russian Federation was to ensure more active civic participation in public control over the activities of public authorities and local self-government, as well as enterprises, institutions and organizations owned by the state or municipal entities. This initiative of the President of the Russian Federation was also actively supported at all levels of government. Adoption in 2014 of the Law of Moscow "On ensuring the openness of information and public control in the areas of landscaping, housing and communal services" represents one of the examples of such support at different levels.

In our opinion, the current situation in implementation of the Anti-Corruption Policy in Russia can be characterized mainly as positive. Most of the specific instructions of the President of the Russian Federation, indicated by him in his Message to the Federal Assembly for 2012, have found their direct practical implementation. Federal state authorities, state authorities of constituent entities of the Russian Federation, and local self-government bodies are increasingly facilitating the fight against corruption and corruption manifestations.

The topic of the fight against corruption was touched upon by Russian President Vladimir Putin in his Address to the Federal Assembly

[13] Federal Law No. 41-FZ dated 5 April 2013 "On the Accounts Chamber of the Russian Federation" (with amendments and additions). Official Internet portal of Legal Information. Available at: http://www.pravo.gov.ru [Accessed 25.09.2022].

of the Russian Federation in 2013.[14] The text of the official document does not pay as much attention to this issue as in the Message to the highest representative authorities for the previous year. Nevertheless, the head of the State outlined the problems most inextricably linked with corruption. The President noted high level of corruption in the system of local self-government bodies, which "are constantly shaken by corruption scandals."

The Message for 2013 raised the issue of the need to involve civil society institutions to discuss draft regulatory legal acts. The President of Russia stressed that it is necessary to create public councils under federal and regional executive authorities in the future. They should be authorized to exercise independent civil control over adopted legal acts in order to exclude corruption-related norms. In this regard, it should be mentioned that the possibility of creating public councils under executive authorities controlled and accountable to the Government of the Russian Federation was legally fixed back in 2005.[15] The creation of public councils under executive authorities reporting to the President of the Russian Federation was also regulated by the relevant decree of the Head of State in 2006.[16] One of these councils is the Public Council under the Ministry of Internal Affairs of the Russian Federation, formed under the Decree of the President of the Russian Federation in 2011.[17] In accordance with the Sub-Clause "d" Clause 4 of the Regulations on

[14] Message of the President of the Russian Federation to the Federal Assembly dated 12 December 2013. Rossiyskaya Gazeta. No. 282. 13 December 2013 (In Russ.).

[15] Resolution of the Government of the Russian Federation No. 481 dated 2 August 2005 "On the Procedure for the Formation of Public Councils under Federal Ministries Headed by the Government of the Russian Federation, Federal Services and Federal Agencies Subordinate to these Federal Ministries, and Federal Services and Federal Agencies Headed by the Government of the Russian Federation" (annotated). Assembly of Legislation of the Russian Federation. 8 August 2005. No. 32. Art. 3322 (In Russ.).

[16] Decree of the President of the Russian Federation No. 842 dated 4 August 2006 "On the procedure for the formation of public councils under federal ministries, federal services and federal agencies, the management of which is carried out by the President of the Russian Federation, under federal services and federal agencies subordinate to these federal ministries" (with amendments and additions). Collection of Legislation of the Russian Federation. 7 August 2006. No. 32. Art. 3539 (In Russ.).

[17] Decree of the President of the Russian Federation No. 1027 dated 28 July 2011 "On approval of the Regulations on the Public Council under the Ministry of Internal

the Public Council under the Ministry of Internal Affairs of the Russian Federation, one of the main tasks of the Council is to conduct a public examination of draft federal laws and other regulatory legal acts of the Russian Federation concerning activities of internal affairs bodies. The type of legal expertise indicated above is an independent public anti-corruption expertise.

Speaking to members of the Federal Assembly of the Russian Federation in 2013, the President specifically mentioned the problems of interethnic relations in Russia. Vladimir Putin quite rightly noted in his speech that many difficulties of state development are connected with interethnic relations, since corruption is one of manifestations of such relations. Countering corruption in a short term will contribute to reducing interethnic tensions in Russia and improving the level of efficiency of public administration. In 2014, corruption was not directly addressed in the message of the President of the Russian Federation, but a year later the Head of State returned to the problem again. He said that "corruption is an obstacle to the development of Russia."[18] The President noted several other important aspects of combating corruption in public administration. Vladimir Putin indicated that information about contracts that state and municipal officials plan to conclude with the business entities associated with their relatives and friends were also subject to disclosure. In addition, the President of the Russian Federation highlighted that attention of the representatives of regulatory and law enforcement agencies, as well as civil society to situations where there are signs of personal interest of public officials and conflicts of interest in the exercise of their powers had increased.

The directions proposed by the President of the Russian Federation Vladimir Putin in his messages to the Federal Assembly of the Russian Federation over the years on combating corruption are absolutely correct and necessary in the system of state and municipal administration. The anti-corruption policy developed by the head of state is balanced and

Affairs of the Russian Federation" (with amendments and additions). Collection of Legislation of the Russian Federation. 1 August 2011. No. 31. Art. 4712 (In Russ.).

[18] Message of the President of the Russian Federation V.V. Putin to the Federal Assembly of the Russian Federation dated 3 December 2015. Parliamentary Gazette. No. 44. 4–10 December 2015.

fully meets modern Russian realities. The authors note that over the past few years, the content of anti-corruption initiatives of the President of the Russian Federation has changed somewhat to a certain extent. If earlier the Head of State indicated, in fact, the need to solve the most common and acute problems of combating corruption, today one can notice the focus of anti-corruption policy on eliminating certain specific corruption manifestations in public administration, as well as shortcomings in the legal and organizational support of anti-corruption activities.

V. Administrative Law Forms and Methods of Corruption Prevention in Public Administration

According to the legal definition enshrined in Para. 2 Art. 1 of the Anti-Corruption Law No. 273-FZ, anti-corruption is related to the functioning of federal public authorities, public authorities of constituent entities of the Russian Federation, local self-government bodies, civil society institutions, organizations and individuals. Based on the content of the existing definition, it can be argued that anti-corruption as an institution represents a complex activity of all interested actors. In practice, this figuratively means that anti-corruption work is carried out not only "from above," but also "from below." The definition of anti-corruption also reveals the content of corruption prevention that includes prevention of corruption, including identification and subsequent elimination of the causes of corruption.

Starting from the postulates of the theory of public administration, we isolate, first of all, the activities of executive authorities and other state bodies endowed with appropriate state-administrative powers. Taking into account the fact that the fight against corruption mainly falls within the competence of law enforcement agencies within the framework of criminal law regulation, anti-corruption, which has an administrative law content, consists mainly of prevention of corruption and elimination of manifestations of corruption offenses. Thus, with regard to public administration, it is necessary to underline the importance of using a specific institution — administrative anti-corruption, in which the main role is played by special anti-corruption

forms and methods used in the system of executive authorities of the Russian Federation. We suggest that *administrative anti-corruption* mean activities of bodies authorized to carry out public administration, regulated by the norms of administrative law, related to the implementation of anti-corruption forms and methods for the prevention of corruption manifestations. The use of forms of public administration is associated with ensuring direct implementation of the powers of executive authorities. The choice of a specific form of administration is determined by the competence of the relevant body, as well as the objects to which the administrative impact will extend. In this regard, the authors share V.P. Umanskaya, who writes that the effectiveness of public administration, the quality of decisions made and the results of their execution depend on the correct choice of the form of administration, a competent combination of various forms of activity (Umanskaya, 2014, p. 14).

In our opinion, anti-corruption plans and programs adopted at various levels of government form the main administrative law form of combating corruption in public administration at the present stage. These documents form a "constitution" of The State Anti-Corruption Policy. The national Anti-Corruption Plan has been approved by the President of the Russian Federation. Currently, the National Anti-Corruption Plan for 2021–2024[19] is being implemented, which forms the basis for anti-corruption plans in each constituent entity of the Russian Federation, state authorities and local self-government. In addition, anti-corruption planning today covers all types of enterprises and institutions, regardless of the form of ownership. Strict adherence to the measures stipulated in the documents and instruments under consideration is the foundation of the prevention of all types of corruption.

Anti-corruption standards of conduct for state and municipal officials constitute another important form of countering corruption in public administration. They represent a set of normative rules expressed in the form of prohibitions, restrictions, and requirements aimed at the formation of sustainable anti-corruption behavior. Anti-corruption

[19] Decree of the President of the Russian Federation No. 478 dated 16 August 2021 "On the National Anti-Corruption Plan for 2021–2024". Available at: www.pravo.gov.ru (In Russ.) [Accessed 25.09.2022].

standards contain not only basic prohibitions and restrictions for state and municipal employees, but also special rules for the prevention of corrupt behavior in certain public authorities, as well as enterprises and institutions. Anti-corruption standards can have both a mandatory form of consolidation and they can be recommendatory in nature in various methodological documents.

Administrative regulations for the performance of state functions and the provision of public services represent another important anti-corruption administrative law form. These legal acts are applied to the activities carried out by executive authorities for detailed regulation of the procedure for the execution of actions and decisions of executive authorities and their officials aimed at exercising their powers in the process of performing state functions. Certain administrative regulations are directly related to the exercise of the powers of executive authorities to prevent corruption.[20]

In relation to the category "method of public administration," the science of administrative law similarly applies the term "form of public administration." In other words, there is no consensus among Russian scholars regarding the use of the categories "management method," "method of public administration," "administrative law method," "administrative method," etc. Taking into account the dominant approaches in law concerning the content of administrative methods and measures, the authors propose to include the following anti-corruption methods, as well as specific anti-corruption measures accompanying them, as the most relevant for theory and practice:

Anti-corruption expertise of legal acts of public administration, expressed in conducting a comprehensive legal review of regulatory legal acts and their drafts of executive authorities in order to identify corruption-causing factors and their subsequent elimination.

[20] See for example: Order of the State Inspectorate of St. Petersburg for Supervision of Technical Condition of Self-propelled Vehicles and other Types of Equipment (Gostechnadzor of St. Petersburg) No. 59-r dated 11 December 2012 "On Approval of the Administrative Regulations of Gostechnadzor of St. Petersburg on the execution of the state function for the implementation of activities within the competence of Gostechnadzor of St. Petersburg implementation of anti-corruption policy in St. Petersburg". Bulletin of the Administration of St. Petersburg. 2012. 50 (In Russ.).

Anti-corruption monitoring carried out in order to ensure development and implementation of anti-corruption programs through revealing corruption offenses and persons committing them and holding them responsible for such offences, analyzing documents, conducting surveys and experiments, processing, evaluating and interpreting data using corruption indicators.

Analysis of corruption risks associated with the identification and study of the possibility of the causes and conditions that contribute to the commission of corruption offenses in public administration.

Anti-corruption propaganda as a purposeful activity of state authorities of the Russian Federation, subjects of the Russian Federation, local self-government bodies, organizations, public associations and citizens aimed at carrying out information and educational work in society on anti-corruption issues.

Anti-corruption education of public servants is a system of events (lectures, seminars, round tables, colloquiums, trainings, solving incidents, individual consultations) conducted with civil servants in order to prevent corruption offenses, and formation of anti-corruption legal awareness.

VI. Conclusion

In the Russian Federation, the system of anti-corruption legislative acts has become the basis for corruption prevention in public administration. In the system of anti-corruption legal regulation, in addition to laws, the priority is given to the state plans and programs approved by the President of the Russian Federation, as well as the heads of constituent entities of the Russian Federation. In addition, in recent years, the country's leadership has signed a large number of by-laws aimed at eliminating corruption in public administration. Improving anti-corruption legal regulation is a main task of the internal policy of the Russian Federation. Only an exceptionally detailed and comprehensive normative regulation of all aspects of anti-corruption activities can result in significant reduction of corruption in public administration. Forms and methods of public administration are the most important institutions of administrative law. When the activities of

public authorities are considered, it is absolutely necessary to apply the categories of "administrative law form" or "administrative law method" of public administration that have their own distinctive features and that can also be classified on different grounds. Understanding the content of forms and methods of management in the practical activities of executive authorities makes it possible to increase the efficiency of public administration and minimize corruption manifestations.

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INTERNATIONAL AGENDA

Article

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Evolving Roles of the International Institutions in the Implementation Mechanisms of the Rules of International Humanitarian Law

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Abstract: The dire need to expand the frontiers of the enforcement mechanism of the rules of international humanitarian law through the international institutions has been of a global concern for ages. Driven primarily by efforts to enforced and promote the rules of international humanitarian law, there is a need to develop measures capable of promoting the rules of international humanitarian law through the international institutions. The objective of this paper is to analyze and establish that expanding the frontiers of the enforcement mechanism of the rules of international humanitarian law through the international institutions bothering on individual or state responsibility will further strengthen the low level of enforcement of these rules. However, this paper noted that there is a significant enforcement gap both at the regional and international levels. Further, this paper argues that in order to guarantee a high level of enforcement of these rules both at the regional and universal levels, a more integral approach on the role of international institutions is capable of addressing the enforcement gap of the rules of international humanitarian law. This paper adopts a diagnostic approach based on a review of literatures, which is achieved

by synthesis of ideas. This paper concludes with recommendations among others that in order to boast the purpose for which the rules of international humanitarian law were made, the level of enforcement of these rules should be expanded to fill the enforcement gaps at the domestic, regional and universal levels.

***Keywords*:** enforcement; international humanitarian law; United Nations; international institutions; rules

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Contents

I. Introduction

This paper arose out of the compelling need to re-examine the principles of international humanitarian law and the institutional discourse relating to the practicability of promoting the principles of international humanitarian law through the agencies of the United Nations. Different approaches have been adopted in effecting the

realization and for effective implementation and respect of the principles of international humanitarian law amongst nations.

Despite the various attempts and approaches in the implementation of international humanitarian law, it may therefore be understood from the perspectives of a traditional institution consisting of the law regulating co-existence and cooperation between the members of the international society, that is the States, and/or international law governing the conduct of member States and their citizens. Although, it must be emphasized that international humanitarian law emerged as part of the traditional layer, that is, as law regulating belligerent inter-State relations, but today it has become nearly irrelevant unless understood within the second layer, namely as the law protecting war victims against States and others who may wage war. Thus, in line with the relevance of the principles of international humanitarian law, it must be emphasized that the international institutions have played a significant role in ensuring that these fundamental principles are respected and as well promoted. In light of the above, it should be noted that some provisions of the Charter of the United Nations[1], particularly with reference to Art. 2(4) provides that:

> *All Members shall restrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations.*

In a similar vein, Art. 2(7) further provides thus.

> *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdictions of any State or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter.*

However, it might sometimes be argued that for states and international organizations to enforce the compliance of the rules of

[1] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Available at: https://www.refworld.org/docid/3ae6b3930.html [Accessed 07.04.2022].

international humanitarian law, the apprehension created by the above provisions has made it a bit challenging. In addition, there is a serious argument that since the United Nations do not have international police, neutral states during armed conflicts between belligerent parties that would ordinarily interfered to broker peace with all means and methods are of course prevented from doing so because of the above provisions in Art. 2(4) of the Charter of the United Nations. This paper focuses on some of the practical or most effective means and methods of enforcing international humanitarian law principles in modern time.

In any case, it must be emphasized that since states have defied the principles of Art. 2(4) and 51 of the Charter of the United Nations to make wars and other form of forcible measures a fact of their international relations, all the laws of warfare find application for "a war is still war in the eyes of international law even though it has automatically arisen from acts of force which were not intended to be act of war" (Oppenheim, 1952, p. 299). In other words, the fact that States do not impute the character of war in their acts of force does not preclude the application of the laws of war. It is the writer's belief that this is for the common rationale of humanizing wars or forcible measures, through the balancing of military necessity with concerns for humanity (Jochnick and Normand, 1994, p. 52). In addition, this paper noted that Art. 3 Common to all the Four Geneva Conventions (1949) and Art. 1 of the Additional Protocols to the Four Geneva Conventions (1977) state that the provisions of the Conventions shall apply in all situations. In the light of the above, this paper thus seeks to examine the promotion of the principles of international humanitarian law through the institutions of the United Nations from a holistic perspective and attempts a critical, realistic and contextual assessment of the socio-legal and cultural assessment of the role of these agencies to the realization of the promotion and respect of the principles of international humanitarian law with a view to identifying the commonalities and divergences in ensuring full compliance with these principles and law they could constitute a coherent framework for adequate protection of both combatants and non-combatants in an armed conflicts or internal disturbances.

II. International Institutions and Their Contributions to the Promotion and Respect of the Rules of International Humanitarian Law

Recent challenges and developments have made the authors to examine several arguments arising from the contributions of the various international institutions in the respect and promotion of the principles of international humanitarian law around the globe since it is true that both the States and individuals are under the obligation to comply with international humanitarian law in such that non-compliance can, in some cases, render the individuals liable under penal law, as many national and international courts have acknowledged.[2] In this sense, it is important to highlight that the United Nations bodies and agencies as well as international tribunals listed below are primarily concerned with ensuring respect for humanity in time of war. They guarantee that humanity will be upheld in circumstances that threaten it.

II.1. United Nations Security Council

Basically, the activities of the United Nations bodies on the implementation of international humanitarian law began in 1949 with the adoption of the four Geneva Conventions for the protection of victims of armed conflicts in 1949. The Security Council activities in this regard are quite extensive and keep increasing. Notably, the first express mention by the Security Council of the Geneva Conventions was not couched in strong terms. More importantly, by the Resolution 237, relating to the Middle East, the Security Council recommended to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war as contained in the Geneva Conventions of 12 August 1949.[3] Also, the Security Council has taken a very large number of actions with respect to the implementation

[2] *See* Inter-Parliamentary Union Declaration Adopted without a vote by the 90th Inter-Parliamentary Conference Canberra (18 September 1993).

[3] *See* Security Council Resolution 237, U.N.SCOR, 1361st Meeting (13 June 1967).

of international humanitarian law which may be seen from the Call and Demands for respect of the rules of international humanitarian law,[4] and the determination that certain Acts constitutes violations of international humanitarian law.[5] Interestingly, the importance of the pronouncement by the Security Council on certain Acts constituting violations of international humanitarian law lies in the public pressure and however, creates responsibility on the States.[6]

That being the case, it must be emphasized that in two resolutions underway, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them.[7] Be that as it may, questions are sometimes raised as to whether expanding the role of the Security Council in the area of enforcement of the rules of international humanitarian law ever be a progressive development in the enforcement of the rules of international humanitarian law, due to suggestions that Security Council's auxiliary role to the enforcement of the rules of international humanitarian law may at times be incompatible with its independence.

Drawing from the central role assigned to the Security Council by the Charter of the United Nations which is made manifest in the prohibition of the use of force in Art. 2(4) and the conferral of "primary responsibility for the maintenance of international peace and security" on the council in Art. 24(1) of the United Nations, this paper argues that the importance accorded to the council by the San Francisco conference in 1945 was nevertheless, tampered by political realism or is more than just normative aspirations. More so, in order to provide an effective response, Art. 40 of the Charter provide that, before making recommendation or deciding upon measures provided for in Art. 39, the council may "call upon the parties concerned to comply with such

[4] *See* Security Council Resolution 307, 3 U.N.SCOR, 1621st Meeting (21 December 1971).

[5] *See* Security Council Resolution 452 U.N.SCOR, 2159th Meeting, 3 (20 July 1979).

[6] *Ibid.*

[7] International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadic* (Jurisdiction) IT-94-1-AR72 (1995), Para. 133.

provisional measures as it deems necessary or desirable. Also, Art. 41 of the Charter empowers it to decide what measures not involving the use of armed force are to be employed to give effect to its decisions.

It goes without saying that Art. 42 of the Charter allows the Security Council to take such actions as may be necessary to maintain or restore international peace and security. However, prior to 1990, action under Chapter VII of the Charter of the United Nations was as inconsistent as it was infrequent. Furthermore, it is much more realistic and common place in practice to maintain that in recent times, the intents of the Security Council in the enforcement of the rules of international humanitarian law is to promote a peaceful resolution of the conflict without pronouncing upon the question of its international or internal nature as reflected by the Report of the Secretary-General of 3 May 1993 and by the statements of Security Council members regarding their interpretation of the Statute. This argument ignores, however that as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in international armed conflicts as the case may be.[8]

Against this backdrop, and judging from the enforcement of the rules of international humanitarian law by the Security Council, it is understandable from the above provisions that in the absence of agreements under Art. 43 of the Charter, the command and control of the Secretary General should prevail. It is important to note that the United Nations peacekeeping force in the Republic of Congo was authorized to use force to end the civil war between 1961 and 1964, but remained under the command and control of this Secretary General. It has been argued that this constituted an enforcement action under Chapter VII of the Charter,[9] but this is a minority position. The rationale behind the use of force according to the Secretary General was essentially an internal security measure taken by the Security Council at the invitation of the Congolese government, perhaps implicitly under Art. 40 of the Charter (Seyersted, 1961, p. 446).

[8] *Prosecutor v. Tadic*, IT-94-1-AR72, Appeal Chamber, Decision (2 October 1999), Para. 74–75.

[9] Charter of the United Nations, Art. 43.

With regard to the procedure that came to characterize the United Nations' involvement in maintaining peace and security during the Cold War, however, one should note that peacekeeping operations were traditionally non-threatening and impartial, governed by the principles of consent and minimum force. It may be argued that the legality of peacekeeping operations on the basis that Chapter VII must be read as providing the only legitimate basis for the decision to use military is very difficult to accept. However, with the above characteristics, peacekeeping operations have expanded in number and scope as well as enforcement actions of the rules of international humanitarian law. It is submitted that the most basic transformation in the use of Security Council powers is that, it now appears to be broadly accepted that a civil war or internal strife may constitute a threat to international peace and security within the meaning of Art. 39.

II.2. United Nations Peacekeeping Force

Generally, the idea of the United Nations Peacekeeping Operations or Forces was developed by the United Nations whereby the presence of national or multi-national troops in an area of hostility can reduce tension and pave the way for negotiations that would bring about sustainable peace and re-unity. These positive obligations under the United Nations, of course, impose obligations on State parties to international humanitarian law treaties to ensure respect and compliance with the rules thereof. From an operational point of view, and in literal terms, it may be argued that since not all States are parties to the international humanitarian law treaties, how then can the rules of international humanitarian law be universally applied and respected and/or be legally binding on such a State who has not ratified the treaty? However, as the respect and compliance with the rules of international humanitarian law become more complex given the above scenario, the challenges of understanding the phenomenon of peacekeeping operations under international law becomes more daunting.

Admittedly, it must be emphasized that peacekeeping operations are not only geared toward assisting the host nations to rebuild and provide security, and public order, but also to help them restating es-

sential service and also tackle the root causes of the conflict thereby achieving an enduring peace and unity. On the other hand, while the relevance of peacekeeping operations cannot be overemphasized, one might argue that peacekeeping has been looked at as an instrument of choice in international conflict management after the cold war. In a similar vein, this paper also noted that the application of international humanitarian law to United Nations Forces or Peace Support Operations as they are often conservatively styled has drawn considerable contentions over the years.[10] The thrust of this argument is that, as an organization, the United Nations and many Regional International Organizations and peace support organizations are not signatories or part of the High contracting parties to the existing conventions, even though the United Nations itself, by the authority given to it to create and employ armed forces has the correlative authority to make treaties to protect such forces (Bowelt, 1964, p. 224).

In this respect, it should be pointed out that if peacekeeping troops protect civilians and disarm combatants, they will promote greater respect for international humanitarian law. However, this is exemplified when peacekeeping forces facilitate the provision of humanitarian assistance to noncombatants in the form of food, shelter, health care, and sanitation. But conversely, it should be fairly uncontroversial to state that given the increasing pace of peacekeeping operations in ensuring maximum compliance of the rules of international humanitarian law, the idea espoused in this paper is situated within the context of different understanding of the concept of peacekeeping operations. Interestingly, it is widely accepted that peacekeeping forces have also been implicated in sexual exploitation and sexual violence against war-affected populations, including the abuse of women, who lived in refugee and displaced persons camps and under the care of those very peacekeepers.[11]

Put differently, it should be borne in mind that, the changing character of peacekeepers as international policemen in war times, considering the volatility and complexity of their job, an appropriate and

[10] *See* United Nations Document ST/SGB/1999/13 of 6 August 1999.

[11] United Nations Security Council Adopted Resolution 1188 (2009).

powerful mandate is given to them to enable, handle and responsively approach parties that oppose or obstruct peace. This is the assumption underlying the fact that this is where international humanitarian law applicability comes to play. This dominant view suggests in an attempt to sustain or address the issue and for the purposes of setting out fundamental principles and rules of international humanitarian law that apply to forces conducting operations under the United Nations Command and Control, the United Nations Secretary General released a Bulletin.[12]

Thus, Section 1 of the Bulletin provides that:

> *The fundamental principles of international humanitarian law set out in the bulletin are applied to the United Nations Forces when in situations of armed conflicts, they are actively engaged therein as combatants to the extent and for the duration of their engagement.*

II.3. International Court of Justice (ICJ)

Again, opinions on this issue will differ, but even if it does not justify any reason given by the Charter of the United Nations, the obvious reason remains that according to Art. 93 of the Charter all members of the United Nations are automatically parties to the International Court of Justice (ICJ), even non-members of the United Nations may also become parties to the Court's Statute under Art. 93(2) of the Charter.

Pursuant to the above provisions of the charter, it must be acknowledged that in keeping with the burning desire in ensuring that the rules of international humanitarian law are respected and promoted accordingly by state parties and individuals, it should be noted that the International Court of Justice (ICJ) has had the occasion to deal with questions of humanitarian law in three highly notable cases concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America),[13] the *Corfu Channel* case (UK

[12] United Nations Document St/SGB/1999/13 of 6 August 1999.

[13] Nicaragua v. United States of America, Merits, International Court of Justice (ICJ), 27 June 1986. Available at: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed 23.11.2022].

v. Albania)[14] and Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro.[15] The ICJ has also contributed to the enforcement and promotion of the rules of international humanitarian law through its advisory opinions addressing such issues as the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,[16] the Legality of the Threat or Use of Nuclear Weapons[17] and Constructing a Wall in the Palestinian Territory[18] in 2004.

The important aspect of this section is to further highlight the fact that prior to the emergence of the International Criminal Court (ICC), the International Court of Justice entertained matters bordering on offences of genocide and crimes against humanity as demonstrated in the past where there were several cases of violation of international humanitarian law. That said, the significant role of the ICJ in the implementation of international humanitarian law cannot be overemphasized. On this basis, one can safely maintain that the international criminal justice has been deeply involved in the interpretation of the rules of international humanitarian law (Frenkel et al., 2020). Be that as it may, the International Court of Justice is perceived as the guardian

[14] Corfu Channel Case (United Kingdom v. Albania), International Court of Justice (ICJ), Judgement, 9 April 1949. Available at: https://www.icj-cij.org/public/files/case-related/1/001-19490409-JUD-01-00-EN.pdf [Accessed 23.11.2022].

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, p. 43. Available at: https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf [Accessed 23.11.2022].

[16] International Court of Justice Report, Advisory Opinion Concerning Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 May 1951. Available at: https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf [Accessed 26.11.2022].

[17] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996. Available at: https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf [Accessed 26.11.2022].

[18] The Construction of a Wall in the Palestinian Occupied Territories (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories), ICJ Reports 2004, p. 136 (Wall Opinion). Available at: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [Accessed 26.11.2022].

of the unity of humanitarian law (Raimondo, 2007, pp. 593–611). It is clear from the above that the focus of an international humanitarian law case before the International Criminal Justice is not whether a particular individual has committed genocide, a war crime or crime against humanity, but whether one of the States Party to the case has incurred international responsibility for a breach of international law and/or international humanitarian law. In this regard, it allows ICJ to appreciate the details of particular incidents and examine patterns of conduct. Also, an important limit to the contentious jurisdiction is that it depends on both parties to a case having submitted themselves to the jurisdiction of the International Court of Justice.[19]

Furthermore, it must be emphasized that the ICJ also possessed an advisory jurisdiction which permits it to give an advisory opinion on any legal questions if it requested to do so by the United Nations General Assembly, the Security Council or any organ of the United Nations. That said, it is important to note that two opinions of the ICJ on nuclear weapons (Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), ICJ Reports 1996,[20] and the Construction of a Wall in the Palestinian occupied territories (Legal Consequences of the construction of the Wall in the Occupied Palestinian, ICJ Reports 2004 (Wall Opinion)[21] are an important contribution to the understanding of international humanitarian law.

II.4. International Financial Institutions

Basically, it is obvious and well settled that apart from the respective role played by the above mentioned bodies of the United Nations in the development and promotion of the rules of international humanitarian law through their involvement in resolving crises between the parties to an armed conflict, it can therefore be said that such UN specialized agencies as the international financial institutions are increasingly

[19] United Nations, Statute of the International Court of Justice (adopted June 1945 and entered into force 18 April 1946), Art. 36.

[20] *See* ICJ Reports on Nuclear Weapon Opinion 1996, p. 226.

[21] *See* The Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p. 136.

involved in conflict situations and countries in which the violations of international humanitarian law are widely spread and devastating to civilian population and the country's economic prospects. Their establishment is rooted in the Bretton Woods Conference.[22] It must be stressed that it was envisaged as one of the three pillars of the international economic system focusing at the outset of the financing of post-war reconstruction and development.

It is submitted here that international financial institutions assistance can take a number of forms through aid, loans; and or other measures to encourage of facilitate the promotion of international humanitarian law during armed conflict between parties to the conflict. According to the World Bank Report,[23] there are now over 150 agencies involved in development assistance including "South-South exchanges of financial resources." However, it has been widely noted that although the Articles of Agreement of the major international financial institutions prevent them from involvement into political affairs of member states,[24] this paper noted that sometimes the United Nations may jettison this provision. To an extent, it could be argued that the influence of the international financial institutions like the World Bank Group and the International Monetary Fund led to the promotion of international humanitarian law during the apartheid regime of South Africa wherein, the World Bank and the IMF were prevailed upon to stop dealing with the apartheid regimes.

Indeed, the World Bank Group plays an important role in development assistance such that it is generally described as the Premier development institution" in International economic relations. Against this background, this paper however, asked whether international financial institutions are appropriate agents for the promotion, adherence to and enforcement of international humanitarian law? Are they capable to do so? These questions are of extremely importance to the issue of promoting the rules or international humanitarian law.

[22] United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, United States of America, 1944.

[23] World Bank: "New World, New World Bank Group: Post Crisis Direction", 2010, Para. 6 (DC 2010-0003).

[24] World Bank Articles of Agreement (adopted 20 July 1956), Section 10.

Given the significant constraints on the structural and political concerns which have posed obstacles to the development of a role and function international financial institutions with respect to international humanitarian law, it may be argued that the role and function of the international financial institutions in the international community enable then to make some contributions to the implementation and enforcement on international humanitarian law and that factoring humanitarian law violations into their decision making processes which can actually be essential to the effective implementation of their own mandates of greater concern is that international financial institutions involvement in international humanitarian law can also support efforts by the United Nations and the international community in preventing and limiting violations of international humanitarian law and as well enforce the law against those suspected of committing atrocities. It must be emphasized that the World Bank and the IMF are specialized agencies of the United Nations that function as independent international organizations not bound by most of the General Assembly decisions, instead they are bound by the UN Security Council resolutions.[25] Acknowledging the above provisions of the Charter of the United Nations, this Charter however, imposes strict obligation on the international institutions the activities of which should be tailored towards the provisions of Chapter VII resolutions in order to ensure that they do not contravene the binding decisions and actions of the United Nations. This threshold is understood to imply that any effort aims at promoting a role for the international financial institutions in international humanitarian law must be capable of addressing the accountability and political questions raised by the international financial institutions' governance structures and the legal questions raised by the limited mandates of the international financial institutions as special economic organizations.

However, it must be noted that international financial institutions in the implementation and enforcement of international humanitarian law should not always withdraw or reduce funding, but rather should consider the impact of international humanitarian law violations as a factor in making policy and decisions (Blank, 2002, p. 42).

[25] Charter of the United Nations, Chapter VII.

II.5. International Criminal Court (ICC)

Absolutely, the International Criminal Court is a permanent tribunal established by the international community to prosecute individuals for genocide, crimes against humanity, war crimes and the crimes of aggression. It is important to highlight that the international criminal court is a new mechanism for the enforcement of international humanitarian law.[26] A key concern is that, this court was established on the 17 July 1998 in Rome with the primary purpose of arresting and trying all persons involved in violating the rules of international humanitarian law. In that sense, it is a properly constituted court of competent jurisdiction.

Generally, aside from being a court of competent jurisdiction, there are other emerging challenges ranging from the tension inscribed in the statute between the particular interests of states and the normative interest of the international community as a whole in repressing crimes under international law which of course, lies at the heart of the international criminal system. It could be argued that how successfully the drafters of the statute struck the balance between these two competing impulses will ultimately determine the effectiveness and legitimacy of the Court. In other words, this paper noted that, in a technical sense, it is worth emphasizing that this tension of dichotomy is itself the product of the fact that the statute is a treaty, and not some other form of instrument. Furthermore, it must be borne in mind that the Preamble and Art. 1 of the Rome Statute declare that the International Criminal Court is to provide "complementarity" to national jurisdictions. It might be argued that it is in the context of complying with the provisions of Art. 1 of the Rome Statute that the notion of "complementarily" was overwhelmingly agreed upon at every stage of the negotiations from the international law commission Draft to the Rome Statute, thus ensuring that the ICC would not supersede national courts, which are to retain primary responsibility for investigation and prosecuting international crimes (Holmes, 1999, p. 73). However, it

[26] United Nations General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, UN DOC. PCNICC/1999/INF/3, Art. 126. Available at: https://www.refworld.org/docid/3ae6b3a84.html [Accessed 23.11.2022].

would be argued that notwithstanding the agreement in principle to complementarity, the question of whether national authorities or the ICC should decide on the admissibility of a case before the Court and on the criteria to be applied, remained contentious. The same can be said that the authority to decide the admissibility of cases before the ICC often times are carefully circumscribed to make them acceptable to states. In this sense, it can be said that the resulting balance has made the complementarity regime "one of the cornerstones on which the future international criminal court will derive its powers" (Imoedemne, 2017, pp. 89–121; Bleich, 1997, p. 231).

Another crucial point to note in this paper is that international law prescribes certain rules of behavior for states, and it is up to every state to decide on practical measures or penal or administrative legislation to ensure that individuals whose conduct is attributable to it, or under some primary rules, and/or even all individuals under its jurisdiction comply with those rules. Indeed, only human beings can violate or respect rules. Aside from this substantive requirement, it should be pointed out that international humanitarian law obliges states to suppress all its violations that amount to war crimes which of course, are criminalized by international humanitarian law. However, this concept of war crimes includes, but is not limited to the violations listed and defined in the conventions and Protocol I as grave breaches.[27] Moreover, it must be emphasized that international criminal court represents a delicate balancing act in the enforcement and promotion of the rules of international humanitarian law. However, this perspective is particularly significant for the understanding that the Rome Statute of the ICC has also criminalized widespread and severe damage to the natural environment,[28] the recruitment of child soldiers[29] and all violation of Common Art. 3 of the Four Geneva Conventions of 12 August 1949, particularly in armed conflicts not of an international character.[30]

[27] Geneva Conventions I–IV 1949, Art. 50, 51, 130, 147 of Geneva Convention 1949, Art. 11(4), 85 and 86 of Additional Protocol 1 of 1977.

[28] Rome Statute of the International Criminal Court, Art. 8(2)(b)(iv).

[29] *Ibid*, Art. 8(2)(b)(xxvi).

[30] *Ibid*, Art. 8(2)(c).

In the context of the above development, and on the account of the seriousness that the international criminal court attaches to the enforcement of international humanitarian law in non-international conflicts or civil wars that the first amendments to the Rome Statute, which came up in Kampala, Uganda proposed inclusion of the use of certain weapons as war crimes in the context of an armed conflicts not of an international character. Thus, the obvious reason behind this is to achieve military objective without causing a superfluous or unnecessary suffering or damage to the civilians or civilian objects (Greenwood, 1995, pp. 30–31). Essentially, it must be understood that another unique aspect of the international criminal court as far as the violation and promotion of international humanitarian law is concerned, lies in the Rome Statute's extension of acts of criminality in warfare to gender crimes, comprising rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence, including trafficking in women and children.[31] For purposes of clarity of the above section, it may however be safe to hold that these gender crimes are now characterized as crimes against humanity which makes the international criminal court the most far-reaching institution of international criminal justice addressing gender and sexual violence.

It goes without saying that one of the most formidable aspects of the international criminal court's problems is its contamination by political sentiments and as a result, lack of wide spread global acceptance. Thus, given these realities and all efforts to rid the international criminal justice of the political smear, this taint is still very much visible, now prompting a situation in which some of the culprits of the international humanitarian law violations are not brought to justice (Moghalu, 2008, p. 4), especially those perpetrated by the superpowers. In another vein, it is also crucially important to note that the jurisdiction of the court rests on the assumption that it compliments national criminal jurisdictions.[32] This means that the Court is not allowed to exercise its jurisdiction over a case if a state has exercised its domestic criminal jurisdiction over the same case. Thus, the rule of complementarity in the ICC differs from the cases in International Criminal Tribunal of Former Yugoslavia

[31] *Ibid*, Art. (1)(c) and 7(2)(c).

[32] *Ibid*, Art. 17.

(ICTY) and International Criminal Tribunal of Rwanda (ICTR) whose jurisdictions take precedence over the national criminal jurisdictions of the relevant states.[33]

II.6. International Tribunals

The establishment of the international criminal tribunals as a measure under Charter VII of the United Nations taken by United Nations Security Council[34] cannot be overemphasized. Thus, these tribunals are temporal in nature created for the purposes of punishing war crimes committed in relation to two specific contexts; the former Yugoslavia (the International Criminal Tribunal for the former Yugoslavia (ICTY)) and Rwanda (the International Criminal Tribunal for Rwanda (ICTR)). It is worth mentioning the fact that since international humanitarian law seeks to protect the victims of armed conflict and to limit the means and methods of warfare, serious violations of this law constitute war crimes.

While there are serious questions with regard to the establishment of the International Tribunals, it should be noted that the Appeals Chamber in *Prosecutor v. Tadic*.[35] stated,

> *Art. 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regards, and it has been otherwise, as such as a choice involved political evaluation of highly complex and dynamic situations.*

Beyond this work, it is becoming increasingly clear that the work of both Tribunals has shown that international investigation and international prosecution of persons responsible for serious violation of international humanitarian law are possible and realizable. Crucially important in this regard is that these developments have given new

[33] United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993, Art. 2(2). Available at: https://www.refworld.org/docid/3dda28414.html [Accessed 23.11.2022]; United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Art. 8(2). Available at: https://www.refworld.org/docid/3ae6b3952c.html [Accessed 23.11.2022].

[34] Charter of the United Nations, Chapter VII.

[35] IT-94-1-AR72 Appeals Chamber Decision, 2 October 1995, Para. 39.

vigor to the principles of universal jurisdiction, and have encouraged at least some prosecutions by various states of persons responsible for gross violations of the rules of international humanitarian law. It should be noted that the contribution of the Hague Tribunal was to advance the concept of the applicability of the Hague law to non-international conflicts. In addition, the Hague Tribunal has also given a very expansive, yet credible, reading to international customary law.[36] More so, in examining the import of Art. 3 of the Geneva Conventions the Appeal chamber held that:

> *Article 3 functions as a residual clause designed to ensure that no serious violations of international humanitarian law are taken away from the Jurisdictions of the International Tribunal.*

This construction of Art. 3 is also corroborated by the object and purpose of the provision. In terms of the legal acceptability of these systems, the Security Council when establishing the international tribunals did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and in Rwanda. Thus, Art. 3 is intended to realize that undertaking by endowing the international tribunal with the power to prosecute all "serious violations" of international humanitarian law.

From the foregoing, we could also point to fact that the Nuremberg Tribunal emphasized the relationship between the treaty-based and customary rules of international humanitarian law prohibiting certain forms of individual conduct and it had the mandate to apply that positive legal order. Another important aspect is that the 1949 Geneva Conventions for the protection of the victims of armed conflicts define a series of acts as grave breaches of their rules and stipulate that the States Parties are under the obligation to search for persons alleged to have committed them or to have ordered them to be committed, and to bring them before their own courts or, if they prefer, to hand them over for trial to another state provided that the state has made out a prima facie case against them.[37]

[36] *See* The Appeals Chamber in *Prosecutor v. Tadic,* IT-94-1-AR72 (1995) Para. 39. Available at: https://www.refworld.org/cases/ICTY/40277f504.htm [Accessed 05.11.2022].

[37] Art. 49 GC I; Art. 50 GC II; Art. 129 GC III; Art. 146 GC IV of 1949.

With these considerations in mind, the Statute of the ICTY and the ICTR, and the Rome Statute of the ICC[38] also collaborate on the assumption of individual criminal responsibility. Basically, this type of responsibility has been accepted generally in the absence of any controversy. It has become part of international law which originally only regulated relations between states and under which only states could be held accountable for the commission of an internationally unlawful act, even though the responsibility may be civil in appearance.[39]

On the other hand, it is important to understand that criminal responsibility rests with national persons who commit an act specifically defined as a crime by international law. It is important to understand that international Tribunals in the enforcement of the rules of international humanitarian law have expanded the notion of war crimes. Indeed, since the material jurisdiction attributed to the ICTR by the Security Council at the point of its establishment bothers on rules that, at some point of its establishment formed part of both international custom and treaty-based law, however, in this context, the ICTY decisions will explain better on the institution of the Nuremberg Tribunal, on whether the notion of war crime has been expanded or not. Notwithstanding, these important advances in terms of the expanded notion of war crimes, the fact remains that this notion applies not only to grave breaches of the rules of international humanitarian law committed in the context of a war as such, but also to acts perpetrated in connection with an armed conflict, be it international or internal.

III. Levels of Enforcement of the Rules of International Humanitarian Law

It is obvious from the preceding sections that international humanitarian law is a set of rules designed to protect persons who are not, or no longer, participating in hostilities and to limit the methods

[38] Rome Statute of the International Criminal Court, Art. 25.

[39] The United Nations General Assembly Resolution A/56/83 on the Responsibility of States for Internationally Wrongful Act (adopted by the General Assembly 28 January 2002, A/RES/56/83), Available at: https:// www.refworld.org/ docid/3da44ad10.html [Accessed 22.11.2022].

and means of waging war. That is to say that, it also sets out mechanisms designed to ensure compliance with the rules of this branch of law. However, in order to meet these obligations, this paper will henceforth examine the level of enforcement of these rules at different levels.

III.1. Universal Level of Enforcement

The above overview of emerging challenges in the enforcement of the rules of international humanitarian law at all levels operation highlights that as enforcement become more complex and challenging, measures should be adopted by the United Nations in order to understand the complex manner in which the enforcement mechanism will be capable to address the level of violation of these rules at the international level. Perhaps the most important point to note is that the United Nations through its collaborative efforts with *ad hoc* international criminal tribunals and as well as the cooperation with the International Criminal Court is capable of addressing these challenges.

Be that as it may, the United Nations set up international criminal tribunals to try crimes committed in the former Yugoslavia known as the ICTY as well as the ICTR, respectively, to try crimes committed in both countries. In this context, these tribunals have primacy over national courts, which may at any stages of the proceedings, formally request national courts to defer to their competence.[40] However, States are obliged to cooperate with these tribunals in the investigation and prosecution of persons accused of committing serious violations of the rules of international humanitarian law. States must also comply with the tribunal in areas bothering on the identification and location of persons testimony and production of evidence, service or document, the arrest and detention of persons, the surrender of the transfer of the accused to the tribunal in question. Thus, the specific question that arises in the above context is whether states who are not parties to the

[40] International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993, Art. 9(2). *The Prosecutor v. Dusko Tadic* (Jurisdiction) IT-94-1-AR 72 Appeal Chambers, Decision (1995), and International Criminal Tribunal for Rwanda (ICTR) 8 November 1994, Art. 8(2).

treaty could be bound by this. The answer depends on the consent given by such a state who may or may not be a party to such a treaty.

In a similar vein, the enforcement of the rules of international humanitarian law could be done through a mutual cooperation with the International Criminal Court. In this case, the ICC exercises its jurisdiction only when a state is unwilling or genuinely unable to carry out investigation or prosecution over alleged crime of violation. This paper however, submits that the international criminal courts effectiveness is dependent on the level of cooperation given to it by the state. In this sense, it must be acknowledged that states parties must cooperate fully with the ICC in its investigation and prosecution of crime within its jurisdiction bothering on genocides, crime against humanity, war crimes, and the crime of aggression.[41] Also the ICC may as well invite any state not party to its Statute to provide assistance on the basis of an ad hoc arrangement an agreement or on any other appropriate basis.[42] Moreso, states parties must ensure that there are procedure available under their national laws for this form of mutual cooperation's to succeed.[43] Thus, the states cannot circumvent their obligations by their own designation of the act.

Nonetheless, while it is true that in a specific situation and upon the request of a state party to the Statute, the international criminal courts may provide assistance to the state in an investigation into or a trial in respect of conduct which constitutes a crime within the jurisdiction of the ICC or which constitutes serious crime under the national laws of the requesting state. In other words, the ICC may also grant a request for assistance from a state which is not party to the ICC Statute.[44] Against this background, it is important to recall that cooperation between state and with international jurisdiction is essential to the smooth running of the system as well as enforcement of the rules of international humanitarian laws at international level of operation of the ICC. Indeed, the need for mutual assistance is especially evident in the case of offences where these allegedly responsible must be brought to trial or

[41] Rome Statute of the International Criminal Court, Art. 86.

[42] *Ibid*, Art. 87(5)(a).

[43] *Ibid*, Art. 88.

[44] *Ibid*, Art. 93(10).

extradited by state. According to Art. 88 of Additional Protocol I, grave breaches of the Geneva Conventions or their Additional Protocols, and the specific obligations to cooperate in a matter of extradition, broadest possible mutual legal assistance among state parties in this regards, is necessary in a similar vein, it is particularly important to state that Art. 18 and 19 of the second Protocol[45] to the Hague Convention of 1954 for the protection of cultural property in the event of armed conflicts[46] also address the issues of extradition and judicial cooperation.

III.2. Regional Level of Enforcement

At this level of operation, this paper noted that regional human rights mechanism is however, increasingly examining violations of the rules of international humanitarian law. This would suggest that the European Court of Human Rights is the central piece of the European system of human rights protection under the 1950 European Convention on Human Rights,[47] while in Americas, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights[48] are in charge and, of course, the African Commission on Human and Peoples' Rights is the supervisory body established under the 1981 African Charter and the 1998 Protocol to it is the treaty establishing an African Human Rights Court.[49] In addition, in light of the fact that the African Human Rights system and its capacity to deal with violations of

[45] *See* Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Art. 18 and 19. Available at: https://en.unesco.org/sites/default/files/1999_protocol_text_en_2020.pdf [Accessed 26.11.2022].

[46] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954 and entered into force 7 August 1956). Available at: https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf [Accessed 26.11.2022].

[47] European Convention on Human Rights (adopted 4 November 1950, ETS 5). Available at: https://www.refworld.org/docid/3ae6b3b04.html [Accessed 26.11.2022].

[48] Statute of the Inter-American Court on Human Rights (adopted 10 October 1979 and entered into force 1 January 1980). Available at: https://www.refworld.org/docid/3decb38a4.html [Accessed 26.11.2022].

[49] African Charter on Human and People's Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 211. L.M.58 (1982). Available at: https://www.refword.org/docid/3ae6b3630.html [Accessed 26.11.2022].

international humanitarian law have thus far received little scholarly attention, it must be emphasized that there are instances where the African Court on Human and Peoples Rights can directly apply norms of international humanitarian law (Viljoen, 2014, p. 333). However, there are three avenues where African Court can engage with international humanitarian law such as firstly, through reference to international humanitarian law in the substantive norms of relevant human rights treaties, secondly, by way of its subject — matter jurisdiction, and thirdly, through its interpretative competence. It seems clear that in the first category where there is a proper incorporation by reference to international humanitarian law obligations into a human rights treaty in respect of which the African Court may exercise subject — matter jurisdiction, the court will then have jurisdiction in respect of the incorporated international humanitarian law obligations. In a similar situation, reference to international humanitarian law obligations that are not incorporated serves to acknowledge the relevance of international humanitarian law to the rights in discourse, as well as the connection between the observance of international humanitarian law and the enjoyment of human rights and provides a basis upon which to engage in contextual analysis that considers the impact of the State in giving effect to its human rights obligations.

Generally speaking, the enforcement of the rules of international humanitarian law at the regional level takes places through different modes of non-judicial and judicial mechanisms which ensure that human rights are respected and promoted during armed conflicts, whether of international or none-international nature. Moreover, given the mutual relationship between international humanitarian law and human rights law as well as the prevailing situations of armed conflicts around globe, it must be emphasized that regional institutions dealing with human rights have been able to address cases of breaches of the rules of international humanitarian law. However, there is a strong argument that these regional human right courts are ill-equipped to handle mass atrocity crimes. The paper is of the view that their caselaw is important for the enforcement of the rules of international humanitarian law, especially when it has to do with state responsibility in situation of armed conflicts.

III.3. National Level of Enforcement

In view of the challenges frequently encountered in the enforcement of rules international humanitarian law at the national level, consideration should be given to the nature and extent of the responsibility for violations of the rules. Thus, such responsibility may raise numerous legal questions, including whether the perpetrators bear individual responsibility for the violations they commit and the guilty of serious violations must be prosecuted and punished. However, it is common knowledge that the Four Geneva Conventions of 1949 (GC I-IV), their Additional Protocols of 1977 (AP I, AP II) and other treaties set forth for State Parties explicit obligations regarding penal repression of serious violations of the rules they contain.

Firstly, in line with the provisions of the Geneva Conventions of 1949 and their Additional Protocols of 1977, this must be borne in mind when considering the nature of responsibility and analysis must be put in its proper context. An understanding that the state party to the Geneva Conventions and Additional Protocols of 1977 must prevent and halt any acts contravening these instruments no matter whether they are committed in an international or non-international armed conflicts is necessary to ensure that the measures that state must take to this end may vary in nature and may include penal sanctions if necessary. However, it is important to bear a number of considerations in mind. In the situations under review, it must be emphasized that at the National level of enforcement of the rules, the national government have further obligations relating to certain flagrant violations of international humanitarian law as well as the grave breaches. However, these precise acts listed in the Geneva Conventions and Additional Protocol I, such as willful killing, torture and inhuman treatment, will fully cause great sufferings or serious injury to body or health, and certain violations of the basic rules for the conduct of hostilities.[50]

Secondly, in repressing grave breaches of the Geneva Conventions and Additional Protocol I, it must be pointed out that the law is not the answer in itself, nor the only element to consider; policy and operational considerations are equally important. However, the Geneva

[50] Art. 39, 50, 129 and 146 GC I; Art. 85 Para. 1 AP I.

Conventions and Additional Protocol I stipulate that "grave breaches" must be punished accordingly at all levels. It is for these reasons that the States Parties must search for persons accused of having committed or having ordered the commission of grave breaches, regardless of the nationality of the perpetrator or the locus of the crime, in accordance with the principle of universal jurisdiction. These perpetrators must be brought to their national court, or be handed over for trial in another state which has made out a *prime facie* case.[51] Also it should be noted that Additional Protocol I[52] applies to the State Party in case of grave breaches resulting from a failure to act when under a duty to do so.

It is now generally accepted that in order to meet up with these obligations, State Parties must adopt the legislative measures needed to punish persons responsible for grave breaches through the enactment of laws that will prohibit any repression and will apply to everyone irrespective of his status who has committed or ordered the commission of such offences and ensure that these laws relate to acts committed in the national territory and/or elsewhere. In addition, it is worth mentioning that attention should be drawn to amendments to the national legislation which were made to complement the provisions of the Geneva Conventions, some of which, as this paper noted, go so far as to make it possible for national courts to convict the persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1999, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. In any event it must be stated that Art. 142 clearly provided for war crimes against the civilian population, while Art. 143 expressly provided for war crimes in respect of the wounded and the sick. However, the above situations apply at the time of war, an armed conflict or occupation, this would seem to imply that they also apply to an internal armed conflict.

In view of the above, necessity could be invoked to justify this position. Without any ambiguity, Belgian law enacted in 1993 for the implementation of 1949 Geneva Conventions and the two Additional Protocols, provides that Belgian Courts have jurisdiction to adjudicate

[51] Art. 39 GC I; Art. 50 GC II; Art. 129 GC IV; Art. 146 GC IV; Art. 85 Para. 1 AP I.
[52] Art. 86 Para. 1 AP I.

breaches of Additional Protocol II to the Geneva Convention relating to the victims of a non-international armed conflict. However, Art. 1 of this law[53] provides that the series of grave breaches of the four Geneva Conventions and the two Additional Protocols listed in the same Art. 1, constitute international law crimes. Thus, to state the obvious, the legislator has a number of options for translating serious violations of international humanitarian law into national penal legislations and for making the criminal acts constituting them subject to domestic law.

IV. Conclusion

We hope that this paper will contribute to clarifying an essential aspect of international humanitarian law, and especially, that it will help to determine more precisely the level of commitment of the institutions of United Nations in ensuring that international humanitarian law should be respected and promoted. It argues that, several international institutions are involved in the development and promotion of international humanitarian law, but not all have the same capacity. In this sense, it can be justifiably concluded that the United Nations institutions involvement in the development and promotion of international humanitarian law is more recent, but they have the capacity of ensuring respect for the rules of international humanitarian law if they so wish. Among them it is the UN Security Council that has primary responsibility, under the Charter of the United Nations, for the maintenance of international peace and security. It is for the Security Council to determine when and where a United Nations peacekeeping operation should be deployed.

As broadly examined in this paper, it is submitted that both Chapters VI and VII of the Charter of the United Nations entrusted the responsibility of preventing threats to peace, suppression of acts of aggression, and peaceful settlement of international disputes to the Security Council. However, as the article has explored, despite the various roles played by the international institutions in the enforcement of the rules of international humanitarian law, the level of their participation

[53] Article of the Geneva Conventions, 1949. International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecuter v. Dusko Tadic* (Jurisdiction) 1T-94-1-AR 72, Appeals Chamber, Decision, 1995.

in the enforcement agenda of the rules of international humanitarian law cannot be taken for granted. Furthermore, while it is accepted that the Security Council can impose sanctions on those states that violate international humanitarian law, it is imperative to suggest that these sanctions can be achieved through the authorization of military operations that can lead to the establishment of *ad hoc* international criminal tribunals to prosecute violations of international humanitarian law. Finally, this paper argues that the fact that the Security Council prefers to establish its own *ad hoc* commissions to investigate violations of international humanitarian law rather than resort to the findings of the Commission provided for in Art. 90 of the Additional Protocol I, clearly shows that it has regards to international humanitarian law.

Ultimately, while it is clear that the United Nations institutions are major role players in ensuring respect and promotion of the rules of international humanitarian law, it must be emphasized that they are faced with numerous challenges as the nature of armed conflicts and contemporary weapons of warfare evolves. That being said, armed conflicts, indiscriminate violence and acts of terror have continued to threaten the safety and security of innocent people and undermine efforts to bring about a lasting peace and stability around the globe.

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Article

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Comprehension of the EU Political and Legal Development

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Abstract: The dynamic change in the role of the European institutional integration in the joint development of continental Europe, as well as its consequences arises some issues for discussion. The purpose of the research is to offer alternative options for the development of the EU to avoid a perforce change in European integration. Currently, the transition from a narrow economic model of delegation to a broader model of demarcation continues. The EU sees itself as an indispensable tool for implementation of the common interests of states and citizens in different spheres, energy and finances in particular. From the legal point of view, European politicians have grounds for the rule implementation concerning various areas of life, not limited to the economic sphere, and taking the established rule of EU law into account. At the same time, problems arise regarding the understanding of this supremacy. Since the essence of the European Union as an integration association and an international organization is unusual given the independence from the Member States EU policy, the institutions themselves often pursue an aggressive policy to bring national practices on certain issues in line with the Union law. Uncertainty about the further development of Europe has arisen because some states and the EU initially pursued different goals within the framework of the Union. The EU's approach is increasingly focusing on the creation of common good and search for justice. By these means, the Union seeks to replace the functions of the state. At the same time, guided by the legal point of view and the fact that EU policies do not always suit the nation and its citizens, it may be necessary to rethink the role of EU institutions. It should no longer imply the

adoption of binding decisions by the Member States regarding issues of social security and equality of rights of various groups. Otherwise, cases of conflict within the EU will lead to a perforce reduction in the organization's functions. The article reviews the latest trends concerning the harsh response of several European states to EU extensive policy aimed not only at economic regulation, but also at changing society and the principles of its existence as a whole. The authors believe that in order to force the transfer of powers to the EU level Russia is deemed an eminent factor. The methods of research include both theoretical (analysis, synthesis, deduction, induction, analogy) and special legal methods of cognition (formal legal and comparative legal).

Keywords: European Union; problems of European integration; EU law; philosophy of EU law; Russia; EU energy policy; EU Capital Markets Union; EU social function

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Contents

I. Introduction

The study of the philosophy of the European Union and its legal system is among important issues when considering various options for the political and legal development. There is an authoritative opinion that the philosophy of the EU is a separate component of social and political philosophy (Walker, 2014, p. 4). This approach is valid largely, but it seems appropriate to expand the scope of philosophical studies,

of which the study of the European Union could be a part. Thus, the philosophy of the Union would cover economic, cultural, and religious issues as it indicates the diverse nature of the development of this organization, the penetration of European integration and thought into various spheres of life.

At the same time, initially, even before the foundation of the European Union and its preceding communities, there was no clear idea of the structure, role and sectors to which the European integration model would apply.

The development of Europe within the framework of a separate alliance has been considered and studied since the 15th century (Hay, 1968, p. 11). Even then, the continent was emerging as a territory of a consistent political project. Subsequently, great thinkers also predicted the formation of a unified Europe under a common socio-political denominator. For example, in 1745, in the "Perpetual Peace" treatise I. Kant outlined his ideas of a world order based on the principles of confederation. These ideas were largely applied as a basis for the construction of the European Union (Bykova and Sineokaya, 2020, p. 71).

In the post-war period, three concepts emerged regarding how the European political system should developed. So far, each of these concepts remains relevant.

II. Concepts of European Integration and their Historical Evolution

The first approach (federal) implied de facto the formation of a single European federation for joint development in the post-war period (Urwin, 2007, pp. 14–15). The federal model provided for the functional unification of national subjects and the refusal of states from their national sovereignty.

Jean Monnet and Robert Schumann (Hass, 1958, pp. 23, 34) envisioned the second concept of neo-functionalism. Their interest lied in the development of a supranational European system that would implement a universal policy without a legally fixed transfer of national sovereignty. At the same time, it was implied that in order to maximize

the effectiveness of the main areas of economic integration, appropriate favorable regulatory conditions should be applied to related sectors of economic and social policy, such as those equalizing product safety standards or eliminating gender discrimination, or ensuring equal conditions in the labor market. At the same time, one of the founders (J. Monnet) hoped that one day Europe would still be able to unite into a single federal state, and therefore abandon the idea of national sovereignty.

German *ordoliberalism*, as the final idea of the organization of European integration development, focused exclusively on the creation of an association with a special purpose of a mere economic integration excluding any interference in social security and welfare issues (Milward, 2000, p. 70). For Ordoliberals, the Treaty of Rome became a proper economic constitution for Europe with its supranational system of rights that strengthen the market, the legitimacy of which required the absence of subsequent pressure from the European integration community on issues of national socio-economic legislation.

Despite this, it is mostly neo-functionalism that became the basis of European integration, although other approaches were not discounted. For a long time, EU institutions have been developing a plan to adopt a supranational, pan-European constitution, which would bring European integration to a new level. However, as is known, the states refused the proposal of the institutions of the European Union (Moravcsik, 2006, pp. 7–9). Some of them were guided by the fact that the ideas of J. Monnet and R. Schumann are sufficient for the subsequent development of the Union. The others gradually declared the crisis of the European Union and the expediency of limiting the competencies and powers of the institutions and bodies of the Union solely to ensure building the economic market spheres (Habermas, 2012, p. 346).

In our opinion, at present the concept of *ordoliberalism* is more relevant than ever. It is often used by the EU Member States to protect their national interests when EU institutions are trying to expand the concept of neo-functionalism and promote their ideas beyond the reasonable limits of the economic sphere to cover healthcare, migration, religion, protection of sexual minorities, etc.

EU institutions use the EU law general principles and the abolition of the three pillars of European integration[1] (e.g., the guarantee of respect for the fundamental rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms) to build up various strategies that do not always correspond to the national interests of the Member States. And these are no longer limited to the economy and the construction of the single (internal) market.[2] Within the framework of a broader understanding of the EU mission, supranationalism as a structural vision of the legal and political order (as a whole) is applied to raise economic prosperity, in the process of which the ideal political structure is determined. Thus, the single (internal) market is no longer justified solely by considerations of maximizing well-being (Weiler, 2003, p. 570); European policy (as a whole) is developing dynamically and consistently in other spheres of life.

Currently, we are faced with the continuing development of the transition from a narrow economic model of delegation to a broader model of demarcation. The legitimization of EU measures and decisions is still carried out mainly through the authorization of Member States, but the authorization increasingly tends to be indirect rather than direct. The EU sees itself as an indispensable and relatively indisputable transnational means for the realization of some common interests of States and their citizens.

From the legal point of view, European politicians have grounds for rule implementation in various areas of life, not limiting themselves to the economic measures and taking into account the established rule of law of the EU (in the meaning of precedence principle). At the same time, some issues exist regarding the understanding of this very rule. The practical approach of Member States to the application of EU law and compliance with its supremacy is also different. Is the supremacy of

[1] The three pillars of the EU until 2009 were the European Communities, the Common Foreign and Security Policy, Police and Judicial Cooperation in Criminal Matters. With the enacting of the Lisbon Treaty, the ability to carry out such activites was based on the extensive provisions of the constituent treaties of the EU; in addition, the Union received a broad international legal personality and a greater number of competencies and powers (for example, in a separate direction in the energy sector).

[2] Relevant examples will be shown further.

the Union law over constitutions, basic (constitutional) laws applicable? There is no unified position thereon among the states. However, in our opinion, it is not framed solely for practical purposes of those states whose political interests have not been affected by modern concepts of the development of European integration. On the contrary, it is defined in Germany (Klyomin, 2017, pp. 82–88) and Poland that the basic constitutional provisions unconditionally prevail upon Union law. For example, Art. 23(1) of the Basic Law for the Federal Republic of Germany states that "the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law."[3] Overall, it means that Germany can stop supporting the acts of the EU and even the way of its development when it comes to the different understanding of fundamental, constitutional rights protection. The German Federal Constitutional Court also confirmed the priority of the German constitution:

> "The Federal Republic of Germany, after the entry into force of the Treaty on the European Union, became a member of the union of states in which the power of the Community is derived from the member states and in the sphere of German sovereign competences can act in a binding manner only by virtue of a German order to exercise his law <...>"[4]

As for Poland, in one of its recent judgments[5] Poland's Constitutional Tribunal (Tribunal) held that the first and the second subparagraphs of Art. 1 of the Treaty on European Union (TEU) have

[3] Basic Law for the Federal Republic of Germany. Available at: https://www.btg-bestellservice.de/pdf/80201000.pdf [Accessed 15.11.2022].

[4] Decision of the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 2134/92, 2 BvR 2159/92 of 12 October 1993. Available at: https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf [Accessed 15.11.2022].

[5] Judgment of the Constitutional Tribunal of the Republic of Poland in Case K 3/21 of 7 October 2021. Available at: https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [Accessed 15.11.2022].

allowed for a new stage of the European integration, which causes the Polish State to lose its sovereignty protected by Art. 2 and 8 of the Polish Constitution.[6] According to this Article, the Republic of Poland is a democratic state, and the Constitution is its supreme law. The Tribunal has further decided that Art. 2 and 19(1) TEU are inconsistent with the Polish Constitution as they allow lower national courts and the Polish Supreme Court to disapply the Constitution, to set aside the rulings of the Constitutional Tribunal and to examine the legality of the procedure for the appointment of judges. And this is outside the competences of the EU. Such legal policies, of course, cannot please EU institutions; as a result, a confrontation is gradually opening up which dangerous, first, for the Union itself.

Alongside with that, it is worth supporting the position of the states defending their exclusive constitutional interests. They use legal remedies to protect their national sovereignty. Otherwise, it would seem as the renunciation of nations of their rights and freedoms (Klishas, 2021) of the supreme power, which was defined by J. Bodin as sovereignty, or the basis of fair governance of what is in common possession (Silina, 2021, pp. 100–106). Without such sovereign power, there is no state itself.

The nature of the European Union as integration and an international organization is ultimately unusual given the EU policy that has been formed in many areas and is largely independent of the Member States. The implementation of the powers and competencies of its institutions implies the protection of the integrity and inviolability of a united Europe. Consequently, the institutions themselves often conduct extremely insistent policies to make national practices on certain issues compliant with the law of the Union. In response, some States have to fend off attacks, defend their national sovereignty and ask questions about the expediency of limiting the competencies of the EU. In conditions of insubordination of Member States to the institutional body on issues that contradict their principles and values, the ordoliberal approach is increasingly developing, the approach of

[6] Polish Constitution. Available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [Accessed 15.11.2022].

returning the powers of the EU's organizational and legal mechanism to the state of its creation and implementation of exclusively economic agendas.

In autumn 2021, fierce disputes broke out in the European Union over the decision of Poland's Constitutional Tribunal on the precedence of the basic law of the state to the European law.[7] Now Poland's Constitution prevails upon any other legal norms, it should underlie the activities of all state bodies in Poland, and the president has received the right to nominate candidates for positions in the Supreme Court of Poland. The position of the judicial body was the result of EU policy, including the recognition of the rights of representatives of LGBT communities.[8]

In this context, the most popular opinion in Poland remains as follows: the state supports only economic cooperation within the EU but firmly opposes someone else's "moral laws" being imposed on the country.[9] This leads to the idea of the need to recognize the ordoliberal approach for further European integration.

Some countries and politicians support the Polish position. For example, a Member of the EU Parliament for Lithuania, Valdemar Tomaševski, stated the following: "Nowhere in European law is it written that European legislation is above the constitution. Poland's decision is only a confirmation of the fact. We have a similar opinion in Lithuania, this is not only the opinion of citizens, but it is also a legal opinion. No one, when joining the EU, gave up their full sovereignty, this is an abuse of today's left-liberal EU officials."[10]

[7] RBC, (2021). The EC criticized the decision of the Polish court on the primacy of the Constitution over EU law. 8 October. Available at: https://www.rbc.ru/rbcfree news/615faf749a79470c7a6efc18 (In Russ.) [Accessed 15.11.2022].

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[9] Misnik, L., (2021). We joined another EU. Why Warsaw staged a revolt against Brussels. Gazeta.ru, 8 October. Available at: https://www.gazeta.ru/politics/2021/10/08_a_14066089.shtml (In Russ.) [Accessed 15.11.2022].

[10] *Ibid.*

In addition, amidst Commission's procedural accusations against Poland on the issue of violation of EU legislation and the decision on the supremacy of the national constitution over European law, relations in the Union began to heat up, which is confirmed by the Polish politician Jarosław Kaczyński. The leader of Poland's ruling Law and Justice Party accused Germany of intending to create a "Fourth Reich" based on the EU,[11] which would deprive the Polish population of their basic constitutional rights.

Another Polish public official Zbigniew Ziobro did not leave aside the unfair policy of the EU as well: "If the European Union decides to deprive Poland of funding and continues to put pressure on it on the issue of the rule of law, Warsaw should suspend EU membership fees, as well as start vetoing all decisions taken in Brussels."[12]

Hungary has developed a rather similar, but more specific position on the supremacy of national constitutional rules: the Constitutional Court of Hungary ruled that the country's authorities in some cases have the right to be guided by the provisions of the constitution until the European Union develops an effective approach to solving a particular migration problem.[13] The Hungarian decision provoked comments from many politicians, including the French President Emmanuel Macron: "The EU's role is not to try to substitute Hungary's sovereignty."[14] However, from the legal point of view, taking into account the experience of expanding the competencies of EU institutions, everything turns out to be quite the opposite. For

[11] Lenta.ru, (2021). Poland has accused Germany of seeking to create a "Fourth Reich". 24 December. Available at: https://lenta.ru/news/2021/12/24/4th_reih/ (In Russ.) [Accessed 15.11.2022].

[12] Izvestiya, (2021). Poland has threatened to stop contributions to the EU and veto European decisions. 12 December. Available at: https://iz.ru/1263383/2021-12-12/polsha-prigrozila-prekratit-vznosy-v-es-i-nalozhit-veto-na-evropeiskie-resheniia (In Russ.) [Accessed 15.11.2022].

[13] TASS, (2021). Hungarian Constitutional Court recognized the supremacy of the country's constitution above imperfect EU regulations. 10 December. Available at: https://tass.ru/mezhdunarodnaya-panorama/13169595 (In Russ.) [Accessed 15.11.2022].

[14] TASS, (2021). Macron says EU doesn't interfere with the sovereignty of Hungary. 12 December. Available at: https://tass.ru/mezhdunarodnaya-panorama/13189865 (In Russ.) [Accessed 15.11.2022].

many decades, some components of national sovereignty have been transferred to EU institutions, e.g., under the Maastricht Treaty, foreign and security policy became "common" as the second pillar of the Union. In general, the policy of limiting the supremacy of nations within the state territory has been maintained.

The situation of uncertainty as to the further development of Europe has developed as the EU and some of the states initially pursued different goals within the framework of integration, and many factors, including socio-cultural ones, caused this situation.

The EU and the Commission, as the main institution of the developing integration, are interested in depriving states of their sovereignty by expanding neo-functionalism, there can be no doubt about it. Only constitutional norms, due to their special legal nature, can confirm the national sovereignty of states. The actions of the Union institutions show that they do not agree with such recognition in the form in which they are seen by the national bodies that previously established the above-mentioned constitutional norms.

Thus, classical neo-federalism is no longer a mandatory basis for limiting the sovereignty of states, their constitutional rights and freedoms; it does not require a supranational constitution, as well as the consent of all EU Member States. Trying to squeeze the maximum out of the neo-functional approach, hiding behind it the features of federalism, EU institutions jeopardize the effectiveness of interstate relations within the Union mechanisms and instruments, as well as the security of the entire population, its confidence in the future. Given the analysis of the above examples of disputes between the EU and its Members, one should agree with the modern German philosopher Jürgen Habermas that in the process of democratic unification within the EU, its Member States have nevertheless lost a much-needed democratic substance (Motroshilova, 2008, p. 27).

Thus, if the last century's political philosophy of Western European integration assumed the gradual death of the functions of the nation state in favor of the federal dimension of integration and its supranational structures (Gromyko, 2017, p. 170), now a series of different events have shown that such a process has been interrupted. Instead, the neo-functional model is developing and expanding in

a new way. Despite this and considering all the above, to avoid the escalation of new political conflicts within the Union, it is still advisable to distinguish the nature of the decisions of institutions taken in the social and economic spheres. If the Commission and the Court of Justice of the EU must necessarily determine the vector of economic development, then all related social issues can be resolved through the adoption of resolutions voluntarily implemented by the Member States — the relevant EU positions should not become imperative and lead to the supremacy of European law over constitutional norms. We shall notice that the renunciation of sovereignty is not provided for by any constituent acts of the Union.

III. The Democratic Approach in Determining the EU Subjectivity

When considering the organization of the EU's business, it is worth recognizing that the modern approach, including that of the EU, regarding what democracy is, differs significantly from the ancient approach, say, in Ancient Greece. Moreover, today the actual European and ancient Greek thought have little in common concerning that issue. When building their state system, the Greeks tended to use the concept of democracy (or similar to it) primarily to determine who will be the bearer of state power. The organizational mechanism and the political and legal reality in the ancient state did not require other questions and answers regarding the generation and implementation of power, which only played into the hands of ancient Greek leaders — in general, a few scientists recognize the absence in our understanding of the democratic foundations in Hellas (Isaev, 2019, pp. 276–299). Modern Europe, in turn, by its development and education assumes a completely different model. When building democracy at the present stage of the development of the European civilization, the question accompanying such a process begins not with the word "who," but "how," namely how to successfully implement the democratic model at present, using the accumulated and well-known experience? The democracy of the European Union significantly surpasses similar processes in various states and associations of the past and present. She has long ago and

decisively received an answer to the question that, as it seems, made ancient politicians and thinkers exceptionally wonder who are the source and generator of power. Open representations of their points of view on the issue seem to be detrimental to the integrity of the EU system and will certainly cause an effective reaction from not only those Member States that were mentioned in the previous paragraph but also all the others. Thus, the organizational and legal parts of Europe, using a kind of analogue of the Russian proverb "Do not wake up the evil while it is quiet" (similar to English proverb: Let sleeping dogs lie), is in search of new answers and mechanisms for maintaining the democratic essence of the EU.

Therefore, in this context and for further consideration of European development, it is important to understand what democracy means in the understanding of the European Union. To do this, it is most expedient to refer to regulatory legal acts, official EU documents. We can see the confirmation of the above thoughts and judgments therein. For institutional Europe, democracy is a State in which citizens may form laws and public policy at both the European and national, regional, and local levels. At the same time, several guarantees, checks and balances are required, as well as institutions that effectively fulfil their role.[15] Preparation, effective observance, and operation of the above elements of the democratic system show how democracy should function. In our opinion, for the above purposes, the mechanisms of policy implementation at all levels, as understood by the EU, should be legal, transparent, the same for everyone and legitimate. The fulfilment of such requirements altogether forms democracy as a special political and legal state.

At the same time, it is worth paying attention to legitimacy (and its inherent accountability) as a special category, often and justifiably called democracy. For further research, democratic approaches based on the criterion of legitimacy and accountability of the EU's organizational and legal mechanism will be further considered.

[15] *See*, e.g., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — European Democracy Action Plan. Dated 3 December 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423 [Accessed 15.11.2022].

To determine to what extent it is advisable to build up new relations within the framework of European integration, including resolving some issues of old and new crises, it is necessary to determine the nature of the subjectivity of the European Union: whether it remains dependent on states or whether it is independent.

A comprehensive democratic approach to the study thereof is important because states established the Union through the expression of national will, taking into account their requirements and wishes. However, at a certain historical moment in the development of the competence and powers of the Union, its role in the implementation of pan-European policies seriously shook the position of the states.

A full-scale democratic approach to justifying supranational power seems vulnerable. Someone questions its democracy, insists on the lack of it: the apathy of voters and the weak organization of transnational political parties are emphasized, the continued marginalization of national parliaments (despite reforms inspired by subsidiarity (Vasilyeva, 2016, p. 7)) and the weak accountability of the Council and Commission.

There is an opinion that the failure of quasi-populist initiatives, such as the preparation of the constitutional Convention on the Future of the European Union, also undermines democratic foundations and values. This approach, in our opinion, is not right. On the contrary, Member States did not follow the institutions of the Union and showed their political will. Thus, in France, the Constitution lost when the majority of about 55 % voted against it on May 29, 2005. On 1 June the people in the Netherlands, with even greater majority (61.6 % to 38.4 %) voted against the document (Podolnjak, 2007, p. 2). In addition, let us recall the recent debates over the single currency, sovereign debt, and the relationship between monetary and fiscal integration, in which the social legitimacy of the EU was seriously compromised.

A disaggregated (non-complex) democratic approach also takes place. It involves focusing not on mass, public democracy with ballot boxes and other relevant attributes, but on the interaction of knowledgeable groups. This aims at ensuring contextual optimization of the common good dependent on certain circumstances, e.g., within the framework of an open method of coordination coined in 2000 (Sabel

and Zeitlin, 2008, p. 14), and public consultations in which everyone can participate.[16]

Undoubtedly, only one approach is applicable within the framework of European construction. They both take place, complementing and replacing each other. Perhaps each of them needs the other to eliminate their shortcomings.

We should not forget that the European Union bears the features of various phenomena, but it does not cease to be an international organization, a special component of which is the presence of international treaties voluntarily signed by the Member States. This represents the very real democratic foundation of the EU. It is obvious that in many ways the activities of the organization cannot be fully controlled by each of the Member States. However, its democratic essence preserves. It is more expedient to talk about the need to reconsider approaches to certain issues of European construction with the consolidation of the will of states that do not want to transfer their sovereignty, the inviolability of national constitutional rights. All this remains important, including in light of new attempts by the EU to define the goals of its existence.

IV. The Development of EU Goals in the Framework of a Neo-Functional Approach

The historical problem of the European Union for many years has been to define a special deep purpose, as well as a set of relevant guidelines (Williams, 2010, pp. 283–285). The EU's approach is increasingly aiming at creating common good and seeking justice, correcting the historically unbalanced preference for economic rights over social solidarity and collective support. By these means, the Union seeks to replace the functions of the State.

The EU, of course, considers justice to be the basis of common good. However, the problem lies in the fact that such good should be

[16] For example, in 2021, public consultations were organized on the reform of the gas market and the formation of the hydrogen market, which will be discussed in the next paragraph thereof. *See* Gas networks — revision of EU rules on market access. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12766-Revision-of-EU-rules-on-Gas- [Accessed 15.11.2022].

the same for all its Members (States), and then it should be shared within society and its citizens without any distortion. Pierre Gassendi, comprehensively considering the phenomenon of common good of states, concluded that justice and common good should be considered as the basis of the state and its law. In turn, Jean-Jacques Rousseau does not limit himself to the fact that the consolidation of common good is possible only through the will of the state. The French philosopher focuses on the fact that it is important "to find a form of association that would protect and defend the personality and courage of each participant with a combined common force and in which everyone, uniting with everyone, would obey and remain as free as he was before" (Rousseau, 1998, pp. 207–208).

The thoughts and works of the above-mentioned philosophers are still relevant and of crucial importance in the actual transition of the power to determine the public good from states to EU institutions.

Thus, through a long-term formation of pan-European economic markets, the Union presented to the world its unique version of capitalist development, which is not a precursor of classical imperialism. However, at present, the rhetoric of EU institutions increasingly assumes the preservation of fundamental markets as the result of many years of European economic construction, with subsequent attention to solving socially useful issues regardless of the sphere of life. All this should allow the institutions of the Union to ensure the security of their existence without repeating the mistakes of the previously existing imperialist states. Accordingly, it seems true that the presence of the most important social function will prevent the transition to the imperialism of several states and avoid the subsequent disappearance of institutional Europe.

In general, the Union sees no other options but to continue the development of the united continent and determine supranational goals of existence (both in the economic and social paths) due to several global, at the same time "convenient" reasons.

One of them, of course, is the political, economic, and ideological competition with Russia. It seems that within its framework, the European Union considers the Eastern state as neoimperialist: the main elements of imperialism identified by the founder of the soviet ideology (Lenin, 2020, pp. 12–16) correspond to the Russian political

and legal reality and can be projected onto the current features of economic processes. Without making value judgments, we note that due to its socio-cultural development, Russia adheres to a centralized approach in solving most political, social, and economic issues and organizing cooperation with other states; this is also manifested in the joint development of the industrial and financial sectors of the state, their subjects.

This idea of development contradicts the spirit and policy of the European Union. Ideologically and politically, its institutions systematically convince states in the need to unite to achieve joint goals and confront an unfriendly regime — a classic attempt to use the image of the enemy. In addition, in practice, we see how institutional Europe adheres to the course that started back in the 1980s and aimed at decentralizing the energy and financial business. Focusing on the most important energy sector, we note that now the EU continues to actively restructure vertically integrated gas and electricity enterprises, creating transparent chains of generation, transportation and sale of energy resources. The Russian approach, e.g., that of PJSC Gazprom, is different and implies the implementation of its activities through the centralized organization of its activities and the business of foreign subsidiaries and dependent companies abroad. Undoubtedly, this the European Union cannot like both ideologically (considering classical scientific works) and in practice as this largely leads to the economic and energy dependence of the EU on Russia.

As for the second reason, it is worth noting the following. Europe is concerned about climate change and, accordingly, decarburization of industry has become one of the main activities of the EU (Chugunov, 2021, p. 56). Carbon neutrality, independence from traditional energy sources, and the ability to use the power of nature at any time have essentially become the mission of the Union. To achieve all this, according to EU representatives, it is necessary to create new green energy markets or at least tighten the requirements for energy carriers on existing traditional ones.

Thus, guided by the idea of making its mark on history, the Commission decided to start forming a hydrogen market in 2022

in order to decarbonize Europe.[17] The implementation of hydrogen requires a new appropriate infrastructure or the adaptation of part of the existing one for gas transportation. Realizing the irreversibility of the consequences, the Commission nevertheless proposes to use a flexible approach while organizing EU hydrogen system, namely, to apply a transitional regulatory period, discounts on the transportation of generated hydrogen, the ability of the Member States to independently determine whether hydrogen will be injected into their gas transmission system and, if so, what amount.[18]

In addition, the Commission proposes to use the possibility to cross-subsidize the hydrogen market at the expense of those using the gas transmission system, which means the following. While the hydrogen system is being formed, companies whose gas is transported on the territory of the EU will keep financing it. It is worth saying that the Russian side, namely Gazprom, will be considered the main victim as it occupies the largest share in the market not only concerning gas but also to all EU energy resources.

Cross-subsidy between future systems and networks powered by hydrogen and natural gas will not only lead to significant market distortions but also violate one of the basic principles of EU energy regulation. It is reflected in Para. 1 Art. 13 of Regulation 715/2009,[19] namely the prohibition of cross-subsidization and the requirement that the network usage fee reflect the actual costs incurred by the operator.

Back in the 80s of the 20th century, in terms of economic and market standpoint there developed a right approach that commodity subsidies are unacceptable since they distort the principles of market

[17] EU to promote global hydrogen markets. Available at: https://energy.ec.europa.eu/topics/energy-systems-integration/hydrogen_en (In Russ.) [Accessed 15.11.2022].

[18] TEN-E: Council and Parliament reach provisional agreement on new rules for cross-border energy projects. Available at: https://www.consilium.europa.eu/en/press/press-releases/2021/12/22/ten-e-council-and-parliament-reach-provisional-agreement-on-new-rules-for-cross-border-energy-projects/ [Accessed 15.11.2022].

[19] Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0715 [Accessed 15.11.2022].

construction and competition processes. Today, in search of an "eternal" energy supply, the Union is ready to take a certain risk, changing the rules of the game guided solely by idealistic considerations. Within the framework of this approach, the Union shows social and political will, which no European State would ever show.

The European Union intends to fulfill its mission exclusively for its Member States, but not for the third parties, especially Russia that supplied gas fuel to the EU and provided the European population with the energy during the cold winter of 2021–2022 and the energy crisis in general. The EU's goals, aimed, among other things, at competing with other states, are deeply manifested in the current process of adopting a new Carbon Border Adjustment Mechanism,[20] which assumes the possible application of a new tax on gas and other traditional energy sources supplied from third countries from 2026. In addition, only the EU will decide on the pool of such countries. Given the tense relations, it is likely that Russia will also join in and will pay substantial amounts to the budget of the Union, which independently decides on how to dispose of them. For states whose eco-policy is "worse" and does not coincide with EU policy, it would be advisable to propose the return of the tax taken by the Union to the relevant third countries, for example, with the obligation to use such funds for the implementation of green projects to reduce CO_2. This is quite difficult to implement at the political level, but it seems to be the most correct and logical solution, which, of course, will not be accepted by EU politicians, whose interests include decarburization and the interests of the Union exclusively. What is the importance of this project? It promotes the development of the European policy of protectionism, the consolidation of new funds for various projects within the Union. All this constitutes a new round in the EU's environmental and energy policy aimed at the formation of a low-carbon territorial space.

The above measures appear to be extremely harsh towards third states, but progressive for the integration association itself — after all, it will come closer to the goals of decarburization, which is the deep goal

[20] Carbon Border Adjustment Mechanism: Questions and Answers. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3661 [Accessed 15.11.2022].

of the Union. Having solved the issues of energy security, the European Union will be able to bring integration to a new level inaccessible to other associations and individual states, and the issues of security, social inequality, and the need to protect the European economy will disappear by themselves. The basis of any state and integration association — the Russian economy, whose principles do not coincide with the European approach, will be comprehensively undermined.

In practice, it is necessary to pay tribute to EU institutions. The Union's approach to the organization of a new energy system can become advanced and successful, but much will depend on what advantages individual European states will receive, what will be the transition period, implying the preservation of productive relations with the main exporters of energy resources (in particular, with Russia).

On paper, legislative support for new energy projects provided by the Union may lead to lower prices for energy supply, but at the same time, it will generate greater decentralization in the organization of business chains, which in certain situations will also complicate the resolution of future crises.

A striking example of combining the economic achievements of the EU and the realization of a social function is also the functioning of the Capital Markets Union, designed to ensure the genuine realization of the freedom of capital movement as one of the key principles of the economic essence of the Union, provided for by the Rome Treaty of 1957.[21]

At the very beginning of the creation of the Capital Markets Union, both in the program and other documents as well as in official speeches, it was indicated that the implementation of this project is designed, in particular, to solve the problems of providing financing to small and medium-sized businesses (SMEs), which are the largest group of employers for EU citizens (Evdokimov, 2019, p. 48). Thus, not only the issue of free movement of capital between economic entities is being solved, but also an increase in the level of employment is also achieved (Kasyanov, 2019, pp. 172–174).

[21] Treaty establishing the European Economic Community. Available at: http://data.europa.eu/eli/treaty/teec/sign [Accessed 15.11.2022].

As part of the first stage of the Capital Markets Union (2014–2019), the regulatory reform of European venture capital funds (EuVECA) and European social entrepreneurship funds (EuSEF) was carried out to transfer from national regulation of similar funds to the implementation of uniform rules for exercising such activities within the Union.[22] The most important result is the creation of a pan-European personal pension product, which allows, on the one hand, to distribute the "long money" of future pensioners more efficiently among potential investors, including SMEs, and on the other hand, it allows to smoothen out the inequality in the pension provision of citizens of EU Member States.[23]

Having become a long-term project, within the framework of the second stage of building the Capital Markets Union (2020–present time), the trend of extracting economic benefits and implementing social functions continues. In particular, the regulation of European long-term investment funds (ELTIFs) is being finalized, the issue of improving the information of potential investors and recipients of financing about the benefits of investing within the framework of the Capital Markets Union is being worked out.

In the field of finance, the EU will continue to increase the number of regulations instead of directives. At present, this direction will be evolved within the scope of measures provided by Capital markets union 2020 action plan. For instance, EU Commission presented package to ensure better data access and revamped investment rules (2021). This requires the review of European Long-Term Investment Funds (ELTIFs) Regulation, Alternative Investment Fund Managers Directive (AIFMD). Including but not limited to the mentioned package the Commission shall proceed that work on legislative initiative in the context of further

[22] Regulation (EU) 2017/1991 of the European Parliament and of the Council of 25 October 2017 amending Regulation (EU) No. 345/2013 on European venture capital funds and Regulation (EU) No. 346/2013 on European social entrepreneurship funds. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R1991 [Accessed 15.11.2022].

[23] Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1238 [Accessed 15.11.2022].

reviews of the Insurance Distribution Directive (IDD) and Markets in Financial Instruments Directive (MiFID II).

The above examples of defining the deep purpose of the EU show the moral readiness of its institutions to take responsibility for the environmental policy of states, as well as various aspects of their energy policy and the integration of national capital markets, not only to build economic law and order but also to influence the public good and replace the implementation of elements of national sovereignty, "above which only the laws of God and nature" as Jean Bodin mentioned (Silina, 2021). Do not forget that the deep goal of the EU, discussed above, is accompanied by the idea of confrontation between the West and the East: a "free" Europe and an "absolutist" Russia. As practice has shown, the fight against the threat of modern "absolutism" is possible not only within the framework of neo-federalism, as the Russian-French thinker A. Kozhev claimed (2006, pp. 390–393).

At the same time, the possibility of determining the goal of further integration at such a high level in itself characterizes the EU as an association that has actually largely solved the issues of building economic markets and is currently searching for a balance of social manifestations. This is primarily due to the stability of the EU's organizational and legal mechanism and the fact that the European Union, having deepened economic integration, has expanded the scope of its intervention far beyond economic markets.

This is the distinguishing feature of the Union, for example, from the Eurasian Economic Union (hereinafter EAEU): the European integration model that assumes the independence of institutions and their representatives, who, having achieved great success in the field of economic regulation, aimed at achieving socially significant interests, often not correlated with national ones. Thus, the European Union began to implement policies, guided by the considerations that it is the engine of Europe and the bearer of its values.

Various areas of activity in the above-mentioned EAEU are implemented differently. Markets and other processes within the framework of this association develop mainly in accordance with the national positions of the EAEU member states. The power system is

consolidated and centralized, and the social function, the development of which may represent a special goal of integration development, is not defined due to the lack of properly formed economic spaces. The states themselves will never be ready and eager to develop in the same way as the Union of European states is developing due to the fact that it can lead to the same contradictory legal and judicial practice regarding the correlation of states and the integration association, as it has developed in Europe. The current position of the relevant states can be traced both based on the actual activities of the EAEU and from the contractual norms of the association. The main governing body of the EAEU is the Supreme Eurasian Economic Council, consisting of the heads of state/government of the member states: such a body determines the composition and powers of other regulatory structures, and its decisions become binding in all states of the entity in question.[24] Furthermore, unlike the European Union and the now abolished Eurasian Economic Community, the EAEU lacks an irreplaceable symbol of further integration — a supranational parliament. It is extremely important to note that its member states have rejected a body whose counterpart in the EU promotes both the establishment of a balance between national interests through the democratization of processes, including direct elections in the European Parliament, and the development of supranational regulation, since the relevant European body takes part in the legislative process. Given the position of some states (for example, the Republic of Kazakhstan[25]), the emergence of such a body in the medium term is not expected.

Such a practice is beyond thought within the walls of the EU, which has been forming separate and independent political institutions and bodies for decades. Having reached a certain limit in building an economic legal order, EU institutions will continue to develop a comprehensive policy, the orientation of which remains its views and ideals.

[24] Art. 12 of the Treaty on the Eurasian Economic Union. Available at: https://docs.cntd.ru/document/420205962 (In Russ.) [Accessed 15.11.2022].

[25] Euro-optimists and Euro-skeptics: A stroke of the future political demarcation. For and against. Available at: https://online.zakon.kz/Document/?doc_id=31571266 (In Russ.) [Accessed 15.11.2022].

V. Conclusion

European integration began in the Middle Ages and it reached a high institutional organization only in the post-war period. For many decades, the unification of Europe was limited to the formation of economic law and order, but then EU institutions began to strive more and more for the federal development of the Member States under one lead. Despite the failure, the basic idea of neo-federalism was extolled within the framework of the concept of neo-functionalism. The achievement of success in the issues of economic construction allowed the organizational and legal mechanism of the Union to focus on the implementation of the social function and a deeper definition of its mission both within the economic space and in other areas of regulation. Part of it was ensuring the freedom of capital movement through the Union of Capital Markets, as well as the low-carbon and subsequent carbon-free development of Europe. As part of this development, EU Commission is trying to offer compromise options for the Member States themselves. Otherwise, it may provoke a further negative perception of the EU's political and legal thought in the context of instability of relations between the Union and the Member States.

The European Union is based on democratic principles. Despite this, there are contradictions in interaction at national and supranational levels, and the difficulties in the functioning of the Union remain. At the same time, the EU institutions, pursuing their policies, both in the field of economic development and energy as well as the green course in general, allow states to express their positions and participate in the processes of changing the face of Europe. The implementation of such activities has become the responsibility of the Union institutions, their conscious deep goal being to develop the success of economic transformations.

The EU is a unique example of the integration capitalist association, the purpose of which is to reject the transition to imperialism to avoid further decline and disappearance of Europe. Moreover, for its security, the organization carried out the most important transition of the social function from the state.

Still, guided by the legal point of view, it may be necessary to rethink the role of the EU institutions. It should no longer imply the adoption of decisions binding on the Member States concerning issues of social security, equality of rights of various groups and much more. The recognition of the European Convention for the Protection of Human Rights and Fundamental Freedoms should be revised and imply only the possibility of providing recommendations to the Member States. Otherwise, conflict situations within the EU will continue to increase and lead to a violent reduction of the organization's functions.

At the same time, when considering the short-term prospects for the European Union's rule-making activity, it should be noted that in the coming years, the course aimed at intensifying and constantly developing EU legal framework (considering the rapid non-linear and multilateral economic development of the Union) will be maintained. The main role in the accompanying processes will remain with the European Commission. In the financial sector, the initiatives of this institution will be explained by a programmatic approach to improving the legal mechanisms for financial regulation, including within the framework of the single financial services market, the European Banking Union and the Capital Markets Union. In industrial sectors, the trigger remains the need to diversify gas and oil supplies in order to reduce the EU's dependence on one supplier, complicating the latter's business processes.

As in the field of finance, the role of regulations as the main legal acts of the European Union will increase in the energy sector. Such regulations will increasingly be permeated with a social component in order to ensure a protectionist principle, depriving Russia of competitive advantages, that is, those opportunities that, in theory and in practice, should be the basis of any capitalist system, both at the national and supranational levels. Numerous EU initiatives related to limiting the supply of traditional energy resources from Russia, setting price limits for gas, directly show the vector of European development on the example of a particular industry. At the same time, the successful development of Russia will continue to be often used as a pretext for the rapid centralization by EU institutions of significant powers that shape various directions for the development of states under their control.

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HUMAN RIGHTS AND MODERNITY

Article

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Women in the Domain of Law in Russia: Emancipation and Counter-Emancipation

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Abstract: The emancipation of women in Russia, while it began quite fruitfully, during some periods of the development of the Russian (Soviet) society and Russian (Soviet) statehood had obvious failures that eventually reversed it resulting in counter-emancipation. To this day, these phenomena remain in an unfriendly interaction. This is most clearly demonstrated in political and social activities, labor (restrictions on the right of access to a profession; harassment), criminal policy (gender differentiation in the penal system, inefficiency in counteracting domestic violence), legal regulation of family relations (no legal recognition of *de facto* marriage; *de facto* polygamy; surrogate motherhood; property insecurity). The draft law on guarantees of equal opportunities for men and women and their implementation has been given a "red light". The sociocultural context of the relations under consideration is heavily burdened by a patriarchal parlance. The authors suggest that despite the obvious fact that public opinion and legislative decisions are not generally oriented towards maintaining discrimination and/or counter-emancipation, we have yet to see a clear and efficient breakthrough that would equalize the legal and actual statuses of men and women in the Russian legal system and in Russian society as a whole.

Keywords: women; gender; Russian Law; emancipation; discrimination; social practice; judicial practice

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Contents

I. Introduction

The emancipation of women in Russia began in the 1860s and accelerated sharply in 1917–1918 (Pushkareva and Pushkareva, 2021, p. 21). It partially retreated from its achievements in the 1930s-1950s and then rejected the stated retreat by the end of the 20th century (Tarusina, 2015, p. 98; Khasbulatova, 2018, pp. 51–52). Currently it is still characterized by "gender games" (mainly in the form of "swings") in the political, social and legal domains (Tarusina and Isaeva, 2016, p. 77; Isaeva, Tarusina, and Sokolov, 2015, p. 453). Since the authors identify themselves as representatives of jurisprudence, an emphasis on the legal aspect of the vision of the problem is preferable. The clearest example of the contradictory nature of women's emancipation can be found in the seven spheres of Russian legislation such as constitutional, labor, social security, criminal, penitentiary, medical and family legislation. Having "tested the waters" in the aforementioned seven areas of Russian legislation, women generally demonstrate a hardened nature, though not without the challenges of preserving and implementing it.

The provision in Part 3 Art. 19 of the Constitution of the Russian Federation continues the tradition of the earlier constitutions and proclaims the principle of equality of men and women/ In the provision in Part 1 Art. 38 we find the idea of complete protection of motherhood (just to note, the objective of protecting paternity was formulated only in 2020, in an amendment to the Constitution (Part 1 "zh" Art. 72)). The legal fate prescribed for the aforementioned postulates a range of would-be "adventures." So, even from the point of view of terminology, patrimonial preferences are clearly obvious — both essentially and even alphabetically. The most striking example of the former is the following: the consent of a man and a woman is required to conclude a marriage (Art. 12 of the Family Code of the Russian Federation; further RF FC), while in Russian the word *woman* ("женщина"), beginning with the letter "ж", should naturally stand alphabetically before the word *man* ("мужчина"), as "ж" precedes "м"; in the constitutional amendment above, the alphabetical sequence is similar.[1] To continue this topic further, we should note that when the rights to communicate with children are listed (Art. 67 of the RF FC), terminologically *grandfathers* ("дедушка," beginning with the letter "д") precede *grandmothers* ("бабушка," beginning with "б") — although, it is actually the other way round — as known, "б" has always preceded "д" as it is grandmothers who usually take care of their grandchildren in real life), and the same thing applies to *stepsons* and *stepdaughters* (Art. 97 of the RF FC). Chapter 19 of the RF FC has the title "Adoption of a son (adoption of a daughter)" though in this chapter only the word "*usynovleniye*" — meaning exclusively the adoption of boys — is used as a universal term, apparently by design (the above "alphabetic" discrimination is considered based on the Russian language).

Sad examples of the second type include the following: while labor legislation uses the concept of a "*single mother*" (Art. 261 of the Labor Code of the Russian Federation), "*single fathers*" are not even referred

[1] It is worth noting that in the Art. 35 of the USSR Constitution of 1977, the formulation of the provision on gender equality began with an appeal to a woman. It can be assumed that in this period the problem of "equalizing" the status of a woman with a man seemed to be very relevant to the legislator. The modern legislator, apparently, considered the problem settled and somewhat "relaxed"...

to;[2] the law in Art. 55 of the Federal Law "On the Basics of Protecting the Health of Citizens in the Russian Federation," when listing the subjects of rights for participation in the surrogate motherhood program, uses the egregiously unacceptable term a "single woman", naturally without any mention of a "single man" (it seems that regardless of the marital status, the men by default cannot be considered "single") (Tarusina, 2022a, p. 74). Nor do the Russian legislators consider the negative philological context of the concept of a "surrogate mother" from the point of view of the Russian language usage. The tradition of naming professions and positions according to the male terminological type also goes unquestioned and there are no plans to review this position. Let us consider, however, the ontological aspects of the legal status of the Russian woman and its implementation.

II. Women in Politics and Civil Society

In pursuance of the idea of creating the prerequisites for significant female representation in public agencies and administration, back in 2003, the draft Law "On the State Guarantees of Equal Rights and Freedoms of Men and Women and Equal Opportunities for Their Implementation" was introduced by the State Duma of the Russian Federation: among other things, it envisages priority for the gender group with less than 50 % representation in civil service jobs. This text, during rare periods of political excitement with regard to gender issues, was freed out from under the "fabric" of the relevant committees, only to be sent there again. At the same time, representatives of women's public organizations were unsuccessful when they appealed to political parties to include at least 30 % women on their ballots. While the authors' attitude to the idea of representative quotas is ambiguous, we still note that at a certain stage of counteracting the patriarchal context of parliamentarism — and public administration in general — it is useful, albeit not in a normative sense but as a social appeal. Its invocative nature, however, unfortunately fails to yield the commensurate result. Thus, the gender composition of the State Duma

[2] However, even now it is possible to see the desire of the legislator to use a gender-neutral construction: persons with family responsibilities (for example, in Art. 259, 261 of the Labor Code of the Russian Federation).

of the Russian Federation (2021 convocation) includes: 450 deputies, of which 74 are women (16.4 %); among 9 Deputy Chairpersons we find only 2 women; only 4 of the 32 Duma committees are led by "representatives of the fair half of humanity". In terms of party lists we see the following picture: the "New People" Party — 20 % (3 people); "United Russia" — 18.5 % (60 people); Communist Party — 12.1 % (7 people); "Fair Russia — Patriots for Truth" — 10.7 % (3 people); and 0 % for the Liberal Democratic Party. Only in 8 of Russia's 85 regions we can find women heading legislative bodies. Among the mayors of 20 cities with population of 500 thousand to 1 million, we find 4 women. For cities of more than 1 million (15 cities) we find 3 women. Among these 7 women, 6 have high management ratings, and 1 a low rating. It is obvious that these numbers are a "silent scream". At a meeting of the organizing committee of the Eurasian Women's Forum in October 2021, Chairwoman of the Federation Council Valentina Matvienko announced plans to increase the representation of women in the Federation Council to 40 % in 3 years. She said, *"I think eventually we will achieve a situation in which each region in the Federation Council represented by a man and a woman (the upper chamber has two representatives from each constituent entity of the Russian Federation — one from the executive and one from the legislative authorities."*[3] Statistics on women's representation in other countries, after the adoption of the Beijing Declaration and Platforms for Action (1995), which calls on governments of all countries to eliminate any obstacles to the participation of women in every sphere of public and private life, testifies that as of 2019, the number of women in parliaments has doubled to 23.4 %, over the previous figure of 11.3 %; the number of "male-only" parliaments has also decreased.[4]

[3] The number of women in the Russian Parliament is planned to reach up to 40 per cent. Parlamentskaya gazeta [Parliamentary Newspaper], 27 October 2021. Available at: https://www.pnp.ru/politics/predstavitelstvo-zhenshhin-v-rossiyskom-parlamente-planiruyut-dovesti-do-40-procentov.html (In Russ.) [Accessed 10.01.2022].

[4] Women in Parliament: will gender quotes affect gender equality in politics? Indicator, 29 March 2019. Available at: https://indicator.ru/humanitarian-science/zhenshiny-v-parlamente.htm (In Russ.) [Accessed 10.01.2022].

In connection with this, doctrine and mass communications demonstrate the "masculinity of the Russian political territory": first, the transition of women from a subordinate position to a position of equality "originally assumed obligatory mimicry: it is not enough to simply "defeat" men — this needs to be done on their "territory", impregnated with "a spirit of machismo", recognizing their methods as exclusively correct" (Golod, 2008, p. 41); second, "...popular and ever-miserable variations on the subject of "women and politics are incompatible" is also notable. Would you like to lay asphalt? Welcome! Surf space? You are welcome. Sniper, tamer, war reporter? No problems there. But "sorry — no politics". Why? Because politics is power" (Khakamada, 2006, p. 173).

At the same time, according to UN materials and some other sources, it follows that a socially significant figure in order to begin solving the issue within the ranks of political power is at least 20 % representation by women, the optimal figure being 40–50 %, as observed in Scandinavian countries (Tarusina and Isaeva, 2016, pp. 78–79). This, however, is not an axiom, but rather a highly probable assumption, since it is not always confirmed in practice: some examples of female leadership are far from being socially oriented, and there are also real examples of increased social welfare-oriented context of legislation even under male leadership! Moreover, the doctrine stated long ago that female dominance is not clearly accounted for in cases where "soft law" decisions are made, for instance on protection of low-income citizens, the interests of women and/or children, etc. (Bryson, 2011), "mobilizing women as women" (Ajvazova, 2018, p. 46).

The socio-political activity of Russian women can be manifested in various forms, including via civil society institutions. Thus, women fruitfully participate in the work of various public chambers. The Civic Chamber of the Russian Federation includes 62 women (36.9 %). 29 of the 85 regional chambers are headed by women (34.1 %, with none in the minority national republics). Among other things, this indirectly indicates a greater willingness of men to give up leadership roles to women in cases where work is carried out primarily on a gratuitous basis and does not involve authoritative powers.

Women are also active in the electoral process: both as voters and candidates for elected positions, and in other roles essential to the electoral process. At first glance, the statement that the Russian electoral system has a "female face" (as often emphasized in the speeches of Ella Pamfilova, currently Chair of the Central Election Commission of Russia) looks rather convincing, and is confirmed by statistics. As of 2021, women head 85 % of precinct election commissions in Russia. At the same time, an interesting detail should be noted: if we look at election commissions of higher significance (regional rather than precinct), the proportion of women's representation decreases significantly: with 40 % of women in the former and 65 % in the latter. The current Central Election Committee of Russia boasts fewer than 30 % women — only 4 of 15 members are representatives of the "fairer sex."

The above statistics are aptly illustrated by Ella Pamfilova's statement on the evolution of "the face of Russia's election system" over the past 5 years: "Over this period, our system has become even more feminine, which does not mean weak. Rather, we speak of a soft power that enables to withstand any hardship that may challenge commission members during the course of election campaigns… we speak of a woman of character, and repeated occasions have convinced of precisely this."[5] Obviously, the work in local election commissions is more intense and less well-paid, which in itself may provide an explanation for why men are not interested in competing with women for this work, which clearly does not provide the glory of a "place in the sun". Here we must also make allowances for one more "trick": the active recruitment of women into the work of the electoral system, including in management positions such as in the case of the chairperson of the Central Election Commission, in one way or another may promote people's trust in the electoral process, so sadly denigrated over the past decades.

Women also actively manifest themselves as voters: numerous statistical studies analysing both traditional and e-voting contexts

[5] Pamfilova: The face of the election campaign has become more feminine. Rossijskaya gazeta (Russian Newspaper), 24 March 2021. Available at: https://rg.ru/2021/03/24/pamfilova-lico-izbiratelnoj-sistemy-stalo-bolee-zhenskim.html (In Russ.) [Accessed 10.01.2022].

demonstrate that the "portrait of a typical voter" also has a female face: this is confirmed by both VCIOM (Russian Public Opinion Research Center) data and information published by public agencies.[6] Furthermore, women also support the "party of power" more actively than men. Some politicians, however, unfortunately dare to use statements disparaging women in this regard: thus, Andrey Parfyonov has explained women's motivation for voting for "United Russia" by the fact the "the growing popularity of the party among women is facilitated by the fact that... Vladimir Putin enjoys the sympathy of the fairer half. Stop any woman on the street and ask her if she likes Putin, and she'll answer "yes!", because for any woman, Putin represents "man as he *should* be."[7]

It is possible that these gender prejudices, which hint at the frivolity of women and their inability to make unemotional political decisions, explain with precision the reason why most Russian citizens would not favor a woman for any serious political post. According to VCIOM, the majority of respondents cannot imagine a woman as President or Prime Minister of Russia. This position, moreover, is not limited to men, but also shared by women themselves. Experts predict that Russia cannot realistically expect a "woman as the head of state" until at least 2048.[8] Overall, women are less active as candidates during elections, and the statistics here show little tendency for change: for example, 21 % of candidates in the 2021 State Duma elections were female, a figure absolutely identical to the same statistic in 2016 (the feminist ideas are supported by 33 % of women and 30 % of men).[9]

[6] VCIOM found out the average age of most voters in the elections. RIA Novosti, 18 March 2018. Available at: https://life.ru/p/1098940 (In Russ.) [Accessed 10.01.2022]; Sostavlen obshchij portret izbiratelya (The general portrait of voter a has been compiled). Rambler, 19 March 2019. Available at: https://news.rambler.ru/sociology/42855256-sostavlen-obschiy-portret-izbiratelya/ (In Russ.) [Accessed 10.01.2022].

[7] "Because Putin enjoys the sympathy of women". How parties see their voter and what is he like in actual fact. Lenta.ru, 16 August 2016. Available at: https://lenta.ru/articles/2016/08/16/ladieslikes/ (In Russ.) [Accessed 10.01.2022].

[8] VCIOM: citizens of Russia do not favor a woman as President or Prime Minister. Kommersant, 6 March 2020. Available at: https://www.kommersant.ru/doc/4277541 (In Russ.) [Accessed 10.01.2022].

[9] Candidates for deputy in the mirror of statistics: the billionaires and the paupers. DW.com, 14 August 2021. Available at: https://www.dw.com/ru/kandidaty-v-deputaty-gosdumy-v-zerkale-statistiki-milliardery-i-nishhie/a-58831533 (In Russ.) [Accessed 10.01.2022].

III. The Work Environment: Professional Restrictions, Harassment, etc.

In the realm of work and social security, despite legislators' inclination towards gender neutralization using the framework of "persons with family responsibilities", differentiation in the legal status of women and men still remains in some areas. This is partly due to objective reasons, including: pregnancy, women's postpartum physical condition, the need to care for babies, which requires attention in the form of protective provisions for dedicated leave, as well as conditions for the performance of labor functions during particular periods (such as if woman re-starts work ahead of the required start date) and the insurance of targeted social payments. On the whole, Russian legislators are quite successful in this respect. We find, however, that the area of concern comes with the question of parental leave for the care of children up to the age of three. Here the gender-neutral approach is already revealed as lacking. Thus, the leave is not granted to male military personnel — an appeal to redress this lack of parity was addressed by the Constitutional Court of the Russian Federation back in 2009. The Court failed to recognize the ban as unconstitutional, referring to the provisions of Art. 55 of the Constitution of the Russian Federation on the admission of restrictions on the rights of citizens in the interests of ensuring state security (Decision No. 187-0-0 dated 15 January 2009). The European Court of Human Rights disagreed with the legal position of the Constitutional Court, stating: "In view of the foregoing, the Court considers that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably or objectively justified. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex."[10] This, by the way, evoked a broad legal (and political) discussion on the ontology and limits of sovereignty of the Russian legal system (Tarusina and Isaeva, 2016,

[10] European Court of Human Rights, Grand Chamber, *Konstantin Markin v. Russia,* Application No. 30078/06, Judgment of 22 March 2012. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109868%22]} [Accessed 10.01.2022].

p. 88) and eventually led to the adoption of a constitutional amendment clarifying the right of the Court to decide in favor of non-action vis-à-vis the decisions of international courts, if these, in the Court's opinion, contradict the constitutional foundations of Russian statehood. Our task here is not to analyze legislation and judicial acts that infringe men's rights. The situation, however, can also be considered from the perspective of women issues, due to the fact that legal discrimination against one of the "persons with family responsibilities" (in our case, the father of a child), clearly means that this respective burden is placed upon another "person with family responsibilities" (the child's mother).

The most striking example of explicit labor discrimination is the laws directly restricting a woman's right of access to specific professions. As of 2000, for instance, the ban on women's labor extended to a total of 456 professions. For this reason, Anna Klevets was denied admission to a training course for "assistant electric train drivers" for the St. Petersburg Underground. She appealed against this refusal in court, went through all the courts of appeal and filed a complaint with the Constitutional Court of the Russian Federation that found no grounds upon which to accept her case for consideration (Decision No. 617-0-0 dated 22 March 2012). Among other things, the Court indicated that first, principles of equality should be implemented taking into account a woman's social role in procreation and proper care for her reproductive health; second, by the meaning of Art. 253 of the Labor Code of the Russian Federation, the contested list is not considered as an absolute as the restriction can be overcome by improving specific labor conditions; third, the verification of the list's validity is outside the competence of the Court and must be carried out by courts of general jurisdiction. Indeed, in any particular case, such a restriction is associated more with an assessment of the intellectual capabilities and psychological characteristics of a woman (a factor indicative of discrimination), rather than with the supposed challenging and dangerous labor conditions that the legislator uses as grounds for banning the access to the aforementioned list of professions. In addition, "forced happiness", achieved by subordinating real personal happiness to social considerations, is in opposition to the idea of a woman's right to reproductive choice. Though we are not advocates of

the childfree womanhood club, the aforementioned woman's freedom is quite obvious, including the fact and term of motherhood. Since 2019, the list has been reduced to 100 professions (by order of the Ministry of Labor of Russia No. 512n dated 8 July 2019). The updated list, however, also includes dubious restrictions, such as an aircraft mechanic (technician) for airframes and engines, an excavator driver, and work related to the care of certain types of animals. Nevertheless, we may conclude that the profession-related restrictions in effect are undoubtedly closer to provisions for differentiation than to out-and-out discrimination. Women's activity, coupled with particular rationality amongst managers, has yielded significant income for the "treasury" of labor emancipation, bringing the Russian environment closer to the global average for gender balance in this sphere, and relative harmony of the gender equality concepts and social responsibility of the state with regard to the care for women's health (Sillaste, 2020, p. 49). As already noted, however, we have not "fully plowed the field of professional gender parity" yet.

Questions of women's employment still remain urgent. Even under standard (non-emergency, non-pandemic) living conditions, the temporary self-exclusion of a woman from social labor during pregnancy and childcare or a career break create difficulties for her further labor rehabilitation. These circumstances in a woman's "typical life" are supplemented with quite traditional employment-related challenges: as a rule, employers often *de facto* search for ways to give priority to the hiring of men, whose prospective reproductive (and, in general, family) function is not so clearly expressed as in the case of women. Recent pandemic circumstances somewhat shifted the focus: on the one hand, it would seem that the massive transfer of workers to remote locations facilitates the ability to combine both social and domestic work. But on the other hand, it brought children, husbands and relatives back into the realm of "a full day with the family", increasing the required amount of domestic care — and at home a woman in Russia is still considered as a "working unit", while men are "honorary members of the club"; furthermore, remote work blurs working hours, and also often involves additional types of labor. For instance, pedagogy encountered a new

mandate for the mastery of modern distance learning technologies and the development of a very diverse digital educational product; information and progress monitoring communication with students began to be exercised far beyond the standard work schedule; etc. Pandemic lockdowns have also affected women's employment prospects. It should be noted, however, that women have simultaneously benefitted from additional opportunities, including new forms of employment exclusively for women, new methods of searching for vacancies and acceptable forms of remote work, allowing them to independently restore the space in which they can experience professional self-realization. (Tihanyi et al., 2020, p. 93).

Among issues relevant for today, a special place belongs to the phenomenon of harassment, understood both in a narrow sense (as sexual harassment) and more broadly (obscene sentences, insulting remarks, psychological persecution, etc.). Harassment is, *de facto*, widespread, but it is also outside the "developed legal field": currently, every Russian woman usually has to "survive on her own". Most still have to either endure harassment, quit their jobs, or resort to modern technical methods of correcting illegal actions and insist upon legal consequences, this latter being extremely rare. This having been said, neither society, nor employers or employees (as part of it) are generally ready to actively support women in their stance against the abovementioned forms of violence (according to the media, 16 % of single or multiple-instance harassments are reflected in the statistics;[11] about a third of employers respond to such actions).[12] We believe that the statistics here are unlikely to correspond to reality, since unacceptable behavior against working women is, as a rule, shrouded under a cloak of silence. This suspicion is also confirmed by our practice. The necessary ideas have yet to be introduced at a systemic level, and have not made their way into classical education, public communications or the thought realm of non-profit social organizations yet. Furthermore, Russia ratified the European Social Charter in 2009 but excluded from its

[11] 6 % of harassment is recorded — against men, that is, almost 3 times less.

[12] Sexual harassment at work: Russian specifics. Vedomosti, 23 January 2020. Available at: https://www.vedomosti.ru/career/articles/2020/01/22/821257-rabotodateli-pomogayut (In Russ.) [Accessed 10.01.2022].

international obligations Art. 26 that calls on states to protect workers from sexual harassment and other unacceptable behavior. Currently, protection against them is hypothetically possible, under Art. 2 and 3 of the Labor Code of the Russian Federation, which in an excessively general form provides for the prohibition against discrimination, the principle of respect for the dignity of an employee and judicial support in cases of violation of regulatory requirements. Labor law doctrine states that since harassment is not considered as a form of discrimination or dangerous psychosocial risk (Chirico et al., 2019, p. 2470), and the rules of proof in civil proceedings (each party is obliged to prove its claims and objections) do not ensure effective protection to the offended party, it is an unbearable burden for a female employee plaintiff to prove her position, and the prospect of winning legal confrontation with her employer is more ephemeral than actually possible. At the same time, researchers have not identified examples of court decisions that would be based on facts of sexual harassment (Golovina, Sychenko, and Voitkovska, 2021, pp. 636–640). It is obvious in the extreme that Russian legislation and law enforcement should explicitly and, at least to some extent, effectively amend its outlook with regard to this matter.

At the very start of our reflections on the problematic nature of legal terminology in the gender context we spotted the presence of the concept of a "single mother" in jurisprudence, while the concept of a "single father" remains absent. It goes without saying, however, that this information is not limited to philological protest. We are talking about women who deal with their parental, economic and other issues independently. In a narrow sense, this female group includes unmarried women who have a child (children) out of wedlock. These criteria are the specific prerequisite for the receipt of official status and appropriate special social support. In a broader sense, the group is extended to include divorced mothers and widows raising a child (children) without the father. The state, however, supports their lives according to the general rules for labor and social legislation, i.e., on the same terms as for families with children. Nevertheless, from a sociological perspective, both subgroups have similar problems in exercising their rights to employment, and individual choice (considered as a value,

Klammer, 2018, pp. 50–52) in their case is significantly hampered by family circumstances: often, they have to be content with low income jobs (if they have stable work), a minimum of leisure time and/or the resources for it, and the *de facto* lack of access to social and/or vertical mobility channels (Lytkina and Yarosnenko, 2021, pp. 65–66). By all means, exceptions do exist — these, however, as it is well-known, only confirm the sad rule already specified. This social niche, therefore, also requires legislators to have a broader and more profound outlook on the problem, not limiting their capabilities exclusively to social benefits and labor guarantees.

IV. Violence and Criminal Prosecution

The criminal and penal enforcement branches of law also develop constitutional principles by enshrining citizen's equality, including matters of gender equality (Art. 4 of the Criminal Code of the Russian Federation (further the Criminal Code); Art. 8 of the Penal Enforcement Code of the Russian Federation (further the Penal Enforcement Code)). Nevertheless, we cannot testify to any consistent implementation of these specific statutes of criminal and penal enforcement. Thus, it is common knowledge that the degree of legal restriction experienced by the sentenced to deprivation of liberty is much dependent upon the type of detention institution in which they are being held. Currently in Russia there are 465,896 people held in correctional institutions and pre-trial detention centers, of which 38,579 are women. This figure generally corresponds to average statistics of 10–20 % for developed countries (Tihanyi et al., 2020, p. 93). 13 orphanages housing 335 children under the age of 3 are in operation at women's "prison colonies".[13] Fewer women are expected to reside in penal institutions, which is explained by their lower degree of criminal activity (meaning that women are more law-abiding): during three quarters of 2021, for

[13] A brief description of the penitentiary system in the Russian Federation as of 1 January 2022. Available at: https://fsin.gov.ru/structure/inspector/iao/statistika/Kratkaya%20har-ka%20UIS/ (In Russ.) [Accessed 10.01.2022].

example, 652,592 persons were identified as having committed crimes, while 106,751 of these were women (16.4 %).[14]

According to Art. 74 of the Penal Enforcement Code, detention centers include correctional "prison colonies", juvenile detention centers, general prisons and medical correctional institutions. The category of correctional "prison colony" can be further broken down into penal colony settlements and correctional prison colonies with general, strict or special regimes. Thus, there are seven different types of correctional institutions in Russia, in addition to pre-trial detention centers, which house detainees who perform diverse community service works (Art. 77 of the Penal Enforcement Code). But by virtue of Art. 58 of the Criminal Code and Art. 74 of the Penal Enforcement Code, women can be kept only in only four of the seven specified types of institutions: penal colony settlements, general regime prison colonies, juvenile detention centers and medical correctional institutions. For reasons of humanity, they cannot be sent to any of the penal institutions where conditions are most severe: these include prison colonies with strict or special regimes, and general prisons. At the same time, women have a number of privileges over men in terms of sentencing. In Russia, the life sentencing of women is prohibited (Art. 57 of the Criminal Code), as is the death penalty (Art. 59 of the Criminal Code). On the one hand, a more merciful attitude towards the "weaker sex" is quite noble and justified. The criminal legal status of men and women cannot be one of absolute parity, given women's abovementioned objective particularities, i.e., taking into account the importance of women with regard to reproductive objectives, etc. There are real reasons why the Supreme Court of the Russian Federation, in its special review on the application of international law, called upon lower courts to refrain from imposing punishment in the form of imprisonment upon pregnant women and mothers — especially those mothers with underage children — insofar as it is possible. On the other hand, such serious preferences based upon gender are disharmonious with the principle of equality, as well as with other fundamental principles of the criminal legal branches. Among

[14] A brief description of the status of crime in the Russian Federation in January-September 2021. Available at: https://xn--b1aew.xn--p1ai/reports/item/26421097/ (In Russ.) [Accessed 10.01.2022].

other things, gender asymmetry contradicts the principle of justice itself (Art. 5 of the Criminal Code). The key criterion for a measure of punishment is the gravity of an offense (Art. 60 of the Criminal Code). Sadly, there are many historical examples of cruel crimes committed not only by men, but also by women. It is sufficient to recall the terrorist attacks committed by female suicide bombers wearing bomber belts at the Lubyanka and Park Kultury stations of the Moscow underground, which claimed dozens of human lives. It seems that "flirting" with the female sex in such cases, by way of exception, is inappropriate both from the standpoint of a legal principle and from the standpoint of the protection of rights and interests of crime victims, their relatives and friends. We are therefore inclined to regard the above differentiations in the legal status between men and women as clear discrimination that requires elimination.

In the meantime, it should be noted that the specified benefits enjoyed by women also have other "toxic" consequences. At present, those women who have committed especially grave crimes or who have repeatedly committed grave and especially grave crimes are kept in general regime prison colonies, while men with a similar "solid" track record are held in strict and special regime prison colonies and general prisons. Needless to say, the placement of women of radically different danger levels in one and the same penitentiary institutions does not fit well with the corrective objective of the penal system and directly contradicts the principle that differentiation and individualization should be reflected by the measure of punishment (Art. 8 of the Penal Enforcement Code).

These examples do not exhaust all the gender distortions present in today's Russian Criminal Code and the Penal Enforcement Code. We might also mention that many legal preferences are granted to women with children under the age of three: certain types of punishment are prohibited (Art. 49, 50 of the Criminal Code, etc.), and the unjustified refusal to hire them or the unjustified dismissal from employment entail criminal liability under Art. 145 of the Criminal Code. Indeed, it is hard to explain, in light of this, why fathers with children under three are being "forgotten". An equally tangible differentiation between the statuses of

men and women can be identified in the penal legislation. For example, according to Point 93 of the Internal Regulations of Correctional Institutions, approved by the Order of the Ministry of Justice of Russia No. 295 dated 16 December 2016 (amended: 22 September 2021), the maximum number of packages, parcels and book posts allotted to men serving sentence is limited quite strictly and dependent upon type of correctional institution, while convicted women are allowed to receive an unlimited number (!).

From here, things just go from bad to worse. Under Art. 99 of the Penal Enforcement Code, in correctional prison colonies, the living space allotted to a man cannot be less than two square meters, while for women the same figure is three meters. Confinement conditions for men vs. women are also indicative of the distortion; this includes established norms for food and material support. Thus, according to the Russian Governmental Decree No. 205 dated 11 April 2005 (amended: 24 August 2020) "On the minimum norms for nutrition and material support of those sentenced to deprivation of liberty…", men and women, respectively, receive (in grams per day): bread — 300 and 200, salt — 20 and 15, potatoes — 550 and 500. Here it seems the men win out. True, the same decree stipulates those ladies get more cow milk in the pre-trial detention centers (200 ml, whereas men only get 100 ml).

It seems that certain differences in the conditions for detention, as well as in the general legal status of men and women who have broken the law, are attempts to objectively reflect the physical differences between the sexes. At the same time, some existing differences clearly seem archaic, or even ridiculous — for example, the difference in daily allowances for bread and milk. We are convinced that deviations from the gender equality principle in law must be justifiable, without turning supposition into discrimination against one sex or the other. To round off the anti-criminal chapter of our story, we note that the Special Part of the Criminal Code of the Russian Federation also offers fertile ground for gender differentiation analysis. The prohibitions described there are intended, among other things, to act as a tool for the prevention of domestic violence, where women are victims in most cases. The need to improve the efficient prevention of domestic violence is highlighted

in the State Family Policy Concept for the Russian Federation through 2025 and in the National Action Strategy for the Interests of Women for 2017–2022, which have been approved by the Government of the Russian Federation. Unfortunately, in this regard, Russian criminal law is far from ideal.

Just to illustrate, we shall describe the metamorphoses of the legal norm for addressing beatings, which are the most common form of family violence against women (men are also sometimes beaten, but this is the exception, rather than the rule). In the original edition of the Criminal Code, beatings were subject to criminal liability under Art. 116, without any additional conditions (regardless of motives, etc.). In 2016, in accordance with the latest wave of humanization and liberalization, ordinary beatings were decriminalized and transferred to the category of administrative offense (with Art. 6.1.1 "Beatings" were introduced into the Code of Administrative Offenses of the Russian Federation by virtue of the Federal Law No. 326-FZ dated 3 July 2016). Criminal liability under Art. 116 of the Criminal Code was retained for those beatings resulting from base motives (defined as hooliganism and/or extremism), as well as for beatings inflicted upon "persons of close relation," which by all means includes spouses. At the same time, the Criminal Code was supplemented by Art. 116.1, which provides for a punishment under the Criminal Code for beatings committed by a person previously found guilty of a similar act resulting in administrative liability only.

It would seem that such a model of criminal legal protection against family beatings (primarily of women, under statistical reality) would well serve to prevent domestic violence, given that one of the ways beatings become eligible for incurring criminal liability is by being inflicted upon "persons of close relation." However, in line with the general course towards humanization, legislators then excluded from Art. 116 of the Criminal Code any mention of "persons of close relation," when they issued the Federal Law No. 8-FZ dated 7 February 2017. Since then, beatings have incurred criminal liability only if they are motivated by hooliganism or extremism (Art. 116 of the Criminal Code) or if they are repeated offenses (Art. 116.1 of the Criminal Code). Clearly, in domestic violence situations, motives of hooliganism or extremism are *a priori*

absent; and Art. 116.1 of the Criminal Code acts only as weak help for victims, given that it requires they must first go through the process of bringing tyrants to administrative responsibility.

As a result, a rather curious situation has developed, and it amounts to a tragedy for the victims of domestic violence. Despite the fact that the right to personal immunity is proclaimed by the Constitution (Art. 22), despite all the slogans about the need to "strengthen and deepen" the protection of victims of domestic violence, it has already been five years (!) since the Criminal Code of the Russian Federation suddenly found itself lacking any efficient mechanism for holding those who inflict beatings on the family to serious accountability. Moreover, beatings — even when repeated or perpetrated for the abovementioned motives — are punishable by a maximum of only two years of imprisonment, while cruelty to animals resulting in their mutilation (Art. 245 of the Criminal Code) is punishable by three years of imprisonment. Certainly, it is tempting to exclaim "*o tempora, o mores*!" in such a situation.

In view of the above, the draft law submitted to the State Duma by the Plenum of the Supreme Court of the Russian Federation, which envisages the transfer of repeated beatings (Art. 116.1 of the Criminal Code) from the private to the private-public realm of prosecution, as understood under the Code of Criminal Procedure of the Russian Federation, is only a half-measure,[15] which essentially fails to resolve the problem. We do not share any of the general enthusiasm with regard to this bill, as the fundamental basis for the protection of victims of domestic violence is criminal law. For this reason, the law must first be reverted to its original version within the Criminal Code, after which an adequate punishment for the crime of beating should be established. And the punishment, we think, should not be less severe than that earned by those who enjoy inflicting cruelty upon animals.

[15] The Supreme Court proposed to protect victims of domestic violence by canceling private charges in the courts. 6 April 2021. Available at: https://www.vsrf.ru/press_center/mass_media/29837/ (In Russ.) [Accessed 17.01/2022. The draft law is available at: https://www.zakonrf.info/postanovlenie-plenum-verkhovnogo-suda-rf-3-06042021/ (In Russ.) [Accessed 10.01.2022].

V. Relations with a Family Element

The issues caused by a woman's right to terminate her pregnancy — as a component of her fundamental right to take charge of her own life — are at the very intersection of medical and family law. This right is not connected to any man's position (including that of the woman's husband), although present doctrine does include some speculative reflection about the possibility of introducing the framework for the man's consent to abortion — emphasizing various Eastern examples. Furthermore, this freedom is opposed by religious ideas and practices that consider abortion to be sinful. In some countries — for example, Poland — there are severe restrictions in respect of abortion. Russian medical legislation, meanwhile, fails to consider abortion an absolute freedom: a pregnancy of up to 12 weeks may be terminated at a woman's discretion, from 12 to 22 weeks a woman may choose to abort her pregnancy for social reasons, the list of which is continuously being amended so as to become shorter. Abortion for medical reasons, at any term of pregnancy, is possible with the decision of a council of doctors. At the same time, over the period between 1992 and 2019, Russia saw an eight-fold reduction in the number of abortions (Sakevich, Denisov, and Nikitina, 2021, p. 46). It is well-known that the most common motivations for abortion are economic and, more recently, socio-psychological, in the form of a woman's unwillingness to interrupt the career growth and/or exclude herself from her typical social milieu/ experience due to the challenges of motherhood. In such cases, tools such as the issuance of a maternity capital, the granting of tax and mortgage benefits, etc., are hardly ever effective. The same can be said of ideological campaigns for the promotion of motherhood as a social value. Cases in which it is necessary to make a decision on whether to continue pregnancy when the health prognosis for the unborn child is unfavorable are especially difficult. Moreover, in recent years a new issue has surfaced, involving the problem of a possible future conflict between parental choice (primarily maternal choice) and the "potential autonomy of the child", the right to disagree with it — such as in cases where assisted reproduction technologies are used (Davis, 2009, p. 32). Russian law still leaves such questions outside its scope of action, being

content with a simple prohibition against choosing the sex of an unborn child (Bogdanova, 2021, p. 49). In the near future, lawmakers must face the task of revising the list of socially justifiable reasons for abortion in order to adequately respond to new challenges in the planning and preservation of pregnancy introduced by modern genetics.

Family law itself is one of the leaders in terms of gender problematics. Since the topic of our study is woman as a subject of the law, here we will put aside aspects of legal regulation, as well as administrative and judicial practice, which result in discrimination against men in terms of a family and legal status. These include restrictions on participating in the surrogacy program, restrictions on the right to a divorce either during a wife's pregnancy or within a year after a child's birth, a clear gender imbalance during the court resolution of disputes with regard to a child's place of residence when the marriage is dissolved or in the case of parenthood out of wedlock, and the father's exclusion from the list of persons entitled to alimony, even in a case when the child under three stays with the father. We would refer anyone interested in these issues to the excellent studies on this topic published by Zykov in 2020 (Zykov, 2020, pp. 48–58). Beyond the scope of our study there remain aspects of legal gender differentiation based on the gender-neutral ontology, though they are extremely relevant and debatable from the standpoint of Russian legislation and in part, from the standpoint of general legal doctrine, too. These include such issues as the constitutional amendment defining marriage as a union between a man and a woman, the lack of legal framework for addressing the question of same-sex marriage, the legal consequences of a sex change during a marriage, the prohibition of adoption by citizens of states with a different understanding of the essence of the marriage union, etc. These topics are excluded from the scope of our analysis that has a narrower focus, which concentrates primarily on the legal status of women (an overview of the Russian legal backdrop for these questions can be found in Lushnikov, Lushnikova, and Tarusina, 2015, pp. 117–165).

In terms of fair and reasonable provisions establishing rights and interests of women inside the institution of marriage, two vectors bear analysis. First of all, despite an unambiguous declaration of the secular nature of marriage, upon the basis of which polygamy is

prohibited by law, prevailing political and legal concepts may also incorporate opinions in defense of polygamy, while social practice in some southern territories actually demonstrates clear-cut cases. Liberal Democratic Party leader Vladimir Zhirinovsky firmly supported polygamy, explaining his standpoint by the following considerations: 1) a disproportionate number of women, as compared to men, creates a situation in which not all women who wish to marry and have a family with children are able to do so; 2) polygamy more successfully leads men towards responsible behavior.[16] The idea of polygamy is also supported by some Muslim clergy. Voices in favor of polygamy can also be found within concepts of family law. It is sometimes argued that the legalization of polygamy would protect the interests of women in *de facto* polygamous unions, and would expand the spectrum of choice with regard to possible forms of marriage in territories where polygamy is not part of the national cultural tradition (Tarusina, 2022b, pp. 135–136). Leaders of the women's movement, such as Maria Arbatova, qualifies such statements as kitsch, personal PR, not based on science and suggests, by the way — while we are at it — why not sink to the level of our opponents and introduce polyandry as well in the true spirit of being completely gender neutral...[17] In response to the complaints of one apologist of polygamy, who claimed that his constitutional rights were being violated, the Constitutional Court of the Russian Federation responded by confirming the secular basis of marriage and reiterating that no more than two people can participate in a given marriage (Decision No. 851-0-0 dated 18 December 2007).

Our second vector for reflection focuses on the problem of *de facto* marriage. It is well-known that until 1944 Soviet law had recognized the legal significance of *de facto* marriage, and discussions of the corresponding stipulation within the draft of the Code of Laws on Marriage, Family and Guardianship adopted in 1926 show that

[16] Zhirinovsky urged to allow polygamy in Russia. Izvestiya, 21 October 2019. Available at: https://iz.ru/934612/2019-10-21/zhirinovskii-prizval-razreshit-mnogozhenstvo-v-Rossii (In Russ.) [Accessed 10.01.2022].

[17] Maria Arbatova: I am against polygamy without polyandry. Liveinternet, 7 August 2009. Available at: https://www.liveinternet.ru/users/2471598/post107944225/ (In Russ.) [Accessed 10.01.2022].

prevailing political and legal views played with the idea that *de facto* marriage — free from state intervention of any sort — might be the one true form for the "marriage of the future" (Tarusina and Isaeva, 2017, pp. 79–80). This did not happen (predictably); in fact, prevailing attitudes towards unregistered unions reversed entirely. Meanwhile, social practice demonstrates the continuous presence of *de facto* marriage in Russian society, and legal practice demonstrates the obvious defenselessness — especially with regard to property issues — of women in such relationships in most cases. If an unregistered family union is terminated or the *de facto* spouse dies — and women usually live longer than men — she is unable to claim her fair share of acquired property or to inherit. The only basis for protecting her interests in the latter case is for a court to recognize her status as a dependent of the *de facto* spouse (unfit for employment), which allows her to inherit. At the same time, the patriarchal nature of a relationship is retained in many families, meaning the woman is primarily engaged in domestic tasks: she takes care of any common children and relatives, often devoting all or a significant portion of her time and energy to these tasks. It is common, therefore, that she either has no employment or only partial employment outside the household. It is precisely these circumstances which from time to time motivate various Russian politicians to raise the issue of reinstating legal protections for the interests of spouses (women) in a *de facto* marriage. The most recent draft bill addressing this question (2019) suggested extension of both the rules for spousal joint property and for alimony obligations to *de facto* marriage relationships, providing that the family union has lasted at least five years for couples without children, or at least two years for couples with a common child or children. Many legislators, however, were still opposed to the recognition of *de facto* marriage. Their arguments were varied, and ranged from the fear that a "legitimate marriage" would become less relevant to concerns about state statistics on family relations and the challenges of providing social support for families, to arguments that *de facto* marriage is "fornication" and constitutes a sinful union. Taking into account the views of the new Head and Deputy Head of the Russian State Duma Committee for Family, Motherhood

and Childhood Protection, there is no hope for progress on the issue under discussion.

Formally speaking, the institutions of parenthood and other childcare are, on the whole, gender neutral. Only a small number of issues directly affecting women's interests are being discussed. First, the universal character of the presumption of paternity within marriage does not always serve the interests of the mother: former legislation gave her the right to declare a man other than her husband as the child's father when registering the birth, providing she had his consent. The doctrine suggests reinstating this rule; after all, challenging the presumption in evident cases does not make sense for various reasons, not the least of which is court costs.

Second, the discussion continues on the rights of women who have given birth out of wedlock in cases where no father has been officially established to register their children with a "matronymic" (based on the mother's first name) rather than the patronymic, which would be assigned according to the usual Russian naming standard. For reasons based upon tradition, this is expressly forbidden by current legislation. In practice, however, the ban can be bypassed: under Art. 51 Part 3 of the Family Code of the Russian Federation, the mother may enter any name and patronymic in the "father" field of the birth registration, therefore she may enter a made up first name, based upon her own (e.g., Olga > Olgiy). In this way, she can effectively assign the child with a matronymic (e.g., Olgiy > Olgievich / Anna > Anniy > Annievich).

Third, a rather difficult discussion is underway relating to a surrogate mother's preferential right to the child she gave birth to. At present, the child's genetic parents — the surrogate program clients — can only be registered as the mother and father of the child with the surrogate mother's consent; this imperative is laid out under Art. 51 Part 4 of the Family Code of the Russian Federation. Despite the obvious nature of a surrogate mother's preferential right, judicial practice concerning its sustainability remains contradictory. In 2012, for instance, the Constitutional Court of the Russian Federation heard an appeal in which it upheld the constitutional nature of the norm, and ruled in favor of the surrogate mother's preference against that

of the genetic parents (Ruling No. 880-0 dated 15 May 2012). The members of the Court published two particular opinions with regard to this decision. Significant arguments in favor of considering the merit of the issue raised by the appeal included the fact that the imperative in Art. 51 Part 4 acts against the achievement of the surrogate program's goal, which is to overcome clients' infertility issues. Moving forward, in 2017 the Supreme Court of the Russian Federation took a legal position that was far from clear (Para. 31 of Resolution No. 16 dated 16 May 2017) indicating a possibility that the case could be resolved in favor of the genetic parents and also mentioning the interests of the child. Afterwards, although in 2018 the Constitutional Court of the Russian Federation rejected the applicants' complaint, it also indicated that they might rely on the legal position of the Supreme Court of the Russian Federation (Decision No. 2318-0 dated 27 October 2018), which was even accompanied by a dissenting opinion of one of the judges, expressing clear doubts with regard to the correctness of the Court's legal position and stating that illegal judicial practice should not be encouraged and that doubts about the fairness of law need rather be redressed by changing the law. Through all this, grounds for the ultimate reorientation of judicial practice, which is contrary to the imperative set out by family law, have been established in an instance where higher courts might rather implement their right to take a legal initiative. Meanwhile, the context of debate on surrogate motherhood is much wider. The essence of this phenomenon is being called into question, in the sense that sometimes it is being qualified as exploitation of women and trafficking of children — an opinion which is, to a certain extent, shared (legally) by a significant number of countries (Bakaev et al., 2021, pp. 77–82). It is unlikely that there will be a ban on the surrogacy program in Russia, since "Pandora's box" is already open. We can, however, fully anticipate that certain restrictions may be introduced, such as a ban on the participation of foreign citizens, changes in the content of surrogate contracts, and clarification of preferential rights.

It is interesting how Art. 49 of the Family Code of the Russian Federation is worded; in that it instructs courts to be guided by reliable evidence when resolving a paternity dispute in the case of a child born out of wedlock. The nuance here is that civil procedural law universally

exhorts judges to establish actual circumstance based on true facts; so why in this particular case do we see an additional declaration reiterating specifically for this particular type of case (and not any other)? There is a historical, legal and social explanation. Previously, Russian family law on cases involving the paternity of illegitimate children was not only contradictory, but also cruel: in 1944, so as to solve the demographic problem created by terrible human loss during the war, legislators deliberately released men from any responsibility for the life of their illegitimate children by simply placing a dash in the "father" field on birth certificates, thereby assigning all responsibility to the woman. It was then that the concept of a "single mother" appeared. Later, during discussions on whether to revoke this "draconian" decision, deputies, as well as some representatives of legal science, insisted on maintaining various restrictions so as not to "indulge women's frivolity". As a result, courts first got a rule that limited the possibility to satisfy suits under certain circumstances (1969) and later, when this restriction was removed, they discovered a vestige of the previous approach in the form of an oddly exclusive call to rely on credible evidence specifically in cases of extramarital paternity (Tarusina, 2022b, p. 139). A round of applause for the deputies!

Fourth, one should focus on family property relations. Current legislation is not very generous in terms of formulating the grounds for alimony obligations between spouses/former spouses, which are limited to facts regarding work incapacity (e.g., disability, achievement of retirement age), the wife's/ex-wife's pregnancy, and the need to care for a child who is disabled or under three years old. Other difficult life situations also do occur, however, for instance, a situation when a woman did not previously work (housework does not count as work in Russia). She may have previously managed a household, taken care of children, may not have completed her education upon marriage, may not have acquired a profession, may have been ill for a long period of time but was not officially recognized as disabled, etc. All this should also make her eligible for the possibility of assistance in the form of alimony, even if only temporarily. We believe that a positive legislative response would be appropriate here.

The framework of the marriage contract should also be subjected to some socialization: when first introduced into Russian law — only in 1994 — it was but experimental and not fully adapted to Russian realities. Even then, however, it was clear that the parallel, sovereign coexistence of two opposing means for the legal regulation of spousal property relations was not in line with the established tradition and, most importantly, fails to protect a woman's interests in cases where the marriage is terminated. In fact, she is the one whose interests are infringed by the assumption of a share-based system, or especially a separate-property based system, in the vast majority of instances. Roughly speaking, this happens in the same situations discussed above in cases involving the legal recognition of *de facto* marriage. Therefore, we believe that the freedom of a marriage contract should be limited by established minimum protection for the socially weak party, specifying fair conditions and grounds for material support if the union is dissolved and guaranteeing allocation of a share to the property which would ensure basic significant living requirements. Unfortunately, an obvious passion for the commercial context of life still fails to provide Russian legislators with the attention necessary to solve this problem.

VI. On Sociocultural Stereotypes in Russian Society

Legislative collisions, one way or another based on gender inequality, have a pronounced psychological background. Genetically determined and scientifically proven differences in mentality between the sexes are very few. If they do affect a woman's ability to perform, for example, professional functions, the range of restrictions is also very small (we are not making reference here to activities that require significant physical strength). Sexism (discrimination based upon sex) is not something grounded in the naturally occurring specifics of the female body or mentality. The perception of women as individuals with qualitatively different opportunities compared to men is explained by traditional social stereotypes which are still extremely prevalent in Russian society (Kamneva, 2015, pp. 370–374).

The female stereotype is based on the idea of a woman as dependent upon a stereotypically dominant man, giving her a secondary position

in terms of decision-making with regard to various issues in life. This is most pronounced with regard to employment (Bobbitt-Zeher, 2011, pp. 765–784) and, as noted above, directly reflected in legislation. In some other spheres, the same tendency is implicit though the effects are seen primarily on the level of vocabulary ("single mother", "adoption of a son / adoption of a daughter").

Among other things, the stability of gender stereotypes is due to the highly positive role they — like other sociocultural stereotypes — play in interpersonal interaction. When contacts are short-term and people have little detailed information as to their partner's identity, typical patterns come in helpful when developing tactics for interaction. These, in turn, transfer on to the subsequent period of communication. Furthermore, it is highly likely that one person's behavior towards another based on a gender stereotype provokes behavioral responses from the latter that reinforce existing stereotypes. As a result, the very behavior that launches a "vicious circle" of mutual stereotyping is reinforced.

Another component of the feminine stereotype is the idea that parenthood and childrearing are a woman's function, whereas a man is assigned the functions of creation, creativity and accomplishment outside the home. One reflection of this concept is the abovementioned clear tendency that in the case of divorce, a child's place of residency is determined to be with the mother. In addition, a negative attitude towards childless women has become entrenched within society — especially towards those women who support a "childfree" ideology. In the public mind, these women are associated with egoism and irresponsibility, even though the results of one test questionnaire demonstrate that the level of social responsibility of subjects who deliberately reject motherhood is higher than that of those women in the group who have children (Perova and Kara, 2020, p. 84).

Masculine stereotypes and corresponding behavioral prescriptions are more rigid than those relating to women, who may go relatively unpunished by society for allowing some deviation from their societally assigned roles. Women also demonstrate greater gender flexibility when faced with changing socio-economic conditions (Gustafsson Sendén et al., 2019). But at the same time, there are more legal restrictions upon women than upon men.

It should be noted that currently, favorable psychological prerequisites are emerging for the legislatively enshrined empowerment of women as subjects of law, since the development of social relations, technical and cultural progress have brought to life a tendency towards the convergence of stereotypical ideas about "male" and "female" psychological traits (Bosak et al., 2018, p. 120), and women become more gender-flexible in changing socioeconomic conditions (Gustafsson Sendén et al., 2019). At the same time, research data on the sustainability of gender stereotypes, focusing on a period of several decades in the late 20th and early 21st centuries, are now available (Haines, Deaux, and Lofaro, 2016, pp. 353–363). Insofar as gender stereotypes give rise to their corresponding attitudes and behavior, they ultimately reduce the adaptative potential of their carriers. High adaptive potential is supported by androgynous, and not polar mental structures (Stepanova, 2009, pp. 67–71). Increased gender equality on the level of legislation and the increased flexibility of gender stereotypes and attitudes are interpenetrating processes that reflect the need for societal development.

VII. Conclusion

Russian society and its legal system in the current state are characterized by conflicting approaches to understanding the role of women in society, as well as her social and legal statuses. On the one hand, on constitutional level and among the general principles of Russian law the principle of equality for men and women is proclaimed. On the other hand, due to the objective, natural differences between the sexes, law sometimes reflects a certain differentiation between their statuses that often turns into discrimination. For several years now, the draft law "On State Guarantees of Equal Rights and Freedoms for Men and Women and Equal Opportunities for Their Implementation" has been among the projects under scrutiny by the relevant committee of the State Duma of the Russian Federation. They return to it only rarely and with an *ad hoc* approach.

The political and societal activity of Russian women coexists in an environment which is also highly tempered by masculine and

feminine stereotypes. There are too few women, percentage wise, participating in the activities of state structures: current figures are simply unsatisfactory. As a rule, at this point percentage increases are being caused by lower rates of compensation for work or when work is carried out entirely free of charge.

Recent years have seen a push for gender neutralization in the labor sector, due to the introduction of the concept of "persons with family responsibilities" into law and law enforcement practices; nevertheless, discrimination is far from eliminated. This is most clearly manifest in restrictions on the right to a profession which have been retained; the list of professions and jobs from which women are banned is still impressively long and far from universally justifiable. Legislators' focus on a woman's reproductive function as a basis for differentiating her status is clearly out of date, especially in the context of her freedom to reproductive choice. Neither has the issue of women's protection from harassment been resolved on the level of law and law enforcement.

The field of criminal policy is also characterized by legal norms focused on differences between the sexes — both in terms of formulating the body of offenses and in the system of punishments. To a large extent, this differentiated approach provides for the objective needs of a woman, though in some respects discrimination can be seen. For several years, lawmakers and members of the public have been actively discussing measures to ensure the protection of women against domestic violence. A preoccupation with the debate, however, obviously delays prospects of finding a solution to the problem.

In addition, legal regulation of relationships with a family element is primarily focused on working toward gender neutralization. It finds itself under attack, however, both with regards to the status of women and men (a mother's priority in disputes over the child's place of residence; the restricted right of men to divorce during a wife's pregnancy or within a year of the child's birth, etc.). A patriarchal bent within the public consciousness is determinate in discussions regarding the potential permissibility of polygamy, the special role of women within family, and the denial of legal recognition of *de facto* marriage, in which, as a rule, it is the woman's interests that are unprotected if a relationship is dissolved. The institutions of the marriage contract,

alimony obligations and surrogate motherhood are characterized by an excessively commercial approach.

Though it is obvious that public opinion and legislative decisions are not generally oriented towards maintaining discrimination and/or counter-emancipation, we have yet to see a clear and efficient breakthrough that would equalize the legal and actual statuses of men and women in Russian society.

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Article

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Cryptocurrencies Turnover and Forensic Analysis of the Mechanism of Committing Crimes

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Abstract: Criminalistics and forensics need rapid development to keep up with the changes in the society that are caused by dramatic changes in information and telecommunication technologies. The paper addresses the issue of including a new subject related to the turnover of cryptocurrencies in criminalistic analysis. Investigative and court practice show that when crimes are committed cryptocurrency can be an object of the offense (e.g., in theft) or can be used by offenders in the mechanism of a crime (e.g., legitimization of proceeds of crime by cashing in). To successfully investigate such crimes, it is necessary to study the mechanism of formation in the cryptocurrency transactions used by criminals in order to provide scientific recommendations to law enforcers concerning detection, fixation, seizure and investigation of traces of a crime. The development of effective tools in criminalistics forms a priority task at the present stage. The authors associate the specifics of the investigation of crimes related to the cryptocurrency turnover with its electronic nature, which determines the criminalistic recommendations proposed in the paper. Urgent training courses for investigators seem to be a reasonable solution to the problem. They can train investigators specializing in the investigation of such crimes, and their training (retraining) should involve the best experts in the field of IT technologies and experts from foreign jurisdictions where law-upholders have already accumulated experience in countering such crimes.

Keywords: blockchain; cryptocurrency; criminalistics; crime investigation; drug trafficking; corruption

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Contents

I. Introduction

The era of digital currency began in 2009 when someone (it is still believed that that was a group of persons) acting under the pseudonym *Satoshi Nakamoto*[1] generated the first block and the first 50 bitcoins. On 12 January 2009 the first transaction to transfer 10 bitcoins took place. Now, cryptocurrency is understood as a cryptographic function for encrypting records. It is based on the distributed ledger technology — blockchain, an autonomous telecommunication network that supports a certain interaction algorithm for the exchange of information between numerous computer users in a single technological space. The electronic information exchange procedure allows forming in each system a single information register, the changes of which can be controlled by each participant, and the information is identical for all. The interest of the system participant is the accumulation of certain blocks of information in digital (cryptographic) form on his "crypto wallet" (account) with the possibility of writing off such a block from the account and crediting to the account of another participant.

In the authors' opinion (Bushev, 2021, p. 32), the advantages of using such an algorithm include: the system autonomy, the absence of central authority, the exclusion of intermediaries from the process of

[1] Satoshi Nakamoto Bitcoin: A Peer-to-Peer Electronic Cash System // https://dzen.ru/media/id/5b29efdd92e66100a912e9c0/bitkoin-odnorangovaia-elektronnaia-denejnaia-sistema-5dccfe6b1877c954d6c79f92 [Accessed 19.11.2022].

movement of rights, the reduction of the risk of abuse of power and the risk of error, the reduction of costs, the strengthening of the reliability of the information contained in the register due to their availability to all participants, and the anonymity of the participants. In case of using smart contracts in the system, the dynamics of legal relations at all stages of their existence is automated, in connection with which risks associated with the human factor are excluded, and the turnover capacity of objects accounted for in the system is increased.

Other supporters of this technology operate with such values as the freedom of the individual on the Internet, the rejection of "corporate" management and the monopoly of banks regarding distribution of monetary funds, the anonymity of payments on the network (Batoev and Semenchuk, 2017, p. 9). Cryptocurrency is proposed to be used in the activities of various start-ups, as well as for micro-enterprises looking for innovative solutions.

The number of cryptocurrencies is growing rapidly and now, in total, it exceeds 4,800 (2,541 of which are registered and traded on cryptocurrency exchanges). Bitcoin[2] has the largest capitalization (56 %, according to other estimates 59 % of the market), as well as such cryptocurrencies as: Ethereum, XRP, Bitcoin Cash, Litecoin, Stellar. Cryptocurrency can be purchased and converted through cryptocurrency exchanges (online trading platforms), specialized exchange offices and automatic payment terminals (ATMs).

It is impossible to stop the processes launched by the era of digital currency and values. Therefore, in the absence of leverage on the blockchain system, states can only form the attitude towards this reality and try to fit it into the legal systems. In Germany, New Zealand, Switzerland, Japan, cryptocurrencies are recognized by the state as means of payment and units of account. In France, Poland, Sweden, bitcoin is equated to property, and in the USA, it refers to personal property controlled by a private key and accepted as collateral. In China, Morocco, Algeria, Bolivia, Egypt, Ukraine, cryptocurrencies are completely or partially prohibited. In Vietnam, India, Russia, Belarus,

[2] Dated 27 December 2021, at the coindesk.com exchange rate, the cost of bitcoin is $ 51,494 or 3,791.750 rubles.

cryptocurrencies are actually in civil circulation, but without defining special legal conditions: they are neither money, nor goods, nor values, and they circulate depending on the supply and demand (Zaitsev and Meleshko, 2020, p. 87).

Cryptocurrency turnover regulation has become a problem not only of private, but also public, as well as international law. The decentralized, cross-border and supranational nature of cryptocurrencies' generation and turnover over time began to be used by perpetrators for illegal purposes:[3] financing of terrorism and extremism, drug trafficking, corruption, money laundering, theft, fraud, extortion and others. As always, criminality in its ingenuity and resourcefulness outstripped law-enforcement authorities and at first forced law enforcers to assess the very illegality of the acts committed. The growing trend of using cryptocurrency turnover for criminal purposes makes criminalists pay more attention to this "monetary surrogates" and to the problems that arise in the investigation of such crimes.

II. Methodology

The number of criminal cases involving the element cryptocurrency is constantly growing. Thus, in 2021, 954 criminal cases were initiated by the investigative bodies of the Russian Federation. Of this load of criminal cases, 738 crimes were related to drug trafficking. In 96 % of cases, criminal cases were initiated by investigators of the agencies of internal affairs of the Russian Federation.

In 2021, Investigators of the Investigative Committee of the Russian Federation dealt with only 7 criminal cases in three constituent entities of the Russian Federation — Krasnoyarskiy and Primorskiy Kray, as well as the Kurgan region.

The authors analyzed 411 court decisions having the word "cryptocurrency" in court files and posted on the website sudact. ru (dated 21 June 2022). They highlighted that none of cited cases contained indications of the procedural status of the cryptocurrency. Also, these decisions did not indicate how cryptocurrency was

[3] Available at: https://go.chainalysis.com/ [Accessed 27.12.2021].

discovered, "withdrawn," or how its safety was ensured. The final procedural decisions did not determine cryptocurrency's fate.

Tutynin and Khimicheva, in this regard, reasonably note that "law enforcement officers avoid "contacting" with cryptocurrency, they do not in any way record procedural actions and decisions with cryptocurrency and other digital financial assets" (Tutynin and Khimicheva, 2022, p. 10).

III. Analysis

With regard to the legality of cryptocurrency turnover within the territory of the Russian Federation, it should be noted that the legal definition of digital currency was first given as yearly as on 1 January 2021 in Federal Law No. 259-FZ dated 31 July 2020 "On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation."[4] In accordance therewith, a digital currency is a set of electronic data (digital code or designation) contained in the information system that are offered and (or) can be accepted as a means of payment that is not the monetary unit of the Russian Federation, the monetary unit of a foreign state and (or) an international monetary or accounting unit, and (or) as an investment and in respect of which there is no person liable to each owner of such electronic data, with the exception of the operator and (or) nodes of the information system, that only ensure that the procedure for issuing these electronic data and the implementation of actions in relation to them to make (change) entries in such an information system comply with its rules.

The law established a number of prohibitions, for example, accepting payment for goods, works and services in digital currency, disseminating information about the offer and acceptance of digital currency as a method of payment for goods, works and services. At the same time, entities can defend in court claims related to the possession of digital currency only if they reported that they have such a currency, and they have made transactions or operations with it.

[4] Federal Law No. 259-FZ dated 31 July 2020 "On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation." Legal Reference System "ConsultantPlus" [Accessed 19.12.2021] (In Russ.).

Therefore, in the Russian Federation, state workers are also not prohibited from possessing digital currency. At the same time, it is not an official monetary asset, it cannot be used as a means of payment, its turnover is still beyond the legal framework.

Conducting a study of cryptocurrency turnover as a new subject of criminalistic analysis, the authors examined a sufficient array of empirical materials, which leads to the conclusion that cryptocurrency can act in two forms when committing crimes: direct and indirect ones. In its direct form, cryptocurrency is the subject of an offence when criminal actions are aimed at the illegal transfer of digital rights from the cryptocurrency owner to the perpetrator or other persons. It takes place when a theft and/or fraud are committed. This also includes crimes, although not directed against someone else's property, but aimed at seizing someone else's digital rights, when cryptocurrency is the key interest of the criminal, for example, in the form of a bribe.

With an indirect form of using cryptocurrency, transactions are made by the cryptocurrency owner, who is allowed to operate his crypto wallet without signs of unauthorized access. For example, when transferring (paying) money for the sale (acquisition) of drugs, as an object of money laundering, etc.

In our opinion, the issue of voluntary execution of transactions is the key one when choosing criminalistic tools (investigative actions and criminal intelligence operations) in the course of detecting and investigating crimes.

Other classifications of the crimes under consideration can be found in the scholarship. For example, differentiation into crimes when cryptocurrency is used as an actual means of payment and crimes when it is the subject of a criminal assault (Perov, 2020b, p. 11). Researchers also proposed classification that allows subdividing crimes using cryptocurrency into quite distinguishable groups:

1. Sale of prohibited goods and services (drugs, weapons, video content, etc.), in which digital currency acts as a means of payment.
2. Legalization of proceeds from crime by cashing out of digital currency.
3. Theft of digital currency by any means.
4. Cyber fraud using malicious software.
5. Terrorism financing (Bederov, 2021, p. 5).

The authors' study of domestic investigative practice and jurisprudence allows us to supplement this classification with corruption crimes when cryptocurrency is increasingly used as the subject of a bribe. Attractiveness of bitcoins used as a bribe can be explained by the peculiarities of the technology predetermining its existence, as discussed above. Bitcoin's peculiarities explaining its attractiveness include: 1. anonymity of the subject of transactions; and 2. decentralization, i.e., absence of a single issuer and regulator, which determines both the deflationary nature of bitcoin and the impossibility of its arbitrary change or blocking.

Another advantage of using bitcoins as the subject of a bribe is the difficulty of their assessment by law-enforcement authorities and the court for the purpose of bringing a person to criminal responsibility, since today there is no official bitcoin exchange rate in Russia (unlike, for example, the United States). Meanwhile, bitcoin has an obvious exchange value and can be quite easily converted into a currency that performs the function of an official means of payment. We mention herein that we predict the use of not only bitcoins as fungible tokens, but also non-fungible tokens (NFTs) as a bribe in the near future. These are cryptographically unique tokens associated with digital content that provide proof of ownership. They are digital assets containing identifying information recorded in smart contracts. Today it is one of the fastest growing sectors of the crypto industry. NFTs have unique attributes, they are usually associated with a specific asset and can be used to prove ownership of digital items up to ownership of physical assets. They can be presented with any virtual objects to prove their value or rarity: collectibles, works of art, land parcels, etc.

At the same time, the relative anonymity of financial transactions using cryptocurrencies, the difficulty of proving the actual ownership of a crypto wallet by a specific person (Klyuchnikov, 2018, p. 85), and a number of other unresolved procedural and criminalistic problems do not prevent the detection, investigation and clearance of crimes. So, on 17 April 2019 two investigators from the Investigation Department of the FSB security agency of Russia were detained on charges of extorting a bribe in the amount of 65 million rubles, which was supposed to be

transferred in bitcoins. When the first tranche in bitcoins in the amount of 3 million rubles was already credited by the briber to the "crypto wallet" registered for another person, they were detained. In March 2020, they were sentenced by a military court to 9.6 and 12 years respectively (Materials of the Department of Criminal Procedure and Criminalistics).

Nevertheless, the largest number of examined criminal cases is connected with the laundering proceeds of crime obtained as a result of the sale of narcotic drugs, psychotropic substances and their analogues.

The criminal case considered by the Leninsky District Court of Saransk is the characteristic one. Members of the criminal community (criminal organization), in order to legitimate the possession, use and disposition of cash assets obtained by criminal means, following the instructions of the organizers and leaders of the criminal community (criminal organization), opened virtual Internet accounts to receive payment for the work done in the form of crypto currency — bitcoin, — as well as accounts with "Qiwi-Bank" JSC, "Yandex.Money," PJSC AKSSB "KS Bank," PJSC "Sberbank of Russia," PJSC "Bank Otkritie" both in their own names and in the names of third parties. At the same time, electronic wallets (Qiwi-wallets) and bank accounts were used, where, by transferring from crypto currency — bitcoin to Russian rubles, money legalized from drug trafficking was transferred through an online exchange.[5] The authors found similar legalization schemes using cryptocurrency in other court decisions.[6]

[5] The Ruling of the Leninsky District Court of the City of Saransk of the Republic of Mordovia dated 2 May 2017 (case No. 1-87/2017) on charges of T. and others, of committing a crime under Part 2 Art. 210, Part 3 Art. 30, Items "a, d" Part 4 Art. 228.1, Item "a" Part 3 Art. 174.1 of the Criminal Code of the Russian Federation. Available at: https://sudrf.ru/ (In Russ.) [Accessed 12.09.2022].

[6] The Ruling of the Leninsky District Court of Saransk of the Republic of Mordovia dated 15 June 2017 (case No. 1-102/2017) on charges of N. and others, of committing a crime under Part 2 Art. 210, Part 3 Art. 30, Part 5 Art. 228.1, Item "a" Part 3 Art. 174.1 of the Criminal Code of the Russian Federation; The Ruling of the Sovetsky District Court of Krasnoyarsk dated 2 June 2016 on charges of N. and others, of committing a crime under Items "a, c" Part 2 Art. 229.1, Part 3 Art. 30, Items "a, d" Part 4 Art. 228.1, Item "a" Part 3 Art. 174.1 of the Criminal Code of the Russian Federation. Available at: https://sudrf.ru/ (In Russ.) [Accessed 12.09.2022].

In 2019, the Supreme Court of the Russian Federation confirmed the practice of criminal qualification of transactions with cryptocurrency, supplementing the Resolution of the Plenum of the Supreme Court No. 32 dated 7 July 2015 "On judicial practice in cases of legalization (laundering) of monetary funds or other property acquired by criminal means, and on the acquisition or sale of property obtained by criminal means" with a new paragraph, according to which, "...based on the provisions of Art. 1 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism dated 16 May 2005 and taking into account FATF Recommendation No. 15, the subject of crimes under Art. 174 and 174.1 of the Criminal Code of the Russian Federation may also include monetary funds converted from virtual assets (cryptocurrency) acquired as a result of a crime.[7]

At the same time, we also find examples when the accused converted bitcoins received from the sale of drugs into rubles, which he then transferred to a third party's bank account and the court did not recognize this as legitimization.

Thus, the court found K. guilty of six crimes in the field of drug trafficking, as well as of legitimization (laundering) of proceeds acquired as a result of committing a crime (Part 1 Art. 174.1 of the Criminal Code of the Russian Federation). According to the case file, K. converted the bitcoins he received from the sale of drugs into rubles that he then transferred to the bank account of a third party. An indictment and a description of a criminal act against K. did not contain an indication of any further transactions with funds. Under Federal Law No. 115-FZ dated 7 August 2001 "On Countering the legalization (Laundering) of Proceeds from Crime and the Financing of terrorism," legitimization (laundering) of proceeds from crime is understood as giving a lawful form to the possession, use or disposal of funds or other property obtained as a result of the commission of a crime.

[7] Resolution of the Plenum of the Supreme Court No. 32 dated 7 July 2015 "On judicial practice in cases of legalization (laundering) of monetary funds or other property acquired by criminal means, and on the acquisition or sale of property be obtained by criminal means". Legal Reference System "ConsultantPlus" [Accessed 19.12.2022] (In Russ.).

However, the Court of Cassation indicated in its decision that the crime under Art. 174.1 of the Criminal Code of the Russian Federation relates to the sphere of economic activity, and its necessary element is the purpose of involving money and other property obtained as a result of the commission of a crime in lawful economic turnover. For this corpus delicti, not just financial transactions and transactions with property obtained by criminal means are necessary, but actions aimed at establishing, changing or terminating civil rights and obligations, giving them the appearance of legitimacy. This is how legitimization as a criminal offense differs from the crime committed using financial institutions, the purpose of which is conspiracy as a way to generate income. The term a monetary means or funds as the subject of a crime under Art. 174.1 of the Criminal Code refers to the funds in the currency of the Russian Federation or in foreign currency, as well as non-cash funds, including electronic money. Thus, the court of first instance had to check whether the cryptocurrency "bitcoins," illegal actions with which K. is incriminated, refers to the subject of Art. 174.1 of the Criminal Code of the Russian Federation. The court of cassation overturned the sentence imposed on K., referred the criminal case for a new hearing to the same court with a different qualification.[8]

Our study allows to state that a typical mechanism for committing crimes has already been developed. Its distinguishing feature includes organization of digital currency transfers between crypto wallets by means of subscriber electronic devices and their subsequent exchange for the so-called fiat money. In the case when a digital currency acts as a means of payment, the method of investigation, and, consequently, of countering it, has specifics associated only with the electronic nature of this means.

The specificity of the investigation of such crimes is associated with the seizure and examination of electronic subscriber devices from which access to the sphere of circulation of cryptocurrency was carried out, obtaining evidence from informed persons about circumstances relevant to the case, and conducting forensic examinations.

[8] The Ruling of the Seventh Court of Cassation of General Jurisdiction dated 28 June 2021 in case No. 77-776/2021. Legal Reference System "ConsultantPlus" [Accessed 21.06.2022] (In Russ.).

Cryptocurrency, as a rule, is stored in a special crypto wallet, which means a program for managing virtual assets, the most valuable elements of which, like any activity on the Web, are login and password. The specificity of cryptocurrency is that the loss of a crypto wallet (login or password) means an unconditional loss of digital assets, since in the absence of a system administrator they are irreplaceable. This is the downside of decentralization: more freedom means more responsibility. The loss of passwords is the reason why the volume of cryptocurrency in circulation is constantly (slightly, but irreversibly) decreasing, since, as you know, the emission of cryptocurrencies is limited. To establish a crypto wallet and access to it, tactical forensic complexes should be used, which are still waiting for their developers. However, even now, investigative practice can offer effective ways to solve such tactical problems.

For example, in the course of criminal proceedings, "...an inspection of an electronic wallet (bitcoin wallet) with cryptocurrency — bitcoin — information about which was discovered (established) during the examination of a *Dexp* cell phone seized from citizen Z. The investigation used a personal computer with an Internet connection. It was found that in the memory of the *Dexp* cell phone there was information about an electronic wallet (bitcoin wallet) with a login and password. In order to inspect and study the specified electronic wallet on the Internet, an entry was made to the electronic platform of the *Exmo* cryptocurrency exchange under that account and the following information was established: after entering the exchange under the above login, the exchange window opened, where in the top menu there was a menu of wallets. When you open this menu, information about all account wallets that contain information about cryptocurrency — bitcoin — is displayed. For each cryptocurrency that can be traded on the exchange, a specific wallet is attached. When examining the wallet of this account, it was established that there was information about the operations carried out with cryptocurrency — the transfer of cryptocurrency into rubles and cash withdrawal in rubles for a total of 52.000 rubles.[9]

[9] An indictment in a criminal case on Z's charge of committing crimes under Part 3 Art. 290, Part 1 Art. 283 of the Criminal Code of the Russian Federation. Proceedings of the Department of Criminal Procedure and Criminalistics of the Faculty of Law of St. Petersburg State University.

That is why the key role in the investigation of crimes involving cryptocurrency should involve dealing with the owners of crypto wallets. A crypto wallet is a kind of an equivalent of a bank account where users store their cryptocurrency and make transactions. It does not store cryptocurrency in the form of data, but contains only keys for managing addresses and implements technical interaction with the blockchain (i.e., it forms transactions or searches for information in the ledger). Some types of crypto wallets implement currency exchange functions, additional security tools and other tools. The crypto wallet can be used to store various cryptocurrencies. These are the so-called multi-pockets. The number and types of stored cryptocurrencies vary depending on the type of the multi wallet. Multi wallets, as well as regular wallets, are differentiated into hot and cold.

A hot wallet is a wallet that performs a transaction at any time with Internet access. It is noted that hot wallets have the advantage of speed and operation. However, they are subject to some risks, e.g., a cyber-attack and hacking, due to which users' funds may be stolen. Unlike a hot wallet, a cold wallet is much safer, but it is less convenient to perform transactions with it. A cold wallet is a tool for storing access data to the user's cryptocurrency assets that does not require a permanent connection to the Internet. Cold wallets can include a computer that is not connected to the Internet, where crypto assets are stored, a hard disk with cryptocurrency or an ordinary sheet of paper with access keys printed on it. The main disadvantage of cold wallets is an inconvenient transaction procedure, which usually involves several stages and takes much more time than a simple transfer via a hot wallet. Also, cold wallets are subject to such physical risks as loss, destruction, breakage, theft, etc.

Hardware wallets constitute one of the types of cold wallets. A hardware wallet for cryptocurrencies is a special electronic device designed for the needs of cryptocurrency owners. Hardware wallets represent a cross between a USB flash drive and a smartphone. To make transactions, you need to connect your wallet to your computer via USB. Hardware wallets store all the necessary keys, they have a mechanism for entering a password and connecting to a computer. At the same time, stealing a hardware wallet gives absolutely nothing

to a wrong-doer — it is extremely difficult to "get" a password from a hardware wallet (Karpilovskiy, 2018, p. 111). Data concerning the status of the wallet and its owner can be obtained only with the help of special analytical tools, using the results of investigative actions and operational investigative measures.

Unlike determining and verifying the user's identity and authority when opening a bank account, user's identification when registering a crypto wallet is not performed in the cryptocurrency system. Therefore, identification of crypto wallets' owners is very difficult due to the fact that their registration at the exchange (a special service) does not require providing any personal data about the person.

Anonymous (in the legal sense) possession of a crypto wallet is the norm and custom of the digital assets turnover similar to the possession of fiat money in the traditional economy (Manuylov, 2018). In fact, if a suspect or an accused does not voluntarily inform about having access to the crypto wallet (i.e., the right to dispose of it) and does not provide law enforcement and judicial authorities with the crypto wallet details, public and private keys (login, password, PIN), the possibility for investigation and inquiry agencies and court to establish the fact that the suspect or the accused has cryptocurrency, are significantly limited and depend on the results of operational investigative and inquisitorial activities and other procedural actions carried out in cooperation with Rosfinmonitoring bodies, cryptocurrency exchanges and their representative offices in the Russian Federation, or departments of foreign bodies within the framework of international legal assistance. At the same time, gaining access to the wallet cannot guarantee electronic data protection from manipulation by the suspect (accused) or other persons, since anyone who knows the access key can enter the crypto wallet from any device at any time and withdraw cryptocurrency.

Therefore, an important aspect necessary for the implementation of the criminal procedure mechanism for the seizure of property in relation to cryptocurrencies is the permission for the bodies of preliminary investigation and inquiry and courts at the legislative level to create multi-currency crypto wallets, as well as to grant them the right to create and use digital electronic signatures (or multi-signatures used for joint authorization by different authorized persons, for example, an investigator and an employee of the financial and economic

department, for joint authorization). Such a procedure, for example, exists in the United States, where the crypto assets of persons who, by law, may be subject to the seizure of their property are transferred to controlled crypto wallets during special procedural and technical measures, thereby depriving suspects and accused of the rights to use and dispose of cryptocurrencies. At the same time, voluntary transfer of information about access to crypto wallets is based on criminal responsibility: evasion of the suspect who caused harm or the accused from providing information about his property, is punishable (Emelyanova and Butenko, 2022, p. 72).

Prof. A.Yu. Ushakov notes that in most cases, data concerning the owners of crypto wallets become known under several scenarios:

— the applicant is the owner of the crypto wallet;

— the person who committed the crime has turned himself in;

— information about the owners of crypto wallets became known as a result of cryptocurrency transactions (as a rule, their withdrawal or exchange);

— information about the owners of crypto wallets became known as a result of direct reference to them by any of the participants in the criminal case;

— information about crypto wallets owners became available from the expert 's opinion concerning the conducted computer examination (Ushakov, 2020, p. 54).

However, the authors would like to dwell on one more problem related to the peculiarities of the seizure of cryptocurrency. Under Art. 115 of the Code of Criminal Procedure of the Russian Federation, in order to ensure the execution of a sentence in terms of a civil claim or possible confiscation of property, the investigator initiates a petition before the court to seize the said property of the accused (suspect), that is, the cryptocurrency, which is (was) the subject of criminal encroachment. However, there are a number of unresolved issues here (Philipson and Ryabinin, 2020, pp. 132–138).

First, it is primarily necessary to get (request) information about availability of a cryptocurrency wallet. In this regard, the scholarship highlights that when the regulator (cryptocurrency exchange) is located on the territory of another state, the request for information or direct

legal restriction in the form of withdrawal "will be executed exclusively by a platform that recognizes the powers of law enforcement agencies of Russia," other subjects of relations can ignore, since "disclosure of information about holders of cryptocurrencies contradicts the principle of anonymity of their functioning."

Second, the cryptocurrency must be secured in money, which can cause a significant difficulty, since the rates of most digital currencies are characterized as highly volatile. As Prof. A.Yu. Klyuchnikov notes, for these purposes, you can use online cryptocurrency exchanges with a higher trading volume. However, there are many exchanges, each of them has its own quotes. Thus, one can use data of several of them as a basis (the bitcoins rate against the ruble). The high risk of significant fluctuations in the price of cryptocurrency leads to the situation when during the court proceedings, the value of the seized units of cryptocurrency in terms of rubles can change significantly (e.g., the crisis and subsequent bankruptcy of the FTX cryptocurrency exchange that significantly affected the rate of the most popular cryptocurrency — bitcoin).

Since the court must describe the method of providing a collateral (security), it will need to specify the type and the bitcoin wallet address (e.g., 3RThjIt9pogh5sJjMJErEy9wLdVGSvbrt8). According to the general rules for building block chains, the address will be visible to all Network users. For some cryptocurrencies, you can put a "signature" (label) to the blocks, indicating that they were secured as part of the investigation (one can specify the procedural authority that made the decision and sign with a digital signature).

Attachment may require the creation of a special investigative/judicial wallet, to which the cryptocurrency component of the collateral will be transferred. This is necessary even for currencies placed in a paper wallet, since there is always a risk of having copies of such a wallet with the possibility of loss of collateral. Therefore, the best solution here is to use hardware wallets (Klyuchnikov, 2018, p. 66). But as V.V. Obraztsova points out, firstly, it is necessary to strictly limit the persons who have the right to work with such devices, determine storage locations, ways of documenting operations using equipment, and secondly, it should be borne in mind that, like any other information data carrier, a hardware

wallet can be subjected to mechanical and system damage (Obraztsova, 2017, p. 645).

Therefore, an important aspect necessary for the implementation of the criminal procedure mechanism for the seizure of property in relation to cryptocurrencies is the permission for the bodies of preliminary investigation and inquiry and courts at the legislative level to create multi-currency crypto wallets, as well as to grant them the right to create and use digital electronic signatures (or multi-signatures used for joint authorization by different authorized persons, for example, an investigator and an employee of the financial and economic department, for joint authorization). Such a practice, for example, exists in the United States, where the crypto assets of persons who, by law, may be subject to the seizure of their property are transferred to controlled crypto wallets during special procedural and technical measures, thereby depriving suspects and accused of the rights to use and dispose of cryptocurrencies. At the same time, the voluntary transfer of information about access to crypto wallets is based on criminal responsibility: evasion of the suspect who caused harm or the accused from providing information about his property, is punishable.

According to the decision of the Board of the Ministry of Internal Affairs of Russia No. 3km dated 1 November 2019 "On measures to improve the work on identification, disclosure and investigation of crimes committed using information and telecommunications technologies," development of a legal mechanism for virtual assets' attachment in order to seize them was entrusted to the divisions of the Ministry of Internal Affairs of Russia in cooperation with Rosfinmonitoring, the Prosecutor General's Office of the Russian Federation, the Investigative Committee of the Russian Federation of the Russian Federation, the Ministry of Justice of the Russian Federation, the FSB of Russia. Federal Customs Service of Russia, Federal Bailiffs Service of Russia, with the participation of the Supreme Court of the Russian Federation. The deadline for developing proposals was until 31 December 2021. However, to date, a specific mechanism for the attachment of crypto currency to compensate damage caused by the use of digital currency is still under development. While in a number of foreign countries, including the post-Soviet countries, certain steps have already been taken to resolve this issue.

IV. Conclusion

Criminalistics should develop even faster in order to keep up with the changes in society that are caused by the rapid modification of information and telecommunication technologies and cause the emergence of new subjects of criminalistic analysis. It is obvious that a new task has been set for the scientific criminalistic community, requiring to increase the development of criminalistic characteristics of crimes related to the turnover of cryptocurrencies, understanding the mechanism of their commission, as well as mechanism of marking formation as a result of generation and transactions of cryptocurrencies. Criminalistic tools for detecting, preventing and investigating such incidents need to be improved: the development of typical investigative situations, tactical complexes for establishing the owners of crypto-wallets, the facts of the transfer of digital rights to other persons, tactical methods for detecting, fixing, seizing (copying) virtual traces of transactions, programs for interpreting virtual traces and many other problems need to be clarified.

Such research takes time, but investigative and trial practice cannot wait for the results of dissertation research, the publication of scientific monographs and forensic textbooks. Practical tools are needed even today. Therefore, the moment has come when recommendations should be formulated, at least brief ones, but clear and practically applicable so that investigators and operational officers can use them in their practical activities. The organization of urgent advanced training courses for investigators who could specialize in investigating such crimes is seen as a reasonable way out in such a situation, and specialists in the field of IT of the highest level, as well as, experts from foreign jurisdictions where experience in preventing such crimes has already been accumulated should be involved in their training (retraining).

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Article

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Personal Identity in the Metaverse: Challenges and Risks

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Abstract: Gone are the days when humanity existed in only one dimension. Digitalization, artificial intelligence (AI), virtual reality (VR) and augmented reality (AR) create new opportunities but also pose new challenges and risks for society. One of the most vital concerns that arises due to these changes is whether people's perception of themselves remains the same or it is gradually changing. These issues require particular attention amid the emergence of a new world: the metaverse. The article addresses the issue of identifying the main changes happening to a person's 'self' from a philosophical and legal perspective and outlines the already existing threats to human rights. The study revealed that it is already possible to speak about serious transformations in a personal identity construct, which is changing qualitatively, but also expands dimensionally, i.e. there are not only a multiple identity, but also a multidimensional one. These transformations have caused serious implications of ethical and legal character. Digital identity in its legal sense has become an integral part of our lives, whether we like that or not. Privacy is becoming the most topical issue as the ubiquitous surveillance, data gathering of various kinds leave next to nothing as to preserving your private life private.

Keywords: metaverse; digital reality; cyberspace; identity; digital identity; self; homo digitalis; human rights; ethics

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Contents

I. Introduction

In terms of technologies, the humanity has already come a long way. Today, we are facing an immense introduction of technologies and tools only science fiction writers dared to dream about. Indeed, digitalization has become an integral part of existence. It is transforming all the spheres of life and bringing about changes to society. Artificial intelligence (AI) being one of the most valuable and fast developing areas is undoubtedly impacts all aspects of our life, intertwining with everything already created and offering new — smarter and faster — solutions to the existing problems. More than that, AI has opened way for a new world: the metaverse.

Today it is becoming trendy to discuss the metaverse, namely the term that appeared in "Snow crash" written by Neal Stephenson (1992). Stephenson developed an idea depicting an artificial parallel digital world intrinsically linked to the conventional reality. Still, the metaverse is not the only way to describe similar environments. Thus, William Gibson (1984) popularized the term "cyberspace," which is his interpretation of a virtual world at the edge of the information era.[1] Jean Beaudrillar (1981) coined the term "hyperreality" linking

[1] Interestingly, Gibson introduced the term "cyberspace" in his short story "Burning Chrome" written in 1982, but it was only after "Neuromancer" that "cyberspace" went viral.

it to the idea of a simulacrum — something replacing reality with its representations — so one cannot see the line between the real and the unreal. In the "hyperreality," the image or simulation dominate; the products are sold before they even exist; virtual selves pervade. Nevertheless, the term "metaverse" took the lead in 2021 after several multinational companies announced their plans to create the digital environment capable of providing people with new experiences and opportunities; and, eventually, a new life.

There is no doubt that it is too early to speak about the Stephenson's metaverse, let alone ideas covered in such science fiction films as "The Matrix" and "Ready Player One." However, there are certain achievements present, for example, in gaming simulations of various kinds. Blockchain technologies, cryptocurrencies and NFTs are gaining momentum in completing the next stage in the development of the metaverse. Apart from its obvious commercial ground, the metaverse is said to create exquisite opportunities for socializing, networking, and communicating in the post Covid-19 information era. Lack of real social contacts set off a series of discussions aimed at overcoming psychological pressure caused by the necessity to remain locked down. Guelmami and Nicolle (2022) note that "social bonding is becoming the most crucial feature of cyberspace, rather than information exchange." Eventually, these two realities are expected to coincide. Ljubisa Bojic (2022) notes that "living in parallel virtual and direct realities will be a future course of humanity, a world in which digital will be integrated into physical reality so much that it will dominate it, and not vice versa."

The development of the metaverse environment is bringing about many changes to society in general and sparks off vivid discussions on such issues as personal data protection and privacy, artificial intelligence (AI) technologies implementation, ownership and NFTs, reputation and deep fakes, ethics and human rights protection. Besides, the human nature has undergone dramatic changes as well, for example, the way people identify themselves has become different.

Several things are discussed in this article, the concept of the "metaverse" itself being one of them. Today, the term "metaverse" seems rather ambiguous and it is important to clarify and distinguish between various approaches. This study aims to present and analyze

recent works on the metaverse. Second, it is important to look at a participant/subject of the relationship in the metaverse. Third, it is vital to consider some ways the emerging realm of metaverses changes the person's identity both in practical and philosophical ways. Finally, the article aims to see if there are any changes in the perception of a person in terms of human rights protection.

Some of the methods used in the course of the research are philosophical, general scientific and specific legal methods. These methods helped to define the main transformations and identify some legal issues taking place in terms of personal identity. Discourse analysis of different sources made it possible to identify the points for discussion. Content analysis as one of the research methods employed in the course of the study made it possible to define the main characteristics and features of the metaverse, to outline a number of legal implications that may arise amid the emergence of the immersive metaverse.

It is important to mention that this article does not aim at covering technologically driven issues inherent in the metaverse, e.g., blockchain, cryptocurrency, etc. but primarily targets the issues related to a human as a subject of this new reality.

II. The Rise of the Metaverse: Definition and Main Features

The past couple of years have shown a significant increase in the interest to the so-called metaverse. Some say that the metaverse is a new gaming simulation aiming at giving their users options to distract themselves from the hardship of the real life. Some believe that this is our nearest future where the only physical interaction is left to our own bodies. Still, it is not clear whether we are discussing the only one unique metaverse or it is rather a network of a range of metaverses created by different corporations. Nevertheless, most authors refer to "The Metaverse" implying a particular kind of the virtual reality.

The term itself is one of the most frequently used nowadays but very few have tried to properly explain what it implies (ReedSmith LLP, 2021; Jeon et al., 2021; Bojic, 2022; Ball, 2022). In the broadest

terms, metaverse is a digital (virtual reality) environment that enables their users (avatars) to interact with each other in various different ways. The term itself first appeared in a science fiction novel written by Neal Stephenson in 1992. His "Snow Crash" showed a new reality that allowed citizens to create a different life style through engaging in virtual reality activities. It is not only a way out of reality; it is a new space for business and life.

Matthew Ball (2022) defines the Metaverse as "a massively scaled and interoperable network of real-time rendered 3D virtual worlds that can be experienced synchronously and persistently by an effectively unlimited number of users with an individual sense of presence, and with continuity of data, such as identity, history, entitlements, objects, communications, and payments."

Metaverse is also presented as "an online, 3D, virtual space connecting users in all aspects of their lives. It would connect multiple platforms, similar to the internet containing different websites accessible through a single browser" (Binance, 2021).

Metaverse is sometimes described as an imaginary word, world of dreams, such as in "The Matrix" movie, depicting humans as a fuel having the only living function: dreaming. In fact, what we see today is a changing economic and governance paradigm resulting from ubiquitous implementation of artificial intelligence technologies (AI). Jeon et al. (2021) point out that the metaverse aims at creating new economy and governance realm combining both virtual and real political, economic, social and cultural interactions.

Lee et al. (2021) point out the following key technologies for the development of the metaverse: extended reality, user interactivity, AI technologies, blockchain, computer vision, Internet of Things (IoT) and robotics, edge and cloud computing, and future mobile networks such as 5G. This list can be well enlarged by augmented reality (AR) technologies, developments in neurosciences (for example, the so-called "brain-readers" implemented in Chinese schools are discussed further in the article).

Such a metaverse has a lot to offer. For example, one of the key features that is outlined by most is that the metaverse allows people to socialize in a new better way. The second idea concerns creativity.

Jeon et al. (2021) note the intrinsic human desire to create and this undoubtedly what the metaverse has to offer: tabula rasa for imagination.

Some authors prefer to use such a term as "cyberspace" that is hardly different from the metaverse as to its basic characteristics. Guelmami and Nicolle (2022, p. 2(362)) define cyberspace as "an Internet-mediated space of human existence" and note that "from different theoretical perspectives, cyberspace is equivalent to "real," offline space."

To some point of time, the metaverse remained an abstract idea used in sci-fi books and films; later it became a gaming space. There is no doubt, that today the metaverse is something that still belongs to the gaming environment. Although some would disagree as it is forming a brand new market engaging more and more people and corporations in a range of economic relationships. Cryptocurrency, blockchain, NFTs, etc. are becoming more and more familiar to the public. Covid-19 and such consequences as digitalizing and virtualizing of society gave rise to rethinking of both "real" reality and the virtual (Internet) reality.

There is an approach to the issue in question that dwells upon a range of metaverses (thus referring to "A metaverse" or "metaverseS"). To some extent, it is also true, but in this case the term is used to describe different gaming platforms that do engage some of the technologies and ideas inherent in the metaverse (and probably even form some kind of the base ground for the creation of the metaverse) but remain independent from the rest of the net.[2]

One of the most widely known metaverses — as simulation gaming platform — is "The Second Life" that allows users to create their life in a different environment. A user creates an avatar — a new identity that communicates in the game. The game in its nature provides for numerous opportunities to promote and run different businesses. Some time after the game had been launched, the "Second Life" market appeared: this particular metaverse launched its own currency that is traded at the "local" stock exchange and is used to purchase necessary items that avatars use.

[2] Among the most known metaverse platforms *see*, e.g., Minecraft, The Second Life, Roblox, Decentraland, etc.

Roblox became another great example of an emerging metaverse allowing its users to interact and socialize together through the creation and playing games, some of which charge the players, offer goods and service. Indeed, there are quite a lot of gaming environments providing their users with multiple opportunities to create their imaginary worlds at the same time socializing and doing business.

Mark Zuckerberg caused a new wave of interest to the term when he introduced some changes to the company. He wanted to present the metaverse as a successor to the existing Internet, forming new immersive environment that will allow the users to interact with their families, friends and businesses in a new way. It is hard to imagine that kind of immersion at this very point; still many companies claim to launch their metaverses.[3] Today, it is more about gaming and illusion although the idea that lies behind is the feeling of presence as a vital feature of the "metaverse."

Despite the fact that there are quite many approaches to understanding the metaverse and there are multiple metaverses created by a number of corporations, the main idea is interconnection of all of these "verses" in a way to create a truly unique parallel structure allowing for a new way of existence and coexistence — the metaverse.

Put bluntly, the metaverse is a virtual, transcendent universe, which creates not only new opportunities for businesses and the users, but also creates new types of identities and transforms the perception of the existing ones.

III. Transforming Personal Identity in a Digital Environment

Personal identity (hereinafter "identity") is one more aspect of human existence that has undergone profound changes. Since the earliest days of humankind, scholars have defined identity in quite a broad manner. To some extent, the concept has become rather ambiguous given its wide application in various fields. Besides, there is one more concept that is commonly used in a similar sense, namely "personality."

[3] *See* e.g., Microsoft, Unity Technologies, Roblox Corporation, Nvidia, Tencent (described its idea of the metaverse as "Hyper Digital Reality," Krafton, Alibaba, etc.

To make this discussion clearer, let me differentiate between these two terms. Cambridge Dictionary defines *identity* in two ways. The first, and it seems the most obvious idea, identity is "a person's name and other facts about who they are." The second, which is of particular interest in the course of this discussion, is "the fact of **being**, or **feeling** that you are, a particular type of person <...>; the qualities that make a person <...> different from others."[4] At the same time, "personality" is referred to as "the special combination of **qualities in a person** that makes that person different from others, as **shown by the way the person behaves**, feels, and thinks."[5] Thus, the concept of "identity" deals with an array of questions a person may ask (of subconsciously feel) about themselves — What I am? Where do I come from? What will I become after death? — and it is often discussed under the term "self," which is sometimes used as a synonym to the word "person."

The "identity" itself appears relatively simple. It is who you are in terms of your name, age, status, origin, etc. On the other hand, there is more than that. The concept of "identity" has become quite an urgent topic for discussion in the past couple of centuries, primarily due to the developments in psychiatry, psychology and, a bit later, sociology. However, many of the ideas developed in psychiatry are based on such philosophical theories as existentialism, humanism, naturalism, and the like. It is no surprise since "identity" in some form or another has been an issue for discussion since the Ancient Greece, when Aristotle, for example, identified a human as a creature both biological and social, i.e., a human is not only a biological species but also, in the first place, a subject of social relations.

Nowadays, the study of "identity" is gaining momentum. Virtual and augmented realities, all the array of technologies emerging and penetrating the life itself change our perception of the world, our experiences, and the way we interact with other people. The boundaries between the real and virtual worlds have blurred. More than that, these boundaries are becoming less evident with every single day.

[4] Cambridge Dictionary. Available at: https://dictionary.cambridge.org/dictionary/english/identity [Accessed 11.08.2022].

[5] Cambridge Dictionary. Available at: https://dictionary.cambridge.org/dictionary/english/personality [Accessed 11.08.2022].

Technological development and gradual transition to the cyber space shaped a similar "digital identity" that is in fact a simple reflection of an offline identity: name, age, origin, nationality, etc. At the same time, digitalization and employment of various technologies possess one important feature: it is ideal for hiding — hiding your identity and thus creating a new artificial one. Besides, it is not only the "real identity" that is being transformed; it is also the "self" that is also becoming the focus of scrutiny.

One more point that can be discussed here is the emergence of multiple identities, not only from different perspectives: philosophical, sociological, psychological, legal, but rather inside each one of them. The pace of life, multiple interactions create multiple identities that make a person doubt if they have one. Eventually this may result in losing identity completely, which is becoming an urgent point.

This part of the article examines the construct of identity in the digital environment (social media platforms, cyber reality and metaverse) from the general and socio-philosophical perspectives. It will also look at how the use of technologies is reshaping our understanding of a human being, both in terms of their mindset and bodies. The question to answer here is whether human nature changes due to constant interactions with virtual realities and to what extent these interactions shape our "self."

III.1 Philosophical Perspective

Recently the "identity" has attracted more attention. The word "identity" derives from Latin *"identitas"* meaning "sameness" and in its philosophical sense "identity" is seen as a relation each thing bears only to itself. Identity here is in the first place the relation that two things are in fact the same thing, i.e., identical to each other. With the development of technologies and in new digitalized realities such as the cyber space or the metaverse, one may pose a just question: am I the same in the digital world as I am in the real one. Daniel Sollberger (2013) notes that "the problem of identity became a problem of substance throughout the history of philosophy in the efforts to define the principle of individuation. Leibniz in his Discourse on Metaphysics

(Section 9) summarized this principle in a mathematical law: it states that no two distinct things exactly resemble each other; otherwise they would be "indiscernibles" and therefore one thing. In other words: two things are indistinguishable and in fact one single thing, if everything that truly can be said of the one may be said of the other as well." Amid technological development, it seems necessary to consider identity as an internal sameness and as a relation to a cultural environment.

Philosophy does not often dwell upon the idea of "identity" per se. First and foremost, they would consider identity in terms of cognition, of "self." In order to understand the concept of personal identity, Locke (1690) distinguishes between person, man, and substance. A person is a thinking intelligent being "which it does only by that consciousness which is inseparable from thinking." Since consciousness always accompanies thinking, "it is what which makes everyone to be what he calls self." Your personal identity depends solely on your consciousness, not on your body. "This may show us wherein personal identity consists: not in the identity of substance, but, as I have said, in the identity of consciousness."

David Hume (1739–1740) refused the fact that humans have a real understanding of the "self" believing that we only experience a number of feelings, and the "self" is nothing but a connective of causative perceptions.

Nikolay Berdyaev (1949, p. 35) describes a human as a complex and complicated creature that is in fact possesses a multifaceted and "multi-storied" self. Thus, his own "self" is at the crossing of two worlds and believes that "this word" is not real, not primary, and not final. There is a "different world," that feels more real and authentic. Berdyaev's self-knowledge is dual: external and internal; objective and creative; realistic and reverie. Indeed, Berdyaev describes his own feelings and his own being writing that "I found little pleasure in living my life, except for creative acts; I felt more enjoyment remembering my life experiences or dreaming about new ones" (Berdyaev, 1949, p. 40).

Transition to the digital reality is a projection of a search of the "self." In the world of the metaverse, there are many who act in a similar (to Berdyaev) way. The duality (and the "self", the "identity") becomes not only multifaceted, it becomes multidimensional. It is not only the

inner and outer of a human, not only their practical and reverie parts — the "self" is now transitioned to one more plane: the natural word and the metaverse.

It is in the human nature that a person longs for some kind of transition. It could be thrill seekers and adventurers leaving their habitats in search of new lands, new knowledge, and new experiences. It could be partisans of religion, looking for answers in sacred books. It could be anyone looking beyond everything that is known. Today it is the metaverse creators and inhabitants.

The real world is a world of illusions as every single human sees the reality in their own way, based on their own empirical knowledge and dreaming abilities. The world of illusions (the metaverse as it is right now) becomes to some extent even more real, bringing most fantasy like ideas to their embodiment. Time is of essence and it flies faster than before. Every second of life is vital and it matters in full when it goes beyond the time. In fact, it is the fear of death that makes the metaverse transcendental and appealing. Any true creative act aims at keeping a piece of "self" in the eternity. The real world as we know it limits creativity as there are some boundaries both natural and conventional that preclude the possibility of reaching this aim. Nothing is eternal. And nothing is real.

It is getting more complicated to create in the natural world — so many things people have already said, written, and created — so the metaverse provides humanity with a new venue for creativity, new venue for self-development and cognition. Any many are more than willing to step into this new world in attempt to create and to find their inner "self."

The creation of a new world is to some extent escape from the reality. In order not to experience real existence, people turn to dreaming about other worlds, both in terms of real creative acts (programming, creating and producing NFTs, etc.) and in terms of "living the time of their life" in a form of avatars, pretending (or dreaming) of a life.

Rene Descartes' "I think therefore I am" principle (1637) is under transformation transmitting human's identity to a new level. "Traveling" between different dimensions, different universes makes a person redefine and reconsider their achievements, desires, and identities.

Moreover, historical and cultural developments, challenges brought up by everyday communications, the changing structure of society create the need for multiple identities making its multi-facetedness even more complex. This complexity may eventually result in the loss of identity. Vladimir Przhilenskiy (2009) notes that "the loss of identity is becoming inherent in a human. Moreover, it affects the masses. The search for a new identity go hand in hand with the creation of a new reality, which makes this search fatalistic." It seems that the further it goes, the more true to life it becomes.

Philosophical perspective in the study of identity is vital for understanding the essence of the construct. At the same time, amid the emergence of the new world multiple identities and occasionally the loss of the identity shift the focus from philosophical reflection to sociological and psychological. This facilitates a consecutive discussion.

III.2 Personal Identity in Sociology and Psychology

Despite the fact the psychiatry, psychology and sociology have popularized the idea of "identity," it is philosophy that laid foundation for the development. Thus, existential and humanistic tradition reminds us of identity as a perception of "self" as the whole. James Bugental (1976) distinguishes between a genuine, procedural, changeable and external, acquired from the outside, rigid identity. He argues that identity is a process of a constant feeling of your own "self" together with accepting your "self" as it is.

All human beings are fluid, meaning-making creatures (Whitaker, 2018). It is not a surprise that changing reality easily transforms human's self-perception and self-awareness.

Social nature of a human being as a Sapiens is intertwined with narrative communication. By means of communicative narrative acts self-awareness and memory (both individual and social, including historical) become an effective tool aimed to shape and develop the construct of "self" and identity. This ability appears as part of a socialization process: learning socio-cultural interaction through communication where humans develop narrative skills describing themselves — narrating about themselves as the active participant of events (Tulchinskii, 2021).

A person, as a class, becomes specific as a real subject having their identity. The concept of "identity" focuses on a human, in the first place, as a separate individual as a representative of top biological species Homo Sapiens. There is an opinion that Homo Sapiens as a species has already become an endangered species slowly transforming into a human being constantly connected to some screens and displays.[6] It seems reasonable and the above discussion brings us to the idea that we may be at the very beginning of a new era: the era of Homo Digitalis.

III.3 Identity Transformation through a Legal Perspective

As Professor Vladimir Przhilenskiy (2009, p. 37) rightly mentioned "new identity, whatever it is — acquired voluntarily or not, adopted or imposed — is always about new rights, new powers, new blame and new responsibility. We have all become the bearers of at least one new identity, i.e., digital identity. Digital identity is put in the core of the real life. It is almost impossible to avoid being involved into this (Wyatt, Vanhaecht and van Es, 2021). A digital identity, or digital ID, is a representation of a person's real self, online. Just like in the real world, many unique identifiers can make up a digital identity. Among these one can name, for example, such personal information as the name and date of birth, email address, gender, marital status and so on. Thus, digital identity is considered an integral part of a human existence.

The European Commission Digital Strategy sets a new vision, addressing digital transformation opportunities of a post-pandemic scenario, and supporting the delivery of the EU's strategic priorities by 2030.[7] EU also implemented its program on European Digital Identity stating that "the European Digital Identity will be available to EU

[6] *See* e.g., Galván, D., Flores, M., and Suárez, A., (2018). From Homo Sapiens to Homo Digitalis. Santander Global Technology & Operations. Available at: https://santandergto.com/en/from-homo-sapiens-to-homo-digitalis/ [Accessed 20.10.2022]; Montag, C. and Diefenbach, S., (2018). Towards Homo Digitalis: Important Research Issues for Psychology and the Neurosciences at the Dawn of the Internet of Things and the Digital Society. Sustainability, 10(2), p. 415, doi.org/10.3390/su10020415.

[7] European Commission, (2020). Shaping Europe's Digital Future. Available at: https://ec.europa.eu/info/publications/EC-Digital-Strategy_en [Accessed 20.10.2022].

citizens, residents, and businesses who want to identify themselves or provide confirmation of certain personal information. It can be used for both online and offline public and private services across the EU. Every EU citizen and resident in the Union will be able to use a personal digital wallet."[8]

One of the major risks that can be seen as potential threat to the person's identity is the use of trendy accessories accompanying the user's trip to the metaverse. Not only do they aim at providing better immersion to a new world but they can also be used as a means for manipulating the mind of the person who would use such software (Voskobitova and Przhilenskiy, 2022, p. 260). As L.A. Voskobitova and V.I. Przhilenskiy note various modern AI and digital technologies "may also be used to the detriment of human rights. Consciously and arbitrarily, the operator of such accessories will be able to change the natural behavior of a person, deliberately shape only a unilaterally advantageous decision, induce decisions and actions disadvantageous to the person" (2022, p. 261).

Nevertheless, the discussion of the identity transformation from the legal point of view is not possible without an overview of the major changes taking places in the legislative process. The next part of the article provides an overview of the law in the metaverse in general and to outline some challenges and risks relating to the human rights protection and ethical perception of the emerging technologies.

VI. The Metaverse and the Law

The changing digital environment makes us think not only about the technologies themselves, about the changes taking place in society, about the transformations that every person is undergoing. The changing environment changes the overall legal framework. Throughout the history of the technological development, legislators have been trying to catch up with the changing environment, especially in terms of technological advancements. Still, they have always lagged behind. This

[8] European Commission, (2020). European Digital Identity. Available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-digital-identity_en#digital-identity-for-all-europeans [Accessed 20.10. 2022].

time it seems legislators, as well as legal academia, are trying to keep up or even to forecast possible implications that we may face immersing in the realm of the metaverse. This part of the article aims to give a brief overview outlining the major legal trends related to the metaverse and focus attention on the ethical issues that touch on the human rights.

VI.1. Legal Issues in the Metaverse: A Brief Overview

This year has seen a dramatic increase in the number of works related to the metaverse, in both writing and those videoed (conferences, discussions and podcasts).[9] The idea that lies behind is that no one wants to be late for any kind of consequences that will inevitably appear if there is no proper preparation for this "life long journey" to this new hyper digital reality of the metaverse. Thus, companies would not want to lose money and their assets because of improper usage, operation, maintenance or insufficient ownership regulations; governments would want to make sure that there are no loops in legislation just because they have not considered something such as tax laws, IP rights protection, data protection or even possibilities of creating new types of business vehicles. The sky is the limit. As a rule, ordinary people pay little attention to such things until something happens, especially in terms of their personal data protection. This seems the key issue. Indeed, so far, personal data protection and privacy seem the most developed area. Many countries have developed and implemented specific legal frameworks to protect sensitive information.[10]

ReedSmith LLP (2021) published a comprehensive report on legal issues that arise when we speak about the metaverse. Among the issues they cover are Intellectual Property rights, AI, data protection

[9] *See*, e.g., Sciences Po, (2022). The Metaverse: Challenges and Regulatory Issues. Available at: https://www.youtube.com/watch?v=zdxpZDP4Ddk&t=24s [Accessed 12.10.2022]; Spice Route Legal, (2022). The Metaverse & the Law. Available at: https://www.youtube.com/watch?v=O5r6Fj8pHYA&t=570s [Accessed 12.10.2022]; Stanford Law School, (2022). 2022 Future Law: Computational Law and the Metaverse. Available at: https://www.youtube.com/watch?v=KTPUzmEkIMI [Accessed 12.10.2022].

[10] *See*, e.g., Federal Law No. 152-FZ dated 27 July 2006 "On Personal Data." Legal Reference System "ConsultantPlus". Available at: http://www.consultant.ru/document/cons_doc_LAW_61801/ (In Russ.) [Accessed 15.11.2022].

and privacy, content licensing, ownership in the metaverse, distributed ledger technologies and NFTs, bitcoins and other crypto-assets, reputation and deep fakes, antitrust and competition risks. Some areas have already been discussed and well developed, some are yet to be considered properly. Nevertheless, most of these are covered — let me put it this way — externally.

There is a different side of the coin. It is not only the legal regulation that should be taken into account, it is the person — the subject of the metaverse — that should matter the most. Living and socializing in the real world generally makes people law-abiding citizens: this way or another an ordinary reasonable person learns at least the basic rules that are to be followed. Let alone inherent religious axioms prohibiting stealing, killing, etc. — ideas found in any legislation. Personal identity transformed in the realm of the metaverse feels no boundaries, feels no rules. The thing is that those actions that are *a priory* considered illegal or immoral seem different in the imaginary, illusive world of the virtual reality. The habit acquired while playing computer simulation games in the already existent virtual reality may backfire bringing more violence and human rights violations in the real world. The more a person's identity is shaped by a digital hyper reality, the greater the chances of blurring the ethical (and legal) foundations thereof are.[11] It becomes vital to learn to differentiate between playing games in the real world, virtual online gaming and gaming in the metaverse using VR and AR devices. Indeed, there is an opinion that is the nature, mentality and the psychic state that lies behind people's choice, not the games and/or devices. But as we can see, the person's nature itself, the construct of personal identity is changing. So might the consequences of any actions occurring in the metaverse (no matter how imaginary they are). The consequences thus may become more serious and far-reaching in the real world due to this blurring of the boundaries between the real and the virtual, between the good and the bad.

Most interesting is that personal identity in the existing digital reality is capable of being illusionary, or to put it simply — fake. The reasons for that are twofold. First, people just do not want to bring out

[11] One of the first cases emphasizing that some things and ideas are not to be touched upon wherever you play is the so-called Minecraft "terrorism" case.

their lives to the digital society. Second, which is in fact more worrying, people (or companies) create fake identities to stalk, to bully, or to get false opinion polls and eventually shape public opinions on various topics.[12] Besides, deep fake technologies are becoming increasingly popular for both personal and political purposes when deep fakes and shallow fakes become a means of manipulation. Thus, ReedSmith LLP (2021) states that "deepfakes and shallowfakes can be used for the manipulation of pornographic material (for example, revenge porn) as well as for political purposes (for example, to fake political statements or actions)."

The issues outlined above are undoubtedly require attention at different levels; still, they seem the tip of an iceberg as there is still no proper understanding of what the metaverse really is or what (and when) it is to be. However, the existing advances bring about concerns related to the ethical aspect of their application and their effect on the fundamental human rights.

VI.2 Virtual Worlds, Real People: Ethics and Human Rights in the Metaverse

At first glance, the fundamental human rights remain as they are. There is no difference when and where to apply the rules enshrined in the Universal Declaration on Human Rights (UDHR) adopted by the UN General Assembly more than 70 years ago.[13] To some extent, all the issues mentioned in the previous paragraph touch on the basic human rights. Still, in this part of the Art. I would like to focus on those points that overlap in terms of personal identity transformation, human rights and ethics.

[12] Interestingly, the word of the year 2022 announced by the Merriam-Webster Dictionary is "gaslighting," which the dictionary defines as "the act or practice of grossly misleading someone especially for one's own advantage." *See* Demina, M., (2022). American Merriam-Webster Dictionary Announces Word of the Year Dictionary. RG.RU. 28 November. Available at: https://rg.ru/2022/11/28/amerikanskij-slovar-merriam-webster-nazval-slovo-goda.html (In Russ.) [Accessed 28.11.2022].

[13] Universal Declaration on Human Rights. Available at: https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf [Accessed 11.08.2022].

It is obvious that the human's privacy is at higher risk now: ubiquitous data gathering by means of cookies, social media marketing and "like" policies, sophisticated software tracking the movement of our mouse on the screen, data collection used by companies we have to work and communicate with, etc. Often it is almost impossible to avoid this, for example, some resources do not even provide their users with an opportunity to refuse cookies. No matter how hard you try to keep your personal data safe and sound, even the simple use of a smartphone gives AI-based data collectors numerous opportunities to learn who you are.

Privacy has already been attacked at a larger scale, and no one knows what the future holds, what consequences there will be. Moreover, it is becoming easier to harm anyone's reputation through a simple mentioning of a person in a post or a blog, let alone shallow fakes and deep fakes. Fact checking is no longer an issue as at times it is not possible to trace information back to the primary source; besides, anything that has been said remains on the net. Indeed, there are laws providing for the right to be forgotten,[14] however, the scale of the information distribution — reposting, copying and referencing — makes it extremely difficult to erase every single mentioning of the fact. People are faced with the problem of a constant need for making excuses of explain what they meant (or choosing to remain indifferent) or that they have nothing to do with the news.

One more right that seems to be at risk is the freedom of movement as there is still no understanding on the possible boundaries of each state, which raises concerns and questions. Is it going to be a different state? So far, the metaverse is presented as a space for better socializing and greater experiences without losing the feeling of the presence. Nevertheless, if there are boundaries, what will the rules be? Will the boundaries mirror the real ones or it would not matter what IP address you are using to get inside and where you are physically located? What will happen to the right of residence within the borders of each State?

[14] For example, "the right to be forgotten" is enshrined in the Federal Law No. 264-FZ dated 13 July 2015 "On the Amendments to the Federal Law "On Information, Information Technologies and Protection of Information" and Art. 29, Art. 402 of the Civil Procedure Code of the Russian Federation. Available at: https://rg.ru/documents/2015/07/16/informacia-dok.html (In Russ.) [Accessed 10.09.2022].

Property issues require particular attention as it is much easier to rid someone of their property if it is not in the material physical form. Dark net, hackers, "joy riding", simple data and programming crashes will inevitably result in the loss of digital property. ReedSmith LLP (2021, p. 55) mentions that "by removing the physicality of the real world, the metaverse is posed to shift our human society away from several long-held legal concepts, including the concept of ownership. Because "owning" has a completely different meaning in the virtual world that it has in the real world, what one owns or may own in the metaverse will likely be a question that is only relevant to a happy few." One of the solutions to this problem is a non-fungible token (NFT) that is a unit of information recorded on a blockchain about a good or service that is not interchangeable. Although this sphere is increasingly developing, it is still early to predict the legal consequences that may arise in the immersive metaverse of the future.

Ubiquitous surveillance is gaining momentum as well. Data collection technologies have opened the way to companies (and governments) to shape our desires, interest and minds. Surveillance here is not only about is not even about digital traces we leave all over the city and online, face recognition technologies that identify us wherever we are going.[15] And it is not about digital consumption (which to some extent even strengthens our identities teaching us to react and to resist unexpected urges to consume something we in fact do not need and want. The question here is even more disturbing.

Thus, some Chinese schools implemented the so-called brain-reading headsets tracking the focus and level of concentration of about 10,000 schoolchildren.[16] This modern neuroscience-backed pedagogy

[15] Smart city concept and smart house concept has acquired a lot of attention several years ago. These technologies have advanced greatly allowing for both comfort and security, but at the same time make a person not a subject of the digital reality, but rather an object.

[16] *See* Ye, Y., (2019). Brain-reading headsets trialled on 10,000 schoolchildren in China. New Scientist. 14 January. Available at: https://www.newscientist.com/article/2190670-brain-reading-headsets-trialled-on-10000-schoolchildren-in-china/ [Accessed 19.10.2022]; You, T., (2019). Chinese pupils must wear "mind-reading" headbands which scan their brains and will alert teachers if they are not concentrating in class. Mail Online. 31 October. Available at: https://www.dailymail.

based on AI technologies allows teachers to track their students. These accessories show the level of concentration of a student during a class. As soon as the teacher notices lack of attention in a student, they intervene in the process drawing students' attention back. Besides, they are to report on the event including this information to the special report form later to be sent to the school management and child's parents.

As always, here arises the evergreen ethical question on what for one uses any tool. One may say that such a technology will benefit educational purposes allowing for adjusting curricula and teaching approaches to the need of a particular child. Still, it seems that the dark side of the coin is truer to life. Invasion of privacy is the first thing that comes into mind. Throughout the world history, the only thing people could be sure of is that their thoughts remain their personal business. There are those great in reading the air, feeling the atmosphere, being able to grasp and analyze people's gestures and emotions expressed in their faces. But never are they even close to a real "mind-reading."[17]

Shaping a specific type of a mindset is another possible threat. It is highly important to understand not only the human nature in general but also a type of a learner a child belongs to. Some can stay focused, goal-oriented and ready to follow the given approach to task solving. Many, especially at a particular age, are vivid and imaginative, able to see ways that differ from those recommended to use. Eventually the use of such technologies may result in "standardization" of a human — a human with no creative skills and desires willing to have no options.

co.uk/news/article-7634705/Chinese-school-makes-pupils-wear-brain-scanning-headbands-class-ensure-pay-attention.html [Accessed 19.10.2022]; Blair, A., (2022). Chinese researchers claim they have AI capable of reading minds. New York Post. 4 July. Available at: https://nypost.com/2022/07/04/chinese-researchers-claim-they-have-ai-capable-of-reading-minds/ [Accessed 19.10.2022]; Yoo, A., (2020). AI in Education in China. Will it turn students into mindless drones? Math Genie. 27 June. Available at: https://www.mathgenie.com/blog/ai-in-education-in-china.-will-it-turn-students-into-mindless-drones [Accessed 19.10.2022]; Wexler, B.E., (2019). In a Chinese school, a "mind-reading" headband tells teachers when their students are distracted. Scroll.in. 9 December. Available at: https://scroll.in/article/946204/in-a-chinese-school-a-mind-reading-headband-tells-teachers-when-their-students-are-distracted [Accessed 19.10.2022].

[17] Neal Stephenson expresses a similar idea in his "Snow Crash" when one of the character taken to examination feels relieved at the fact that they cannot read what she is thinking of.

There is more than that. These are not only school students who are under this "mind-reading" pressure. These technologies are said to be able to measure loyalty to the Chinese Communist Party.[18] Notably, China is famous for its rather specific but progressive "social" technologies. Let alone "social credit rating" that is capable of changing a person's attitude to life. How many are strong enough to remain calm and independent in their chose of habits that are said to be unhealthy, detrimental and eventually immoral. There is every reason to believe that these changes in the structure of digital reality will result in a full transformation of society, and of an individual mindset.

If it is possible to evaluate students' activity during a class and measure people's loyalty, isn't it possible that gamers and streamers using gadgets based on a similar approach be at higher risks of becoming an object of research and/or manipulation?

As can be seen from the above discussion, many legal implications related to personal identities and the metaverse arise. One and foremost is data protection and privacy even given the already developed legislation. The range of questions that appear bring about the necessity to consider and determine who, in fact, will be responsible and what laws we will have to apply if (or when) the metaverse becomes what it implies.

V. Conclusion

Today we are all witnesses of great and dramatic changes in the social structure of our civilization. Information society is not an issue any more. We are becoming a part of a new era — an era of digital society, digital identity and digital consumption. It seems relatively early to speak about the Metaverse as a parallel reality inherent in sci-fi works such as "Snow crash," "The Matrix," "Ready Player One," etc. Still, it is obvious that the metaverse for digital consumption has already formed its subject field. At the same time, new devices allow

[18] Towey, H., (2022). Researchers in China claim they have developed "mind-reading" artificial intelligence that can measure loyalty to the Chinese Communist Party. Insider. 10 July. Available at: https://www.businessinsider.com/china-says-mind-reading-ai-can-gauge-political-loyalty-reports-2022-7 [Accessed 19.10.2022].

for not only new ways of facilitating consumption (through various marketing manipulations) but to change the mindset. Here we may speak about new approaches to mass mind manipulations that bring about more questions for discussion.

Metaverse creates some prospects of a parallel existence, and indeed, it creates some prospects for constructing and shaping of a new type of identity. Before the technologies have become vital and inevitable part of the being, there were no difficulties in understanding a person's identity. Identity is in the first place some data, some information related to a particular person: name, age, collection of social numbers, etc. But it is just a tip of the iceberg. Identity is more than that.

Speaking about identity, we always have to remember about our belonging to a particular group — Homo Sapiens. Technology itself is neutral in its nature but society today is becoming more and more determined by technologies, which influences the idea of a commonly used Homo Sapiens model. It is already possible to speak about a new "Homo" — "Homo Digitalis" capable of dealing with technologies at a new level, and to some extent becomes digital physically and mentally. These changes undoubtedly result in the way people perceive themselves. There are changes in self-perception, self-awareness, the "self" per se. The construct of "self" per se is changing.

Moreover, the perception of identity is undergoing transformations from the legal point of view as well. The transfer of a basic "identity" to the digital realm creates a "digital identity" parallel to the one of the real world. At the same time, it is essential to focus on human rights amid the metaverse development as they become more dimensional and thus require reconsideration and specification. The ethical issues of using and implementing new technologies and creating a new universe have never been that urgent.

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THE LEGACY OF THE HUMAN RIGHTS MOVEMENT

Article

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The Legacy of the Human Rights Movement: Prosecutor-General Fritz Bauer on Genocide and Human Rights

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Abstract: The paper is devoted to the legacy of Fritz Bauer — the Prosecutor General of the Land of Hesse in West Germany — and analyzes his understanding of the possibility of building the rule of law in Germany, understanding the criminal past of Germany and realizing the responsibility of the German citizens for the genocide of the Jewish people. Fritz Bauer was one of the most consistent supporters of the criminal prosecution against Nazi criminals in the Federal Republic of Germany (FRG). In Bauer's view, the Nuremberg trials were supposed to witness the desire of the German state to restore the rule of law, preserve the memory of millions of victims of Nazism, celebrate the triumph of justice and human rights. In the course of the court proceedings, Fritz Bauer sought to show that millions of German citizens who supported the Hitler regime and shared the ideology of National Socialism were responsible for Nazi atrocities. The merit of Fritz Bauer's goal was to recognize the Third Reich as an illegitimate State and rehabilitate the participants of the Anti-Hitler Resistance Movement. In his articles and court speeches, Bauer justified the right of citizens to resist the criminal authorities, argued that disobeying criminal orders was the only possible option for lawful behavior in an illegitimate State. Fritz

Bauer was convinced that it was possible to prevent the repetition of the past and prevent the neo-Nazis from coming to power only through the democratic education of the younger generation of the Germans, ensuring universal respect for human rights and dignity.

Keywords: Fritz Bauer; genocide; human rights; right to resistance; Nazi criminals; Otto-Ernst Remer; trial; joint responsibility; criminal regime; culture of enemy

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Contents

I. Introduction

Prosecutor General of the State of Hessen Fritz Bauer (1956–1968) was one of the most consistent supporters of the criminal prosecution of Nazi criminals in Germany (Meusch, 2001). An irreconcilable standing of the Hessian Prosecutor General in relation to the officials of the German justice who had tarnished themselves during the years of National Socialism turned Fritz Bauer into the strongest enemy of the former Nazis (Rautenberg, 2015, p. 170). In 1968, Fritz Bauer was found dead in his own bathroom. The police stated suicide. However, the mysterious death of the prosecutor still raises many questions (Steinke, 2013).

For many years, the German public preferred not to remember the personality of the Prosecutor General Fritz Bauer. Only in the 1990s, when a new *culture of memory*, aimed at realizing the responsibility of

the German citizens for the crimes of National Socialism, was initiated in the country Bauer's name returned to the public discourse in Germany. The Fritz Bauer Research Institute was founded in Frankfurt am Main.[1] It was engaged in carrying out studies and research, making documentaries and feature films devoted to the life and work of the prosecutor (Wojak, 2009; Steinke, 2013; Kettelhake, 2015; Jaeger, 2015, p. 319). German researchers describe Fritz Bauer as an outstanding fighter for democracy and human rights in post-war Germany.[2]

II. Fritz Bauer and His Contribution to Human Rights Movement

Fritz Bauer was born in 1903 in Stuttgart to a Jewish family. A future prosecutor studied law at the universities of Heidelberg, Munich and Tübingen (Perels and Wojak, 1998). "Phylosophy of Law" by Gustav Radbruch was Bauer's main reference book during his studies at university (Bauer, 1998, p. 41). In this book, Gustav Radbruch distinguished two types of jurists: 1) jurists prioritizing the sense of order; and 2) jurists prioritizing the sense of freedom. According to the scholar, jurists of the first type were adherents of the police state and "German discipline," they were prone to excessive "regulation and rationalization." Jurists prioritizing the sense of freedom represented the "advanced layer of the rule of law" (Radbruch, 1915, p. 132). Since his student years, Fritz Bauer considered himself to be a jurist of the second type. Referring to the work by Gustav Radbruch, Bauer described the goals persued by jurists prioritizing the sense of freedom as prioritizing "protection of freedom against order, life against reason, a chance against a rule, completeness against a scheme, and, in short, what constitutes the goal and values against what is valuable only if it is expedient" (Bauer, 1998, p. 41; Radbruch, 1915, p. 132).

[1] *See*: Fritz Bauer Institut official web-site. https://www.fritz-bauer-institut.de [Accessed 10.11.2022]. (In Germ.).

[2] *See*, for example, the special issue of the research journal "Forschungsjournal Soziale Bewegung" (2015; No. 4), dedicated to the human rights movement in Germany. The central heading of this issue, consisting of 34 articles by German researchers is called "Fritz Bauer: Human rights as a challenge to jurisprudence and legal policy."

In 1928, Fritz Bauer became an assessor judge in the Stuttgart district court. Two years later, he became the youngest judge in Weimar Germany. From his early age, Fritz Bauer was active in politics. Back in 1921, he joined the Social Democratic Party. In 1931, he headed the Stuttgart branch of the paramilitary organization "Imperial Flag Black-Red-Gold" (Perels and Wojak, 1998). The organization united the supporters of democratic parties and used to be the most numerous movement (3 million members) in Weimar Germany. The main purpose of the association was to protect the republican system from right-wing radicals and extremists (Yakhlov, 2005, p. 80).

According to Fritz Bauer, professional lawyers should not have recused themselves from political life and should not have turned into "Legal Technocrats" hiding behind the phrase "Politics without me." Arguing his stance, Bauer added: "Democracy is not a steamer, the management of which is entrusted to the captain. On the contrary, democracy is a boat in which we must row together." The jurist was convinced that the legal profession obliged him to have a clearly expressed civic stance, to defend the values of democracy, humanism and human rights (Bauer, 1998, p. 40).

After the Nazis came to power in March 1933, Fritz Bauer was sent to the Heuberg concentration camp, where he stayed for six months. In the concentration camp, he became close to Kurt Schumacher, the future leader of the Social Democratic Party of Germany. Fritz Bauer wrote that communication with Schumacher gave him strength. As Schumacher's inmate, Bauer admired his courage and steadfastness (Bauer, 1998, p. 39). In 1936, Fritz Bauer managed to leave Germany for Denmark. Since 1943, he was in Sweden, where he joined the Social Democratic emigrant movement, and, together with Willy Brandt, he was engaged in editorial activities (Wojak, 2015a, p. 72).

In 1949, Fritz Bauer decided to return to Germany. The legal scholar said that returning to his homeland, he hoped that he would be able to take part in the construction of new democratic Germany, where laws would be based on the principles of humanity, equality, justice and tolerance (Wojak, 2015b, p. 126). Being a professional lawyer and a member of the anti-Nazi movement, Fritz Bauer reached a high position in the German justice system. In 1950–1956 he was the Prosecutor

General of Braunschweig, from 1956 until his death he held the post of Prosecutor General of the Federal Land of Hessen (Perels and Wojak, 1998, pp. 15–16).

On Bauer's initiative, on the facade of the Frankfurt Prosecutor's Office building, three-dimensional letters were installed, representing a quote from Art. 1 of the German Constitution: "Human Dignity is Inviolable." The prosecutor wrote that building a democratic society is unthinkable without respect for the dignity of everyone (Bauer, 1998, p. 42). Mutual respect between people was based on feelings of humanity and brotherhood. The jurist insisted that the slogan "Germany above all" should be replaced by the statement "All people are brothers" (Bauer, 1998, p. 88). To do this, German society needed a comprehensive program of re-education, eliminating authoritarian thinking and deeply rooted racial prejudices (Meusch, 1998, p. 61; Wojak, 2015b, pp. 133–134).

Fritz Bauer was convinced that the trials against Nazi criminals were an effective tool for the democratic, anti-fascist education of the younger generation of Germans (Meusch, 1998, p. 66). Widely publicized in the press, public trials demonstrated to German citizens unprecedented atrocities committed by their compatriots in the history of mankind. The Hessian prosecutor initiated dozens of trials against former Nazi functionaries. The Frankfurt am Main Prosecutor's Office supported the prosecution in such high-profile trials as the trial against the criminals of the Auschwitz concentration camp (1863–1965) (Grakhotskiy, 2019, p. 146), the trial against members of the Sonderkommando-4a, who took part in the mass killing of Jews in Babi Yar (1966), the trial against high-ranking officials of the German justice system, who organized the forced killing of more than 70 thousand mentally ill and disabled people (1970), etc. (Wojak, 2015b, p. 131; Dittmann, 2015, p. 208).

According to Fritz Bauer, the trials against Nazi criminals were supposed to testify to the desire of the German state to restore the rule of law, preserve the memory of millions of victims of Nazism, and the triumph of justice and human rights (Wojak, 2015a, p. 83). The prosecutor wrote: "[these] trials are not just trials against individual criminals, but they are "The Days of Last Judgment" for the German people and their history." In the course of the court proceedings, Fritz

Bauer sought to show that millions of "little Hitlers, Heydrichs and Eichmanns," who supported the Hitler regime and fully shared the ideology of National Socialism, were responsible for Nazi atrocities (Meusch, 1998, pp. 61–62). Criminal trials were supposed to be a "bitter medicine" designed to permanently cure German citizens of the vices of Nazism (Bauer, 1998, p. 85).

However, post-war German society was not ready to accept Bauer's ideas. Society was dominated by the opinion that ordinary Germans "had nothing to do" with the crimes of the Nazi regime, citizens were only hostages of totalitarian power, the full responsibility for what they had done lay solely on Hitler and his entourage (Bauer, 1998, p. 83). Based on this, the approaches of the Hessian Prosecutor General to the criminal prosecution brought against Nazi criminals did not find support either in the state or in the public structures of West Germany. Fritz Bauer repeatedly received anonymous threats demanding to stop investigating criminal cases against former Nazis. The prosecutor regularly faced attacks from politicians who accused him of "undermining the image of Germany in the face of the whole world" (Meusch, 1998, p. 70).

The state of German society in the first post-war decades was succinctly described by the philosopher Hannah Arend. After many years of emigration in 1950 she visited Germany. Hannah Arend was amazed at how strong the desire of the Germans was to "escape from reality and responsibility" (Wojak, 2015b, p. 129). On the contrary, as Ftitz Bauer wrote, every time he left his office, he found himself in a hostile environment (Rautenberg, 2015, p. 164).

III. Bauer's Approach to Germans Involvement in Genocide

In the course of his work, Fritz Bauer repeatedly thought about the reasons that prompted German citizens to support the criminal plans of the Nazi Party and take an active part in the genocide of the Jewish people. In the article "Genocide" Fritz Bauer noted that the ideology of National Socialism corresponded to the worldview of "social losers." Among the latter, the jurist referred to the petty-bourgeois strata of German society. The prosecutor explained that after the First World War, most German citizens faced severe socio-economic upheavals.

Mental and psychological problems added to total unemployment and an unprecedented drop in living standards; the Germans felt humiliated because of defeat in the war, suffered from unfulfilled aspirations and dreams of prosperity, education and decent work (Bauer, 1998, p. 70).

According to Fritz Bauer, on the wave of general discontent in 1933, marginals came to power in Germany. They sought to shift responsibility for all the troubles of German society to an external enemy. The Hitlerite regime appealed to the dichotomies "we — they," "friend — foe," "good — evil" (Bauer, 1968, pp. 20–21). Nazi propaganda constructed a "sense of we" [Wir-Gefühl] by proclaiming Germans as "superhumans," designed to deal with numerous enemies and expand their "living space." The Jews were declared the source of all the troubles and the worst enemy of the German nation. According to Nazi racial ideology, they were not "full-fledged people and were condemned to death." Fritz Bauer highlighted that, according to various estimates, the Nazis killed from 4 million 194 thousand to 5 million 721 thousand European Jews (Bauer, 1998, p. 66).

The prosecutor concluded that millions of German citizens were involved in the commission of a state-sanctioned collective crime — the genocide of the Jewish people (Bauer, 1998, p. 66). Implementation of the collective atrocity required a clear division of labor, similar to how the roles of criminals united in a gang of robbers are distributed. The gang consists of the ringleader, gangsters, gunners, concealers, etc. In turn, genocide implementation required participation of executioners, guards, transporters, doctors, who carried out selection, and countless managers and employees of various government departments (Bauer, 1998, pp. 72–73).

During the trials against Nazi criminals, the accused claimed that they did not share the criminal intent of the leadership of the Third Reich and did not wish Jews to die, but "only obeyed the orders of their superiors" (Bauer, 1998, p. 66). Such reasoning made it possible to assign full responsibility for the Holocaust to Hitler and his associates, as well as to minimize the punishment of the direct perpetrators of crimes (Hey, 1984, pp. 62–63; Alekseev, 1986, pp. 270–275). Fritz Bauer did not agree with this approach, he argued that many ordinary Germans were convinced anti-Semites and adherents of racial ideology,

they consciously took part in actions of mass annihilation of Jews (Wojak, 2015, p. 85).

Fritz Bauer identified 5 types of citizens involved in the genocide of the Jewish people. To the first type — believers — the prosecutor referred the Germans believing in the ideas of National Socialism. They were convinced of the scientific validity and inviolability of the Nazi racial theory. According to Bauer, the leading role among such people was played by "fanatics" and "neurotics" who suffered from an inferiority complex and sought to compensate for their social inferiority by belonging to the "master race" (Bauer, 1998, pp. 69–70).

Citizens of the second type were called "formalists." They were distinguished by unquestioning obedience to the State, they strictly followed the orders of their superiors, believed that any order received from above was legitimate and not subject to discussion. According to the prosecutor, such behavior of German citizens was caused by the traditions of German authoritarian-militaristic statehood. For centuries its subjects were instilled a sense of submission, commitment to discipline and order (Bauer, 1998, pp. 70–71).

The third type included people referred to as "beneficiaries." The prosecutor noted that for a significant number of German citizens, Nazi ideals were only a cover for the pursuit of their personal goals. The Germans participated in the implementation of Hitler's criminal plans in the hope of "realizing themselves," moving up the career ladder and prosperity. In some cases, sadists and sexual maniacs hid under the screen of convinced National Socialists, and during punitive actions they sought to satisfy their insane intentions (Bauer, 1998, p. 71).

The fourth type covered "involuntary criminals." As Fritz Bauer noted, individual citizens were forced to obey the criminal orders of their superiors, as they feared that they would be severely punished for refusing to participate in the genocide. However, the prosecutor warned against exaggerating the number of such citizens. According to Bauer, there were enough "believers," "formalists" and "beneficiaries" at the disposal of the Nazi leadership who participated in the crimes of National Socialism without any coercion and intimidation. The jurist added that in the judicial practice of the Third Reich there were no cases of punishment for refusing to carry out criminal orders. As a rule,

such a "fault" could be followed by a transfer to another duty station, denial of the right to vacation or *making a mark* in a personal profile (Bauer, 1998, p. 71).

The fifth type was classified as "fellow travelers" or "observers." This type included citizens who were not directly involved in the implementation of the genocide of Jews, but they also did not take any action to prevent the criminal intentions of the Hitlerite authorities. Fritz Bauer pointed out that with the tacit consent of millions of German citizens, the Nazis committed atrocities unprecedented in the history of mankind (Bauer, 1998, p. 72). Thus, the Hessian prosecutor came to the idea of the collective responsibility of the Germans for the genocide of the Jewish people.

Thus, despite a certain degree of generalization, Bauer's identification of 5 types of German citizens involved in genocide reveals their systematic and consistent involvement in the procedure that was not justified either from humanistic or juridical points of view. At the level of domestic jurisprudence, he insisted on holding German citizens responsible for Nazi crimes regardless of their claims that they had not shared the criminal intentions of the Nazi leaders.

IV. The Trial against Otto-Ernst Remer and the Right to Resist

On Bauer's initiative, on 7–15 March 1952, the trial against Otto Roemer took place in the Braunschweig court. During the Second World War, the defendant was the commander of the "Great Germany" security regiment. Following Hitler's orders, Remer suppressed the so-called "Conspiracy of July 20" (1944), when a group of Wehrmacht officers led by Colonel Schenk von Stauffenberg attempted to assassinate Hitler and carry out a *coup d'etat*. After the war, Remers became one of the leaders of the neo-Nazi Socialist Imperial Party. In May 1951, in his speech at an election rally, the neo-Nazi declared that the "July 20 conspirators" were "traitors to the motherland paid from abroad." A criminal case was initiated by the Braunschweig Prosecutor's Office on the fact of slander and desecration of the memory of the deceased officers (Wolf, 2015, p. 197).

During the trial, the prosecution was represented by Fritz Bauer. As noted by the biographer of the Hessian prosecutor R. Steinke, Bauer's accusatory speech at the trial in Braunschweig became historic (Steinke, 2013, p. 143). The prosecutor pointed out that the main purpose of the trial was to rehabilitate the participants of the Conspiracy rather than to bring the defendant to justice (Bauer, 1998, p. 169). In this regard, Fritz Bauer opined that there were no signs of such a crime as treason in the act of the German officers, since the rebels were not in collusion with foreign governments, they did not give out state secrets and did not seek to harm Germany. On the contrary, the officers were motivated by a sense of love for the fatherland, they sought to save their country and the German people from an imminent catastrophe. It was obvious to the military that the war was lost, an attempt to eliminate Hitler and stop the war meant saving millions of human lives. Fritz Bauer convinced the participants of the court session that if the plot on 20 July had succeeded, Germany would have had to sign a peace treaty on the most difficult conditions, but those conditions would have been much more acceptable than the conditions of the Act of Unconditional Surrender of 8 May 1945. The prosecutor believed that in the summer of 1944 Germany still had a chance to create a democratic government and avoid the partition of the country (Bauer, 1998, pp. 170–171).

According to Bauer, the actions of the conspirators could not be qualified as actions committed with the aim of seizing state power, since, since 1933 there had been no legitimate state power in Germany, the regime of the Third Reich had never been legitimate. In fact, the Nazis usurped power by gross violation of the Constitution (the publication of the Law "On Granting Emergency Powers," the unification of the state posts of President and Chancellor), the abolition of basic civil rights and freedoms. Moreover, Fritz Bauer defined the Third Reich as an illegitimate state that was "based on a system of violence and arbitrariness." In his opinion, the Nazi regime was criminal; war crimes, crimes against peace and humanity were committed on the initiative of the Fuhrer. The prosecutor concluded that the attempt to overthrow Hitler was not a desire to seize state power, but the implementation of the right of citizens to resist the criminal regime (Bauer, 1998, pp. 176–177).

In his accusatory speech, Fritz Bauer paid special attention to right to resist. The prosecutor noted that the right to resist was known to the Germans since the days of ancient German democracy. "Saxon Mirror" (13th century) allowed the Germans to resist the authorities that infringed on their interests (Bauer, 1998, p. 178). Bauer stressed that in modern society, the right to resist did not lose its relevance: "As soon as the constitution and the principle of separation of powers cease to operate in the state, parliament is deprived of the right to make laws, independent courts are liquidated, the activities of the opposition are banned, citizens have the right to resist the authorities and restore the democratic system" (Bauer, 1998, p. 178).

Fritz Bauer wrote that those German citizens who dared to resist the Nazi regime "sowed the seed of a new democracy" in Germany. The prosecutor clarified that the allies in the Anti-Hitler coalition defeated the Hitlerite troops and thereby "removed the stone that prevented the ascent of this seed." However, it was planted by the Germans who challenged Hitlerism (Bauer, 1998, p. 174).

As a result, the Braunschweig court found Otto Remers guilty of slander and desecration of the memory of the deceased. The defendant was sentenced to 3-month imprisonment. In the text of the sentence, the judges agreed with Bauer's arguments concerning an illegitimate nature of the Third Reich: "The state the top leadership of which practiced disenfranchisement and suppressed human rights cannot be called legitimate" (Wolf, 2015, p. 204). The members of the court recognized the actions of the rebels as legitimate. The court decision noted that the officers sought to eliminate Hitler and his regime, guided by a sense of love for the motherland, self-sacrifice and responsibility for the fate of the German people (Wolf, 2015, p. 203).

The attention of German and foreign mass media was focused on the Braunschweig process. The Remer's verdict significantly influenced the public opinion with regard to Germany: if before the trial the Germans believed that "July 20th conspirators" were traitors, then after the trial, most citizens evaluated the rebels in a positive way. German jurist R. Wasserman described the Braunschweig trial as "the most important trial since the Nuremberg Tribunal" (Wojak, 2015b, p. 130).

V. Duty to Resist the Criminal Regime

Fritz Bauer was convinced that resistance to the illegitimate state was not only the right, but also the duty of every citizen (Bauer, 1998, p. 177). According to the prosecutor, when the Hitlerite regime issued legislative acts violating human rights (for example, the Nuremberg racial laws), and issued criminal orders for the extermination of Jews, Gypsies and representatives of Slavic peoples, German citizens had to fulfill their "constitutional duty of disobedience:" to abandon "complicity in disenfranchisement" and "eliminate evil emanating from the state" (Bauer, 1998, p. 209; Staff, 1988, p. 449).

Fritz Bauer wrote that every German was under the duty to prevent the commission of crimes and to help victims of the Nazi regime. Based on this, everyone had the right to eliminate Hitler, Heydrich, Eichmann and any other participant in the "Final Solution to the Jewish Question" (Bauer, 1998, pp. 177, 210). The prosecutor summarized that resistance to criminal power was an act of necessary defense (Bauer, 1998, p. 208).

In 1963, in the interview given the German radio station "NDR" Fritz Bauer noted that in order to prevent rehabilitation of National Socialism in Germany, German society must return to the foundations of Christian morality. The jurist reminded radio listeners of the biblical truth: "A person should be more submissive to God than to people." The prosecutor explained these words as follows: "above any law or order there should be an awareness that there are actions that cannot be performed under any circumstances," a person should be able to say "no" to state commands that contradict the Ten Commandments of Christianity (Bauer, 1998, pp. 113–114).

In support of his stance, Fritz Bauer referred to the words of Pope John XXIII. In his famous encyclical "Pacem in Terris" (1963), dedicated to the rights and duties of the man, the relationship between the state and society, as well as the problems of peace between States, the Pontiff wrote: "If state bodies do not recognize or violate human rights, then their orders lose their legal force." In the margins of this document, the prosecutor made a note: "Not every law is the law, not every order is the order" (Wojak, 2015b, p. 133).

Fritz Bauer distinguished between passive and active resist to Nazi disenfranchisement. The first involved refusing to carry out criminal orders. The second was the most difficult task for the citizens of the Third Reich, as it contradicted the human instinct of self-preservation, required unprecedented courage to sacrifice their own lives to save the destinies of other people (Bauer, 1998, pp. 113–114). As cases of such self-sacrifice, Fritz Bauer described the activities of the underground group of students of the University of Munich "White Rose," "July 20 Conspirators," the case of German officer Hans Oster. Hans Oster, being an active participant in the anti-Nazi Resist, gave the Dutch military information about the date and time of Hitler's troops attack on the Netherlands. The prosecutor noted that, in accordance with the norms of international law, waging an aggressive war was a crime. According to Bauer, Hans Oster was aware of the criminal nature of Germany's intentions and made the only right decision — he tried to prevent aggression, passed the official information available to him to representatives of another state (Bauer, 1998, p. 173).

In his article "The Right of a Little Man to Resist" (1962), the Hessian prosecutor wrote that the aggressive nature of the war unleashed by the Third Reich was obvious to every sane German citizen. In this regard, Fritz Bauer raised the question of the legality of desertion of soldiers and officers of the Wehrmacht. The prosecutor argued that the evasion of military personnel from participating in an aggressive war was a legitimate form of resistance to the Hitlerite regime (Bauer, 1998, pp. 209, 213).

Shortly before his death in June 1968 Fritz Bauer gave a public lecture for the last time. Within the walls of the University of Munich, the prosecutor talked about resistance to the criminal state. The jurist came to the conclusion that the joint responsibility of the Germans meant that citizens, with the exception of individual participants in the anti-Hitler Resistance, did not fulfill their "duty of disobedience." In this case, the lawyer turned to the moral and ethical side of joint responsibility. The prosecutor wrote: "[t]he submission of citizens to the criminal regime was immoral, it was disobedience that was the only morality in Nazi Germany" (Meusch, 1998, pp. 61–62).

VI. Conclusion

Fritz Bauer anticipated his time by several decades. The activities of the Hessian prosecutor marked the beginning of destruction of the myth that German citizens were only hostages of the Hitlerite regime and "knew nothing" about the crimes of the Third Reich establishment. At the trials against Nazi criminals, Fritz Bauer sought to show that millions of Germans were involved in the infernal mechanism of mass destruction of innocent people, every German citizen bore his share of responsibility for the genocide of the Jewish people and other atrocities of National Socialism. The jurist's ideas about joint responsibility of the German people became relevant in the 90s of the twentieth century and formed the basis of the modern culture of memory in Germany (Thamer, 2007, p. 81; Boroznyak, 2014).

Fritz Bauer is rightfully considered a central figure in the post-war human rights movement in Germany. The Hessian prosecutor himself characterized his activities as "a continuous struggle for human rights" (Bauer, 1998, pp. 37–49). The merit of Fritz Bauer's goal was to recognize the Third Reich as the illegitimate state and rehabilitate the participants of the anti-Hitler Resistance Movement. In his articles and court speeches, he justified the right of citizens to resist the criminal authorities, argued that disobeying criminal orders was the only possible option for lawful behavior in the illegitimate state.

Fritz Bauer was convinced that it was possible to prevent the repetition of the past and prevent the neo-Nazis from coming to power only through the democratic education of society, ensuring universal respect for human rights and dignity. The prosecutor wrote: "We cannot make Heaven out of the Earth, but each of us can do something to prevent it from becoming hell" (Bauer, 1998, p. 49).

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